

# Second Conference for a Euro-Mediterranean Community of International Arbitration

Cairo  
12 November 2015



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# INTRODUCTION

The Organization for Economic Cooperation and Development (OECD) created the MENA–OECD Investment Programme to support investment policy reform for growth and jobs creation in the Middle East and North Africa. This programme is structured around several regional networks and country-specific projects undertaken in collaboration with regional and international partners. In that framework, the Working Group on Investment Security in the Mediterranean (MENA–OECD ISMED Working Group) was constituted and, since 2013, four task forces have independently developed innovative policy proposals to foster private-sector investment in infrastructure in the MENA region. The proposals reflect these areas of focus: (i) risk mitigation and project finance; (ii) arbitration; (iii) public-private partnerships: legal aspects and risk sharing; and (iv) Islamic finance.

The United Nations Commission on International Trade Law (UNCITRAL) was chosen as the leader of the task force on arbitration and, as a first endeavour, it co-organized—together with DiMed (Délégation interministérielle à la Méditerranée, France) and the OECD—the first Conference for a Euro-Mediterranean Community of International Arbitration, in Marseilles on 8 December 2014.

Given the success of the first conference, OECD and UNCITRAL decided to repeat the experience in a country of the southern part of the Mediterranean. Therefore, in 2015, they co-organized with the cooperation and support of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Second International Conference for a Euro-Mediterranean Community of International Arbitration, which took place in Cairo on 12 November 2015.

By bringing together experts and professionals in international arbitration and investment, the annual conference aims at promoting a sustainable Euro-Mediterranean arbitration community as part of a broader agenda for securing investments, key for stabilization and economic growth in the South and the East of the Mediterranean.



# **CONFERENCE PROCEEDINGS**



# OPENING STATEMENTS

**H.E. Counsellor Taha Abdou**

*Principal Legal Advisor to the Minister,  
Ministry of Investment, Egypt*

I am delighted to be part of this conference that brings together experts and professionals in international arbitration and investment from the European Union (EU) and Middle East and North Africa (MENA) area to promote an arbitration shared community in an attempt to form a wider legal community and to build on common practices for international rules of law. I also would like to express my thanks to the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Organization for Economic Cooperation and Development (OECD) and the United Nations Commission on International Trade Law (UNCITRAL) for organizing such an event with the purpose of boosting the Euro-Med cooperation in international arbitration community.

Although international arbitration is deemed to be the only option for foreign investors as the only means of protection in their agreements and contracts, that area was reformed in the past year in Egypt. This umbrella that enables investors to guarantee their entry and stay in the host country recipient of investments is deemed to be burdensome to some countries of the region, including Egypt.

From the facts, Egypt nowadays has become one of the most common defendants as a host country in investor-State dispute settlement (ISDS) cases, where it ranks fourth in international investment litigation after Argentina, Venezuela and the Czech Republic.<sup>1</sup> This post-2011 rise of cases was mainly witnessed with an increase of 14 cases brought against Egypt, to make them reach a total of 26 cases—a burdensome mechanism that is a weight on both the hosting country and the plaintiff. Therefore, Egypt had to enhance its amicable mechanisms starting as from early 2000.

Egypt has long envisaged dispute resolution methods that opt for adjudication in an amicable way in an attempt to render international arbitration a last resort for settlement. Domestic investment legislation provided for a dispute settlement mechanism pursuant to Investment Law No. 8 of 1997, that aimed at receiving complaints raised by foreign investors, considering them and rendering a decision settling the issue before it turns to a claim raised before international arbitration. Investment law was always keen to reduce investor resort to international arbitration, starting with the ministerial committee established by the Prime Minister's decree in 2002 entrusted with resolving all complaints raised by foreign investors and interpreting investment law. This first attempt to settle the disputes amicably was considered to have legally binding and final decisions pressing both parties to the dispute to comply. The second attempt includes the ministerial committee for State contracts, which was launched in 2011, entrusted with the amicable settlement of disputes arising out of State contracts.

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<sup>1</sup>United Nations Conference on Trade and Development (UNCTAD) database on ISDS.

The 2015 amendments of Investment Law No. 8 of 2006 introduced notable observances in both committees: an enhanced authority through a fixed and regular representation of concerned ministers and high-level government officials. The substantial changes that were made reflect more care and willingness to resolve investment dispute in an amicable way before they are raised before international arbitration. This provides for more efficiency and for enforcement of decisions rendered by both committees.

