MENA-OECD INVESTMENT PROGRAMME

International Investment Agreements

Concluded by MENA Countries

POLICY BRIEF

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Contact:

Alexander Böhmer alexander.boehmer@oecd.org

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INTRODUCTION

1. The recent increase of FDI in the Middle East and North Africa (MENA) region demonstrates the emerging consensus among governments and the private sector in MENA countries that the crucial determinants for enhancing investment, in particular the attraction of FDI, include investment-friendly policies and administrative frameworks alongside the development of local markets and institutions.1 A pro-business enabling environment is widely seen as a vital prerequisite to attract FDI and to encourage the vitality of the local private sector.

2. The MENA-OECD Investment Programme provides a forum for policy dialogue and identification of investment reform items as well as a platform for capacity-building.[2] In international scoreboards many MENA countries are still perceived as carrying a high investment risk.[3] Given this perception, there is a strong argument to promote the establishment of regulatory frameworks which favour the attraction of foreign investment not only through national laws and regulations, but also by entering into binding International Investment Agreements (IIAs).[4]

3. Examples of such credibility-enhancing instruments abound, not least including the OECD Codes of Liberalisation of Capital Movements, the OECD National Treatment Instrument, Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs), Regional Integration Agreements, and certain specific WTO agreements. The number of BITs, for instance, has increased considerably, not only between OECD and MENA countries but also amongst MENA countries. Concurrent to the development of FTAs and RIAs containing investment provisions, MENA countries have embarked into a number of regionally-based initiatives. Figure 1 below depicts the number of BITs concluded by MENA with OECD countries as of end 2006.

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[1] Refer to Nabli, Mustapha K., Restarting Arab Economic Reform, in: Augusto Lopez-Claros/Klaus Schwab, the Arab World Competitiveness Report 2005, 16.

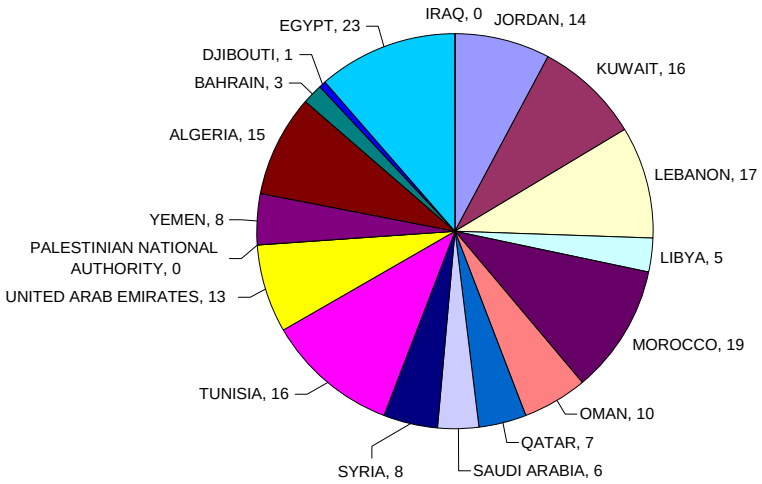
[2] Refer to Annex 4 for conclusions of the last Taskforce meeting on International Investment Agreements.

[3] Refer to Figure 3 below.

[4] The term 'IIAs' is used in a broad sense describing legally binding bilateral, regional and multilateral instruments containing exclusively or partially investment protection and promotion provisions.

Figure 1 - Number of BITs concluded by MENA countries with OECD countries

Total 183



Source: UNCTAD/OECD 2006.

4. The following inventory of IIAs concluded by MENA countries is intended to inform Working Group 1 on the main issues relevant for MENA negotiators of IIAs by describing:

- Benefits which MENA countries can derive from the conclusion of IIAs;
- Information about the existing agreements and arbitrations involving MENA countries; and,
- Information on the content of core provisions of IIAs concluded by MENA countries.

5. The inventory document has served as a basis for the first and the second meeting of the MENA-OECD Expert Group on International Investment Agreements - held respectively in, 27 June 2005 in Rabat and 12-13 December 2006 in Cairo - and has since been regularly updated.

I. BENEFITS OF IIAS FOR THE INVESTMENT PROMOTION STRATEGY OF MENA COUNTRIES

6. For MENA countries, the question of the impact of IIAs on the attraction of investment is relevant considering that negotiation of IIAs requires resources and implies certain limitations with respect to governmental policies and regulations. Recent research on the benefits of IIAs, particularly BITs, and their impact on investment flows, has resulted in some interesting findings.

7. As highlighted in Figure 1, the number of IIAs in the form of Bilateral Investment Treaties (BITs) concluded by MENA countries with OECD countries varies largely among countries in the region. Egypt, Lebanon, Morocco, Jordan, Algeria and Tunisia are at the forefront of BITs concluded with OECD countries. Iraq, Libya, Djibouti and Bahrain are countries which have chosen to conclude only a few BITs with their counterparts in OECD countries. Of course, there are various historical and political reasons for these differing strategies. Nonetheless, the main question today for MENA governments seeking to attract more investment, particularly in the form of FDI, concerns the benefits which can be reasonably expected from IIAs in attracting investment to the region.

8. As a matter of fact, the conclusion of IIAs in the forms of BITs, FTAs and RIAs has increased tremendously over the last decade. This seems to demonstrate that governments expect IIAs to positively contribute to enhancing their investment climate and attracting more investment. New research has also gained momentum among academics who are debating the measurable impact of IIAs on FDI flows. Among the issues discussed in this context, the following four main considerations need to be distinguished:

- Do IIAs with standard investment protection provisions achieve their aim of enhancing investor protection?
- Do IIAs have an impact on FDI flows to the host country?
- How do these treaties interact with the level of political risk in the host country?
- Do IIAs have a reform enhancing impact on the regulatory investment environment of the host country?

9. Both recent research and the substantial rise of international investment disputes have shown that the answer to the first question can be affirmative. For instance, *Salacuse and Sullivan* conclude in a recent study on the effects of BITs that:

> "…after reviewing the nature and scope of BIT provisions, the strength of related enforcement mechanisms, and the actual cases brought against host countries by aggrieved investors, one may conclude that BITs *have achieved their first goal of fostering investment protection* [emphasis added]. While that protection is not absolute …., investors and investments that are covered by a

BIT certainly enjoy a higher degree of protection from the political risks of governmental intervention than those that are not."[5]

10. IIAs, which posses clear and enforceable rules to protect and facilitate foreign investment, reduce risks that the investor otherwise would have to assume personally, thus and encourage investment. From this point of view, the rationale for IIAs themselves being the promise of protection of capital received by the host state, is a valid one.

11. As to the second question as to whether IIAs have a positive impact on FDI flows, the evidence taken from more recent studies shows a positive correlation. Former studies (*Tobin/Rose-Ackermann, Hallward-Driemeier*) have found only a very weak relationship between BITs and FDI. According to these results, BITs only have a positive effect on FDI flows in countries with an already stable business environment. In low and middle income countries that do not possess such an environment, BITs seem to have little or virtually no statistically significant effect on foreign investment and on outside investors' perception of the investment environment.[6] However, other studies have concluded that a significant relationship exists between the level of standards protecting investors enshrined in IIAs and their potential for enhancing FDI flows to the host country. With regard to BITs concluded by the United States, *Salacuse and Sullivan* found that higher protection standards result in greater impact on FDI flows. Most countries which have established BIT programmes continue to pursue opportunities to enter into new treaties.

12. Support for this result derived from a very recent publication from *Neumayer and Spess* who for the first time found clear evidence that the more BITs a country signs, the greater the FDI flows to that country will be. This study, which employed a much larger panel than its predecessors and which covered up to 119 countries (over the period 1970-2001) found "a positive effect of BITs on FDI inflows that is consistent and robust across various model specifications. The effect is sometimes conditional on institutional quality, but is always positive and statistically significantly different from zero at all levels of institutional quality."[7]

13. A practitioner in the area of investment promotion would have difficulties in singling out IIAs as a separate instrument from the whole of a country's investment promotion strategy. Indeed, it would be difficult to test the causal link between the conclusion of IIAs and enhanced inflow of FDI into a host country. An IIA can only be one element of a more comprehensive national investment promotion strategy, which includes a country's general liberalisation commitments; its administrative environment and governance, investment and export finance and the institutional setting of investment promotion.

14. If an IIA can only have a complementary function to these other elements of an investment promotion strategy, the question whether the conclusion of an IIA by itself increases investment flows might already be conceptually problematic. This arises from the fact that the question does not take into account the intrinsic link between various instruments of investment promotion. In case of FDI attraction, it may be more relevant to ask whether *the interplay of regulatory, administrative and institutional investment promotion results in higher inflows of FDI.* Even so, IIAs deliver a powerful message regarding

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[5] *Jeswald W. Salacuse, Nicholas P. Sullivan*; "Do BITs Really Work?, 46 Harv. Int'l L.J. 67 (2005), p.90.

