DRAFT NOTE:

STRENGTHENING REGIONAL INVESTMENT FRAMEWORKS IN THE MENA REGION

Prepared in the context of the MENA-OECD Working Group on Investment Policies and Promotion
Paris, 15-16 December 2010
Mandate

1. The MENA-OECD Investment Programme initiated a dialogue with MENA economies on the strengthening of regional investment frameworks in the MENA region, underlining the need to modernize and harmonize rules for the protection and promotion of investments.

2. In the Marrakech Declaration of November 2009, MENA and OECD ministers mandated the Programme to “pursue analysis of ways to strengthen regional investment frameworks, including screening the effectiveness of regional investment protection instruments with a view to promoting intra-regional investment flows”.

3. The issue was first discussed during the meeting of Working Group 1 in Amman, Jordan in February 2010. The suggestion to analyse further the current status of existing bilateral and regional investment agreements and to explore ways of strengthening regional instruments was greeted positively by the participants. They requested the OECD Secretariat to “expand the stocktaking analysis on the evolution of international investment agreements (IIAs) in the MENA region and integrate examples from other regions, with contributions from Working Group members and regional institutions”. This mandate was endorsed during the Steering group meeting in Paris in May 2010.

Context

4. Regional trade integration is underway in the MENA region following implementation of trade agreements, such as the Greater Arab Free Trade Agreement, and fulfilment of WTO commitments. However, intra-regional integration in the area of investments has been limited. Such cooperation can be achieved through solid and effective investment frameworks.

5. Sound and stable legal frameworks regulating foreign direct investments (FDI) are essential to attract investors and increase regional and intra-regional investment flows. FDI are sources of growth and a major integration factor, provided that they are governed by common standards at the bilateral and regional levels, in terms of increased transparency, predictability and convergence of norms and principles. Investment frameworks at the bilateral and regional level thus respond to the rationale of contributing to economic cooperation and facilitating coordination of investment relations (between host States, home States and foreign investors) through agreed common denominators.

6. Currently, the worldwide trend towards proliferation of international investment agreements and increased complexity in treaty provisions causes lack of coherence between international agreements themselves and with national investment policies, creates difficulties in interpretation by arbitral tribunals and results in confusion and weakened transparency for investors. To overcome these obstacles, some countries revised their bilateral investment treaty model and negotiated new generation-type treaties based on
recent arbitral jurisprudence. In addition, there is a recent trend to incorporate investment protection provisions into bilateral and regional trade integration agreements (e.g. FTAs).

7. At the regional level, some groupings are seeking to reinforce and strengthen their legal investment frameworks, usually as a means to foster economic integration. This can be achieved through soft-law instruments (e.g. the Asia-Pacific Economic Cooperation (APEC) Non-Binding Investment Principles (1994) and the OECD Declaration on International Investment (1976, updated 2000)) or binding instruments. The most recent and inclusive example of a regional investment instrument is the ASEAN Comprehensive Investment Framework (ACIA) signed by the 10 member countries of the Association of Southeast Asian Nations in February 2009.

8. In the MENA region, some regional investment agreements exist (see below), but they are either not implemented, or not known.

International investment frameworks in the MENA region

9. The MENA region has been following the worldwide trend in terms of proliferation of agreements. The MENA-OECD Investment programme is conducting an ongoing stocktaking evaluation of the international investment treaties (IIAs) in the region. Findings show that the 18 participating countries and territories in the Programme have signed 622 bilateral investment treaties (BITs) worldwide, 81 of which have been signed between them. Among these, 30 are not ratified.

10. In addition to BITs, MENA economies signed bilateral, regional and inter-regional economic agreements with an investment component. Over 50 have been identified in the region. These treaties encompass bilateral treaties encouraging investment flows (e.g. the United States Trade and Investment Framework Agreements), Association agreements with the European Union, bilateral free trade agreements covering certain aspects of investment, and investment-related agreements signed within the framework of a regional organization. Among this last category\(^1\), it should be noted that the League of Arab States endorsed

\(^1\) Selected existing regional investment-related instruments:

- Instruments of the Islamic Conference: Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (1986); Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit (ICIEC) (1995);
- Instruments of the Union du Maghreb Arabe: Convention relative à l’encouragement et la protection des investissements entre les pays de l’UMA (1993);
several instruments and the most comprehensive one is the Unified Agreement for the Investment of Arab Capital in the Arab States (1980). However, these instruments have not been effectively implemented, resorted to so far, or are unknown by investors.