The 2015 law amendments aimed at establishing new mechanisms that prescribe for dispute prevention through more efficiency and keenness emanated from officials. Its concern came to reflect the role of State custody in terms of a speedy, efficient and serious mechanism for dispute settlement. In this regard, both committees were given more authority and representation in handling and resolving investment disputes.

Starting its work in July 2015, the ministerial committee for investment dispute settlement hit a record in handling complaints submitted by foreign investors. Headed by the Minister of Justice, with the presence of several ministers, the committee has the authority to render a final decision after submission of the revision of the complaints report by the technical secretariat. The latter was established by Prime Ministerial Decree No. 1273 of 2015 and headed by the Minister of Investment and is composed of high-level government officials. It provides for reviewing claims received from investors between investors and administrations (see below) under Law No. 8 of 1997 in an attempt to be submitted to the ministerial committee for adjudication.

This technical secretariat applies Egyptian laws and regulations and grandfathering cases previously settled as well as treaties that Egypt is a party to.

In contrast to the previous years, this committee, which commenced its work in August 2015, had held six sessions, during which it had the capacity of reviewing 114 claims where 107 disputes were solved. This number of cases settled has hit an unprecedented record against a smaller total number of cases addressed in the past years, as described in the table below.

<b>Year</b>	<b>Number of cases settled</b>	<b>Length of achievements</b>
2010	93	During the year
2011	103	During the year
2012	108	During the year
2013	148	During the year
2014	160	During the year
2015	107	During a quarter of the year

*Source:* Egyptian Ministry of Investment.

In the same vein, the ministerial committee for State contracts had witnessed a widespread practice compared to the past few years. This implied an increased ability to handle complaints and a rise in the number of cases resolved compared to the past few years prior to the amendments.

This form of amicable mechanism for dispute settlement reflects not only the efficiency and the enhanced capacity of the Government to handle disputes, but also its concern for settling the dispute in an amicable way and keenness to play a role in State custody for foreign investors, where it provided for all means to attract and retain investment without prejudice to investors rights. This room of manoeuvre given to investors should encourage

them to resort to international arbitration as a last recourse if the exhaustion of the local remedies did not work.

This facilitation and the guarantees provided in the light of the new amendments could counteract the limitation imposed in the Egyptian Bilateral Investment Treaty (BIT) model. Encouraging the investor to exhaust local remedies before resorting to international arbitration is cited in the Egyptian BIT model, where it should be agreed by written mutual consent to have recourse to international arbitration.

Shedding light on this particular concern of amicable ways of settling disputes was mandatory, especially given the rise in the number of cases brought against Egypt before the International Centre for Settlement of Investment Disputes (ICSID). This, in turn, has called for a rapid action for the State custody that could contribute to reducing international arbitration claims and contribute to solving pending disputes.

In this era, where instability is invading the MENA region, it is important to raise awareness of this sensitive topic among the authorities so that they take it as a major concern and avoid its repercussions on their economies. Promoting and attracting investments could not be apart from retaining investments. This will not be effective without granting investors their rights through efficient mechanisms for disputes settlement. The particular concern of the government officials could be a backbone for this protection.

Finally, finding a common ground in the Euro-Med region in international arbitration that promotes enhanced legal and economic cooperation is a great achievement, in which building cooperation on this level could be a means to provide attraction and security for foreign investors. This enhanced cooperation could be backed by, inter alia, investment protections, guarantees and agreed mechanisms for resolving disputes in an efficient professional manner without prejudice to State interests in development, which could ultimately contribute to boosting cross-border and cross-regional investments in the Euro-Mediterranean region.

## **Hrvoje Sikirić**

*UNCITRAL Chair (2012-2013),  
Professor and Head of the Department of Private International Law  
at the Faculty of Law of Zagreb, Croatia*

Excellencies,  
Distinguished Representatives,  
Ladies and Gentlemen,

It is my pleasure and an honour to welcome you all at the second Conference for a Euro-Mediterranean Community of International Arbitration. I am doing so on behalf of Mr. Renaud Sorieul, the Secretary of UNCITRAL, who is unfortunately not able to join us today.