[6] *Jennifer Tobin, Susan Rose-Ackerman*; "Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of BITs", Yale University, 2005 or *Hallward-Driemeier* "not any statistically significant effect", *Hallward-Driemeier, M.* (2003), Do Bilateral Investment Treaties Attract FDI? Only a bit…and they could bite, in: World Bank Policy Research Paper WPS 3121, World Bank, Washington DC.

[7] *Eric Neumayer* and *Laura Spess*, Do bilateral investment treaties increase foreign direct investment to developing countries? Revised Version, May 2005, p.4. Accessible at: http://www.lse.ac.uk/collections/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/BITandFDIarticle.pdf.

a country's commitment to high standards of treatment of FDI. The inter-relationship between IIAs and other instruments of investment promotion can be demonstrated by the example of international finance and guarantee instruments.

15. One of the core investment financing institutions in the home countries of investors are investment/export finance and guarantee agencies. In OECD countries, the decision of an Investment Guarantee Agency to grant an investment guarantee depends on the character of the investment, on its economic viability and eligibility, and, above all, on sufficient legal protection afforded to the investment in the host country. For this reason, Investment Promotion Agencies and Finance Ministries of OECD countries retain an interest in the continuous improvement of legal protection requirements, and consequently, the protection and coverage of their investors abroad.[8] One way of showing a country's commitment to the treatment of FDI is to conclude IIAs which can have the status of a condition for financing or guarantee instruments promoting investment in a particular host country.

16. Equally importantly, Export Credit and Guarantee Agencies monitor the risk environment in countries of destination for their exports. All OECD and some non-OECD member agencies have signed on to the Arrangement on Officially Supported Export Credits (as of November 2006). Article 22 of the Arrangement, aims at ensuring that Participants to the Arrangement charge premium rates in addition to interest charges which cover the risk of non-repayment of export credits (i.e. credit risk). The article also ensures that the rates are adequate to cover long-term operating costs and losses associated with the provision of export credits. One key element to risk monitoring is a system for assessing country credit risk and the classification of countries into eight country risk categories (with categories ranging from zero to seven). The conclusion of IIAs is an element taken into account in the risk assessment stage.

[8] This can have the form of a *sine qua no*, see for the German Investment Guarantee Agency: http://www.agaportal.de/en/dia/deckungspraxis.html, for MIGA: Operational Regulations, para.3.16, 27 ILM 1227 (1988).

II. EXISTING IIAS CONCLUDED BY MENA COUNTRIES

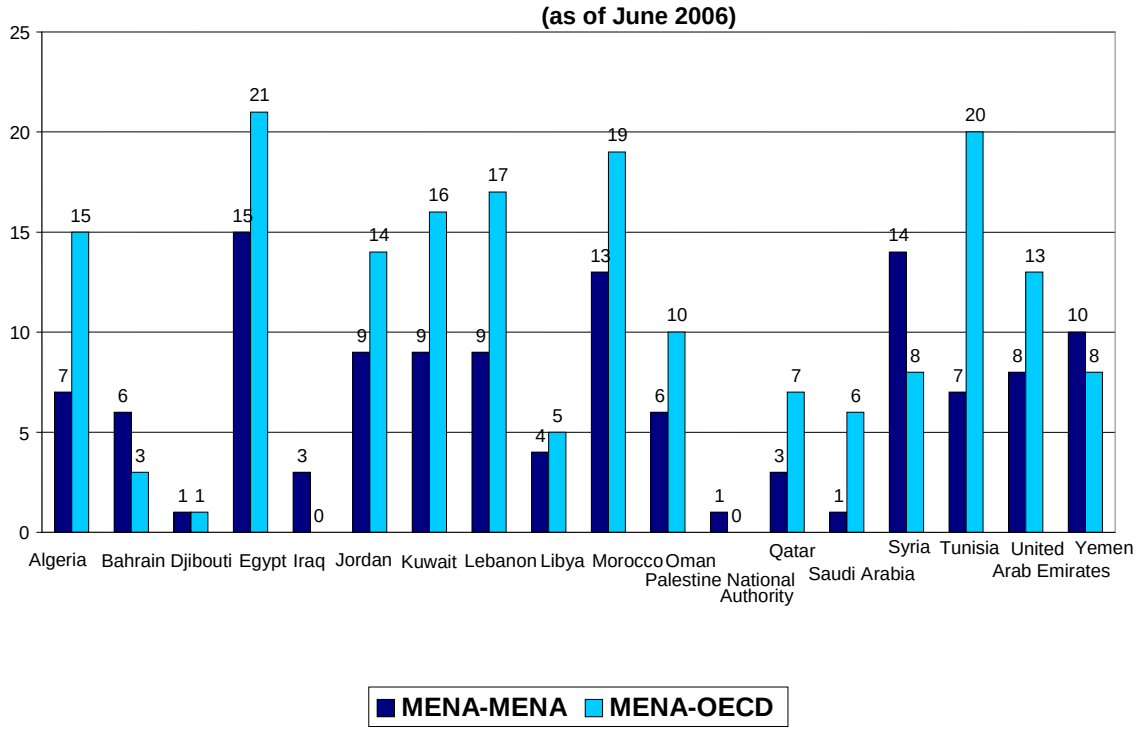
17. IIAs can take various forms which can be observed in the MENA region. The investment provisions demonstrated in this region fall under the following categories: free trade agreements (FTAs), regional integration agreements (RIAs), multilateral agreements, and BITs. For these different types of IIAs, the key concern is to enhance the freedom of the firm in contesting markets irrespective of the modality used to contest them (i.e. sales, licensing, branches, and subsidiaries) given that FDI and trade have become intrinsically linked to international production. This aim was traditionally pursued by states through the conclusion of BITs, however recently more and more FTAs or RIAs are also containing standard investment promotion and protection provisions.

A. Bilateral Investment Treaties (BITs)

18. Bilateral Investment Treaties constitute an important pillar of investment protection at the international level. A majority of BITs continue to be signed between OECD and non-OECD countries. The first BITs appeared at the end of the 1950s and took over the function of the old Friendship, Commerce, and Navigation Treaties. By the end of 2005, more than 2495 such treaties had been concluded, a majority of them after 1990. Not only are they increasing transparency and predictability for foreign investors, but the presence of such a framework for foreign investment can potentially encourage countries to adopt similar standards for domestic investors. Since 1990s, the number of BITs concluded increased substantially, the latest trend being the occurrence of south-south countries BITs (see figure 3 for MENA-MENA BITs).

19. Figure 3 shows that with the exception of Bahrain, Syria and Yemen (not counting treaties of MENA countries with other non-OECD countries), MENA countries have been following the global trend, with an increasing number of BITs concluded. This trend underscores the increasingly important position of FDI in MENA countries. The numbers of MENA BITs increased from the mid-1990s, peaking at 45 new treaties in 2001. With the exceptions of Syria, Iraq and Yemen, MENA countries finalise more BITs with OECD countries than among themselves (refer to Figure 3). MENA countries participating in the *MENA-OECD Investment Programme* have concluded around 183 bilateral investment treaties with OECD countries. As Figure 3 also shows, Gulf Corporation Council (GCC) countries rely to a lesser extent on BITs with OECD or other MENA countries than Maghreb and Mashrek countries.

Figure 3. Comparison of BITs between MENA-MENA and MENA-OECD countries (as of June 2006)



Source: OECD/UNCTAD 2006.

B. Free Trade and Regional Integration Agreements

20. In parallel with the increase in BITs negotiations, there is also an upward trend in the conclusion of Free Trade Agreements and Regional Integration Agreements containing market access for investors, and investment protection and promotion provisions. MENA countries participating in the *MENA-OECD Investment Programme* have concluded around 183 bilateral investment treaties with OECD countries. At the same time, these countries have concluded or were negotiating during 2003- 2004 20 bilateral, regional and inter-regional agreements containing FDI provisions with OECD countries.[9] The conclusion of FTAs containing investment protection and promotion provisions traditionally found in BITs follows a general trend towards the consolidation of existing agreements and is supplemented by a drive towards expansion.[10]

21. MENA countries' own initiatives include the Arab Free Trade Area which aims to establish a free trade zone among 18 members of the Arab League by 2008. In the past, there have been serious efforts led by the Arab League to establish regional investment agreements. For instance, the Agreement on Arab

[9] UNCTAD, International Investment Agreements: Key Issues, Vol. I, 2004, p.48 et seq.

