

# Investment Protection and Arbitration in the Arab Mediterranean Area: The Arab Spring of Hope

**Dr Mohamed S. Abdel Wahab<sup>1</sup>**

Assistant Professor

Faculty of Law, Cairo University

Founding Partner and Head of the Arbitration Group

Zulficar & Partners Law Firm, Cairo

The Mediterranean is a rich and vibrant region for investment. The region includes a diverse group of States across the development spectrum. Whilst some States in the region are indeed economically developed and already attract significant investments, other States in the region have progressed and adopted policies aimed at incentivising, promoting, and securing credible investment. In strictly macro-economic terms, the countries on the southern and eastern rims of the Mediterranean have made significant progress in this regard during the past decade.

It is unequivocal that the region has witnessed an accelerated rise in foreign investment, arguably caused by a set of internal factors, such as liberalisation, reforms, large public projects, drops in customs tariffs, and demography, as well as external factors, such as exogenous income, increased relocation, and “near-shoring.” Both sets of factors have simultaneously contributed to the dynamic and appealing nature of investment in the Mediterranean. Moreover, the geographical proximity to the European Union, availability of adequate infrastructure levels, availability of a qualified and cost-effective labour force, and reformed investment policies have equally contributed to the proliferation and progression of investment in the region.

Taking into consideration the significance and increasing importance of Mediterranean Arab States

for investments in the region, this article aims to offer a panoramic overview of the diverse investment policies adopted by Arab Mediterranean countries, the prevailing investment arbitration culture therein, and the impact of the recent so-called “Arab Spring” on the envisaged trajectory of investment security and disputes in the region.

## **Investment Policies in the Arab Mediterranean: Incentives and Guarantees**

The Arab Mediterranean includes nine States: Algeria, Egypt, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, and Tunisia. Whilst the Mediterranean region mobilises considerable external resources through its exports, it is worth noting that three large types of exogenous resources are equally available and constitute a major source of income: tourism, foreign investment, and migrant transfers.

A scrupulous analysis of investment trends in the Mediterranean region, especially in the Arab Mediterranean, reveals that investment preferences and investors’ appetites have been focused on six main sectors, namely: energy, banking, construction and infrastructure projects, telecommunications, materials (cement, glass etc.), and tourism. To that effect, Arab Mediterranean countries have opted for adopting incentivising investment policies and regulatory frameworks.

It is submitted that Arab countries have experienced a clear transition from “restrictive” investment policies, with an ideology averse to foreign investment, to a more “liberal” and “open” investment policy consistent with the economic and strategic reforms undertaken over the past two decades to stimulate

<sup>1</sup> Vice-Chairman, Chartered Institute of Arbitrators (Cairo Branch), and Faculty Coordinator and Adjunct Professor of Dispute Resolution, Indiana University LL.M. Program in Egypt. Email: <[msw@zulficarpartners.com](mailto:msw@zulficarpartners.com)>.

economic growth. To this end, almost all Arab Mediterranean countries have enacted investment laws that aim to promote and protect foreign investment. Whilst each Arab State has passed its own investment law(s) consistent with its strategic investment policies, the common denominator and fundamental gist of all such legislative initiatives is to afford adequate security and protection to foreign investment. Moreover, all Arab Mediterranean States have entered into and concluded many bilateral investment treaties (BITs), which provide reciprocal investment guarantees and incentives for foreign and national investors. Since BITs will be independently considered below when assessing the principles of investment arbitration, the following analysis shall solely focus on Arab legislative initiatives.

Given Arab investment legislative initiatives such as Egyptian Law No. 8 of 1997, Syrian Law No. 7 of 2000, Libyan Law No. 9 of 2010, Tunisian Law No. 93-210 of 1993, Algerian Law No. 01-03 of 2001 (as amended by Law No. 06-08 of 2006), Moroccan Law No. 1-95-213 of 1995, Palestinian Law No. 1 of 1998, Jordanian Laws Nos. 67 and 68 of 2003, and Lebanese Law No. 360 of 2001, it appears that security and protection of investment take the form of: (a) *investment guarantees*, and (b) *investment incentives*.

