

THE UNIVERSITY OF HULL

Under the Shadow of Sharia Law:
the Implementation of Government Procurement Agreement (GPA)
Provisions by Saudi Arabian Government Tenders and Procurement Law

being a Thesis submitted for the Degree of
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By

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Abstract

This research is a scientific study about the approach of sharia law to the implementation of the requirements of the World Trade Organization's (WTO) Agreement on Government Procurement (GPA) in government tenders and procurement law in Saudi Arabia.

Saudi Arabia has reformed its legal system in order to be part of the WTO. Furthermore, Saudi Arabia has adopted measures to liberalize its procurement market, as it modified the procurement law in 2006. However, Saudi Arabia is not party to the GPA. The protective measures and lack of transparency are the main characteristics of the procurement law which contradict the main principles of the GPA which are transparency and non-discrimination.

The impact of joining the WTO for Saudi Arabia was fruitful, as the quality of goods and services has been improved, and also the settlement of trade disputes has become professional. Therefore, as Saudi Arabia suffers from the low quality of products and services in some sectors, and stalled projects have become a relatively common feature, the main aim of this research is to bridge the gap between the GPA and procurement law.

The chapters of this research will discuss the legitimacy of the GPA in the eyes of sharia law, which is the main source for all Saudi laws. The main contradiction between the GPA and procurement law will be reconciled according to the public interest methods which are approved by sharia law.

The research considers some cases from the Board of Grievances [the administrative court] as well as some of the Council of Ministers' decisions in Saudi Arabia. They show that there is an urgent need to reform the procurement law provisions, in particular provisions related to transparency and non-discrimination. In addition, these provisions might be the main reasons for the delay in joining the GPA by Saudi Arabia.

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List of Abbreviations

ARAMCO	Saudi Arabian Oil Company
CIB	Control and Investigation Board in Saudi Arabia
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding
FDI	Foreign Direct Investment
GAB	General Auditing Bureau
GATT	The General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GBP	Great British Pound
GDP	Gross Domestic Product
GPA	Government Procurement Agreement
IICJ	International Islamic Court of Justice
IT	Information Technology
MFN	Most-favoured Nation
MMRA	Saudi Ministry of Municipal and Rural Affairs
MPTP	Makkah Public Transport Program
NTBs	Non-tariff barriers
OECD	Organization for Economic Co-operation and Development
OEEC	Organization for European Economic Co-operation
PPPs	Public-Private Partnership
SAGIA	Saudi Arabian General Investment Authority
SAMA	Saudi Arabian Monetary Agency
SAR	Saudi Arabian Riyal

SCM	Agreement On Subsidies and Countervailing Measures
SDRs	Special Drawing Rights
SMEs	Small and Medium-Sized Enterprises
The Board	The Board of Grievances in Saudi Arabia
Tokyo Code	Tokyo Round on Government Procurement
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Program
WTO	World Trade Organization

Chapter One: Introduction to the Research

1.1 Overview:

The Kingdom of Saudi Arabia is governed by sharia law (Islamic Law), which is based on the following legal sources: The Quran, the Tradition (Prophet Muhammad's sayings and actions) including scholarly debates, interpretations, and precedent. Generally, Saudi courts apply sharia law in all disputes, including contractual disputes. However, commercial activities such as government contracts are subject to other laws and regulations, which are enacted by ministries and decreed by the Saudi Council of Ministers. In Saudi Arabia, any law, as well as its implementing regulations, shall not replace the provisions of sharia law, furthermore, laws and their implementing regulations shall supplement and be compatible with the sharia law.¹

One of the most important commercial activities which has become the focus of the Saudi government in recent years is government procurement. Government procurement is a significant part of the Saudi Arabian economy. According to the Saudi Arabian Monetary Agency (SAMA), by 2007 government procurement accounted for 17% of the gross domestic product (GDP).² The government of Saudi Arabia allocated a large part of its annual budget to providing social services and building infrastructure. For example, in recent years the Saudi government has signed many large contracts to build new universities and to provide public transport, such as the Metro in Riyadh, which cost \$22.5 billion (£14 billion). This large spending in government procurement was due to the rapid development of the Saudi economy, which has been supported by the increase of oil prices.³

The subject of government procurement has been tackled at an international level. As will be mentioned later in this research, the first negotiations on the subject of government procurement were in Tokyo, Japan. The Government Procurement Agreement (GPA) which came into force in 1981 was the first legally binding agreement on an international level. This was followed by the establishment of the

¹ Nancy B Turck, 'Resolution of Disputes in Saudi Arabia' (1991) Arab Law Quarterly 3.

² Saudi Arabian Monetary Agency, 'Annual report' (Saudi Arabian Monetary Agency 2007).

³ Abdulaziz Al-Mahmood, 'Foreign Direct Investment in Saudi Arabia: Joint Venture Equity Shares and Source Country Characteristics' (PhD thesis, Newcastle University Business School 2010).

World Trade Organization (WTO). The GPA was later brought under the administration of the WTO.

Saudi Arabia joined the WTO in 2005, when it automatically became bound to all WTO agreements. However, the GPA is a plurilateral agreement, which means it is optional for the WTO members to join it. Saudi Arabia has not joined, and the delay has continued since 2005, when the WTO made negotiation for accession to the GPA a pre-condition to WTO membership.

Despite the strong economy of Saudi Arabia as one of the biggest economies in the Middle East, the accession to the World Trade Organization (WTO) by Saudi Arabia was considered to be relatively late. One of the main reasons for the delay was that the Saudi laws and regulations took a long time to be translated. Moreover, the Saudi foreign trade regime has been seen as incompatible with WTO agreements. In addition, Saudi Arabia was unable to provide market access to many products, such as alcohol and certain types of meat, on religious grounds.⁴

The author of the present research intends to examine the delay in accession to the GPA by Saudi Arabia from a legal perspective. The researcher will highlight the main aspects of the GPA and its requirements. Also, there will be a legal analysis of the Saudi Arabian government tenders and procurement law (hereafter called procurement law), to find the main issues which contradict the GPA.

Saudi Arabia's delay during the accession to the WTO was due to religious reasons because the Saudi legal system is based on sharia law. Therefore, the GPA will be analysed from a sharia law perspective to ensure that the GPA is seen as legitimate in accordance to sharia law. Finally, sharia law is going to play a main role when reconciling the GPA and procurement law, as it will provide the procurement law with tools such as the principle of public interest when dealing with the conflicting issues raised by the GPA.

1.2 Aims and Objectives of the Study:

During the accession of Saudi Arabia to the WTO, the negotiation teams overcame all barriers on their way towards membership including religious barriers. Although

⁴ Saudi Industrial Development Fund, *WTO Benefits and Requirements on Kingdom of Saudi Arabia*, (SIDF 2005).

Saudi Arabia promised to start negotiations to join the GPA within one year of accession to the WTO, Saudi Arabia is still not a member of the GPA. Therefore, the aim of this research is to bridge the gap between the GPA and procurement laws. Moreover, as sharia law is the source of the Saudi legal system, any international agreement must be compatible with sharia law. Therefore, the effort to bridge the gap between the GPA and procurement law is subject to the evaluation of sharia law. The research aims to generate a common ground between the GPA and sharia law which will facilitate the compatibility between the GPA and procurement laws in Saudi Arabia. Furthermore, the researcher aims to reconcile some sharia law provisions through the use of the principle of public interest (*Maslaha*). This will promote the sharia law provisions, in order to make it a system that can be integrated and reconciled with contemporary issues such as government procurement.

In reaching these aims, there are several objectives that will be achieved:

- To explore the GPA, as one of the outcomes of the Tokyo Round, which has the status of plurilateral agreement. Despite the fact that the GPA has been modified, and was revised in 2014, it still has the same status within the framework of the WTO. Thus, it is important to understand the nature, requirements, and objectives of the GPA, in order to see if it is possible to implement the GPA in a national legal system that is based on sharia law.
- To identify the views of sharia law in regard to international agreements in general, and on the GPA in particular.
- To analyse the main aspects of procurement laws in Saudi Arabia, in particular, what are the shortcomings of the domestic procurement laws that might act as barriers to the accession to the GPA?
- To assess the principle of public interest as a tool to reform sharia law, as well as to provide the procurement law with the ability to be flexible and adaptable with international agreements such as the GPA.

1.3 The Significance and Importance of this Study:

Public procurement is a very important sector of the national economy. Saudi authorities have paid great attention to it. The Saudi government enacted the first procurement law in the mid-1960s, and has since modified it twice, which reflects the government's dedication to keep it up to date. However, the procurement regulation in

Saudi Arabia is still in need of further reform. Some legal loopholes have allowed the growth of corruption. For example, some procuring entities divide procurement into separate procurements with the intention of excluding them from the application of the open tender method.⁵ Also, there is a flaw in the system of sub-contracts; procurement law only requires the contractor to inform the procuring entity if he or she intends to sub-contract to another contractor without looking at the sub-contractors' financial and technical ability. Moreover, Saudi Arabia suffers from many stalled projects, which have caused vast waste of the public funds. In 2013, the cost of stalled projects exceeded SAR 40 billion (GBP 7.1 Billion).⁶

Furthermore, the low quality of procurement products is one of the problems that Saudi Arabia is facing nowadays, due to many reasons, such as awarding contracts to the lowest bidder which is a requirement of procurement regulations in Saudi Arabia.⁷ According to the chairman of the National Committee for Contractors in Saudi Arabia,⁸ the lowest price policy is the main cause of stalled projects and poor quality of work. Moreover, he stated that, 'more than 1500 contractors will be added to our black list'.⁹ The other reason is the requirement of procurement law to award contracts to only local contractors. In one case, the latter requirement has limited market access to foreign companies. This has affected the quality of some projects, as some Saudi construction companies lack the experience to implement them and deliver an acceptable standard of work.

The above paragraph clearly points out the unfairness and the lack of the principle of transparency that exists in Saudi procurement laws. One of the solutions in closing these loopholes is the implementation of the GPA requirements.

The GPA requires all parties to remove all discriminatory practices and to implement the principle of transparency. The GPA provides instructions to be implemented in national law to ensure equality, quality, and transparency. Saudi Arabia has come

⁵ The procurement law in Saudi Arabia permits the procuring entity to conduct direct purchase without a tender if the amount of the procurement is less than SAR 30,000 (£5,300).

⁶ Abdullah Al Babbain, 'Stalled projects in Saudi Arabia: how to reduce them?' (The Construction Contracts conference: Fulfil the Contract, Riyadh, November 2013).

⁷ Finance Ministry Decision no 362, March 10, 2007; The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 29.

⁸ The National Committee for Contractors is one of the committees which is administrated by the Council for Saudi Chamber of Commerce and Industry.

⁹ Fahd Almouraki, 'The construction contracts in KSA' *Alriyadh* (Riyadh, 9 July 2014) <<http://www.alriyadh.com/951054>> accessed 7 March 2016.

under pressure from the WTO to join the GPA, however it has not yet joined. Thus, this research will provide the reader with a better understanding of the procurement laws in Saudi Arabia, and the main legal barriers that Saudi Arabia faces in joining the GPA. Moreover, the research will explore the GPA requirements and how it enhances government procurement in Saudi Arabia.

The subject of government procurement has a long history in Saudi Arabia. It has existed since it was formally established by the kingdom's founder King Abdul Aziz. The King established the 'Shura' council as the responsible body for all government purchases. Government procurement in Saudi Arabia has been given scant attention by researchers and academics, as there have been very few studies on government procurement regulations in Saudi Arabia. Most of the research focuses on the changes to the new procurement laws in Saudi Arabia.¹⁰ Furthermore, the subject of accession to the GPA by Saudi Arabia has barely received the share of attention it deserves from researchers.¹¹ In addition, the Saudi legal system, which is based on sharia law, and the GPA which is based on international agreements, need to be reconciled, so that the GPA can be operational and implemented in every member's national laws. However, the GPA and its requirements have not been discussed in the light of sharia law; for example, checking whether the GPA products and practices are sharia law compliant or not might affect Saudi Arabia's accession to the GPA.

Although the process of accession to the WTO by Saudi Arabia was described as difficult and complicated,¹² nevertheless, Saudi Arabia was able to overcome all the barriers to its accession to the WTO including religious ones. This is a sign that compromise can be reached between the procurement laws in Saudi Arabia and the

¹⁰ Saudi Arabia committed to start negotiation to access to the GPA in 2005. Most studies which evaluate and discuss the new government tenders and procurement law started after the enactment of the law in 2007; Ahmed Al-Said 'Legal Analysis to the Saudi Arabian Government Tender and Procurement Law: Comparative Study with Egyptian Procurement Law'; Salem Al Motaoue 'Public Contract in the Light of Government Tender and Procurement Law'. These studies explain and discuss some issues of the procurement law of Saudi Arabia. However, they have not discussed whether the government procurement law meets the requirements of the GPA. Also, they have not decided if the procurement law implements some basic international criteria.

¹¹ Al Hudithy's study 'Right of tenders and contractors under Saudi public procurement contract regulation: comparative study with England and Wales', (Durham University, 2006) was the first doctoral thesis about the subject of public procurement regulation, but the author talked about the right of contractors in general, and he mentioned GPA when he talked about the right of foreign contractors.

¹² Abdulaziz Al-Jarallah, 'Analysing the Impact of the World Trade Organisation (WTO) on the Sustainability of Competitiveness of the Petrochemical Industry in Saudi Arabia' (PhD thesis, Durham University 2010).

GPA which is administrated by the WTO. Therefore, this research will bridge the gap between the GPA and the procurement laws in Saudi Arabia by finding possible compatibility or areas where compromise between these two legal systems can be reached. Moreover, the research will show how sharia law which is the main source for all Saudi laws deals with international agreements, and in particular, how sharia law evaluates the GPA and its requirements. This will provide the reader with the ability to understand how the Saudi legal system reviews current and future agreements. In addition, the researcher will provide some solutions to some of the issues which may stand against the accession of Saudi Arabia to the GPA, this would include religious and legal issues.

It is anticipated that the findings of this research will assist policy makers and Muslim scholars in Saudi Arabia to decide on the accession of Saudi Arabia to the GPA. Moreover, the research will provide the GPA committee with an understanding of the Saudi legal system, as it is a system based on sharia law, and any violation of sharia law may result in agreement failure. Therefore, the research will make the committee aware of sharia law requirements, and thus, they can conduct the negotiation in the light of sharia law. Furthermore, the research will highlight the main shortcomings of the procurement laws in Saudi Arabia, such as the lack of transparency and favouritism. The research will also provide some solutions to these shortcomings, which may affect the accession of Saudi Arabia to the GPA.

Finally, this thesis will review the challenge procedures and dispute settlement in the GPA. However, as the GPA only provides guidelines, and each party has discretion in establishing challenge procedures, the researcher will suggest some solutions in changing or reviewing the procedures, whether by the Committee for Review of Compensation and Boycott of Contractors, or the Board of Grievances (hereinafter called the Board). ‘The Board of Grievances is an independent administrative judicial commission directly responsible to His Majesty the King’.¹³ It is anticipated that the solutions suggested by the researcher will assist policy makers in the improvement of the judicial system in Saudi Arabia.

¹³ Royal Decree no m/78, 1 October 2007, The Law of the Board of Grievances, art 1; The Board of Grievances was established by the royal decree (7/13/8759) in 1955. The law of Board of Grievances was modified in 2007 to specialize in only the administrative judiciary.

1.4 Research Questions:

Sharia law is the main source of the Saudi Arabian legal system. Sharia law does not contain prescriptive details on all issues, but it provides a framework in which contemporary events can be located. Moreover, the majority of sharia law provisions are based on the evaluation of Muslim jurists. To this end:

- 1- What requirements does sharia law impose on the conclusions of international agreements? Do the requirements of sharia law permit Saudi Arabia to accede to the GPA?
- 2- The GPA is an agreement administrated by the World Trade Organization (WTO). It includes provisions which regulate government procurement. What are the requirements of the GPA?
- 3- Procurement law has been described as transparent and non-discriminatory law. However, some of the provisions of the procurement law may not meet the standard requirements of the GPA. What are the main problematic issues of the procurement law which may contradict the GPA? And how can these contradictions be solved under the shadow of sharia law?

1.5 Methodology:

This research aims to be a scientific study about the approach of sharia law in the implementation of the GPA requirements in regard to procurement law. The researcher has used early and contemporary Arabic resources, together with English resources, in order to explore and discuss the GPA, as well as to review sharia law and its evaluation of international agreements and the regulations of international relationships in general. However, sharia law does not contain prescriptive detail on all issues; sharia law provides a framework in which contemporary events and issues can be dealt with. Moreover, most sharia law provisions are based on the rigorous interpretations of Muslim jurists.¹⁴

The vast majority of Muslim jurists agree that all issues should be addressed by the Quran, or the Tradition. However, for contemporary issues which have not been mentioned in the Quran and the Tradition, God commands humans to find solutions

¹⁴ In chapter three the researcher will provide the methods of Muslim scholars in dealing with contemporary issues.

through *Ijtihad* (personal reasoning).¹⁵ This includes the use of analogy and the principle of public interest, in accordance with guidelines and conditions, which will be discussed in chapter three. Therefore, in this research sharia law will address the GPA and its requirements in accordance with this method of analogy and the principle of public interest. Moreover, the researcher will try to use sharia law together with personal reasoning, if necessary, to modify some part of the procurement law. This research will analyse two legal texts: the GPA and the procurement law. Also, this research will review sharia law approaches to the compatibility and reconciliation between the GPA and procurement law. Therefore, the methods of this research are divided into three stages. First, discovery and analysis of the two systems: the GPA and Saudi procurement law. Second, the compatibility approach and third, the reconciliatory approach.

1.5.1 Discovering and Analysing the Legal Texts:

Generally, the role of legal researchers is to interpret or analyse the rules of the law, which is normally described as black-letter law or doctrinal legal research.¹⁶ The black-letter approach uses interpretive methods to examine the cases, statutes, and other sources of law in order to discover, explain, and evaluate the legal text. By using the interpretive method, the researcher is able to determine the content of each article of the GPA, as well as the procurement law. This will make it easy for the researcher to determine the scope of application of each article of the legal texts. Furthermore, using the interpretative method is essential, even if the legal text appears to be clear and precise, because to develop a legal text we need to interpret it, and interpretation will create arguments, and some arguments support the legal interpretation. This will result in the development of legal text.¹⁷

Some jurists provide that there are four types of legal interpretation: legislative interpretation, such as the implementing regulations of procurement law, judicial interpretation, doctrinal interpretation, and administrative interpretation.¹⁸

¹⁵ Muhammed Idris Alshafaai, *Al Risalah (The Message)* (vol 1, Mustafa Albabi Al Halabi Publishing 1940).

¹⁶ Mark Van Hoecke, *Methodologies of legal research: which kind of method for what kind of discipline?* (Bloomsbury Publishing 2011).

¹⁷ *ibid.*

¹⁸ Idris Jordan and Al Sharif Al Ghiobi, 'The Methodology of Legal Texts Analysis' (electronic journal for legal research 2006) < <http://droitplus.ma> > accessed 10 November 2013.

Traditionally, researchers use a doctrinal interpretation to interpret and analyse legal texts. This means that studies by legal scholars and academics clarify the statement of the law and comment on the provisions of the law. Often, doctrinal interpretation is theoretical. It is a critical analysis by legal researchers and academics, which might be considered or neglected, unlike judicial interpretation, which is normally applied and is legally binding. However, doctrinal interpretation and argument is very important for legislators and the courts, since it will guide legislators to reform legal text because of the scientific methods used by the doctrinal researchers. Moreover, it will guide the courts to clarify the exact meaning of the content of legal texts. Thus, the researcher will use the doctrinal interpretation in order to interpret and analyse the legal texts. Moreover, it will explore the content of the texts, and determine the scope of the application of the texts ¹⁹

In chapters two and four the researcher will discuss and analyse the GPA and procurement law. The GPA includes many articles which are focused on achieving its main principles, such as transparency and non-discrimination. Therefore, the GPA and its appendixes and annexes will be laid bare in order to learn the GPA's requirements. This will assist the researcher in evaluating the compatibility between the GPA and procurement law. Moreover, by examining the GPA, the researcher may be able to suggest particular solutions for particular problems of procurement law, such as the lack of transparency.

In addition, during the discovery and analysis of the two legal texts, the researcher will attempt to undertake a closer reading of the legal texts. This will result in a deep understanding of the real will of the legislators. However, as the French jurist Geny²⁰ emphasized, the legal text shall be interpreted in accordance with the will of the legislators, if the legal text was clear and resolute. Therefore, the researcher will interpret the legal texts without seeking what is the 'assumed' or underlying will of the legislators.²¹

1.5.2 The Compatibility Approach:

¹⁹ *ibid.*

²⁰ Francois Geny (1861-1958) was a French jurist and law academic.

²¹ Jordan and Al Ghiobi (n 18).

After exploring and analysing the legal texts of the GPA and procurement law, the researcher will assess the possible compatibility between the GPA and procurement law. It might be obligatory and encouraged by sharia law to make some of the provisions of procurement law compatible with the GPA, as it might achieve public good for the citizens and the country.

At this stage, the research will attempt to show compatibility between the two legal systems and their compliance with sharia law. It is notable that when sharia law remains silent or does not provide a provision or judgment for a certain case this is a sign that an act or transaction is permissible.²² Silence is a sign of approval by sharia law and a sign that it is permissible and, therefore, automatically in compliance with sharia law. For example, one of the GPA requirements is 'to conduct procurement in a transparent and impartial manner that is consistent with the GPA, using methods such as open tendering, selective tendering and limited tendering'.²³ Sharia law does not provide provisions or guidelines on how to conduct procurement and, therefore, it remains silent suggesting approval. As the GPA instructs that tendering implementation methods should be principally transparent so as to prevent corrupted practices, this is an area where sharia law and the GPA are in total agreement.

Furthermore, as explained above, sharia law encourages procurement law to adopt the GPA requirements when they are for the public interest. For example, if the procurement law has ineffective provisions that would not reduce corruption, then it is obligatory, according to the sharia, to adopt the GPA measures that will reduce corruption.

The importance of the compatibility approach is that it demonstrates the similarity between the GPA and procurement laws. Moreover, this study will add to the literature pertaining to the case of the accession of Saudi Arabia to the GPA, as it will show how the negotiation teams of the GPA and Saudi Arabia were able to find common ground. This would save time and accelerate the accession of Saudi Arabia to the GPA. Furthermore, and more importantly, it will provide the reader with details

²² Saleh Al Shikeh, *Commentaries on Nawawi forty Hadiths* (1st edn, dar alasmah 2010).

²³ The Revised Agreement on Government Procurement (Geneva, Switzerland, 2014); The agreement is the outcome of the initiative by the parties to the agreement to revise the agreement according to built-in provisions of the GPA 1994, the outcome of the negotiation was adopted in 2012 and came into force 2014.

of what is permissible and prohibited in sharia law in regard to GPA requirements. If a requirement of the GPA is permissible, then it must be compatible with procurement law. However, if there are incompatibilities between the GPA and procurement law then a principle of public interest could be used as a reconciliatory approach.

1.5.3 The Reconciliatory Approach:

The role of sharia law in this research is to examine the legitimacy of the GPA, and to review the compromise and the reconciliation between the GPA and procurement laws. It is notable that the GPA does not allow any party to reserve any provision of the agreement, it states that 'No Party may enter a reservation in respect of any provision of this Agreement'.²⁴ This means that a party to the GPA must implement all of its provisions. The researcher will discover and investigate the compatibility between the GPA provisions and the procurement laws. However, if the compatibility is not achievable then a reconciliatory approach will be resorted to, in order to bridge the gap between the two legal texts.²⁵

After determining the area where the GPA and procurement law are not compatible, the researcher will endeavour to link the GPA and procurement laws. As the GPA does not allow any reservation over its provisions, the researcher will discuss the provisions of procurement laws that may contradict the provisions of the GPA. Moreover, the researcher will suggest some remedies for these contradictions, by modifying the provisions of procurement laws that contradict the GPA. Subsequently, the solutions should be supported by sharia law, which normally uses the principle of public interest to deal with current issues such as government procurement. In addition, using the principle of public interest to deal with contemporary issues can be a tool to reform sharia law.

1.5.4 The Sources and Data:

The researcher has obtained the data from different sources. The university enabled access to several databases, therefore, many of the resources are in electronic format. This is to ensure that all information is up to date. Whilst many main sources could

²⁴ *ibid*, art XXII 3.

²⁵ Niaz Shah, *Women, the Koran and international human rights law: the experience of Pakistan* (BRILL 2006).

be found at the researcher's university, visits to other academic institutions were vital to gather more data that are not published online. Furthermore, several visits to Saudi governmental institutions were conducted, to peruse government documents related to the subject of government procurement. The researcher visited the Ministry of Finance in Saudi Arabia to access some of the government documents such as administrative circulars, and some judgments from the Committee for Review of Compensation and Boycott of Contractors. Moreover, the Board was visited in order to obtain some of the judgments related to the subject of procurement, however, the researcher only had access to a limited number of cases. The researcher also visited the Supreme Jurisdiction Institute at Imam Mohammed bin Saud University in Riyadh, in order to learn more about the latest studies in the topic of government procurement law.

1.6 Organization of the Thesis:

The thesis is organized into six chapters which will be briefly summarized in this section.

Chapter one serves as a general introduction to the study. The research overview is highlighted here, and the research aims, objectives, and questions that have set the basis of this research will be clarified. The importance and significance of this research will be expounded. Finally, the methodologies of the research will be provided.

Chapter two explores the GPA. It outlines the history of the agreement and the intensive effort by the international community to tackle the subject of government procurement at an international level. The unique status of the GPA as a plurilateral agreement will be discussed. The aims of the GPA will be analysed, and how the policy of favouring domestic suppliers over foreign suppliers has created significant barriers to international trade. The main principles of the GPA such as transparency and non-discrimination will be highlighted. The accession process of the GPA will also be provided. The main provisions of the revised text of the GPA such as tender procedures will be explored and discussed. The provision related to special and different treatment of developing countries will be analysed, and will show how the frequency of exceptions in the revised text may weaken the GPA. Challenges to procedures of the GPA will be explored and some of the criticism of the GPA's

procedure challenges will be reviewed. Finally, remedies available under the GPA will be defined.

Chapter three shows how the main source of Saudi laws which is sharia law assesses the GPA. In the beginning of the chapter, an outline of sharia law and its sources will be provided. As the GPA is an international agreement, there will be a discussion of how sharia law approaches international agreements in order to provide a background on sharia law's position on international agreements. Also, the chapter will introduce some of the tools used by sharia law to deal with contemporary issues, for example, public interest. The legitimacy of the GPA in the purview of sharia law will be discussed. The chapter will include the definitions of sharia law on transparency and non-discrimination, which are the basic principles of the GPA. In addition, the chapter will highlight the nature of financial transactions, and the best methods of evaluating the value of the contracts. Finally, the chapter will elaborate on the methods of sharia law in resolving disputes.

Chapter four contains an introduction to Saudi Arabia's legal system. The impact of the WTO on the Saudi legal system, and the delay of the accession of the kingdom to the WTO will be analysed. Also contained in this chapter is the legal framework and background of the procurement laws. This chapter will discuss the importance of the procurement law, as a new law, which is briefer and shorter than the previous law. An outline of the key provisions of the procurement law will be studied and criticized. Finally, the chapter will provide the procedural rules of the procurement law. It will discuss the development of settlement disputes in government procurement. This chapter will also evaluate the achievements of the Committee for Review of Compensation and Boycott of Contractors, a quasi-committee which is responsible for resolving all government procurement disputes. The committee's duty is to decide on compensation only and any other dispute shall be brought before the Board, therefore, the Board and its role in the resolution of disputes will be explained. Finally, the chapter will show the position of government arbitration in respect to public contracts.

Chapter five deals with reconciliation between the GPA and procurement law. After exploring the GPA, procurement law, and the sharia law position on the GPA, the chapter will attempt to reconcile the GPA and procurement law. The reconciliation between the GPA and procurement law will be supported by the opinion of sharia

law. The chapter will discuss the main issues of procurement law that may not be compatible with the GPA such as ‘equality’ of tax and zakat (which is a special tax paid by Muslims as a religious duty, because zakat is the third pillar of Islam), and ‘transparency’ in publishing tender opportunities. Finally, the chapter will try to uncover if there is compatibility between the GPA and procurement law in terms of dispute settlement.

Chapter six concludes the study with summarized statements about the study, assessments, and recommendations.

Summary:

This chapter has provided an overview of the research. The aim and objectives of this research have been provided in order to be focused, as well as to give the researcher a direction to solve the problems of the research. The significance and importance of the research has been presented. Then, the research questions have been provided which will be answered in the next chapters. The methodology of solving the research problem has been defined. In addition, the organization of the research has been outlined.

This research aims to bridge the gap between the GPA and procurement law, therefore, the next chapter will define the GPA principles and requirements which the GPA requires its parties to implement in their domestic laws.

Chapter Two: The Requirements of the Government Procurement Agreement:

2.1 Introduction:

The Government Procurement Agreement (GPA),²⁶ has been considered as the most averse of WTO agreements, because it limits the intervention of the members in tender procedures. It also promotes transparency and reduces corruption, which has been the biggest issue for most countries in the world after the Second World War.²⁷ The GPA was first negotiated in the Tokyo Round and came into force in 1981. It is the only agreement focusing on government procurement that is legally binding. However, it is legally binding for its members only. It is under WTO administration by the Committee on Government Procurement, and it is a plurilateral treaty, which means that it is optional for WTO members to join it. This treaty respects national laws, regulations, procedures and practices; therefore, members have the chance to adapt this treaty in accordance with their own domestic law.²⁸

2.2 The Background of the GPA:

Government procurement was hardly mentioned in The General Agreement on Tariffs and Trade (GATT), because of "the peculiar features of government procurement"²⁹; also the focus of developed countries was to reduce tariffs. Government procurement includes a combination of interests. The financial resources for government procurement are normally the taxpayers, however, in some cases the financial resources for government procurement can be the natural resources, international

²⁶ The 'Government Procurement Agreement contains four Appendices with regard to each member. The Appendices are an integral part of the agreement. Appendix I consists of five Annexes which determine the coverage of each party, while Appendices II, III, and IV list the publications where parties publish notices of intended procurement, list of qualified suppliers in case of selective tender, and applicable rules and procedures of parties. In addition, there are general notes to each party appendix I annexes which qualify the commitment referred to in the annexes'.
<https://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm>

²⁷ Christopher McCrudden and Stuart G Gross, 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17 *European Journal of International Law* 151.

²⁸ Mitsuo Matsushita, Thomas H Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law Practice and Policy* (2nd edn, Oxford University Press 2006).

²⁹ *Ibid*, P. 742.

development banks, or through Public-Private Partnership (PPPs).³⁰ The people who stand to benefit from the government services are concerned whether the services provided are good value, whether they are delivered in a timely manner and whether the contractors are willing to perform the contracts and comply with the contract conditions. In addition, the government itself may have an interest, as governments sometimes use procurement as a tool of personal or political gain.

This complexity had put the international community in a difficult position to develop an international framework to regulate procurement. However, Article III of the GATT gave details for the principle of National Treatment, moreover, it explicitly excluded government procurement from the GATT provisions. Article III.8.A³¹ states that:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

Also, article III.8. B³² states that:

The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

This article allowed the principle of preferences for government procurement, and to give subsidies to domestic industries, therefore, a government may prefer local products or suppliers, if it is for government use only.

The rules of GATT, which allowed the principle of preference for domestic products in government procurement, were the major loophole in the GATT system.³³ There was awareness that discriminatory practices in government procurement would

³⁰ The PPPs scheme means the cooperative venture between government and private business on a particular project. Normally this scheme applies to large infrastructure projects which need experience and quality. In the late 1970s, there was criticism of the public sector, because of the bureaucracy, political interference, and inefficiency of the services provided by public agencies. Therefore, some of critics suggested that the PPPs scheme would deliver better quality with lower price; Pauline Vaillancourt Rosenau, *Public-private policy partnerships* (MIT Press 2000).

³¹ General Agreement on Tariffs and Trade (Geneva, 1947) entered into force on 1 Jan 1948, it is the predecessor to the World Trade Organization (Marrakesh, Morocco 1994).

³² *ibid.*

³³ John H Jackson, Jean-Victor Louis and Mitsuo Matsushita, 'Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules' (1982) 81 Michigan Law Review 267.

restrict international trade,³⁴ and also contracting parties thought that keeping government procurement out of the control of the WTO would result in difficulties in implementing free trade principles, because government procurement is a large part of a national economy. Therefore, contracting parties agreed that this issue should be revised.³⁵ In the 1960s, there was an effort to reform the government procurement regulations, whether on domestic, regional, or international levels. This issue was discussed by the Organisation for European Economic Co-operation (OEEC), and then subsequently at the Organisation for Economic Co-operation and Development (OECD). However, these attempts to develop an international regulation for government procurement were not successful. Nonetheless, these discussions were very important and provided an avenue for the negotiations in the Tokyo Round.³⁶

2.2.1 The Tokyo Round Agreement:

The seventh, or 'Tokyo Round' of GATT, was considered to be the most important round for the non-tariff barriers (NTBs). It came after the success of previous rounds,³⁷ which focused on reducing the tariffs which were the main barriers for trade at that time. Since the Kennedy Round,³⁸ the NTBs had grown due to the extent of international trade. However, a precise estimate is very hard to obtain, because of the nature of some NTBs,³⁹ and the absence of transparency in some countries. Therefore, the Tokyo Round paid great attention to GATT plurilateral agreements that addressed non-tariff barriers, whether they were agricultural or industrial products, such as the international dairy arrangement, the arrangement regarding bovine meat, and the agreement on government procurement.

The government practice of 'buy national' was considered as one of the main obstacles preventing the liberalization of international trade agreements on

³⁴ Sangeeta Khorana and Sujitha Subramanian, 'Potential Accession to the WTO Government Procurement Agreement: A Case-Study on India' (2012) 15 *Journal of International Economic Law* 287.

³⁵ Matsushita, Schoenbaum and Mavroidis (n 28).

³⁶ McCrudden and Gross (n 27).

³⁷ Hugh M Aree and others, *The Impact of Trade Agreements: Effect of the Tokyo Round, US-Israel FTA, US-Canada FTA, NAFTA, and the Uruguay Round on the US Economy* (Washington, DC: US International Trade Commission 2003).

³⁸ The Kennedy Round was the sixth session of GATT, named after the previous US president John Kennedy. He requested the US congress reduce the tariffs within the framework of GATT. This round resulted in the Anti-Dumping Agreement. Also, it was noted that in this agreement the membership of developing countries increased due to the special treatment for developing countries article.

³⁹ Overseas Development Institute, 'The Tokyo Round and the developing countries' (1977) ODI, London.

government procurement.⁴⁰ There had been a discussion among powerful countries to develop a new rule to regulate government procurement at an international level. This issue was taken up by the Tokyo Round negotiations, which resulted in a new international agreement on government procurement.⁴¹

The application of the Tokyo Round on government procurement was rather limited (hereafter called the Tokyo code). It included goods, but not services by central government entities, and local government and treaties related to government and construction were excluded. Furthermore, the special treatment for developing countries was not sufficient.⁴² However, the Tokyo code included a preamble and nine articles. The preamble contained the aims of the code, which were mainly to reduce or eliminate NTBs, by introducing effective measures at the international level to be the base for government procurement procedures. Also, the code considered the needs of developing countries and the least developed countries who were given a special and different treatment. Therefore, the code recognized the welfare of people in developing countries, by exempting those countries from the national treatment principle, however, the exemption was to be reviewed regularly. Furthermore, the code concentrated on the principle of transparency in law, regulation related to government procurement, and opening up the procurement market to achieve an effective international framework for the conduct of world trade.

Article one of the Tokyo code provided that all laws, regulations, procedures, and practices, shall be subject to the code if the contract value was 15,000 SDR or more, and there was no division of the contract for the purpose of reducing the value of the contract to award it to a special party which is not covered by the Tokyo code. Although the local governments are not covered by the Tokyo code, the central governments shall request them to be compliant with its provisions. The Tokyo code required all parties to implement the principle of national treatment and non-discrimination in their local law, to be compatible with the provisions of code. On the other hand, the Tokyo code mentioned in article three that there shall be special measures for developing and less developed countries to promote the economy and social welfare of those countries, and to support imports from them. Therefore, the

⁴⁰ Florence Naegelen and Michel Mougeot, 'Discriminatory public procurement policy and cost reduction incentives' (1998) 67 *Journal of Public Economics* 349.

⁴¹ Jackson, Louis and Matsushita (n 33).

⁴² Matsushita, Schoenbaum and Mavroidis (n 28).

principle of national treatment was exempted in article 3(4) - (6), which showed that the developing countries may negotiate with the participants of this agreement to exclude the principle of national treatment with respect to certain entities included in entities lists according to the circumstances of each case. Moreover, developing countries may also modify their lists, even after the agreement came into force. In addition, article 3 (7) insisted that this exclusion shall be based on the condition which allowed the committee to have an annual review, and after three years a major review, to evaluate the effect of this exclusion.⁴³

Article five of the Tokyo code gave details of the methods of procurement. The parties to the Tokyo code shall ensure that all tendering procedures are consistent with the provisions of the code. The methods of tendering are firstly, open tender, which means that all interested parties who want to join the tenders are allowed. Secondly, selective tenders, where the bidders are invited to participate in a tender, in this case entities shall maintain a list of qualified suppliers to be published annually. Thirdly, single tendering, in which the entity directly contacts the bidder. However, this method of tender was only able to be used in certain specific circumstances: First, if there was no bidder or the bids were rigged; second, if the objective of the tender is to obtain a specific product from a specific supplier; third, in cases of emergency due to the difficulty operating a tender procedure, such as war or outbreak of diseases, and finally, if a change of suppliers was impossible due to the use of a facility which was located for the products.

2.2.2 Transparency in the Tokyo Code:

As mentioned above, the Tokyo code were the first rules that governed government procurement at an international level, aiming to achieve the principle of transparency in tender procedures. However, the provisions of transparency remain similar to the subsequent agreement. They requested all parties to publish their law, regulations, and any procedure related to government procurement. Also, the procuring entities shall inform the qualified bidder why he or she has been rejected, or not invited, and furthermore, the procuring entities shall justify why it awarded the contract to the successful bidder.⁴⁴

⁴³ Tokyo Round Code on Government Procurement (1979).

⁴⁴ World Trade Organization, Agreement On Government Procurement (Tokyo Round) art 6.

2.2.3 The Status of GPA as a Plurilateral Agreement:

The GPA is one of the outcomes of the Tokyo Round, which has the status of a plurilateral agreement, and has remained in the same status within the framework of the WTO.⁴⁵ Despite the fact that government procurement was considered to be one of the most important tools of the economies of the members of the WTO, due to the complexity of government procurement, there are differences in the various members' positions toward the GPA. There are countries which support the GPA (mainly developed countries), and there are countries (mainly developing countries) which are hesitant and suspicious of the objectives of the GPA. The developed countries suggest that government procurement should be liberalized, and the procurement market should be open for foreign products, suppliers, and services, to make world trade more integrated and efficient.

On the other hand, as the government procurement market is easy to dominate and consumes a large amount of gross domestic product (GDP), developing countries have endeavoured to keep the government procurement market under their power, by imposing a 'buy national' policy and by subsidizing local products. They argue that imposing such a policy will result in the development of the local economy, support small enterprises, and reduce the unemployment rate. Consequently, the WTO decided to characterize GPA as a plurilateral agreement. This means that members of the WTO have an option to join the GPA or not.⁴⁶ Although participation in the GPA is optional, a condition of WTO membership is to start negotiation to join the GPA, thus denying this status. For example, in the case of Saudi Arabia, the accession to WTO by Saudi Arabia was conditional. The condition was to commence negotiations to join the GPA after one year of accession to WTO. Therefore, accession to the GPA would not consider as an optional for Saudi Arabia.

2.3 The New Form of the GPA after Uruguay Round:

In the Uruguay Round in 1994 there was negotiation about government procurement and how to open up national government procurement to international firms, however,

⁴⁵ Mohsen Hilal, 'Government Procurement' (The Arab Conference - World Trade Organization- Opportunities and Challenges, Beirut, April 2011).

⁴⁶ Matsushita, Schoenbaum and Mavroidis (n 28).

on 1 January 1996 the GPA entered into force.⁴⁷ In 2011, the text of the GPA was revised, and was adopted in 2012,⁴⁸ and came into force in 2014.⁴⁹ The GPA succeeded some principles in the Tokyo Round, such as national treatment and non-discrimination, but there were some additions to the GPA, including the extent of the coverage of the agreement to include services and local government. Furthermore, the parties could establish challenge procedures to resolve disputes between them.⁵⁰

2.4 The Aims of the GPA:

Government procurement accounts for a substantial proportion of GDP.⁵¹ (There are a few studies about the size of government procurement, however, they usually focus on a very limited number of countries or regions,⁵² and they are typically about 10 to 20 per cent of GDP).⁵³ It is well known that discrimination and the lack of transparency in government procurement may create significant barriers to trade. In terms of government procurement, restricting imports in order to buy domestic products only might be a significant barrier to trade. For example, if a government bans procurement from foreign suppliers, and the government demand exceeded domestic supply, then the domestic supply will expand to meet the requirements of the government which might increase the price and may affect private consumers.⁵⁴

⁴⁷ Charles Tiefer, 'The GATT Agreement on Government Procurement in Theory and Practice' (1997) 26 *University of Baltimore Law Review*.

⁴⁸ Krista Nadakavukaren Schefer, 'Will the WTO Finally Tackle Corruption in Public Purchasing? The Revised Agreement on Government Procurement' (2013) 17 *American Society of International Law* <<https://www.asil.org/insights/volume/17/issue/11/will-wto-finally-tackle-corruption-public-purchasing-revised-agreement>> accessed 15 April 2015.

⁴⁹ The official website of WTO <https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>

⁵⁰ Matsushita, Schoenbaum and Mavroidis (n 28).

⁵¹ Robert D Anderson and Sue Arrowsmith, 'The WTO Regime on Government Procurement: Past, Present and Future.' in Robert D Anderson and Sue Arrowsmith (eds), *The WTO Regime on Government Procurement Challenge and Reform*, (vol 1 Cambridge University Press 2011).

⁵² Denis Audet, 'Government procurement: A synthesis report' (2002) 2 *OECD Journal on Budgeting* 149.

⁵³ R Preston McAfee and John McMillan, 'Government procurement and international trade' (1989) 26 *Journal of international economics* 291; Gerard De Graaf and Matthew King, 'Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round' (1995) 29 *The International Lawyer* 435; Arie Reich, 'The New Text of the Agreement On Government Procurement: An Analysis and Assessment' (2009) 12 *Journal of International Economic Law* 989.

⁵⁴ Simon J. Evenett, 'Multilateral Disciplines and Government Procurement' in Aadity Mattoo, Bernard Hoekman, Philip English (eds), *Development, Trade, and The WTO* (The World Bank 2002).

Thus, the discriminatory policy will reduce the volume of trade.⁵⁵ On the other hand, not all discriminatory practices affect trade,⁵⁶ for example, some discriminatory policies may result in increasing the domestic output. Therefore, it has been submitted by some economists that, ‘the same discriminatory policy applied to different sectors of the economy produces different result’.⁵⁷

Nevertheless, government procurement is one of the most important subjects for international trade regimes, including the WTO. Thus, the first preamble of the GPA illustrates the main aims of GPA, which are: greater liberalization, expansion of world trade, and improving the international framework for the good practice of world trade.⁵⁸ The first preamble states that:

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade.⁵⁹

In addition, for the first time, the revised text of the GPA mentions corruption, which was absent in previous texts. The sixth preamble shows the importance of transparent measures in government procurement to avoid any practice of corruption or personal interest,⁶⁰ ‘in accordance with applicable international instruments, such as the United Nations Convention against Corruption’⁶¹ (UNCAC). UNCAC was negotiated in the United Nations office in Vienna by more than one hundred representatives from all around the world. It seeks international cooperation to prevent any practice of corruption. The provision which deals with government procurement is article nine, which states that:

Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement,

⁵⁵ Federico Trionfetti, 'Home-biased Government Procurement and International Trade: Descriptive Statistics and Empirical Evidence' in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution*, (Kluwer Law International 2003).

⁵⁶ Arrowsmith and Anderson, 'The WTO Regime on Government Procurement: Past, Present and Future' (n 51).

⁵⁷ Trionfetti (n 55).

⁵⁸ Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement'.

⁵⁹ WTO, Agreement On Government Procurement (Legal Text) (2011).

⁶⁰ Reich (n 53).

⁶¹ The Revised Agreement on Government Procurement.

based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.⁶²

Many countries, including the US, practise a 'buy national policy',⁶³ and in some countries it is the law. For example, in Saudi Arabia, article five of the government tender and procurement law states that: 'Priority shall be given to national manufactured goods, products and services and to those treated as such'.⁶⁴ However, the preference policy is hidden in some countries, therefore, they practise this policy through procurement procedures that have less transparent measures, which give the decision makers much discretion. These practices are considered to be the main barriers to international trade. Therefore, one of the aims of the GPA is to resolve these problems by persuading governments to open up their procurement markets to international competition.⁶⁵ To achieve these aims, the application of two fundamental principles, non-discrimination and transparency, are crucial.

A- Non-Discrimination:

Discrimination is one of the main barriers in both the international trade and government procurement process. Given that discrimination induces corruption, inefficacy, poor quality, and reduces competition, the revised text clarifies that services and supplies from other parties shall be treated equally like the domestic services and supplies. It also prevents discrimination against local suppliers who have foreign partners. Furthermore, the revised GPA shows that procuring entities shall not seek, take account of, impose, or enforce any offset.⁶⁶ For example, by forcing foreign contractors to use local material or local labour.⁶⁷

B-Transparency:

Another fundamental principle of GPA is transparency. The need for transparency in government procurement is to give the ability to interested parties to monitor any practice of discrimination or protection which occurs during the procurement procedures, and give them the right to complain about these practices.⁶⁸ Therefore, the

⁶² United Nations Office on Drugs and Crime, *United Nations Convention against Corruption* (2004).

⁶³ Trionfetti (n 55).

⁶⁴ Royal Decree no m/58, September 27, 2007, Saudi Arabian Government Tenders and Procurement Law.

⁶⁵ Reich (n 53).

⁶⁶ The Revised Agreement on Government Procurement, art IV (6).

⁶⁷ Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement'.

⁶⁸ Anderson and Arrowsmith (n51).

term transparency is referred to in the sixth preamble, as it states: ‘The importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner’.⁶⁹ Thus, transparency is a key tool in promoting good use of government money, which is highly recommended to create better quality projects, therefore, ensuring integrity in the procurement system and preventing corrupt practices. Moreover, in some countries the practice of transparency can lead to public accountability.⁷⁰ In addition, by implementing the provisions of transparency, this could improve the image of a country (nationally and internationally) in terms of its reform attempts and anti-corruption image. This will result in the consolidation of a country’s stability and developing community awareness of any form of corruption, and making corruption a national crisis.

2.4.1 The Accession Process of the GPA:

As laid down above, the GPA is a ‘Plurilateral’ agreement, meaning that not all WTO members are members of the GPA; it is legally binding only for those who have acceded to the GPA. At this time, forty-two members of the WTO are members of the GPA, including Canada, the EU (including all twenty-eight member states), Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, the Kingdom of Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the US. Moreover, in 2015 two countries joined the GPA which are Montenegro and New Zealand.⁷¹ There are some countries which have applied for accession to the GPA and submitted all relevant documents including Armenia, Albania, Oman, Panama, Georgia, China, Jordan, the Kyrgyz republic, and Moldova.⁷² In addition, there are some countries for whom accession to the GPA was the pre-condition to joining the WTO, including Croatia, the Former Yugoslav Republic of Macedonia, Mongolia, Ukraine, and the Kingdom of Saudi Arabia.

The accession to the GPA is open to all members of the WTO, and is based on the terms that are agreed between the acceding member and the existing GPA parties. Also, the Director-General of the WTO is informed by depositing an instrument of

⁶⁹ The Revised Agreement on Government Procurement.

⁷⁰ Anderson and Arrowsmith (n51).

⁷¹ For more details about the GPA members and their dates of accession to the GPA and revised GPA <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>

⁷² McCrudden and Gross (n 28).

accession that contains the agreed terms, and the date the agreement will come into force, which is the thirtieth day following the accession to the agreement.⁷³

The process of accession is by submitting an application of accession. The application notes the process of negotiations between the acceding member and the GPA parties, that these negotiations are about the coverage offer, and whether or not they meet the requirement of the GPA. The coverage offer from any acceding member is a key element of the process of accession, therefore, the application shall include the entities that shall be covered. However, each party shall specify the following information in its annexes to Appendix I: central government, sub-central government entities, other entities, goods, services, construction services, and general notes.⁷⁴ In addition, the domestic law and regulations of the acceding member must be compatible with the requirements of the GPA. Some countries adopt different legal systems of government procurement, which at first glance appear to be compatible with the GPA as they are transparent and use a transparent method of tenders. For example, in some countries they adopt a 'repeated tender' which is a contract awarded to the contractor to carry out a previous contract with a similar or lower amount of money. Even if this method of tender has a condition that the previous open or selective tender procedures were conducted for this method of tender, this method of tender contradicts the principle of transparency, because one of the most important provisions of transparency is the publication of contractors. Moreover, it is a discriminatory practice, as it gives preference to local products or suppliers as they may agree to keep lower prices. Therefore, the parties must verify that the law and regulations of an acceding member is compatible with the requirements of the GPA.⁷⁵

As developed countries are already members of the GPA, and the acceding members are normally developing countries, thus, special and differential treatment for developing countries is considered to be an element of the accession process. According to article V of the GPA,⁷⁶ there is special and differential treatment for developing countries, as the article states that '...the Parties shall give special

⁷³ The Revised Agreement on Government Procurement, art XXII (2).