[10] Jo-Ann Crawford and Roberto V. Fiorentino, The Changing Landscape of Regional Trade Agreements, WTO Discussion paper No 8.

Economic Unity was signed in 1957,[11] guaranteeing the freedom of movement of capital. Subsequently, in 1970 the *Agreement on Investment and Free Movement of Arab Capital Among Arab Countries* was signed by the Arab States members of the Agreement of Arab Economic Unity. Signatories of the Agreement included Egypt, Iraq, Jordan, Kuwait, Sudan, the Syrian Arab Republic and the Arab Republic of Yemen. While this Agreement reiterated the principle of each state's sovereignty over its own resources, it already contained standard non-discrimination, expropriation and free transfer of funds provisions.[12]

22. The signing of the Unified Agreement for the Investment of Arab Capital in the Arab States in 1980, represents, to date, the latest effort put forth by MENA countries to set up a regional and enforceable investment regime. The Agreement has been ratified by all member States of the League with the exception of Algeria and the Comoros Islands. It established an Arab Investment Court to hear cases brought under the Agreement. On the substantive side, the Agreement commences with a provision in Article 2 permitting "to transfer Arab capital freely[among the State Parties to this Agreement] …and to promote and facilitate its investment according to the economic development plans and programmes within the States Parties and in a manner beneficial to the host State and the investor.". The Agreement contains provisions on national treatment, free transfer and expropriation, although subject to exceptions. Article 14 deals with responsibilities of investors.[13]

23. In order to update the existing agreements and to bring them in line with international developments, the Council of Arab Economic Unity approved, in 2000, the Agreement on the Encouragement and Protection of Investments and Transfer of Capitals among Arab States by virtue of decision No. 1125/71 of 7/6/2000.[14] In addition to these agreements, the countries of the GCC are currently negotiating and/or considering FTA negotiations with the EU, India and China. Japan, too, has begun to promote Economic Partnership Agreements which include elements of FTAs based on the premise that they "contribute to the development of Japan's foreign economic relations as well as the attainment of its economic interests as a mechanism to complement the multilateral free trade system centering on the WTO."[15]

24. More regional agreements are foreseen in the region, including with the United States which has engaged its U.S. Trade Representative (USTR) in intensive negotiations with a number of Arab countries to develop bilateral trade agreements in the hopes that it will materialise into the Middle East Free Trade Area (MEFTA) by 2013.[16] In pursuing this goal, the U.S. administration has announced the following six-step process for MENA countries to join MEFTA: (1) Joining the WTO; (2) possibly participating in the Generalised System of Preferences; (3) trade investment framework agreements (TIFAs); (4) BITs; (5) FTAs; and, (6) participating in trade capacity-building. Morocco, Jordan and Bahrain have concluded FTAs with the United States; similar agreements with Oman and the United Arab Emirates are currently being explored.

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[11] Members to this agreement were Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Republic, and the Arab Republic of Yemen. Mauritania, the Palestinian Authority and Somalia subsequently also became signatories to the Agreement. (UNCTAD, 1996, vol. III).

[12] Articles 3-7 of the Agreement, UNCTAD, 1996, vol.II.

[13] UNCTAD, 1996, vol.II.

[14] http://www.arabinvestmap.com/default.asp?PageId=4&CurrentLanguage=EngLang&agrID=4 .

[15] Para. 1 of Basic Policy towards further promotion of Economic Partnership Agreements (EPAs), approved by the Council of Ministers on the Promotion of Economic Partnership on December 21, 2004, http://www.mofa.go.jp/policy/economy/fta/policy0412.html .

[16] For details, *Mary Jane Bolle*, Middle East Free Trade Area: Progress Report, CRS Report for Congress, 2005.

25. MENA countries are also strengthening their ties with the European Union by negotiating and implementing the Euro-Mediterranean Partnership Agreements. Tunisia, Morocco, Egypt and Jordan only recently signed the Agadir Agreement committing them to negotiate an FTA by 2006. Currently the EU is engaged in FTA negotiations with the countries of the GCC. Several countries in the region have concluded FTAs also with the European Free Trade Association (EFTA).[17] Table 1 summarises the existing FTAs with MENA countries.

Table 1. FTAs and other regional agreements signed or ratified by MENA countries

Algeria	EU	2002	Association Agreement
	USA	2001	TIFA
Bahrain	USA	2006	FTA
Egypt	EU	2001	Association Agreement
	Turkey	2005	FTA
	EFTA	2007	FTA
Jordan	EU	2002	Association Agreement
	EFTA	2002	FTA
	Singapore	2004	FTA
	USA	2000	FTA
Kuwait	USA	2004	Concerning the Development of Trade and Investment Relations - TIFA
Lebanon	EU	2002	Association Agreement
	EFTA	2007	FTA
Morocco	EU	2000	Association Agreement
	EFTA	1999	FTA
	USA	2004	FTA

[17] EFTA includes Switzerland, Norway, Iceland and Liechtenstein. See http://secretariat.efta.int/Web/legaldocuments.

Oman	USA	2006	FTA
Palestinian Authority	EFTA	1999	FTA
Qatar	USA	2004	Concerning the Development of trade and Investment Relations - TIFA
Saudi Arabia	USA	2003	Concerning the Development of trade and Investment Relations - TIFA
Syria	EU	2004	Association Agreement
Tunisia	EU	1998	Association Agreement
	EFTA	2006	FTA
Yemen	USA	2004	Concerning the Development of trade and Investment Relations, TIFA
UAE	2004	2004	TIFA
Council of Arab Economic Unity		1970	Agreement on Investment and Free Movement of Arab Capital Among Arab Countries
		2000	- Agreement on the Encouragement and Protection of Investments and Transfer of Capitals among Arab Countries - Agreement on the Settlement of Investment Disputes in Arab Countries
Gulf Cooperation Council	Syria	2005	FTA
League of Arab States		1980	Unified Agreement for the Investment of Arab Capital in the Arab States

Source: MENA-OECD Investment Programme 2006.

C. Multilateral Rules (WTO obligations)

26. Furthermore, almost all MENA countries have joined **major multilateral agreements** covering investment related aspects. As of 30 November 2006, 11 of the 18 MENA countries and territories participating in the *MENA-OECD Investment Programme* became members of the World Trade Organisation(WTO). As such, the countries are obliged to implement the obligations of General Agreement on Trade in Services (GATS), Trade-related aspects of intellectual property rights (TRIPS) and Agreement on Trade-Related Investment Measures (TRIMs). The GATS provides the right of establishment for certain investors if the member of the GATS makes specific commitments on market access. TRIPS accords national treatment and most-favoured-nation-treatment (MFN) to foreign firms' intellectual property rights; while TRIMs provides that certain categories of trade-related investment

measures offend the principles of the GATT. Table 2 (below) demonstrates that other five countries in the region currently have observer status in the WTO, thus reducing the number of MENA countries without WTO membership or observer status to two.

27. All MENA countries have signed the convention establishing the Multilateral Investment Guarantee Agency (MIGA) and can profit from its risk mitigation facilities. In order to be eligible for a guarantee granted by MIGA to an investor in its territory, a country' investment policy must be in accordance with the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment. The operational regulations of MIGA further state that "an investment will be regarded as having adequate legal protection if it is protected under the terms of a bilateral investment treaty between the host country and the home country of the investor."[18]

Table 2. WTO Membership

	WTO Member (year of accession)	Observer	Not Observer
		(year of accession)	
Algeria		1987	
Bahrain	1995		
Djibouti	1995		
Egypt	1995		
Iraq		20041	
Jordan	2000		
Kuwait	1995		
Lebanon		19992	
Libya		2004 [3]	
Morocco	1995		
Oman	2000		
Palestine National Authority			√
Qatar	1996		
Saudi Arabia	2005		
Syria			√
Tunisia	1995		
United Arab Emirates	1995		
Yemen		√[4]	

Notes:

1. On 25 May 2007 WTO began negotiations with Iraq for membership upon Iraq's request for accession submitted September 2004.

[18] MIGA Operational Regulations, para.3.16, 27 ILM 1227 (1988).

2. Lebanon applied for full accession in 1999, and negotiations are currently ongoing. A first report outlining terms of membership for Lebanon has been drafted and agreed 3 May 2007.

3. In July 2004 WTO accepted Libya's application for membership and began negotiations.

4. Yemen's request for accession was circulated on 14 April 2000. The third meeting of WTO Working Party to discuss Yemen's accession took place in July 2006. The checkmark indicates that no date associated with observer status was available on the WTO website.