With respect to investment guarantees, a survey of Arab Mediterranean investment laws reveals that foreign investors generally enjoy, subject to varying degrees, the following rights:

- equal treatment and non-discrimination between national and foreign investment;
- protection of assets and funds against nationalisation, expropriation, requisition, sequestration, and confiscation;
- the ability to open offshore accounts and to engage in cross-border transfers and the repatriation of funds;
- ownership of land, subject to national security requirements and public policy considerations, other immovables, and movables;
- preferential treatment and facilitation of entry requirements, visas, and residence permits; and
- access to international arbitration as a prominent form of dispute resolution.

With respect to investment incentives, a mapping of Arab Mediterranean investment laws shows that States generally, and subject to varying degrees, of-

fer competitive packages as incentives, including the following:

- reduced corporate and income taxation rates;
- tax holidays;
- availability of special and qualified economic zones and tax-free zones to incorporate companies in;
- incentives for capital formation, such as special investment allowances (accelerated depreciation and enhanced deductions) and competitive capital thresholds, tax credits, and allowances on reinvested profits;
- exemption from withholding tax;
- exemption from, or reduction in, import and export duties, custom duties, value added tax, and/or social security payments for labour; and
- favourable profit distribution schemes and norms.

## Whilst each Arab State has passed its own investment law(s) consistent with its strategic investment policies, the common denominator of all such legislative initiatives is to afford adequate security and protection to foreign investment

Whilst the above-mentioned investment policies (guarantees and incentives) clearly mark a favourable trend to attract foreign investments to the Arab Mediterranean, the Arab Mediterranean has not been immune to investment disputes. On such account, the following section shall shed light on the culture of investment arbitration in the Arab Mediterranean and the diverse principles of investment protection enshrined in BITs involving Arab States as applied by international tribunals.

### **BITs and Investment Arbitration in the Arab Mediterranean: Principles of Security and Protection**

At the outset, it is worth noting that investment arbitration is not exclusive to BIT claims, but rather includes contract claims as well. Investment disputes

can be rooted in contractual arrangements or international investment instruments, such as multilateral or bilateral investment treaties.

Prior to the proliferation of investment treaties, when an investment went sour, the investor's options were limited to the following: (a) attempting to sue the host State before its national courts; (b) arbitration on the basis of an arbitration agreement; and (c) diplomatic espousal of a claim. Nowadays, investment treaties typically confer a "direct right" on investors to bring a claim against the State in international arbitration.

International arbitration is currently the most prominent form, and the preferred mechanism, for settlement of investment disputes. Similar to commercial arbitration, investment arbitration can be ad hoc or institutional in nature. A survey of the most common venues and rules governing investment arbitration proceedings reveals that most investment proceedings are hosted by the International Centre for Settlement of Investment Disputes (ICSID), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or the International Chamber of Commerce (ICC). Moreover, many investment disputes are administered under United Nations Commission on International Trade Law (UNCITRAL) arbitration rules in an ad hoc context.

In any event, since treaty-based investment arbitration is increasingly becoming common practice, it is worth mentioning that Arab Mediterranean States have concluded and entered into more than 400 BITs, with Egypt leading the pack with more than 100 BITs. Tunisia, Morocco, and Lebanon are each party to more than 50 BITs, Algeria and Syria to more than 40 BITs, and Libya to more than 20 BITs. Such large numbers of BITs underscore the common misconception about the direct relationship between the number of BITs and the proliferation of investments. It is often mistakenly believed that the greater the number of BITs, the more investment opportunities a State will enjoy.

Whilst it is doubtful that the conclusion of BITs will automatically lead to boosts in investment, it is worth noting that Arab Mediterranean States were parties to a considerable number of investment-treaty arbitration cases under the auspices of ICSID and elsewhere.

However, the term "investment" is not generally defined in multilateral investment treaties such as the ICSID; the term is instead usually defined in legislative instruments, contracts, and/or BITs. To that effect, most BITs concluded in the Arab Mediterranean

offer a broad definition of the term "investment." For example, most Egyptian BITs, as well as the Morocco-Spain BIT, use generic language by referring to "every kind of asset" or "every kind of investment in the territory." This normally includes: (a) movables, immovable property, and any other property rights, such as mortgages, liens or pledges, usufruct, and similar rights; (b) shares, stock, debentures, and any other kind of participation in companies; (c) claims to money or to any other performance under a contract having an economic value associated with investment; (d) copyrights, industrial property rights, know-how, and good-will; (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract, or exploit natural resources; and (f) licences and permits awarded to investors.