⁷⁴ *ibid*, art II.4.

⁷⁵ Robert D Anderson and Kodjo Osei-Lah, 'Forging a More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011); Khorana and Subramanian (n 34).

⁷⁶ The Revised Agreement on Government Procurement, art V.

consideration to the development, financial and trade needs and circumstances of developing countries and less developed countries'.⁷⁷ Therefore, during the process of accession, parties of the GPA shall implement the provision of article V of the revised text of GPA. However, the special and differential treatment for developing countries is subject to negotiation,⁷⁸ including price preferences, offsets, phased-in addition of specific entities and sectors, and a threshold that is higher than its permanent threshold.⁷⁹

2.5 The Main Key Features of GPA:

2.5.1 Scope and Coverage:

Before engaging with the scope and coverage of the GPA, it is worthwhile to mention that the revised text of the GPA started with the list of definitions. Article I mainly defines the terms used in the revised text, also it defines some of the terms in the previous text, and some terms in member states' schedules. The reasons for this introduction is to make the GPA simpler and clearer.⁸⁰ For example, it was very difficult to understand the meaning of the 'offset' in government procurement, therefore, the definition of this term has simplified the understanding of this agreement, especially in the issue of special and differential treatment for developing countries.

It has been argued that there are no core changes to the revised text, in terms of scope and coverage, and change only occurred by gathering some provisions such as coverage and exceptions into one article.⁸¹ However, the revised text is unlike the previous text, in fact, the provisions related to article II (scope and coverage) has been remarkably developed, because it illustrates and confines the concept of government procurement. Moreover, it clarifies that some government purchases are not considered to be government procurement, and do not apply to the provisions of the GPA. For example, some countries have a financial surplus, and they want to invest it in real and financial assets such as stock, bonds, or other securities. Therefore, some

⁷⁷ *ibid.*

⁷⁸ Robert D Anderson, *Forging a More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement*.

⁷⁹ The Revised Agreement on Government Procurement.

⁸⁰ Reich (n 53).

⁸¹ *ibid.*

countries have established a Sovereign Wealth Fund in order to invest in national wealth. This process, even if it was a government purchase, and the resources were taxpayers or natural resources, and is for the benefit of population in the long run, is not under the conceptual frame of government procurement, because this type of purchase is for commercial purposes. Article II.2 of the GPA states that:

For the purposes of this Agreement, covered procurement means procurement for governmental purposes: of goods, services, or any combination thereof: as specified in each Party's annexes to Appendix I; and not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale.⁸²

The GPA applies to any measures covered by the state party accession agreement. As laid down above, the revised text of the GPA has introduced a list of definitions for the terms that are used in the text. Article I.i. defines the term of measures as, 'Any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement'.⁸³ This definition is one of the most important definitions, because it simplifies the text and avoids repeating long sentences. Furthermore, this definition of the term 'measure' illustrates that any form of protection whether they are laws, regulations administrative circulars, or any recommendations which are not legally binding, is a breach of the rules of the GPA. For example, some countries have transparent government procurement laws or regulations, however, they may award a contract to a specific party, because there is a document or recommendation from some ministers or general managers which permits the exception of some types of large project due to some excuse related to the ability to implement the project. But, the real and invisible reasons are not known. Therefore, the terms measure determines what is covered by the GPA.

As mentioned above, the GPA is a set of rules that require the opening up of the procurement market, non-discrimination, and transparency. On the other hand, this set of rules does not apply automatically to all government procurement activities of each party. These rules rather apply to the government procurement activities that are determined in each party's schedule.⁸⁴ Moreover, the government activities covered as listed in the annexes (goods, services, construction services) must have a value that

⁸² The Revised Agreement on Government Procurement.

⁸³ *ibid.*

⁸⁴ Jean Heilman Grier, 'Recent Developments in International Trade Agreement Covering Government Procurement' (2006) 35 Public Contract Law Journal 385; Reich (n 53).

exceeds specified threshold values.⁸⁵ In addition, each party is permitted (in its annexes, which also have the party commitment) to have a general derogation in a separate form called general notes.⁸⁶ Through the above, it can be clarified that the entities, thresholds, and the exclusion to coverage, are three essential elements that determine which government procurements fall under the coverage of the GPA.⁸⁷

A-Entities:

As set out in article II.1, the GPA applies to any measures regarding government procurement. It means that it shall apply to all laws and regulations of central government entities, sub-central government entities, and other entities, such as state-owned enterprises,⁸⁸ or institutes that are governed by the government but have their own internal administration system. Moreover, Article III states that there is no provision in the GPA that prevents any party from taking any action or not publishing any information that is considered to be sensitive information due to national security, or for national defence.⁸⁹ However, some current members of the GPA provide a non-sensitive list in their coverage schedules.⁹⁰

B-Threshold:

All contracts that fall under the GPA must be equal or exceed the threshold at the time of publication of contracts. The value of contract is specified in terms of Special Drawing Rights (SDRs).⁹¹ For central government (Annex 1 entities) the threshold for the goods and services are SDR 130,000 and SDR 5,000,000 for the construction services. For sub-central government entities (Annex 2 entities) the threshold for goods and services are SDR 200,000 and SDR 5,000,000 for the construction

⁸⁵ Introduction to the Agreement on Government Procurement.<http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.

⁸⁶ Kodjo Osei-Lah and Robert D Anderson, 'The Coverage negotiation under the Agreement on Government Procurement context, mandate, process and prospect' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, vol 1 (Cambridge University Press 2011).

⁸⁷ Grier (n 84).

⁸⁸ *ibid.*

⁸⁹ The Revised Agreement on Government Procurement, art III (1).

⁹⁰ Robert D Anderson, 'The Coverage negotiation under the Agreement on Government Procurement Context, mandate, process and prospect'.

⁹¹ Special Drawing Rights are an international reserve asset created by the International Monetary Fund. The value of this asset is based on a basket of four key currencies: US Dollar, Euro, British Pound, and Japanese yen.

services. For other entities (Annex 3 entities) the threshold for goods and services are SDR 400,000 and SDR 5,000,000 for construction.⁹²

C- Exclusion to Coverage:

Each party of the GPA can exempt a specific member from participating in tenders in certain sectors. For example, Korea has disqualified tenderers from Canada to participate in tenders listed in annexes 2 and 3, and has promised that it will amend this note when an issue has been resolved with Canada.⁹³ Moreover, many parties of the GPA ensure that a general note shall include reciprocity as a principle when dealing with other members of the GPA. For example, in South Korean general notes on the GPA coverage, the negotiating party has made conditions that the services listed in annexe 4 are covered only by particular parties who also include these services in their Annexe.⁹⁴

2.5.2 The GPA Coverage Negotiation:

Practically, the negotiation on the expansion of coverage started in 2002. On the other hand, in 1987 the parties put some efforts into improving the Tokyo code in terms of coverage and they managed to finalize an agreement to improve the Tokyo Round.⁹⁵

It is obvious that one of the main objectives of the GPA is to expand the coverage among all parties. However, the revised text has not included any improvement in terms of coverage. Article XXII.7 of the revised text states that:

Not later than the end of three years from the date of entry into force of the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012, and periodically thereafter, the Parties shall undertake further negotiations, with a view to improving this Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all parties on the basis of mutual reciprocity, taking into consideration the needs of developing countries⁹⁶

It is similar to the previous text of the GPA.

⁹² Government Procurement. Thresholds in Annexes 1, 2 and 3 of Appendix 1 of the Government Procurement Agreement (expressed in SDR)
<http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm>.

⁹³ Korea General Notes to the GPA.

⁹⁴ Appendices and Annexes to the GPA. <www.wto.org/english/tratop_e/gproc_e/appendices_e.htm>.

⁹⁵ Reich (n 53).

⁹⁶ The Revised Agreement on Government Procurement.

2.5.3 Special and Differential Treatment for Developing Countries:

Despite the fact that Saudi Arabia is one of the largest oil exporters, it is still considered to be a developing country.⁹⁷ Therefore, it is important to understand the GPA's special and differential treatment for developing countries. This will provide the researcher with the ability to determine the advantages that Saudi Arabia can obtain from the provisions related to developing countries.

It is notable that there are some great values that do not fall under the scope of rights which are organized by international laws and organizations. However, these rights stem from the belief of people in the importance of these rights to achieve justice, equality and the principles that are devoted to brotherhood among human beings. One of the most important values is 'tolerance' between human beings. Tolerance can be demonstrated by good treatment, kindness, caring for others, and sympathizing with others in cases of disasters. Moreover, caring for others in any type of crisis, such as financial crisis and development crisis by showing the meaning of humanity and respect to others.

Religions have paid great attention to the principle of tolerance. For example, sharia law covers in great detail and attention the principle of tolerance, because of the importance of this principle to life. Furthermore, sharia law indicates some important principles to achieve tolerance, which will lead human beings to peace and development.

The most important principle is that sharia law considers all human beings as one family, created by God, as the Quran states that: 'O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women'.⁹⁸

Moreover, the Quran has proved that, regardless of religion, there is a brotherhood attributed to Adam, as the Quran says: 'O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another'.⁹⁹

⁹⁷ Country Classification, prepared by the Development Policy and Analysis Division (DPAD) of the Department of Economic and Social Affairs of the United Nations Secretariat (UN/DESA).<http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012countryclass.pdf>

⁹⁸ Surat An-Nisa verse 1.

⁹⁹ Surat Al-Hujurat verse 13.

Furthermore, the words of the Prophet in his final speech in Makkah during his last pilgrimage emphasized the unity of human beings as he said: ‘O people, your Lord is one, and your Father is one, all of you attributed to Adam, and Adam created from dust, and there is not differences between Arabic and non-Arabic person.’

Human beings are one family. Sharia law believes that maintaining the human brotherhood is highly admired and important to building a better universe, and that can be achieved by cooperation between humans, sharing experience, and providing assistance to any one in need to develop and improve their lifestyle. However, in the next chapter, the researcher will discuss sharia law’s views towards aid given to the countries which need assistance to develop their economies and their development.

In terms of international organizations, the GPA under the WTO has an article which embodies the principle of tolerance which is entitled ‘developing country’. However, it was formerly entitled ‘special and differential treatment for developing countries’ in the previous text of the GPA.

During the renegotiation of the revised text of the GPA, there was an effort by parties of the GPA to maintain it. There has been a revision of the provisions of the GPA to facilitate accession by developing countries. Special and differential treatment (S&D) provisions for developing countries are a feature of virtually all WTO agreements.¹⁰⁰ The Marrakesh agreement, which established the WTO (The WTO agreement), states that:

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.¹⁰¹

Despite the special treatment which is given to developing countries, it can be acknowledged that most developing countries are not ready to join the GPA, due to their historical protectionist policies,¹⁰² the preference policy which is implemented in some developing countries’ systems, unequal treatment, and the small size and lack of

¹⁰⁰ Anna Caroline Muller, 'Special and Differential Treatment and Other Measures for Developing Countries Under the Agreement on Government Procurement: The Current Text and New Provisions' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on government procurement: Challenge and reform* (Cambridge University Press 2011).

¹⁰¹ The WTO, Marrakesh Agreement Establishing the World Trade Organization (1994). Second preamble. <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm>

¹⁰² Khorana and Subramanian (n 34).

experience of the companies in developing countries which disqualify them from competing with big firms from developed countries.¹⁰³ However, it is very difficult for a developing country to decide whether to join the GPA or not, because of the fear that the accession will lead to economic losses and may affect the development of their industries.¹⁰⁴ Some countries have a fear accession to the GPA may affect their sovereignty. Moreover, some developing countries still claim that the reason for using discriminatory practices is to protect small and medium enterprises, support youth initiative, and to counter the economic downturn.¹⁰⁵

2.5.4 The Developing Countries Provision in the Revised Text of the GPA:

The GPA is like other agreements of the WTO that contain S&D provisions which give developing countries special rights and require developed countries to treat developing countries more favourably than other WTO members. The aim of S&D provisions is to encourage developing countries to be active participants in international trade, as well as to assist them to overcome any difficulties they may encounter joining WTO agreements.

As noted above, the GPA has been revised to avoid the ambiguous and long statements in the previous text and the new text entered into force in 2014. In contrast, the revised text is more specific, coherent, and time-bound.¹⁰⁶

The revised text uses the collective term of developing countries to include both developing countries and less developed countries, to ensure that there are no differences between them. This is to achieve one of the aims of the GPA, to simplify the revised text, as well as to emphasize that developing countries do not have to be

¹⁰³ Ibrahim Mohammad Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales' (PhD thesis, Durham University 2006).

¹⁰⁴ Chang Fa Lo, 'The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei' in Sue Arrowsmith and Robert Anderson (eds), *The WTO regime on government procurement: Challenge and reform* (Cambridge University Press 2011).

¹⁰⁵ Khorana and Subramanian (n 34).

¹⁰⁶ Muller, 'Special and Differential Treatment and Other Measures for Developing Countries Under the Agreement on Government Procurement: The Current Text and New Provisions'.

party to the GPA in order to be entitled to the technical assistance¹⁰⁷ which has been stated in Article V 8.¹⁰⁸

One of the main aspects of the provision of the revised text regarding developing countries is the focus on accession. The previous text envisaged accession as a possibility but not a focus.¹⁰⁹ Therefore, article V of the revised text starts with ‘in the negotiation on the accession...’ to show that in the development of the text it has focused on accession. Moreover, this development of the text may strengthen the status of the GPA to become a multilateral agreement rather than a plurilateral agreement, by addressing all issues and removing all barriers toward accession to the GPA by developing countries.

While the previous text of the GPA encouraged market access by developing countries by facilitating increased imports from developing countries¹¹⁰ the revised text simply emphasizes the principle of most-favoured nation (MFN). It is subject to the terms of negotiation between parties and a developing country, to create a balance of opportunities for all parties,¹¹¹ and also to prepare developing countries to deal with the new provision, which is based on the terms negotiated. However, some developed countries that are members of the GPA have used the principle of reciprocity rather than the MFN principle. For example, some GPA members have reacted to Canadian coverage to exclude sub-central government by excluding the equivalent coverage. Such reaction is legally in contradiction to the principle of MFN adopted by the GPA, however, it was accepted in order to find a compromise and room for reciprocity. As mentioned above, it can be said that developing countries have been given more responsibility to negotiate the coverage commitment, and they have to play a more active role in obtaining more coverage to other procurement markets.

In contrast, the new text is more flexible in terms of market protection. Developing countries are permitted to take protective measures to protect their procurement, but

¹⁰⁷ *ibid.*

¹⁰⁸ Article V 8 of the revised text of the GPA states that ‘The Parties shall give due consideration to any request by a developing country for technical cooperation and capacity building in relation to that country’s accession to, or implementation of, this Agreement’.

¹⁰⁹ Muller, ‘Special and Differential Treatment and Other Measures for Developing Countries Under the Agreement on Government Procurement: The Current Text and New Provisions’.

¹¹⁰ WTO, *The Plurilateral Agreement on Government Procurement (GPA)* (1994) Article V 2.

¹¹¹ Muller, ‘Special and Differential Treatment and Other Measures for Developing Countries Under the Agreement on Government Procurement: The Current Text and New Provisions’.

this has to be under certain rules. First, the flexibility that should be granted to developing countries is to develop their policy in a transparent manner. Accordingly, the revised text permits developing countries a 'policy space' to promote national industries through a price preference programme and offset, although it is against the principle of MFN laid down under the GPA. However, the GPA is a kind of exception to the other agreements of the WTO.¹¹² The GPA contains many exceptions in its provisions. For example, in terms of a price preference programme, developing countries are allowed to award contracts to local suppliers even if the suppliers have a higher price, and the entities can discount the price of a contract of local suppliers. However, the full price will be paid for goods and services, which are the only two parts of a contract permitted to have a price preference. Also, the goods and services must originate in the developing country. Second, for the purpose of developing their policy and to avoid economies shrinking, developing countries are temporarily permitted to exclude specific entities from coverage. Furthermore, they are permitted to exclude certain coverage in the form of phasing-in, and the thresholds can be higher than the one stated in the revised text. In addition, parties can negotiate with acceding countries to delay the application of any specific obligation in the GPA, and the period shall be five years for less developed countries and not to exceed three years for developing countries.¹¹³

It has been noticed that the provision for developing countries in the revised text has been shortened. It is unlike the previous text which gave more details for S&D granted to developing countries. For example, the previous text gave more details of measures relating to the technical assistance that should be given to developing countries, while the revised text provides only a general provision on technical assistance, which does not indicate any measures related to technical assistance.¹¹⁴ This might be because the intent of the GPA parties was to subject some of the assistance to developing countries to negotiation and request. Therefore, a developing country should make a request upon accession to the GPA about any technical assistance they might need.

¹¹² Simon J Evenett and Bernard M Hoekman, 'Government procurement: market access, transparency, and multilateral trade rules' (2005) 21 *European Journal of Political Economy* 163.

¹¹³ WTO, *The Plurilateral Agreement on Government Procurement (GPA)* art V 4.

¹¹⁴ Muller, 'Special and Differential Treatment and Other Measures for Developing Countries Under the Agreement on Government Procurement: The Current Text and New Provisions'.

Despite the fact that the GPA considers the principle of non-discrimination (national treatment and MFN) as the core of the agreement, some parties to the GPA have conditioned their commitment on market access to that offered by other parties of the GPA. These conditions, which are based on the principle of reciprocity, do not achieve the GPA objectives to maintain free competition in the local procurement market.¹¹⁵

The frequency of conditions and exceptions within the GPA weakens the implementation of the text. Therefore, some sharia law jurists have adopted the theory which states that if there are many exceptions in a legal text this will lead to an incoherent text. Furthermore, it will not be suitable to be used as evidence.¹¹⁶ Moreover, some Muslim scholars have invalidated a number of sharia law rules because of the large number of exceptions. On the other hand, in terms of exceptions, the researcher is aware of the scope of application of the rules by understanding the reasons and wisdom laid down behind these exceptions to the rules. This develops a researcher's skills to understand the secrets and objectives of the rules. Therefore, researchers must look at each exception to establish if it has a considerable motivation or not.

The GPA is a controversial, unfixed, and plurilateral agreement. Therefore, the frequency of exceptions on rules can be a positive phenomenon to attract more developing countries and fill the ability gap between developing and developed countries. Moreover, these exceptions are necessary to prepare the legal systems of developing countries to meet the requirements of the GPA. In addition, the exceptions that are granted to developing countries have a time limit, therefore a developing country must progress as necessary to adhere to their commitments and achieve the goals for which the exception exists.

2.5.5 The Benefits and Costs of the GPA for Developing Countries:

The GPA is a very important international legal instrument to promote transparency, integrity, implementation of fair competition, enhancement of value for money, and to acquire better quality goods and services. The GPA's guiding principles are similar to

¹¹⁵ Evenett, 'Multilateral Disciplines and Government Procurement'.

¹¹⁶ Tawfiq Yahya, 'Exception from Jurisprudence Rules and its Impact on Doctrinal Rules' (2013) 9 Academy of Social Studies and Humanities, University of Hassiba Benbouali Algeria 86.

those issued by international organizations, such as the UN, OECD, and the World Bank.¹¹⁷ The decision whether or not to join the GPA should be based on the costs and benefits of the GPA. In the following section, the researcher will focus on the legal side of the benefits and costs of the GPA. Will accession to the GPA reform the legal systems of potential acceding countries and implement the transparency and non-discrimination which are the two core principles of the GPA? Accession to the GPA will enable developing countries, especially those who have a specific advanced sector such as information technology (IT) and the petrochemical industry, to compete with developed countries.

There are some potential benefits for developing countries to be inspired by the text of the GPA. The accession to the GPA will achieve value for money. Since many developing countries award tenders to the lowest bidders, there has been an argument that awarding tenders based on lowest price will affect quality and decrease competition. Therefore, the GPA has adopted the principle of most advantageous tender, which allows the procuring entities to select the best suppliers.¹¹⁸ This procedure will achieve the best value for money for governments. Furthermore, increasing the level of competition will create the best value for money as required by the GPA, thus reducing corruption.

One of the most important provisions of the GPA requires the limiting of discrimination.¹¹⁹ Most governments in developing countries tend to prefer local products and suppliers, and sometimes imported materials from local manufacturers. However, the GPA contains provisions which state that foreign bidders shall receive national treatment, thus foreign tenderers can submit a tender and obtain all the rights and obligations which are allocated for domestic products and suppliers, such as they can challenge any procedures that may breach the GPA provisions.¹²⁰

¹¹⁷ Chakravrthy and Kamala Dawar, 'India's possible accession to the Agreement on Government Procurement: What are the pros and cons?' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government procurement: Challenge and reform* (Cambridge University Press 2011).

¹¹⁸ Chang Fa Lo, 'The Benefits for Developing Countries of Accession to The Agreement on Government Procurement: The Case of Chinese Taipei' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government procurement: Challenge and reform* (Cambridge University Press 2011).

¹¹⁹ Dawar, 'India's possible accession to the Agreement on government Procurement: What are the pros and cons?'

¹²⁰ The Revised Agreement on Government Procurement, art XVIII (P)1 2.

Furthermore, the GPA promotes transparency in the laws and regulations regarding government procurement. Consequently, all parties to the GPA shall have a procurement law requiring all procurement information to be fully disclosed and available to all potential suppliers.¹²¹ Moreover, laws and regulations shall have a transparent bid challenge to enable all suppliers to challenge any breach of the GPA. The implementation of the provisions of transparency will reduce corruption and rent-seeking which are the result of opaque procurement.¹²²

Accession to the GPA will guarantee accession to other procurement markets of the GPA members. Furthermore, accession to the GPA will enhance the quality of labour and products. In addition, the GPA rules require a transparent and effective bid challenge mechanism to monitor the procedure, and to offer redress to any alleged breach of the GPA under the Dispute Settlement Understanding.¹²³

Finally, many developing countries have committed to access the GPA, therefore, this commitment puts them under pressure to enact or to reform their procurement law to meet the requirements of the GPA.¹²⁴ For example, in 2007 Saudi Arabia introduced its reformed procurement law as the King's reform plan and to respond to the requirements of the WTO, as starting negotiations to access the GPA was one of the conditions of joining the WTO. Until recently, the Saudi Arabian procurement law did not meet the requirements of the GPA, due to discrimination and the lack of transparency in some of its provisions. One may argue that reforming the procurement law may have occurred without acceding to the GPA. However, this is unlikely to have happened due to the influence of some politicians in the procurement market who prefer to protect local markets as they believe this will preserve economic benefits.

¹²¹ Lo, 'The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei'.

¹²² Evenett and Hoekman, 'Government procurement: market access, transparency, and multilateral trade rules'.

¹²³ Dawar, 'India's possible accession to the Agreement on Government Procurement: What are the pros and cons?'

¹²⁴ Lo, 'The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei'.

2.5.6 The Cost of Joining the GPA:

The developing countries may not be able to adhere to their commitment to the GPA, because their domestic law cannot be fully consistent with the GPA. Some developing countries would rather keep to their old domestic laws, which protect those who have been traditionally involved in the procurement market and make it easy for them to exploit it. In addition, the lack of professional staff, improper staffing patterns, and bureaucracy are the main barriers for reforming procurement law.¹²⁵

Another cost of joining the GPA is the financial cost. This includes training staff, publishing the change, and acquiring statistics and studies from reliable research centres. On the other hand, the benefit of joining the GPA is in the interest of developing countries as it reinforces the principle of transparency in all stages of tender procedures, which reduces the corruption and any irregular practice that might occur.¹²⁶

Finally, one of the significant costs of joining the GPA is to incorporate the bid challenge procedures into domestic law. Moreover, the administrative staff and judges must be independent and impartial, and ensure that each party has the right to be heard and present all documents.¹²⁷

2.5.7 Tendering Procedures:

As noted above, the GPA revised text has shortened the provisions and summarized long sentences, it has also considered the electronic tools, which will be analysed in this chapter. Nevertheless, in terms of tender methods, the revised text is different in dividing these. The previous text limited the tender methods into open, selective, and limited tenders. The revised text has taken a different approach by only requiring parties to conduct procurement in a method which is transparent and consistent with the provisions of the GPA, such as open, selected, and limited tenders.¹²⁸

¹²⁵ Robert R Hunja, 'Obstacles to Public Procurement Reform in Developing Countries' (2003) 15 *Public Procurement: The Continuing Revolution*, Kluwer Law International.

¹²⁶ Dawar, 'India's possible accession to the Agreement on Government Procurement: What are the pros and cons?'

¹²⁷ The Revised Agreement on Government Procurement, art XVII; Wang Ping, 'Accession to the Agreement on Government Procurement: The Case of China' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government procurement: Challenge and reform* (Cambridge University Press 2011).

¹²⁸ The Revised Agreement on Government Procurement, art IV (4); Reich (n 53).

As mentioned above, the revised text pays great attention to the use of electronic tools in procurement as long as this does not create barriers to competition.¹²⁹ Thus, the revised text clarifies that electronic tools can be used in the same way as traditional means of communication. Therefore, Article IV 3 of the revised text elaborated that when the procuring entity decides to use any electronic tools it shall ensure that they use the available and interoperable information system and software. Moreover, the procuring entity shall maintain a mechanism that guarantees the integrity of the requests to participate in tendering, determining a specific time for receiving the offers and preventing any inappropriate access.¹³⁰

Accordingly, the rationale for the different approach of the revised text in not limiting the tender methods is due to the obligation of the GPA to make the text more flexible and adaptable to potential accession parties and accommodate the different circumstances of each party. Another factor is the development of electronic tools in procurement, which might be one of the reasons for not limiting the methods of tenders.¹³¹ However, it is difficult to envisage any method of tenders apart from those mentioned in the revised text. There might be a different name, but ultimately it will fall under one of the three methods of tenders that have been stated in the revised text. For example, direct purchasing in Saudi Arabian procurement law is similar to limited tendering in the GPA. It also has similar conditions, which are an emergency such as war or health disaster (this type of purchasing must not be more than one million SAR),¹³² or if there is only one supplier who can provide the goods or services for technical reasons.¹³³ Nevertheless, the importance of electronic means in public procurement was considered in the previous text of the GPA, but as electronic means were not as advanced as they are today this issue was not addressed broadly.

¹²⁹ Sue Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to the Procedural Rules and other Transparency Provisions' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government procurement: Challenge and reform* (Cambridge University Press 2011).

¹³⁰ The Revised Agreement on Government Procurement, art IV (3).

¹³¹ Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to the Procedural Rules and other Transparency Provisions'.

¹³² Saudi Arabian Government Tenders and Procurement Law, art 44.

¹³³ The Revised Agreement on Government Procurement, art XIII (a) (b) states that: 'the procuring entity may use limited tendering only under the following circumstances: where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons: (i) the requirement is for a work of art; (ii) the protection of patents, copyrights or other exclusive rights; or (iii) due to an absence of competition for technical reasons'; Sue Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to the procedural rules and other transparency provisions' 285.

However, as one of the main objectives of the GPA parties is to keep the GPA updated, the revised text has paid great attention to electronic means. The rationale is to improve and streamline the traditional tendering activities, such as speeding up exchange of documents¹³⁴ to minimize the processing time,¹³⁵ and implementing the best method of transparency if the entities use the internet to disclose all information which has to include rules, procurement plan, the result of awarding a contract and the justification for this award.¹³⁶

With the exception of selective tendering, it has been argued that the revised text has not made any significant changes.¹³⁷ However, the revised text has made a core change, in that it has become more adaptable and has given the legislators the discretion to adopt or create different forms of tender methods, which must be within the legal framework of the GPA. Consequently, countries such as Saudi Arabia, which has real issues regarding stalled projects, can adopt purchasing procedures that address this issue and still can remain within the boundaries of the GPA after agreeing on compromise between two parties. Therefore, Saudi Arabia can address this issue by enacting a new law for large projects. This law has to consider the government entity as a single purchaser. Consequently, the government shall observe the market and find which undertakers have the ability to implement the projects in accordance with the specification determined by the government, and then invite the best performer in the market to submit their offer. This procedure will encourage competition and will lead to the improvement of the quality of projects and reduction of stalled projects.

ARAMCO company, which is the biggest oil company in Saudi Arabia, has recently authorised by the Saudi government to supervise a selective tender to build 11 stadiums across the country. The authorization to ARAMCO to undertake this project was due to ARAMCO's success in delivering several projects such as King Abdullah University in Jeddah and the King Abdullah sport city project within a determined specified time and desired quality. Although the 11 stadiums project was a

¹³⁴ Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to the Procedural Rules and other Transparency Provisions'.

¹³⁵ Knut Leipold et al. 'The World Bank e-procurement for the selection of consultants: Challenges and lessons learned' (2004).

¹³⁶ Knut Leipold, 'Electronic Government Procurement (e-GP) Opportunities & Challenges' (Congress to celebrate the fortieth annual session of UNCITRAL).

¹³⁷ Reich (n 53).

government procurement, ARAMCO did not fully comply with the GPA principles. In particular, ARAMCO did not give the opportunity for local companies to provide consultancy services for designing the new stadiums.¹³⁸ This practice contradicts with the principle of equality laid down under the GPA, as the GPA requires all qualified contractors whether they are local or international to participate in selective tender. Thus, it is a good step for the GPA to focus mainly on improving the legal aspect of selective tendering by requiring entities to include in their notice the number of suppliers to be invited and the criteria that will be used for selecting them.¹³⁹ In essence, the revised text explains who is qualified to join selective tendering (which are the contractors satisfying the conditions for participation), and given that it is based on large and sensitive projects, the revised text has further defined selective tendering as a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender¹⁴⁰ without any discrimination between local and international contractors.

2.6 Challenge Procedures:

The challenge procedures are one of the most important rules of the GPA, as they guarantee the enforcement of the GPA rules. Article XVIII of the revised text states that each party shall provide timely, effective, transparent, and non-discriminatory procedures through which suppliers may challenge a breach of the agreement, or if the suppliers do not have the right to challenge directly a breach of the agreement under the domestic law.¹⁴¹ The focus of the GPA on these four principles (time, effectiveness, transparency, and non-discrimination) stem from the nature of trade issues, especially the challenge procedures in government procurement as they require a speedy determination of procurement compliance by the review body. Furthermore, since many developing countries have written rules but have a problem implementing them, the GPA seeks effective challenge procedures in domestic laws to achieve the objectives of the GPA by a timely, impartial review body, remedies, and effective enforcement.¹⁴² As regard to the principles of transparency, this concerns the publicity

¹³⁸ PK Abdul Ghafour, '11 new stadiums in 2 years' *Arab News* (Jeddah, Saudi Arabia) <<http://www.arabnews.com/news/612331>> accessed 28 December 2015.

¹³⁹ The Revised Agreement on Government Procurement, art VII (2) (K).

¹⁴⁰ *ibid*, art I (Q).

¹⁴¹ *ibid*.

¹⁴² Sue Arrowsmith, 'The Character and role of national Challenge Procedures under the Government Procurement Agreement' (2002) 11 *Public Procurement Law Review*.

of challenge procedures by presenting a clear rule to regulate all steps of procedures. In addition, the GPA challenge procedures require all parties to provide a non-discriminatory challenge procedure by treating all parties equally based on the MFN principles.¹⁴³

It has been argued that the revised text of the GPA on challenge procedures suffers from many shortcomings, such as the possibility of referring the challenge to a non-judicial review body. The extent of review body power has some ambiguity if the review body has the authority to set aside a signed contract which breaches the agreement, the absence of requirements to postpone signing of contracts after awarding the contract, and the limitation on the power of review body to give compensation to aggrieved bidders.¹⁴⁴ To refute the previous argument, the researcher considers that the shortcomings highlighted above are not the shortcomings of the subjects of provisions of the GPA, they are, rather, criticism of the GPA being summarized without detail in all issues. Moreover, these shortcomings were presented because the GPA has provided the main provisions related to challenge procedures such as each party shall have an independent and impartial judicial system, and has given the parties the discretionary power to have a detailed provisions in their domestic law which has to be within the framework of the GPA.

International agreements normally work as a constitution. Furthermore, the GPA only provides a basic framework for national challenge procedures.¹⁴⁵ For example, the GPA requires each party to provide timely, effective, transparent, and non-discriminatory administrative or judicial review procedures. However, it gives the parties the discretion to create in detail a national challenge procedure which has to be within the framework of the GPA. Nevertheless, the problem is not the GPA having been shortened or summarized, but it is the issue of national challenge procedures which contradict the instructions of the GPA. For example, Saudi Arabia (which has observer status) modified procurement laws in 2006 to meet the requirements of the

¹⁴³ Xinglin Zhang, 'Constructing a System of Challenge procedures to Comply with the Agreement on Government Procurement' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, (Cambridge University Press 2011). See also: Arrowsmith, 'The Character and role of national Challenge Procedures under the Government Procurement Agreement'.

¹⁴⁴ Reich (n 53).

¹⁴⁵ Zhang, 'Constructing a System of Challenge procedures to Comply with the Agreement on Government Procurement'.

GPA, however, even after the modification of the Saudi government tender and procurement laws, they still contradict some GPA regulations. In terms of challenge procedures, the GPA requires each party to establish an ‘independent’ committee to deal with the issue of government procurement. Nonetheless, article 87 (a) (b) of the procurement law states that ‘The Finance Minister has to select a committee which should include at least three members from the ministry of finance and other “relevant” government authorities, after coordination with said authorities’. This committee merely reviews the compensation claims, but not the cancellation, postponement of contracts, or the challenge of the procedure of awarding a contract, which has to be within the board.¹⁴⁶

As laid down above, this is clearly in contradiction to the GPA requirements. The committee which is selected by the Ministry of Finance includes relevant government authorities, therefore, the article should clarify that by not permitting any member of the procuring entity to be a member of this committee. Furthermore, in Saudi Arabia many large projects, such as Princess Norah University for girls, was undertaken by the Ministry of Finance, and if there is any breach of procurement law in Saudi Arabia the aggrieved contractors shall exhaust the case in this committee. This is not independent of the Ministry of Finance, which breaches the GPA provision on domestic challenge procedures.

Moreover, article 152 (3) of Saudi implementing regulations of government tender and procurement law imposes a legal obligation on contractors to go first to the procuring entity. The article clarifies that, as a condition, contractors must go first to the procuring entities and seek a resolution, and if they are not satisfied, then they can submit a complaint to the committee within 60 days of the final decision of the procuring entity. This is unlike the GPA, which does not require legal obligation,¹⁴⁷ but merely ‘encourage the entity and supplier to seek resolution of the complaint through consultation’.¹⁴⁸ The ‘encouragement’ but not enforcement from the GPA might be due to the fear that in some countries the procuring entity may influence the contractors not to take the case further by bribe or threat. For example, to exclude the

¹⁴⁶ Saudi Arabian Government Tenders and Procurement Law.

¹⁴⁷ Arrowsmith, 'The Character and role of national Challenge Procedures under the Government Procurement Agreement'.

¹⁴⁸ The Revised Agreement on Government Procurement.

supplier from future business, or the fear that resolving the case within the procuring entity may require forced concession or intended bureaucracy.

Therefore, domestic review procedures must be ‘independent’ to avoid any negative potential influences from the procuring entity, especially in a country such as Saudi Arabia in which the procuring entity has the right to monitor the implementation of the project, amend the contract, and implement sanctions.

2.6.1 Forum for Review:

As mentioned above, the GPA has given the parties discretionary powers to enact or modify their procurement laws, which have to be within the framework of the GPA. In some civil law countries, public procurement cases are referred to judicial review before a general administrative court, and in some countries administrative courts have full responsibility to consider all aspects of public procurement cases. Thus, the GPA considers the diversity of national legal systems that regulate public procurement and gives governments the discretion to determine the forum of review procedures.¹⁴⁹ However, the GPA requires that the challenge must be ‘heard’ by an ‘independent’ review body (if the administrative body is the final or the only forum of the review body).¹⁵⁰ Moreover, to ensure that the review body is able to inspect complaints, the GPA requires that the review body shall have the following procedures: the procuring entity must respond ‘in writing’¹⁵¹ to any challenge and disclose all relevant documents, and the participant shall have the right to be heard before the decision of the review body. Furthermore, the participant shall have the right to attend all discussions related to the complaint and the right to assign a lawyer. Also, the proceedings can take place in public.¹⁵² Finally, when the recommendation or decision is made a statement must be attached which illustrates the basis for the recommendation or decision.¹⁵³

¹⁴⁹ Arrowsmith, 'The Character and role of national Challenge Procedures under the Government Procurement Agreement'.

¹⁵⁰ Zhang, 'Constructing a System of Challenge procedures to Comply with the Agreement on Government Procurement'.

¹⁵¹ ‘In writing’ is defined in article I of the GPA revised text as any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically transmitted and stored information.

¹⁵² Arrowsmith, 'The Character and role of national Challenge Procedures under the Government Procurement Agreement'.

¹⁵³The Revised Agreement on Government Procurement, art XVIII (6).

In regard to the ‘independence’ of judicial authority, article XVIII (4) requires that the judicial authority must be independent from the procuring entities to avoid any influence that may change the course of the case. However, the GPA considers the diversity of national legal systems. Therefore, the GPA does not require the independence of judges, because in some countries judges are not independent from government. This might be due to the concerns of the GPA to attract more countries to join the GPA.¹⁵⁴

One important requirement of the GPA regarding review procedure is ‘hearing’ from participants, as the GPA gives many relevant procedural requirements, which have been mentioned above. This reflects the concerns of the GPA that some legal systems or review bodies do not hear from all participants, or they may issue their decision based on only some of the participants’ witnesses.

How much discretion should be left to the countries to enact challenge procedure in their domestic law?

As mentioned by the researcher, the revised text of the GPA is flexible, moreover it provides countries with the discretion to enact the challenge procedure in their domestic public procurement laws. However, there have been debates about the extent of discretion which should be given to countries to enact challenge procedures in their domestic law. Moreover, if such discretion is awarded to countries will it be difficult to implement the harmonization of public procurement regulation? In fact, some countries prefer to keep their domestic laws as it reflects their biased policy, which is normally in line with government and political trends. Some countries prefer to preserve their sovereignty rather than interacting in international trade.

The predominant view espoused by some scholars, including Arrowsmith and Trepte, is that diversity in public procurement regulation is necessary, and criticism should not be directed to the comprehensively accepted procurement laws, but should be directed at the context of law.¹⁵⁵ In that sense, the importance of different systems has been justified, as some countries focus more on one or two objectives of public procurement due to different values. For example, some countries pay more attention

¹⁵⁴ Zhang, 'Constructing a System of Challenge procedures to Comply with the Agreement on Government Procurement'.

¹⁵⁵ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, vol 1 (1st edn, Oxford University Press 2004).

to accountability or integrity because their country suffers from corruption, therefore, some countries have adopted a strict policy regarding transparency to eliminate any practice of corruption including bribes. Also, one of the justifications for a different approach in public procurement is that a different level of training is needed for procurement staff.¹⁵⁶ Finally, different legal systems are very important because some countries' religious law practices cannot be changed, therefore, the GPA as part of the WTO tends to adopt criteria to be implemented in domestic laws rather than enforce its own law. In contrast, if there is pressure on a country to practise a different procurement law, it might be due to pressure from an enforcing body. For example, some developing banks require a country to implement their guidelines,¹⁵⁷ to ensure that the country will achieve the objectives and that the procurement procedure will not be affected by any corrupt practices.

Despite the discretion given to some countries by the GPA to enact their domestic laws, these laws must be within the framework of the GPA. The following section will give more details regarding procurement entity review. The GPA encourages suppliers to seek resolution through consultation.¹⁵⁸ But, in some countries such as Saudi Arabia, it has been observed that some procuring entities act as quasi-judicial bodies, as they are able to inflict penalties (which are not mentioned in the contract) on contractors.

For example, in Saudi Arabia the Ministry of Health removed four officials from their mandates in the general directorate of health affairs in Tabuk (north west Saudi Arabia) after accusing them of involvement in manipulation of the awarding of tenders for medical and office equipment worth more than four million SAR. The Ministry of Health realized that there had been a manipulation in awarding tenders, therefore, the Minister of Health ordered a committee to be formed and headed by the general manager of the control department at the Ministry of Health. The committee issued its decision which stated that the four top officials were to be removed from their positions and transferred to another department in the general directorate of health affairs in Tabuk. They also had two months' salary deducted as a punishment and were banned from being appointed as head of any general directorate in any

¹⁵⁶ Sue Arrowsmith et al. *Public procurement regulation: an introduction* (University of Nottingham 2011).

¹⁵⁷ *ibid.*

¹⁵⁸ The Revised Agreement on Government Procurement, art XVIII (2).

region. This disciplinary action was based on questioning ‘some’ leaders and staff. Nevertheless, after the final decision was approved by the Ministry of Health, one of the four aggrieved employees submitted a complaint to the Board claiming that he was not guilty of those charges. The Board agreed with the complainant, thus reversing and cancelling the decision of the Ministry of Health. The decision of the Board was based on the lack of evidence, and the violation of law (as some of the legal procedures were not correct). Moreover, the Board found that the charges against the accused were incorrect.¹⁵⁹ As shown above, there was no breach of the GPA’s relevant procedural requirements on review bodies because it was the decision of an initial review body, the procuring entity, and not a judicial authority. Also, under the GPA rules it is optional for any aggrieved party to use this as a first step and seek resolution through consultation. But in Saudi Arabia it is a pre-condition that the procuring entity is the first to look at the case.

In Saudi Arabia there is no clear legal system regarding the manipulation in awarding contracts,¹⁶⁰ and all similar cases are subject to consideration by a committee formed by ministers, after which complaints can be taken further to the Board. Therefore, the researcher suggests that any penalty should be issued by an independent judicial or quasi-judicial body and be approved by the Board instead of a minister.

In addition, tenders and government procurement laws in Saudi Arabia should be modified, by establishing a perfect review procedure to review all the stages of tenders to enable the contractors to challenge the procedure of awarding a contract, implement transparency and a discrimination procedure, rather than allowing the contractors and suppliers to challenge only when claiming compensation.

¹⁵⁹ Nader Al-Anazi, 'The Board of Grievances acquits former official in general directorate of health affairs in Tabuk' *Okaz* (Jeddah, Saudi Arabia).

<<http://www.okaz.com.sa/new/Issues/20120524/Con20120524505524.htm>> accessed 23 May 2015.

¹⁶⁰ In Saudi Arabia aggrieved contractors or suppliers must go to the procuring entity first, and then they can go to the committee formed by the Ministry of Finance, then they can take the complaints to the Board. However, this has to be after the completion of the contract, and the committee shall look at compensation cases only.

2.6.2 Available Remedies under the GPA:

One of the most important parts of the GPA is the provision of remedies to the parties, which include interim measures, such as suspension of the contract, correction, such as ending any discriminatory practices, and finally, compensation.¹⁶¹

A- Interim Measures:

Article XVIII (7) of the GPA revised text requires that each party shall provide rapid interim measures to correct any breach of the GPA, and preserve the participants' commercial opportunities to join tenders. The most important interim measure is a suspension of the contract¹⁶² if it does not affect the public interest. This should not apply automatically, but it should be based on the review body's opinion in each case. Interim measures other than suspension exist, for example, the review body may decide that the tender process shall continue and rejected suspension due to the availability of other measures to protect the aggrieved contractors, such as allowing disqualified suppliers to submit their offers, or the decision to disqualify the suppliers may be evaluated by the review body to decide if the decision was correct. Moreover, these measures should take place before the contract is concluded, to preserve every participant's opportunity as it is difficult or might even be impossible to correct any breach after performance begins,¹⁶³ or to set aside a concluded contract.¹⁶⁴ However, the GPA has not mentioned whether the interim measure shall apply to concluded contracts or not.¹⁶⁵ The researcher's view is that since the GPA provides for suspension of the contract and preserves every participant's commercial opportunity as a remedy to any breach of the GPA, consequently, it implies that the review body shall have the power to set aside a concluded contract.

B- Correction 'or' Compensation:

Article XVIII (7) (b) of the revised text provides that if the review body has determined any breach to the GPA, it shall provide a correction of damages 'or' compensation. One controversial issue regarding the available remedy is the use of

¹⁶¹ The Revised Agreement on Government Procurement, art XVIII (7).

¹⁶² Christopher H Bovis, *EU Public Procurement Law* (2nd edn, Edward Elgar Publishing Limited 2012).

¹⁶³ Arrowsmith, 'The Character and role of national Challenge Procedures under the Government Procurement Agreement'.

¹⁶⁴ Bovis (n 162).

¹⁶⁵ Zhang, 'Constructing a System of Challenge procedures to Comply with the Agreement on Government Procurement'.

the word ‘or.’ At first glance it will be understood that the review body is free to choose one of these remedies. Moreover, the review body does not have to provide a set aside remedy if they do not wish to do so, but they can use compensation as a remedy instead. On the other hand, if a review body uses compensation as the only remedy it will not achieve one of the principles of challenge procedures mentioned in article XVIII (1) which is the effectiveness of domestic challenge procedures. Aggrieved suppliers or contractors may rather not take the case further due to the bureaucracy in administrative procedures. Also, as compensation is sometimes limited to the costs only,¹⁶⁶ if the procurement system does not have a corrective procedure this will result in ineffective and non-enforceable procurement rules. Moreover, if the review body merely allows aggrieved suppliers to claim compensation, what is the point of having interim measures, such as suspension, as a remedy? In these circumstances there will not be any correction of the breach, but only compensation. In addition, the correction of a breach may not result in compensation, but only require removing the damage. For example, if foreign suppliers claim that there has been a discriminatory practice against them, such as unfair requirements or unreasonable conditions requested by a procuring entity, their remedy is not compensation, but is to correct the breach by removing the discriminatory practices to preserve their commercial opportunities and allow them to compete for the contracts fairly.

Finally, the correction of the breach reflects that the procurement system is transparent, because it shows that the breach has been determined and corrected due to the transparent procedure in all tender stages, unlike a system which only allows aggrieved contractors or suppliers to seek compensation. For example, in Saudi Arabia, which has quite a different approach to remedies, the public procurement law states that the Ministry of Finance shall form a committee that has a jurisdiction to review only compensation claims submitted by contractors and suppliers. However, this committee does not have the power to review any claims regarding discrimination, any breach of transparency provisions, and fraud in awarding contract.

¹⁶⁶ *ibid.*

Moreover, the contractors or suppliers cannot claim compensation until the contract is terminated and there is a final hand-over of the work.¹⁶⁷

Given the standards of the GPA, it is believed by the researcher that the Saudi system of challenge procedures is still incompatible with the GPA. As it will be explained in chapter four, the Saudi government tender and public procurement law, which is responsible for all government procurement practices, does not include any provision regarding set aside or annulment of the contract. Moreover, the judicial committee which was formed by the Ministry of Finance does not have the powers to take any interim measures such as the suspension of contracts. Only the Board has the power to set aside or annul the contract, but the government tender and procurement law has not stated any provision in regard to that issue. Nevertheless, it is unusual for a case of set-aside or annulment of the contract to be taken to the Board for the following reasons: with regard to discrimination, the government tender and procurement law states that priority shall be given to domestic products,¹⁶⁸ therefore, such a case can be regarded as discriminatory. Also, it is assumed that the law of government tender and public procurement has created strict rules in regard to the opening of sealed bids, which must be open to the public. Thus, the opportunity for manipulating the award of contracts or ordering a relaxation of requirements from certain participants is rather limited. In addition, the frequent questioning of government administrative procedures is not welcomed by the government, as it may affect the structure of the government and its dignity.

Summary:

This chapter is considered to be a key part of this study. It has outlined the main principles and provisions of the GPA and is an important basis for the subsequent chapters. These main requirements will be examined to ascertain if it could be possible to implement them in Saudi procurement law under the shadow of sharia law.

The GPA is a controversial agreement. Developed countries still find it difficult to attract developing countries to join the GPA. The nature of government procurement,

¹⁶⁷ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 152 (2).

¹⁶⁸ Saudi Arabian Government Tenders and Procurement Law, art (5).

the fear of economic losses, and personal and political gain might be the main reasons that have made developing countries unwilling to join the GPA. The GPA's main principles are transparency and non-discrimination. Therefore, most of the requirements of the GPA revolve around these principles.

The GPA has provided some provisions that required its parties to provide a special and different treatment to developing countries in order to attract them to join. The GPA is a plurilateral agreement which means that it is optional for WTO members to join. However, the revised text of the GPA regarding developing countries has considered accession to the GPA as a main focus, unlike the previous text which considered accession as a possibility. This reflects that the GPA might become a multilateral agreement which means that all WTO members would join the GPA. Moreover, the focus of the GPA on accession might also put pressure on developing countries to reform their procurement law.

The GPA does not mandate legislation in a particular form, but it only provides provisions which it requires parties to implement in their domestic law. For example, the GPA only requires that a tendering procedure shall be conducted in a method that is transparent. However, the parties to the GPA have the discretionary power to adopt any method of tender such as open, selected, and limited tenders.

This chapter has also examined the challenge procedure. These procedures are the most important part of the GPA as they guarantee the enforcement of the GPA rules. The GPA requires all parties to adopt and publish a clear set of rules of challenge procedures. Moreover, the challenge procedure shall not be a discriminatory procedure, thus, every party shall be treated equally based on MFN principles. In addition, the GPA has provided remedies to the parties, including interim measures, such as suspension of a contract, and correction 'or' compensation.

After identifying the principles and requirements of the GPA, the next chapter moves on to understand the view of sharia law on the GPA. The researcher may not be able to start analysing why the GPA requirements are not implemented in Saudi procurement law until he has ensured that the GPA does not include any provision that may contradict sharia law. Thus, in next chapter the researcher will examine the GPA from a sharia law perspective.

