

MENA–OECD Investment Programme

Preliminary Assessment of Investment Policies and Promotion in the MENA Region

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**MENA-OECD
INVESTMENT
PROGRAMME**

Indicators of the BCDS Investment Dimension

Investment Policy and Promotion

FDI Policy

NON DISCRIMINATION

- Restrictions to national treatment
 - Approval procedures
- Admittance of business personnel
- Transfer of FDI-related capital
 - FDI incentives
- Performance requirements

PROPERTY RIGHTS

- Land ownership
- Titling and cadastre
- Intellectual property

INVESTOR PROTECTION

- Guarantees against expropriation
 - International agreements
 - International arbitration

Promotion and Facilitation

FRAMEWORK

- Investment promotion strategy
- Implementing agency
- Monitoring and evaluation
- National/sub-national coordination

SERVICES & ACTIVITIES

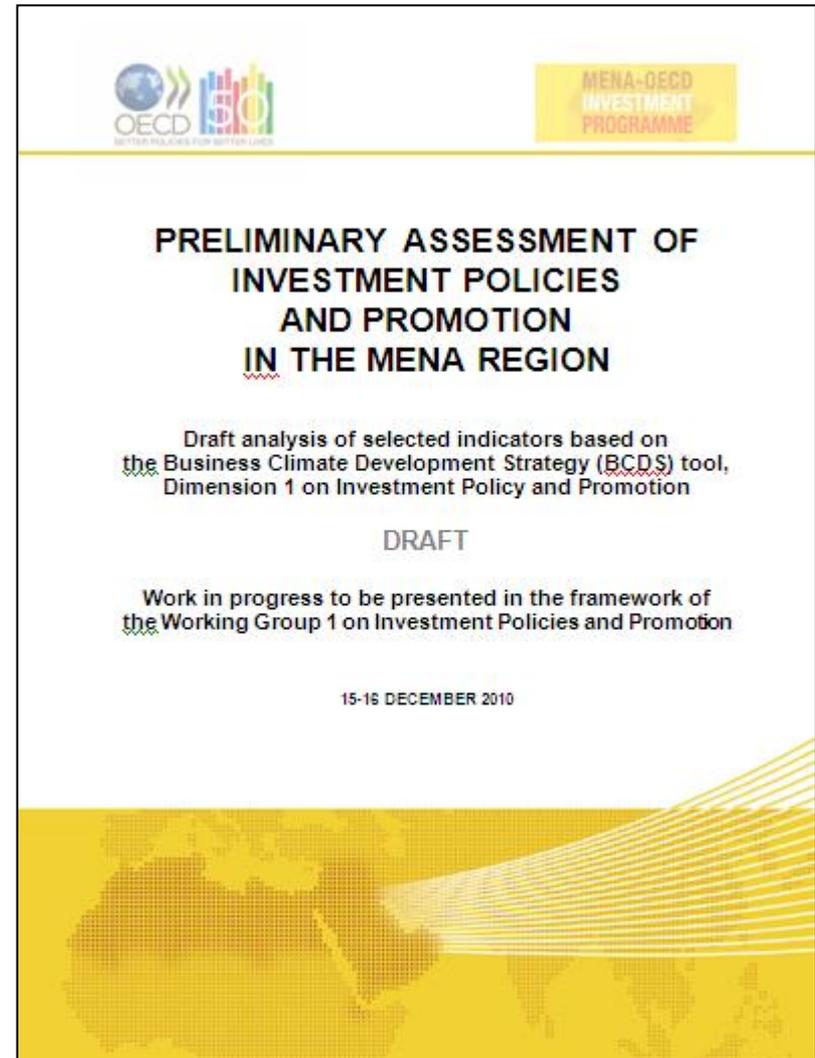
- FDI-SME linkages
- One-stop shop
- Client relationship management (CRM)
 - Policy advocacy
 - Aftercare services
- Economic zones

Transparency

- Publication avenues and tools
- Prior notification and stakeholder consultations
 - Procedural transparency