Whilst BITs normally define the term "investment," international tribunals, especially those constituted under the auspices of the ICSID, have not always relied solely on the parties in defining what constitutes an investment. For example, in *Joy Mining v. Egypt* (ICSID Case No. ARB/03/11), the arbitral tribunal explicitly stated that the fact that the ICSID Convention has not defined the term "investment" does not mean that anything consented to by the parties might qualify as an investment under the Convention. Moreover, it was stated that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.

In establishing the existence of an investment, ICSID tribunals have generally been inclined to uphold the so-called "Salini Test," which sets four main criteria for an investment: (a) a "certain duration"; (b) an "element of risk"; (c) a "commitment that is substantial"; and (d) a "significance for the host State's development."

The above test was initially coined by the tribunal in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Kingdom of Morocco* (ICSID Case No. ARB/00/4) and was subsequently followed in many cases including *Jan de Nul N.V. Dredging International N.V. v. Egypt* (ICSID Case No. ARB/04/13) and *Consortium Groupement L.E.S.I.-DIPENTA (Italy) v. Algeria* (ICSID Case No. ARB/03/8). In other cases, tribunals have considered such criteria as guiding benchmarks or mere examples or have even added new criteria, such as the necessity of a "certain regularity of profit and return." This latter criterion was added by the tribunals for *Joy Mining v.*

*Egypt and Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19).

Similarly, the term “foreign investor” has been practically and legally disambiguated in a number of BITs to encompass: (a) natural or legal persons of a nationality different from that of the host State; (b) foreign controlling or minority shareholders of a local company; (c) foreign indirect shareholders of a local company (i.e., notwithstanding intermediate corporate layers); and (d) local companies controlled by foreign investors.

On a substantive level, BITs normally afford certain substantive protection to investors. This generally includes: (a) prohibition against expropriation (whether direct or indirect, *de facto* or *de jure*) without compensation; (b) fair and equitable treatment and non-discrimination; (c) most favoured nation treatment (“MFN” clauses); (d) full protection and security (against riots, movements, revolutions, and damage caused by armed forces, police or other governmental authorities); (e) umbrella clauses (availability of treaty protection for breach of contractual rights); (f) free transfer of funds; and (g) access to international arbitration, which can be restricted or unrestricted (restrictions may include: the necessary prerequisite of exhaustion of local remedies, or “fork in the road” provisions that obligate foreign investors to choose between treaty-based arbitration, litigation in municipal courts, or contract-based arbitration).

A survey of the diverse investment arbitration awards involving Arab Mediterranean States reveals that most of the above-mentioned BIT provisions and issues have been raised by investors and States. However, the principle of fair and equitable treatment (FET) unequivocally ranks amongst the most frequently invoked standards in investment arbitration. This notwithstanding, the application of the FET standard by tribunals has not been entirely consistent. Whilst some decisions tend to uphold a broader scope of the FET standard by not making any reference to customary international law, such as the decisions in *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (ICSID Case No. ARB/99/6) and *Emilio Agustin Maffezini v. Spain* (ICSID Case No. ARB/97/7), other decisions upheld a different scope of the FET standard that is primarily fact driven and encompasses the denial of justice, such as the decision of *Jan de Nul N.V. Dredging International N.V. v. Egypt*. In essence, it appears that there are four different categories of acts or omissions that may constitute a breach of the FET standard by a host State: (i) those that adversely transform the legal and business

environment; (ii) those that mark a failure by the State to respect its obligations towards the investor; (iii) those that encroach upon the investor’s personal and procedural rights; and (iv) those that appear to be a manifestation of arbitrary and discriminatory treatment of an investor.

As at March 2012, 30 ICSID cases had been filed against Arab Mediterranean States, with Egypt being a party to more than 50% of them. Out of the known 375 ICSID arbitrations, 16 were filed against Egypt, 5 were filed against Jordan, 3 were filed against Algeria, 3 were filed against Morocco, 2 were filed against Tunisia, and 1 was filed against Lebanon. This accounts for approximately 8% of the ICSID caseload.