Chapter Three: The Sharia Law Approach to the Government Procurement Agreement (GPA):

3.1 Introduction:

This chapter provides the views of sharia law on the GPA as an international agreement. Sharia law does not include specific details regarding government procurement, such as the method of tenders, the award of contract procedures, and challenge procedures for procurement issues. It provides an essential regulation and standards to be the general framework for all laws and regulations. Moreover, laws and regulations should be within the framework of sharia law to acquire legitimacy,¹⁶⁹ which is necessary for any law or regulation. In addition, all international agreements that Saudi Arabia is planning to access must acquire their legitimacy from sharia law.¹⁷⁰ Therefore, the importance of sharia law views on international agreements illustrates its position vis-a-vis international agreements, especially the GPA, to give the Saudi procurement law the green light to start negotiation for accession to the GPA. The position of sharia law in this context is to screen the GPA, and to ensure that it does not include any prohibited practices such as trading in alcohol, pork products, or any banned financial transactions such as usury. Also, it must ensure that the GPA meets the requirements of sharia law regarding the principles of transparency¹⁷¹ and non-discrimination. The remaining issues regarding procurement procedures will be dealt with when considering the compatibility between Saudi procurement laws and the GPA.

This chapter will explore the approach of sharia law towards international agreements and the GPA in particular. The Saudi legal system is based on sharia law, and as one

¹⁶⁹ The meaning of the principle of Legitimacy in this context is to ensure that any provision or any consequence of implementing any provision shall not contradict sharia law.

¹⁷⁰ The principle of legitimacy can be achieved by one side, for example, in terms of the payment of the value of the contract or the fund of the project. Saudi Arabia does not have to accept any payment with interest even if many financial transactions between the GPA parties contain interest, as a result of postponing the payment or selling a bond to fund a project.

¹⁷¹ The principle of transparency in sharia law requires that the Muslim country must decline accession to any agreement if there is a possibility of dominating their markets or if it results in the harming of national products and industries. Therefore, sharia law allows the principle of Ijtihad to evaluate the advantages and disadvantages of all upcoming issues.

Islamic maxim states that ‘The decided ruling depends on the understanding’.¹⁷² Therefore, it is essential to bring the subject of sharia law into this research to identify its role in the Saudi legal system and how it deals with contemporary issues including the GPA.

The objectives of this chapter are to define the sharia law sources and methods which are going to be used in dealing with the GPA, for example, the principle of public interest is one of the sources of sharia law. This principle will provide the Saudi legal system with the flexibility to deal with the provisions of the GPA. This chapter will also clarify the status of the GPA as an international agreement from the perspective of sharia law. In addition, this chapter intends to examine the issues that could contravene sharia law, for example, subsidies and financial interest. Finally, the chapter will explain the main sharia law provisions related to transparency and non-discrimination, which will assist an understanding of the approach of sharia law to the GPA. By achieving the objectives mentioned above the researcher will be able to remove the barriers that hamper Saudi Arabia’s chances of joining the GPA.

3.1.1 The Sharia Law (An overview):

Sharia literally means ‘the way’. It is a term used to identify the Islamic law.¹⁷³ Sharia law is a comprehensive system for all the affairs of life, therefore, it is the main source for all Saudi legal systems including administrative law. According to Islamic jurisprudence and theology the provision of sharia law is based on the revelation by God to his Prophet Muhammad. This can be the Quran or Tradition (*Hadith*). Furthermore, Islamic scholars have developed sharia law by interpreting God’s will from the available resources. However, since the death of the Prophet Islamic scholars have not been able to agree on the main resources of sharia law (apart from the Quran and Tradition), therefore many differences of opinion have arisen regarding its provisions and sources.¹⁷⁴

The Saudi legal system considers sharia law as a general source, while it considers royal decrees, royal orders and ministerial regulations as modern sources or specific

¹⁷² Muhammed Alshenqity, *The methods of Research and Debate*, vol 1 (Dar Alam Alfwaid 2006).

¹⁷³ Ibrahim Al-Hudaithy, 'Historical review of Saudi Administrative Contracts' (2002) 11 Public Procurement Law Review 186.

¹⁷⁴ Jan Michiel Otto, *Sharia incorporated: A comparative overview of the legal systems of twelve Muslim countries in past and present* (Leiden University Press 2010).

sources. Despite the difference of opinion regarding to the sources of sharia law, the prevailing opinion is that the general sources of sharia law or ‘the roots of law’ are the Quran and the Tradition.¹⁷⁵

3.1.2 The Holy Quran:

The holy Quran has been defined as ‘collection of divinely inspired utterances and discourses’.¹⁷⁶ It is the words of God which were revealed by God through the Angel Gabriel to the Prophet,¹⁷⁷ as the Quran states that ‘Indeed, it is we who sent down the Qur’an and indeed, we will be its guardian’.¹⁷⁸ The holy Quran is divided into 114 chapters called ‘Surah’ which are dedicated to teach human beings all the important aspects of their lives. The Quran deals with all aspects of human life, such as the relationship between God and people, and between people and their society.¹⁷⁹ Moreover, the Quran emphasizes all important standards that the human being needs to enhance their life including ethics, law, politics, and trade. The Quran states that:

And [mention] the Day when we will resurrect among every nation a witness over them from themselves. And we will bring you, [O Muhammad], as a witness over your nation. And we have sent down to you the Book as clarification for all things and as guidance and mercy and good tidings for the Muslims.¹⁸⁰

3.1.3 The Prophetic Traditions (*Hadith*):

The prophetic Traditions of Prophet Muhammad is another source of sharia law in the Saudi legal system. The Traditions and the Quran are both considered to be sources of guidance and primary sources of sharia law.¹⁸¹ The Traditions are the recorded sayings and deeds of the Prophet which were reported through his companions.¹⁸² However, the Quran takes precedence over the Traditions in the legislation,¹⁸³ because the former is the Word of God and the latter is the collection of practices by

¹⁷⁵ Al-Hudaithy, 'Historical review of Saudi Administrative Contracts'; Fazlur Rahman, *History of Religion (Islam)* (William Clowes 1966).

¹⁷⁶ Akbar S Ahmed, *Discovering Islam Making Sense of Muslim History and Society* (Routledge and Kegan Paul Ltd 1988).

¹⁷⁷ Al-Hudaithy, 'Historical review of Saudi Administrative Contracts'.

¹⁷⁸ Surat Al-Hijr verse 9.

¹⁷⁹ Al-Hudaithy, 'Historical review of Saudi Administrative Contracts'.

¹⁸⁰ Surat An-Nahal. Verse 89.

¹⁸¹ Al-Hudaithy, 'Historical review of Saudi Administrative Contracts'.

¹⁸² Rahman (n 175).

¹⁸³ Mahmoud Al-Jazaar, 'The Contradiction between the Traditional Signs and its Juristic Influences', (Islamic University 2004).

the Prophet adopted by his companions. For example, the Prophet appointed his companion Muadh ibn Jabal to be a judge in Yemen. Before Muadh's departure to Yemen, the Prophet wanted to know how he was going to decide cases. Thus, the Prophet asked him how will you decide a problem? Muadh answered, according to the Quran. The Prophet said, what if it is not in it, then Muadh replied according to the Tradition (Sunnah), after that the Prophet asked what if it is not in that either, and Muadh answered that then I will use my own reasoning.¹⁸⁴

The Tradition includes other matters which are not mentioned in the Quran. For example, despite the fact that prayers have been mentioned in the Quran, the Prophet taught his companions the method of performing prayers, and he said 'perform your prayers in the same manner you had seen me doing'.¹⁸⁵ Moreover, the Tradition encompasses many interpretations of the Quran. For example, when the Quran states that 'They who believe and do not mix their belief with injustice - those will have security, and they are [rightly] guided',¹⁸⁶ many of the Prophet's companions were confused about the meaning of injustice in this verse, nevertheless, the Prophet elaborated the meaning of this verse by saying that the injustice means the 'Polytheism'.¹⁸⁷

It is clear from the latter traditions that the role of Traditions is to explain some Quranic verses. Also, it was used as an exegesis to resolve some issues that were not mentioned in the Quran. However, while the Traditions are considered to be a complementary source to the Quran, there are some contemporary issues that were not mentioned either in the Quran or the Traditions that needed to be resolved in accordance with sharia law. Therefore, the majority of Muslim scholars have approved secondary sources of sharia law, which are consensus and analogy.

3.1.4 Consensus:

The third source of sharia law is the consensus (*ijma*). It means that if Muslim scholars of a particular generation reach an opinion, the opinion can become a point

¹⁸⁴ Abu Dawud Sulaymān As-Sijistani, *Sunan Abu Dawood* (first published 888, Dar Alqiblah for Islamic Knowledge 1998).

¹⁸⁵ Abdulaziz Bin Baz, *Prophet Mohammad's Manner of Performing Prayers* (Presidency of Islamic research, IFTA and propagation 1992).

¹⁸⁶ Surat Al-anam verse 82.

¹⁸⁷ Abdulrahman Hassan Alsheikh, *Fath Al-Majeed Sharh Kitab At-Tawheed* vol 8 (Dar Almuaid 2002).

of law in the sharia.¹⁸⁸ However, in the contemporary era some Muslim scholars have debated about the consensus arrived at by the early scholars. Their debate is centred on whether to accept consensus reached by earlier scholars or reach a new consensus based on contemporary evidence. In Saudi Arabia, the only body allowed to formulate consensus is the Council of Senior Scholars. Normally, the Council of Senior Scholars reviews some sharia provisions and gives some recommendations on religious matters. Discussion of the provisions of consensus is beyond the scope of this research, as consensus applies only to the fundamental religious issues such as prayer and zakat. Moreover, the consensus does not play an important part in Saudi Arabia's decision to join the GPA, as the decision to join the GPA is the responsibility of the Council of Ministers. Furthermore, the Council of Ministers normally refer issues pertaining to the GPA to the Shura Council (the Consultative Assembly of Saudi Arabia) to assess the accession to the GPA and provide the Council of Ministers with its recommendations.

3.1.5 Analogy:

The fourth source of sharia law is analogy (*Qiyas*). The use of analogy is being widely discussed. Some Muslim scholars refused to use analogy or analogical reasoning, such as ibn Hazm.¹⁸⁹ He considered the Quran and the Traditions as the only source of sharia law. However, the use of analogy is permitted in sharia law¹⁹⁰ as the Prophet used analogy on several occasions. Moreover, there are many issues that have not been mentioned in the Quran nor the Tradition, therefore, it is permissible in accordance with the Quran to use analogy.¹⁹¹ However, using analogy is subject to the condition that if Muslim scholars are unable to find a resolution from the Quran or the Tradition, then, and only then, can they use analogy.¹⁹²

¹⁸⁸ Golam Wahed Choudhury, *Islam and the contemporary world* (Indus Thames 1990).

¹⁸⁹ Ali Bin Ahmed Ibn Hazm (994-1064) was a Muslim scholar and a leader of the Zahiri School of Islamic Thought. One of the most important principles of this school is that speculation cannot lead to the truth. Therefore, they rejected analogy as a source of Sharia Law.

¹⁹⁰ Choudhury (n 188).

¹⁹¹ Surat An Nisa verse 83.

¹⁹² Al-Hudaithy, 'Historical review of Saudi Administrative Contracts'.

3.2 Sharia Law and International Agreements:

3.2.1 Preamble:

The GPA is an international agreement. Therefore. It is essential to identify the approach of sharia law to international agreements. In Saudi Arabia all enacted laws or signed agreements, whether they are international or local agreements, must be compatible with sharia law.¹⁹³ Although sharia law does not contain prescriptive detail on all issues, it provides a framework in which to locate contemporary events. Moreover, most sharia law provisions are based on the efforts of Muslim jurists.¹⁹⁴

There has been a debate on the question of why all the Islamic provisions are? not peremptory norms. To answer this question it is necessary to differentiate between the basic issues which normally relate to worship of God (*Ebadat*) and other issues in sharia law which normally deal with commerce and civil matters (*Muamalat*). The main issues, whose disagreement will lead to conflict or disagreement among Muslim scholars, will result in misunderstanding of the basic issues of sharia law, such as praying, paying zakat, fasting in the holy month of Ramadan, and taking usury. Therefore, these basic issues were commanded by God in the Holy Quran, and often interpreted by his Prophet in the Tradition which are normally the primary resources of sharia law. Allah says in the holy Quran:

And establish prayer and give zakat and obey the Messenger – that you may receive mercy.¹⁹⁵

And also:

Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, ‘Trade is [just] like interest.’ But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein.¹⁹⁶

Sharia Law approaches international agreements on the same basis as the above Quranic verse. The basic principles of international law, which were accepted by international community, cannot be breached by the states. These principles are transparent, shall not be violated, and can only be modified by a subsequent norm of

¹⁹³ Basic Law of Governance (1992).

¹⁹⁴ Group, S ‘Islamic Law Sharia and Fiqh’ Language and Culture.

¹⁹⁵ Surat An-nur verse 56.

¹⁹⁶ Surat Al-Baqarah verse 276.

international law which has a similar character.¹⁹⁷ However, the international community acknowledges a number of basic principles, such as prohibiting acts of abuse and the prevention of slavery (as well as the slave trade). Moreover, these principles cannot be breached, as they are considered as fundamental issues under international law.

However, for other issues, such as international agreements, sharia law has given basic rules in how to deal with all issues. Furthermore, in *muamalat* issues, the debate and disagreement among Islamic scholars are not seen as a bad thing, in fact it is a good thing because it offers some flexibility and adaptability, and also gives people more options to choose what is suitable for them. Moreover, these debates among Muslim scholars generally bring about new legislation which will accommodate the needs of the people.¹⁹⁸

From this perspective it shows that sharia law has not often been detailed about *muamalat* issues, allowing people to innovate and be adaptable. Therefore, sharia law allows people belonging to different cultures and different time periods flexibility in settling issues. In addition, if peremptory norms are adhered to without flexibility, it will be difficult for sharia law to be relevant in the contemporary period. Therefore, sharia law allows ‘personal reasoning’ or ‘diligence’ (*Ijtihad*), permitting people to adopt new issues by giving them a chance to choose what is appropriate for them and for their interest. Sharia law has approved the diligence as God says: ‘Indeed, we have revealed to you, [O Muhammad], the Book in truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate’.¹⁹⁹ Also, Prophet Muhammad said: ‘If a judge makes a ruling, striving to apply his reasoning (*ijtihad*) and he is correct, then he will have two rewards; and if a judge makes a ruling, striving to apply his reasoning and he is mistaken, then he will have one reward’.²⁰⁰

It is obvious that international agreements, and more specifically, the political–trade agreements such as the Government Procurement Agreement (GPA) are not peremptory norms, in fact, they fall under the non-fundamental issues of Islamic law.

¹⁹⁷ United Nations Conference on the Law of Treaties, *Vienna Convention on the Law of Treaties* (1980).

¹⁹⁸ Hassan Maraai, *The Ijtihad in Sharia Law* (Imam Muhammed bin Saudi University Press 1984).

¹⁹⁹ Surat An-nisa verse 105.

²⁰⁰ Imam Muslim, 'Sahih Muslim' (first published 855, Taibah House 2006).

This means they are subject to the effort of scholars or personal reasoning, and how the scholars (*mujtahedeen*) evaluate the benefit and the harm of international agreements, moreover, making sure agreements are compatible to the basic principle of sharia law. The next section will explain the conditions and method of personal reasoning.

3.2.2 The Provisions of Personal Reasoning *Ijtihad*:

Personal reasoning is the effort to develop and draw any provision within the framework of sharia law. It has also been described as ‘rethinking’ and ‘independent reasoning’²⁰¹ and defined as ‘exerting efforts in order to derive from the basis of Sharia Law’.²⁰² Islamic scholars impose terms and conditions for those who practise personal reasoning. They should have a good grasp and knowledge of the Arabic language, Holy Quran, Prophetic Tradition, and contemporary issues, and a deep understanding of the objectives of sharia law.²⁰³

3.2.3 The Method of Personal Reasoning *Ijtihad*:

If a new issue occurs then the scholar gathers all related sources and material. First, the scholar looks to the Holy Quran, and if he finds any provision then he shall keep to it. Second, if the scholar cannot find any provision pertaining to the issue in the Holy Quran, then he searches in the Prophetic Tradition. Third, if the scholar cannot find any of the above options, then he looks at the general rules derived from the Holy Quran and Tradition.²⁰⁴ In addition, as the objective of sharia law is to bring good governance, personal reasoning is required to obtain the benefit from the experience of non-Muslim states in all fields, especially in the field of law and administration, if this experience is going to achieve justice and equality.²⁰⁵ For example, the Prophet’s companion Omar ibn Al-Khattāb, (born 579 CE, died 3 November 644 CE) was the second Caliph (ruler) of Islam. Omar imposed taxes on agricultural land belonging to non-Muslim people in Islamic states. His personal reasoning was based on the experience of non-Muslims, as this rule came from the Byzantine empire and Omar

²⁰¹ Shaista P Ali-Karamali and Fiona Dunne, 'The ijtiḥād controversy' (1994) 9 Arab Law Quarterly 238.

²⁰² R Peters, 'Idjtiḥād and Taqlīd in 18th and 19th century Islam' (1980) 20 Die Welt des Islams 131.

²⁰³ Tariq Ramadan, 'Ijtiḥād and Maslaha: The Foundations of Governance' (2006) Islamic Democratic Discourse: Theory, Debates, and Philosophical Perspectives 1.

²⁰⁴ Maraai (n 198).

²⁰⁵ Khalid Ali, *The political system in Islamic Law*, (1st edn, Alrushd Press 2012).

realized that by imposing such a rule it would bring justice and equality, because there is a zakat which has to be paid by Muslim people if they have agricultural land. Also, Omar established and acknowledged the punishment of prisons, even though prisons were not in existence in the time of the Prophet.

Some parts of the GPA do not need effort from scholars to make them compatible with sharia law, because they are already mentioned in the Holy Quran, or Prophetic Traditions, such as the principle of transparency and equality. On the other hand, there are some parts of the GPA which need some effort from scholars and legislators to make them compatible with sharia law, such as the free movement of labour and the amount of tax that has to be imposed on non-Muslims. The most important general rule that applies to some parts of the GPA is 'public interest'. This can be called 'general good' (*Maslaha*), which is a concept or a general rule derived from sharia law, to deal mainly with contemporary discussion. However this concept derived its validity from sharia law's norm which is 'the objectives of Sharia is to protect people from haram and securing their welfare and promoting their benefits'.²⁰⁶

Any debate which is related to God, such as praying and fasting (*Ibadat*), are to be found in the Quran or Prophetic Traditions and these rules cannot be changed, although they can be interpreted by personal reasoning through the use of derivative sources such as consensus.²⁰⁷ However, concerning human relations, what is called *Muamalat*, and in terms of international relations, if no rulings are to be found in the primary sources, Quran and Prophetic Traditions, then the scholars reinterpret the rules by using the concept of public interest as long as they do not contradict sharia law. Imam Al-Shatibi (d. 1388 AD), a scholar of the principles of Islamic jurisprudence, stated that if the society changes, the Islamic law needs to change, because the sharia law possesses a certain element of flexibility.²⁰⁸

Due the change in time and circumstances, and to meet the need for changes, the Muslim scholars have used their utmost ingenuity to create a legal methodology and

²⁰⁶ Mohammad Hashim Kamali, *Principles of Islamic jurisprudence* (The Islamic Text Society 1991).

²⁰⁷ Majid Khadduri, 'Maslaha (Public Interest) and Illa (Cause) in Islamic Law' (1979) 12 NYUJ Int'l L & Pol 213.

²⁰⁸ Abu Ishaq Al-Shatibi, *Al-Muwafaqat*, vol 1 (Ibn Affan press 1997).

concepts to keep sharia law up to date, and to make it easy for Muslims to practise their daily life within the framework of sharia law.²⁰⁹

The public interest concept has been used by Muslim jurists. Thus as we live now in a more complex world, scholars of sharia law are obligated to innovate to achieve justice, and further preserve individual rights.²¹⁰ Furthermore, this concept of public interest or public good is mostly used in administrative processes, such as the labour law, registration of the contract of marriage, driving licences, to practise medicine, pharmacy, and law. More importantly, the concept of public interest is required more in the places where services are provided to the population such as public procurement, and every part related to procurement such as procurement law or international agreements related to procurement. However, this concept is the most relevant for contemporary era issues, because it is the most appropriate solution for reforming the legal system in Muslim countries.

3.2.4 The Definition of Public Interest (*Maslaha*):

In sharia law public interest has many names, such as *Istislah* and *Al-masalih al-murslaa*, which is the most frequently used term in sharia law, meaning unrestricted interest.²¹¹ However, it refers to unrestricted public interest, in the sense it has not been regulated by sharia law, because it is not sanctioned by textual authority.²¹² In addition, all of these terms have the same meaning which is to secure benefit and promote welfare or to remove harm from people.²¹³ The extent of this concept is that only what is compatible and convenient with the principles and objectives of sharia law are adopted and acknowledged.

3.2.5 The Objectives of Public Interest:

The objectives of using the concept of public interest in sharia law is the same as the objectives of sharia law in general, which are the preservation of religion, life, intellect, lineage, and wealth, which are called the *five necessities*.²¹⁴ Furthermore, the importance of this concept in this research is to show how sharia law plays a role in

²⁰⁹ Khadduri, 'Maslaha (Public Interest) and Illa (Cause) in Islamic Law'.

²¹⁰ Yousuf Al-Qaradawi, *Unrestricted Interest and its rules* (Al-Qaradawi Library 2013).

²¹¹ Khadduri, 'Maslaha (Public Interest) and Illa (Cause) in Islamic Law'.

²¹² Kamali, *Principles of Islamic Jurisprudence*, p.. 235.

²¹³ Saleh bin Humaid, *Removal of hardship in Islamic Law* (Om Alqura University 1983).

²¹⁴ *ibid*.

protecting wealth and to curb the misuse of the national income. Public procurement is a huge part of the economy, and it is important to use the concept of public interest in this field to protect the economy. In public procurement, contracts and tenders are offered to bidding entities. Therefore, it is important for citizens and part of the public interest to see that the right procedures are followed, such as transparency, equality, and elimination of corruption, when awarding contracts and tenders. It is important that the public are involved or are aware of not only the national but also international procurement agreements, because of their impact on the wealth of the nation and whether the services procured are up to standard.

3.2.6 The Rules of Public Interest:

Public interest is subject to certain rules:

First, the public interest shall be reasonable, which means that the majority of scholars must agree with it.²¹⁵ Moreover, it has to be accepted by the majority of people.

Second, the public interest should be used to preserve the five necessities, mentioned earlier, or to mitigate difficulties, which means that if people did not use the facility they would face a disadvantage.

Third, there must be compatibility between public interest and the objectives of sharia law, which means that public interest should not contradict the basic principles of sharia law.²¹⁶

The important thing when using the public interest concept is that it should only be used when there is a genuine public interest. Therefore, a specious public interest shall be void. However, in some cases some scholars believe that the use of public interest as evidence to legalize or prohibit some new issue should be restricted, because some people use this concept for a personal interest, or they are concerned with the short-term benefits only and not the long-term harm. Therefore, any decisions on public interest should be used or be based on fair assessment by not only religious scholars, but also by experts in all other fields such as medicine, economics, and law.²¹⁷ Moreover, the decision as to whether the concept of public interest should

²¹⁵ Abdullah Saleh, 'Unrestricted Interest and How to Practice It With Contemporary Issues' (2000) 16 Damascus University.

²¹⁶ Humaid (n 213).

²¹⁷ Al-Qaradawi (n 210).

be used or not should be the subject of continuous assessment, and if the benefits no longer exist, then the rule should be changed or modified if the reasons for their adoption or enactment no longer exists.²¹⁸

As set out above, this research will seek to demonstrate that the basic principles of the GPA are compatible with sharia law. For example, one of the most important principles of the GPA is transparency,²¹⁹ and this principle is not contradictory to sharia law.²²⁰ Since the first international agreement in the Tokyo Round in the 1970s,²²¹ issues of government procurement and especially the provision of transparency in laws, regulation, procedures, and practice regarding government procurement has been at the centre of debates. Similarly, sharia law reinforces the principle of transparency in all types of dealings. The Prophet stressed that all dealings must be transparent, as he stated that: 'He who believes in God and the Last Day either speak good or keep silent',²²² also the Prophet stated that:

The seller and the buyer have the right to keep or return goods as long as they have not parted or till they part; and if both the parties spoke the truth and described the defects and qualities (of the goods), then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost.²²³

It is clear from the latter traditions that the Prophet ordered that the principle of transparency shall be the cornerstone for any type of dealing including the deal between government and tenderers.

The other principle of the GPA is non-discrimination.²²⁴ The GPA has mentioned that any law or regulation should not discriminate against foreign products, services, or suppliers.²²⁵ Sharia law encourages this principle as God said in the Quran:

²¹⁸ *ibid.*

²¹⁹ Inbom Choi, 'Long and winding road to the government procurement agreement: Korea's accession experience' in Will Martin and Mari Pangestu (eds) *Options for global trade reform* (Cambridge University Press 2009).

²²⁰ Reich (n 53).

²²¹ WTO Agreement On Government Procurement (Tokyo Round).

<http://www.wto.org/english/docs_e/legal_e/tokyo_gpr_e.pdf>.

²²² Al-Bukhaari, *Saheeh Al-Bukhaari* (first published 870, Taibah Press 2005).

²²³ *ibid.*, Book 34, Hadith 32.

²²⁴ Choi (n 219).

²²⁵ WTO The Plurilateral Agreement on Government Procurement (GPA).

O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.²²⁶

The principle of openness, which is one of the objectives of the GPA, is also mentioned by sharia law, the Prophet said: ‘You know more about your own worldly affairs’.²²⁷ Therefore, this research clearly shows compatibility between sharia law and the basic principles of the GPA, as both of them encourage these principles of transparency and non-discrimination. However, to achieve these principles is subject to the implementation of the GPA requirements. Therefore, the research intends to analyse the legal texts of the GPA, and attempt to use the sharia law concept of public interest or public good as prescribed by Muslim scholars to find compatibility between Islamic Law and the GPA. In addition, the research will use the rule of public interest to discuss concessions which may be required by the GPA.

Because the GPA is part of an international agreement it is essential to look at sharia law’s views on international agreements, in order to contextualize the role of the GPA within sharia law. It is also important to understand the nature of agreements within sharia law, and how new agreements can be classified and applied to the GPA, showing the obligation for both parties, such as the law of tax. Compliance with the GPA requires long negotiations, therefore, in this chapter, the researcher will look at how the concept of public interest or public good is used when negotiating agreements. The research will use Islamic law’s primary resources, the Quran, Prophetic Traditions and plus the opinions of contemporary scholars on issues pertaining to the GPA.

3.3.1 Sharia Law and International Agreements:

There are some similarities between the provisions of agreements in sharia law and the regulations in force in international agreements, but sometimes there are some differences in words and terminology.²²⁸ For example, the United Nations (UN) Charter has indicated that the purpose of the UN is to preserve and implement security, justice, and equality. In order to achieve these aims the UN has to take measures to ban any attack, aggression, or any threat to peace. Moreover, the UN has

²²⁶ Surat Al-Ĥujurāt verse 13.

²²⁷ Al-Bukhaari (n 222); WTO The plurilateral Agreement on Government Procurement (GPA) <http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.

²²⁸ Wahbah Alzohaily, 'The Provisions of Treaties in Islamic law' (1997) Sharia and Law college, UAE.

a role to develop friendly relationships between nations based on justice, equality and the exchange of interests that can be achieved only by reinforcing the principle of general peace.²²⁹

The law of governance in Saudi Arabia is derived from sharia law. This law (as was stated in the introduction of the law) was issued, based on the public interest requirement, due the development of the states in various fields and the desire to achieve the goals that the nation seeks.²³⁰ Furthermore, this law appreciates the importance of international agreements as a tool to improve the legal system, to achieve sustainable development, and to support the need for experience to use natural resources and information technology. Thus, this law focuses a lot of attention on the international agreements, as stated in article 81: ‘The enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organizations and agencies to which the Kingdom of Saudi Arabia is committed’.²³¹ This shows that international agreements shall not be violated by implementing domestic laws. Moreover, international agreements shall take priority over domestic laws.

In sharia law, the approach of studying and assessing international relations, whether with states or international organizations, will be derived from Islamic primary resources, the Quran and Prophetic Traditions. These resources (which allow the use of public interest) should be the general reference for any new laws or agreements. Moreover, the general instructions of sharia law are considered as valid and suitable for any period and location. Therefore, the enactment of new rules or signing of international agreements is left to the decision makers, who are normally appointed by the leader of the state, and they are allowed to evaluate and make judgment on any issues that arises, taking into consideration circumstances, changes, time period, and location.

3.3.2 The Principle of International Agreement in Sharia Law:

²²⁹ UN, *Charter of The United Nations* (1945) Article 1; Li Weiwei, 'Equality and Non-Discrimination Under International Human Rights Law' (Research Notes, Norwegian Centre for Human Rights, University of Oslo 2004).

²³⁰ Basic Law of Governance (1992).

²³¹ *ibid.*

Sharia law considers all human beings to belong to one nation, regardless of race, gender, ethnicity, etc.²³² God stated in the Holy Book:

O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women. And fear Allah, through whom you ask one another, and the wombs. Indeed Allah is ever, over you, an Observer.²³³

Thus, the Quran shows that race and language is not a barrier to equality among human beings, God in His wisdom created people from different backgrounds, to give them power to adapt with their environment. The Quran states that: ‘And of His signs is the creation of the heavens and the earth and the diversity of your languages and your colors. Indeed in that are signs for those of knowledge.’²³⁴ God created human beings into different nations and tribes, so that they will know each other, and not to fight each other or to have permanent disagreements. This cooperation leads to mutual benefit between people, thus things like natural resources do not belong to a certain region, but to all humanity. The Quran says: ‘O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you’.²³⁵

Cooperation is a general principle in sharia law. The Quran says: ‘And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty’.²³⁶ The Prophet encouraged the principle of cooperation and building of good relationships between nations, even if there are differences in religion and language. Therefore, when the Prophet immigrated to Medina he signed an agreement with Jews of Medina, the objective of this agreement was to create a pact with the Jewish community of that city to ban any attack, aggression, or any threat to peace.

As above, and to achieve cooperation and desired benefits between nations through international agreements, there are some basic principles of international agreements in sharia law, which need to be considered when signing an agreement.

²³² Mohammed Abuzahra, *International Relations in Islam* (House of Arabic Thought 1995).

²³³ Surat An-Nisa verse 1.

²³⁴ Surat Ar-Rum verse 22.

²³⁵ Surat Al-Ĥujurāt verse 13.

²³⁶ Surat Al-Maidah verse 2.

1. *Justice*

Every relationship in sharia law is based on justice. Sharia law insists on giving everyone his or her rights,²³⁷ even enemies during war. Moreover, sharia law requires people to be just with their enemies, even more than with friends or family. Therefore, the law of war and peace emphasized that the motivation to starting war is always to achieve justice.²³⁸

In addition, the loss of rights should not be tolerated because it is against the principle of justice. Especially, concessions that result in the loss of right and power. To tolerate injustice when only a section of the society benefits and others lose is frowned on by Islamic Law. For example, when a government allows damage to the environment at the expense of the local communities or when the government charges foreigners more taxes than the locals. In the case of these injustices the Quran states that: 'O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness.'²³⁹ More importantly is the principle of reciprocity which is related to justice. According to some scholars, this rule is necessary in terms of international trade relations, because trade relations require cooperation and mutual benefit. Keohane suggested that reciprocity is the most appropriate method of cooperation among sovereign states.²⁴⁰ Reciprocity is an important tool in bringing states to cooperate with each other. Nevertheless, this research shows that reciprocity cannot play an important role in international trade although it is good in politics where it can be a remedy for conflict. Because of a lack of balance of power among states, reciprocity cannot be practised in international trade, as it contradicts the GPA's provision of special treatment for developing countries.

2. *Equality*

One objective of sharia law is to give equal opportunities to everyone to claim their basic rights. Therefore, if opportunities are equally available to everyone then the disparity between people would only be due to their personal efforts.

3. *Freedom*

²³⁷ Adel Alshedi Saud Al-Saud, Khalid Aldris, Suliman Aleid, Abdulaziz Altoyhi, Tayser Abuhaimed, *The Political System In Sharia Law* vol 14 (Madar Alwatan 2013).

²³⁸ Abuzahra (n 232).

²³⁹ Surat Al-Maidah verse 8.

²⁴⁰ Robert O Keohane, 'Reciprocity in international relations' (1989) 40 International organization.

This principle stems from the principle of equality between people when the Prophet signed a peace agreement with the tribe of Quraish²⁴¹ in Makah. The content of this agreement was to stop the war and give Muslims peace in practicing their religion. In that agreement, the clans of the Quraish tribe were given specific duties to cater to needs of the pilgrims to Makah, such as to provide food and beverages, which was an honour among the clans. In his subsequent migration to Medina, the Prophet acknowledged the Jewish religion and he did not force them to convert to Islam. He signed peace pacts with them, which included freedom of property, work, practicing religion, and freedom of movement, which are all enshrined in sharia law. From this we can deduce that sharia law adopted an open door policy in international relations, and rejected the policy of isolation and seclusion. Sharia law rejected any limitation or unfair restriction on development and the movement of labour, goods, and services. In addition, it is important to mention that sharia law does not acknowledge any agreement that is signed by force, because it contradicts the principle of freedom.

4. The fulfilment of promises

The Quran emphasizes that the fulfilment of promises is a key element in international agreements. Furthermore, sharia law emphasizes the fulfilment of promises when dealing with strong and weak parties.

5. Common interest

International agreements should consider the common interest of all parties. In terms of international relations, it has been observed that all of the efforts made by scholars are based on the consideration of common interest, which means warding off harm and bringing benefits for all parties.²⁴² However, any new invention or innovation, which will bring prosperity and will not cause harm to all parties, must be taken into account, whether during war or peace time.

However, sharia law considers the agreements as an element that will add to trust and confidence between nations because such agreements will bring peace, which will result in the development of trade and industries, the opening up of markets for

²⁴¹ Quraish is a tribe living in the west of what used to be called the Arabic island and is now Saudi Arabia, also this tribe is the tribe of the Prophet Muhammad (peace be upon him).

²⁴² Mohammad Hashim Kamali, 'Qawa 'Id Al-Fiqh: The Legal Maxims Of Islamic Law' (1998) Association of Muslim Lawyers.

exports and imports, and the exchange of goods and services.²⁴³ The Quran says: ‘And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing.’²⁴⁴

3.3.3 The Categories of International Agreement in Sharia Law:

The GPA is an agreement which requires more than just exchange of trade or open markets. It also requires the movement of labour, experts, and staff between countries, thus, it is important to analyse the nature of such agreements within sharia law

According to some Muslim jurists, including imam Alshibani, international agreements in sharia law can be divided into the following categories:

1. According to the purposes of the agreement, there are commercial, political, cultural and humanitarian agreements.
2. According to the status of the agreement, there are bilateral and multilateral agreements.
3. According to the duration of the agreements, there are permanent agreements such as *Ahl-aldimmah* (people of protection), and temporary agreements such as *Aman contract* (pledge).²⁴⁵
4. According to the conditions of the agreements, there are open and closed agreements.

The GPA is an agreement administered by the WTO, where most of the agreements are politically based. This research will focus on the commercial agreements between Muslim countries and non-Muslim states by looking at foreign trade relationships and political treaties to determine the nature of the relationship. The thesis will also identify the treatment of non-Muslims where projects and agreements require the movement of labour or training staff. Before delving into the detail of Islamic Law and its relationship with the GPA, it is very important to identify the type of agreements in sharia law to contextualize the role of the GPA within sharia law.

²⁴³ Ahmed Abdulwanis, *The Origin of International Relations in Sharia Law in Peacetime* (1st edn, International Institute of Islamic Thought 1996).

²⁴⁴ Sūrat Al-anfāl verse No 61.

²⁴⁵ Othman Jumah Domairiah, *The sources of international relations in the jurisprudence of Imam Mohammed bin Alhsan Alshibany* (1st edn, Dar Almalay 1999).

3.3.4 The Types of Agreements in Sharia Law:

. According to Wahba Alzohaily(d. 2015),²⁴⁶ there are three types of treaties in sharia law: first, a belief treaty (to believe in God), second, a political treaty, and third, a commercial treaty. Treaties which are considered political treaties are divided into four categories: a peaceful coexistence treaty, a pledge treaty, a treaty of peace or cessation of hostility, and a permanent peace treaty. Some Shia (one of the sects of Islam) jurists adopt a different division. Aqil Saaid indicated that there are three types of treaties in sharia law: pledge treaties, cessation of hostility treaties, and protection of people treaties.²⁴⁷

Alzohaily provides more detail in his analysis than other contemporary scholars, although it can be argued he mixed up the definitions of the second and third types of treaty in sharia law by including commercial agreements with permanent peace agreements on the one hand, then also defining them as a separate type of agreement in sharia law on the other. It is submitted that commercial agreements should be defined either as permanent peace agreements, or should be considered as a separate type of treaty. The reason for this is because there is argument in sharia law over whether Muslims can trade during war or conflict with non-Muslim states. Alzohaily's opinion is that a Muslim country can trade with non-Muslim states during war or conflict but only in a limited range of products.²⁴⁸ Saaid agrees with Alzohaily in some areas, but Aqil confined agreements in sharia law under the framework of war. On the other hand, Muslim scholars should attempt to clarify guidance on the requirement of sharia law in relation to commercial agreements.

It is argued that the division by Saad Alotaiby is a more appropriate division of the agreements in sharia law.²⁴⁹ Alotaiby divides agreement as follows: first, general peace agreements, second, pledge agreements and third, protection of people agreements. Undoubtedly this division is the clearest division, because he considers the general peace agreement to be an umbrella for all trade agreements whether between a Muslim country and non-Muslim states, or between a Muslim country and

²⁴⁶ Alzohaily, 'The Provisions of Treaties in Islamic law'.

²⁴⁷ Saaid, A 'International Agreements in Sharia Law' <<http://biphome.spray.se/shia/artiklar/16.htm>> accessed 15 January 2014.

²⁴⁸ Yaqub Ibrahim, *Alkharaj Book* (House of Knowledge 1979).

²⁴⁹ Saad Al-Otaiby, 'The significance and types of Treaties in the Islamic international law' (2010). <<http://www.alukah.net/Web/alotaibi/10606/22810/>> accessed 16 April 2014.

international organizations. Moreover, he believes that the central theme of all commercial agreements is normally peace and the mutual pursuit of common interests. Although one might argue that the GPA requires more than what is normally required in a general peace agreement. It requires not only the export and import or buying products from other countries, but also the movement of labour, experts, and staff to a Muslim country, which means that they will become resident in a Muslim country whether permanently or temporarily. Therefore, it is argued that the GPA is a general peace agreement and also a protection of people agreement. As a consequence, the GPA is subject to the requirements in sharia law applicable to the two types mentioned earlier.

Given that this chapter has argued that the GPA falls under the provisions of general peace agreement and also the protection people agreement, it is important to consider the requirements of sharia law in relation to these two types, in order to contextualize the role of the GPA within sharia law, as any such implementation has to be located within both the philosophical and practical application of existing sharia law.

3.3.5 General Peace Agreements:

The general peace agreement is the basis and the reference point for most international agreements such as commercial, economic, and sport agreements, that take place between Muslim countries and non-Muslim states. Peace and stability will result in the prosperity of all human affairs. The word peace has been repeated more than one hundred and forty times in the Quran, while war is mentioned in only six verses of the Quran. This clearly reflects that sharia law inclines more towards peace than war in all practices. In the Arabic language the word Islam is derived from *Salam* which means peace, which shows the permanent connection of the word peace to Islam.²⁵⁰ Sharia law has not only called for peace as part of its moral obligation, but also as a means to organize the relationship between human beings and their Creator, and between themselves. Sharia law applies the term of peace in the following applications:

- I) Peace in belief: sharia law allows people freedom of religion, thus, it forbids the forceful conversion of non-Muslims to Islam, which means sharia law

²⁵⁰ Muhammed Saah Jalal, 'Islam's call for peace' (2006) 3 Study of International Islamic University Chittagong 123.

provides and guarantees the freedom of religion. The Quran states: ‘There shall be no compulsion in [acceptance of] the religion’.²⁵¹

- II) Peace in personal life: this is applicable under the constitution of sharia law, to guarantee to all individuals to live their lives through the combination of their desires and legal obligations. Therefore, it is permissible for individuals to satisfy their needs or their desires, without harming others or breaching the legal system.
- III) Peace in human relations: sharia law acknowledges the principle of brotherhood and equality among human beings, and eliminates the idea of fanaticism or discrimination. Sharia law has provided some general principles in terms of human relations, and determines the rights and obligations of individuals. Moreover, sharia law has made the system of governance as a force to ensure peace in the community of Muslims and non-Muslims.

In sharia law there is no restriction on the type of relationship between Muslim countries and non-Muslim states, as long as the basis of the agreement is peace. However, sharia law rejects any agreements that contain a requirement to deal with something forbidden in sharia law such as alcohol. It also rejects any agreement that is signed by force. In addition, sharia law confirms that the rules and conditions of any agreement should be clear to avoid any confusion or ambiguity.²⁵²

3.3.6 *Dhimmi* (non-Muslim) Agreements:

As noted above, the GPA requires the movement of labour, staff, and experts, therefore, these issues fall under the provisions of sharia applicable to non-Muslim agreements. These type of agreements are compulsory and do not have a time limit, even if it is not indicated in the rules of agreement,²⁵³ unlike pledge agreements, which have a time limit. Under such agreements, the Islamic authorities must protect and defend the protected people against any attack. Moreover, non-Muslims have the right to be dealt with as a national of the Muslim country.²⁵⁴ The Muslim country has

²⁵¹ Sūrat Al-Baqarah verse 256.

²⁵² Abuzahra (n 232); Alotaiby (n 249).

²⁵³ Abuzahra (n 232).

²⁵⁴ Mohammed Othman, *Rights and Duties and International Relations in Islam* (4th edn, Dar Aldhia 1991).

to provide them with personal safety, treat them with equality and justice, and respect their choices and reputation.²⁵⁵ On the other hand, as non-Muslims have rights, they also have obligations. Non-Muslims should pay tax to the Muslim country, to enjoy all services provided, and also they should not insult any religious norms.²⁵⁶ The tax must be paid by a non-Muslim to enjoy the services provided by the state such as health, education, and collecting refuse. Moreover, as non-Muslims, they do not have to pay zakat..²⁵⁷

Nevertheless, Islamic jurists agree that tax should not be imposed on women and children who are dependents, but only on those who work.²⁵⁸ There is considerable debate on the issue of the amount of money that should be paid by non-Muslims in a Muslim country. One of the parties to the debate is the leading Islamic scholar Abu Hanifa (d. 767).²⁵⁹ He seeks to divide non-Muslims into three categories: first, upper class who have to pay forty-eight Dirham (one Dirham is equal to three grams of silver); second, middle class who have to pay twenty-four Dirham, and third, lower class who have to pay twelve Dirham. Classification depends on the income of the individual concerned. Alshafei's view is broadly in line with that of Abu Hanifa, but he estimated the tax to be no less than one Dinar (a Dinar is equal to four grams of gold).²⁶⁰ Another Muslim jurist, Malik Bin Anas, takes an opposing view, arguing that tax should not be estimated, rather it should be at the discretion of the leader of the country.²⁶¹

Scholars today agree that there should not be estimation of tax, because such an approach is not appropriate for the modern context. Furthermore, nowadays the taxation imposed on foreign investors in Saudi Arabia arises as a result of the foreign direct investment law which was adopted in 2000. The rate of tax in this law was at the discretion of the leader, suggesting that it should be possible for such an approach

²⁵⁵ Majid Khadduri, 'Human rights in Islam' (1946) 243 *Annals of the American Academy of Political and Social Science* 77.

²⁵⁶ Ali Hosny Alkharbotly, *Islam And The People Of Protection* (1st edn, The Supreme Council for Islamic Affairs 1969).

²⁵⁷ Mohammad R Taheri, *The basic principles of Islamic economy and their effects on accounting standards-setting* (Accountancy, 2000) < www.accountancy.com.pk > accessed 06 March 2013.

²⁵⁸ Alkharbotly (n 256).

²⁵⁹ Ali Alkawrdi, *The Ordinances of Government* (Kuwait University 1989). P. 184.

²⁶⁰ *Ibid.*.

²⁶¹ Abu Bakr Kasani, *Bada'i al-Sana'i fi Tartib al-Shara'i* (2nd edn, Scientific Library 2003); Majid Khadduri, *War and Peace in the Law of Islam* (5th edn, The Johns Hopkins University Press 2006).

to be compatible with sharia law. Moreover, the importance of this discussion arises because one of the GPA requirements is national treatment, and if a higher tax is imposed on foreign investors or workers, this would not meet one of the GPA requirements. Therefore, legislators should consider that for the public interest, the adoption of the view which gives authority to legislators to set the rate of tax is the most appropriate way forward in the contemporary world. In addition, by giving the authority to legislators to make estimates, permits greater opportunity to negotiate.

3.4. The Provisions of Negotiations in Sharia Law:

In the eyes of sharia law negotiation is a tool in the relationship between Muslim countries and international communities, however, negotiation is kind of dialogue, or communications instrument through which other parties can agree or disagree on certain issues.²⁶² Negotiation is designed in order to achieve the best outcomes for all parties. If negotiation is considered as a method of exchanging views in order to conclude an agreement between parties there should not be any kind of force or coercion imposed on any party to the negotiations. Furthermore, it is not necessary to agree, at the beginning of the process, on the demands of one party as opposed to the demands of another; all parties should find a reasonable and acceptable compromise, based on mutual and balanced concessions. More importantly, it is important to recognize the difference between negotiating on peripheral issues and core values. Realistically it is critical to understand that core values are seldom, if ever, the subject of negotiation, as sharia can never permit the infringement of core values.²⁶³

As noted above, negotiation is designed in order to achieve the best outcomes for all parties. Therefore, a Muslim country must use the process of negotiation in all of their international actions, because the basis of a Muslim country's relationship with foreign states and organizations is peace, as negotiation contains dialogue, persuasion, and satisfaction. Allah said in the Quran:

Say, 'O People of the Scripture, come to a word that is equitable between us and you...'.²⁶⁴

²⁶² Mofid Shehab, 'International negotiation' (Lecture at the Institute of Diplomatic Studies, Riyadh 1993).

²⁶³ Abdulwanis (n 243).

²⁶⁴ The Holy Quran: Surat 'Āl-Imrān verse 64.

From this we can see that negotiation was the method used in signing many agreements during the history of Islam, whether such agreements were permanent or temporary.²⁶⁵

Moreover, the Prophet used to send negotiators all around the world; he sent negotiators to the Persian Empire to exchange hostages and relieve the prisoners from both sides. More important was the negotiation of the Prophet with the tribe of *Ghatfan* in Medina when he gave them one-third of the Muslim harvest for the security of Medina.

The process of accession to the GPA requires a series of negotiations and concessions. The GPA requires parties to make their procurement law transparent and open to foreign suppliers. Also, the GPA bans any discriminatory practices against any party, therefore procurement bodies should disclose all procedures of tenders. Furthermore, procuring entities should treat parties to the GPA equally, without any favour to domestic suppliers.²⁶⁶ Indeed, the need for these requirements to be met during the process of negotiation is imperative.

Thus, it is important to highlight the approach of sharia law to the process of negotiation. The first requirement is that of good will. Parties should determine the framework for the negotiation on the principle of good will. The leader should select a qualified team, who are not only able to negotiate, but in addition have the ability to evaluate whether there is or was anything untoward behind the proposed agreement, and consider if there is or was an attempt to unreasonably exploit the wealth of the country contrary to the overt terms of any agreement. Also, the leader can authorize a person who has a good relationship with another team. For example, the Prophet sent his companion Othman Bin Afan to the tribe of Quraish to negotiate as Othman was an important figure in that tribe.²⁶⁷

The second requirement is that of concessions. Negotiators in sharia law should show some flexibility during the process of negotiation, more importantly, if there was general interest for the state, negotiators may make some concessions even if some

²⁶⁵ Yasri Abdullah, 'The Legal Significance of The Negotiations in International Trade Contracts' (PhD, Alnailin University 2011); Abdulwanis (n 243).

²⁶⁶ WTO, The plurilateral Agreement on Government Procurement (GPA) arts III, XVII.

²⁶⁷ Sadiq Afify, *The Development of Diplomatic Exchanges in Islam* (Englo-Egypt 1986); Abdulwanis (n 243).

harm to the state could occur, such as the flow of capital out of the state, or an increase in the unemployment rate. Approval for this can be seen in the treaty of *Hudaibyyah*, when the Prophet wanted to perform *Umrah* (pilgrimage to Makah that can be undertaken at any time of the year). He travelled from Medina to Makah, then the tribe of Quraish, which governed Makah, knew that the Prophet was coming with his companions and refused them permission to perform *Umrah*. Negotiations took place and they concluded their negotiation by agreeing that the Prophet could perform *Umrah* the following year. The Prophet made many concessions in that treaty, such as he agreed to be called only Muhammad bin Abdullah, instead of the Prophet.

3.5.1 The Legitimacy of the GPA in Light of Sharia Law:

The basis of the principle of legitimacy in sharia law is not to contradict the provisions of the Quran and Prophetic Traditions. These principles have been adopted in the Saudi legal system. For example, article 1 of the criminal procedure law in Saudi Arabia states that sharia law shall be applied on all cases; also laws issued by the state shall be applied if they do not contradict with the provision of sharia law. Therefore, the violation of sharia law provisions due to the general interest principle is not permitted. Moreover, the outcome of this violation is invalid.