Main source of information: World Trade Organization website (www.wto.org)

III. RECENT TRENDS IN IIAS AFFECTING MENA COUNTRIES - CORE PROVISIONS OF INTERNATIONAL INVESTMENT AGREEMENTS

28. Recent trends in negotiating IIAs, coupled with the increase in international investment arbitration cases over the last years have resulted in new features of IIAs. These recent trends, including the core provisions of IIAs concluded by MENA countries, as well as international arbitrations MENA countries merit discussion. First, new features concerning the core provisions of IIAs treat issues such as indirect expropriation, fair and equitable treatment standards, transparency provisions, labour and environmental standards, as well as investors' responsibilities. These areas are emerging as new issues in the negotiation practice, which MENA negotiators have already confronted or will soon be confronting. Secondly, due to the recent surge in investor-to-state dispute settlement arbitration, MENA negotiators of IIAs should be informed about the relevance of certain core provisions in IIAs for international arbitration cases. Annex 1 provides a list of concluded and ongoing cases MENA countries are involved in.

29. Like IIAs concluded outside the region, numerous IIAs concluded by MENA countries contain similar core provisions to IIAs concluded outside the region. These provisions cover definitions regarding the scope of the agreement, provisions on the standards of treatment, repatriation of profits, fair and equitable treatment, direct and indirect expropriation, and market access. The following inventory will show which provisions are contained in IIAs involving a MENA country, with an emphasis on those core provisions which have the potential of giving raise to international dispute settlement procedures.

A. Right of Establishment

30. Under international law every state is sovereign in controlling entry and establishment of foreign entities within its territory. The Agreement on Investment and Free Movement of Arab Capital among Arab Countries of 1970 reiterates this principle in Article 3, highlighting each signatory's sovereignty over its own resources and its right to determine the procedures, terms, and limits which govern Arab investment.[19] Similarly, the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States controls rights of entry and establishment,[20] as does Article 2 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference of 1981[21].

31. International investment instruments of the OECD and its member countries tend to follow a different approach. The two OECD Liberalisation Codes contain an obligation to 'standstill' and 'rollback' for any national restrictions upon the transfers and transactions to which the codes apply. The codes even foresee a positive duty to grant the authorisation required for the conclusion or execution of the transactions or transfers covered; moreover, there is a duty of non-discrimination in the application of

[19] UNCTAD, International Investment Instruments: A Compendium, vol.II, 1996, p. 122.

[20] UNCTAD, ibid., Articles 2 and 5, p. 213, 214.

[21] UNCTAD, ibid., p.241.

liberalisation measures to investors from other member states.[22] The OECD Code of Liberalisation of Capital Movements was extended in 1984 to include rights of establishment.

32. Removal of all discrimination in matters of admission is required by the U.S. model of BITs, which makes entry into the host state subject to the principles of national treatment and most-favoured-nation treatment, and is qualified by the right of each party to adopt or maintain exceptions falling within one of the activities or matters listed in an annex. Other than in BITs concluded with the U.S. or Canada, or BITs and FTAs concluded by Japan, this "negative list" approach can be only found in NAFTA, the Energy Charter Treaty, and the OECD Codes of Liberalisation. Other multilateral instruments covering investment such as the GATS follow a "positive list" approach where parties open particular sectors to FDI.

Box 1. Pre-establishment Obligations

The Unified Agreement for the Investment of Arab Capital in the Arab States, 1980, Article 5: "The Arab investor shall be free to invest within the territory of any State Party in fields which are neither prohibited nor restricted to the citizens of that State and within the percentage limits for shared ownership as prescribed in the law of the State."

OECD Code of Liberalisation of Capital Movements, 1984, Annex A, related to inward direct investment: "The authorities of Members shall not maintain or introduce: Regulations or practices applying to the granting of licenses, concessions, or similar authorisations, including conditions or requirements attaching to such authorisations and affecting the operations of enterprises, that raise special barriers or limitations with respect to non-resident – as compared to resident – investors, and that have the intent or the effect of preventing or significantly impeding inward direct investment by non-residents."

BIT US Model Agreement, 2004, Article 3, para.1 and 2:

"Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

"Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

BIT French Model Agreement, 2005, Article 4, para. 1 (translation from French)

"Each Contracting Party shall apply on its territory and in its maritime area to the nationals and companies of the other Party, with respect to their investments and activities related to the investments, a treatment not less favorable than that granted to its nationals or companies, or the treatment granted to the nationals or companies of the most favored nation, if the latter is more favorable. In this respect, nationals authorized to work on the territory and in the maritime area of one Contracting Party shall enjoy the material facilities relevant to the exercise of their professional activities….This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third party State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization….The provisions of this article do not apply to tax matters."

[22] OECD Codes of Liberalisation of Capital Movements; http://www.oecd.org/dataoecd/10/62/4844455.pdf.

33. In international dispute settlements, pre-establishment rights have not yet played an extensive role. However, the ability to challenge regulatory measures geared at the pre-establishment stage presents a potentially significant challenge to the host country.

B. Provisions defining the scope of application of the Treaty

34. All IIAs contain provisions that define the scope of application of the agreement. They do so *ratione materiae, ratione personae, ratione territoriae,* and *ratione temporis.* Already at this stage, the contracting parties make an important decision as to the influence the agreement may have on their economies. In sharp contrast to this, Article 25 of the ICSID Convention - does not define the term 'investment', but leaves it to the parties to agree on whether a business transaction qualifies as an investment.[23]

Asset based vs. direct investment only

35. IIAs mainly directed at the protection of FDI tend to define investment in a comprehensive manner, covering not only the capital that has crossed borders with a view to the acquisition of control over an enterprise, but also other kinds of enterprise or investor assets.[24] This approach, seeking to protect investment - including portfolio investment - is also referred to as an 'asset based approach'. In the case of BITs, the capital-exporting states traditionally tend to favour broad definitions for assets including physical assets, equity, and non-equity investments. For example, the United States Model Agreement includes not only tangible and intangible property, but also "a claim to money or a claim to performance having economic value."[25] The Mexican Model Treaty reduces the scope of non-equity investment by stating that investment includes "claims to money or to any performance having an economic value except for claims to money that arise solely from commercial contracts for the sale of goods or services."[26] The French Model Treaty gives an inclusive, non-limitative definition of investment, described as "every kind of assets, such as goods, rights and interests of whatever nature, and in particular though not exclusively…", with an ensuing list of subcategories exemplifying investment.

36. MENA countries' IIAs tend to be based on the broader, asset-based definition of investment. For example, Article 1, 1.1 of the Model Agreement for the Promotion and Protection of investments of Bahrain follows a broad investment definition including "claims to money having a financial value' and 'intellectual property rights.".[27] Similarly, the Model Agreement on the Reciprocal Promotion and Protection of Investments of Morocco includes "claims to money or any other claim under contract having an economic value."[28] Chapter 10 of the recent FTA between *Morocco* and the *United States* provides in its Section C no 'catch all' clause, but lists specifically a number of areas other than direct investment like turnkey and concession contracts or intellectual property rights. The U.S.-Morocco FTA agreement also

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[23] Commentators have indicated that in order to qualify as investment under the ICSID Convention, the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development. See Christoph Schreuer, The ICSID Convention: A Commentary, 2001, Art.25, 119-124.

[24] UNCTAD, International Investment Agreements: Key Issues, Vol. I, 2004.

[25] US Model BIT Agreement, 2004; Article 1, Section A.

[26] See Art. 1 (a) of the Mexican Model Agreement on the Promotion and Reciprocal Protection of Investment.

[27] Model Agreement of Bahrain, http://www.ustr.gov/Document_Library/Fact_Sheets/2004/Bahrain_Free_Trade_Agreement_Fact_Sheet.html

[28] Model Agreement of Morocco, Article 1, para.1, (iii).

highlights that "some forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics."[29]

Box 2. Definition of 'Investment'

Unified Agreement for the Investment of Arab Capital in the Arab States, 1980, Article 1, para. 5: "Arab capital: assets owned by an Arab citizen comprising any material and immaterial rights which have a cash valuation, including bank deposits and financial investments. Revenues accruing from Arab assets shall be regarded as Arab assets, as shall any joint share to which this definition applies."

OECD Codes on Liberalisation of Capital Movements and of Current Invisible Transactions: 'Investment' defined under 2.1 Operations Covered by the Code of Liberalisation of Capital Movements.[30]

BIT USA/Egypt, 1992, Article 1, para. 1c:"Investment means every kind of asset owned or controlled and includes but is not limited to:

-tangible and intangible property, including rights, such as mortgages, liens and pledges;

-a company or shares, stock, or other interests in a company or interests in assets thereof;

-a claim to money or a claim to performance having economic value, and associated with an investment;

-valid intellectual and industrial rights property, including but not limited to rights with respect copyrights and related patents, trademarks and trade names, industrial designs, trade secrets and know-how, and goodwill".