## There appears to be a direct relationship between investment disputes and the investment sectors most appealing to investors

In those 30 cases, arbitral tribunals included arbitrators of diverse nationalities, including: Swiss, French, English, US, Canadian, Australian, German, Italian, Spanish, Chilean, Lebanese, Egyptian, Belgian, Jamaican, Swedish, Greek, Chinese, Dutch and Bangladeshi. However, French arbitrators ranked first in number, with French arbitrators being appointed 16 times to ICSID tribunals involving Arab Mediterranean States, followed by Swiss arbitrators (12 times), US arbitrators (7 times), English and Belgian arbitrators (6 times each), Spanish arbitrators (5 times), and Italian, German, and Canadian arbitrators (4 times each).

With respect to the subject matter of the ICSID proceedings, amongst the pending and concluded cases, 10 cases related to construction projects, 4 cases related to the energy sector, 5 cases related to tourism and the hospitality industry, 2 cases related to the textile industry, 2 cases related to property development, and 1 case related to shipping and handling services.

In light of the above, it appears that the construction, energy, and hospitality sectors are the most susceptible to disputes. As already stated, these very same sectors rank amongst the top investment destinations for foreign investors. Accordingly, there appears to be

a direct relationship between investment disputes and the investment sectors most appealing to investors. Concerning the status and outcome of the ICSID proceedings, there are currently 9 pending cases and 21 that have been concluded by an award or proceedings that have been discontinued in relation thereto. Egypt has 6 pending cases, Lebanon 1, Algeria 1, and Tunisia 1. In 10 cases, the State has prevailed, and the investors' claims were either rejected for lack of jurisdiction or on the merits. In 7 cases, a settlement was reached and proceedings were discontinued. In 4 cases, the investors prevailed and their claims were upheld either in full or in part. Out of the 4 cases in which investors prevailed, 3 were against Egypt.

By and large, it is worth noting that Arab Mediterranean States have positively contributed to, and have been active players in, the universe of investment arbitration. The first ever ICSID arbitration was *Holiday Inns v. Morocco* (Case No. ARB/72/1) involving Morocco, and the infamous Salini Test was formulated in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Kingdom of Morocco* (ICSID Case No. ARB/00/4). Moreover, *Waguih Elie George Siag and Clorinda Vecci v. Egypt* (ICSID Case No. ARB/05/15) represents another landmark ruling, marking the highest compensation awarded to an individual under the auspices of the ICSID. Similarly, the case of *Southern Pacific Properties (Middle East) Limited v. Egypt* (ICSID Case No. ARB/84/3) marks the first case in which jurisdiction was ascertained on the basis of a standing legislative offer in a State's investment law. These are but examples of the important investment cases involving Arab Mediterranean States.

### **Conclusion: Investment in the Arab Mediterranean Amidst the Arab Spring of Hope**

It has been seen that Arab Mediterranean States have positively contributed to investment in the Mediterranean region and have likewise concluded many BITs and engaged in investment disputes under the auspices of diverse fora, especially the ICSID, where 8% of all registered cases were commenced vis-à-vis Arab Mediterranean States, with Egypt holding the unfortunate status of being a party to more than 50% of them.

However, it is worth noting that, over the last decade,

Arab Mediterranean States have positively contributed to intra-regional investments and have notably boosted their share of investments. This notwithstanding, it seems manifest that investment in the Arab Mediterranean entered a new paradigm during the so-called "Arab Spring" triggered by the Tunisian and Egyptian revolutions of January 2011.

### **Arab Mediterranean States have positively contributed to investment in the Mediterranean region and have likewise concluded many BITs and engaged in investment disputes under the auspices of diverse fora, especially the ICSID**

The unprecedented revolutionary tidal wave sweeping across the region and aimed at promoting the rule of law in a corruption-free political and economic environment has, so far, been successful in Tunisia, Egypt, and Libya. Prior to this revolutionary tsunami sweeping the Middle East, the economic and legal crises suffered by some States striving to join the developed world were not purely a manifestation of the inadequacy of the regulatory and legal framework, but also of the catastrophic lack of well-structured institutions, as well as the lack of sustainable implementation of the rule of law. Predominantly, a distorted image and erratic enforcement of the rule of law prevailed. Nevertheless, the revolutionary spark that lit the candle of democracy and freedom in the region has certainly impacted traditional perceptions of States and governments. Nowadays, it is firmly believed that the "rule of law" serves as a recipe for an effective long-term solution to the most pressing challenges and ails in the Middle East today, including despotism, poverty, conflict, endemic corruption, and disregard for human rights.