Any laws, regulations and administrative circulars shall acquire the legitimacy status which requires that states and people shall be subject to the laws. Also, for international agreements to acquire legitimacy they must be sharia compliant, and they shall not contradict with the provisions of the Quran and Prophetic Tradition. However, in the contemporary era, international agreements are considered to be one of the sources of the principles of legitimacy.²⁶⁸ This means that if states sign agreements those agreements will automatically be legitimate. Nonetheless, the government of Saudi Arabia has ensured that all international agreements signed by it have not contradicted sharia law. Moreover, Saudi Arabia has reservations on many provisions in different international agreements because they contradict sharia law.

Saudi Arabia has joined the WTO, consequently, it will be automatically bound by all WTO multilateral agreements. At first glance, it will seem that the WTO has acquired legitimacy in Saudi Arabia because it is sharia law compliant. However, it has been

²⁶⁸ Fadi Al-Alwnah, 'The Principle of Legitimacy in the Administrative Law, How to be Achieved?' (Dissertation, Alnajah National University 2011).

argued that many of the WTO agreements require the withdrawal or reduction of subsidies. For example, the WTO agreement on subsidies and countervailing measures (SCM) has a mission which is to end any adverse effect of subsidies on WTO members. Thus, these measures regulate the actions that members can take to counter any harm that occurs due to the subsidized imports under dispute settlement procedures. However, these measures are different to the aid provided by the government to its citizens. For example, if the government purchases medicines from the open market and supplies them to the people at lower prices, it will not contradict the rules of the WTO, as the WTO has no objection to a state granting aid to individuals or providing infrastructure.²⁶⁹ Moreover, sharia law considers this aid as a form of cooperation between the state and the people, because the purchasing power is different from person to person, especially in some developing countries where providing support to people is required due to poverty, and where people cannot afford their basic needs such as food or medicines. Therefore, sharia law requires the leaders of Islamic countries to provide support from the central bank to cover all essential products if needed.²⁷⁰ However, in terms of subsidies prohibited by the WTO SCM agreements and the GPA, such as giving a preference to local goods over imported products, sharia law has left this issue to the discretion of the leaders of Muslim countries, who have the obligation to assess this issue in pursuance to the public interest principle.²⁷¹

The GPA is one of the plurilateral agreements under the WTO, and joining is optional for WTO members. This means that Saudi Arabia, which practises sharia law, is not automatically bound by the GPA rules. Therefore, it is necessary to find the legitimacy of the GPA in the light of sharia law.

By examining the aims of the GPA, which are greater liberalization of trade, expansion of world trade, and the improvement of the international framework for the

²⁶⁹ Agreement on Subsidies and Countervailing Measures, (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, art 1.3.

²⁷⁰ The WTO SCM agreement has prohibited any adverse effect of subsidies which may affect other members' markets. Furthermore, the most important forms of prohibited subsidies are as follows; direct subsidy which is linked to export goods, or providing a subsidized material for the purpose of producing goods to be exported, also exemption from direct taxes on profits from exports. The other prohibited subsidy is the use of domestic over imported goods. For example, the Saudi procurement law orders contractors to use local products over imported products.

²⁷¹ The Saudi Procurement law explicitly encourages contractors to use local products over foreign products.

good practice of world trade,²⁷² it can be realized that these aims include contemporary terms such as liberalization. Furthermore, these aims are the result of development in transportation and communications. Accordingly, as a principle, and by looking at the aims of the GPA, it can be said that the GPA provisions are accepted by sharia law as the Quran says: 'It is He who created for you all of that which is on the earth'.²⁷³ However, as these aims are of the contemporary world, they shall be subject to the principle of public interest (*maslaha*), and how the leader of a Muslim country evaluates the outcomes of the GPA. Therefore, sharia law has given discretionary powers to Muslim countries to evaluate the interest of its people vis-a-vis the GPA. Moreover, it has given them the power to enact laws which are compatible with international agreements, but do not contradict the basic principles of sharia law. These aims can be achieved by implementing the core principles of transparency and non-discrimination.

3.5.2 The Implementation of the GPA Provisions on Transparency and Non-discrimination:

3.5.2.1 Implementing the Principle of Transparency:

Sharia law encourages the principle of transparency as the Prophet stated that: 'He who believes in God and the Last Day either speak good or keep silent'.²⁷⁴ Transparency is the right of all citizens and residents to obtain all information, and relates to the mechanism of taking decisions. Moreover, the principle of transparency is demanded to develop ethical standards in an institutionalized system. Development cannot occur without transparency, accountability and good governance. Therefore, the majority of Islamic scholars have opined in favour of accountability and transparency.

Acquiring legitimacy for the GPA within the perspective of sharia law has to be subject to many considerations, including the extent of implementing transparency provisions. Moreover, for the procurement decision to be regarded as legitimate, it has to be transparent, because transparency in public procurement entails the availability of all information that is related to the procurement, such as financial transactions, the

²⁷² Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement'.

²⁷³ Surat Albaqarah verse 29.

²⁷⁴ Al-Bukhari (n 222); Book 2 Hadith 26.

publicity of procurement opportunities, the award of contract procedures, and clear rules related to the enforcement of the rules. This availability of information will reduce any form of corruption, including any negative practice to control or exploit developing countries' procurement markets. Moreover, it will achieve better quality in public procurement, which will favour the citizens and residents.

The GPA considers transparency as a fundamental principle, thus, the GPA gives a detailed provision to ensure that a procurement procedure is transparent. Arrowsmith has put the rules of the GPA on transparency into four categories: first, in respect of publicity for the laws and rules, article VI of the revised text requires that each party promptly publish any law, regulation, judicial decisions, and administrative ruling of general application.²⁷⁵ This publication and information has to be accessible to all parties in paper or electronic form. Furthermore, the article states that each party shall provide an explanation to any party on request, and shall inform the committee of any modification to the party's information listed in appendixes. In addition, the rules and requirements for specific procurement shall be published such as a technical and economic requirement. This requirement will inform all the potential bidders, which will make them aware of any prohibited criteria, and give them full opportunity to join the tenders without any fear that there might be a hidden requirement which could appear during the awarding of the contract.

Second, in respect of publicity for procurement opportunities, article VII of the revised text requires each party to publish an intended procurement in an appropriate manner including paper or electronic form. The publication of the procurement shall be in a certain named publication (unified journal) such as the official journal of the European communities.

The third category relates to the provisions limiting the discretion of procuring entities. Despite the GPA giving the parties the discretion to enact their procurement laws to be within its framework, the GPA also gives provisions related to procurement methods and instructions on how to award the contract to the bidder. Moreover, the GPA does not accept any irrelevant criteria which might go against the principle of transparency under the excuse of the discretionary rights that are provided under the GPA.

²⁷⁵ The Revised Agreement on Government Procurement, art VI.

The fourth category covers monitoring and enforcement. The GPA requires all parties to verify that their procurement procedures are compliant with the GPA provisions, such as the publication of procurement notices, and giving losing bidders the reasons for their failure to win tenders against their competitors, or why they were disqualified. In addition, the GPA requires all the GPA parties to establish domestic challenge procedures to undertake for any potential breach to the GPA.²⁷⁶

It is clear that the GPA imposes strict rules on transparency. Moreover, sharia law cannot disagree with what is provided by the GPA regarding the rules of transparency as they apply to the laws and procedures of procurement. Implementing the principle of transparency in the procedures of public procurement shall be discussed when it comes to the details of Saudi procurement laws, in order to consider whether it implements the rules of the GPA regarding transparency. On the other hand, sharia law uses the principle of transparency in all transactions to illustrate what is permissible under sharia law. The GPA has reinforced the principle of transparency to achieve the objectives of public procurement including eliminating corruption.

The GPA provides rules that shall be followed to ensure the implementation of transparency to achieve the objectives of public procurement, and end any practices that would be a barrier to achieving these objectives. Sharia law reinforces the principle of transparency to ensure that there is no breach in sharia law, such as the disclosure of any defect in the commodity, or any practice that may contain interest.²⁷⁷ For example, payment is the most important stage of the contract. The value of the contract shall be paid according to sharia law instructions relating to transparency and disclosure. There are many financial transactions that are forbidden in sharia law including interest and deception (*Gharar*),²⁷⁸ and they have to be avoided when paying the value of the contract. When a dispute occurs in a foreign

²⁷⁶ Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement'.

²⁷⁷ Hani Dwider, 'The GATT Agreement in the Light of Sharia Law' (The development of social science conference, Oman, March 2013).

²⁷⁸ Gharar means uncertainty, it implies that the commercial partner shall know exactly the countervalue of the transaction. To boost the transparency transaction, Gharar is banned as it implies uncertainty in both parties. Moreover, to avoid Gharar in the transaction, contracting parties shall ensure that the content of goods and price are known, also the suppliers are able to deliver by an agreed date. For example, the sale of a fish in the sea or bird in the sky is forbidden as it is uncertain whether the suppliers can deliver it. Furthermore, both parties shall disclose the quantity and the quality shall be described; Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing 2013).

country which does not practise sharia law, and the panel decides that compensation which includes interest to be paid to the aggrieved contractors, then, the sharia court in Saudi Arabia which is obliged to enforce the judgment of the foreign country has the right to remove the interest from the total amount of remedy after agreeing with parties.²⁷⁹

Transparent methods of funding and payment are required in public procurement under sharia law. Countries such as Saudi Arabia, which practise sharia law, apply Islamic finance when it plans to fund large projects. For example, King Abdul-Aziz Airport in Jeddah has been funded using Islamic bonds (*Sukuk*).²⁸⁰ This type of fund is based on sharing the risk, which means that the bondholders are partners who share the profits and losses.²⁸¹ Therefore, the financial transactions between a GPA party and a country which practises sharia law shall not contain any transactions which are banned in sharia law.

3.5.3 The Importance of Coordination between the GPA Parties and Saudi Arabia to turn the transactions into Islamic Financial transactions:

It is important to transform all financial transactions into Islamic financial transactions. Obviously, this has to occur when it comes to dealings between Saudi Arabia and other GPA parties. As far as the researcher can establish, an Islamic financial transaction will not affect other parties of the GPA, as sharia law does not allow interest (usury). It only requires Saudi Arabia to deal with these type of transactions. For example, if Saudi Arabia plans to undertake a project in one of the GPA party countries, it shall not accept any transactions forbidden by sharia law, such as receiving payment as a bond which will be paid with interest, or if one of the GPA parties could not pay a Saudi company on time, then the government or Saudi companies shall not accept the delay of the loan which will lead to accrual of interest (sale of debt), they should rather follow the Islamic financial instruments to avoid any breach of sharia law.

²⁷⁹ Case No 185/2/K 1989.

²⁸⁰ Saudi Press Agency, 'Civil Aviation Issues the Second Version of Islamic Bonds' *Alriyadh* (Riyadh, 24 September 2013) <<http://www.alriyadh.com/870095>> accessed 08 June 2014.

²⁸¹ Visser (n 278).

3.5.4 The Permissible (*Halal*) Financial Instruments in Public Procurement:

The subject of public procurement is a new topic for sharia law. Sharia law merely gives the fundamental provisions in dealing with financial issues, such as the banning of interest and sale of debt,²⁸² as the Quran states that:

Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, 'Trade is [just] like interest.' But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein.²⁸³

Therefore, if a Muslim country undertakes a project with one of the GPA members it should receive the payment in accordance with sharia law. For example, a Saudi company was awarded a contract to build a project in one of the GPA members, and by the time of maturity the GPA member could not pay the Saudi company. Then the GPA member will resort to sale of the debt whether to the Saudi company or to the third party as a bond, which includes interest. Basically this kind of transaction is not permissible in sharia law, and this issue needs to be addressed to be compatible with sharia law. Thus, there are options²⁸⁴ to be considered by a Saudi company when the GPA member cannot make the payment.

The first option is that partnership (*Musharakah*) means that the creditor can be a partner in the project, which will result in the creditor sharing the risk, therefore he or she will be responsible for the losses and profits depending on the proportion.²⁸⁵ *Musharakah* plays an important role in Islamic financing. It is one of the alternatives to taking interest from a loan, which is prohibited in sharia law. However, *Musharakah* is subject to agreements between both parties. The creditor may find the project not be in his or her favour, moreover, even though *Musharakah* is one of the permissible financial instruments under Sharia Law, it is not a preferred instrument by

²⁸² When a debtor cannot pay the debt to the creditor at the agreed time, then the debtor asks the creditor to delay the payment with a condition that he will pay with interest, or the debtor can sell the debt to a third party as a bond. The rationale for the prohibition of this transaction is that it will result in interest (*Riba*).

²⁸³ Surat Al-Baqrah verse 275.

²⁸⁴ However, in some cases that have come to the Board foreign and local companies agreed to cancel the interest from the total amount of remedy.

²⁸⁵ Visser (n 278).

Islamic banks to fund projects. *Musharakah* financing does not exceed 3% of the total funds of Islamic banks.²⁸⁶ Therefore, creditors can move to the second option which is rescheduling the debt without increase, because if there is any increase it will be considered as interest, which is prohibited in sharia law. Finally there is an option to increase capital through the entry of new partners.²⁸⁷

3.5.5 Transparency Standards under Sharia Law:

It has been shown that sharia law uses the principle of transparency to show the legality of all transactions and also to ensure that any transaction will be cleared from any kind of cheating or hidden costs.²⁸⁸ Thus, it is worthwhile to mention the standards of the principle of transparency under sharia law. This refers to two basic standards, namely ethical and administrative criterion.

3.5.5.1 Ethical Standards of Transparency under Sharia Law:

Transparency is considered to be one of the legislative bases for the developed countries, meaning that it is a basic requirement to enact a transparent law and regulation to enable citizens and residents to participate. Moreover, transparent laws and regulations will result in the availability of all information, which means that the community will be more knowledgeable and open, and therefore they can observe the implementation of law. Consequently, it will reduce corruption and achieve the principle of good governance.

From the perspective of the international community, the principle of transparency has witnessed major developments. It used to be limited to the access to information and administrative documents for interested people, however, many developed countries are obliged to put their data, information, and documents on the internet, thus the government provides information instead of people seeking information.

The international community has adopted this principle in their treaties and agreements such as the GPA, which created many standards for the principle of

²⁸⁶ Yousef Al-Shobily, 'Musharaka Financing - practical mechanisms to develop it' (Abu Dhabi Islamic Bank Third Conference, Abu Dhabi, January 2011).

²⁸⁷ Husain Shaatah, 'Islamic approach to get out of financial crisis ' (Dar Almashora 2014) <<http://darelmashora.com/Default.aspx>> accessed 25 November 2014.

²⁸⁸ Sami Dragmah and Muhammed Salamah, 'The Standards of Transparency in Islamic law and its Impact on the Prevention of Economic crises' (2014) 2 Islamic University Journal for Islamic Studies 475.

transparency. For example, a transparency standard for the awarding of contract procedures, as the entity shall inform the bidders of the reasons for not winning a contract. Sharia law has many ethical standards for the principle of transparency. It recognizes trade as a permissible endeavour, moreover, it encourages competition as the Quran states that: ‘O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful’.²⁸⁹ However, sharia law has highlighted the forbidden practices that may cause damage to others, as the Prophet stated that, ‘There should be neither harming [*darar*] nor reciprocating harm [*diraar*]’. Therefore, sharia law requires the regulation of the relationships among human beings to ensure that they receive their rights without harming others, because forbidden practices such as price fixing and becoming a monopoly in the market will harm all dealers in all categories.²⁹⁰ It is part of public interest to postpone or even decline the accession to any agreement that might cause harm to local suppliers and products. To give a legal framework for the transparency standard in sharia law the researcher has adopted the principles of Imam Al Ghazali²⁹¹ as he has suggested that in sharia law there are four requirements for transparency when selling items, which are:

- (1) Not to praise one's goods.
- (2) Not to conceal the defects of one's goods from others.
- (3) Not to conceal the weights and measures of goods.
- (4) And, not to cheat in respect of a price of a thing.²⁹²

The above mentioned requirements will be applied as a benchmark in government procurement as all consist of transactions of selling and buying, because Ghazali's principles are central to the ethical aspects of transaction.

To apply these requirements on government procurement it is suggested that the ethical standards for transparency in sharia law should be followed, which are: (i) any person, institution, government or international organization shall not falsely

²⁸⁹ Surat An-Nisa verse 29.

²⁹⁰ MUSAAD ALOTAIBI, 'Legitimate Competition and Preventing Monopolistic Practices' *Aljahirah* (Riyadh <<http://www.al-jahirah.com/2014/20140117/ec6.htm>> accessed 22 October 2014.

²⁹¹ Al-Ghazali is one of the greatest Islamic jurists, theologians and mystical thinkers. He was born in Tus in north Iran in 1058 and died in 1111.

²⁹² Abu Hamid Muhammad Al-Ghazali, *The Revival of Religious Sciences* (first published 1106, Dar Ibn Hazam 2005) 519.

advertise.²⁹³ For example, the GPA parties shall be transparent in terms of the objectives of the GPA, and leaders in countries where sharia law applies have the right to decline any agreement which is contrary to the public good. Moreover, if the products are deemed harmful and destructive (*mafsadah*), then they are automatically prohibited under sharia law.²⁹⁴ (ii) The GPA parties shall not conceal any negative impact of the GPA on potential members. For example, the GPA parties shall give a clear interpretation of the text of the GPA, because then the potential party can discover their objectives. However, the potential acceding states shall discover the real meaning of the text of the GPA. Thus, the potential acceding party should look at the real willingness of the GPA in terms of applying and/or interpreting any situation for the time being, rather than looking at the potential or virtual situations that might happen as a result of a specific situation in the future. Therefore, if the GPA acceding party is unable to find an answer for a proposed situation they should look for the rule in primary sources or seek a counsel in official sources, otherwise they should look into the rule itself and try to find a valid interpretation.

(iii) The third standard for transparency in sharia law that was referred to by Ghazali is not to conceal the weights or measures of things. With regard to government procurement, this standard applies to any forbidden practice by a procuring entity to divide the procurement into separate procurements or use a particular method of valuation with the intention of excluding it from the application of the GPA.²⁹⁵ (iv) Finally, and most importantly, sharia law has paid a great deal of attention to price cheating which is a form of corruption. The general definition of corruption is the use of public office for a private gain, this includes bribery and extortion.²⁹⁶ Corruption is taken extremely seriously by sharia law. For example, the Prophet has said that, 'damned is the bribe giver or corrupter, the bribe-taker or corrupted, and he who goes between them', which demonstrates the severity with which corruption is viewed.²⁹⁷

²⁹³ *ibid.*

²⁹⁴ Amir Shahrudin, 'Maslahah-mafsadah approach in assessing the Shari'ah compliance of Islamic banking products' (2010) 1 International Journal of Business and Social Science. <<http://ijbssnet.com/journals/11.pdf> 129> accessed 12 May 2014.

²⁹⁵ The Revised Agreement on Government Procurement, art II.

²⁹⁶ Daniel Kaufmann and Cheryl W Gray, 'Corruption and Development' (1998) 35 International Monetary Fund (IMF). <<http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf>> accessed 12 August 2014.

²⁹⁷ Victoria Jennett and Marie Chene, 'Islamic approaches to corruption' (2007) Anti-Corruption Resource Centre accessed 5 September 2014.

Moreover, sharia law has given preventive and control measures to fight corruption and adopted effective measures to prevent corruption, including:

Promoting the moral values by strengthening self-control through a strong belief in God, observing His will, fearing Him, and obeying Him.²⁹⁸ On the necessity of self-control the Quran states that:

O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted²⁹⁹

Moreover, sharia law states that one of the solutions to address the issue of corruption is to develop a religious parameter, where people are urged to fight all kinds of corruption. It has addressed this issue and has given a solution to prevent any type of corruption, and consider any act leading to corruption as a forbidden act, which will be punished in this life and the hereafter,³⁰⁰ as stated by the Quran:

[We said], ‘O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah.’ Indeed, those who go astray from the way of Allah will have a severe punishment for having forgotten the Day of Account.³⁰¹

In addition, one of the most effective measures to prevent corruption commended by sharia law is the hiring of staff who have good qualifications and integrity to take responsibility for all government procurement. Therefore, governments should select for public office a well-known person who is honest, loyal and efficient. Muslim jurists have stressed that people entrusted with public offices should be honest, efficient, qualified and impartial. Moreover, governments should disregard those who are known to be unjust and inefficient. Ibn Khaldun defines injustices as follows³⁰² as

²⁹⁸ Mohammad Ali Shomali, 'The Significance of Self-control and Self-purification' (2009) 10 Ahlul Bayt Digital Islamic Library Project < <http://www.al-islam.org/message-thaqalayn/vol10-n1-2009/significance-self-control-and-self-purification-mohammad-ali-shoma-0>> accessed 3 May 2014.

²⁹⁹ Surat An-Nisa verse 135.

³⁰⁰ Firas Abu Gaauad, 'Preventing the Administrative Corruption from the perspective of Islamic Thought' (2013) 36 Baghdad College of Economic Sciences Journal. <<http://www.iasj.net/iasj?func=fulltext&ald=82766>> accessed 18 April 2014.

³⁰¹ Surat Saad verse 26.

³⁰² Ibn Khaldun was one of the most remarkable Muslim historians who established modern sociology. His book *The Muqaddimah* is considered the most important book in social science.

he said that injustice is more than ‘confiscation of money or other property’, to him, injustice covers various things, taking of a person’s property, forced labour, unjust claims against a person, imposing taxes unfairly and so forth.³⁰³

For the purpose of achieving transparency and to fight corruption, sharia law provides the guidelines for those who will take charge of public offices, and these are to employ the most efficient and competent person to occupy the office. The Prophet used to appoint the most charismatic and confident person to occupy public office. For example, when the Prophet’s companion Abu Dharr Algifary asked him, will you not appoint me to a public office? The Prophet stroked his shoulder with his hand, and said, ‘Thou art weak and authority is a trust. And on the Day of Judgment it is a cause of humiliation and repentance, except for one who fulfils its obligations and (properly) discharges the duties attendant thereon’.³⁰⁴ This discussion shows that a leader can select the person who meets the requirements for occupying public office, thus a person seeking employment should not use any form of nepotism or ‘old boy’s network’, which may lead to corruption. This is forbidden in sharia law as the Quran states that: ‘whoever intercedes for an evil cause will have a burden therefrom. And ever is Allah, over all things, a Keeper’.³⁰⁵ Furthermore, the discussion between the Prophet and his companion leads us to an important issue, which that is a leader should not appoint anyone who asks to be appointed to any sensitive public offices, such as a judge or someone responsible for government spending. Because if anyone is too keen to obtain this sensitive public office, he/she can be prone to abusing this position, or can use pressure to maintain the position.

The government has the authority to discharge any employee who is involved in any kind of corruption, or if he/she is not capable of taking responsibility for public office because of health issues or other social pressure, such as pressures from family or ethnic groups. Furthermore, in sharia law, government has the authority to discharge anyone who lacks experience. For example, the Caliph Omar discharged Ammar Bin Yasser (the Prophet’s companion) from his position and said to him, I knew that you are not a professional public officer, but I interpret the verse of Quran which states that: ‘And We wanted to confer favour upon those who were oppressed in the land

³⁰³ Abdulrahman Ibn Khaldun, *The Muqaddimah* [Introduction] (first published 1377 Yarub House 2004).

³⁰⁴ Imam Muslim (n 200); Hadith No 4492.

³⁰⁵ Surat An-Nisa verse 85.

and make them leaders and make them inheritors'.³⁰⁶ The Caliph Omar appointed him and he hoped that he would be able to perform his duties as a public officer, but he realized that he was not capable of discharging his duties, and subsequently he dismissed him. It is clear from the latter dialogue that the leader of a Muslim country has the right to terminate an employee if he or she is not able to discharge their duty as a public officer, due to lack of experience or other shortcomings.

The second prerequisite for appointing public officers is trust. Trust has been mentioned in the Holy Quran in many verses, which shows the importance of trust in sharia law, especially with regard to public office where dealing with government spending is a regular occurrence.

Finally, sharia law requires that any public officers should be examined and interviewed for the job. It is obligatory in sharia law to achieve the highest standard of transparency. This will happen by selecting the most appropriate person to take the position and examining and interviewing the potential public officers. To highlight the extreme necessity of examination and interview in sharia law the Quran tells the story of the Prophet Abraham's test by God:

And [mention, O Muhammad], when Abraham was tried by his Lord with commands and he fulfilled them. [Allah] said, 'Indeed, I will make you a leader for the people.' [Abraham] said, 'And of my descendants?' [Allah] said, 'My covenant does not include the wrongdoers'.³⁰⁷

Although Abraham was sent to spread God's message to his people, God tested Abraham as an example that even the well-known should be tested for their honesty and reliability. Moreover, as mentioned above, the Prophet Muhammad interviewed his companion Muadh bin Jabal before he was sent to Yemen and asked him how he would solve a problem. Muadh answered according to the Quran, and the Prophet said what if it is not in it? Then, Muadh replied according to the Tradition (Sunnah). After that the Prophet asked, what if it is not in that either? Muadh answered, then I will use my own reasoning.³⁰⁸ Muadh bin Jabal was acknowledged and approved by the Prophet, and subsequently he became a judge in Yemen.

³⁰⁶ Surat Al-Qasas verse 5.

³⁰⁷ Surat Al-Baqarah verse 124.

³⁰⁸ As-Sijistani (n 184).

3.5.5.2 The Administrative Standard for Transparency:

In terms of general business, sharia law provides that business dealings must be documented as a way of instilling confidence and maintaining rights.³⁰⁹ Moreover, the Quran gives a detailed provision regarding documentation as it states that: ‘O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice’.³¹⁰

Documentation is closely linked to transparency, because it controls and regulates all types of transactions between two or more people, to ensure the achievement of all of the objectives of transactions. Moreover, documentation will be a proof for a plaintiff in case a contract is breached.³¹¹

The sharia law jurists have suggested a general framework for the forms of documentation, which are the documentation shall determine the form of a transaction, when it occurs, and preserve everyone’s rights. Also, the formulation of the document shall be clear and precise to prevent any suspicion or fraud, which will reduce the causes of dispute between parties. Furthermore, documentation will define the purpose of the document, which automatically will protect the content of the document, as it may be needed in case of dispute.³¹²

In addition, the Quran urges that transactions should be documented as it states that: ‘And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you’.³¹³

The second standard for administrating transparency in sharia law was suggested by some Muslim jurists who urged the need for price control. The subject of price control was discussed in the 7th century,³¹⁴ when the Prophet’s companion Anas reported that:

[S]ome of the prophet’s companions came to him and they said; Messenger of Allah, prices have shot up, so control the prices for us. Thereupon the Messenger of Allah said: Allah is the one who controls prices, who withholds, gives lavishly and

³⁰⁹ Jennett and Chene (n 297).

³¹⁰ Surat Al-Baqarah verse 282.

³¹¹ Abdulatif Alshikh, *Documentation Among the Jurists of the Maliki School* vol 1 (Juma Almajid Heritage & Culture Centre 2004).

³¹² Dragmah and Salamah (n 288).

³¹³ Surat Al-Baqarah verse 282.

³¹⁴ Muhammad Lawal Ahmad Bashar, 'Price Control in Islamic Economy' (1997) 9 *Islamic Economics* 29.

provides, and I hope that when I meet Allah, none of you will have any claim on me for an injustice regarding blood or property.³¹⁵

Yet, the issue of price controls is still controversial among Muslim jurists. Some Muslim jurists including the followers of Imam Abu Hanifa, Malik, and Alshafie opposed price controls, citing the narration by Anas mentioned above, and also that those in authority do not have the right to control the price for many reasons. First, the people have the freedom to dispose of their property as they see fit. Second, abundance and scarcity of goods are dependent on many elements, including divine phenomenon, therefore, if the price increased as a result of natural causes, then price control becomes unjust.³¹⁶

On the other hand, other Muslim jurists, including Abu Hanifa and Malik, have adopted the theory of price control. Moreover, they claim that price control is permissible and in some cases is obligatory in sharia law. They based their opinion on the prophetic tradition, where the Prophet said, ‘a townsman must not sell to a man from the desert’.³¹⁷ This means that the townsman normally knows the price, unlike the desert man who owns the commodity, as he does not know the price. They also claim that when there is a collusion of sellers against buyers, or when people need certain goods, such as in the case of disease outbreaks, and also in the case of traders monopolising the market, the control of price becomes obligatory to remove harm from people. Furthermore, some contemporary jurists added that this opinion promotes the principle of transparency, because it shows the link between control of price and transparency, as it will stop any attempt to shape any collusion against consumers.³¹⁸

To refute the previous argument, it is suggested that the government has no right to control the price in the market, for many reasons. First, the fact which can be derived from the prophetic tradition reported by Anas, that the Prophet did not approve of price control as although people pressured him to take action against traders who were overcharging, he did not yield to their request. Moreover, the Prophet equated price control with injustice, which is forbidden in sharia law. Also, the theory of price

³¹⁵ As-Sijistani (n 184). The grade of Hadith is ‘authentic’.

³¹⁶ Kasani (n 261); Mawaffaq Ad-Din Abdullah Ibn Ahmad Ibn-Qudama, *Al-Muqni* vol 3 (Dar Alam Alkotob Press 1997); Bashar (n 314); Dragmah and Salamah (n 288).

³¹⁷ Imam Muslim (n 200).

³¹⁸ Dragmah and Salamah (n 288).

control will lead to price rise, because traders from outside will not bring their goods to market due to imposed price controls, and they will be forced to sell their goods at a lower price even if the demand was high.³¹⁹ Moreover, domestic suppliers will hide their goods, which will create a black market.³²⁰ Furthermore, price control will reduce the quality of goods because it will weaken the competition. In addition, today it has been noted that price controls are not for the benefit of citizens and not good for the national economy. For example, in the last century the Polish government wanted to keep the price of TVs artificially low, but due to the high demand for TVs they were not available upon request. A citizen needed to join a waiting list and maintain their position in a queue by showing up in the store regularly. This resulted in the cost of controlling the price of TVs in the Polish economy to be more than the industry's total sales.³²¹ Therefore, as highlighted above, it is suggested that price controls are forbidden in sharia law, except for certain cases where there is genuine fear that citizens will be exploited by unscrupulous traders, otherwise all shall be evaluated in accordance with the public good principle.

3.5.5.2.1 Implementing the Principle of Non-Discrimination:

'Discrimination refers to a government's tendency to favour its own domestic industry's supplies and disregard foreign firm supplies. If a government cares for local firms' profits but not foreign firms, it will discriminate against them when competing for government procurement contracts'.³²² Thus, what is meant by discrimination in this regard is the discrimination that is based on local interest which is prohibited by the GPA.³²³

One of sharia law's values for business is the prohibition of discrimination. Sharia law considers that discrimination is not a permissible practice, and prevents it in all aspects of life. This prohibition is based on the prophetic tradition, as the Prophet stated that:

No Arab has superiority over any non-Arab and no non-Arab has any superiority over an Arab; no black person has superiority over a white person and no white person has

³¹⁹ Ibn-Qudama (n 316).

³²⁰ Bashar (n 314).

³²¹ Fiona M Scott Morton, 'Problems of Price Controls' (2001) 24 Regulation 50.

³²² Steiner Vagstad, 'Promoting fair competition in public procurement' (1995) 58.2 Journal of Public Economics 283.

³²³ Francis Ssenoga, 'Discriminatory Public Procurement Policies' (PhD thesis University of Twente 2010).

superiority over a black person. The criterion for honour in the sight of God is righteousness and honest living.³²⁴

However, the GPA requires opening up the procurement market and implementing the MFN principle to achieve the principle of non-discrimination. Therefore, sharia law's view on discrimination will be limited to these issues.

Opening up the market is a result of, and is in accordance to, economic globalization. Accordingly, the researcher will show the Muslim jurists' opinions on economic globalization, bearing in mind that most of their opinions are based on the principle of public good. There is no doubt that the liberalization of public procurement has been an ongoing debate. Moreover, there has been an effort by many countries to set up a framework for government procurement, beginning in the 1960s, but these efforts were unsuccessful. The first agreement on government procurement, which was considered to be the most successful, compared to previous agreements, is the GPA. The long debate on the subject of government procurement reflects the fear and hesitation by many countries towards liberalizing procurement markets. The main reluctance about liberalization was the desire to preserve their sovereignty, and to achieve their own economic and social objectives such as supporting small and medium industries.

However, the concept of economic globalization is based on economic integration, by achieving fair competition, enhancing the quality of products, and preservation of human rights. Sharia law encourages the principles of economic globalization, as the Quran calls for cooperation, it states that:

And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty.³²⁵

Therefore, economic globalization has to be based on real cooperation between nations where public good is the paramount objective. Also, sharia law permits trading with non-Muslims, as stated by the Quran:

Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes - from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.³²⁶

³²⁴ Baker Ahmad Alserhan, *The Principles of Islamic Marketing* (Gower Publishing Ltd 2011).

³²⁵ Surat Al-Maidah verse 2.

³²⁶ Surat Al-Mumtahanah verse 8.

However, to gain acceptability under sharia law, economic globalization has to follow certain rules of justice,³²⁷ by ensuring that all trade transactions are fair which will result in free trade, because freedom is a result of fairness. Also, implementation of economic globalization must apply the Islamic maxim 'harm must be removed' in all transactions. For example, if economic globalization will cause pollution or dumping in a market, then any harm must be removed in accordance to the rules which are determined by sharia law. Moreover, all transactions must be sharia law compliant, thus any forbidden transactions or products must be banned. In addition, some Muslim jurists have allowed the implementation of the principle of quid pro quo if necessary, for example, if other countries started imposing tariffs or giving preference to their domestic products, then Muslim jurists allow the use of the principle of quid pro quo.³²⁸

3.6 Dispute Settlement in Islamic Jurisprudence:

Sharia law pays great attention to reconciliation with the aim of resolving conflict in order to restore peace and justice. Thus, the Quran rewards those who mediate between two parties a share of zakat, and also the Quran states that: 'No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people',³²⁹ which emphasizes that God will greatly reward the mediator for bringing human beings together.³³⁰

The previous texts show how resolving any conflict peacefully is central to sharia law. Also, if we look at the provisions in many of the international agreements regarding the settlement of disputes such as the GPA, we will find that consultation, whether by negotiation or mediation, is the first and main objective of the GPA challenge procedures. In addition, sharia law urges people to be more tolerant and harmonious in their dealings, and to remove any selfish practices.

With regard to Islamic jurisprudence, if a dispute could not be resolved through consultation, then the court can take interim measures, which are permissible in

³²⁷ Riyadh Almomani, 'The Future of Islamic Economy In the Context of Globalization' (Globalization conference, Jordan, May 2006).

³²⁸ Hussain Shaatah, 'Islamic Economics Approach to Economic Globalization' (2008) Dar Elmashora, accessed 15 October 2014.

³²⁹ Surat An-Nisa verse 114.

³³⁰ Salem Al-Solmy, 'The Provisions of the non-International Armed Conflicts' (PhD thesis, Prince Naif University 2012).

Islamic jurisprudence. According to Article 33 of the International Islamic Court of Justice (IICJ), if necessary, the court has the right to take interim measures to preserve rights. On the other hand, the court shall not issue a decision of suspension before informing all parties and giving them a period of time to appeal.³³¹

The other remedy which was debated among Muslim jurists is financial sanction or compensation. In sharia law there is no existing provision that prohibits public good, and it also insisted that corruption must be removed. Thus, in general, Islamic jurisprudence permits financial sanctions in public contracts to achieve public good. Although some Muslim jurists have opposed financial sanction, because it contradicts certain verses in the Quran indicating that taking people's wealth unjustly is forbidden. For example, the Quran states that: 'And do not consume one another's wealth unjustly'.³³² They also argued that financial sanction was permitted in the early stages of Islam but later repealed. However, the correct opinion is that financial sanction is permitted in sharia law due many prophetic traditions that allow financial penalties. For example, the Prophet imposed fines on those who went to the farms and harvested some of the produce such as dates without informing the owner of the farm. Also, there is a need for financial sanctions today to preserve public good, and imposing financial sanction in public contracts will preserve the rights of all citizens, which will result in achieving public good.

Nevertheless, the evidence used by the Muslim jurists who do not permit financial sanctions are wrong, because they claim that the Quran forbids financial sanctions, however the Quranic verse they use is too broad and general. It was later better defined and interpreted by some of the prophetic tradition that followed. Therefore, financial sanction and compensation is permitted in sharia law.³³³

Summary:

This chapter is important to the thesis as sharia law is the main source of the Saudi legal system. Moreover, if the provisions of the GPA contradict sharia law then it would automatically contradict the Saudi legal system. Therefore, it is essential to

³³¹ Statute of the International Islamic Court of Justice (1987) art 33.

³³² Surat Al Baqara verse 188.

³³³ Hamad Al-Eid, 'The Sanctions in Public contracts in Saudi Legal system and the Position of Islamic Jurisprudence' (Masters dissertation, Al-Imam Muhammad Ibn Saud Islamic University 2007).

identify the view of sharia law with regard to the GPA as an international agreement and a political-trade agreement.

It has been submitted that there is no such thing as government procurement law under sharia law. Thus, in old Islamic sources there are no regulations which regulate government procurement. However, this chapter has provided the methods that sharia law uses to deal with contemporary issues such as the GPA and its requirements. The Quran and prophetic tradition are used to deal with all contemporary issues. However, if there is no provision in the Quran and prophetic tradition to deal with contemporary issues, then sharia law has permitted methods to deal with those issues. One of the most important methods, which is also the most appropriate method for contemporary issues, is the principle of public interest. Nevertheless, using the principle of public interest has to be under certain rules which have been provided above.

In general, sharia law agrees with international agreements' principles, such as transparency and non-discrimination, which are the main principles of the GPA. Furthermore, this chapter has provided sharia law's view on these principles. It has also shown that one of the significant findings is that sharia law has provided the discretionary power to decision makers to award legitimacy to contemporary issues where there are no provisions in the Quran or Tradition. Therefore, in terms of the GPA, decision makers shall evaluate the outcome of the accession to the GPA based on the principle of public interest.

However, it should be noted that there are a few financial transactions that are not permitted in sharia law. Hence, Saudi companies which undertake a project or supply products in foreign countries shall not accept the delay of a loan that will lead to accrument of interest. This kind of transaction is considered as usury which is not permitted in sharia law. On the other hand, sharia scholars have suggested some permissible transactions such as *Musharakah* in order to avoid any transactions that are prohibited in sharia law.

This chapter has also provided the sharia law approach to settling disputes. Sharia law is similar to the GPA as both urge people to solve their dispute through consultation. Nevertheless, if the dispute could not be solved through consultation, then the review body can take interim measures which are permitted in sharia law. Moreover, some Muslim scholars argued that compensation is not permitted in sharia law. However,

the correct opinion is that it is permitted in sharia law due many prophetic traditions that allow financial penalties.

It has been submitted in this chapter that the GPA may not contradict sharia law. Therefore, in the next chapter the researcher will analyse the Saudi procurement law in order to find the main issues of the procurement law which clearly do not meet the requirements of the GPA.

Chapter Four: The Saudi Arabian Legal System and Procurement Law:

4.1 Introduction:

Joining the WTO has been a complicated issue for the Kingdom of Saudi Arabia, as well as other countries who are part of or are planning to join the WTO.³³⁴ For Saudi Arabia, the legal system, bureaucracy, and issues related to sovereignty are the main reasons for these complications. These complications could also be the main obstacles and barriers on the road to the Kingdom's membership of the WTO's Government Procurement Agreement (GPA).

Therefore, this chapter will provide a general view about the Saudi legal system. It will show Saudi Arabia's efforts in joining the WTO, and the reasons behind the delay to its accession to it. Moreover, this chapter will highlight the main provisions of the Saudi basic law of governance (the Constitution) related to international agreements and trade.

Government procurement is a focus of the WTO. Moreover, the GPA endeavours to attract WTO members to join the GPA. The GPA members must implement the requirements of the GPA such as the principles of transparency and non-discrimination in domestic law. Therefore, this chapter intends to examine and discuss the provisions of Saudi government tenders and procurement law. The main focus will be on the provisions related to the main principles of the GPA.

Finally, this chapter will provide an overview of the challenges faced in procedures and dispute settlement under the current tender and procurement law (the New Law). It will explore the process of resolving problems and challenges. Also, it will try to find the available remedy, and highlight the effect of Saudi Arabia's judicial system on government procurement.

³³⁴ Faisal Ghulam, 'Accession to the World Trade Organization: factors shaping the case of Saudi Arabia's accession (1985-2005)', (PhD thesis London School of Economics and Political Science University of London 2012).

4.2 The Saudi Arabian Legal System:

4.2.1 The Saudi Arabian Legal System (an overview):

As it has been mentioned in chapter one, Saudi Arabia's legal system is based on Islamic law (sharia law) which is derived from the Quran and Tradition (sayings of the prophet Muhammad). However, Islamic scholars have different interpretations of the Quran and Prophetic Traditions. The system of governance is monarchical; it is based on justice, Shura (consultation) and equality.³³⁵ Without prejudice to other provisions, one of the main principles of sharia law is equality, as determined in Article 8 of the Saudi basic law of governance,³³⁶ which means that all laws, regulations and agreements must consider the principle of equality as a core issue.³³⁷

4.3 Saudi Arabian Legal System and the WTO:

4.3.1 The Impact of Joining the WTO:

In 1985, Saudi Arabia started its negotiation to join GATT and obtained an observer status. But it was not until 1993 that Saudi Arabia became a member of the GATT which later became the WTO in 1995.³³⁸ During the negotiation to join the WTO, Saudi Arabia embarked on reform to its legal system, which reflected its desire to keep pace with the development of international trade and to meet the requirements of the WTO.

These changes also allowed Saudi Arabia to take advantage of its geographical location and its economic position, as one of the richest countries in the world, and the biggest energy producer in the world. In addition, one of the objectives of the country was to develop its infrastructure, because there was a lack in providing services, due to the limited number of projects related to infrastructure.³³⁹ These weaknesses in infrastructure and the legal systems of Saudi Arabia were the main

³³⁵ Basic Law of Governance (1992).

³³⁶ *ibid*; Article 8 of the basic law of governance in Saudi Arabia states that 'Governance in the Kingdom of Saudi Arabia shall be based on justice, shura (consultation), and equality in accordance with the Islamic Shariah'.

³³⁷ *ibid* s15.

³³⁸ James Wynbrandt, *A Brief History of Saudi Arabia* (2nd edn, Library of Congress Cataloging Publication Data 2010).

³³⁹ WTO, Executive Summary on the Kingdom of Saudi Arabia, Trade Policy Review. WT/TPR/s/256. <https://www.wto.org/english/tratop_e/tpr_e/s256_sum_e.pdf>.

barriers to the development of the country, and also to the flow of foreign investment into the country. Therefore, Saudi Arabia enacted more than 40 laws related to trade,³⁴⁰ and signed over 35 multilateral agreements including a general agreement on trade in services.³⁴¹

Saudi Arabia's reform of the legal system was fruitful, because when it applied to join the WTO, the tariff on 75% of goods was 12%, and in 2003 the tariff on 85% of goods was 5%. Furthermore the agreements with the WTO forced Saudi Arabia to decrease its tariff further.³⁴² The agreements were made with the interest of citizens at heart, according to the negotiating team. Consequently, nowadays, because of the improvement of the monitoring system by the Ministry of Commerce, there have been improvements in the Saudi market, including the freedom to choose goods and services available in the local market, and also consumer confidence has been raised due to the reduction in commercial fraud, counterfeit goods, and price manipulation. All of these improvements have happened because of the reform of the Saudi legal system when it was subjected to WTO rules.³⁴³

Saudi Arabia did not wish to join GATT prior to the Uruguay round for many reasons and elements related to GATT. First, it grew out of a failed effort to establish an international trade organization (ITO). Second, the focus of GATT was on industrial products, because by the end of any round of the GATT, the tariff decreased on industrial products. For example, the tariff was 40% in 1947 and had decreased to 4% before the Uruguay round. Moreover, it had been noticed that the focus was only on industrial products that belonged to industrial countries, but the industrial products of developing countries were not as popular as the products of developed countries. Third, developed countries violated some of the GATT rules. Fourth, the developed countries were dumping and also subsidizing their products.³⁴⁴

³⁴⁰ Hani Arab, 'The effects of Saudi Arabia's accession to the World Trade Organization'(2008) King Abdul-aziz University 1.

³⁴¹ Ali Eid Al-Hossiny, The Advantages and Implications of Saudi Arabia's Accession to WTO (Prince Naif University conference, Riyadh, March 2009).

³⁴² Brad Bourland, John Sfakianakis and Gasim Abdulkarim, *Saudi Arabia and the WTO* (1 Samba Financial Group 2011).

³⁴³ Ahmed Hamdan, 'Kingdom's Accession to the World Trade Organization "Historic step of the Saudi Economy in the Reign of King Abdullah"' *Alriyadh* (Alriyadh 22 July 2006)
<<http://www.alriyadh.com:8080/2006/07/22/article173639.html>> accessed 23 March 2014.

³⁴⁴ Fahad Aletany, *World Trade Organization, Origin, Principles, and Agreements*, (1st edn 2012); Arab (n 340).

Therefore, the Uruguay round was the most important round of international trade negotiations and eventually paved the way to the launch of the WTO. Saudi Arabia was an observer during this round and it observed the development of international trade, especially in services, due to the development of technology. Also, the increase of oil prices and the recession in the international economy led to the initiative to liberalize international trade.

After the adoption of the final recommendations of the Uruguay round, which established the WTO, Saudi Arabia accelerated its steps to meet the requirements of the WTO, by attempting to implement the main principles of non-discrimination (national treatment and MFN), transparency, reciprocity in some cases, reducing the trade barriers, special treatment for developing countries, and environmental protection.³⁴⁵

Although the WTO agreements are complicated and take time, at the same time Saudi Arabia also took a considerable time to join agreements related to international trade. However, Saudi Arabia applied to join the WTO in the mid-1990s, and had long and complicated negotiations with many parties of the WTO which lasted more than ten years.³⁴⁶ Ultimately, Saudi Arabia was successful in becoming the 149th member of the WTO in 2005.³⁴⁷

According to Al-Hossiny,³⁴⁸ the sensitive and complicated nature of negotiations were the main reasons for the long negotiations and the delays in joining the WTO. While Aljarallah's view³⁴⁹ is that the reason for delay of joining the WTO was due to the complicated deliberation that took place among the decision makers and the political, social, and religious leaders, which were time consuming.

The researcher believes the reason for the delay in joining the WTO was that the Saudi negotiating team was keen on defending the rights and interests of Saudi

³⁴⁵ Al-Hossiny (n 341).

³⁴⁶ Simon J Evenett and Carlos A Primo Braga, 'WTO accession: moving the goalposts?' in Richard Newfarmer (ed) *Trade, Doha, and development a window into the issues*. (The International Bank for Reconstruction and Development / The World Bank 2006).

³⁴⁷ The WTO general council formally concluded the negotiation with the Saudi Arabian team on the terms and conditions of Saudi membership to WTO. By the end of 2005 Saudi Arabia became a member of all WTO multilateral agreements.

See<https://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm>

³⁴⁸ Al-Hossiny (n 341).

³⁴⁹ Al-Jarallah (n 12).

Arabia, and preserved its legitimate gains. However, if the Saudi negotiating team had agreed on the requirements of the WTO, then it would have joined the WTO much earlier, but Saudi Arabia realized that some of the WTO's requirements were not consistent with Saudi Arabian economic principles. Also, the enactment of new laws and modification of the Saudi legal system took time to be approved and translated. This made Saudi Arabia become one of the biggest free markets outside of the WTO, therefore it became a target of the members of the WTO who intensified bilateral negotiations so as to keep the market as open as possible.

Despite the long and complicated negotiations that took place during the process of joining the WTO, where Saudi Arabia was asked to enact new laws and modify its legal system, Saudi Arabia was successful in gaining a concession from the negotiating parties of the WTO.³⁵⁰ The following are some of the concessions: first, article 20 of GATT gave Saudi Arabia concessions to ban 36 products which were religiously prohibited, such as alcohol, pork, and even frog meat.³⁵¹ Also, the negotiating parties agreed to the Saudi Arabian team's request to allow 75% ownership in local and foreign companies in a process known as Saudization.³⁵² The insistence of the Saudi team on imposing this request is due the high rate of unemployment in Saudi Arabia. According to The Central Department of Statistics and Information,³⁵³ in 2013 the unemployment rate for Saudi citizens was 12%, and for Saudi females was 35.7%. The insistence on Saudization stems from the Saudi government's fears of the long-term negative effect of an open market policy, which might encourage foreign companies to hire foreign labour because they are more qualified and are paid less, compared to their Saudi Arabian counterparts. Also, the concessions in the crude oil sector were deemed to be out of the WTO's jurisdiction. In addition, the authority is allowed to impose zakat on local companies, and income

³⁵⁰ MA Ramady and Mourad Mansour, 'The impact of Saudi Arabia's WTO accession on selected economic sectors and domestic economic reforms' (2006) *World Review of Entrepreneurship, Management and Sustainable Development* < <http://faculty.kfupm.edu.sa/FINEC/ramadyma/articles> > accessed 13 March 2013.

³⁵¹ Saud Al-Enazi, *The emergence of the World Trade Organization* (1st edn, 2010).

³⁵² Saudi nationalization scheme (saudization) is a new policy of the government of Saudi Arabia which was implemented by the Ministry of Labour. The ministry requires all Saudi firms and foreign companies investing in Saudi Arabia to fill their workforces with Saudi citizens up to certain levels. It is part of government plans to solve the problem of the high unemployment rate, as well as to encourage Saudi nationals to participate in private sectors; Ramady and Mansour 'The impact of Saudi Arabia's WTO accession on selected economic sectors and domestic economic reforms'.