BIT Jordan/ Lebanon, 2002, Article 1, para. 1:"The term investment means every kind of investment of assets invested in accordance with the laws and regulations of the other contracting party hosting the investment including but not limited to:

-movable and immovable assets and any property rights connected herewith such as mortgages, pledges and guarantees;

-bonds, shares and securities in companies ownership;

-titles and claims to money or right in any obligation to work having financial value;

-intellectual property including rights relating to publication, patents, trademarks, trade names industrial designs, commercial secrets, technical manufacturing processes, know-how and goodwill;

-business privileges granted by law or contract prospecting and discoveries and extraction or exploitation of natural resources, any change in invested funds form shall not have effect in their classification as investment provided that such change shall not contradict the laws and regulations of the contracting party hosting the investment."

FTA USA/Morocco, Article 10, para. 27, Section C, 1985:"Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

[29] FTA Morocco-US, Section C, FN 9, http://www.ustr.gov./index.html

[30] Refer to the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations, which defines transactions considered as investment. This document is available at http://www.oecd.org/document/63/0,3343,en_2649_201185_1826559_1_1_1_1,00.html.

37. Several International Center for Settlement of Investment Disputes (ICSID) cases have dealt with the question of the definition of investment. The following is a list of prominent cases referencing this question:

- *Alcoa Minerals v. Jamaica* upheld that contribution of capital was one type of investment;[31]
- *Amco Asia* first annulment proceeding established that an international tort and an investment dispute were not mutually exclusive categories;[32]
- *Fedax* recognized that promissory notes issued in certain circumstances qualified as an investment;
- *CSOB* admitted that a loan was in the circumstances of the case an investment;[33]
- *Atlantic Triton* accepted as an investment the conversion of equipment of fishing vessels;[34]
- *Salini v. Morocco* did so in connection with the construction of a highway; and
- *SGS v. Pakistan* included pre-shipment inspection activities and other services within the concept of investment.[35]

38. Recent ICSID arbitrations in which MENA countries have been involved have similarly dealt with the definition of 'investment.' For instance, in *Joy Mining Machinery Limited v. Arab Republic of Egypt* (Case No. ARB/03/11),[36] disagreement arose among the parties regarding the technical aspects related to the commissioning and performance tests of equipment. Joy Mining Machinery Limited ("Joy Mining" or the "Claimant"), a company incorporated under the laws of England and Wales, requested for arbitration against the Arab Republic of Egypt. The request, invoked the ICSID arbitration provisions in the United Kingdom-Arab Republic of Egypt Agreement for the Promotion and Protection of Investments, which entered into force on February 24, 1976.

39. The Tribunal was asked to answer whether bank guarantees can be considered an investment. The ICSID Convention itself does not define the term 'investment', but leaves the definition to the consent of the parties, expressed by means of contract, national legislation, bilateral investment treaties, or other arrangements. Nonetheless, the Tribunal ruled that "the fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, it means 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

[31] Alcoa Minerals of Jamaica, Inc. v. Jamaica (ICSID Case No. ARB/74/2), Decision on Jurisdiction and Competence of July 6, 1975, 4 Yearbook Commercial Arbitration 206 (1979) (excerpts).

[32] Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1)

[33] Fedax NV v. Venezuela (ICSID Case No. ARB96/3).

[34] Atlantic Triton Company Limited v. Guinea (ICSID Case No. ARB 97/7)

[35] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), available at http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

[36] Summaries of cases are taken from the ICSID publication.

this case, the Tribunal concluded that it lacked the jurisdiction to consider the dispute because the claim fell outside both the BIT and the Convention in question.

40. In contrast to the above case, the Tribunal in *Salini Construttori S.P.A. and Italstrade S.p.A. v. Kingdom of Morocco* (Case No. ARB/00/4) assumed the existence of an investment. The dispute among the parties concerned the construction of a highway sector. The Tribunal analyzed the objections to its jurisdiction, namely one which argued that construction contracts do not qualify as investments under the ICSID Convention. The Tribunal considered the following criterion generally identified by the Convention's commentators: existence of contribution, certain duration, and risk participation. The commentators also added that the operation should contribute to the development of the host State as stated by the Convention's preamble. In this specific case, the Tribunal found that the construction contract fulfilled the criteria for investment. With respect to the risk criteria, the Tribunal indicated that a construction project lasting several years, for which total costs cannot be established with certainty in advance, created a risk for the contractor. Thus, the construction operation was qualified as an investment and the disputes that arose directly out of it were within the ICSIDs jurisdiction. Given the precedents set by this and other cases, there is generally some indication that Tribunals may provide a relative broad reading to IIA provisions defining 'investment.' This could imply that host countries could be subject to arbitration on the same grounds.

Investor – natural and corporate persons

41. The protection offered by BITs is limited to investors who invest in the territory of the host contracting state and who possess a qualifying link with the home contracting state. The issue which can arise here concerns the qualifying links of the person with the State party to the agreements. For instance, the nationality of the person can be doubted. Although not exhaustive, Box 3 below illustrates the legal nuances and differences of interpretation among MENA countries in qualifying the status of an 'investor'.

Box 3. Definition of an 'Investor'

BIT Lebanon/Switzerland, 2000, Article 1, para. 1a, b: "The term investor refers with regard to either Contracting Party to be:

-natural persons who, according to the law of that Contracting Party, are considered to be its citizens;

-legal entities, including companies, co-operations, business associations and other organizations, which are established under the law of that Contracting Party, as well as legal entities not established under such law but effectively controlled by nationals or legal entities of that Contracting Party; these criteria also apply to holding and offshore companies."

BIT Jordan/Yemen, 1996, Article 1, para. 3: "The term Investor means:

-any physical person holding nationality or permanent residency of Contracting Party according to the laws and regulations of that Party;

-any legal person established or incorporated under the applicable laws and regulations of a Contracting Party."

FTA Morocco/USA, 2004, Article 10, para. 27:"Investor of a non-Party means, with respect to a Party, an Investor that concretely attempts to make, its making, or has made an investment in the territory of that Party, that is not an investor of either Party;

Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that concretely attempts to make, is making, or has made an investment in the territory of the other Party; provided,

however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."

42. In *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt* (Case No. ARB/02/9), concerning a cotton processing and trading enterprise, the decision on the jurisdiction of the Tribunal was issued in a case brought to ICSID. The case was brought by five Claimants- two companies and three individuals, under the 1982 Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments, which entered into force in 1992. The five claimants - all shareholders of National Cotton Company (NCC), a cotton trading and processing company, incorporated in Egypt - - alleged that Egypt had violated the Treaty by taking a series of measures in the cotton industry affecting their investment. Three of the claimants held Egyptian nationality in addition to their U.S. nationality.

43. The Tribunal declared that it does not have jurisdiction over the individual Claimants since Article 25 (2)(a), concerning natural persons, contains a clear and specific rule regarding dual nationals. The other two corporate Claimants were seen on the other hand as constituting jurisdiction of the Tribunal; this was the case considering Article 25 (2)(b) of the Convention concerning juridical persons provides a certain scope for Contracting Parties and investors to agree on how to determine the nationality of a company.

C. National Treatment/ Most-Favoured-Nation Treatment

44. The principle of non-discrimination is the cornerstone of IIAs and many multilateral agreements under the umbrella of the WTO. IIAs grant investors national treatment (NT) and most-favoured-nation treatment (MFN). The principle of national treatment requires parties to treat foreign investors no less favourably than their own investors. While this does not imply that parties have an obligation to grant foreign investors more favourable treatment than domestic ones, the obligation concerns not only laws or regulations directed at the operations of a foreign investor, but also laws and regulations which govern any aspect of economic activity such as, *inter alia*, competition law, intellectual property rights, consumer protection, incentives, labour laws, environmental regulations, social policy regulations and potentially the deliverance of public services.

45. According to the MFN principle, once a country has accorded a given treatment to a foreign investor or a foreign investment of a particular state, it cannot grant less favourable treatment to any other investor or investment coming from a different state. Box 4 below illustrates how this general principle manifests itself in the laws of a sample number of MENA countries.

Box 4. National Treatment and Most-Favoured-Nation-Treatment

BIT Bahrain Model Agreement, 2000, Article 3, para. 1, 2: "Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors or any third State.

Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."