Status of assessment – December 2010

- 25 indicators on investment policy and promotion
- 6 indicators analysed for each of 18 MENA economies:
 - I.1: Restrictions to national treatment
 - I.4: Transfer of FDI-related capital
 - I.10: Expropriation
 - I.11: International investment agreements
 - I.12: International arbitration
 - II.2: Investment Promotion Agencies
- Other indicators to be analysed in 2011, based on a calendar to be defined by WG1



- Country Progress Reports: MENA-OECD Investment Programme (2010), *Investment Reforms in the MENA Region: Country Progress 2006-2009*.
- Primary legislation (investment laws), secondary legislation (e.g. sectoral laws)
- Websites of investment promotion agencies
- IIA databases
- Reports from international organisations: OECD, WTO, World Bank, ANIMA
- Law journals and articles

Objectives of analysis

- Stocktaking of investment policies and promotion strategies for the whole region
- Description only
- A work towards harmonisation
- Governments are encouraged to provide data and comments on the assessment and conclusions



MAIN PRELIMINARY CONCLUSIONS ON SIX INDICATORS

Indicator I.1 – Restrictions to national treatment

- This indicator examines whether:
 - **National treatment and non-discriminatory treatment** are incorporated in FDI legislation;
 - Restrictions occur on the basis of **clearly defined general exceptions** to national treatment; subject-specific exceptions; and country-specific exceptions.
 - Restrictions to foreign investment are clearly listed and identified;
 - Restrictions are **regularly reviewed** and updated.

Indicator I.1 – Restrictions to national treatment

- Most MENA economies have a specific law relating to foreign and/or domestic investment, except Bahrain and the U.A.E.
- 8 out of 18 MENA economies explicitly affirm the principle of national treatment in their primary FDI legislation: Algeria, Djibouti, Iraq, Jordan, Lebanon, Libya, Palestinian Authority and Yemen.
- The principle is also affirmed in IIAs.
- Most MENA economies have taken steps to modify or reduce restrictions to national treatment in their primary FDI legislation. Publicly available lists of sectors or activities open to foreign investment (positive list) or closed to foreign investment (negative list), available in Bahrain, Egypt, Jordan, Morocco, Saudi Arabia and Syria.
- Some countries maintain screening and prior approval on foreign investment projects.

Identified regulatory restrictions in MENA economies			
	Shareholding quotas	Access to land	Sector-specific
Algeria	√	?	?
Bahrain	√	√	√
Djibouti		√	√
Egypt	√		√
Iraq		√	√
Jordan	√		√
Kuwait	√	?	√
Lebanon		?	√
Libya	√	?	√
Morocco		√	√
Oman	√	√	√
Palest. Auth.		?	√
Qatar	√		√
Saudi Arabia			√
Syria			√
Tunisia	√	√	√
U.A.E.	√	√	√
Yemen	√		√

Indicator I.4 – Transfer of FDI-related capital

- This indicator examines whether:
 - The **transferability and convertibility of FDI-related capital** are subject to regulatory provisions;
 - FDI-related capital includes: **profits, dividends, sales and re-sales of shares, compensation for expropriation, damages awarded by an arbitral or judicial decision;**
 - **International commitments** have been undertaken under Article VIII of the IMF Articles of Agreement, BITs, or the 1980 LAS Agreement on Investment;
 - **Exceptions are clearly identified** in law: bankruptcy, insolvency, criminal proceedings.

Indicator I.4 – Transfer of FDI-related capital

- All MENA economies report the free transferability and convertibility of FDI-related capital and their repatriation abroad, either in their domestic law and/or by way of international obligations.
- Few MENA economies explicitly cover the widest range of FDI-related capital, i.e. profits, dividends, sales and re-sales of shares, in addition to payments of compensation for expropriation and damages awarded by an arbitral or judicial decision (Palestinian Authority, Qatar).
- The actual process of repatriating capital, in particular in cases of liquidation, requires clearance from various institutions, such as the tax administration. Potential sources of difficulties in the repatriation process remain to be analysed in practice.