³⁵³ Annual statistics by The Central Department of Statistic and Information.
<<http://www.cdsi.gov.sa/>>

tax on foreign companies.³⁵⁴ Imposing zakat can be considered as a religious prerogative of the Saudi Arabian government. According to the foreign direct investment law a tax shall be imposed on foreign investors, but they can obtain tax exemption if they invest in remote areas, or if they train Saudi citizens. However, the legislators in Saudi Arabia shall use the principle of public interest to modify the percentage of income tax, because (i) the high tax imposed on foreign investors is one of the main barriers to the flow of foreign direct investment in Saudi Arabia. Furthermore, (ii) imposing taxes only on foreign investors is against the principle of equality which is one of the main principles of the WTO.

Subsidy on many local products is allowed. For example, it is permitted to subsidize the agriculture sector for ten years, giving free land for industrial projects, and reducing utility bills. However, this is not discrimination, because the subsidy is only allowed for the products which are consumed locally, such as dates and milk.³⁵⁵ Furthermore, foreign investors must apply for a licence from the Saudi Arabian General Investment Authority (SAGIA). While only Gulf Cooperation Council (GCC) citizens can invest in real estate and the stock exchange, there has been a reform of capital market law in Saudi Arabia, therefore foreign investors can invest in the stock exchange through local brokerage companies. Finally, Saudi Arabia has received exemption from the WTO.³⁵⁶

After Saudi Arabia obtained these concessions it also needed to respond to the requirements of the WTO negotiating party. Firstly, Saudi Arabia, with a few exemptions, needed to reduce the customs tariff now and in the future, and also cap the tariff level on individual products and ensure the tariff would not increase in the future. Furthermore, it was to eliminate subsidies in the agriculture sectors. Nevertheless, Saudi Arabia did obtain exemption when it came to locally consumed products. Secondly, it needed to prevent any form of discrimination in goods and services among WTO members, and impose and enforce intellectual property rights. Thirdly, it had to grant permission to access Saudi Arabian markets, as long as they are not listed in a negative list in foreign direct investment law,³⁵⁷ and allow

³⁵⁴ Al-Jarallah (n 12).

³⁵⁵ *ibid.*

³⁵⁶ Bourland, Sfakianakis and Abdulkarim (n 342).

³⁵⁷ Negative list: a set of activities that prohibited from being carried out by foreign investors, in accordance with Article 3 of foreign investment law in Saudi Arabia 2000.

foreigners to own majority shares in investment projects. Finally, there was a need for equal treatment of foreigners and locals, meaning they pay the same taxes, and the abolition of all discriminatory practices, such as the requirement that trade should be conducted through brokers or a sponsorship agent, and treat foreigners equally by allowing them to own real estate,³⁵⁸ Article 8 of the foreign investment law in Saudi Arabia now allows foreign investor to own real estate to operate their licensed activities or housing for them and their staff.

Saudi Arabia has put an enormous effort into meeting the requirements of the WTO by concessions or by attempting to reach a compromise.³⁵⁹ The long and complicated negotiation has assisted Saudi Arabia in acquiring excellent skills and the ability to take part in further negotiation, especially in trade agreements. It has also given Saudi Arabia experience in what steps the country should take to meet the requirements. Nevertheless, Saudi Arabia has already taken many steps to meet the requirements of the WTO. It has embarked on enacting new laws which are related to intellectual property rights and trademarks. This was in preparation for meeting the requirements of joining the WTO. These new laws must not contradict sharia law. For example, according to sharia law alcohol is forbidden, therefore, any products which contain alcohol should be excluded from trade law.

More importantly, Saudi Arabia has undertaken to remove all barriers related to entry into the country by easing the procedures of obtaining visas, especially business visas. However, the majority of WTO member countries issue visas restrictively, using complicated procedures and sometimes only for certain visa classes. Every country has immigration regulations specific to their needs and, therefore, they cannot be interfered with as it will impinge on a country's sovereignty.³⁶⁰ Saudi Arabia signed the information technology agreement and also promised to phase out tariffs on information technology equipment. Furthermore, it agreed to open competition in telecommunication services. However, in Saudi Arabia the telecommunication sector has witnessed a huge shift from 2003 to the present day. This was a sector in which one company monopolised the market, but today there are five mobile phone

³⁵⁸ Ramady and Mansour, 'The impact of Saudi Arabia's WTO accession on selected economic sectors and domestic economic reforms'.

³⁵⁹ Al-Hossiny (n 341).

³⁶⁰ Abdul-rahman Al-ali Yousef Alsadoun, *World Trade Organization. Past, Present, and Future*, (vol 58, Alyamamah Press 1998).

companies and four landline companies from different member countries of the WTO.³⁶¹

One of the most important achievements to meet the requirements of the WTO is that in 2004 Saudi Arabia issued a royal decree number M/25 to acknowledge the competition law which was recommended by the Shura council,³⁶² to provide anti-trust protection and consumer protection in accordance with WTO rules. Saudi Arabia has been able to enact modern competition law to protect competition in accordance with international standards. In general, this law is a good start, although there are some negative points in it, in particular the objectives and goals of the law. Article 1 states that the objective of this law is to protect and encourage competition and eliminate any monopolistic practices, which may affect competition. Nevertheless, there is a lack in determining the objective of competition law. Therefore, to make the law more neutral it is necessary to add the following objectives: achieving the principle of equal opportunities, eliminating discriminatory practices, and achieving the principle of transparency, which means the availability of information to all interested competitors.

The competition law exempts companies owned by government from the provisions of this law. Article 3 states that the competition law shall apply to all companies that work in the Saudi market except public corporations and wholly-owned state companies.³⁶³ This contradicts the principle of equal opportunity which is the core of competition law, because there are some companies practising the sale of services to customers, such as the national gas company. In summary, there is a need to activate the competition law in Saudi Arabia to become more compatible with the requirements of the WTO. More importantly, there is a need to educate the competitors and consumers that there is a competition law which exists to protect everyone's rights.

One of the most important steps to enhance the legal environment of competition was the Saudi negotiating team's commitment to the WTO to start negotiation on access to

³⁶¹ Ahmed Hamdan, 'Liberalization of the Telecommunications Sector in Saudi Arabia' *Alriyadh* (Saudi Arabia 23 September 2008) <<http://www.alriyadh.com:8080/2008/09/23/article375983.html>> accessed 8 February 2014.

³⁶² Royal Decree no m/25, July 22, 2004, Saudi Arabian competition law.

³⁶³ Anoud Alsolamy, 'Critical analysis to the competition law in Saudi Arabia' (2011) Saudi National Commercial Bank research.

the GPA by the modification of procurement law. During the negotiation to join the WTO, the negotiators called for Saudi Arabia to agree to several initiatives, including a public procurement agreement. Therefore, some of the member parties requested Saudi Arabia join the GPA when it joined the WTO. The representative of Saudi Arabia answered that the nature of the GPA is plurilateral, which is not a pre-condition to joining the WTO. The working team told the representative of Saudi Arabia that government procurement is a substantial part of the country's imports, so it is highly beneficial for the country to join the agreement to reinforce transparency and lower the cost of procurement.³⁶⁴ Saudi Arabia considered the salient points of view as the reinforcement of transparency will lower the cost. Furthermore, it reported that it would work on this point, and would submit its revision after this has been effected. However, Saudi Arabia indicated that it would start the negotiation for the GPA during the accession to the WTO and would look at the gains of this agreement and, moreover, it would complete the negotiation for accession to GPA within one year.³⁶⁵ Even though Saudi Arabia has had observer status at the GPA since 2007, it has not started the negotiations to accede to it, saying that it will join the GPA after the adoption of the revised text of the GPA. However, although the text revision was completed in 2011, Saudi has not joined the GPA yet, and it has indicated that it will consider the revised text.

4.4 Saudi Arabian Legal System and Public Procurement Law

4.4.1 The Basic Law of Governance in Saudi Arabia (The Constitution):

The first effort to enact a law to be the foundation of all laws in Saudi Arabia was in 1925 when King Abdul-Aziz³⁶⁶ announced that all decisions shall be made depending on the consultation of the Muslim people and scholars. He also said that the sources of any legislation and any provisions shall be based only on sharia law. In 1926, another announcement was made by King Abdul-Aziz, which stated that the sharia law shall be the only reference for all people. The Kingdom continued to adopt these announcements until 1992 when King Fahd acknowledged the basic law of

³⁶⁴ *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61 (1 November 2005) p.76, para. 230.*

³⁶⁵ *Ibid.*

³⁶⁶ King Abdul-Aziz bin Abdul Rahman Al Saud is the founder of the Kingdom of Saudi Arabia.

governance in Saudi Arabia. This law became the foundation of all laws which were issued after that date. Moreover, all laws which were issued before the basic law of governance were modified to be in accordance with the basic law of governance.³⁶⁷

The importance of the basic law of governance is that it has the highest position in the Saudi Arabian legal system, which means that it has the features of a constitution and the rules of this constitution dominate all other regulations. In terms of topics of the law, it regulates the form of the country, the system of governance, and the competence of each authority. This law also determines the rights and obligations of the individual and the authority. Therefore, the rules of this law and their implications are the basic rules for all regulations in Saudi Arabia. Furthermore, any new law shall build upon the basic law of governance. Consequently, in what follows the researcher will discuss the emergence and importance of this law, followed by a discussion and analysis, especially of the issues related to commercial and international relations.³⁶⁸

In Saudi Arabia, and according to article 1, this law cannot be called a constitution, because the law could be superseded by the Quran and Tradition which are the real constitution. However, the basic law of governance has the features of a constitution, and it is equivalent to the constitution in other countries. Therefore, this law can be called a constitution if it was in accordance with sharia law. Moreover, and to keep pace with developments, there is a part in any constitution that should be changed from time to time depending on the circumstances of time and location, whereas the Quran and Tradition cannot be changed. Some of the provisions of sharia law have changed due to public interest, but any changes must not deviate from Islamic basic tenets, such as praying, giving zakat, and also should not sanction prohibited financial dealings that are based on usury. Furthermore, the opinion of Muslim scholars regarding changes to sharia law financial transactions can be set aside, as long as it has not been prohibited by the Quran nor mentioned in the Prophetic Traditions.³⁶⁹

Constitutions vary depending on the political system of the country. Some countries adopt a democratic method through referendum to ensure public participation, and

³⁶⁷ Mohammed Alsaaidy, 'The Basic Law of governance in the Kingdom of Saudi Arabia: Islamic view' (Muslim World League Conference, Mecca 2011).

³⁶⁸ Faisal bin Mashal Alsaud, Viewing The Basic Law of Governance, (Lecture presented at Al Qasim University organized by Sharia College 2010).

³⁶⁹ Alsaaidy (n 367).

some countries use a non-democratic method, which gives the rulers the main roles to establish the constitution.³⁷⁰

The basic law of governance has 83 articles, organized by 9 chapters. Initially these chapters present a general principle, by explaining the system of governance. Then this law explains the roles of various authorities and the power they have. The law shows the rights and duties of people and their governors, and also promotes the values of Saudi society. In addition, the law provides the main economic principles, including the taxes that shall be imposed only when the need for them arises.³⁷¹ The focus is on the following: first, the relationship between the basic law of governance and sharia law. Second, the part of the basic law of governance regulating trade issues, and third, the part of the basic law of governance regulating international relations and international agreements.

4.4.2 The Relationship Between the Basic Law of Governance and Sharia Law:

The most important aspect of this law is its Islamic directive, which means it is a religious state,³⁷² although it does not mean that it is a theocratic state. On the other hand, it is possible for religious scholars to give advice or a suggestion to the rulers, who must consider their suggestions. Furthermore, this law or any law under this law must be changed or modified if necessary, in accordance with the circumstances of time and location, as well as to keep pace with the principle of a modern state, as long as these changes do not contradict with sharia law. There have been changes to some of the sharia law provisions, and the reason for this is to make it easy for the people to practise their religion. Also, in Saudi Arabia there have been changes and modifications to most of the regulations, due to the growth of the population and the need to meet the requirements of the WTO, for example, the public procurement law and foreign direct investment law. In addition, Article 83 of the basic law of

³⁷⁰ Ibrahim Al-Hudaithy, 'The Amendment of the Basic Law of Governance in Saudi Arabia' (2013) 55 *Sharia and Law Journal* < <http://sljournal.uaeu.ac.ae/issues/55/images/1-%20.pdf> > accessed 9 March 2014.

³⁷¹ Saudi Arabian Basic Law of Governance (1992), art 20.

³⁷² Al-Hudaithy, 'Historical review of Saudi Administrative Contracts'.

governance acknowledges the principle of amendment, it states that: 'No amendment to this Law shall be made, except in the same manner as it was promulgated'.³⁷³

If we look into the basic law of governance, we will find that it enables sharia law in all parts of this law. Articles 1 to 8 state that Islam is the religion of the country, the Quran and Tradition is its constitution, and the system of governance and the selection of governance shall be in accordance with sharia law. It also states that the system of governance shall be based on the principles of justice, consultation, and equality.

4.4.3 The Basic Law of Governance Regulating Trade:

This law gives an outline of the economic regulations and emphasizes the economic principles of the country in 9 articles. Article 14 states that 'All natural resources that are deposited underground, above ground, in territorial waters or within the land and sea domains under the authority of the State, together with revenues of these resources, shall be the property of the State, as provided by the Law'. Article 15 states that: 'No concessions or licenses to exploit any public resources of the country shall be granted unless authorized by provisions of the Law'.³⁷⁴ In sharia law the principle of franchise does not exist, neither does the right to invest in or exploit any public resources. But, sharia law acknowledges a similar form of contemporary franchise such as feudalism and monopoly. However, contemporary scholars agreed that only the leader of a muslim state has the right to grant the franchise, in accordance with the public interest.³⁷⁵

Public funds are inviolable and must be protected by the government, foreign residents, and citizens. This stems from the objective of sharia law to preserve public funds, which is part of the five necessities: 'five necessities are the preservation of religion, life, intellect, lineage, and wealth'. These funds are dedicated for a direct benefit such as schools and hospitals, or indirect benefits such as medical equipment. Therefore, it is forbidden in sharia law to own them, and they must be used for public purposes only. The jurists emphasized that public funds must include all of the funds

³⁷³ Royal decree no A/91, March 1, 1992, Saudi Arabian Basic Law of Governance; Al-Hudaithy, 'The Amendment of the Basic Law of Governance in Saudi Arabia'.

³⁷⁴ Saudi Arabian Basic Law of Governance (1992), art 15.

³⁷⁵ Ibrahim Al-Tanam, '*Franchise in Islamic Financial Transaction and Its provisions in Islamic jurisprudence*' (1st edn, Ibn Al Jouzi publisher 2009).

for projects, relying on the maxim which states: 'it is not permitted to exploit the public fund', which means prevent any action that would prejudice the purpose for which the public fund was allocated. Without distinction between the public officials and citizens, the Saudi government established the General Auditing Bureau (GAB) in 1971 to monitor all the country's revenues and expenditure, and also ensure appropriate use of public funds.³⁷⁶ Article 16 of the GAB law states:

In case of disclosing a violation, the GAB might, according to the importance of such violation ask the employer to carry out needed investigation with the responsible employee and inflict administrative punishment on him, or the GAB may resort to lodging a case against the implicated employee to the competent disciplinary board.³⁷⁷

Furthermore, an administrative decision by the Saudi Council of Ministers (No 733 in 1975) requested all government institutions to alert the GAB within 15 days of any infractions. In case of late reporting of infractions, the GAB has the right to take the case to the Control and Investigation Board (CIB) (established in 1971) which plays the role of the administrative prosecution. The roles of the CIB are to investigate complaints regarding any financial fraud by government institutions, by tracking the case and referring it to the Board.

As highlighted in articles 17 and 18, the rights of ownership, labour, and capital, are fundamental elements of the economy. The state guarantees that private property will be not taken away except for public interest, and there shall be fair compensation awarded to the owners. However, authorities normally resort to removal of property in the case of a lack of alternative, or if they cannot take it by consent. Furthermore, taking away property is not permitted if there is not a project approved in the annual budget, and the decision must be taken by a legal personality such as the minister, or the chairman of the board. The decision of expropriation must be advertised in one Saudi gazette, two local newspapers, and a copy of the advertisement must be affixed in the headquarters of the undertaker of the project. The owner of the property must be informed, and he or she has the right to have at least 30 days to evacuate the location.³⁷⁸

³⁷⁶ Royal Decree no. M/9, April 7, 1971 Saudi General Auditing Bureau Law.

³⁷⁷ *ibid*, art 16.

³⁷⁸ Jaber Abu Zaid, *Administrative Law in Saudi Arabia* (7th edn, Dar Hafiz 2012/2013).

One of the GPA's main principles is national treatment. However, the basic law of governance's articles 20 and 21 which related to taxation and zakat considered to be fairly ambiguous articles, as there is disagreement in interpreting them. These articles state that no tax or fees shall be imposed on people except if there is a need and it shall be on a just basis.³⁷⁹ However, many researchers are confused by the concept of zakat and tax. In Islamic jurisprudence, taxes are the amount of money imposed by the government for emergency needs, which used to cover overheads. From an Islamic perspective, taxes³⁸⁰ should be temporary, and if the reason for the imposing taxes is finished then the taxes should be cancelled. Sharia law does not consider tax to be permanent legislation, but it is an extraordinary case. Therefore, taxes should not be considered as part of the country's resources, but should be imposed in times of emergency only. Muslim scholars have many different opinions on the rules of imposing taxes, some of them including Abu Hanifah allow for the imposition of taxes, but within certain conditions. Other Muslim scholars including Ashabi (d. 723) are against taxes, and say that taxes should not be imposed on Muslims, because for Muslims the only financial duty is to pay zakat.³⁸¹

For non-Muslims there are other Islamic provisions which explain their financial duties, because zakat is not imposed on them.³⁸² Scholars argue that personal ownership should be respected, and taxes are considered to be an expropriation. But other scholars, who allowed the imposition of taxes, said that if there is a need for the taxes to build a school, hospital, or to pave roads they should be allowed. According to Imam Ghazali,³⁸³ the Shafaii School of thought³⁸⁴ authorizes the taking of taxes from rich people if rulers need the taxes for a public interest. Also, taxes should be considered as a principle of social solidarity, as individuals cannot gain money or build roads alone, because if there is no assistance from the community or government, then he or she will not be able to work or use a public facility.

³⁷⁹ Saudi Arabian Basic Law of Governance (1992).

³⁸⁰ Isaa Alomary, 'The Rule of Taxation in Islamic Jurisprudence' (*Islam Fiqh Website*, 2012) <<http://www.islamfeqh.com/News/NewsItem.aspx?NewsItemID=1181>> accessed 14 May 2014.

³⁸¹ Yosef Al-Qaradawi, *Fiqh Alzakat* (2nd edn, Arrisalah publisher 1969). P 968.

³⁸² Muhammed Aldado Alshonqity, *The Rules on Working in the Collection of Taxes* (2006) <<http://www.dedewnet.com>> accessed 26 June 2014.

³⁸³ Abu Hamid Muhammad ibn Muhammad Al-Ghazali, *Al-Mustasfa fi 'ilm al-isul* (on legal theory of muslim jurisprudence, Dar Alwatan 1997).

³⁸⁴ Shafi'i is the third school of Islamic jurisprudence.

Furthermore, he or she will not enjoy safety and stability. This derives from the principle of brotherhood which was advocated by sharia law.

It has been recognized by the researcher that taxes are one of the basic resources of the modern country, for many reasons. In the past there was no need to impose taxes on people, as there are today, since there were no enormous projects to be maintained regularly, such as schools and hospitals, which need money for staff, school supplies, and medical equipment. Zakat is not a substitute for taxes, because it has social and religious objectives. The recipients of zakat are usually people who are in absolute poverty, those who cannot meet their basic needs, non-Muslims who are sympathetic to Islam or wish to convert to Islam, people whom one is attempting to free from slavery, those who have incurred enormous debts, and street children or travellers. In addition, one of the sharia law maxims is ‘public harm takes a precedence over a private harm’, which means that taxes must be imposed if the state is in financial difficulties, where the state needs enormous amounts of money and the state’s treasury cannot cover the expenses.

As laid out above, it is clear that zakat is a special form of financial duty and has its own objectives. The objective of zakat is not to collect the money and spend it on public services. Therefore, in Saudi Arabia there is a special department which specializes in collecting Zakat. Furthermore, Islamic scholars who have authorized taxes have, at the same time, forbidden the mixing of zakat and tax revenue, because each of them has its own objectives.³⁸⁵ However, article 20 seems to be based on the jurisprudential view which states that taxes shall be imposed on people to achieve public interest, unless there is a natural resource such as oil, then the taxes shall be cancelled. However, articles 20 and 21 should be revised, because it is stated that; taxes can only be imposed on a just basis, but in foreign direct investment law there is a higher tax on foreign investors than local investors. Therefore, there is a need to achieve justice when dealing with foreign investors in order to be in accordance with the basic law of governance.

The government of Saudi Arabia has paid great attention to development. Article 22 emphasizes that economic development shall be achieved through a fair plan. Saudi Arabia first drafted its development plans in 1969, when the oil prices had increased,

³⁸⁵Al-Qaradawi (n 381).

which created an enormous surplus and was mostly spent on infrastructure and providing people with services. The first development plan commenced in 1970 and covered a five-year period. These were later called five-year plans. Since then, there have been nine five-year plans until 2014. The main objective of these plans is to enhance the national economy. This was explained in the first plan, which focused on giving the private sector the main role in the national economy, and reducing the reliance on oil.³⁸⁶ These plans also focused on enhancing the national economy by enacting laws which encourage privatization and private investment. Therefore, one of the features of the plans is the adoption of the principle of the free market in order to improve the quality of services, the outputs of private sectors, and preserve sustainable development.³⁸⁷ Saudi Arabia has been aiming to achieve these objectives through a ‘three-pronged approach: joining the WTO, a national privatization program, and through foreign direct investment. By transfer technology and promote national economy’.³⁸⁸

4.4.4 The Basic Law of Governance Regulating International Agreements:

Article 81 states, ‘The enforcement of this Law shall not prejudice whatever treaties and agreements with states and international organizations and agencies to which the Kingdom of Saudi Arabia is committed’.³⁸⁹ This article explained that the implementation of any treaty or agreement that Saudi Arabia had signed shall not be violated by the basic law of governance, because Saudi Arabia normally ensures that the international agreement which will be signed is not in conflict with sharia law. This is because Saudi Arabia is part of the international community and has a commitment to all agreements that it has signed. Moreover, in response to the openness of the global economy, sustainable development and the commitment to international agreements, the Saudi government has given great attention to these agreements, and they are superior to domestic laws. Therefore, for example, if there is

³⁸⁶ Mohamed A Ramady and John Saeed, 'Foreign direct investment: A strategic move toward sustainable free enterprise and economic development in Saudi Arabia' (2007) 49 *Thunderbird International Business Review* 37.

³⁸⁷ Al-Mahmood (n 3).

³⁸⁸ Ramady and Saeed, 'Foreign direct investment: A strategic move toward sustainable free enterprise and economic development in Saudi Arabia.' 41.

³⁸⁹ Saudi Arabian Basic Law of Governance (1992), art 81.

any dispute regarding trade issues, they will apply the international agreement on this dispute.

Following the Saudi basic law of governance, the Saudi Arabian government has issued a number of regulations. One of the most important regulations that was issued and modified was the government tenders and procurement law designed to organize the resources of the country and meet its needs in terms of goods and services.

4.5.1 The Legal Framework for Public Procurement in Saudi Arabia:

Saudi Arabia's judicial system is divided into two separate courts. Firstly, there is the Sharia Court, which deals with most of the cases, such as civil and criminal cases. The second is the administrative court or Board of Grievances which deals with the disputes between government entities and individuals or private sectors.³⁹⁰ It notable that from 2012, the Board of Grievances is not responsible for the enforcement of foreign judgments, even if related to government procurement.³⁹¹

4.5.2 The Legal Background to Public Procurement in Saudi Arabia:

In 1977, the Saudi Arabian government issued a new regulation for government procurement and published it in the Official Gazette. This regulation has been seen as brief, flexible and a short-term solution. However, the reason for this shortcut was due to the period, which was the beginning of the 1980s, where the price of oil had increased rapidly,³⁹² with the result that government spending in all sectors had

³⁹⁰ Ibrahim Al-Hudaithy, 'Legal Analysis of the New Saudi Procurement Regulations' (2011) 25 Arab Law Quarterly 103; Article 13 elaborates all the functions of the Board. It states that: 'Administrative courts shall have jurisdiction to decide the following:

(a) Cases relating to rights provided for in civil service, military service and retirement laws for employees of the Government and entities with independent corporate personality or their heirs and their other beneficiaries. (b) Cases for revoking final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, abuse of power, including disciplinary decisions and decisions issued by quasi-judicial committees and disciplinary boards as well as decisions issued by public benefit associations – and the like – relating to their activities. The administrative authority's refusal or denial to make a decision required to be made by it in accordance with the laws and regulations shall be deemed an administrative decision. (c) Tort cases initiated by the persons concerned against the administrative authority's decisions or actions. (d) Cases related to contracts to which the administrative authority is party. (e) Disciplinary cases filed by the competent authority. (f) Other administrative disputes. (g) Requests for execution of foreign judgments and arbitral awards'.

³⁹¹ The Royal Decree No 53 refers all foreign judgments to Sharia courts which is responsible to enforce them if they are not contrary to the provision of Sharia Law.

³⁹² Abdulla Al-Whibi, *The Rules Governing Administrative Contracts* (1st edn, Riyadh, 2008).

increased. The most important goals of the Saudi regime were the establishment of infrastructure projects in health, education and transportation, which had to happen quickly. This system has been amended and some new rules and administrative decisions were added. Preceding this regulation there had been a regulation of tenders and auctions, which was released in 1967 and contained in 197 articles that organized procedures and conditions for administrative contracts. The former regulation was unlike the latter in that there were more details and explanations in the previous one. However, the latter regulation came close to the former after the amendments and administrative decisions were added to it.

In the researcher's opinion, and to be more precise, the lack of the regulation in 1977 was not only because the government was in a hurry to build new projects such as hospitals, schools and roads, but also because there was a lack of legal advisors and legislation. At that stage there was limited expertise in terms of the law and the economy. Most of Saudi Arabia's regulations were introduced from other countries and, sometimes, imported regulations are not well suited, because each country has its own settings which are grounded in its own culture and traditions. Although international agreements normally provide requirements to be implemented in domestic law, nevertheless, international agreements such as the GPA do not play the role of the legislator. Also international agreements, such as the GPA, allow parties to the agreement the right to include exceptions and conditions in their commitment to an agreement, and include some conditions brought by some of the parties. Therefore, implementing the requirements of international agreements is different to importing legislation from another country.

The 1977 regulation has been replaced by the regulation of government tenders and procurement law (New Law), which was issued in 2006 under the Council of Ministers Resolution No. 223.³⁹³ The New Law contains 81 articles, divided into 13 parts, whereas the implementing regulation contains 155 articles.³⁹⁴ All government bodies are subject to the provisions of the New Law. It is taken into account when implementing all international treaties and agreements to which Saudi Arabia is a party. It is the most important law to have been issued in recent years. It represents the efforts of the country's reforms to achieve efficiency and transparency; moreover, it

³⁹³ Saudi Arabian Government Tenders and Procurement Law.

³⁹⁴ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia.

supports the private sector to contribute to the country and to achieve sustainable development. It also supports the private sector in playing a major role in the field of international trade and international competition.

4.5.3 The Reconstruction of the New Law:

One of the most important ‘developments’ of the New Law is that it is briefer than the 1977 Saudi procurement regulations. Moreover, even though the New Law has reduced the procedures of tenders, it is more effective than the 1977 regulation. There are reasons behind the abbreviation of the New Law which are difficult to explain. However, governments normally resort to simplifying regulations to make them transparent, flexible, and easy to adapt. Furthermore, some governments make laws brief in response to outside pressures, such as international organizations.

There is no doubt that rules exist in order to provide safety to the community by regulating their relationships, because the alternative to the absence of the rule of law is widespread corruption and chaos. However, the enactment of a new regulation is subject to many elements, including fairness and justice, which means treating individuals equally. Moreover, when enacting a new law the incentives and the benefits should be clear. For example, the road traffic act is necessary to save human life and the absence of these laws would result in many accidents.

On the other hand, long, complicated and detailed regulations do not necessarily indicate discipline, less corruption, and the development of the country, because some legislators use these intricate regulations to engage in corrupt practices. Furthermore, some heads of administrative departments issue many unnecessary administrative circulars to camouflage their illegal practices, such as bribes. Therefore, because of these cumbersome administrative circulars and complex rules, some people pay kickbacks to circumvent these excessive procedures. For those who do not pay bribes, they are forced to follow the process, and even government tenders have been affected by these delay tactics, whereby some competitors lose the opportunity to participate in the tender. Furthermore, some government departments tend not to publish their

administrative circulars at an appropriate time, therefore forcing people to engage in illegal practices to speed up their procedures.³⁹⁵

To take this point further it would be justified if a country suffers from specific issue such as awarding a contract to certain people to have long and detailed provisions which focus more on accountability. However, the researcher would agree with theory which states that, a large number of regulations and administrative circulars is a sign of corruption.³⁹⁶ Therefore, legislators and government authorities should strike a balance between the cost and benefit of the new measures when enacting a new law, or when issuing administrative circulars. These measures should be necessary and appropriate in the light of the objective sought.³⁹⁷ Moreover, the increase in regulations enactment might result in contradictory laws, leading to negligence and lack of due diligence. Some complex laws will need be reviewed in order to make them clearer and adaptable. Moreover, long procedural rules will lead bureaucrats to be accused of corrupt practices. Thus, succinct procedural rules will reduce corruption, because lengthy procedural rules are susceptible to corrupt practices. For example, the Saudi Arabian Customs Department suffered from corruption for many decades. It was the most corrupt Customs Department in whole of the Middle East at that time. The government became aware of the corruption affecting the Customs and formed a committee to reform it. The committee's main focus was the modification and abbreviation of the procedural rules as they were a series of lengthy and complicated procedural rules. The committee did not dismiss any of the employees, but some of them who were involved in corruption voluntarily resigned after the modification and abbreviation of the procedural rules. Consequently, the abbreviation of procedural rules should be considered when enacting a new regulation.³⁹⁸ Moreover, in terms of tendering procedures, the amendment of procedural rules by making them clearer, shorter, and briefer, will streamline all the processes of tender.

4.5.4 The Concept of Public Procurement:

³⁹⁵ Saleh Al-Husain, 'The Exaggeration in Codification could Lead to Administrative Corruption' (Rowaq Organization 2012).

³⁹⁶ Ibid.

³⁹⁷ Peter Braun, 'A Matter of Principle(s) -The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives' (2000) Public Procurement Law Review 39.

³⁹⁸ Al-Husain (n 395).

Public procurement refers to the function of purchasing goods and services which the government needs to carry out its functions from outside bodies.³⁹⁹ It is a significant part of the economy in most industrialized countries as well as in Saudi Arabia.⁴⁰⁰ However, Saudi Arabia has always rejected the provision of statistical data on government procurement and normally claims that the government did not collect data on such procurement.⁴⁰¹

4.5.5 The Objectives of the Public Procurement System:

There are many objectives for public procurement and these are implemented through many means. The regulatory system is one of these means. There are many divisions of the objectives of the public procurement system. Public procurement has been classified into three objectives: economic efficiency, social and political promotion, and trade objectives.⁴⁰² According to Arrowsmith,⁴⁰³ there are many objectives of the public procurement system including: value for money, integrity and accountability, equal opportunity and fair treatment, efficient implementation of industrial, social, and environmental objectives, opening up public procurement to international trade, and efficiency in the procurement process. However, countries vary in identifying their objectives in public procurement, some countries pay more attention to a particular objective, such as equality, and some countries pay more attention to good value. Therefore, some countries are willing to pay a higher price for public procurement. However, the differences in determining the objectives shows the approach of countries to how they enact their public procurement law. For example, the regulations which put more weight on accountability are most likely to provide a detailed legal system, which allows for monitoring and follows all the procedures of tenders and contracts. On the other hand, it might lead to the rejection of the contract due to the cost of the project.

The emergence of some relatively new procurement law in the world and also boundaries set by donor countries on emerging economies to adopt a procurement

³⁹⁹ Sue Arrowsmith and Don Wallace, *Regulating public procurement: National and international perspectives* (Kluwer Law International 2000).

⁴⁰⁰ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁴⁰¹ Ghulam (n 334).

⁴⁰² Trepte (n 155).

⁴⁰³ Arrowsmith and others, *Public procurement regulation: an introduction*.

system that is like those in developed countries have created some debate on how to enact advanced procurement law. It has also raised questions on what is the appropriate approach to implement this law. Many countries and organizations offer their version of public procurement law as being the ideal procurement system. The donor countries normally offer guidelines to the recipient countries.⁴⁰⁴

Countries who are members of international or regional organizations, such as the EU, have adopted the EU directives for public procurement in their legal systems. The members of the WTO have also been asked to modify their legal system to be in accordance with WTO rules that regulate public procurement. However, it was easy for the countries which are members of the EU to join the GPA, because the GPA reflects some of the agreements which were approved in the EU for public procurement.

The GPA has made an enormous effort to enact a special provision for the developing countries. In some cases, such as Saudi Arabia, the administrative team of the GPA has made the commencement of negotiations to access the GPA as a pre-condition of joining the WTO. Therefore, Saudi Arabia has started to modify its procurement law. Many committees have been appointed to spearhead the work of accession to the GPA. Moreover, the Saudi Arabian government believed that the development of the public procurement system will result in better services and products. Consequently, in 2006, Saudi Arabia issued royal decree number M/58 to be the new law for public procurement.

4.5.6 The Aims of the New Procurement Law in Saudi Arabia:

The New Law starts with the main principles and ends with general regulations.⁴⁰⁵ Articles 1 to 9 present the main principles of the New Law. Article 1 refers to the aims which are: first, protecting public funds⁴⁰⁶ by ensuring that there is no influence of personal interest, aiming to fight corruption. This is derived from the Islamic Tradition which states that: ‘Some people spend Allah’s Wealth (i.e. Muslim’s wealth) in an unjust manner; such people will be put in the (Hell) Fire on the Day of

⁴⁰⁴ Trepte (n 155).

⁴⁰⁵ Al-Hudaithy, 'Legal Analysis of the New Saudi Procurement Regulations'.

⁴⁰⁶ Public funds is money that is owned by all people from a certain region or a group of them, which they have the right to benefit from, without any personal interest.

Resurrection.⁴⁰⁷ The protection of public funds is subject to civil and criminal protection. Therefore, the public funds must be used for the purpose of which it was determined, which is public interest.

The second aim is achieving the maximum degree of economic efficiency in government procurement, and performing government projects at fair and competitive prices. This aims to encourage the principle of low prices for procurement, as article 9 requires the prices not to exceed the prevailing prices.⁴⁰⁸ Most countries encourage this in their procurement system. However, sharia law adopted the principle of the 'agreement must be kept', although due to the increase of the price of building materials and labour all around the world many small enterprises have gone bankrupt and projects are stalled. Therefore, Islamic scholars and jurists have attempted to find a remedy to address these issues. Othman (a member of the Islamic research academy at Al-Azhar-Egypt) has come to an opinion that the increase of prices is not anyone's responsibility, but this is due to circumstances beyond anyone's control, therefore, solidarity is required among all parties.⁴⁰⁹ Furthermore, in the case of lack of a solution, Islamic jurisprudence authorized judges to interfere and solve the issue in the light of sharia law and its maxims, including 'harm should be removed'. However, this goal needs to be revised, because there are other aspects that need to be looked at, such as the history of the contractors, and the efficiency of their projects. Therefore, the new law should focus on the best value rather than the lowest price. Moreover, researchers shall propose to senior scholars in Saudi Arabia that there is a need to preserve public funds, and keeping the lowest price criteria may harm public fund. The lower price criteria has caused many problems, in particular for large projects. Furthermore, it might be against the public interest because awarding the contract to the lowest bidder has created many disadvantages. Some contractors have not implemented their projects in accordance with the technical specification, or have followed their own criteria in classifying the quality of the materials. For example, some competitors use low quality iron for the lamp posts, or they use the lowest quality road signs which might not be appropriate for the environment due to the extreme heat. Consequently, in terms of the prices, the legislator should focus on (i)

⁴⁰⁷ Al-Bukhaari (n 222).

⁴⁰⁸ Saudi Arabian Government Tenders and Procurement Law art 9.

⁴⁰⁹ Jamal Alsaied, 'Price Differences ' (On Islam 2008) <<http://www.onislam.net/arabic/fiqh-a-tazkia/fiqh-papers/8084/106858-2008-05-29%2013-10-06.html>> accessed 12 November 2014.

the best quality even if it is a higher price, because this will reduce the maintenance cost, which is very expensive, and (ii) awarding to the lowest bidder should be eliminated.⁴¹⁰

The third aim is to promote competition and integrity, so as to ensure that there is a fair treatment of competitors in all procedures of tenders. Competition policy measures were adopted by the Saudi government to ensure that these measures will be employed to guarantee a fair competitive environment. Although it has been argued that ‘competition is often restricted in developing countries,’⁴¹¹ Saudi Arabia is an exception in the case of developing countries, due to the economic prosperity gained from oil production. Saudi Arabia is practicing privatization, according to its fifth plan, and in fulfilment of WTO requirements. Furthermore, Saudi Arabia realized that privatization could introduce competition. Therefore, privatization is being implemented in Saudi Arabia, and competition law applies to all related laws. Although articles 3 and 5 contradict the principle of competition, because article 3 emphasizes that this law should not breach the provisions of the foreign direct investment law, which does not treat foreign and local contractors equally. Article 5 states that, ‘Priority shall be given to national manufactured goods, products and services and to those treated as such’.⁴¹² This article is devoted to the principle of favouritism, which is against the objective of competition.

The fourth aim is achieving transparency in all stages of tenders and procurement procedures. Transparency is one of the most important principles in procurement regulations, to guarantee that all procurement information is available to all contractors. Most procurement regulations encourage this principle in their legal system. Therefore, if procuring bodies do not provide the information to the competitors, or they do not advertise the tenders, they would breach the principle of transparency. The objective is to reduce discriminatory practices, such as not advertising tenders, and not opening up procurement for all interested competitors.⁴¹³

⁴¹⁰ Abdul-aziz Al-Sohaibany, 'A Critical Study of the Government Tenders and Procurement Law' *Alriyadh* (Riyadh-Saudi Arabia 2 December 2010) <<http://www.alriyadh.com/581603>> accessed 2 April 2014.

⁴¹¹ Rod Falvey and others, *Competition policy and public procurement in developing countries* (credit research paper 2008).

⁴¹² Saudi Arabian Government Tenders and Procurement Law, art 5.

⁴¹³ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

This article in the New Law is similar to the article of the old law, which requires the procuring entity to provide all information to all interested parties. However, the New Law forces a procuring body to advertise in the official gazette, and article 7 allows public authorities to advertise their competition by electronic means. The article states that, 'the bid submission date and the sealed-bid opening date as well as places thereof shall also be specified in the tender announcement'.⁴¹⁴

One of the developments of the New Law is the requirement that all government entities disclose the result of the competition.⁴¹⁵ Although the New Law does not explain the reasons for the rejection of competitors, because the main requirements from competitors is the most economical prices. Only article 23 refers to the fact that, even if a competitor has the lowest prices, the procurement authority can recommend the exclusion of any bid if the bidder has many projects at the time of the competition and the authority believes that the size of his contractual obligations rises to a level that exceeds his financial or technical abilities.⁴¹⁶ However, article 23 does not give a transparent answer to other competitors who have been rejected. As this principle was imported from the old law the positive and negative impacts remain the same, which violates the efforts of reforming the legal system.

There are some barriers to implementing the principle of transparency in Saudi Arabia. Access to the judicial decisions of the Board of Grievances is very difficult, even if there is not a law prohibiting any disclosure of the Board's decisions. Moreover, there is difficulty in obtaining administrative circulars or instructions related to procurement, as they are not well gathered,⁴¹⁷ which creates an incoherent database and breaches the principle of transparency. The principle of transparency has existed since the time of the Prophet, therefore this principle is highly recommended by sharia law. On the other hand, this principle has been reintroduced in the contemporary era as a tool of reform, and to also play the role of monitor, to safeguard all government practices. However, it has been contended that transparency in the procurement process entails the following criteria: (i) that the terms and criteria guiding the procurement should be made readily available, (ii) the reasons for the

⁴¹⁴ Saudi Arabian Government Tenders and Procurement Law, art 7.

⁴¹⁵ Al-Hudaithy, 'Legal Analysis of the New Saudi Procurement Regulations'.

⁴¹⁶ Saudi Arabian Government Tenders and Procurement Law, art 23.

⁴¹⁷ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

procurement award result and award should be made readily available, and (iii) the term ‘expeditiously’ is to guard against any deviations or discrepancies in the procurement process and the measures utilized to remedy the situation.⁴¹⁸

4.6 Government Tenders and Procurement Law in Saudi Arabia:

An Outline of the New Law

4.6.1 Applicability:

Article 69 of the New Law states that:

Without prejudice to effective international agreements and treaties to which the Kingdom is a party, this Law and its Implementing Regulations shall apply to all government authorities, ministries, departments, public institutions and public bodies with independent corporate personality. As for agencies with their own laws, this Law shall apply to cases not provided for in their laws.⁴¹⁹

This shows that the legislator and all government institutions and agencies are subject to this Law. However, the New Law does not apply to any governmental institute which has its own law of procurement, such as the Ministry of Defence and the Ministry of National Guard.⁴²⁰ When comes to the types of government procurement that are covered by the New Law, it stresses that all government works and procurement shall be conducted through public tender.⁴²¹ However, certain categories of procurement have been exempted under the provisions of the New Law.⁴²² In

⁴¹⁸ Simon Evenett and Bernard Hoekman, 'Transparency in government procurement: What can we expect from international trade agreements' in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution* (Kluwer Law International 2003).

⁴¹⁹ Saudi Arabian Government Tenders and Procurement Law, art 69.

⁴²⁰ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 151.

⁴²¹ Saudi Arabian Government Tenders and Procurement Law, art 6; Ahmed Al-Said, *Legal Analysis to the Saudi Arabian Government tender and Procurement Law. Comparative Study with Egyptian Procurement Law* (1st edn, Riyadh: Law and economy library 2013).

⁴²² Article 47 of the New Law provides details of the exempted procurement from public tender. It states that: 'As an exception from public tenders, a Government Authority's needs from the following works and procurements may be met in accordance with the specified methods for their purchase, even if their cost exceeds the eligibility of direct purchase: (I) Weapons and military equipment and their spare parts by direct purchase from manufacturers. The best offer serving public interest shall be selected by a ministerial committee formed for this purpose by a royal decree of at least three members in addition to its chairman. It shall then bring its recommendations before the President of the Council of Ministers for approval. (II) Consultancy and technical works, studies, setting specifications, plans and supervision of their execution, services of accountants, lawyers and legal advisors by inviting five specialized offices licensed to provide such services to submit their bids within a period determined by the Government Authority. The award of the bid shall be determined in accordance with the provisions of Article 16 of this Law. (III) Spare parts of mechanical, electrical and

addition, the New Law provides provisions for projects and work performed by governmental authorities outside of Saudi Arabia and requires that they be subject to the New Law.⁴²³

Although the New Law pays great attention to the principle of commitment which requires all government authorities to apply the provisions of the New Law, the government authorities are permitted to request an exemption from this principle. Moreover, article 79 of the New Law provides that in the case of requesting an exemption by the procuring entity, it should be brought before a committee presided over by the president of the Council of Ministers, which includes the Minister of Finance, the minister concerned, and two other ministers to review the request for the exemption. Only then will it be given the King's royal seal of approval.⁴²⁴ Furthermore, the New Law allows the authorities performing a project or work outside of Saudi Arabia to request an exemption from the provisions of the New Law if needed.⁴²⁵

It is submitted that there are some parts of procurements that need to be exempted from the New Law, because of the complexity of the projects, which might need advanced skills and equipment, which at times a foreign company can provide. For example, the Council of Ministers has approved a request to exempt Makkah Public Transport Program (MPTP) from applying the New Law.⁴²⁶ Therefore, MPTP is not required to advertise or to follow tender procedures. The MPTP, which cost 62 Billion SAR (11 Billion GBP), includes building bus networks and metro systems in the city of Makkah.⁴²⁷ The project's implementation is projected to take ten years in three phases. This project was exempted from the New Law due to the need for highly qualified companies with long experience in this field to implement this project.

electronic machines and equipment by inviting at least three specialists to submit their bids within a period determined by the Government Authority. The competent minister or the head of the independent agency shall form a committee to examine these bids and select the best of them. (IV) Goods, constructions or services available only through one supplier, contractor or producer and with no acceptable alternatives, shall be procured by direct purchase subject to the approval of the competent minister or the head of the independent agency in accordance with the procedures provided for in the Implementing Regulations. (V) Medical requisites urgently needed in case of outbreak of epidemics'.

⁴²³ Saudi Arabian Government Tenders and Procurement Law, art 70.

⁴²⁴ *ibid*, art 79.

⁴²⁵ *ibid*, art 70.

⁴²⁶ Council of Ministers Decision No. 45268 (2012).

⁴²⁷ Khamis Al-Sadi, 'The Implementing of Makkah Public Transport Program' *Al Eqtisadiyah* (Riyadh, 12 March 2013) < http://www.aleqt.com/2013/03/12/article_738552.html > accessed 9 July 2014.

Therefore, the Development Commission of Makkah and Mashaar has signed a contract with a French company 'Systra' to conduct a preliminary design for the metro. It has also signed a contract with a German company 'BW Engineers' for the second phase of the project.⁴²⁸

It has been noticed that there are a growing number of requests from government authorities asking to be exempted from the New Law. This growth of exemption is a result of the provision of article 79 of the New Law, which does not determine and limit the nature of the procurement and projects and who is entitled to apply. Moreover, the Minister of Finance has sent a letter to the Head of the Council of Ministers claiming that the requests for exemption from the New Law has been on the increase recently. Furthermore, he claimed that the government authorities request exemption so that they can award the contract to a specific contractor, or use a limited tender method. The Head of the Council of Ministers has instructed that the government authorities be subject to the New Law.⁴²⁹

This issue could be addressed by modifying article 79 which should limit the exemption request to only certain projects.⁴³⁰ Moreover, article 151 of the implementing regulations of government tenders and procurement law provides a list of procurements which are exempted from the provisions of the New Law, such as advertising the tenders. Therefore, article 151 should include all exempted procurements, to make the procurement system more transparent, and reduce the practice of corruption which is often a result of exemption from the New Law.

4.6.2 Methods of Procurement:

In Saudi Arabia, the New Law provides two methods of procurement only.⁴³¹ First, open tender, as it states in article 6 of the New Law 'All government works and procurements shall be put up for public tender except those exempted under the provisions of this Law'.⁴³² However, the New Law does not mention limited tenders,

⁴²⁸ *ibid.*

⁴²⁹ Ahmed Amer, 'The Increase of Exemption Request has a Negative Impact on the Government Tenders and Procurement Law' *Alwatan* (Abha, Saudi Arabia, 8 October 2013) <http://www.alwatan.com.sa/Politics/News_Detail.aspx?ArticleID=163430 > accessed 6 July 2014.

⁴³⁰ Al-Said (n 424).

⁴³¹ *ibid.*

⁴³² Saudi Arabian Government Tenders and Procurement Law.

meaning that all projects that cost over 100 million Saudi Arabian Riyal (SAR)⁴³³ or less are treated in the same way. The new law has not clarified when the procuring entity can be excluded from the open tender method. Moreover, the procuring entity only required to contact the cabinet office and ask for a permission to be exempted from the new law.

The generalisation of this Law allows unqualified bidders to compete for large government projects. In fact, it goes against the principle of quality if the New Law allows all bidders to compete for large projects on the same footing, as they will need more experience in technical specification, financial ability, advanced tools to perform the projects, and employ a large number of workers, a main barrier for small companies.

The second method is direct purchase. The rules of direct purchase only apply to urgent cases and should not exceed a million SAR.⁴³⁴ However, the public sector is not the same as the private sector, because it is normal for the public sector to have their suppliers through a competitive procedure, whereas in the private sector the competitive procedure is used less often.⁴³⁵

Although the New Law explicitly mentions two methods of tenders, which are the legal basis for all contracts, nevertheless, government authorities traditionally practise the use of another tendering system called limited tender.⁴³⁶ The New Law has not explicitly included the expression of limited tender, nevertheless, it provides some provisions for limited tender. For example, article 47 of the New Law provides two cases of tender where a government authority may conduct limited tender, even if their cost exceeds the eligibility of direct purchase. The first case is:

Consultancy and technical works, studies, setting specifications, plans and supervision of their execution, services of accountants, lawyers and legal advisors by inviting five specialized offices licensed to provide such services to submit their bids within a period determined by the government authority. The award of the bid shall be determined in accordance with the provisions of Article 16 of this Law.⁴³⁷

⁴³³ Saudi Arabian Riyal is the currency of Saudi Arabia, it equals 3.75 USD (Fixed rate).

⁴³⁴ *ibid*, art 44.

⁴³⁵ Arrowsmith et al., *Public procurement regulation: an introduction*.

⁴³⁶ However, a part of the two cases provided by art 47 (b) (c) the use of the method of limited tender is only permitted if it was approved by the head of Council of Ministers, before that the government authority shall request an exemption to be brought after the Council of Ministers.

⁴³⁷ Saudi Arabian Government Tenders and Procurement Law, art 47 (B).