In such tumultuous times, people are torn between contradictory centrifugal and centripetal forces. So long as the desire for security, prosperity, stability, and true democracy remains unfulfilled, people's aching hearts and throbbing minds will reject and continue in utter denial of corruption, despotism, oppression, and poverty.

This has generated a colossal sense of optimism and a belief that the future must hold a myriad of better opportunities, which mitigates the looming scept-

ticism, fear, and uncertainty. With such mixed feelings of hope and fear, it is indeed hoped that the proper utilisation and implementation of the rule of law will bring about an eternal season of light, hope, wisdom, freedom, and productivity. This will ultimately have a profound positive impact on the prevailing investment climate and available investment opportunities, whose current *status quo* remains uncertain due to the ongoing instability.

It is often argued that the most egalitarian countries (Egypt, Libya, and Tunisia) were paradoxically the most affected by the revolutions at the beginning of 2011, whereas other Arab Mediterranean States have been relatively spared until now. However, investors and investment are generally sensitive to political risks and instability. Thus, Tunisia, Egypt, and Libya are currently experiencing a downturn and regress in investment. Whilst it is hoped that such negative trends will end in the near future, it remains to be seen how the new paradigm shift will impact investment policies, contracts, and disputes.

Egypt presents an interesting case study in this regard. Since the inception of the revolution in January 2011, the State has engaged in a full-fledged legal audit of existing investment contracts, resulting in the registration of 4 new ICSID cases. In an attempt to curb and resolve any pending disputes with investors whilst maintaining an investor-friendly approach and climate, the Egyptian Supreme Council of the Armed Forces issued, on 3 January 2012, a decree amending Investment Law No. 8 of 1997. Pursuant to Article 7 of the said decree, it became permissible to enter into amicable settlement negotiations with investors accused of embezzlement and corruption to avert legal proceedings. As a result, diverse amicable dispute settlement committees have been formed and are currently attempting to amicably resolve investment-related disputes and concerns over existing investment contracts.

In Tunisia and Libya, similar initiatives have been implemented to promote investment under the new paradigms. Following the 14 January 2011 revolution, the OECD and the government of Tunisia have started a joint review of Tunisia's investment policies. The review will chart the country's progress in developing an effective policy framework to promote investment for development. It will suggest ways to further improve the climate for both domestic and foreign investment. This review is taking place as part of the adherence process to the OECD Declaration on International Investment and Multinational

Enterprises. Tunisia's adherence would signal its commitment to applying the highest possible investment protection standards.

In Libya, the National Transitional Council (NTC) affirmed, in May 2011, Libya's commitment and respect to all ongoing legal contracts and agreements concluded with the former Libyan regime provided that such contracts and agreements were validly concluded. This certainly brings a sense of comfort to serious and credible investors and will likely produce positive results by incentivising and promoting foreign investment.

By and large, it seems evident that the investment climate in the Arab Spring will remain favourable to foreign investment, as Arab Mediterranean States cannot afford to sustain a continued negative blow to investment. It is expected that the present negative impact on investment is due to the ongoing political risk and instability, which will likely wither away and disappear with the election of new heads of State and the appointment of new State institutions founded on the rule of law, transparency, and corruption-free practices.

Moreover, following a review of many BITs and investment decisions involving Arab Mediterranean States, it is submitted that: (a) States should reconsider their BITs in light of the prevailing investment case law; (b) States should reconsider the relationship between BITs and the promotion of investment; (c) States should engage in a proper assessment of their investment policies to attract foreign investment and should administer processes and schemes that are consistent with international investment-friendly approaches; (d) States should administer proper schemes for the amicable settlement of investment disputes and avert any risk of legal proceedings that could be detrimental to their image and investment standing; (e) States should avert abusive, discriminatory, and illicit behaviour that could trigger international liability; (f) international arbitrators should carefully consider the behaviour of host States and should also consider investors' conduct in order to dispense with any abuse of process; (g) States should encourage the building of competent legal teams of experts that are well versed in principles of investment and international arbitration to ensure adequate representation in disputes if needed; and (h) States should discern their competitive investment advantage by determining the sectors and projects that are most appealing to investors.