I had the privilege in 2012 to be appointed Chairman of UNCITRAL, and in that capacity, to contribute to a number of activities of the Commission. As you may well know, UNCITRAL is a commission established by the United Nations General Assembly with a mandate to harmonize and modernize the law governing international trade. As such, UNCITRAL is known worldwide for establishing modern legal rules regulating international

commerce in a neutral and balanced manner, and assisting States and other relevant stakeholders with the understanding, enactment, implementation and interpretation of those standards. UNCITRAL work has also contributed to raising the awareness on the relevance of international trade to the development of the rule of law.

In that context, arbitration plays a key role. Indeed, in the field of arbitration, UNCITRAL has made a significant contribution to developing and promoting international standards. The near-universal adherence to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is just one example. The success of the New York Convention and its increased use are a tribute to the role of arbitration as a peaceful means of settling international disputes, as are the numerous enactments of arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration (1985, updated in 2006), and the extensive use of the UNCITRAL Arbitration Rules (1976 and revised in 2010). UNCITRAL continues to work diligently in the field of dispute resolution.

UNCITRAL is currently working on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings, which is a very unique instrument in that the Notes do not seek to promote any practice as best practice. Their aim is to guide arbitral tribunals and parties in the various steps of the arbitral procedure, taking into account of the variety of possible approaches.

One of the recent achievements of UNCITRAL is in the field of treaty-based investor-State arbitration, where UNCITRAL has shown its ability to lead reforms. One of the concerns expressed was that confidentiality, which is a usual feature of commercial arbitration, was not adapted to investor-State arbitration, as those disputes usually involve matters of public interest. In that context, UNCITRAL commenced work on transparency in investment arbitration in October 2010 and after three years, in 2013, the Transparency Rules (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration) were adopted. The Transparency Rules represent a ground-breaking set of rules that determine how information released in the context of investor-State arbitration will be made public, and hearings will be held openly. The Rules also contain procedures to protect the integrity of the arbitral process and ensure that confidential information remains protected.

UNCITRAL also adopted the United Nations Convention in Treaty-based Investor-State Arbitration. Overall, it is expected that the UNCITRAL standards on transparency will significantly contribute to enhancing transparency in investor-State dispute resolution regime, thereby enhancing predictability in decisions made, as well as accountability of those involved in investment arbitration.

In this context, the objectives of the 2015 Cairo Conference are to enhance knowledge of arbitration and investment practices as well as to promote a sustainable Euro-Mediterranean arbitration community. This conference is being organized in the framework of the MENA–OECD Investment Programme, which aims at supporting investment policy reforms in the Middle East and North Africa. In that framework, the Working Group on Investment Security in the Mediterranean (MENA-OECD ISMED Working Group) was constituted and, since 2013, four task forces have independently developed innovative policy proposals to foster private-sector investment in infrastructure in the MENA region.

The UNCITRAL secretariat has agreed to lead the task force on arbitration and, as a first endeavour, it co-organized—together with DiMed (Délégation interministérielle à la Méditerranée, of France) and the Organization for Economic Cooperation and Development (OECD)—the first Conference for a Euro-Mediterranean Community of International Arbitration, in Marseilles on 8 December 2014. By bringing together experts and professionals in

international arbitration and investment, the conference aimed at promoting a sustainable Euro-Mediterranean arbitration community as part of a broader agenda for securing investments, key for stabilization and economic growth in the South and the East of the Mediterranean.

In the same spirit as the first edition held last year in Marseille, this conference is being held to learn from your expertise and listen to your valuable comments. Last, but not least, I would like to take this opportunity to thank our partners, OECD and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) for their dedication to this project. A particular thank also goes to the members of CRCICA, Mr. Abdel Raouf and his team, who made this event in Cairo possible.

Once again, I sincerely thank you for being here today and I look forward to fruitful discussions between our eminent speakers and the audience during the day.

Thank you.

## **Marie-Estelle Rey**

*Senior Advisor,*

*MENA–OECD Investment Programme, Global Relations Secretariat,  
Organization for Economic Cooperation and Development (OECD)*

On behalf of OECD, it is an honour for me to open this second international conference for a Euro-Mediterranean Community of International Arbitration, organized together with UNCITRAL and the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

This conference offers a platform of dialogue with high-level experts and professionals in international arbitration together with government representatives, at a very timely moment. The international arbitration landscape is changing with the negotiation of mega-regional trade and investment agreements, and therefore with new challenges for policymakers. The South Mediterranean region should not lag behind these developments and should keep abreast of and adapt to these transformations. This is why this initiative comes at a critical moment for the region.