The second case is:

Spare parts of mechanical, electrical and electronic machines and equipment by inviting at least three specialists to submit their bids within a period determined by the Government Authority. The competent minister or the head of the independent agency shall form a committee to examine these bids and select the best of them.⁴³⁸

The latter cases would not be open tenders nor direct purchase.⁴³⁹ Moreover, these cases have been categorized as a limited tender according to Egyptian tender law, as article 3 of 89/1998 law (Egyptian Tender Law) elaborates when the limited tender can be used. It states that:

Limited Tender is applicable in cases where the nature of the contract requires restricting the participants in the tender to certain suppliers, contractors, consultants, technicians, or experts, whether foreign or domestic, provided that they have the technical and financial qualifications to fulfill the requirements of the work.⁴⁴⁰

From the above quote it is clear that the New Law has three methods of tender, open tender, limited tender, and direct purchase. Although limited tender has not been considered as a method of tender in the New Law, it does exist, and has been practised on many occasions.⁴⁴¹ Therefore, to achieve the principle of transparency, the researcher suggests that instead of requesting an exemption from the Council of Ministers to conduct a limited tender, which is normally for large projects, a new provision should be added to the New Law to regulate the use of limited tender. Moreover, the use of limited tender should be applied for specific cases and listed in the regulations of the New Law.

4.6.3 The Specifications and Terms before Publishing the Tender:

When the government intends to publish a contract it has to follow some procedures that have been provided by the New Law. These procedures ensure the principle of equality among tenders, as well as the achievement of the principle of transparency. Article 65 of the New Law stresses that when the government authority drafts the specifications and terms of the tender it should ensure that it serves the public interest, moreover, they should not prescribe any specification that may mention certain

⁴³⁸ *ibid*, art (C).

⁴³⁹ Al-Said (n 421).

⁴⁴⁰ Egyptian Tender Law (Qanun Almuzaidat wa almonaqasat) 1998 art 3.

⁴⁴¹ Such as King Saud University Medical City, which will be mentioned in the next chapter.

companies or suppliers.⁴⁴² Furthermore, the government authority should not exaggerate the terms for the purpose of awarding the tender to a certain tenderer,⁴⁴³ and the requirement of the project should not exceed the need of the projects.⁴⁴⁴

One of the contradictions between the New Law and its implementing regulations is that article 9 of the implementing regulations permits the government authority to sign a contract with a supplier if the supplier suggests a sample that would meet the requirement determined by the government authority.⁴⁴⁵ On the other hand, if the government authority has already determined the specification of the procurement, it would mean that the sample suggested by the supplier would be worthless, because the government authority has already determined the specifications, and the procurement will be within the boundaries of the determination.⁴⁴⁶ Therefore, to implement the principle of transparency, article 3 of the implementing regulations emphasises that the government authority should update all procurement information. Moreover, it states that ‘the government authority shall review the technical specification, drawing, and plans, and make any amendments or corrections prior to putting their works up for public tender’.⁴⁴⁷ In addition, and for the purpose of reducing corruption, the procurement law should regulate the issue of sampling especially in cases of the direct purchase method. The sample that is to be provided by the supplier should be disclosed by the government authority and its employees, because it could be assumed to be a bribe. For example, if the government authority intends to procure goods such as laptops or computers, some suppliers may give the employee a sample of the goods as a present, normally they will be consider it to be a sample, but in fact it is a bribe as they has not been declared, and it may influence the process of direct purchase.

4.6.4 The Advertisement of Tenders in the New Law:

⁴⁴² Saudi Arabian Government Tenders and Procurement Law, art 65.

⁴⁴³ Salem Al-Motaoue, *Public Contract in The Light of Government Tender and Procurement Law in Saudi Arabia*, (2nd edn, 2008).

⁴⁴⁴ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 1.

⁴⁴⁵ *ibid*, Article 9 states that: ‘supply may be carried out on the basis of a sample determined by the Government Authority or suggested by the bidder, provided that it is consistent with the terms and specifications determined by the Government Authority’.

⁴⁴⁶ Al-Said (n 421).

⁴⁴⁷ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 3.

The announcement of tenders is considered to be the first phase of contracting procedures. It is a method to invite all interested tenderers to participate in the tenders, and gives them the opportunity to demonstrate their abilities,⁴⁴⁸ such as financial and technical abilities. However, there are other methods to invite tenderers to submit their bids, such as sending official letters to certain suppliers or contractors in the case of limited tenders.⁴⁴⁹ Therefore, the announcement of tenders is normally applied to open tender.⁴⁵⁰

Despite the announcement of a tender, it is not considered to be an offer by the procuring entity (which is an element for a contract to be legally binding), it has to be transparent and comprehensive. Thus, announcement of a tender is a necessary part of the tender to ensure that the procuring entity implements the principles of transparency and equal opportunities. Moreover, it has been affirmed that one key element of transparency is to announce the tender as early as possible in a medium equally accessible to all interested parties.⁴⁵¹

The New Law requires all procuring entities which are subject to the New Law to publish the intended procurement in the Official Gazette, two local newspapers, and through electronic means.⁴⁵² Only local suppliers and contractors are allowed to participate in tenders and contractors, however, foreign investors can join tenders if there is not a local contractor to undertake the project, although they shall be subject to foreign direct investment law.

However, article 7 adds a special provision for the ‘work and projects of special nature’, such as the building of airports and nuclear stations.⁴⁵³ Article 7 of the New Law provides that if there is not a local supplier or contractor to perform the work and

⁴⁴⁸ Omar Al-Khouli, *Summary of The Administrative Contracts*, (2nd edn, Alshqry Library for Publishing and Distribution 2012).

⁴⁴⁹ *ibid.*

⁴⁵⁰ Because it has been argued that sending an official letter to suppliers and contractors to participate in a limited tender is a method of publishing the tender. To refute this argument, the researcher would suggest that the invitation by official letter to contractors and suppliers is different to the concept of publishing of the tender. Therefore, the provisions of transparency would not apply to limited tenders.

⁴⁵¹ Braun (n 397).

⁴⁵² Saudi Arabian Government Tenders and Procurement Law, art 7 (a).

⁴⁵³ Al-Khouli (n 448).

project of a special nature, then the procuring entity should announce the tender in Saudi Arabia⁴⁵⁴ and abroad, in Arabic and in the English language.⁴⁵⁵

4.6.5 Submission of Bids and Opening of Sealed Bids:

The New Law emphasizes that bids shall be submitted in sealed envelopes on the specified date and place to ensure the confidentiality of the bid. Moreover, the government authority shall not accept any bids after the expiration of the specified date.⁴⁵⁶ For the first time, the New Law allows the use of electronic means to submit and open bids in accordance with the Implementing Regulations of the New Law.⁴⁵⁷ The competitor shall submit a tender security (deposit) of 1% to 2 % of the value of the contract, nevertheless, the tender security is not required in the case of direct purchasing or contracting by a charity.⁴⁵⁸ Charitable organizations have never been mentioned in the former law, it is one of the new developments of the New Law to regulate the relationship between public agencies and charitable organizations. This mention of charity organizations is an encouragement to them to participate in the national economy.⁴⁵⁹

Each government authority shall form at least one committee to open sealed bids. The committee shall include at least three members and they must attend all meetings of the committee, and the head of the committee shall be in grade ten in the Saudi civil service law. Furthermore, this committee shall be reformed every three years. Finally, the obligation of this committee is to open sealed bids but not to examine the bids.⁴⁶⁰ The researcher argues that the New Law should not insist that the committee members must attend all of the meetings, because it has been noticed that the provision of the law which requires the members of the committee to attend all meetings has caused some delays in forwarding the documents to the bids committee for examination⁴⁶¹ and caused delay in completion of projects, due to the absence of a member of the committee. Moreover, this delay may open the door for a negative influence from

⁴⁵⁴ In the case of special nature of work and projects, the procuring entity must still apply the provisions of the New Law. Therefore, it shall announce the tender in the official gazette, two local newspapers, and electronic means.

⁴⁵⁵ Saudi Arabian Government Tenders and Procurement Law, art 7 (b).

⁴⁵⁶ Mohammed Thonibat, *Public Contract*, (1st edn, Law and Economy Library 2012).

⁴⁵⁷ Saudi Arabian Government Tenders and Procurement Law, art 10.

⁴⁵⁸ Saudi Arabian Government Tenders and Procurement Law, art 11.

⁴⁵⁹ Al-Hudaithy, 'Legal Analysis of the New Saudi Procurement Regulations'.

⁴⁶⁰ Saudi Arabian Government Tenders and Procurement Law, art 14.

⁴⁶¹ Al-Said (n 421).

outside bodies. Therefore, the committee should carry out its obligation on the specified dates.

4.6.6 Examination of Bids and the Power to Contract:

The objective of this chapter of the New Law is to reduce corruption and promote transparency and quality of the tendering procedures.⁴⁶² Each government body shall appoint at least one committee to examine the bids, and it should give its recommendations based on the best offer. Moreover, the committee can support its recommendation by presenting a report from a specialized technician.⁴⁶³ The committee is not forced by the law to justify their recommendations, and their recommendation for awarding contracts is not normally audited by the head of the department due to time constraints. Consequently, the researcher suggests that there should be a report that includes all the justifications for awarding contracts. Also, before awarding contracts this committee should review all claims and the bidders who have not won contracts should have the opportunity to obtain all the information why they failed to win the contract.⁴⁶⁴

It is not permissible for the president of the committee to examine bids, nor to have the power to decide on the awarding of bids.⁴⁶⁵ The bid examination committee can cancel the tender (i) if the prices of competitors are above the average of the market prices, however the committee shall negotiate with the lowest price tenderer to reduce its price and if it refuses to lower the price to be the same level as the market prices, then the tender shall be cancelled, or (ii) if the cost of the tender exceeds the amount of money allocated for the project, and the committee fails to reduce some amount of items.⁴⁶⁶ However, the New Law has given authority only to ministers for the cancellation of tenders if the provisions of the New Law are breached.⁴⁶⁷

4.6.7 Drafting the Contract and the Period of Execution:

⁴⁶² Therefore, the New Law requests that the president of the examination of bids committee shall be in grade 13, while the president of the committee of opening sealed bids shall be at least in grade 10 (which is lower than grade 13). Also, also the examination of bids committee shall be reformed every year, and it shall include a comptroller.

⁴⁶³ Saudi Arabian Government Tenders and Procurement Law, art 16.

⁴⁶⁴ Saafah Institution, *Proposed Amendments to the Government Tenders Procurement Law* (2014).

⁴⁶⁵ Saudi Arabian Government Tenders and Procurement Law, art 17.

⁴⁶⁶ *ibid*, art 21.

⁴⁶⁷ *ibid*, art 25.

The New Law mentions that there shall be a contract form approved in accordance with the New Law and Arabic must be the language for all contracts. However, another language other than Arabic may be used, but the Arabic language shall be the only language used when interpreting a contract.⁴⁶⁸

The execution period for the contract shall not exceed five years for services, such as maintenance and cleaning, and for public works projects the period shall be equal to the amount and the nature of the work, and also for the annual funds allocated for the project.⁴⁶⁹

4.6.8 Penalties and Extensions of the Contract:

In the New Law the sanctions imposed by ‘the government authority’ against contractors are varied. These could be a financial penalty, rescinding of a contract or executing it at the contractor’s expense.⁴⁷⁰ On the other hand, the government authority does not have the right to boycott a contractor who violates the terms and specification of the project. The government authority should submit a claim for the boycott of the contractor to the Ministry of Finance to decide on the merits of the case.⁴⁷¹

In terms of penalty, if the contractors delay the execution of the contract beyond the specified date, then they will be subject to the penalties which should be 10% of the value of the contract and 6% of the value of a supply contract. If the contractors default in fulfilling the obligations of a maintenance contract, then they should be subject to a penalty which should not exceed 10% of the value of the contract.⁴⁷²

⁴⁶⁸ *ibid*, art 27 & 29.

⁴⁶⁹ *ibid*, art 28.

⁴⁷⁰ Article 53 of the New Law provides the cases which the government authority may withdraw the work, rescind the contract, or execute it at the contractor’s expense, these cases are: ‘(i) If it is proved that a contractor attempts by himself or through others, directly or indirectly, to bribe an employee of an Authority subject to the provisions of this Law or has procured the contract by way of bribery. (ii) If a contractor delays commencement of the work, procrastinates in its execution or is in breach of any of the terms of the contract and fails to rectify the situation within fifteen days from the date of notifying him in writing to do so. (iii) If a contractor assigns the contract or subcontracts its execution without the prior written permission of the Government Authority. (iv) If a contractor becomes bankrupt, files for bankruptcy, is proven insolvent or an order is issued to put him under receivership, or if the contractor is a company liquidated and dissolved. (v) If a contractor dies and his personal qualifications were taken into consideration in the contract. The Government Authority may continue the contract with the heirs if they have adequate technical and financial guarantees’.

⁴⁷¹ Further detail on the issue of boycotting contractors will be discussed in section 4.7.1, in this chapter.

⁴⁷² Saudi Arabian Government Tenders and Procurement Law, art 48, 49.

Regarding the extension of the contract, the period of executing the contract can be extended with an official agreement with the responsible governmental department if it is due to unforeseen circumstances, including if the annual funds allocated for the contract are not adequate to execute the contract within the specified time. However, the extension of the contract for the previous case (unforeseen circumstances) has to be approved by the Ministry of Finance.⁴⁷³ The New Law has not determined any incentive for the contractors who finish executing the contract before the specified time. However, the fixed fine of 10% for the delay of execution of the contract, whether one or ten years, has made some contractors willing to pay this fine, because this fine will be imposed after the execution of the contract, therefore some contractors rent their equipment to other companies and they earn more than the fine.⁴⁷⁴ Furthermore, the New Law has not determined any fine for the poor execution of the contract, which needs to be considered.

The New Law allows contracts to be extended and the penalty to be waived when the contractors are assigned by a government authority to perform additional work, however, in this case permission of the Ministry of Finance is not required.⁴⁷⁵ To take this point further, the researcher suggests that assigning a contractor to perform additional work may breach the principle of transparency. In the New Law ‘additional work’ will result in the extension of the contract and waiving of the penalty. Therefore, the government authority may collude with the contractor by adding additional work when he fails to finish the work at the specified time to allow him to extend the contract and avoid the application of penalties. Moreover, some government authorities may intend not to put all work in tenders and therefore split the works to make them eligible for direct purchase. Thus, in implementing the principle of transparency, any additional work required by the government authority should be put in a separate tender.

4.6.9 The Cancellation of Tender:

⁴⁷³ *ibid*, art 51.

⁴⁷⁴ A Proposal presented by Abdul Aziz Al Suhaibani to be submitted to the Shura Council in Saudi Arabia. The Proposal has suggested that the procurement law in Saudi Arabia shall be amended. Moreover, he has suggested that there should not be a fixed fine for the delay of executing the contract.

⁴⁷⁵ Saudi Arabian Government Tenders and Procurement Law, art 52.

The New Law shows that the tender can be cancelled in two cases. The first case is related to prices. The bid examination committee may suggest cancelling the tender due to the following: (i) if the prices of competitors are above the average of the market prices, however, the committee should negotiate with the lowest price tenderer to reduce its price and if it refuses to lower the price to the same level as the market prices, then the tender will be cancelled and another invitation to tender will be made, or (ii) if the cost of the tender exceeds the amount of money allocated for the project, and the committee fails to reduce some of the items.⁴⁷⁶

The second case is where the procedure of the tender violates the provisions of the New Law. Furthermore, the tender might be cancelled due to public interest, or material errors affecting the terms and specification of the tenders. However, the New Law has given authority to the Minister or the Head of the Independent Agency with regard to the cancellation of tenders if the provisions of the New Law are breached.⁴⁷⁷

The cancellation of a tender is permitted by the New Law before the opening of sealed bids, or after examination of bids. It is clear that if the tenders were cancelled before the opening of the sealed bids this would mean the procurement is no longer needed. However, the procuring entity should provide its justifications for the cancellation of tenders. If the tenders are cancelled after the examination of the bid, for example, if only one bidder submits a bid, then the Minister or the Head of the Independent Agency has the authority to cancel the tenders.⁴⁷⁸ However, the New Law and its implementing regulations should elaborate on when the contract is awarded to the contractor. Is it after being approved by the Examination of Bids Committee? Or does the contractor have to sign a contract with a procuring entity for it to be officially awarded? In one case, the Board has decided that the contractor must sign the contract with a procuring entity to make the contract legally binding. Moreover, the Board stresses that procedures before the signing of the contract by the procuring entity and the contractor will be considered to be administrative procedures, but not a contract.⁴⁷⁹ Therefore, the procuring entity may cancel the tenders even when the contractor was recommended by the Examination of Bids Committee, and the contractor met all the requirements of the tender, such as the lowest price.

⁴⁷⁶ Saudi Arabian Government Tenders and Procurement Law, art 21.

⁴⁷⁷ *ibid*, art 25.

⁴⁷⁸ Al-Whibi (n 392).

⁴⁷⁹ Case 88/c/1992.

4.6.10 The Exclusion of Bidders:

Article 22 mentions that the committee can exclude any competitor if the bid price is less than 35% of the estimation of the committee. It is an important article to ensure the quality of bidders. However, the last paragraph of this article states that ‘The Bid Examination Committee may recommend that the bid is not to be excluded, after negotiating with the bidder, conducting the financial and technical analysis and becoming convinced of the bidder’s ability to execute the contract’.⁴⁸⁰ It is argued by the researcher that the last paragraph of this article is against the principle of equality. Moreover, it contradicts what is stated in the beginning of the paragraph, because this extreme low price is unreasonable if compared to the profit margin of the project.

4.6.11 The Provisions of Assignment of the Contract and Sub-contract in the New Law:

It is a requirement of any procurement law that the main contractor will perform the contract. It is, however, very common that the main contractor will subcontract part of the contract to another contractor to perform part of the contract. The reasons for using sub-contractors are varied. Some countries may use the sub-contract as a political tool, to enable domestic contractors to interact with advanced and highly trained foreign contractors, so as to develop the skills and performance of domestic contractors. Moreover, using a sub-contractor could be a policy of the government to benefit domestic contractors by requiring foreign contractors to subcontract to domestic contractors.⁴⁸¹ For example, SK engineering and Construction Company from South Korea has signed a contract worth \$1.9 billion to build the largest gas plant in Saudi Arabia, called the Wasit Plant, located near to the city of Jubail in the east province of Saudi Arabia. The SK Company subcontracted to several Saudi contractors to establish an offshore platform, a pipeline network, and provide public services for the project.⁴⁸² The SK Company applied strict procedures when awarding the contract to the local companies, such as their history in construction services, and that they should have a licence from the Ministry of Municipal and Rural Affairs

⁴⁸⁰ Saudi Arabian Government Tenders and Procurement Law, art 22.

⁴⁸¹ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁴⁸² Omar Edris, 'International companies to sub-contract Saudi firms' *AL Riyadh* (Riyadh, 9 April 2011) <<http://www.alriyadh.com/621823>> accessed 6 August 2014.

(MMRA) to prove that they are in Grade One of the government classification.⁴⁸³ However, one of the weakest points of the New Law is that it does not provide a provision for the use of sub-contractors. The only requirement for the main contractor to subcontract part or ‘all’ of his procurement contract is to have written permission from the contracting authority.⁴⁸⁴ The lack of regulation in the sub-contract sector has caused many disputes between main contractors and subcontractors,⁴⁸⁵ bringing many of the projects to a halt. Moreover, to implement the principle of transparency the government should limit the use of sub-contractors to specific sectors, and also only permit the main contractors to subcontract ‘part’ of the procurement for work which needs a special skill or special equipment. Furthermore, the main contractor should inform the procuring entity when submitting his bids, and before winning the tender if he intends to subcontract part of the procurement. In addition, the main contractor should justify his request for sub-contracting.

4.7 The Settlement of Disputes in Saudi Public Contracts:

Administrative contracts might end in a dispute between parties. The dispute may occur as a result of misunderstanding the provisions of the contract, or the method of tenders were not in accordance with the law. Also, the dispute may be due to the implementation of a contract that does not meet the requirements of the procuring entity, or a delay of payment. In addition, the contract might consist of some provision which violates sharia law.

However, in the Saudi government tenders and procurement law, the dispute can be resolved by the following methods: a special committee formed by the Minister of Finance to take charge of all procurement disputes, called The Committee for Review of Compensation and Boycott of Contractors, the Board of Grievance, and arbitration.

⁴⁸³ The Council of Ministers in Saudi Arabia established the deputy of classification of contractor under the decision No 820 1973. It is obliged to classify contractors. There are 4 classes, Class one of which is the highest class. Normally government assigns contractors in class one for the large projects in the country. Then there are classes 2, 3, and 4. The classification is subject to the history and financial ability of the contractors. For example, for the construction services, a contractor who is classified in class one must meet the minimum requirement which is 300 Million SAR. < <https://www.momra.gov.sa>>.

⁴⁸⁴ Saudi Arabian Government Tenders and Procurement Law, art 71.

⁴⁸⁵ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

4.7.1 The Committee for Review of Compensation and Boycott of Contractors:

In Saudi Arabia the judicial system is composed of the Sharia courts and the Board, besides these, there are committees (quasi-judicial bodies) which work alongside them, some of whom can issue a judgment which can not be appealed against further.

There are more than 20 committees in Saudi Arabia that were established to keep pace with the rapid development in all factors and, similarly, to implement new laws which have been modified and enacted in the last decade as a requirement for the development of the country, and the requirement of the WTO. In addition, these committees were established as a result of the debate over the codification of the laws, because there is a view that all laws should be codified⁴⁸⁶ and used as the reference for all disputes. However, the Saudi government avoided this debate by establishing a committee for each law, such as the Committee for Review of Compensation and Boycott of Contractors.⁴⁸⁷

It is clear that one of the reasons for establishing this committee is that some of the courts are not happy with the new procedures in dealing with the New Law. Some judges would rather to keep the old procedures and implement a certain provision in some cases which might be against the New Law. Therefore, the government established a new committee which comprises three members, one of whom is a legal advisor, another a technical expert in government procurement, and the third can be appointed by the Minister of Finance.

It is obvious that the Board is the administrative judicial body reporting directly to the King.⁴⁸⁸ Moreover, the Board has the power to decide all administrative cases such as civil service and public contracts.⁴⁸⁹ However, the new government tender and

⁴⁸⁶ Yousef Al-Hodithy, 'Quasi-Judicial Committees' (2009) 1 Centre of Judicial Studies Specialist <<http://www.cojss.com/article.php?a=5>> accessed 27 August 2014.

⁴⁸⁷ This committee was referred to article 78 (A) of the government tenders and procurement law, which states that: 'The Minister of Finance shall form a committee of advisors comprising of at least three members from the Ministry and other relevant government authorities, after coordination with said authorities. Said committee shall include among its members a legal advisor and a technical expert. It shall be headed by a legal advisor whose rank is not lower than "Grade Thirteen" or its equivalent. Its formation shall provide for a substitute member and specify the remunerations of its members and secretary. The committee shall be re-formed every three years and its membership may only be renewed once'.

⁴⁸⁸ The Law of the Board of Grievances, art 1.

⁴⁸⁹ *ibid.*

procurement law has ordered the Ministry of Finance to form a new committee to be responsible for resolving all disputes arising from public contracts.⁴⁹⁰ It aims to decide on compensation,⁴⁹¹ but not the action of annulment of a public contract which has to be taken by the Board. The committee also reviews reports of deceit, fraud, manipulation, and the decision of withdrawal of works.⁴⁹²

The New Law has authorized the committee to review a variety of topics including compensation, deceit, fraud, manipulation, and the decision of withdrawal of works. These topics are different from each other and, moreover, the committee may not be qualified to review all the above topics. Therefore, the researcher suggests that the committee should focus only on their aim, which is compensation, and accelerate the procedure of awarding compensation, and leave the other topics to other government institutes which are more competent in such issues. For example, in the case of fraud or corruption, this should be reviewed by the National Anti-corruption Institute which was established by the government recently.⁴⁹³ However, article 152.4.9, implementing regulations of government tender and procurement law, allows the contractors or the procuring entity to object before the Board of Grievances within sixty days from the date of notification of the decision.

In 2011, the annual report of the committee shows that the committee had reviewed 91 claims that were reported by several governmental agencies about withdrawal of works from contractors, and a request to boycott of some contractors who executed a project in a defective manner. To date, the committee has issued two decisions to boycott contractors from all government procurements, and 37 decisions which rejected the boycott procedures on contractors, and the rest of the cases still under the review by the committee.⁴⁹⁴

4.7.2 The Rules of Procedure:

⁴⁹⁰ Saudi Arabian Government Tenders and Procurement Law, art 78 (b) states that: 'This committee shall review compensation claims submitted by contractors and suppliers as well as reports of deceit, fraud and manipulation, in addition to decisions of withdrawal of works. It shall also review claims submitted by government authorities to the Minister of Finance requesting to boycott a contractor who executed a project in a defective manner or in violation of the terms and specifications of the project'.

⁴⁹¹ Al-Motaoue (n 443).

⁴⁹² Saudi Arabian Government Tenders and Procurement Law, art 78 (b).

⁴⁹³ Saafah Institution (n 464).

⁴⁹⁴ Ministry of Finance, 'Annual report of 2011' The committee for review of compensation and boycott of contractors.<http://www.mof.gov.sa/Arabic/NewsCenter/Pages/mof_20-11-2011.aspx>.

Preamble:

One of the developments of the New Law is the requirement for the claimant to contact the procuring entity first to resolve a dispute. Article 152 of the implementing regulations of the government tender and procurement law elaborates the procedures to submit a claim to the committee. It requires all claimants to submit their claims first to the procuring entity, and try to find a resolution for the dispute. If the claimant is not satisfied with the decision of the procuring entity, or sixty days has elapsed from the first submission of the claim, then the claimant may submit a claim to the committee.⁴⁹⁵ In the former law of procurement there was no requirement for the contractors to inform the procuring entity first. Nevertheless, in the past the contractors used to go to the procuring entity first and try to resolve the dispute. If they were not satisfied, then they would go to the Board.⁴⁹⁶

4.7.2.1 Conditions for Review of Compensation Claims:

The committee has the right to review only the compensation claim which was concluded under the law and these implementing regulations.⁴⁹⁷ Therefore, contracts should be directly concluded with those licensed to work, and the contractors should perform the work themselves. Moreover, if the contractor assigns or delegates a third party to perform the contract, then they will be responsible for the contract if it is reviewed by the committee. However, assigning the contract to a third party is only allowed if it is permitted by the procuring entity.⁴⁹⁸ Also, the committee will not review any claim before the contract is completed and handed over to the procuring entity. Finally, as mentioned above, the claim should first be submitted to the procuring entity, and both parties should work on the dispute and try to find a resolution within 60 days from the first submission.⁴⁹⁹

It could be argued that the preceding condition, which requires the execution of the contract before submitting the claim by the contractors, is difficult to accomplish. For

⁴⁹⁵ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 152.

⁴⁹⁶ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁴⁹⁷ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 152 (1).

⁴⁹⁸ Saudi Arabian Government Tenders and Procurement Law, art 71.

⁴⁹⁹ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 152 (3).

example, the contractors may face a force majeure, or they could experience a dramatic increase of the prices of materials, such as the huge increase of the price of iron in Saudi Arabia in 2007. In that case, the contractors had the choice of two options, either to carry on executing the contract, which might be impossible as the prices of all materials might be higher than the value of the contract, or to stop executing the contract, which may lead to the imposition of a penalty clause for delay. Furthermore, the contractors are not permitted by the law to claim payment until they perform the contract. This condition is contradictory to the theory of 'restoring the financial balance of the contract'⁵⁰⁰ which has to be during the execution of the contract. Nevertheless, this issue has been resolved by a decision of the Minister of Finance, as it allowed to compensate the contractors who was effected by the increase of the prices of building materials⁵⁰¹ although the solution was limited to the specific cases. Moreover, this condition has not been modified in the procurement law as it still requires all contractors to execute the contracts before submitting a claim.⁵⁰²

4.7.2.2 Procedure of the Committee:

When the claim is received by the committee it obtains all information and documents relating to the case, and ensures that all the procedures of the claim are correct. The chairman of the committee distributes the case equally to the members of the committee for their review. Moreover, the committee can summon a representative of the procuring entity, conduct questioning, and hear the contractor. The committee must not issue their decision before summoning the person concerned or the agent to hear their statement. Furthermore, the compensation claim will be struck off if the claimant fails to attend for the third time after being notified, and in the case of absence or resignation of a member of the committee, the Ministry of Finance shall assign a new member to complete the legal quorum. Therefore, any decision must be agreed by at least three members to be legally binding. In addition, if the committee finds a crime which is punishable by the law during the review, it shall refer to the

⁵⁰⁰ Osamah Al-Sulatn, 'The Power of Courts over Implementing Public Contract' (Master thesis, Al - Imam Muhammad ibn Saud Islamic University 2012).

⁵⁰¹ Ministry of Finance Decision No 906 on 15 April 2007.

⁵⁰² Abdul-Aziz Al-Qarary, 'Ministry of Finance to Compensate Contractors Affected by the Increase of Construction Prices' *Alriyadh* (Riyadh, 12 November 2007) <<http://www.alriyadh.com/293373>> accessed 18 August 2014.

judicial body or arbitration tribunal, but they can proceed the claim. However, the committee shall not review a claim if the person concerned has an existing claim relating to the case before a judicial body or arbitration tribunal.⁵⁰³

Finally, the committee decisions shall be reasoned and shall include all facts and the procedure of issuing the decision. The decision should include the right for the parties to take the case to the Board if they are not satisfied with the decision of the committee, and this has to be within 60 days from the date of the notification of the decision.⁵⁰⁴

4.7.3 The Board of Grievances:

Preamble:

Saudi Arabia has a dual judicial system consisting of the sharia courts and other statutory tribunals. One of the most important and advanced tribunals is the Board of Grievances, also called the administrative court.⁵⁰⁵

The Board of Grievances existed before Islam when some of the Quraysh tribes⁵⁰⁶ could not agree on one leader which resulted in injustice among the people. However, after long negotiation these tribes agreed on one leader, which resulted in the elimination of all abnormal behaviour, including behaviour practised against employees. The Prophet acknowledged this agreement (*Alfadhoul Allianz*) and said, 'if I were invited to attend the signing of this agreement, I would do.'⁵⁰⁷ The concern of the Prophet reflects that there should be a legitimate authority with the aim of monitoring all the decisions of the leaders and their representatives such as employees, to ensure that all of their decisions are legitimate and for the interest of the people. However, the first time the Board of Grievances was established as an institution was in Abbasid Caliphate in the middle of the 11th century.⁵⁰⁸

4.7.3.1 Diwan Al Mazalim (The Board of Grievances in Saudi Arabia):

⁵⁰³ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 152.

⁵⁰⁴ *ibid*, art 152 (9).

⁵⁰⁵ Mohammed Al-Ghamdi, John Lonsberg, Jonathan Sutcliffe and Sam Eversman, 'Saudi Arabia' in Richard Clark (ed), *The dispute resolution review* (Law Business Research 2010).

⁵⁰⁶ Quraysh is a tribe that controlled the city of Mecca; the Prophet was a member of the Quraysh tribe.

⁵⁰⁷ Ali Ibn Muhammad Mawardi, *The Laws Of Islamic Governance* (1st edn, Ibn Qutaibah 1989).

⁵⁰⁸ Khalid Al-Thaher, *The Administrative Court in Saudi Arabia* (1st edn, Law & Economy Library 2009).

In 1953 the founder of Saudi Arabia, King Abdul-Aziz, issued a royal decree which included the Council of Cabinet Code. Article 17 of this Code states that under the supervision of the president of the Council of Cabinet a new department was to be formed called the Board of Grievances. This department was to be responsible for all disputes arising between the government and citizens. Furthermore, this department was to investigate all disputes and forward them to the King after the completion of its investigation. The Board started as a consultative department to the Council of Ministers.⁵⁰⁹ Subsequently, and after the role of the Board of Grievances grew, King Abdul-Aziz issued the royal decree No 8759/13/2 which certified the new code called the Board of Grievances Code.⁵¹⁰ However, the tangible development in the Board of Grievances was in 1982 when the King issued royal decree no M/51 to establish the Board of Grievances to be an independent administrative judicial commission.⁵¹¹ It was a fundamental step in developing the administrative law, and it provides an excellent example of the ability of sharia law to adapt with modern needs.⁵¹²

The main reason for the development of the Board in 1982 was that the government extended the infrastructure projects as a result of the significant increase of the oil price at that time. Accordingly, disputes regarding public contracts had increased rapidly. Moreover, the government opened new branches of the Board in the city of Dammam (east province of Saudi Arabia), Jeddah (west province of Saudi Arabia), and Abha (south province of Saudi Arabia) in 1983.⁵¹³ Subsequently, due to King Abdullah's plan to reform the judicial system, the new code of the Board was certified by royal decree No M/78 which is considered to be a big shift in the Saudi judicial system. The main features of the new code are the focus on restructuring the roles of the Board by giving it more power, and determining the competence of the Board.⁵¹⁴ Also, the new code has established the administrative appeal court to be the second instance court. This court normally has three judges.

⁵⁰⁹ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁵¹⁰ Umm Al-Qura, The Board of Grievances Code No. 8759/13/2 (1955).

⁵¹¹ Mohammed Al-Ghamdi, 'Saudi Arabia'.

⁵¹² David E Long, 'The Board of Grievances in Saudi Arabia' (1973) 27 *The Middle East Journal* 71.

⁵¹³ Khalid Bin Faris, 'Judgments Objection before Oppressive Divan in the Kingdom of Saudi Arabia' (Master dissertation, Prince Naif Arab University for Security Sciences 2007).

⁵¹⁴ Al-Thaher (n 508).

In general, trade is permissible in sharia law and any commercial or administrative dispute that might arise should be referred to the Board. There is no written commercial law under sharia law, however, it allows all financial transactions agreed between the parties as long as there is no bank interest. Accordingly, in the case of breach of contract, Saudi courts will grant compensation only for direct damage such as the delay in submitting the projects or supplying items to procuring entities. But damages for loss of profit are not permitted, as it has been prohibited in sharia law.⁵¹⁵ Nevertheless, for contemporary issues such as labour disputes and intellectual property rights, the Saudi government has revised and enacted new laws to meet the standards of the WTO. The Saudi government has also formed some special committees to be responsible for the disputes that may arise in certain sectors, such as a special committee for labour disputes, a special committee for media disputes and, as mentioned above, the Committee for the Review of Compensation and Boycott of Contractors.

The first dispute settlement procedure regarding government procurement took place in 1982 after the adoption of the Board code. Article 8.D of the abolished law of the Board stated that ‘the Board of Grievances shall have the jurisdiction to decide the Cases filed by parties concerned regarding contract-related disputes where the government or an independent public corporate entity is a party thereto’.

Since then, the Board has rapidly developed its judicial procedures. Many reforming steps have been taken, such as training judges and sending them abroad to obtain another qualification or higher diploma in the field of administrative law. Also, more power has been given to the judges.

Despite the rapid development of the Board, it is still necessary to improve some of its procedures. For example, access to the Board’s documents is not available to the public, moreover, even after the completion of the case the public are not allowed access to the Board files. However, pursuant to the plan of reforming the law of the judiciary, officials have committed to publishing some of the judgments after

⁵¹⁵ Hussain Gulzar Rammal, 'Financing through Musharaka: Principles and Application' (2004) Business Quest < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442430> accessed 24 August 2014; This issue will be discussed in the next chapter.

approval by a supreme judicial council, but until now publication has only been for some specific years.⁵¹⁶

It has been argued that one of the defects of the board system is the absence of a clear system of remedies. In government procurement, contractors need a clear system of remedies to protect their rights. Therefore, some contractors may suffer from this absence, as the remedy would depend on the board panel, and what procedure the panel will adopt in deciding the remedy. This may vary from one board panel to another, because normally the judge is only responsible for finding a remedy for the dispute.⁵¹⁷

It seems that this point of view relies on the opinion that having an ordinary court to decide cases involving the validity of government actions will enable citizens and contractors to turn to a court of high standing in public esteem, where highly efficient remedies are available.⁵¹⁸

To take this point further, the researcher would like to highlight the following points. Having a separate system of remedies is incompatible with the character of administrative law for many reasons. First, administrative law is a rapidly developing law. Normally it develops and modifies faster than other laws, such as private law and its branches such as civil law. Perhaps this is due to the nature of the issues addressed by administrative law. Unlike the rules of civil law which are considered to be stable and fairly static, the issues regulated by civil law require extra care and more time. This is because the rules of civil law have given individuals the freedom to deal with issues that have a changing nature within the boundaries of the law. On the other hand, the rules of administrative law address issues which have a unique nature as they are related to public interest, and how good conduct of public utilities could be achieved. Some of the rules of administrative law are not derived from a legislative text, but they are derived from some of the previous cases in administrative courts. Furthermore, administrative law is distinguished as a law which invents remedies for administrative disputes, and does not comply with the provisions of private law. It endeavours to invent the appropriate remedy for each dispute and its circumstances, to

⁵¹⁶ Mohammed Al-Ghamdi, 'Saudi Arabia'.

⁵¹⁷ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁵¹⁸ Christopher Forsyth and William Wade, *Administrative Law* (11th edn, Oxford University Press 2014).

keep pace with the rapid development of public work. In addition, the rapid development of administrative law is influenced by other factors such as social, political, and economic factors. Moreover, these factors are variable and apply to the country's circumstances, whether a war, financial crisis, or the emergence of a new public utility.⁵¹⁹

Second, administrative law emerged as a result of previous judgments. Normally the duty of a judge is to implement the law and resolve the dispute in accordance with the rules of the law. Therefore, if the judge cannot find a resolution for the dispute in the rules, then the legislation provides the judge with the approach to be followed by judges to resolve the dispute. However, most of the provisions of administrative law are not codified, such as the system of remedies in public contracts in Saudi Arabia. Administrative law is also engaged in many administrative activities which are variable and rapidly developing, therefore, the role of administrative courts has become more important than ordinary courts, because the duties of the judges in administrative courts require that they should be flexible in finding or inventing a resolution for the disputes.⁵²⁰ Leaving discretion to the judges in administrative courts is essential because as new disputes arise new ways of dealing with them will need to be devised.⁵²¹

4.7.3.2 The Board of Grievances Circuits:

The Board has a hierarchical structure of circuits, including Panels of the High Administrative Court, Panels of the Administrative Court of Appeal, and Panels of the Administrative Court (the first-instance administrative court). Each panel must contain three judges, however, the administrative court may contain one judge.⁵²²

4.7.3.3 High Administrative Court:

⁵¹⁹ Mazin Radhi, *Summary of Administrative Law* (The Arabic Academy in Denmark 2008).

⁵²⁰ *ibid.*

⁵²¹ Mohamed Fahmi Ghazwi, Ahmed Masum and Nurli by Yaacob 'Issuing Interim Measures in Arbitration in the Kingdom of Saudi Arabia' (2014) 4 *International Journal of Accounting and Financial Reporting* < <http://www.macrothink.org/journal/index.php/ijafr/article/view/6782>> accessed 5 September 2014.

⁵²² The Law of the Board of Grievances, art 9.

The High Administrative Court is not only a place to settle disputes between the procuring entity and the contractors, but it is a place to challenge a decision that was issued by the administrative courts. The High Administrative Court was established in 2007 by royal decree number 78/M. The jurisdiction of this court is to ensure that no decisions violate sharia law, or that there have been no errors in the application or interpretation of the provisions of sharia law. Moreover, to establish if there is a legal error in characterizing or describing the incident, or if a dispute has been decided in contradiction with another judgment previously issued. In addition, the High Administrative Court will reject any judgment if it was issued by a court which is not constituted in accordance with the law.⁵²³

4.7.3.4 The Administrative Court of Appeal:

The Administrative Court of Appeal was established in 2007 as part of King Abdullah's project on the development of the judiciary. The law of the Board determines the jurisdiction of the Administrative Court of Appeal, which is to handle cases which have been reviewed in the Administrative Court.⁵²⁴

4.7.3.5 The Jurisdiction of the Board in Resolving Disputes in Government Procurement Contracts:

It is submitted that one of the Board's jurisdictions is to settle the disputes arising from public contracts. However, article 13.D of the law of the Board is unrestricted as it indicates that the Administrative Court's jurisdiction is to decide on cases related to contracts to which the government entity is party.⁵²⁵ Also, paragraph B of article 13 states that the role of the Board is to decide whether to revoke the decisions issued by quasi-judicial committees. Although this confusion was removed by the new law of pleading in administrative courts which was issued at the end of 2013, article 33.2 clarifies that if the decision issued by the Board regarding the cases mentioned in paragraph D of article 13 is different to the decision of the quasi-judicial committee, then it shall be audited if there is not a request for appeal.⁵²⁶

4.7.4 The Arbitration Tribunal:

⁵²³ *ibid*, art 11.

⁵²⁴ *ibid*, art 9.

⁵²⁵ *ibid*, art 13 (D).

⁵²⁶ Royal Decree no M/3, November 25, 2013, Pleading System in Administrative Court in Saudi Arabia.

Using arbitration to resolve disputes in government procurement contracts is not recommended by the Saudi legal system, therefore, if the parties want to use arbitration to resolve a dispute they must ask for permission from the president of the Council of Ministers.⁵²⁷ The underlying cause of this condition is to keep the dignity of the government as the procedures of arbitration may include some concessions which may affect the power of the government.⁵²⁸ Also, the nature of a public contract is different to other contracts. Government procurement contracts need a special judge who can evaluate the provisions of the contract, because normally administrative contracts include some exceptional provisions such as the right to impose a fine on contractors or withdraw the project if the contractor violates the provision of the contract. Moreover, a public contract is linked to state sovereignty, for example, if the dispute arises from a contract which is signed by the government to explore a natural resource it should be resolved by the court or the committee, if it was resolved by an arbitral tribunal it would lead to the violation of state sovereignty.

To refute the previous argument, the researcher suggests that the role of arbitration in international public contracts is growing, due to the fact that international commercial relations prefers arbitration over the domestic jurisdiction, because it is faster, more flexible, and preserves the privacy of each party. Moreover, arbitration is a group judgment, and each party has the option to select the arbitral tribunal. This does not undermine the sovereignty of the state, because a dispute arising from a public contract has a commercial character. On the other hand, if there is a possibility that using arbitration may undermine the sovereignty of the country regarding natural resources, then the government has the right not to use arbitration in such a dispute.⁵²⁹ In addition, the use of arbitration as a method of resolving the disputes arising from international public contracts has become more important due to the new trend of the international community towards integration.

In the past, Saudi Arabia did not allow the use of arbitration in public contracts, but only in some franchise contracts.⁵³⁰ For example, the Assembly of Ministers issued decision No 1007 in 1968 to allow the use of arbitration to resolve the dispute raised

⁵²⁷ Royal Decree no M/34, April 16, 2012, Saudi Arabian Arbitration Law, art 10 (2).

⁵²⁸ Al-Khouli (n 448).

⁵²⁹ Akon Mustafa, 'Arbitration in International Public Contract' (2012) *Morocco, Business & Law Journal* 1.

⁵³⁰ Council of Ministers Decision No 58 (1963).

between Riyadh Municipality and Ankas Company on the project to develop the city of Riyadh.⁵³¹

However, the first law for arbitration was issued in 1983.⁵³² It was considered to be a very important step, due to the frequent use of arbitration in resolving commercial disputes all around the world. This law was modified in 2012. However, despite the modification of the arbitration law, the old and new laws of arbitration have not presented a tangible change with regard to public contracts. It was a good step by the government to allow the use of arbitration in public contracts in the old law after it was forbidden by the decision of the Assembly of Ministers.⁵³³ However, with regard to public contracts, the new law still has same requirements, as article 10.2 requires permission from the president of the Assembly of Ministers to use arbitration in public contracts.⁵³⁴

Summary:

This chapter has explored the Saudi legal system. It has found that the Saudi legal system is based on sharia law. Moreover, all laws and regulations including the constitution of Saudi Arabia and procurement law must not contradict sharia law. Furthermore, as mentioned in chapter three, all laws in Saudi Arabia must achieve the objectives of sharia law, which are to preserve the five necessities.

This chapter has analysed the provisions of the procurement law in Saudi Arabia. Moreover, it has focused mainly on the provisions of procurement law which may support the preference policy of national products and provisions that lack of transparency.

As mentioned in chapter three, the GPA is legitimate in the eyes of sharia law. Thus, in this chapter the provisions of procurement law have been examined in order to highlight the main provisions of the procurement law that do not implement the GPA requirements.

This chapter has found that the procurement law in Saudi Arabia needs more reforms in order to achieve the principle of transparency. Despite that, procurement law

⁵³¹ Al-Whibi (n 392).

⁵³² It was issued by Royal Decree No M/46. It was the first law concerning all arbitration issues.

⁵³³ Council of Ministers Decision no. 58 (1963).

⁵³⁴ Saudi Arabian Arbitration Law, art 10 (2).

defines the governmental institutes that are not required to apply to procurement law. It has been noticed that there has been an increase of requests by the government institutes to be exempted from the procurement law. The procurement law has only two methods which are open tender and direct purchase, it does not have a limited tender provision. Furthermore, most of the requests for exemption contained a request to conduct a limited tender for large projects. Thus, in order to achieve the principle of transparency, the procurement law should include provisions that regulate limited tenders. This would reduce corruption as some government institutes may ask to be exempted from the procurement law in order to award the contract to certain contractors.

It has also been found that the procurement law explicitly supports some discriminatory practices. For example, giving preference to national products and services, which would be considered as discrimination in the GPA. Therefore, in the next chapter the researcher will attempt to find an area of compromise between the GPA requirements and procurement law. The next chapter will endeavour to bridge the gap between the GPA and procurement law. All these efforts to bridge the gap must be under the shadow of sharia law.

Chapter Five: The Compatibility between the GPA and the Saudi Legal System in the Light of Sharia Law:

5.1 Introduction:

It is well known that the main principles of the GPA are non-discrimination and transparency. Therefore, in this chapter the researcher intends to show that there are areas where the GPA and the Saudi legal system diverge and also converge. Thus, a compromise will be found between the Saudi legal system with regard to government procurement and what is required by the GPA to achieve the principles of non-discrimination and transparency. Compatibility, in this regard, means bridging the gap between two legal regimes. However, as the Saudi legal system is based on sharia law, its role will be the yardstick by which the Saudi legal system will measure its compliance with the provisions of the GPA.

5.1.1 The Principle of Non-Discrimination:

Discrimination in public procurement exists in most legal systems.⁵³⁵ The justifications for discriminatory practices are varied. Traditionally, the rationale for the discrimination is based on the Keynesian Macroeconomic Orthodoxy, which stated that a government should decrease imports in order to increase the national income. Moreover, discrimination may be due to other reasons, such as national security or to support small and medium enterprises.⁵³⁶ Discriminatory practice has also been justified as the need to promote secondary policy such as favouring a disadvantaged group of the society, and some might justify discrimination for non-economic objectives.⁵³⁷ However, the GPA is in existence to eliminate these discriminatory practices in government procurement systems, so as to achieve greater liberalization in world trade which benefits all nations. The revised texts of the GPA start with six preambles: the first and second preambles emphasize the principle of non-discrimination. The first and second recitals of the preamble urge that due to the need for a multilateral framework for government procurement to achieve a greater liberalization and expansion of world trade, no party should prepare, adopt, or apply measures, which give that party the right to protect domestic suppliers, or to

⁵³⁵ Trionfetti (n 55).

⁵³⁶ Khorana and Subramanian (n 34).

⁵³⁷ Evenett and Hoekman, 'Government Procurement: Market Access, Transparency, and Multilateral Trade Rules'.

discriminate among foreign suppliers. Moreover, article IV.1.2 indicates that a party shall not treat foreign suppliers less favourably than domestic suppliers.⁵³⁸

Hence, the researcher will discuss the forms of discrimination in Saudi tenders and procurement laws, whilst attempting to find a solution for each form. Some provisions which explicitly encourage discrimination have to be urgently modified as they are contradictory to the principles of the GPA, and there are some provisions which can be negotiated and where areas of compromise can be reached.

5.1.1.1 The Forms of Discrimination in Saudi Tenders and Procurement Law:

5.1.1.2 The Interrelation of Foreign Investment Law:

Foreign investment law was adopted in 2000 and is considered to be one of the first steps towards reforming the Saudi legal system. Moreover, the foreign investment law has been modified frequently, for example, the rate of tax has decreased to 20%. Furthermore, businesses on Saudi Arabia's negative list have been updated from time to time, and by 2009 only 15 business sectors were on the negative list,⁵³⁹ an improvement from its initial high of 20 sectors.

Like many other countries, Saudi Arabia's discriminatory practices have a long history, and foreign investment law is one of the laws affected by discrimination whether in writing or in practise. There are no regulations in Saudi Arabia which explicitly classify foreign investors as non-Muslims or Muslims.⁵⁴⁰ Before the 2000 investment law, law enacted in 1979 applied to foreign investors. In 1990, a review of the old investment law showed that it deterred the flow of Foreign Direct Investment (FDI). This was because the old investment law gave priority to companies in joint

⁵³⁸ The Revised Agreement on Government Procurement, art IV (1) states that: With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to: A/domestic goods, services and suppliers; and B/ goods, services and suppliers of any other Party. And paragraph 2 states that: With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not: A/treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or B/ discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

⁵³⁹ Al-Mahmood (n 3).