BIT Jordan/Syria, 2001, Article 2, para. 5:"Each Contracting Party shall ensure the provision of fair and just treatment for investors' investments of the other Contracting Party, which established according to his laws and regulations of investment encouragement, and this treatment shall not be less favourable than those conferred and

applied on his citizens or the citizens of any third country"

BIT Lebanon/Spain, 1996, Article VI: "Each Contracting Party shall in its territory accord to investments or returns of investors of the other Contracting Party treatment no less favourable than that which it accords to investments or returns of investors of any third State. Each Contracting Party shall apply, under its own law, no less favourable treatment to the investments of investors of the other Contracting party than granted to its own investors."

FTA Morocco/USA, 2004, Article 10, para. 4:"Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in is territory. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

OECD National Treatment Instrument, as revised 1991: Article 1 Notification: "Members shall notify the Organisation, of all measures constituting exceptions to National Treatment within 60 days of their adoption and of any other measures which have a bearing on National Treatment."[37] Article 10 Exceptions to the Principle of Non-Discrimination: "Members forming part of a special customs or monetary system may apply to one another, in addition to measures of liberalisation taken in accordance with the provisions of Article 2a), other measures of liberalisation without extending them to other members. Members forming part of such a system shall inform the Organisation of its membership and those of its provision which have a bearing on the Code."

46. The basic non-discrimination obligations of NT and MFN are intended to cover both *de jure* and *de facto* discrimination. With regard to the obligation of national treatment, recent dispute settlement Tribunals have not insisted on the higher standard of legal or administrative discrimination, but favoured a more flexible standard of *de facto* discrimination on a case-by-case basis.[38] This may create uncertainty for the host countries as formally non-discriminatory measures may come under scrutiny.

D. Absolute Standards of Treatment

47. While relative principles of NT and MFN treatment establish a "ceiling" in that they represent the highest standards of treatment that can be accorded to foreign investors, the classical absolute investment protection standards provide a "floor" in that they grant investors a minimum level of protection. This 'floor' includes absolute standards like the principles of fair and equitable treatment, compensation for expropriation, and free transfer of payments. The following sections further elaborate these concepts.

Fair and equitable standard

48. Traditionally, fair and equitable standard principles are regarded as being too vague to create real rights for investors; however, they were seen as the guiding principles for the interpretation and application of the whole treaty. However, recent ICSID arbitration changed this perception.[39] For example, in the dispute of *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (Case No. ARB/99/6), the obligation to provide fair and equitable treatment was seen to be infringed upon by the failure to give full notice directly to a ship owner regarding the impending seizure of a ship.

49. The relative low threshold for invoking the fair and equitable treatment standard in recent arbitration led to clarifications as it did, for example, in the U.S. Model BIT of 2004. Certainly, in MENA

[37] www.oecd.org/daf/investment/legal-instruments/nti.htm

[38] For example *S.D. Myers Inc. v. Canada, 13 November 2000; Marvin Feldman v. Mexico, 16 December 2002.*

[39] For details see, Yannaca-Small, Fair and Equitable Treatment Standards in International Investment Law, OECD 2004.

countries with regulatory and administrative environments which are less developed than those OECD countries, there is a potential risk to lose dispute settlement cases against investors on above mentioned grounds. Box 5 contains a sample of fair and equitable treatment standards as enshrined in the BITs between Jordan and Syria, along with an extensive elaboration of the standards within the U.S. BIT Model Agreement.

Box 5. Fair and Equitable Standard

BIT Jordan/Syria, 2001, Article 2, para. 3: "Each of the Contracting Parties shall confer fair and just treatment for investors' investment or the other Contracting Party. In addition management, maintenance, utilize, using, or assigning of the investment, as well companies, and projects in which these investment were completed shall not be subject to any, legally, unjustified special procedures."

BIT USA Model Agreement, 2004, Article 5, Annex A: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

"full protection and security" requires each Party to provide the level of police protection required under customary international law.

A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

Repatriation of profits

50. The free transfer of returns is a critical element in the protection of investors and it must be regarded as a core provision of any IIA. The provision on the free transfer of payments is certainly among the most important ones in BITs concluded by OECD countries[40] Multilateral agreements tend to allow countries to impose restrictions on transfers in circumstances where a member is confronted with a balance-of-payment crisis.[41] However, it is important to note that such a temporary 'balance-of-payment derogation" is absent in most bilateral and regional agreements, with the exception of NAFTA.[42]

[40] US Model Agreement, Art. VII; German Model Agreement, Art. 5, Mexican Model Agreement, Art.5. French Model Agreement, Art. 7.

[41] Agreement of the International Monetary Fund, Article 7 c) of the OECD Codes, Articles XI, XI GATS; The Multilateral Agreement on Investment (MAI), Negotiation Text, Article IV, 4.1.

[42] NAFTA, Chapter 11.

Box 6. Free Transfer

The Unified Agreement for the Investment of Arab Capital in the Arab States, 1980, Article 7, para.1: "The Arab investor shall have the freedom to make periodic transfers, both of Arab capital for investment in the territory of any State Party and of the revenues there from, and subsequently to make retransfers to any State Party following settlement of his outstanding obligations without this being subject to any discriminatory banking, administrative or legal restrictions and without the transfer process incurring any taxes or duties. This shall not apply in respect of banking services."

BIT UK/Egypt, 1975, Article 6: "Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the free transfer of the returns from their investments, subject to the right of each Contracting Party at exceptional financial or economic circumstances to exercise equitably of good faith powers conferred by its laws. In the case of transfer of capital this shall be affected in accordance with the relevant laws of the two Contracting Parties."

BIT Bahrain Model Agreement, 2000, Article 6: "Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted transfer to their investments and returns including proceeds of sale and liquidation of any investment as well as any amounts or payments stated in any provision of this Agreement. Transfer shall be affected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investors and the Contracting Party concerned. Unless otherwise agreed by the investors transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force."

Expropriation

51. Although the legality of expropriation has been one of the most contentious problems in international law in the past, there is now consensus that an international minimum standard for the treatment of property belonging to aliens has evolved. These standards are enshrined in many IIAs, even though traditionally, many capital-importing countries have been critical of this concept. Within the principle of international minimum standards, expropriation is only lawful where it is carried out for a clear public purpose, without discrimination and upon payment of "prompt adequate and effective compensation."[43] Regarding "prompt and adequate" compensation for expropriation, the recent **OECD Policy Framework for Investment** makes a number of recommendations and encourages governments to ask the following questions:

- Does the government maintain a policy of timely and adequate compensation for expropriation?
- Have explicit and well-defined limits been established on the ability to expropriate, such as guidelines on what constitutes public interest?
- Which channels exist for reviewing the exercise of this power or for contesting it?

52. Wherever expropriation takes a direct form, issues of identification do not arise. However, as in some recent cases where the diminution of property rights has been accomplished without dispossession taking place, difficulties may arise. "Indirect," "disguised," or "creeping"" expropriation may qualify as bringing about "the slow and insidious strangulation of the interests of the foreign investor."[44] Currently,

[43] The so-called Hull formula, which appears in a Note from the U.S. Secretary of State, Cordell Hull, see *Ian Brownlie*, Principles of Public International Law, 4th ed., 1990, 532.

[44] *Sornarajah*, the International Law on Foreign Investment, 2nd Ed., 2004, 350.

this is one of the most contentious issues with regard to provisions in IIAs.[45] For instance, prohibiting an investor from importing raw materials which are needed for production can be easily determined as a "measure having equivalent effect" to expropriation (if the investor is not able to substitute the raw materials in question); this instance certainly constitutes public interest if the imported raw material contains substances which are regarded as detrimental to the host country's environment or public health. Box 7 below summarises some of the provisions protecting the rights of investors from expropriation stipulated in a sample of MENA and OECD country Agreements.

Box 7. Expropriation

Unified Agreement for the Investment of Arab Capital in the Arab States, 1980, Article 9, para.1:"According to the provisions of this Agreement, the capital of the Arab investor shall not be subject to any specific or general measures, whether permanent or temporary and irrespective of their legal form , which wholly or partially affect any of the assets, reserves or revenues of the investor and which lead to confiscation, compulsory seizure, dispossession, nationalisation, liquidation, dissolution, the extortion or elimination of ….."

BIT USA Model Agreement, 2004, Article 6, Annex B: "Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: -for a public purpose; -in a non-discriminatory manner; -on payment of prompt, adequate, and effective compensation. -in accordance with due process of law and Article…

-indirect expropriation:

The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

-the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

-the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

-the character of the government action.

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect."

BIT French Model Agreement, 2005, Article 5. (translation from French)

"1.The investments made by nationals or companies of one Contracting Party shall enjoy full and complete protection and safety on the territory and in the maritime area of the other Contracting Party.

2. Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of nationals or companies of the other Contracting Party of their investments on its territory and in its maritime area, except in the public interest and provided that these measures are neither discriminatory nor contrary to a specific commitment.