I am representing the MENA–OECD Investment Programme. This Programme was launched 10 years ago upon request of the countries from the Middle East and North Africa (MENA) region. It is a strategic regional programme of OECD and has just renewed its mandate for five years. The objective of the Programme is to foster regional policy dialogue between MENA and OECD countries with a view to enhancing the business climate in the region. We focus on investment policies, small and medium enterprises (SME) and entrepreneurship development, women's integration in the economy and business integrity through regional working groups and country-specific projects. The MENA–OCDE Programme hosts the ISMED Working Group, ISMED standing for Investment Security in the Mediterranean region. The aim is to enhance the efficiency of legal investment frameworks and to foster innovative policy tools in support of private investment infrastructure. The Working Group focuses on four issues: risk mitigation instruments, private-public partnerships (PPPs), Islamic finance and international arbitration. On this last topic, the theme of today's conference, the

idea is to build a network where arbitrators, magistrates, academics, government representatives and law firms can exchange and advance the reflection on international arbitration. This idea is concretizing today with this second conference and we hope that this initiative will continue with regular annual conferences.

As an introduction, I would like to highlight some key facts on investment trends and policies in the MENA region which show the timeliness of this conference: the drop in FDI inflows, the rise of investor-State dispute settlement cases, the ongoing investment reforms, and the intricate network of investment agreements in the region.

- The region experienced a severe drop in foreign direct investment (FDI) inflows in recent years due to the global financial crisis, but also and mainly due to the regional uprisings that have taken place since 2011. FDI inflows to the region decreased by 50 per cent between 2008 and 2014 and no significant rebound has been noted contrary to other developing regions in the world. The situation differs among the countries: while Morocco saw an increase of 30 per cent of FDI inflows between 2008 and 2014, Tunisia, Jordan, Egypt and Algeria experienced important decreases (of, respectively, 160 per cent, 60 per cent, 49 per cent and 43 per cent).
- The FDI decrease has been parallel to a rise in dispute cases between investors and States. Twenty-seven known arbitration cases have been initiated by investors against MENA countries between 2011 and 2015, with Egypt totalling 15 cases. The region therefore registered more than 10 per cent of total cases during the period. While some have been either settled or discontinued, most are pending and require active involvement of the States in resolving these disputes. Managing and settling these disputes, but also preventing future ones, are essential to re-establishing trust and promoting an enabling climate for investors.
- To reverse FDI decreases, MENA countries engaged into sound investment policy reforms. With a view to restoring investors' confidence, offer better predictability and consistency, and hence counterbalance political and security challenges, reforms tackle the regulatory, institutional and administrative environment for investment. As examples, Iraq adopted a new amendment of its investment law in October 2015 following OECD recommendations; Egypt announced major reforms in March 2015, including an amended investment law and dispute settlement institutional and regulatory measures; Jordan enacted its new Investment Law in October 2014 and established a new institution, the Jordan Investment Commission, merging three bodies. In Tunisia, a thorough consultation and drafting process was conducted to review the Investment Code that should be adopted by Parliament early next year. In Morocco, the revised Investment Charter is reaching final government validation before Parliamentary approval. Other investment reforms, or at least discussions on needed reforms, are ongoing in several other countries in the region, such as in Algeria on the 51/49 rule and the Palestinian Authority. The enactment and revision of legislation in support of arbitration (based on the UNCITRAL Model International Commercial Arbitration Law) are also increasing. The OECD has been accompanying some of these reforms and is supporting their implementation and harmonization.
- At the regional level, the Arab League has engaged into a process of revising its 1980 Investment Agreement. It comprises the revitalization of the Arab Investment Court, which has been hearing a very limited number of cases since its first decision in 2004 (*Tanmiah Co. v. Tunisia*). The new amended agreement is now pending ratification of five member States to enter into force. In addition, countries in the MENA region

have signed 735 bilateral investment treaties (BITs), including 105 between themselves. The majority contain arbitration provisions, though drafted in an inconsistent manner with different degrees of detail on scope and mechanisms. With low levels of intra-regional FDI, fostering regional investment integration is needed. OECD is supporting the Arab League in promoting a concerted approach towards ways of promoting greater regional integration in the area of investment, based on good practices, recognized investment principles and other regional experiences.

Therefore, the issue of investment disputes and arbitration is at the heart of the investment policy reforms that are taking place at the national and regional levels in the MENA region. The conference today offers an opportunity to enhance understanding of the evolving international landscape of arbitration, to contribute to the related international debate and to consider appropriate means to promote arbitration in the region.