⁵⁴⁰ Hussain Naser Agil, 'Investment Laws in Saudi Arabia: Restrictions and Opportunities' (PhD thesis, Victoria University 2013).

venture with Saudi participants, whereas foreign investors were not allowed to invest in the majority of the business sectors. Furthermore, the old investment law was strict in terms of awarding a licence to foreign investors, as it required foreign investors to be accompanied by a foreign technical expert.⁵⁴¹

These restrictions were the main barriers to the flow of FDI into Saudi Arabia. Therefore, the Saudi government realised this problem and started what it called the 'legal revolution', and introduced the foreign investment law in 2000 which established the Saudi Arabian General Investment Authority (SAGIA) to take responsibility for all FDI affairs. The 2000 law streamlined the old law and removed some of the restrictions. For example, under the 2000 law, foreign investors are able to obtain more than one licence in different sectors, and they can be involved in more than one project at the same time. They are also allowed 100% of the ownership of the project. Furthermore, as stated above, the negative list has been modified and foreign investors now have more options to invest in many sectors. In addition, the policy of the Saudi government continues to reduce the negatively listed business organizations to make the FDI environment attractive, and to meet the requirements of the WTO to open up the domestic market to foreign investors.

The changes to the foreign investment law have made it more attractive for foreign investors, and foreign investors are today allowed to join government tenders as stated in the administrative circular No 6722/MB on 4 October 2006. Nonetheless, the reference by article 3 of the procurement law to the foreign investment law reinforces the non-discriminatory principle of the GPA. Article 3 of the procurement law states that:

Without prejudice to provisions of Foreign Investment Law, all individuals, establishments and companies interested in dealing with the Government and are qualified for such dealings shall be given equal opportunities and shall be treated on equal footing.⁵⁴²

This article states that if foreign investors are allowed to join government tenders they shall be treated equally. However, foreign investors still have to apply the foreign investment law, which means that foreign investors have to pay more tax, which is 20%, while Saudi companies have to pay 2.5% zakat per year. Also, they cannot join the tenders in some sectors where they are negatively listed and need a licence from

⁵⁴¹ Al-Mahmood (n 3).

⁵⁴² Saudi Arabian Government Tenders and Procurement Law.

SAGIA for each project. All of these discriminatory practices are contradictory to the principle of equality required by the GPA.

One of the reasons why foreign investment law is referred to by the procurement law might be an attempt by the Saudi government to tighten the opportunity for foreign investors to join certain tenders, especially tenders related to the natural resources sector as they are subject to sovereignty and national security. Another reason might be that the opening up of the market to foreign suppliers without regulation⁵⁴³ could enable foreign suppliers to limit and control the market, as some of them are more qualified and have more experience. Moreover, it has been claimed by the United Nations Development Program (UNDP) that, 'the richest 20 percent of the world's population consume 86 percent of the world's resources while the poorest 80 percent consume just 14 percent'.⁵⁴⁴ Thus, Saudi Arabia's fear might be due to the long run effects of opening up the procurement market, as it might be dominated by large firms from industrial countries.

The reference by the procurement law to foreign investment law breaches the provisions of the GPA, because the GPA reinforces the principle of equality, and urges that domestic and foreign suppliers should be treated equally. The title of the foreign investment law includes the word 'foreign', which means all foreign investors will be treated on this basis, and that is not permitted in the GPA. Moreover, the nature of the procurement law is different from the foreign investment law, as the procurement law is part of administrative law and applies to the administrative court (the Board), whereas disputes that might be raised by foreign investors will be subject to the general courts (Sharia courts).

Foreign investment law is known for its negative list, which includes sectors which are not allowed for foreign investors. Nevertheless, the GPA has enabled its members to specify the procuring entities that would be covered by the GPA in its annexes. In fact, the WTO has made concessions for many countries during their accession to the WTO. For instance, Saudi Arabia has obtained concessions as a prerequisite to joining the WTO, such as no importation of alcohol or any products banned by sharia law,

⁵⁴³ The Foreign Investment Law includes a negative list which helps the country to control certain sectors such as natural resources.

⁵⁴⁴ Global Exchange, 'Top Reasons to Oppose the World Trade Organization' (2008) Global Exchange <<http://www.globalexchange.org/sites/default/files/toptenwto.pdf>>.

crude oil is outside the WTO jurisdiction, and zakat applies for local companies and income tax for foreign companies.⁵⁴⁵ Thus, the procurement law's reference to foreign investment law to take advantage of the negative list can be solved, as the GPA coverage is based on negotiation, and each member can include their sectors in their annexes.

In addition, to connect foreign investment law with procurement law might require the transfer of all problematic issues that are imbedded in the foreign investment law to the procurement law. For example, the contradiction between foreign investment law and other laws (such as contractor classification law), the constant changes to administrative decisions and regulations, and the difficulties of hiring employees and labour.⁵⁴⁶

5.1.1.3 The Tax Rate under Foreign Investment Law:

Limiting discriminatory practices is one of the main objectives of multilateral treaties, including the GATT and its successor the WTO. To achieve this objective, one of the aims of agreements under the WTO is to limit the subsidies for exports and to limit tariff on imports. The subsidies for exports can lead to favouring domestic products over foreign products in the domestic market by imposing a higher tax on foreign products.⁵⁴⁷

Discrimination based on nationality is a common practice around the world⁵⁴⁸ and discriminatory practices on tax do exist even in regional agreements such as the EU. For instance, Sweden imposes a fifteen per cent tax on the premium paid by Swedish citizens to foreign insurance companies but not to Swedish companies. However, the Court of Justice of the European Union (CJEU) has declined the claim that this tax was not discriminatory, because Swedish insurance companies were subject to Swedish taxation, whereas foreign insurance companies were not.⁵⁴⁹ Another example of discriminatory practice is when Germany imposed tax on German lessees of

⁵⁴⁵ *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WT/ACC/SAU/61 (1 November 2005) p. 32, para. 71.

⁵⁴⁶ Fahad Al-Etani, *The Barrier To Foreign Investment In Saudi Arabia* (1st edn, Saudi Arabian General Investment Authority 2003).

⁵⁴⁷ Michael J Graetz and Alvin C Warren Jr, 'Income Tax Discrimination and the Political and Economic Integration of Europe' (2006) 115 *The Yale Law Journal* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=884428> accessed 18 March 2015.

⁵⁴⁸ Naegelen and Mougeot (n 40).

⁵⁴⁹ Case C-118/96 *Safir v Skattemyndigheten i Dalarnas Lin* [1998] CJEU I-1919 .

equipment such as aeroplanes only if the lessors were foreigners. The CJEU has rejected this practice and has stated that: ‘the taxable amount for undertakings leasing assets from lessors established outside that State [is] not permissible’.⁵⁵⁰

Indeed, it can be understood that the CJEU has the legal basis for its decisions which is the EC treaty.⁵⁵¹ Therefore, the CJEU has rejected the Swedish justification because, normally when a country signs an agreement it applies automatically to all domestic laws related to the provisions of the signed agreement. If a dispute arises the domestic law will be ignored and will not be accepted as a justification.

The case of tax imposed on foreign investors in Saudi Arabia under the provision of foreign investment law is similar. It is clear that if Saudi Arabia joined the GPA and a dispute arose regarding discriminatory practice against foreign suppliers, the review body would reject the argument of a Saudi procuring entity if it justified its discriminatory practice by claiming that the foreign investment law imposes tax on foreign investors but not on Saudi citizens. Therefore, the only solution to these issues is to remove the article that connects procurement law to foreign investment law. In addition, the procurement law should be modified by adding an article relating to the rate of tax that will be imposed on contractors, whether they are Saudi or foreign contractors. This reform will benefit the state treasury, especially as it is well known that in Saudi Arabia, the zakat normally goes to the social security department,⁵⁵² while the tax from foreign investors goes to the state treasury. Thus, it might be claimed that not imposing tax on domestic contractors is a form of subsidy that is not permitted by the WTO. In addition, imposing equal tax on Saudi and foreign contractors would enhance the national policy, because Saudi Arabia is fully dependent on one resource which is oil, and imposing tax on Saudi contractors will diversify revenue resources.

5.1.1.4 The Sharia Law Approach to the Issue of Zakat and Tax in the Light of the GPA Requirements:

⁵⁵⁰ Case C-294/97 *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* [1999] CJEU I-7463.

⁵⁵¹ The EC Treaty guarantees of freedom of movement for goods, persons, services, and capital. The Treaty also provides for non-discrimination based on nationality.

⁵⁵² Fahad Althunian, 'Zakat Revenues is 20 Billion Riyals, and no Exemptions for Foreign Companies From Taxes' *Alriyadh* (Riyadh, 9 October 2012) <<http://www.alriyadh.com/774915>> accessed 18 May 2015. The social security department is administrated by the Ministry of Social Affairs. The duty of this department is to distribute the zakat to people who deserve it, under certain rules.

It has been stated that one of the main principles of multilateral agreements including the WTO is national treatment, which includes goods and services. This principle requires the implementation of the principle of non-discrimination for foreign products and services, and to refrain from the use of non-tariff barriers such as taxes, fees, laws, and regulatory procedures as a means to protect domestic products. Therefore, taxes such as income tax and sales tax on contractors should be equal for both foreigners and locals.

In the case of Muslim countries, such as Saudi Arabia, implementing the principle of national treatment requires equality between locals and foreigners in all financial duties including zakat, as zakat is a financial duty that must be paid by local contractors. Consequently, if zakat is a financial duty (as well as other taxes) there should be equality between local and foreign contractors. The question arising here is how Saudi Arabia can achieve the principle of equality in the light of these two different systems (zakat and other taxes)?

It is worthwhile mentioning that Muslim countries impose the zakat differently. The majority of Muslim countries do not impose zakat on their citizens, but only apply fixed taxes in their financial system. Moreover, payment of zakat is optional for their citizens. Other countries impose zakat on only their Muslim citizens along with other taxes that apply to all citizens. Furthermore, there are countries such as Saudi Arabia which impose zakat on citizens and taxes on foreign investors.⁵⁵³

In the case of Saudi Arabia, it can be claimed that the principle of national treatment cannot be implemented because the amount paid by citizens and foreigners is different. In fact, this issue has been raised during the negotiations to join the WTO; however, the Saudi delegation replied that it is not necessary that the tax is higher than zakat as some types of zakat apply to all capital and profit.⁵⁵⁴

There are some solutions to the issue of the differences between zakat and taxes that have been devised by some researchers. Some of them pointed out that the problem is due to the fact that there are two systems, which will result in inequality, and this can be solved by applying a unified financial system which includes all citizens and foreign investors. Nonetheless, this solution has two sides, one possibility is to apply

⁵⁵³ Council of Ministers decision No. 278 Jan 12, 2004; The Law of Income Tax, sec 2.

⁵⁵⁴ *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WT/ACC/SAU/61 (1 November 2005) p. 9. Para. 16.

zakat only on citizens and foreign investors, but this cannot be a solution as zakat is a religious duty which applies to Muslims only. Another option is to apply only tax on citizens and foreign investors, as the majority of Muslim countries practise nowadays. However, this solution contradicts sharia law as zakat is a religious duty that must be paid for delivering social welfare, unlike tax which will be considered as a national resource and will go directly to the state treasury. Another solution is to consider zakat as a debt deducted from tax, which is the case in some Muslim countries. Accordingly, this process implies that for a Muslim individual in Muslim countries, the taxes due from their income will be divided into 2.5 per cent zakat that goes to charity and the rest of their income tax will be paid to the state treasury.

As for non-Muslim individuals, the process of tax deduction is completely different as they only pay taxes that go directly to the state treasury without the 2.5% zakat. Although this solution is acceptable in sharia law, it is not practical because in some categories of zakat such as *Urud Al-Tijarah*,⁵⁵⁵ a Muslim individual is required to pay the full amount of zakat which is 2.5 percent, and they are also required to pay a large amount of tax; however, this is not equal. For example, if a Muslim businessman plans to start his own business selling cars, and if the cars are worth 100,000 SAR and the profit is 10,000 SAR per a year, then he is required to pay 2.5 per cent as zakat on the profit and the value of the cars. Therefore, he is required to pay 2.5 per cent of 110,000 SAR which is 2,750 SAR. He is also required to pay tax on his profit; for example, if the tax rate is 20 per cent, then he will deduct the amount of zakat from the profit and pay tax on the rest of the profit which is 1,950 SAR. Therefore, he will pay 4,700 SAR in total, whereas someone who only pays tax will pay 20 per cent of the profit which is 2,000 SAR. Therefore, this solution cannot be accepted, because it does not apply the principle of equality required by the GPA.

A solution was proposed by the third international conference for zakat in Malaysia.⁵⁵⁶ The second recommendation of the conference suggested that the amount of zakat should be deducted from the amount of tax, which means that individuals who are required to pay zakat must pay it, and if zakat is equal to tax, then they are not required to pay tax. Furthermore, if the tax is higher than zakat, then they are

⁵⁵⁵ In sharia law *Urud Al-Tijarah* means the inventory of goods available for trade.

⁵⁵⁶ Third Conference of Zakat held in Kuala Lumpur, Malaysia 7-10 May 1990.

required to pay the remaining difference.⁵⁵⁷ Although this solution appears sensible and is expected to achieve the principle of equality required by the GPA, it has been criticized by some scholars as they claim that in some cases, but not often, the amount of zakat could be higher than tax. Also, it has been claimed that the state occasionally does not impose zakat on citizens because there is no need for tax.⁵⁵⁸

In Saudi Arabia, this issue has been tackled by imposing zakat on local companies and income tax on foreign companies.⁵⁵⁹ This solution was adopted by the law of income tax that applies to foreign investment law.⁵⁶⁰ This solution was adopted because Saudi Arabia only imposes zakat on citizens and GCC citizens. Furthermore, as Saudi Arabia has a foreign investment system that allows foreigners to invest in the country, and because some of them are not Muslim, the income tax has been imposed on foreigners in order to treat locals and foreigners equally by imposing a financial duty on both parties.⁵⁶¹

Hence, it can be understood that Muslim countries differ on the implementation of zakat. In the case of Saudi Arabia, the solution was reached by the Saudi delegation during the negotiations to join the WTO. The imposition of zakat on locals and tax on foreign investors would be the right solution for the multilateral agreements under the WTO. However, in the case of the GPA, the researcher argues that the most appropriate solution would be to impose tax on foreign contractors equal to zakat. This solution would meet the requirement of the GPA of non-discrimination for the

⁵⁵⁷ Muhammed Al-Alami BU Alam Jalali, *The Institutional Framework for Zakat Dimensions and Contents*, (1st edn, Islamic Institute for Research and Training 1995).

⁵⁵⁸ According to some opinions of Muslim jurists, 'if there is enough resources for the country, imposing tax on citizens is not permitted in Sharia law'.

⁵⁵⁹ Al-Jarallah (n 12).

⁵⁶⁰ Finance, *The Law of Income Tax* Article 7. It is stated that:

Article 7: Tax Rates

(a) The tax rate of the tax base is twenty percent (20%) for each of the following:

(1) A resident capital company.

(2) A non-Saudi resident natural person who conducts business.

(3) A non-resident person who conducts business in the Kingdom through a permanent establishment.

(b) The tax rate of the tax base for a taxpayer engaged only in natural gas investment activities is thirty percent (30%).

(c) The tax rate of the tax base for a taxpayer engaged in the production of oil and hydrocarbon materials is eighty five percent (85%).

(d) Withholding tax rates are those specified under Article Sixty Eight of this Law'.

⁵⁶¹ Abdulla Al-Thomali, 'Implementing the Zakat System in the Light of the Commitment to the Principle of National treatment Required by the WTO. Problem & solutions.' (2007) 19 *Um Alqura Journal for Sharia and Arabic Language Studies* 4.

following reasons: zakat is a religious obligation that needs to be paid yearly, and Saudi Arabia is a Muslim country which implements sharia law in all of its transactions; therefore, zakat should remain as the overriding priority and the norm whereas tax is exceptional.

The nature of public contracts are different; for example, zakat does not apply to assets, offices, and equipment that is not for trade. Therefore, zakat on locals will be on the profit and their capital which makes the issue of zakat being higher than tax improbable. In addition, as the principle of public interest should be used in contemporary issues, this solution will meet the requirement of sharia law to impose zakat on Muslim individuals, and it will meet the requirement of the GPA to implement the principle of non-discrimination. Finally, adopting the view of equalising zakat and tax will remove one of the main barriers towards joining the GPA, which will enhance the quality of work and products.

5.1.2 Preferences to National Products and Services:

Giving a priority to national products would be considered as discrimination in the GPA.⁵⁶² In Saudi Arabia, article 5 of the procurement law explicitly gives preference to national products and services, it states that, 'Priority shall be given to national manufactured goods, products and services and to those treated as such.'⁵⁶³

As mentioned in chapter 4, giving preference to national products and services has been practised worldwide. For instance, during the negotiation of ITO, some countries did not accept the proposal of the US to create an agreement on government procurement as their legislation gave preference to domestic sellers in government purchases.⁵⁶⁴ Another explicit example of preference for national products and suppliers is the US policy 'Buy American'. The Buy American code was enacted in 1933 and is still in force,⁵⁶⁵ it provides a preference for American goods in government procurement.⁵⁶⁶ However, the buy American code does not apply to the

⁵⁶² The Revised Agreement on Government Procurement, art IV (1).

⁵⁶³ Saudi Arabian Government Tenders and Procurement Law, art 5.

⁵⁶⁴ Valeria Guimaraes de Lima e Silva, 'The Revision of the WTO Agreement on Government Procurement: To What Extent Might it Contribute to the Expansion of Current Membership?' (2008) 17 Public Procurement Law Review 37.

⁵⁶⁵ Reich (n 53).

⁵⁶⁶ Laurence A Knapp, 'The Buy American Act: A Review and Assessment' (1961) 61 Columbia Law Review < http://www.jstor.org/stable/1120278?seq=1#page_scan_tab_contents> accessed 18 May 2015.

GPA and other free trade agreements that the US has signed because the 1979 Trade Agreement code has authorised the president of US to waive the buy American code for trade agreements that US has signed.⁵⁶⁷ Implementing the principle of non-discrimination is a core issue for the GPA. It has subjected the principle of MFN and national treatment to its rules to promote the principle of non-discrimination. However, these principles have a further limitation as the parties of the GPA can exclude some of their sectors from its coverage. This will lead to finding that discriminatory measures are permitted under the GPA by excluding some sectors from coverage under the general notes of Appendix I of the GPA. For example, South Korea and Canada have included derogations in the GPA 1994 for the promotion of small and medium-sized enterprises (SMEs).⁵⁶⁸

Despite the big debate within the GPA regarding the extensive departure from the MFN principle under the GPA, members of the GPA do not have such general rules which give a preference for domestic products and services. They can only use the exceptions or possible ways to give their products priority such as derogation from the MFN principle.

In Saudi Arabia, procurement law gives preference to domestic products and services.⁵⁶⁹ The GPA allows parties to include items in their annexes in the coverage lists, and to exclude some sectors in the general notes. Nonetheless, it would not accept for the member state to have in its domestic laws such a general rule which forces all the procuring entities to give a preference to national products and services.⁵⁷⁰ Hence, the article of the procurement law needs to be modified in order to meet the requirements of the GPA. Any object related to secondary policy is subject to negotiation with the GPA team. Furthermore, Saudi Arabia can give a price preference and offset under the provisions of the GPA related to developing countries. It can include in the annex of general note, the domestic SMEs that need to be promoted.

⁵⁶⁷ John R. Luckey, 'Domestic Content Legislation: The Buy American Act and complementary Little Buy American Provisions' (Congressional Research Service, 2012)

⁵⁶⁸ Silva (n 564) ; Also see Annex 7 (General Notes) of Canada.

<https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm>.

⁵⁶⁹ Saudi Arabian Government Tenders and Procurement Law, art 5.

⁵⁷⁰ The Revised Agreement on Government Procurement, art IV.

5.1.2.1 The Sharia Law Approach to the Preference to Local Products and Suppliers:

The principle of equality is considered as a core requirement by the Saudi basic law of governance which is derived from sharia law. The meaning of equality in contemporary constitutions is that all individuals are equal before the law, and discrimination on the basis of ethnicity, gender, religion, language, or social status is prohibited. As a result, normally regional and international agreements, as well as international declarations, apply the principle of equality in their provisions.⁵⁷¹ Moreover, sharia law has promoted the principle of equality in all transactions. God has created all human beings, and all of them shall enjoy fair and equal treatment. The Quran states that:

O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted⁵⁷²

Furthermore, the Prophet ensured the principle of equality as he said, 'human beings are equal as the teeth of comb'.⁵⁷³ However, the meaning 'righteous' in the previous verse of the Quran 'the most noble of you in the sight of Allah is the most righteous of you' is that a human should not be awarded a humanitarian privilege for being most righteous, but only God will reward him. Therefore, it is not permitted by sharia law to treat any human beings as less equal because they are not the most righteous, but they must be treated equally. Acts of worshiping God such as praying and fasting in the holy month of Ramadhan are different from human relations, as interacting with people is related to the nature of the human relationship, while worshiping God is only for God. Therefore, by implementing the principle of equality, human beings will have the opportunity to build a world which is desirable, a requirement by sharia law, which in turn will be rewarded by God.⁵⁷⁴

As such, it is clear that all individuals must be treated equally in sharia law in all aspects of life. The Prophet used to treat everyone equally in Madinah; for example, the *Banu Qainuqa Market* (a predominantly Jewish market) in Madinah was open to

⁵⁷¹ Al-Qutb Muhammed, *Sharia Law and Human Rights* (1st edn, 1989).

⁵⁷² Surat Al-Hujurat verse 13.

⁵⁷³ The grade of Hadith is weak, according to the Muslim Scholar (Al-Albani).

⁵⁷⁴ Ali Al-Tawalbeh, 'The Right of Equality in Sharia Law and Intra-national Conventions' (2012) Jordanian Media and Studies Centre 1.

all customers including Muslim people. There were also other markets in Madinah which included all religions and races, and all individuals were treated equally, thus, the Prophet has acknowledged all of these transactions.⁵⁷⁵ Moreover, sharia law encourages the principle of equality in terms of providing public services. For example, the Prophet's companion Othman Bin Afan (third Caliph of Islam) bought a well (The Well of Rumah) from a Jewish man. This well became a public utility in Madinah and all the people of Madinah could be supplied from this water well.⁵⁷⁶

Due to the developments in international relations, as countries normally impose tariffs or tax on imported items, or some countries impose a tax on foreign investors, consequently, sharia law has permitted the principle of reciprocity to deal with non-domestic products or suppliers. It has been reported that the Prophet's companion Omar received a letter from the Prophet's companion Abu Musa. The letter stated that if the citizens of Rome entered the land, they were not required to pay tax, but when Muslim citizens entered the Roman Empire for trade purposes they were required to pay ten per cent as a tax. Then, Omar ordered all Roman citizens who came for trade to pay ten per cent tax too. Omar imposed tax as retaliation, and all Caliphs after Omar have imposed a similar amount of tax, which has become a custom in sharia law. However, contemporary Muslim jurists have decided that the leaders of Muslim countries have the discretion to decide on this issue based on the provisions of public interest.⁵⁷⁷

5.1.3 Publishing Information on the Procurement System and Intended Procurement:

It is notable that the procurement law in Saudi Arabia has been significantly developed, especially information on the procurement publishing system and notices of intended procurement. The procurement law has introduced the digital means of publishing the intended procurements. Moreover, the procurement law requires the procuring entities to publish the intended procurement in the official gazette *Um Al-Qura* through its website, in addition to two local newspapers.⁵⁷⁸ Thus, it could be

⁵⁷⁵ Abd al-Malik bin Hisham, *As-Sirah an-Nabawiyyah*, (1st edn, Dar Al-Sahabah for Heritage 1995).

⁵⁷⁶ Muhammad ibn Abu Bakr (Ibn al-Qayyim), *Zad Al-Ma'ad Fee Hadi Khairil-Ibad* (Al-Manar Islamic Library 1994) <<http://shamela.ws/index.php/book/21713>> accessed 13 March 2014.

⁵⁷⁷ Muhammed Al-Shinqiti, '*Explanation Of Zaad Al-Mustaqni*' (Al-Shamelah Library 2011).

⁵⁷⁸ Saudi Arabian Government Tenders and Procurement Law, art 6; The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 10 states that: 'The Secretariat of the

acknowledged that the rules for publishing intended procurement in Saudi Arabia would meet the requirements of the GPA, in terms of publishing the main information on the procurement system and providing necessary information for all interested competitors.⁵⁷⁹ Although the procurement law orders all procuring entities to deal with suppliers and contractors in accordance with the principle of equal opportunities,⁵⁸⁰ it has been noticed that the principle of equal opportunities only applies for domestic suppliers and contractors. For instance, the procurement law and its implementing regulations elaborate the method and procedure of publishing the intended procurement. It indicates that tenders shall be published in the official gazette's website, two local newspapers, and if the publication of the tender was abroad it shall be in both Arabic and English.⁵⁸¹ If the contract will be implemented within Saudi Arabia, the language of the announcement will be in Arabic. If the announcement is only made abroad, then it should be announced in both Arabic and English.⁵⁸² This procedure may present difficulties to foreign competitors who intend to compete in the Saudi procurement market because they will need to translate the procurement information into their own language, and they will also need to translate their offers to submit them to the procuring entity. Therefore, procurement documents should be issued in one of the official languages of the WTO which are English, French, and Spanish, in addition to Arabic, to ensure that the language barrier will not obstruct foreign competitors from participating in the procurement market in Saudi Arabia.⁵⁸³

This reform of procedure will meet the requirement of the GPA in terms of publishing the procurement information in one of the official languages of the WTO, as article VII (3) of the GPA states that 'For each case of intended procurement, a procuring

Council of Chambers of Commerce and Industry shall be provided with an electronic copy of the announcement, provided that the announcement remains posted on those sites until the deadline for submission of bids'.

⁵⁷⁹ The Revised Agreement on Government Procurement, art VII (1) states that, 'For each covered procurement, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Appendix III'.

⁵⁸⁰ Saudi Arabian Government Tenders and Procurement Law, art 1(c).

⁵⁸¹ The Implementing Regulations of Government Tenders and Procurement Law in Saudi Arabia, art 10 (a).

⁵⁸² It worthwhile noting that the official gazette Umm Al-Qura has only an Arabic version on its website.

⁵⁸³ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in one of the WTO languages’.

Finally, both Arabic and English copies of the procurement law and its implementing regulations are available on the website of the Ministry of Finance. This is one of the requirements of the GPA when publishing any laws or regulations.⁵⁸⁴ There are still difficulties in gaining access to some of the legal information in Saudi Arabia such as administrative rulings and some of the procedures regarding government procurement,⁵⁸⁵ despite its being a requirement by the GPA. Article VI (1) (a) of the GPA states that, ‘Each Party shall: promptly publish any law, regulation, judicial decision, administrative ruling of general application’. There are great numbers of administrative decisions and instructions regarding government procurement that are not gathered in one series,⁵⁸⁶ which makes it very difficult for interested competitors (locals and foreigners) to obtain access to them. Therefore, to meet the requirement of the GPA in terms of publishing information on the procurement system, these administrative decisions and instructions should be in a database, to be the reference for all interested competitors and translated into one of the WTO official languages.

5.1.3.1 The Sharia Law Approach to the Method of Publishing Tenders:

In the old Islamic jurisprudence there is no mention of tenders because tenders are a new phenomenon. They are a procedure that has been developed due to the need for large projects and public services in the contemporary era. However, bidding was mentioned, and this does take place during competition for tenders.⁵⁸⁷

Most contemporary jurists apply the sharia law provisions of bidding into tenders. However, in the announcement or invitation to participate in a tender, the value of the contract is not determined by the procuring entity nor the competitors, but in sharia law the value of contract should be known and determined. Thus, it has been argued that the publication of the tender by the procuring entity is considered to be an offer, and submitting the offer by competitors is considered to be acceptance. Therefore, it

⁵⁸⁴ The Revised Agreement on Government Procurement, art VI.

⁵⁸⁵ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales’.

⁵⁸⁶ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales’.

⁵⁸⁷ Muahammed Al-Othmani, 'Bidding and Tender Contracts' (2000) 12 International Islamic Fiqh Academy Journal 811.

would be considered to be a contract since the main elements of a contract are achieved; that is, offer and acceptance. Furthermore, the contract breaches sharia law as the value of the contract is not determined in the announcement of the tender.⁵⁸⁸

To refute this argument, the researcher suggests that the offer as meant by contemporary tenders is the invitation to join the tender, and the invitation normally does not determine the value of the contract. Moreover, the contract will not always be signed after obtaining the lowest bid, because the procuring entity may negotiate with the lowest priced tenderer if his price was higher than the average price of the local market. Furthermore, the competitors could withdraw from the tender before awarding of the contract. Therefore, the announcement of the tender would be considered as an invitation to participate in the tender and does not need to determine the price, and that is permitted under sharia law.⁵⁸⁹

5.1.4 The Conduct of Tenders:

The revised text of the GPA is considered to be more flexible than the GPA 1994 in terms of tender rules. It contains a few changes regarding methods of tendering;⁵⁹⁰ for example, the revised text of the GPA gives parties the discretion to adopt in their laws and regulations any method of tendering, such as open tendering, selective tendering, and limited tendering, as long as they are transparent, impartial, avoid conflict of interest, and prevent corruption.⁵⁹¹ The procurement law in Saudi Arabia adopts open tendering as a means of conduct for all tenders except direct purchasing.⁵⁹² The open tender method applies to all government procurements including large projects which removes the limited tender method.⁵⁹³ Hence, such a limited tender method does not exist in the procurement law although, in practice, limited tendering has been practised by some public agencies. For example, King Saud University in Riyadh has requested the Royal Board to allow them to use the limited tender method for large

⁵⁸⁸ *ibid.*

⁵⁸⁹ Abd El-Razzak El-Sanhuri, *Al-Wasīṭ fī Sharḥ al-Qānūn al-Madānī al-Jadīd (Medium commentary on the new Civil Code)*, vol 1 (1st edn, Revival of Arab Heritage 1964).

⁵⁹⁰ Reich (n 53).

⁵⁹¹ The Revised Agreement on Government Procurement, art IV (4).

⁵⁹² Saudi Arabian Government Tenders and Procurement Law, art 6.

⁵⁹³ Al-Hudaithy, 'Legal Analysis of the New Saudi Procurement Regulations'.

projects. The Royal Board has given the university the authorization to invite at least five competitors to submit their offers.⁵⁹⁴

Although the GPA gives rights to parties to adopt a tender method which has to be consistent with the GPA, the Saudi procurement law may not be consistent with the GPA in terms of tendering methods. Individual practices by some public agencies are arbitrary and unwise administrative decisions and the procurement law itself are the main issues for the inconsistency with the GPA.

The procurement law in Saudi Arabia does not distinguish between small projects and large projects.⁵⁹⁵ Large projects normally need special requirements, such as financial capacity, and the ability to meet the requirements of large projects in terms of technical specifications. Therefore, the government has bypassed the provisions of the procurement law on several occasions, such as the King Saud University Medical City and King Abdullah stadium in Jeddah, which were implemented by Aramco. The government's authorization to these public agencies stems from its belief that these projects could not be implemented by small competitors. Furthermore, there were complaints from some of the contractors, submitted to the Royal Board, claiming that some public agencies did not follow the rules of procurement law as they used a limited tender method which is not permitted under the procurement law. The Royal Board responded to this claim by forcing all public agencies to give all interested contractors a full and fair opportunity to participate in government procurement contracts.⁵⁹⁶ However, the Royal Circular repeated what had been stated in the procurement law, but public agencies still use a limited tender method.⁵⁹⁷ Thus, the procurement law should be modified by adding a procedure which guides the public agencies when they use the limited tender method so as not to discriminate against local or foreign competitors. In addition, it is necessary for the procuring entity to keep a record of every use of the limited tender method,⁵⁹⁸ which shall include the

⁵⁹⁴ *ibid*; Saudi Press Agency, '10.3 Billion riyals for Strategic Projects at King Saud University' *Alyaum* (Eastern Province Saudi Arabia).

⁵⁹⁵ Al-Hudaithy, 'Legal Analysis of the New Saudi Procurement Regulations'.

⁵⁹⁶ Royal Circular No 9751 on 10 February

1983<http://www.moqatel.com/openshare/Behoth/Ektesad8/Monakasat/mol01.doc_cvt.htm>

⁵⁹⁷ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁵⁹⁸ Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement'.

name of the procuring entity, the values and kind of contract, as well as the circumstances for using the limited tender method in the procurement.⁵⁹⁹

5.1.4.1 The Sharia Law Approach to the Conduct of Tenders:

It has been acknowledged that Islamic jurists' books do not have a special provision for limited tendering. Contemporary Muslim jurists apply the provisions of open tendering to all kinds of tender methods.⁶⁰⁰ Furthermore, limited tendering is permitted in sharia law, as long as it does not contain any *Najash*,⁶⁰¹ which was prohibited by the Prophet.⁶⁰² This includes any attempt to collude to lower the price of contractors. Thus, provisions of public interest in sharia law order law-makers to include in the procurement law all circumstances that would allow the procuring entity to use limited tendering to avoid any discriminatory practices against local or foreign contractors.

5.1.5 The Evaluation of Contractors:

First, it is worthwhile mentioning that the procuring entity has the right to specify conditions for participation in the intended procurement. However, those conditions are limited where the contractors have the legal and financial capacity, as well as technical ability to undertake the intended procurement.⁶⁰³ Other conditions such as stipulating that the contractor must have been awarded one contract or more or any discriminatory conditions are not allowed by the GPA.⁶⁰⁴ Moreover, the procuring entity shall make available to tenderers documentation that includes all information, such as technical specifications,⁶⁰⁵ to permit interested contractors to prepare and submit their offers. Furthermore, documentation shall include all evaluation criteria the entity will apply in the awarding of the contract. However, if a procuring entity

⁵⁹⁹ The Revised Agreement on Government Procurement, art XIII (2).

⁶⁰⁰ Al-Othmani (n 587).

⁶⁰¹ *Najash* is to offer a person more than the worth of his goods when you do not mean to buy them and someone else follows you in bidding. Similarly, when a contractor colludes to lower the price.

⁶⁰² Muslim (n 200).

⁶⁰³ Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to the Procedural Rules and other Transparency Provisions'.

⁶⁰⁴ The Revised Agreement on Government Procurement, art VIII (1) (2).

⁶⁰⁵ De Graaf and King (n 53).

intends to apply price as the sole criterion, it should show the importance of applying this criterion.⁶⁰⁶

It has been argued that the Saudi procurement law has not been reformed in terms of evaluation criteria, because the principle of lowest price is still the basis for the procurement law. Despite implementing the contracts by contractors who meet the technical requirements of the procuring entity, the quality of projects and the material used in them are normally of the lowest quality. Furthermore, it is assumed that the best solution for this issue is to remove the lowest price principle, and award the contract according to capacity to finish the project and meet the maximum requirement of quality.⁶⁰⁷

If the above argument is correct, the researcher suggests that there is a misunderstanding in the provisions of the procurement law regarding the evaluation criteria. The procurement law does not only adopt the principle of the lowest bidder when awarding contracts, it rather urges public agencies to achieve the maximum degree of economic efficiency in government procurement. Besides, the procurement law requires all public agencies to include in their notices the specific details of the technical specification that needs to be fulfilled by the contractors. Furthermore, the procurement law stresses that if the bid was less by 35% or more than the procuring entity's estimation, then the bid shall be excluded from participating in the tender. The problem that has been highlighted by the argument that meeting the requirements of technical specification but with poor quality of material or low quality workmanship is not a weakness of the procurement law, but is a problem with the staff who undertake the supervision of the projects. Some of them are not well-qualified to take charge of the project, and need more training to evaluate the contractors. Therefore, it is suggested that the procurement law in Saudi Arabia is compatible with the provision of the GPA regarding the evaluation criteria. Moreover, awarding the contract to the lowest bidder should ensure that the competitor conforms to the conditions and specifications set by the procuring entity.

Finally, it has been noted that there have been discriminatory practices in favour of the lowest tenders in government procurement. Moreover, the procurement law adopts

⁶⁰⁶ The Revised Agreement on Government Procurement, art X (7).

⁶⁰⁷ Abdul aziz Al-Suhibani, 'Comments on the Lowest Price Principle' *Al-Jazirah* (Riyadh, 10 December 2008).

the principle of equality in evaluating the contractors, and prohibits any discriminatory practices, such as awarding a contract to the lowest price, or only inviting the competitors with the lowest price bids to participate in the tender. However, the principle of equal evaluation was not implemented when the Ministry of Education in Saudi Arabia excluded most competitors from the evaluation process. It only selected the five lowest priced tenders to go through the evaluation process. The Ministry of Education justified its decision by pointing out that it had received too many bids. The Ministry of Finance supported the decision of the Ministry of Education, and authorized it to exclude contractors whose prices were too high.⁶⁰⁸ Again, this practice is a discriminatory practice, and breaches the procurement law. Therefore, if the procuring entity intends to select tenderers, it should not use an open tender method, but it should use a different method which has to achieve the principle of equality. Otherwise, it should form many evaluation teams to evaluate all competitors to avoid a breach of the procurement law.⁶⁰⁹

5.2 The Principle of Transparency:

As mentioned above, the first principle of the GPA is non-discrimination. This principle could be achieved by implementing the provisions of transparency, as it supports the goal of non-discrimination by making it more difficult to conceal prohibited discriminatory decisions.⁶¹⁰ On the other hand, lack of transparency can impede the ability of foreign contractors to participate in tenders even if there is no discrimination.⁶¹¹

The GPA requires all parties to be transparent in their procurement system, in order to guarantee equal opportunities⁶¹² and open competition for all interested contractors. Therefore, procuring entities should make all information available for all contractors throughout the tender process by publishing intended procurement notices in advance, and specifying the terms and conditions for all contracts. They should also publish the evaluation criteria to avoid any discriminatory practices and provide unsuccessful

⁶⁰⁸ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁶⁰⁹ *ibid.*

⁶¹⁰ Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement'.

⁶¹¹ Evenett and Hoekman, 'Government procurement: market access, transparency, and multilateral trade rules'.

⁶¹² It has been affirmed by the EJC that the principle of transparency is closely connected to the principle of equal treatment; Braun (n 397).

competitors with information on why their bid on the tender was not chosen by the procuring entity.⁶¹³

Transparency has been defined as ‘a clear rule and by means to verify that those rules were followed’.⁶¹⁴ This means that any procurement system must have clear rules and procedure and implement these to enable all competitors to participate in the competition without any discrimination, as there will be a lower risk of interested competitors being rejected.

The opening up of the procurement market is the result of the implementation of the transparency principle.⁶¹⁵ In Saudi Arabia, the procurement law requires that the procurement market must be open for all local competitors, by making all information about intended tenders available.

Although Saudi procurement law has been described as a transparent system, nevertheless, it is still not open to foreign competitors.⁶¹⁶ Moreover, the criteria of the transparent procurement system in Saudi Arabia is different from the GPA standard. For example, in the Saudi law, the procurement process is seen as transparent if tenders are published, and the law of procurement, terms and conditions are made available for all interested local competitors. While the GPA sees the procurement process to be transparent if a government publishes all measures regarding procurement, for example, by publishing law, regulations, and administrative circulars. Therefore, the Saudi procurement law should consider the provisions of transparency that were highlighted by the GPA.

A Saudi official has admitted⁶¹⁷ that the procurement law in the Kingdom needs to be revised. It also needs to change some of its regulations to meet the requirements of the GPA, once Saudi Arabia is a signatory to its provisions. Furthermore, he insisted that Saudi Arabia intends to attract foreign capital to participate in Saudi tender bids, by

⁶¹³ Choi (n 219).

⁶¹⁴ Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement' cited in Gosta Westring *Public procurement: Manual for central and Eastern Europe* (ITCI 1996).

⁶¹⁵ Al-Hudaihy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁶¹⁶ Although on some occasions the Saudi Arabian government has invited a big firms from all around the world to participate in some infrastructure projects, such as the Riyadh metro and some medical projects at King Saud University in Riyadh. Moreover, this invitation must obtain prior permission from the Council of Ministers.

⁶¹⁷ Badar Albusais, 'Saudi Arabia Allows Foreign Investors to Enter Saudi Procurement Market' *Asharq Alawsat Newspaper* (London, 30 May 2012) 1.

reforming the current procurement law to make it more compatible with the GPA, and international regulations regarding government procurement.⁶¹⁸ In the following, the researcher intends to highlight the main issues regarding the principle of transparency in procurement law, and suggest some solutions for these issues in order to make the procurement law compatible with the provisions of the GPA.

5.2.1 Publicity of Rules and Regulations of Government Procurement:

In Saudi Arabia there is a real will by officials⁶¹⁹ to implement the principle of transparency in government procurement. The Saudi Minister of Commerce and Industry has insisted that the Kingdom supports the goal of the GPA to implement the principle of transparency in national laws and regulations. Moreover, he stressed that the new government procurement law in Saudi Arabia would guarantee the principle of transparency in all stages of tenders and procurement procedures.⁶²⁰ Despite the reform ushered in by the new law, the principle of transparency is not yet fully implemented in Saudi Arabia, moreover, it does not comply with all the requirements of the GPA regarding transparency.

The principle of transparency normally requires that the existence of law, regulations, and instructions enabling potential contractors access to all information, including administrative circulars, and also that they have the right to oppose any administrative circulars that may lead to unfair competition. The law has only mentioned the term transparency in the first article which states, ‘guaranteeing transparency in all stages in government tenders and procurement procedure’.⁶²¹ Moreover, the law does not give details of the use of the transparency principle in all procurement transactions, including administrative circulars, and the modification of any rule related to the procurement transaction. Therefore, the transparency required by the law is not

⁶¹⁸ Shugaa Al-Buqami, 'Saudi Arabia opens its Procurement for Foreign Capital to Compete for Government Tenders' *Asharq Alawsat* (London, 30 May 2012) <http://archive.aawsat.com/details.asp?section=6&article=679540&issueno=12237#.VXn_602M2Uk> accessed 11 June 2015.

⁶¹⁹ Tawfiq Alrabiyah, 'Opening Statement' (National conference to introduce the WTO agreement on the government procurement, Riyadh May 2012).

⁶²⁰ *ibid.*

⁶²¹ Saudi Arabian Government Tenders and Procurement Law, art 1.

clarified, and the term of transparency is mentioned only in a general directive. Furthermore, implementing the transparency principle in administrative circulars is more important than general legislation. Thus, article VI of the revised text of the GPA urges that each party shall promptly publish any law, regulation, judicial decision, administrative ruling, and any modification to administrative ruling. Finally, it has been noticed that transparency in administrative circulars is more effective in terms of accountability, while the transparency of general law is less effective.⁶²² Therefore, the Saudi officials should consider that all administrative circulars which interpret the law, or exempt the application of the law on some parties, are available and accessible for the public.⁶²³ In addition, the method and objects of modifying the law or regulations should be transparent, justified and published.⁶²⁴

5.2.1.1 The Sharia Law Approach to the Publicity of Laws and Regulations:

As mentioned above, sharia law has used the concept of public interest to deal with contemporary issues, therefore, the concept of public interest can be used in procurement. For example, if the procuring entity has not published any modified regulations or administrative circulars during the stage of tender, it will lead to monopoly and corruption, which is prohibited by sharia law. Therefore, for the interest of all parties, sharia law requires all competitors to be made acquainted with all changes to regulations and administrative circulars and for these to be published in appropriate publications. Furthermore, the Quran commanded the prophet Muhammad to promptly announce any new orders that had been revealed to him from God to all people to make them aware of all of their duties towards God and life in general. The Quran states: 'O Messenger, announce that which has been revealed to you from your Lord, and if you do not, then you have not conveyed His message'.⁶²⁵ This is consider as a message to people because any order to the prophet by God, will apply to people as well. In addition, sharia law requires any new law or regulation to be clarified, to avoid any ambiguity which might result in prohibited practices. For

⁶²² Ali AlDileh Rasha Altarawneh, 'The Impact of Implementing the Principle of Transparency on the Administrative Accountability in Jordanian Ministries' (2010) 1 The Jordan Journal of Business Administration (JJBA) 63.

⁶²³ Faris Alsubaiee, 'The role of Transparency and Accountability in the Reduction of Administrative Corruption in the Government Sectors' (PhD thesis, Prince Naif Arab University for Security Sciences 2010).

⁶²⁴ Naimah Harb, 'The Reality of Administrative Transparency and its Requirements to be Applicable at Palestinian Universities in the Gaza Strip'(Master thesis, The Islamic University 2011).

⁶²⁵ Surat Al-Maidah verse 67.

example, the Quran ordered the Prophet to clarify all the sharia provisions that were revealed by God, it states that: ‘And we revealed to you the message that you may make clear to the people what was sent down to them and that they might give thought’.⁶²⁶

5.2.2 Transparency in Procurement Opportunities:

Generally, government procurement laws require all procuring entities to publish all procurement opportunities in official journals in order to ensure that all interested competitors are able to find them. The GPA requires that the procuring entities covered by the GPA publish a notice of intended procurement in appropriate paper or electronic medium.⁶²⁷ The notice shall remain readily accessible to the public until the expiration of the time period indicated in the notice.⁶²⁸ It is important to note that new laws have been developed targeted at electronic mediums. Potential competitors can find the notice of intended procurement on the official website of the official gazette. However, there are two issues which might breach the principle of transparency. First, the website of the official gazette, as well as the local newspapers, all publish procurement opportunities in the local language only. This procedure does not meet one of the requirements of the GPA for implementing transparency, which is that the publication of procurement opportunities is in the official languages of the WTO. The second issue deals with the changes to procurement information. The procuring entities should inform all interested competitors about all the changes to procurement information to allow all interested competitors to revise their offers. Therefore, it is worth mentioning that the law should not require the procuring entities to publish their tenders in the two local newspapers, as since the freezing of subsidies by the government, local newspapers in Saudi Arabia have started charge the procuring entities for advertising tenders. Moreover, the publicity provided by the local newspapers does not last longer than the day of issue, and they normally publish the tender in hard copy. In addition, the GPA requires that each procurement entity should publish its intended procurement in paper or electronic medium, and this must remain readily accessible to the public until the expiration of the time mentioned in the notice. Thus, the procurement law in Saudi Arabia should use the official gazette

⁶²⁶ Surat Al-Nahl verse 44.

⁶²⁷ The Revised Agreement on Government Procurement, art VII.

⁶²⁸ *ibid*, art VII.

(paper and website) as a tool to publish all government tenders. These must be in both the local language and one of the official languages of the WTO, and must remain readily accessible in both languages until the expiration of the time period indicated in the notice.

5.2.2.1 The Sharia Law Approach to Methods of Publishing Opportunities:

Sharia law allows any method of publishing opportunities and leaves this to the discretion of the Head of State to enact regulations which are based on equal opportunities. However, in keeping with the concept of public interest, some Muslim scholars have suggested some rules for the publishing of procurement opportunities. These are: the publication should be in reliable newspapers, the procuring entities should not include in the advertisement any specification or condition applying to a particular country, suppliers, or contractors, and the procuring entities should not make any changes to the conditions or specification for the interest of particular tenders.

5.2.3 Transparency in Awarding Contracts Procedures:

As provided above, the law only includes one article requesting the procuring entities to provide fully transparent information to all interested competitors. Nevertheless, it has been observed that the law gives more details on less important issues and ignores more important issues. For example, the law gives more details of the rank of the official employees who are responsible for opening and evaluating tenders. On the other hand, the law does not give details on a more important issue such as giving a rejected competitor the reasons why they failed to qualify for the tenders. The rank of official employees is not important since the committee which awards the contract must support their recommendations for awarding the contract with a report of specialized technicians.⁶²⁹ Furthermore, there is no need to specify the rank of official employees when there are transparent rules. This procedure will create more bureaucracy and the monopolising of power which is against the principle of transparency.

The GPA requires transparent procedures in awarding contracts, which include: a notice including a description of the goods or services procured, the name and address

⁶²⁹ Saudi Arabian Government Tenders and Procurement Law, art 16.

of the procuring entity, details of the successful supplier, as well as the value of their offer, the date of award, and the method of tender which was used. The GPA stresses that the procuring entity covered by the agreement should on request provide unsuccessful suppliers with the reasons why they failed to qualify for the tender or why the procuring entity did not select their tenders. Moreover, the procuring entities shall provide unsuccessful suppliers with all information on why they selected the successful supplier.⁶³⁰ However, one of the weakness of Saudi procurement law is that it does not give a detailed provision regarding unsuccessful tenders. Only article 23 of the law provides the reason for rejecting a tender which is that if the competitor has a number of projects and the committee believe that the size of his or her contractual obligation is over his or her capacity, then the committee awarding the contract are permitted to exclude him or her. However, the law should include provisions which allow unsuccessful suppliers to request the reason why they were rejected, and this should be given before signing the contract with the successful supplier. Moreover, unsuccessful suppliers should have the right to challenge the decision of the procuring entity before they sign the contract with the successful supplier.

5.2.3.1 The Views of Sharia Law on the Disclosure of the Procedures of Awarding Contracts:

In sharia law the implementation of the concept of public interest requires that the procedures of awarding contracts must be transparent. This means that the publication of a tender has to be in a manner where all the competitors were informed about the tender information and the procedures of awarding the contract. Therefore, the contract should be awarded to those who are able to meet the requirements of the procuring entity. Moreover, the result of the tender should be notified to the winner and those who failed to win the tender, as there is a transparent award system based on the transparency and disclosure of information at any time.⁶³¹ Furthermore, during the process of awarding the contract, in order to be transparent, sharia law requires the winning tenderer to disclose information regarding their profit margin. For example, the Kuwaiti Al-Salam Company has published the profit margin of 15% for a contract

⁶³⁰ The Revised Agreement on Government Procurement, art XVI.