[45] For a comprehensive review, see *Yannaca-Small*, Indirect Expropriation and the Right to Regulate in International Investment Law, OECD 2004, http://www.oecd.org/dataoecd/22/54/33776546.pdf.

Any measures of dispossession which might be taken shall give rise to prompt and adequate compensation, the amount of which shall be equal to the real value of the investments concerned and shall be set in accordance with the normal economic situation prevailing prior to any threat of dispossession.

The said compensation, the amounts and conditions of payment, shall be set not later than the date of dispossession. This compensation shall be effectively realizable, shall be paid without delay and shall be freely transferable. Until the date of payment, it shall produce interest calculated at the appropriate market rate of interest.

3. Nationals or companies of one Contracting Party whose investments have sustained losses due to war or any other armed conflict, revolution, national state of emergency or revolt occurring on the territory or in the maritime areas of the other Contracting Party, shall enjoy treatment from the latter Contracting Party that is not less favorable than that granted to its own nationals or companies or to those of the most favored nation."

BIT Jordan/Egypt on the mutual Promotion and Protection of Investment, 1996, Article 4:"Any Contracting Country is not allowed to take expropriation or nationalization measures against the investments of any investor from the other Contracting party, unless the following conditions are fulfilled:

1. The measures are adopted for legal purpose and in accordance with due process of law.

2. The measures are not discriminatory.

3. These measures shall be accompanied with allocations for prompt and effective payment of compensation shall be equal to the value of the investment prevailing in the market at the time of expropriation decision announcement and the compensation shall be transferable in freely convertible currency with the Contracting Party, and in the event that payment of compensation is delayed the investor shall receive interest at a reasonable commercial rate or according to an agreement between the Parties or according to that provisions of the law."

BIT Syria/Jordan 2001, Article 3:"It may not permissible, directly or indirectly, to nationalize, expropriate, freeze of investments of either of the Contracting Parties in the territories of the other contracting Party or the investments of any of its natural or legal persons, as well these investments shall not be subject to procedures have the same effects of nationalization, expropriation, or to limit the disposition of these investment properties and their revenues, except for public interest of this country against an immediate and fair compensation on indiscriminately bases and according to applicable laws and shall permit transference according to Article 4 of this agreement."

FTA Morocco/USA, 2004, Annex 10 b: "The Parties confirm their shared understanding that: Article 10.6.1. is intended to reflect customary international law concerning the obligation of States with respect to expropriation. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. Article 10.6.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. The second situation addressed by Article 10.6.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors: the economic impact of the government action, although the fact that an action or series of action by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and - the character of the government action."

53. The dispute in the case of *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (Case No. ARB/99/6) concerns an alleged expropriation by the government of Egypt of the claimant Middle East Cement's, interests in a cement distribution enterprise which was located in Egypt as well as Egypt's alleged failure to ensure the re-exportation of Middle East Cement's assets. Middle East Cement invoked an ICSID arbitration clause contained in an Agreement between Greece and Egypt for the Promotion and Reciprocal Protection of Investments, which entered into force on April 6, 1995. Egypt issued a decree prohibiting import of all types of Portland Cement, which resulted in the halt of the activities of the Middle East Cement branch in Egypt. Middle East Cement claimed damages due to the

liquidation of its Egyptian branch (including lost profits) as well as for its difficulties in re-exporting the branch's assets including a floating silo.

54. The Tribunal stressed that, "when measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as 'creeping' or 'indirect' expropriation or, as in the BIT, as measures "the effect of which is tantamount to expropriation". As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. The Tribunal concluded that the Respondent breached its obligations under the BIT with Greece particularly by taking measures tantamount to expropriation against the claimant without prompt, adequate and effective compensation (Art. 4 of the BIT).

55. This case demonstrates that there remains some insecurity about how to approach regulatory expropriation claims. This uncertainty over the scope and reach of the expropriation obligations in IIAs in relation to regulatory measures of the host state is an issue of concern for host countries and must be taken seriously by MENA negotiators.

Transparency

56. Transparency issues are part of a broader subject dealing with the relationship between national administrations and their citizens, be they domestic or foreign investors. The extent of transparency of rule-making and administrative procedures, as well as the corresponding existence of procedural rights for the investor to claim transparent treatment from the authorities of the host country, are important elements in testing the seriousness of investor-friendly policies in a host country. Therefore, it comes as no surprise that recent IIAs contain transparency obligations dealing not only with the host country, in addition to home country investment promotion policies and with transparency obligations of the investing entity itself.

57. Modalities of information disclosure covered by transparency obligations in IIAs include the following: consultation and information exchange; making information publicly available; answering requests for information; notification requirements for specific measures to be communicated to the other party; or, setting up a body to fulfil this purpose under the agreement.[46] An example can be seen in the Model BIT for Egypt, where Article 2.3 provides that Contracting Parties may periodically consult on investment opportunities to determine where investments may be most beneficial.[47]

Box 8. OECD Framework for Investment Policy Transparency

The OECD Framework for Investment Policy Transparency aims at assisting both OECD and non-OECD governments to enhance transparency of their investment policy frameworks. The Framework poses fifteen questions:

Question 1: Are the economic benefits of transparency for international investment adequately recognised by public authorities? How is this being achieved?

Question 2: What information pertaining to investment measures is made "readily available", or "available" upon request to foreign investors?

Question 3: What are the legal requirements for making this information "public"? Do these requirements apply to primary and secondary legislation? Do they apply to both the national and sub-national levels? Is this information also

[46] Public Sector Transparency and the International Investor, OECD 2003.

[47] UNCTAD, vol.I,II 1996.

made available to foreign investors in their countries of origin?

Question 4: Are exceptions/qualifications to making information available clearly defined and delimited?

Question 5: What are the main vehicles of information on investment measures of interest to foreign investors? What may determine the choice of publication avenues? What efforts are made to simplify the dissemination of this information?

Question 6: Is this information centralised? Is it couched in layman's terms? In English or another language? What is the role of Internet in disseminating essential/relevant information to foreign investors?

Question 7: Have special enquiry points been created? Can investment promotion agencies fulfill this role?

Question 8: How much transparency is achieved via international agreements or by international organisations?

Question 9: Are foreign investors normally notified and consulted in advance of the purpose and nature of regulatory changes of interest to them? What are the main avenues? Are these avenues available to all stakeholders?

Question 10: Are the notice and comment procedures codified? Do they provide for timely opportunities for comment by foreign investors and accountability on how their comments are to be handled?

Question 11: Are exceptions to openness and accessibility to procedures clearly defined and delimited?

Question 12: What are the available means for informing and assisting foreign investors in obtaining the necessary licensing, permits, registration or other formalities? What recourse is made to "silent and consent" clauses or "a posteriori" verification procedures?

Question 13: What are foreign investors' legal rights in regard to administrative decisions?

Question 14: To what extent "one-stop" shops may assist foreign investors fulfill administrative requirements?

Question 15: What efforts are being made to address capacity building bottle-necks?[48]

USA Model BIT, 2004, Article 10, para. 1: *"Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions that pertain to or affect covered investments are promptly published or otherwise made publicly available."*

58. Transparency requirements for corporate entities have been formulated by the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States, which states the following: *"In the various aspects of his activity, the Arab investor must, as far as possible, liaise with the State in which the investment is made and with its various institutions and authorities. He must respect its laws and regulations in a manner consistent with this Agreement..."*[49]

E. Dispute Settlement

59. Much of the prominence of IIAs, from the point of view of the international investment community, stems from the possibility that the provisions of the IIAs may eventually be enforced in case of a dispute, not only through classical ways of diplomatic protection by the home state, but also by **investor-to-state dispute settlement** procedures. The Investment Committee of the OECD has conducted

[48] OECD Public Sector Transparency and the International Investor; 2003.

[49] Unified Agreement for the Investment of Arab Capital in the Arab States, 1980, Article 14, para.1.

significant analytical work on this subject, with an article on the subject appearing in the International Investment Perspectives 2006 titled *Improving the System of Investor-state Depute Settlement.*

60. The existence of these procedures constitutes a crucial factor underlying a favourable investment climate in the host country. Procedural dimensions of IIAs are likely to become more relevant in the future for MENA countries. Already, many IIAs involving MENA countries contain provisions on investor-to-state dispute settlement, with a considerable number of investment disputes pending or concluded with MENA countries – if only counting the publicised cases of cases taken to the World Bank's ICSID (refer to Annex 1).

61. As shown in Annex 2, 13 MENA countries are signatories of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of other States. Although these provisions had not been used frequently the during the first 30 years of ICSID's existence (35 claims from 1966 to 1995) the subsequent 9 years witnessed a total of 127 claims filed; representing more than a tenfold increase in ICSID activity on an average yearly basis.[50] As of August 2004, there were 79 pending cases before ICSID,[51] the large majority of which were filed pursuant to alleged violations of BITs.