I hope the numerous participants who are present today will benefit from the presentations of internationally recognized experts on arbitration and engage in a dialogue in which everybody will learn from each other. I also hope that this dialogue will continue and nurture further activities of this initiative in cooperation with all active partners.



**I.**

**PRELIMINARY REFLECTIONS  
AND ANALYSIS**



# THE EXISTENCE OF A EURO-MEDITERRANEAN LEGAL AND ARBITRATION COMMUNITY

**Georges Abi-Saab**

*Emeritus Professor of International Law,  
Graduate Institute of International and Development Studies,  
Geneva*

The title of our Conference gives rise to a succession of preliminary interrogations that are worth examining at the outset, namely, “What do we mean by community here?”; “Does such a community exist in the context of law and arbitration within the Euro-Mediterranean sphere or region?”; and if not or not yet, “What are the conditions amenable to its emergence and consolidation?”

## I. THE CONCEPT OF COMMUNITY

The term “community” has permeated the recent literature of international law. But its use has been varied, without a clear focus emerging from it on its hard core or its boundaries. This is exemplified by the very variable geometry of the use of the term “international community”, both in formal instruments and in writings. According to the instrument (treaty, United Nations General Assembly resolution, etc.), or the author, it could signify:

- “The community of the States of the world” (article 53 of the Vienna Convention on the Law of Treaties of 1969: “... the international community of States as a whole...”);
- “The community of the peoples of these States”, thus merging into the concept of humanity; or
- “The active and vocal segment of those peoples, variously called ‘international public opinion’, ‘international civil society’”, etc.;
- Not to mention the self-appointed spokesmen of this community in specific contexts, such as the 5+1 (the five permanent members of the Security Council plus Germany) when negotiating with Iran; both the representatives of those six States and the media referring currently to these negotiations as between Iran and the international community.

To bring the concept of community into focus, one has to turn to the discipline that studied it best: sociology.

### A. The sociological meaning of “community”

Sociologically speaking, “community” is a *relative concept* both in scope and in intensity. In other words, its existence is a question of degree. It can exist within a group on one point, but not necessarily on others; similarly, it may exist with different degrees of intensity.

Even if one takes the most paradigmatic natural group, the family, we find that on certain matters it constitutes an intense community, in the form of a spontaneous solidarity among its members; but that on other subjects, such a community is categorically refuted, by ruptures and conflicts among the members of the same group, precisely because of these family bonds. Yet, on further subjects, belonging or not belonging to the same group, the family, has no bearing or influence.

“Community” is thus a *fragmentary* phenomenon. Consequently, when one says that a community exists within a group on a certain subject, this does not mean that such a community exists within that group in the same way and with the same intensity on other, not to say on all, subjects. Rather than referring to a group as a community in general, it is better, for the sake of precision, to speak of the degree of community obtaining in the group on a certain subject.

### B. The objective and subjective components of the concept of a community

An objective prerequisite for the existence of a community is the presence of conditions conducive to interactions transformable into social relations of exchange, conflict and/or cooperation that persist over time. From such sustainable social (in the large sense of economic, cultural, social, possibly political) relations can emerge certain patterns of conduct corresponding generically to our concept of law.

In any case, such relations join their participants together into a “group”, permitting the distinction of the relationships between those participants (intra-group relations) from their relations with actors outside the group (this is what is referred to in the literature as the problem of identification of the “boundary” of limited or sectorial communities, briefly discussed below).

This objective element does not by itself indicate the existence of a community. For this, it has to be combined with another, subjective, element, namely the emergence from these sustained social relations of a sense or feeling of community in the form of a shared perception of a common interest or value, and of the means to protect and promote it.

As was mentioned before, within a group, a community can exist on one or more subjects. However, only if the group is welded together by a sense of community, even in varying degrees of intensity, over a very broad range of subjects, and only then, can it be globally or aggregately referred to as a community.

## II. THE MAKINGS OF A EURO-MEDITERRANEAN LEGAL AND ARBITRAL COMMUNITY

In the light of the preceding understanding of the concept of community, can we speak of a legal and arbitral Euro-Mediterranean community? Do we have the makings of such a community? Or, in other words, can we identify the objective conditions and circumstances that can provide the necessary infrastructure for its emergence and subsistence?