⁶³¹ Saleem Bin Saleem, 'Government Purchases Based on the National Strategy to Maintain Honesty and Combat Corruption' (Master thesis, Naif Arab University for Security Sciences 2008).

with the Ministry of Transportation to perform postal services in Kuwait.⁶³² Article 18 (3) of law 7 (year 2010)⁶³³ requires disclosure of all information of the companies in the capital market, including their profit margin. This would maintain the public funds and eliminate any corrupt practices, such as bribes. Generally, if a tenderer paid a bribe to some employees, then he would increase the price of goods and services being procured in order to compensate his loss because of the bribe. Therefore, sharia law adopts the concept of public interest to maintain the public funds. Such a procedure as the disclosure of the profit margin when awarding contract prohibits any practice that may lead to corruption such as a bribe, as the Prophet said: ‘cursed to the one who gives bribe and the one who takes it’.⁶³⁴

5.2.4 Transparency in Conducting Negotiation with Tenderers:

Although the GPA gives discretion to the parties to enact rules regarding government procurement, such methods limit the discretion of the entities to conduct negotiations with tenderers. Article XII of the revised GPA provides that the procuring entity is allowed to conduct negotiations when it indicates this in the notice of the intended procurement, or when the procuring entity uses the most advantageous evaluation criteria, and this criteria is not the most advantageous tender.⁶³⁵ Moreover, Article XII.2 of the revised GPA provides the obligations of procuring entities when conducting a negotiation with tenderers. It prescribes that the procuring entities should not eliminate any supplier from participating in the negotiation unless specified in the evaluation criteria of the notice of intended procurement. Also, it must provide the remaining suppliers with a deadline to submit their new or revised tenders.⁶³⁶

The monitoring of the negotiation process by the GPA is to ensure that all negotiation procedures are conducted in a transparent manner. Therefore, when a procuring entity intends to conduct a negotiation with tenderers it must specify that in advance, and

⁶³² Tender No 1/2013/2014/5 BB 2015.

⁶³³ Law no 7 of 2010 concerning the Establishment of the capital markets authority and regulating securities activity, Kuwait.

⁶³⁴ Muhammed Al-Albny, *Irwa Al-Ghaleel* (1st edn, Islamic office press 1979). This book discusses and authenticates the traditions from the famous book of Hanbli (Manar Al Sabeel).

⁶³⁵ The Revised Agreement on Government Procurement, art XII.

⁶³⁶ *ibid.*

have a transparent evaluation criteria in the notice of intended procurement to eliminate any exploitation of the broad discretion granted by the GPA.⁶³⁷ In addition, it appears that the GPA understands the importance of providing many rules regarding the process of negotiation, as many countries use the principle of value for money during the process of evaluating the contract.⁶³⁸

However, the Saudi law does not contain many details on how and when to conduct negotiation with tenderers. Only article 21 allows two cases where a negotiation with tenderers can be conducted. First, if the price of competitors is higher than the market price, then the committee should determine the amount to be reduced to conform with the market price, and write to the lowest price bidder to adjust his price. Second, if the value of competitors exceeds the amount allocated for the project, then the committee could conduct a negotiation with competitors to cancel some items.⁶³⁹

In general, public tender is a relatively static process.⁶⁴⁰ It involves the competitors submitting their bids and the procuring entity selecting the best bid, in terms of quality or prices.⁶⁴¹ In Saudi Arabia, by law procuring entities must choose the lowest price. Therefore, negotiation is only conducted when there is a conflict over prices. This means that the procuring entity will not indicate that it will conduct a negotiation in the notice of intended procurement, as there is a rule in the law which provides the cases for conducting negotiation.⁶⁴² Also, the requirement by the GPA to indicate in advance the intent to conduct negotiation will only apply to the evaluation criteria which involves the most advantageous bid. This is not implemented in the Saudi evaluation criteria. However, compatibility in this regard would be achieved if Saudi law was modified and adopted the most advantageous criteria, which involves negotiation in some cases. This will achieve quality for government purchases.⁶⁴³

5.2.4.1 The Sharia Law Approach to Conducting Negotiation with Competitors:

⁶³⁷ Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement'.

⁶³⁸ Achieving better value for money can be through many ways, including a transparent approach of negotiation. For more detail see National Audit Office, *Getting Value for Money from Procurement - How Auditors can Help* (2001).

⁶³⁹ Saudi Arabian Government Tenders and Procurement Law, art 21.

⁶⁴⁰ Reich (n 53).

⁶⁴¹ *ibid.*

⁶⁴² Saudi Arabian Government Tenders and Procurement Law, art 21.

⁶⁴³ Arrowsmith and Anderson, 'The WTO Regime on Government Procurement: Past, Present and Future' 25.

The Quran has some verses which permit conducting negotiation as a tool to achieve the objectives of a Muslim society. For example, the Quran orders people to conduct negotiation to achieve peace as it states that ‘And if they incline to peace, then incline to it [also] and rely upon Allah’.⁶⁴⁴ Moreover, sharia law provides some instructions on conducting negotiation. The Quran states that:

Invite to the way of your Lord with wisdom and good instruction, and argue with them in a way that is best. Indeed, your Lord is most knowing of who has strayed from His way, and He is most knowing of who is [rightly] guided.⁶⁴⁵

The above verse of the Quran shows that God gave the Prophet the discretion to invite to the way of the Lord, as God orders the Prophet to conduct that with wisdom. This discretion, which was given by God, applies to all leaders of Muslim societies to conduct negotiation with wisdom. The wisdom includes many meanings, and in the context of government procurement it requires the implementation of the principle of public interest in the process of all tender stages including conduct of negotiation. Therefore, the leader of the negotiating team must consider the concept of public interest when conducting the negotiation.

The GPA prescribes that if the procuring entity intends to conduct negotiations it must indicate that in advance to accomplish the principle of transparency in all stages of the tender. Therefore, the leader of a Muslim society must decide what is in the best interest of the society, whether applying the traditional evaluation criteria, which seek the lowest price and do not normally include a process of negotiation, or applying other evaluation criteria which seek the most advantageous bid and could include negotiation. Furthermore, the leader of a Muslim society should consider that Muslim societies applying the lowest price evaluation criteria suffer from corruption and stalled projects due to subcontracting with lower quality contractors. Consequently, the leader must endeavour to eliminate corruption and adopt the evaluation criteria which helps to achieve this goal. Moreover, some researchers have argued that the most advantageous bid criteria is the best evaluation criteria,⁶⁴⁶ as it includes some negotiation between a procuring entity and competitors to improve the quality of their work. Therefore, as the Islamic maxim stresses that, ‘whatever it takes to fulfil these

⁶⁴⁴ Surat Al-Anfal verse 61.

⁶⁴⁵ Surat A-Nahal verse 125.

⁶⁴⁶ Sue Arrowsmith, 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha' (2002) 5 *Journal of International Economic Law*, Oxford University Press 761.

obligations are also considered as an obligation',⁶⁴⁷ it is one of the obligations of a procuring entity to award the contract to the best quality bid. This obligation could be fulfilled by adopting the most advantageous evaluation criteria which allows the procuring entity to conduct negotiation with bids to choose the best quality tender. Thus, if the process of negotiation with tenderers will result in the best quality products or performance, then it is one of the obligations of a procuring entity to conduct negotiation with tenderers. This includes paving the way for the process of conducting negotiation by modifying the law to adopt different evaluation criteria. However, conducting negotiation should be notified in advance by the procuring entity, so as to implement the principle of transparency. Moreover, the procuring entity shall give the tenderers another opportunity to revise their bids.

5.3 Challenge Procedures and Legal Remedies:

Preamble:

The third part of this chapter covers the legal remedies under Saudi procurement law. The author will discuss the available remedies that have been issued by the Board, and will analysis these remedies to ascertain if they are compatible with the requirements of the GPA in regard to remedies. Moreover, some of the remedies which have been issued by foreign judicial systems or foreign arbitrators and were expected to be enforced by the Board have been rejected by the Board, because they were contrary to sharia law.⁶⁴⁸ Therefore, an area of compromise needs to be reached as a resolution to some of these disputes.⁶⁴⁹

⁶⁴⁷ Abdul-Muhsin Al Swaigh, 'The Islamic Maxim "Whatever it Takes to Fulfil these Obligations are also Considered as an Obligation"' (2003) *Sharia and Law Journal*, UAE University 1.

⁶⁴⁸ Case No 185/2/K 1989, and case No 186/2/K 1989.

⁶⁴⁹ Before 2012 the Board was responsible for enforcing all foreign judgments in Saudi Arabia. Moreover, there were no special regulations for the enforcement of the foreign judgments. However, Saudi Arabia was and still is a member of the Arab League Convention for the Enforcement of Foreign Arbitral awards and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Although, after the issuance of royal decree No 53 on 13/07/2012 the Board is no longer responsible for enforcing foreign judgments as the royal decree refers all foreign judgments to sharia courts. Furthermore, the new enforcement law which was issued in 2012 gives a detailed rule regarding enforcement of foreign judgments in article 11 of the enforcement law which states that:

5.3.1 The Importance of the Procedure of Consultation in Resolving Disputes:

The Saudi legal system has developed significantly. The new law of the Board requires the claimant to contact the procuring entity to seek resolution to the dispute before proceeding to the Board.⁶⁵⁰ Unlike the old practice by the judges of the Board, who used to accept cases even if the claimant had not informed the procuring entity.⁶⁵¹ One of the main reasons for this change to the law is the consideration of the legislators that the requirement for contractors to contact the procuring entity and challenge its decision is a means of administrative control.⁶⁵²

It is worth mentioning that sharia law and the GPA tend to prefer the process of consultation to resolve all disputes. The GPA encourages the procuring entities and contractors to seek resolution for the dispute through consultation.⁶⁵³ Article XX.1 states that:

Each Party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding any representation made by another Party with respect to any matter affecting the operation of this Agreement.⁶⁵⁴

Article 11 of the new Enforcement Law states that the Enforcement Judge may enforce a foreign arbitral award only on the basis of principles of reciprocity and if the party seeking enforcement can ensure that (i) Saudi courts do not have jurisdiction with regards to the dispute, (ii) the award was rendered following proceedings in compliance with the requirements of due process, (iii) the award is in final form as per the law of the seat of the arbitration, (iv) the award does not contradict a judgment or order issued on the same subject by a judicial authority of competent jurisdiction in KSA, and (v) the award does not contain anything that contradicts Saudi public policy.

For more detail see Jean-Pierre N Harb and others, *The New Enforcement of Law in Saudi Arabia: an Additional Step toward a Harmonized Arbitration Regime* (Jones Day 2013); Ahmed Makhoulouf, 'The new enforcement law abandon the role of the board to undertake foreign judgments.' (2015) Administrative Development Institute of Public Administration.

⁶⁵⁰ The Law of the Board of Grievances, art 1 (B).

⁶⁵¹ Case No 143/1/T 1991.

⁶⁵² Aroi Abdul Kareem, 'Alternative Ways to Resolve Disputes: Amicable Settlement, and Mediation' (Thesis, University of Algiers 2012.)

⁶⁵³ The Revised Agreement on Government Procurement, art XVIII.

⁶⁵⁴ *ibid*, art XX (1).

Furthermore, sharia law prefers an amicable settlement (*sulh*) to any form of dispute.⁶⁵⁵ The Quran states that, ‘settlement is best’.⁶⁵⁶ The GPA also encourages parties to resolve disputes through consultation, and urged that the Dispute Settlement Understanding (DSU) is applied to the consultation and settlement of disputes under the GPA.⁶⁵⁷ The GPA and DSU do not provide detailed provisions of the process of consultation. In contrast, sharia law has detailed provisions regarding the process of consultation, and has given a clear rule on when Muslim society should have consultation. For example, one form of consultation is amicable settlement, and this applies to the basic five defining provisions of sharia law.⁶⁵⁸ Accordingly, it becomes obligatory if the dispute may result in war and could be recommended especially in financial disputes. For example, if the owner of a property asked the tenant to leave without receiving his final payment, it is neither obligatory nor optional (neutral).

In terms of public procurement, the amicable settlement could be optional or could be prohibited. It could be optional if there is no damage to public interest. For example, if the procuring entity asked the contractors to terminate the contract due to lack of benefits in the project, such as projects in remote areas. It could be prohibited if it was contrary to sharia law. For example, if the settlement contains usury, then it is null and void.⁶⁵⁹ On the other hand, if the parties agree to cancel the amount of usury from the total remedy then such resolution will be accepted.⁶⁶⁰ Also, one important issue that is insisted upon by the GPA and sharia law is that if the reviewing body or amicable settlement committee have determined that there has been a breach of the contract, corrective action or compensation must be limited to the damages.

⁶⁵⁵ Aseel Al-Ramahi, 'Sulh: a crucial part of Islamic arbitration' (2008) Islamic Law and Law of the Muslim World < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153659> accessed 24 December 2015.

⁶⁵⁶ Surat An Nisa verse 128.

⁶⁵⁷ The Revised Agreement on Government Procurement, art (3).

⁶⁵⁸ It is also called Islamic commandments, which are compulsory, recommended, permissible, dislike, and prohibited.

⁶⁵⁹ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁶⁶⁰ Case No 186/2/K 1989 The decision for this case has been issued by the high court in the UK for a British company. Moreover, it had to be enforced by the Board in Saudi Arabia. The Board has rejected enforcement of this decision as the remedy included financial interest which is prohibited by sharia law. However, after the British company agreed to remove the interest from the total amount of remedy, the Board accepted and enforced the decision.

Moreover, the GPA states that the correction action or compensation shall be for the cost of preparation of the tender or the cost of challenge, or both.⁶⁶¹

In sharia law, the issue of compensation for loss of profit has been raised among Muslim scholars. In terms of a procuring entity, the majority of Muslim jurists have agreed that compensation for losing profit which has to be paid to a procuring entity is prohibited in sharia law. They claim that compensation for loss of profit is a form of interest, therefore, if the procuring entity received compensation for loss of profit from the contractors, it would be considered as financial interest. Moreover, they have argued that compensation for loss of profit is seen as an analogy for the penalty for the delay of paying the debt, as both of them include a financial transaction, which is considered to be financial interest in sharia law.⁶⁶² In terms of contractors, the majority of Muslim jurists have agreed that the compensation should be limited to damages, but not for loss of profit. This argument is seen as an analogy for someone who usurps someone's possessions.⁶⁶³ In these circumstances the compensation is for the damage but not for the potential loss of profit.⁶⁶⁴ However, in terms of construction sharia law permits the imposition of a penalty clause on contractors, as it would be applied to the nature of work but not the delay in payment.⁶⁶⁵

In addition, amicable settlement does not apply to some cases in public procurement, such as if it results in wasting public funds. For example, the government is not permitted to seek amicable settlement (which does not contain financial compensation) with a contractor who has stalled a project, as it will be considered as corruption.

Finally, one of the most important parts of amicable settlement in sharia law is that the concessions can be by one side only. Moreover, the remedy can be other than financial compensation. For example, in terms of a dispute arising between a procuring entity and a foreign contractor, sharia law permits the procuring entity to require a specific company from the GPA party to leave the country and may ban it

⁶⁶¹ The Revised Agreement on Government Procurement, art XVIII (7).

⁶⁶² Salman Al-Dhakil, *Compensation for Damages Arising from the Delay of Debt* (1st edn, 2011).

⁶⁶³ For example; if the procuring entity has reserved a tenderer's right to participate in a tender, and the panel decides that he should have participated in the tender, then, the compensation shall be limited to the damages but not for the potential profit.

⁶⁶⁴ Al-Dhakil (n 662).

⁶⁶⁵ Ali Al-Sawa, 'The Penalty Clause For the Debt' (The Role of Islamic Banks in the investment and Development, Sharjah UAE, May 2002).

from joining any tender in the future due to the commission of a serious crime by the company, such as bribery. However, this will not be called an amicable settlement unless agreed by the party related to the company.⁶⁶⁶

5.3.2 The Compatibility of Remedies Provided by the GPA and Remedies Under the Saudi Legal System:

Since the procuring entities and the potential tenderers do not use the provisions of the GPA, they would rather use their national procurement rules, and adapt their rules to the GPA requirements.⁶⁶⁷ Thus, if Saudi Arabia wants to join the GPA, the remedies issued by a quasi-judicial panel or the Board have to be compatible with the requirements of the GPA.

As mentioned above, the GPA requires each party to establish a timely, effective, transparent, and non-discriminatory procedure to review complaints. The GPA encourages the suppliers and the procuring entity to resolve their disputes. However, if they fail to reach an agreement, then the complainant may take the dispute to a court or independent review body. Moreover, the GPA obliges each party to maintain a procedure that provides interim measures, which may result in suspension of the procurement process to preserve the supplier's opportunity to participate in procurement. Furthermore, if it was determined that there has been a breach to the agreement or a party did not comply with the GPA, then a corrective action or compensation for the loss or damages are obligatory.⁶⁶⁸

Through the latter requirements of the GPA, it can be said that the GPA is only providing guidelines for the challenge procedure, and each party has the discretion to establish a dispute procedure. However, they should adapt their domestic challenge procedures to the GPA.

In Saudi Arabia, article 9 of the procedural rule before the Board provides that, 'filing a case shall not entail suspending the enforcement of the contested decision'.⁶⁶⁹ However, it is left to the competent circuit's discretion to decide the appropriate

⁶⁶⁶ Omar Al Hamaad, 'Amicable Settlement in Sharia Law, and Saudi Regulations' (Thesis, Imam Muhammed Bin Saud University 2009).

⁶⁶⁷ Reich (n 53).

⁶⁶⁸ The Revised Agreement on Government Procurement, art XVIII (1) (7).

⁶⁶⁹ Royal Decree no m/3, November 25 2013, The Procedural Rules Before the Board of Grievances art 9.

procedure to suspend the enforcement of a contested decision. This might be: (i) an order to cease the enforcement of the decision, (ii) making an urgent order for a preventive measure, or (iii) making an urgent order for a provisional measure whenever necessary within twenty-four hours of submission of an urgent application.⁶⁷⁰ Furthermore, procedures will be applied when the circuit anticipates unavoidable consequences. For example, in one case the Board suspended a decision of the municipality of city of Taif.⁶⁷¹ The municipality awarded a contract to a contractor to operate 30 cafés and snack bars in the city's parks. Afterwards, the contractor claimed that the municipality decided to invite another contractor to operate some of these bars. The municipality claimed that one of the clauses of the contract allowed the municipality to sign a contract with a different contractor to operate these bars if it considered that it was for the public interest. However, the Board suspended the decision of the municipality, and enabled the contractor to operate all the bars until the Board decided on the case.⁶⁷² If the Board had not issued the interim measure a suspension would have resulted in loss of profit by the contractor.

In general, the types of remedies under the Saudi legal system are compatible with the requirements of the GPA regarding legal remedies. The Saudi legal system adopted interim measures to preserve the rights of tenderers and contractors, which are called 'Interim Relief'. This type of remedy is the most important measure, as it gives the tenderers an immediate opportunity to suspend the procuring entity's decision. Therefore, when the tenderers or contractors consider that the decision of the procuring entity is unjust, they can request interim relief to suspend the tender or the award of the contract process until the judicial body issues its decision regarding the legality of the procuring entity's decision.

It is submitted the flexibility and change are inherent characteristic of administrative law. Despite the new law has provided a detailed provisions of government procurement, the Board has a general rules which do not guide the judges to the methods that should be used when issuing remedies. Therefore, one important issue that needs an urgent reform in the interim relief process is the need for general rules to

⁶⁷⁰ Faris (n 513).

⁶⁷¹ Taif is a city located in the west province of Saudi Arabia.

⁶⁷² Case No 3223/2/Q 2005.

guide the Board judges on when to grant or decline the interim relief. It has been noticed that some judges issued an interim relief for certain cases, and other judges rejected interim relief on a similar case.⁶⁷³ Moreover, they claim that one of the meanings of the independence of judges is that they use their own personal reasoning, and the use of a different ruling was imposed, such as a different personal reasoning, that would violate the independence of judges.⁶⁷⁴ However, the appeal court of the Board are permitted to overturn the cases of the first judge, and that is not considered as violating the independence of judges. Thus, if there were general rules to guide the judges of the Board on when to grant or decline interim relief the overturning of cases would be reduced.

Another type of remedy is an injunction. This remedy has been issued by the Board to stop the procuring entity from acting illegally. In one case, the Board has ordered the Ministry of Education to refund the financial guarantee to a contractor, as the Ministry failed to hand over the work site to the contractor.⁶⁷⁵ The work site should have been handed over within sixty days from the date of awarding the bid.⁶⁷⁶ However, the contractor waited over sixty days and did not receive the work site. The result of such corrective measures will help both the Ministry and contractors. It will encourage the procuring entity to accelerate all related processes and, on the other hand, it will preserve and protect the rights of the contractor from any violation.

It is clear from the above case that these types of remedies are compatible with the requirements of the GPA. The Saudi legal system provides interim measures, as well as injunction remedies, which might be compensation or corrective actions. Although the Board, like the other judicial institutes, does not have a clear system of remedies to follow, each judge is authorized to provide a proper remedy for a single dispute.⁶⁷⁷ Finally, despite the recent reforms, the Board has only published its judgments from 2006 to 2009. It needs to publish the judgments prior to 2006, as well as the judgments after 2009 as this will give lawyers and researchers the full opportunity to

⁶⁷³ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

⁶⁷⁴ Mohammed Aljathlany, 'The independence of judges' *AlRiyadh* (Riyadh, 10 April 2014) <<http://www.alriyadh.com/824767> accessed 31 March 2016.

⁶⁷⁵ Case No 4894/1/Q 2009.

⁶⁷⁶ Saudi Arabian Government Tenders and Procurement Law, art 30 (b).

⁶⁷⁷ Al-Hudaithy, 'Rights of tenderers and contractors under Saudi public procurement contract regulations: a comparative study with England and Wales'.

develop the remedies in the Saudi legal system, and contribute to resolving some legal issues.

Summary:

This chapter aimed to bridge the gap between the GPA and procurement law. Despite the fact that the GPA principles have been approved by sharia law, chapter four has indicated that some of the procurement law provisions do not implement the GPA requirements. Therefore, in this chapter the researcher has attempted to reconcile between the GPA and procurement law under the shadow of sharia law.

This chapter has been divided into three sections. The first section has discussed the main discriminatory practices in the procurement law that contradict the GPA. While the second section has discussed the procurement law provisions that relate to the lack of transparency. The third section has discussed the compatibility between the GPA and procurement law in settling disputes.

There are a several forms of discrimination in procurement law. The interrelation of the foreign investment law with procurement law might be one of the main discriminatory issues in procurement law. For example, according to the foreign investment law in Saudi Arabia, the rate of tax for foreign investors is 20%, while the locals are required to pay zakat only, which is 2.5%. Thus, the requirement of procurement law for foreign investment law to apply to foreign contractors would be considered as discrimination in the GPA. However, the researcher has suggested that the tax should be the same amount as zakat, as the zakat is a religious duty which cannot be changed. In addition, it was found that the procurement law explicitly requires all government institutes to give preference to national products and services. However, article five of the procurement law which requires all government institutes to give priority to national products should be modified.

It has also shown that the procurement law lacks transparency in several parts of the law. For example, the difficult access to administrative circulars might be one of the main contradictions to the principle of transparency. The GPA requires the publishing

of all laws and regulations including administrative rulings. Therefore, the accession to administrative circulars must be available for all interested parties in order to achieve the principle of transparency.

The final part of this chapter has found that the GPA and sharia law agree that all disputes be resolved through consultation. However, sharia law prohibits resolving any dispute that may include usury. Therefore, compensation should be limited to damages. However, sharia law permits the imposition of a penalty clause on contractors if they delay submitting the products or services because this is different to usury.

It was also found that the GPA provides guidelines for the challenge procedures. Therefore, each party should adopt these guidelines in their domestic law. Also, this chapter has shown that the types of remedies in the Saudi legal system are compatible with GPA requirements. The Saudi legal system adopts interim measures to give the aggrieved contractor the ability to suspend the procuring entity's decision. Moreover, the injunction remedy has been practised by the Board to stop some of the government institutes acting illegally. However, the Board must have a clear system of remedies to follow as it has been noticed that one judge may issue a particular remedy for a case whereas a different judge may issue a different remedy.

Chapter Six: Conclusion and Recommendations:

6.1 Introduction:

The aim of this research is to bridge the gap between the GPA and Saudi procurement law. Although there is small amount of literature concerning government procurement in Saudi Arabia, these efforts did not cover Saudi Arabia accession to the GPA. Therefore, it is anticipated that this research will contribute significantly to the literature of Saudi Arabia accession to the GPA and the literature of sharia law and procurement. Specifically, this researcher has determined the barriers that impeded Saudi Arabia accession to the GPA. After, and building on the principle of public interest in sharia law, this research presented several suggestions that would allow Saudi Arabia to overcome such barriers, and thus facilitate the accession to the GPA. Furthermore, it is hoped that this research will also provide a practical contribution by helping decision makers to understand the problem of accession to the GPA, the uses and approaches of sharia law concerning such contemporary issues.

Saudi Arabia joined the WTO at the end of 2005, and as a condition of joining, it started negotiations to join the GPA in 2007. Yet, Saudi Arabia's negotiation to join the GPA is still an ongoing process. The research endeavours to examine the delays in joining the GPA from a legal perspective.

All Saudi laws including procurement law are based on sharia law. Chapter three discussed the GPA from a sharia law purview in order to ascertain if the GPA principles and requirements are sharia law compliant. After confirming that the GPA is sharia law compliant, the researcher embarked, in chapter five, on finding solutions for the problems in the provisions of the procurement law which are inconsistent with the GPA provisions.

As stated in the first chapter, the main aim of the research was to bridge the gap between the GPA, procurement law and sharia law. Although the procurement law was modified in 2007, weaknesses in its provisions were clearly observed. The lack of transparency, the support of discriminatory practices, and limited market access are the main characteristics of the procurement law. The main GPA principles stress the achievement of transparency and the elimination of any discriminatory practices.

Therefore, to achieve the main aims of the research, the researcher has explored GPA requirements in order to understand their nature and objectives, and moreover, to determine the position of the GPA vis-à-vis sharia law. Furthermore, the research tried to ascertain if it is possible to implement the GPA requirements in procurement law. Thus, the foregoing chapters were employed to provide a sharia law approach to the implementation of the GPA in procurement law.

In this chapter, the research is concluded. Section 6.2 is an overview of the main findings of this research. It summarizes and draws from the findings of the substantive chapters: the requirements of the GPA, the sharia law approach to the GPA, the shortcomings of procurement law, and how to reconcile or link the procurement law and the GPA. Section 6.3 provides the main limitations and suggestions for further research that could be undertaken. Finally, section 6.4 shows the general conclusions and recommendations.

6.2 The Main Findings of this Research:

The main findings of the research were organised according to the objectives defined in the first chapter. The research has explored the GPA and its main features. Also, it has described the sharia law approach to the GPA and the role of sharia law in the accession of Saudi Arabia to the GPA. Moreover, there has been analysis of the procurement law in order to find compatibility with the GPA, and suggestions for the areas of procurement law provisions which might preclude Saudi Arabia from accession to the GPA.

6.2.1 The Requirements of the GPA:

In chapter two, the aim was to understand the background, nature, principles, and in particular, the main provisions of the GPA. Understanding the main provisions of the GPA has provided the researcher with the ability to identify the problems of the procurement law that might be a reason for the delay in accession to the GPA by Saudi Arabia. Moreover, it has assisted the researcher in evaluating the GPA from a sharia law perspective.

The results show that the GPA's main principles are transparency and non-discrimination, and all its provisions support these principles. Moreover, the GPA does not permit any reservation over its provisions. However, it is a controversial

agreement, which has undergone a long, complicated process and debates. The GPA was first negotiated at the Tokyo round. Then, after the establishment of the WTO, as a result of the Uruguay round, the GPA came under the administration of the WTO. Furthermore, it has been through a long revision and the revised text came into force in 2014.

One of the main debates was the status of the GPA as a plurilateral agreement, which meant it was not obligatory for WTO members to subscribe to it. This indicates the worry or concerns of the GPA committee about the practical feasibility of the GPA requirements, and whether it was viable or not. However, the researcher suggests that the status of the GPA weakens its thrust and complicates its applicability.

The GPA had been neglected prior to the Tokyo round, as the GATT was focused on other trade issues, mainly to reduce tariffs. The GATT decided, at the Tokyo round, to pay some attention to the subject of government procurement as an important part of the economy. In addition, they decided that government procurement should be subject to international trade principles such as national treatment. However, it is acknowledged that the GPA is flexible with developing countries when it comes to the implementation of the principles of national treatment and MFN. This flexibility is one of the GPA's tools in attracting WTO members to join the GPA. However, WTO membership is subject to the terms of negotiations between the parties of the GPA and the potential acceding country. In addition, the revised text of the GPA indicates that there is a tendency to make the GPA a multilateral agreement, because the main focus is on accession. It states that: 'in the negotiation on accession'. However, the previous text considers accession as a possibility.

One of the more significant findings of this research is that the revised text of the GPA has mentioned the term corruption, which was absent from the old texts of the GPA. This clearly shows the GPA's concerns with corruption, a main reason for the delay of achieving its objectives. Moreover, this also indicates that developing countries are the target of the GPA's concern with corruption as many developing countries suffer from it.

Many countries for many reasons, including personal interest, would rather keep their procurement markets closed to foreign contractors and suppliers. Therefore, the GPA

requires all parties to adopt transparent measures in their government procurement system to avoid any practice of corruption or personal interest.

It was also shown in chapter two that discriminatory practice is one of the main barriers in both the international trade and government procurement process. The GPA requires all its members, as well as potential members, to liberalize their procurement market, and eliminate any practice of discrimination. However, as the policy of 'buy national' is still practiced by many countries, governments should regulate this policy in their procurement system to meet the requirements of the GPA. The unfair use of this policy has resulted in unfair competition, low quality of products and services, and more importantly encouraged corrupt practices.

This research finds that the revised GPA is an improvement, but the text includes some exceptions. The frequency of exceptions is not preferred by sharia law. The researcher has found that the GPA includes negotiation on coverage, as the GPA parties can include the procurements covered in their appendix. Therefore, negotiation normally includes many exceptions, but as the negotiation is normally conducted by both parties it can be beneficial, and this can come through concessions and exceptions.

Another major finding was that the revised text of the GPA is different from previous texts in dividing the tender methods. The previous text has limited the tender methods to open, selective, and limited tenders. On the other hand, the revised text has given domestic laws the discretion to adopt tender methods, which are transparent and consistent with the provisions of the GPA. In addition, the revised text emphasizes the principle of transparency in electronic tenders. It has provided that the electronic tools can be used just like traditional means of communication, using the available and interoperable information system and software.

It was also shown that each party of the GPA must provide a procedure which enables suppliers to challenge a breach of the GPA. It is noted that the revised text of the GPA is focused on four principles; first, the time, to encourage countries to provide a solution in a certain time, as some countries have a slow judicial system, which takes a long time. However, commercial activity requires a speedy transaction, as well as quick solutions to the issues. Also, the GPA is very concerned with the issue of its effectiveness, since there are some countries which have challenge procedures in their

domestic law, but they are not effective as they are ignored and not implemented. The principle of transparency is a core requirement of the GPA in all challenge procedures. The GPA requires all parties to provide clear rules in their challenge procedure, and transparent rules for all the steps of challenge procedures. In addition, the GPA requires all parties to have a non-discriminatory challenge procedure. This means that the challenge procedures will treat other parties equally based on the principle of national treatment and MFN.

This study has also found that the GPA appreciates the diversity of national legal systems that regulate government procurement. Therefore, the GPA does not have its own legislation that can replace domestic laws which regulate government procurement. Moreover, the GPA has given parties discretionary powers to form their own forum of review.

On the other hand, the GPA has certain requirements that must be implemented by the forum of review. The GPA requires that the challenge must be heard by an independent review body in order to avoid any influence that may change the course of the case. Moreover, it must ensure that the procuring entity does not have the authority to issue a judicial decision which could penalize a contractor from participating in further tenders in all government sectors. However, the GPA encourages that complaints be resolved with a procuring entity through consultation. In addition, the researcher has found that the discretion given by the GPA was due to countries that focused on certain objectives of government procurement regulation, such as eliminating any practice of corruption including bribes. Hence, a country should adopt and employ a transparent system that is devoted to resolving these issues.

Regarding remedies, it was shown that the GPA has provided remedies for the parties including interim measures, corrections or compensation. However, the result finds that the interim measures can include options other than suspending the contractor. For example, if the review body was able to review the case before awarding contracts. The second major finding regarding remedies was that there is confusion about corrections and compensation, for example, knowing which one has priority. Because, according to the GPA revised text, the review body has the option to correct 'or' compensate the aggrieved parties. However, this issue should be regulated,

because this may lead to corruption, as some review bodies may resort to compensation where correction measures should have been used. Furthermore, this would be against the principle of effectiveness which is promoted by the GPA, because if the aggrieved contractor realizes that the only remedy available is compensation, then the aggrieved contractor or supplier may rather not start the work because compensation is limited to cost.

6.2.2 The Approach of Sharia Law to the Accession to the GPA:

Chapter three shows that the Saudi legal system is based on sharia law. Therefore, in Saudi Arabia sharia law is considered as the general source for all laws, including the administrative laws. Although sharia law does not contain prescriptive details on all issues it provides a framework, Islamic maxims, and principles on which to deal with contemporary issues. One of the contemporary issues that has been discussed among Muslim scholars is the subject of government procurement. However, the GPA has not been examined from a sharia law perspective. Therefore, to examine the GPA, which is an international agreement, the researcher has described sharia law's views on international agreements. Then, the GPA has been analysed from sharia law's perspective.

It has been shown that the Quran and the prophetic traditions are the main sources when dealing with all issues, including contemporary issues. The finding of this research has shown that the GPA falls under the framework of contemporary issues, which are not mentioned in the Quran and prophetic traditions. However, the principles of the GPA, such as transparency and equality, are mentioned in the Quran and prophetic traditions, as general principles. Thus, sharia law advised scholars and researchers to use reason when addressing issues pertaining to the GPA and also the principle of public interest.

It was also found that the principle of public interest is the most appropriate principle when dealing with contemporary issues, including the GPA. It provides sharia law with the ability to adapt to contemporary issues. Moreover, it is a concept that reforms the provisions of sharia law. Nevertheless, using the principle of public interest should follow certain rules that achieve its objectives. These are similar to the objectives of

sharia law, which are called the five necessities: the preservation of religion, life, intellect, lineage, and wealth.

The other major finding regarding the principle of public interest is that it is the most appropriate method to resolve all issues confronting any Muslim country during the accession to any international agreement. In general, international agreements respect the cultural and religious backgrounds, and they consider them as a right which shall be granted. Therefore, the finding suggests that the use of the principle of public interest as a method to deal with the requirements of international agreements should be considered and used. This will make sharia law more flexible, in order to reconcile between laws based on both sharia law and international agreements. On the other hand, if the requirements of an international agreement are against the basic principles of sharia law, then the principle of public interest as a method to reconcile both laws should not be used. Thus, when signing an agreement, the following sharia law principles should be considered: justice, equality, and freedom.

Chapter three also revealed that sharia law is in agreement with the objectives of international agreements to implement the principle of equality. Moreover, sharia law agrees with principle of 'freedom of religion', which is a basic principle in international law. Therefore, any discriminatory practices based on religious views are prohibited in sharia law.

Sharia law has its own criteria in categorizing and classifying international agreements. These criteria are based on the nature of the international agreements. However, as the GPA is the main focus of this research, the research found that the GPA is an international agreement under the WTO administration which has many requirements, including trade exchanges and labour movement. The accession to the GPA is subject to the decision makers, normally leaders of the states. The GPA is considered as a political-trade agreement and therefore falls under two types of sharia law agreement classifications. First, a general peace agreement, and second, a *Dhimmi* agreement, which requires Muslims to treat all people equally.

The research has described the provisions for negotiations in sharia law. The accession to the GPA includes a series of negotiations between potential accession countries and each party. Therefore, the researcher has drawn lessons from negotiations conducted by the Prophet and has considered them as models for sharia

law in the process of negotiation. This approach requires parties to determine the framework for negotiation on the principle of good will. Moreover, negotiators may make some concessions during the process of negotiation when there is general interest for the country, even if there is a small chance the country could be harmed.

One of the most significant findings to emerge from this research is that the GPA's aims⁶⁷⁸ are legitimate in the light of sharia law. However, as these aims are contemporary, they should be subject to the principle of public interest. Moreover, sharia law has given the government discretionary powers to evaluate the outcomes of the GPA based on the principle of public interest. Furthermore, it has given them discretionary powers to enact or modify laws in order to make them compatible with international agreements.

As laid down in chapter two, the main principles of the GPA are transparency and non-discrimination. Thus, the findings of chapter three indicated that sharia law promotes that the principle of transparency should be implemented in all transactions, as the Prophet stated that: 'He who believes in God and the Last Day either speak good or keep silent,'⁶⁷⁹ which means that, every one shall tell the truth, or otherwise keep silent rather than telling a lie. However, sharia law uses the principle of transparency to ensure that all Muslims are aware of what is permissible and prohibited in sharia law. Therefore, all transactions including the method of paying for the value of a contract must be clear so as to avoid usury, which is prohibited in sharia law. Moreover, the researcher has found some Islamic financial transactions such as Islamic bonds or *Musharakah* as solutions to solve any issues that will occur between a GPA party and a Muslim country.

Also, it was shown in chapter three that sharia law considers discrimination as a prohibited practice. This prohibition is based on the prophetic Tradition which states that:

No Arab has superiority over any non-Arab and no non-Arab has any superiority over an Arab; no black person has superiority over a white person and no white person has superiority over a black

⁶⁷⁸ The aims are greater liberalization of trade, expansion of world trade, and the improvement of the international framework for the good practice of world trade.

⁶⁷⁹ Al-Bukhaari (n 222); Book: 2 Hadith: 26.

person. The criterion for honour in the sight of God is righteousness and honest living.⁶⁸⁰

However, any harm caused by implementing the principle of non-discrimination must be removed, because one of the Islamic maxims states that, 'Harm must be removed'. Consequently, if there is harm caused by implementing the principle of non-discrimination, such as the increase of pollution or collapse of small and medium-sized enterprises, then the harm must be removed in accordance with the sharia law rules mentioned above.

Regarding sharia law methods for resolving disputes, the research has shown that sharia law encourages litigants or complainants to resolve disputes through consultation. Moreover, sharia law has awarded those who settle disputes between two parties a share of zakat. On the other hand, if the dispute cannot be resolved through consultation, then the IICJ statute states that the Islamic courts are permitted to take interim measures to preserve the parties' rights. Moreover, the court must inform all parties before the issuance of suspension, and allow them a period of time to appeal.

Finally, the research has shown that there was a debate among scholars regarding financial sanction or compensation as a remedy. Some scholars argue that financial sanction is not permitted in sharia law due to a Quranic verse which prohibited financial sanctions. However, the research has found that compensation is permitted in sharia law because of many prophetic traditions which include some sayings and actions of the Prophet that sanctioned compensation. Moreover, the verses used as evidence by those who disagreed with financial sanction or compensation are vague, thus in sharia law certain Quranic verses might be made clearer using prophetic traditions.

6.2.3 Main Shortcomings of the Procurement Law:

Chapter four has identified the main shortcomings of procurement law which might act as barriers to the accession to the GPA. The government of Saudi Arabia realized that the old procurement law was outdated and needed to be reformed and modified. Moreover, Saudi Arabia's accession to the WTO at the end of 2005 was subject to a condition to commence negotiations to join the GPA in 2007. Therefore, the

⁶⁸⁰ Alserhan (n 324).

procurement law was modified in 2006 (one year after joining the WTO). However, Saudi Arabia has not joined the GPA yet. Furthermore, the procurement law includes some provisions which may not meet the requirements of the GPA. In the following section, the researcher will shed light on the main shortcomings of the procurement law, which also might be considered as a barrier to the accession to the GPA.

The research has found that there has been an increase of requests by government entities to be exempted from procurement law. Consequently, the procuring entities can award contracts to certain contractors and suppliers. The procuring entities claim that they requested certain projects be exempted because of the complexity of the projects which might require advanced skills and equipment. However, the procurement law and its implementing regulations should limit the sectors which need exemptions, because this would make the procurement law transparent, and reduce corruption, which in some cases is an outcome of large numbers of exemptions.

Chapter four also revealed that the procurement law comprises articles which are devoted to the principle of discrimination. Article three orders that the procurement law should not breach the provisions of FDI law, which means local and foreign contractors would not be treated equally. As a consequence, the foreign contractors may pay higher taxes as the locals are only required to pay zakat. They are also excluded from participating in some sectors listed in a negative list in FDI law. Also, article five of the procurement law is considered to be discriminatory according to the GPA, as it clearly requires the procuring entities to give preference to national products and services.

The procurement law has been improved by the publication of the procurement system, as well as intended procurements. The procurement law has introduced the digital publishing of the intended procurements, and requires the procuring entities to publish the intended procurement in official gazettes through its website, and two local newspapers to ensure that all participants are treated fairly. However, fair treatment only applies for domestic contractors and suppliers, as the procurement law requires the announcement of intended procurements to be in Arabic, unless there is no local contractor to undertake the procurement, then, and only then will the procuring entities use Arabic and English in their announcements. However, to meet the requirements of the GPA the procurement law must require all procuring entities

to announce the intended procurement in one of the official languages of the WTO. In addition, the research found that there is a difficulty in accessing all administrative circulars as there is no database for them, thus breaching one of the GPA provisions which requires all parties to publish all measures including administrative rulings.

It was also shown that the Saudi procurement law includes two methods of tenders which are open tender and direct purchase. Despite the fact that limited tender has not been mentioned in procurement law, some government authorities occasionally practise limited tenders. Moreover, the use of limited tenders has become a way to avoid or bypass the procurement law when awarding contracts to preferred parties. This is because the government allows the procuring entities to request an exception from the procurement law to be submitted to the Council of Ministers to allow them to conduct a limited tender. This may not meet the GPA instructions regarding tendering methods. The GPA requires the method of tender to be transparent, impartial, avoid conflict of interest, and prevent corruption. Accordingly, the procurement law and its implementing regulations should include provisions which instruct government authorities on what cases they may resort to conducting limited tenders. Furthermore, the procuring entities should keep a record whenever limited tendering is used, including the reasons and circumstances for using it.

One important finding is that the evaluation criteria is consistent with the GPA, because when tenderers submit their bids they have already agreed on the terms and specifications provided by the procuring entities. On the other hand, the government should regulate the principle of lowest bids, as it was noted that some government authorities have selected the lowest bid tenderers to go through the evaluation process.

The procurement law must pay more attention to the principle of transparency. It is a core principle of the GPA. Although the procurement law and its implementing regulations are available to the public, the administrative circulars are not easily accessible. The GPA requires all measures including administrative circulars to be published. Moreover, the transparency in administrative circulars is very important in regard to accountability.

It has been indicated that the GPA requires all parties to publish procurement opportunities in one of the WTO official languages. Moreover, opportunities should

remain readily accessible until the expiration of the time period indicated in the notice. However, in Saudi Arabia procurement opportunities are normally published in Arabic. Furthermore, since the GPA requires that they shall remain accessible until the expiration of time, thus, local newspapers (part of the official gazette) must keep the advertisements on their websites.

It is very important, according to the GPA, to provide unsuccessful competitors with the reasons for their rejection or loss, and this should take place before awarding the contract. However, the research found that procurement law has not provided a provision which allows unsuccessful competitors to challenge the rejection decisions.

Finally, one of the improvements in the procurement law requires the claimant in a dispute settlement to contact the government to seek a solution for the dispute. The previous procurement law allowed the claimants to go to the Board without informing the authorities. Therefore, this study has found that the procurement law implements the provisions of sharia law in this context, as sharia law encourages all parties to resolve their disputes amicably. Furthermore, the researcher understands that the GPA prefers the process of consultation to resolve all disputes. Thus, the procurement law has implemented the GPA requirement in this context, which is also a desire of sharia law.

However, if there is a failure in resolving a case through consultation, the researcher understands that the GPA's guidelines are already implemented by the Board. The Saudi procedural rule, before the Board adopts interim measures, gave aggrieved competitors immediate opportunity to suspend the procuring entity's decision. Furthermore, the injunction remedy was used by the Board to correct some breaches of the contract. Therefore, the types of remedies used by the Board are compatible with the GPA's guidelines. However, one important finding of this research is that the Board needs further reforms in the system of remedies. The Board as well as other judicial institutes do not have a clear system of remedies. Therefore, a judge may issue a particular remedy for one case, whereas another judge may issue a completely different remedy for the same case.

6.3 Main Limitations and Further Research:

6.3.1 Main Limitations:

In general, limitations are expected in any academic research, or might be an integral part of any academic research. Therefore, this research like any other research has certain limitations. The main limitation of this research is the limited access to the administrative circulars related to government procurement in Saudi Arabia. This limitation has affected the researcher's understanding of some of the new practices by some government entities. Thus, it has limited the researcher's ability to understand the reasons and justification of some new decisions by the authorities. However, the researcher attempted to reduce this impact by using secondary data resources, such as some academic research and government gazettes in Saudi Arabia. These resources included administrative circulars which were useful to the researcher in learning about some of the practices which breach the provisions of procurement law.

Another important limitation concerns the process of negotiation between the GPA and Saudi Arabia. The researcher had limited access to the details of the negotiation process. This affected the researcher's understanding of the actual barriers to the accession of Saudi Arabia to the GPA. However, the researcher has used historical events, for instance the accession to the WTO by Saudi Arabia, to determine the main barriers to its accession to the GPA. In addition, the researcher has learnt that some procurement law provisions include provisions that do not meet the requirements of the GPA.

6.3.2 Further Research:

This research has focused on the role of sharia law in the accession of Saudi Arabia to the GPA. Moreover, it has attempted to bridge the gap between the GPA and procurement law under the shadow of sharia law. Other researchers can undertake further research that discusses the reason why on some occasions sharia law has been one of the reasons for the delay in signing international agreements.

Furthermore, as the GPA's main principles are transparency and non-discrimination, there is a need to investigate whether accession to the GPA might solve the issue of stalled projects in Saudi Arabia. Moreover, in order to ensure that the accession to the GPA will not destroy local SMEs, which are the main reasons for stalled projects, a further study could be conducted to examine how the amalgamation of local SMEs into foreign companies can reduce stalled projects, and therefore benefit local SMEs by providing them with experience and advanced skills.

Finally, more research could deal with reform of the Board. In particular, research could be conducted to investigate the advantages of having a clear and unified system of remedies. This could accelerate the reform of the judiciary system which recently has been adopted as a core plan by the government of Saudi Arabia.

6.4 General Recommendations:

Laws and regulations in Saudi Arabia should revive the concept of public interest especially when it comes to contemporary issues. International agreements normally take into consideration religious and cultural backgrounds. Thus, public interest will provide the decision makers with a mechanism to deal with religious issues that touch on international agreements. Moreover, this will accelerate the process of integration in both Muslim and non-Muslim countries. However, if an international agreement does not take religious beliefs into consideration, or has provisions which are clearly against sharia law then it will be ignored.

Although Saudi Arabia is a member of the WTO, its system relevant to public procurement does not fully comply with WTO norms due to the preference policy and lack of transparency. Therefore, it would be recommended that procurement law should change or adopt policies that would align its function with WTO norms. Consequently, this would allow procurement law to benefit from the advantages yielded by the GPA such as market access.

The above findings show that there are several provisions in procurement laws which need immediate revision. Accordingly, there must be revision of the procurement law especially for the provisions which lack the principle of transparency and non-discrimination. Moreover, some of the procedures in the procurement method should be regulated. Limited tender is not part of the tender methods in procurement law. However, it has been practised by the Saudi government. The authorities normally ask for approval from the Council of Ministers to be exempted from the procurement law in order to conduct a limited tender. Thus, it is a method used to avoid the sanctions of the procurement law, in order to award contracts to a specific tenderer. Therefore, procuring entities are subjective when awarding the contract. Furthermore, the non-application of procurement law is against the provisions of the GPA, as it requires that all tender methods should be transparent and impartial to prevent corruption. In addition, the GPA has provided conditions for the use of limited tender. These

conditions can be adopted in the procurement law in order to achieve the highest standard of transparency.

The government must remember that publishing administrative circulars is the most important part of the legal system. They are modified and changed very often. Moreover, they might include some exceptions, explanations, or modifications to the law. Therefore, they should be readily available, in order to achieve the principle of transparency, as well as to enable academics, lawyers, and researchers to analyse these circulars to develop a better procedural system.

It is acknowledged that the GPA has adopted the principle of non-discrimination, and this includes implementing the principle of national treatment. Therefore, Saudi Arabia must reform the taxation system in order to ensure that foreign manufacturers and suppliers are treated equally vis-à-vis their local counterparts. Moreover, the procurement law states that: ‘without prejudice to foreign investment law...’, it has been noticed in some cases that the zakat is higher than the taxes imposed on foreign investors, and in some cases taxes are higher than the zakat. Furthermore, as discussed above, public contracts are different from other trade topics, hence, the researcher recommends that the procurement law should include an article which explains the payment of zakat and tax procedures. This procedure should consider the principle of equality as required by the GPA.

The judiciary system in Saudi Arabia should have a clear system of applying foreign judgments, in particular, foreign judgments which include judgments that are against sharia law. For example, in a case mentioned earlier, a Saudi judge agreed to apply a judgment made in a foreign country, as long as it did not involve usury. Therefore, the researcher recommends that the judiciary should adopt a method that would allow it to apply judgments awarded in foreign courts that include usury.

Finally, the Saudi judicial system, and in particular the Board, should establish a clear system of remedies in order to achieve the principle of transparency, and prevent any personal interest or gain. The lack of a system of remedies may result in a judge in one court providing a remedy for a case, and another judge providing an opposite remedy for the same case. In addition, the Board should publish its judgments regularly to allow lawyers, researchers, and academics to contribute in developing hearing procedures and the system of remedies.

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