11. There are 38 known investor-State dispute cases involving MENA economies, among the 357 cases worldwide and these numbers increased in the recent years. This shows that investors continue to increasingly use international arbitration as a means for resolving disputes with their host countries, but also brings some concerns in terms of high costs involved, diverging interpretation and lack of country capacity to handle disputes. In terms of fora, a vast majority of cases are filed under the International Centre for Settlement of Investment Disputes (ICSID). It should be noted that the Arab Investment Court, instituted by the 1980 League of Arab States Investment Agreement, only settled one case to date. This confirms that this regional mechanism is not used by investors and the reasons behind this fact should be further explored.

12. Most MENA economies are parties to the ICSID Convention, with the exception of Djibouti, Iraq, Libya and Qatar\(^2\) (also excluding the Palestinian Authority), and to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, with the exception of Iraq, Libya and Yemen (also excluding the Palestinian Authority).

**Objectives of enhanced regional investment frameworks**

13. Effective regional investment frameworks have several objectives:

- Send a strong signal to the international community and foreign investors in terms of transparency, predictability and accountability: for investors, rule of law includes convergent, clear and stable norms;

- Reinforce regional economic integration: regional investment agreements complements ongoing trade integration;

- Enhance intra-regional and foreign investments by providing harmonised standards of protection: regional investment agreements could aim at fostering regional co-operation, providing incentives to intra-Arab capital movement, and clarifying and harmonising protection standards to ensure coherence and predictability;

- Set an effective implementation mechanism: a regional investment agreement can establish an institutional body to oversee and co-ordinate implementation, promote investment within the region (e.g. organise investment opportunities events, enhance complementation and production networks, support SME development and business linkages, promote transfer of technology...), serve as a depository of national and

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\(^2\) Qatar signed the ICSID Convention in September 2010.
regional legal investment instruments, encourage streamlining and simplification of investment procedures, and facilitate the avoidance and settlement of disputes.

Options in the MENA region and the next steps

14. Given the context and the achievements in the MENA region, two directions could be envisaged to strengthen the framework for intra-Arab and international investments.

Option 1: Modernisation of existing investment instruments

15. The existence of several investment instruments naturally calls for streamlining and revitalising agreements into force. In that context, the most advanced and encompassing regional investment agreement is the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States signed by the 22 members of the League of Arab States. At the sub-regional level, members of the Arab Maghreb Union also signed in 1993 an agreement for the encouragement and protection of investments.

16. Therefore, the modernisation and revitalisation of the LAS 1980 Investment Agreement could be an option to strengthen regional investment frameworks. Considering this option would require questioning what it entails to revise such an instrument and what mechanism would ensure effective implementation. One could also envisage modernizing and implementing existing investment agreements at the sub-regional level.

Option 2: Reinforcing trade integration agreements with investment provisions

17. Efforts towards regional economic integration could also include reinforcement of trade agreements through extension of the scope to investment liberalisation, protection and promotion. Several regional economic integration or free trade agreements exist in the region (e.g. Pan-Arab Free Trade Agreement, the Arab Mediterranean FTA (so-called Agadir agreement), GCC economic agreements...). Incorporating investment provisions into these agreements could be also be envisaged. Forms of this inclusion could be diverse and gradual. Should a comprehensive investment chapter be incorporated into the core agreement or a standing alone agreement building on the liberalisation commitments be negotiated? Should a gradual approach be undertaken (encouragement language towards binding provisions)? Should sub-regional trade agreements be targeted first? What should be the approach towards progressive liberalisation and opening up of sectors (positive vs. negative list)?

18. Members of the Working Group on Investment Policies and Promotion will be asked to give their feed-back on these options and the following questions with a view to guide the work of the MENA-OECD Investment Programme towards strengthening regional investment frameworks.
19. Questions:

1. Do participants agree that investment frameworks in the region should be strengthened following the strong increase of intra-regional investment and trade flows?

2. What is the opinion of the participants on the two options to strengthen regional investment frameworks? Would participants agree on further analysing the two options and their effectiveness in promoting intra-regional investment flows? How could countries contribute to the analysis?

3. Would participants agree to present the findings of the analysis to the forthcoming MENA-OECD Steering Group and Ministerial Conference with a view to reach political decision on the way forward?