Particularly, when speaking of partial or limited communities, whether *ratione materiae* (sectorial, covering a certain sector or subject) or *ratione loci* (territorial, covering a certain spatial sphere), we need to identify the objective commonalities that can bring their participants together, and distinguish them from the other participants in their total environment, without necessarily severing them from that total environment.

What are the commonalities that do or can underlie a Euro-Mediterranean legal and arbitral community? I can think of two (rather obvious ones):

- History and geography
- The civil law system

### A. Geography and history

I think it was Fernand Braudel, the founder of the “Annals school” (l’École des Annales) in history, who coined the phrase “*La Méditerranée: creuset des civilisations*”. *Creuset* is literally a crucible or melting pot, meaning that the Mediterranean has always served as a cross-road, meeting point or melting pot of civilizations developed around it.

Indeed, sustained interactions and relations over and around the Mediterranean existed since time immemorial. This led the famous Italian professor (and later Judge on the ICJ) Roberto Ago to contest the current opinion that the present system of international law emerged in Europe, at the end of the Wars of Religion, with the Peace of Westphalia in 1648. For Professor Ago, well before that period, in fact since the high antiquity, legal relations always existed between the peoples living around the Mediterranean, constituting a kind of international law “within an interstate collectivity having as centre of gravity the Mediterranean, a sea to which the circumstances have assigned the function of meeting place of different civilizations and sovereignties”.<sup>2</sup>

This proximity of the different human groups populating the shores of the Mediterranean, and their long-standing familiarity with each other provide a robust objective basis for a legal and arbitral community.

### B. The civil law system

Another contributing factor to the objective component of a Euro-Mediterranean legal and arbitral community is the fact that almost all the countries concerned adhere to the civil law system. This is true of all continental European countries. It is also true of all the Arab countries that abut on the Mediterranean, whether in North Africa or in the Levant. Of course, we are speaking here only of economic or patrimonial relations, which are governed by civil and commercial law. And as far as those relations are concerned, all Mediterranean Arab countries follow a civil law approach either as a colonial legacy or by free choice; that which is true of Turkey as well.

Of course, adherence to the same legal approach or system does not by itself beget a legal community. But it greatly facilitates its emergence and perpetuation. For the community to emerge, however, these objective elements have to give rise and be accompanied by the subjective component, namely a shared feeling or sense of community among the participants therein.

<sup>2</sup> Roberto Ago, “Les premières collectivités interétatiques méditerranéennes”, in *Le droit international : unité et diversité : Mélanges Paul Reuter* (Paris, Pedone, 1981), p. 34 (translation by the author).

### III. TOWARDS A EURO-MEDITERRANEAN ARBITRAL COMMUNITY

The remaining interrogation is then whether such a sense or feeling of community exists in the Euro-Mediterranean region as far as arbitration is concerned; and if not or not yet, whether certain recent developments in the international commercial arbitration environment prompt the emergence of such a feeling of community within the region. Indeed, the noticeable drift of international arbitral practice from the classical model of arbitration and its virtues can play a catalytic role eliciting such a feeling of community within the Euro-Mediterranean region.

#### A. The original virtues of arbitration

Arbitration is a *private* and *voluntary* means of settlement of disputes. It is a very malleable instrument in the hands of the parties (*“l’arbitrage est la chose des parties”*) or “party sensitive”, allowing them great liberty in fashioning and controlling its process and its pace; in any case much greater than going to court.

As the authors of a relatively recent article put it:

Ideally, international commercial arbitration provides the Parties with a private dispute resolution system which is faster and fairer than court proceedings ... [It] affords the Parties considerable freedom, flexibility and control over the proceedings and is designed to assure that Parties from different jurisdictions can have their disputes heard and resolved in a neutral fashion ...<sup>3</sup>

Its virtues, technically speaking, can be summed up as flexibility, simplicity and economy. The Parties being able to choose the arbitrators and designate or lay down the applicable law and the rules of procedure, they can thus opt for much simpler and less formal rules than those followed in courts. This in turn leads to significant economies in procedures, in time and in costs.

Politically speaking, arbitration allays the concern of a foreign Party that local courts might be biased in favour of a domestic Party, particularly if it is the government or a government-related entity.

These virtues explain the widespread resort to arbitration for the settlement of international economic disputes particularly since the end of the Cold War.

#### B. The present drift of arbitral procedures towards proliferation, complexity and excessive contentiousness

The recent spectacular growth of international economic arbitration was accompanied by a parallel trend in arbitral procedures drifting away from the original virtues of arbitration towards greater complexity, proliferation of motions and papers and excessive contentiousness.