Indicator I.10: Guarantees in case of expropriation

- This indicator examines whether:
 - **Regulatory guarantees** in case of expropriation are provided for in the Constitution, in the investment laws and/or specific expropriation law;
 - **Indirect expropriation** is covered;
 - Expropriation may be lawful under **strictly defined circumstances**:
 - for a public purpose,
 - in due process of law,
 - providing for prompt, adequate and effective compensation, and
 - allowing for judicial review;
 - **International arbitration** is available and enforced, when investment treaties are applicable

Indicator I.10: Guarantees in case of expropriation

- All MENA economies constitutionally or legislatively protect property rights, including investors' rights, and set out conditions for their lawful expropriation.
- A smaller proportion explicitly covers indirect expropriation (Djibouti, Libya and Qatar).
- MENA domestic laws generally refer to the jurisdiction of administrative or judicial courts to adjudicate claims relating to expropriation measures.
- When included into IIAs, ISDS mechanisms may apply.
- The language and level of compensation or indemnification vary in wording ("*fair*", "*just*", "*equitable*", "*reasonable*", "*equivalent to the real economic value*", "*fair market value*", "*market price*").
- More information would be needed on enforcement and effectiveness of local remedies and international awards.

- This indicator examines whether:
 - MENA economies **pursue a strategy** of signing and ratifying investment agreements with major trading partners;
 - Investment agreements contain **main investor protection provisions**;
 - Treaty partners **regularly review the implementation** of their investment agreements.

Indicator I.11: International Investment Agreements

- 622 bilateral investment treaties signed worldwide, and over 50 free trade agreements with investment-related chapters. Top signatories in the MENA region: Egypt and Morocco.
- The rate of ratification (percentage of treaties being ratified and entering into force) averages at 75%, with variations across the region.
- It does not seem that review mechanisms are implemented, except for State parties to FTAs with the United States.
- Renegotiation of treaties is rare.
- Few information is available on the existence of model investment treaties, which are rarely publicly available.

Indicator I.12: International Arbitration

- This indicator examines whether:
 - MENA countries are parties to the **1958 New York Convention** and the **1965 Washington Convention**;
 - States **consent to international arbitration** to resolve disputes with foreign investors either in their investment laws or through investment treaties;
 - Arbitration Laws allow for **effective dispute settlement** (choice of arbitration forum, arbitrability of disputes involving State entities);
 - The enforcement of arbitral awards is **systematic**, including in cases when the award was rendered against the State or a State entity;
 - States have developed alternatives to arbitration.

Indicator I.12: International Arbitration

- The MENA region follows the trend in terms of increase of treaty claims (38 known cases, as Respondents). More and more, MENA investors are also claimants (Gulf region).
- ICSID Convention :13 MENA countries (+ Qatar); New York Convention: 14 MENA countries. Iraq and Libya are the only MENA countries not to be a party to either.
- Most MENA countries provide for international arbitration in their investment laws. However, arbitration fora are rarely listed.
- Most IIAs signed by the MENA economies contain ISDS provisions, usually with a list of fora.
- Some MENA countries recognise the arbitrability of disputes between foreign investors and the State, either in their arbitration law or their investment law (Algeria, Egypt, Morocco and Tunisia).
- Few countries in the MENA region have developed alternative dispute resolution mechanisms, such as conciliation and mediation, e.g. Algeria, Morocco and Egypt.

Indicator II.2: Investment Promotion Agencies (IPAs)

- This indicator examines whether:
 - An **IPA** has been set up with a formal mandate and missions;
 - The IPA Board is composed of **public and private representatives**;
 - The **internal structure** is efficient (**organisation, staff, financial autonomy**);
 - The agency pursues an active **communication strategy** and offers **investor services** (one-stop shop).

Indicator II.2: Investment Promotion Agencies

- All MENA economies have set up an investment promotion body, most of them are full-fledged IPA, few are part of a wider governmental institution.
- The majority of IPAs also act as one-stop shops. Some deliver basic information and assistance, others offer far-reaching investors' services.
- Some IPAs have prerogatives of private developers (free zone developers, sovereign funds).
- Most IPAs are under the authority of a Ministry, and managed by a board of directors usually composed of a mix of public and private sector representatives.
- A majority of IPAs has been established as administratively and financially autonomous institutions.
- Some IPAs have decentralized offices, and sometimes expanded to foreign countries.
- IPA websites are of varying quality and informational standard. E-services are not frequently offered and efficient.

Thank you

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