62. As shown in Annex 1, 9 out of the total concluded ICSID cases involved MENA countries, with 10 cases pending as May 2005 (this statistic only includes cases made public). Around 60 per cent of the cases filed with ICSID are filed under BITs, the remained under NAFTA and state contracts. The proliferation of BITs since 1966 and the overall increase in flows of foreign direct investment can account for this increase. Moreover, another factor which can account for this proliferation is prominence of international investment law by the legal community. Independent of these reasons, however, the sheer number of claims indicates the importance of investor-state arbitration for investors.

63. Once ICSID arbitration is pursued, each state party to the ICSID Convention is required to enforce the resulting arbitral award in its territory.[52] This obligation to enforce awards is derived from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which provides a method to enforce arbitral awards as recognised in accordance with the rules and procedures of the state in which enforcement is sought and is applicable under specified terms and conditions. In total, 14 MENA countries participating in the MENA-OECD Investment Programme are members of the New York Convention (refer to Annex 3).

[50] *See* http://www.worldbank.com/icsid/cases/conclude.htm and http://www.worldbank.com/icsid/cases/pending.htm

[51] *See* http://www.worldbank.com/icsid/cases/pending.htm

[52] Article 54 (1) ICSID: "Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award with its territories as if it were a final judgment of a court in that State."

ANNEX 1
ICSID CASES INVOLVING MENA COUNTRIES

I. List of Concluded Cases

1. Holiday Inns S.A. and others v. Morocco (Case No. ARB/72/1)
Subject Matter: Joint venture to build and operate hotels

2. Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (Case No. ARB/84/3)
Subject Matter: Tourism development project

3. Manufacturers Hanover Trust Company v. Arab Republic of Egypt and General Authority for Investment and Free Zones (Case No. ARB/89/1)
Subject Matter: Bank branch operation

4. Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (Case No. ARB/99/6)
Subject Matter: Cement distribution enterprise

5. Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (Case No. ARB/00/4)
Subject Matter: Construction of the sector of a highway

6. Impregilo, S.p.A and Rizzani De Eccher S.p.A. v. United Arab Emirates (Case No. ARB/01/1)
Subject Matter: Construction of a mosque

7. JacobsGibb Limited v. Hashemite Kingdom of Jordan (Case No. ARB/02/12)
Subject Matter: Waterway construction project

8. Ed. Zueblin AG v. Kingdom of Saudi Arabia (Case No. ARB/03/1)
Subject Matter: Construction of university facilities

9. Consortium Groupement L.E.S.I.- DIPENTA v. Algeria (Case No. ARB/03/8)
Subject Matter: Construction of a dam

10. Wena Hotels Limited v. Arab Republic of Egypt (Case No. ARB/98/4)
Subject Matter: Hotel lease and development agreements

11. Consortium R.F.C.C. v. Kingdom of Morocco (Case No. ARB/00/6)
Subject Matter: Construction of the section of a highway

12. Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt (Case No. ARB/02/9)
Subject Matter: Cotton processing and trading enterprise

13. Joy Mining Machinery Limited v. Arab Republic of Egypt (Case No. ARB/03/11)
Subject Matter: Phosphate mining project

14. Salini Construttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan (Case No. ARB/02/13)
Subject Matter: Dam construction project

15. Ahmonseto, Inc and others v. Arab republic of Egypt (Case No. ARB/02/15)
Subject matter: Textile enterprise

II. List of Pending Cases

1. Hussein Nuaman Soufraki v. United Arab Emirates (Case No. ARB/02/7)
Subject Matter: Concession agreement regarding a port

2. ABCI Investments N.V. v. Republic of Tunisia (Case No. ARB/04/12)
Subject Matter: Acquisition of shares

3. LESI, S.p.A. and Astaldi, S.p.A. v. Algeria (Case No. ARB/05/3)
Subject Matter: Construction of a dam

4. Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (Case No. ARB/04/13)
Subject Matter: Dredging project

5. Waguih Elie George Siag and Clorinda Vecci v. Arab Republic of Egypt (Case No. ARB/05/15)
Subject Matter: Resort development

6. Desert Line Projects LLC v. Republic of Yemen (Case No. ARB/05/17)
Subject Matter: Road construction contract

7. Helnan International Hotels A/S v. Arab Republic of Egypt (Case No. ARB/05/19)
Subject Matter: Hotel lease and development agreements

8. Toto Costruzioni Generali S.p.a. v. Republic of Lebanon (Case No. ARB/07/12)
Subject matter: Highway construction contract

ANNEX 2
ICSID MEMBERSHIP OF MENA COUNTRIES [53]

Country	ICSID member since *
Algeria	1996
Bahrain	1996
Djibouti	No
Egypt	1972
Iraq	No
Jordan	1972
Kuwait	1979
Lebanon	2003
Libya	No
Morocco	1967
Oman	1995
Palestine National Authority	No
Qatar	No
Saudi Arabia	1980
Syria	2006
Tunisia	1966
United Arab Emirates	1982
Yemen	2004

(*) Note: the dates refer to the entry into force of the Convention on the Settlement of Investment disputes Between States and Nationals of Other States

Source: ICSIS, http://www.worldbank.com/icsid/constate/constate.htm

[53] as of May 2007.

ANNEX 3
MENA MEMBERSHIP TO THE 1958 NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

MENA countries	Membership
Algeria	Yes
Bahrain	Yes
Djibouti	Yes
Egypt	Yes
Iraq	No
Jordan	Yes
Kuwait	Yes
Lebanon	Yes
Libya	Yes
Morocco	Yes
Oman	Yes
Qatar	Yes
Saudi Arabia	Yes
Syria	Yes
Tunisia	Yes
United Emirates	Yes
Palestine National Authority	No
Yemen	No

Source: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status

ANNEX 4. CONCLUSIONS OF THE TASKFORCE ON INTERNATIONAL INVESTMENT AGREEMENTS

This second meeting of the Expert Group on International Investment Agreements hosted by the Government of Egypt was conducted as part of the activities of Working Group 1, Output 2 of the MENA-OECD Investment Programme on 12-13 December 2006. The meeting was divided into two parts: a regional meeting of the Expert Group and a special session for Egyptian participants.

During the meeting participants agreed on the following points:

I. Regional meeting of the Expert Group

- To elaborate further the Inventory to serve as a background, adding proposals for treaty negotiators on how to draft clauses in IIAs avoiding ambiguity and potential legal challenges.

- To establish an investment treaty platform for the MENA region consisting of:

  - An inventory of treaty practices reflecting BITs, FTAs with investment provisions, as well as regional and multilateral initiatives. The inventory will include access to treaties, model treaties, litigation (awards, judgments) and legal analysis, a manual of building blocks and options for treaty negotiators;

  - An electronic discussion forum providing a facility for exchanging experience and advice on current treaty issues.

- To support the development of a CSR module reflecting standards of responsible conduct of investors (domestic and foreign) within the region in line with relevant international instruments. There are various international initiatives aimed at promoting responsible business conduct, including the OECD Guidelines for Multinational Enterprises and the UN Global Compact. The OECD Guidelines for Multinational Enterprises provide a government-backed voluntary code of responsible business conduct and a recognized reference in international discussion on investment policies and rules.

- It was agreed by participants that the signing of an IIA has to be followed by its ratification in order to make it directly applicable as binding national law. Ratification requirements may differ from country to country, but a speedy ratification procedure is in the best interest of all parties to an IIA.

- The scope and relevance of core provisions of IIAs must be approached in the light of 1) the growing body of jurisprudence arising from tribunals' decisions on investment dispute notably arbitral awards under the ICSID, 2) established treaty interpretation rules; and 3) state practice.

II. Special session for Egyptian participants

Participants agreed on the following points:

- In order to enhance the ratification record of the Arab Republic of Egypt the treaty negotiation strategy needs to be revised. Egypt has signed 107 BITs, 33 % of it are not ratified. With this number of BITs signed, Egypt is 6th world-wide and is the first capital importing country in the list of countries having concluded the most BITs.

- A model agreement can help to clarify basic concepts and provisions for BITs negotiators, but must be accompanied by a comprehensive promotion strategy to identify the right targeted country. The model agreements is not legally binding, however, it can be seen as an administrative guideline limiting the discretion of the negotiator.

- A model agreement is only one necessary step to enhance the ratification record. Of equal importance is the inclusion of all government ministries involved in the process of ratification at an early stage in the negotiations. Early consultations with a broader stakeholder community including parliamentary bodies and private sector are also recommended since it helps gathering political support for the final ratification.

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