It has become normal today for an international arbitral case—not only in investment arbitration between governments and foreign investors, but also in current international commercial arbitration between two private corporations or entities—to take several years, sometimes well over a decade. It is also normal (not to say expected) that the procedures be strewn with

<sup>3</sup>K.T. Jacobs and M.G. Paulson, “The Convergence of Renewed Nationalization, Rising Commodities and ‘Americanization’ in International Arbitration”, 43 *Texas International Law Journal* (2008), pp. 361 and 364.

innumerable preliminary objections, pleas, motions, and other procedural incidents; supported by a proliferation of papers and documents, witness and expert statements, etc.; served by cohorts of lawyers belonging usually to mega law firms, who leave no stone unturned, however insignificant or spurious it may be; using excessively contentious and aggressive language and strategies.

In other words, international economic arbitration has become, in general, heavy going, heavy-handed, much more formal and procedural, time-consuming and consequently quite costly; the exact reverse (or a negative picture version) of the original virtues of arbitration.

### C. The controversy over the “Americanization” of international arbitration

These negative trends are largely attributed, particularly outside the United States, to what is referred to as “the Americanization of international arbitration”.

There is general recognition, even among United States legal circles, that “international arbitration has been traditionally based on the European civil law practice”;<sup>4</sup> and that it has been significantly influenced in recent decades by American law concepts and practices. But controversy persists, notably in United States publications, over the extent of this influence and particularly over its total effect and whether it is globally detrimental or beneficial.<sup>5</sup>

Be that as it may, what is objectively clear and uncontested is that present day international arbitration bears many of the characteristics of American law and practice. The American influence manifests itself both in the way of handling cases and the procedures followed, and in the reasoning and motivation of awards.

As far as procedures and the handling of cases are concerned, the most striking manifestation is the frequent resort on both sides to large teams of lawyers, mainly American or United States trained, often affiliated to large United States law firms. They carry with them their habitual ways and means (terms, concepts, etc.) of handling litigation; that which could not but leave a deep imprint on arbitral procedures. An illustrative, but far from exhaustive, sample of this imprint includes the following:

- Never-ending procedural disputes: extensive motion practice, jurisdictional objections, evidentiary objections, etc.
- Extensive production of documents, including broad pre-hearing discovery, Redfern schedules, fishing expeditions, etc.
- Preparation and presentation of party witnesses and experts
- Extensive and aggressive cross-examination
- Huge documentary submissions that are physically impossible to read thoroughly in their entirety or even in significant part within the normal time-span of a case

Such a proliferation of procedural motions and documentary and other submissions (exacerbated by the moral hazard of the system of paying lawyers by the hour) translates into

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<sup>4</sup>S.L. Karamanian, “Overstating the ‘Americanization of International Arbitration’: Lessons from ICSID”, 19 *Ohio State Journal on Dispute Resolution* (2003), p. 10.

<sup>5</sup>See, for example, Karamanian, *ibid.*; C. Romano, “The Americanization of International Litigation”, *ibid.* p. 85; M.E. O’Connell, “Introduction to the Symposium Issue on the Americanization of International Dispute Resolution”, *ibid.* p. 1; Lucy Reed and J. Sutcliffe, “The ‘Americanization’ of International Arbitration ?” 16 *Mealey’s International Arbitration Rep.* (2001), p. 37; N.C. Ulmer, “A Comment on ‘The Americanization of International Arbitration ?’”, *ibid.*, p. 24.

an attitude (and an atmosphere) of relentless contentiousness that has been frequently described in literature as “total war”. Apart from its distracting effect away from the essential, i.e. the central substantive issues, it does not make for the serenity of the arbitral process. Moreover, it is not amenable to the search for settlement, which should remain an objective for the Parties even during the arbitration, once their legal positions have been known to each other, permitting each to evaluate the strong and weak points in their respective positions.

It is true that some efforts have been made to elaborate international procedural rules that would be more widely representative and acceptable, such as the IBA Rules. But on close scrutiny, the IBA Rules turn out to be almost a carbon copy of American procedures. It suffices for proof to read articles 3 (on discovery and document production) and 4 (on witness preparation by counsel); two of the most objectionable or at least controversial aspects of United States procedures.

As concerns substance, particularly the reasoning and motivation of the awards, there is an increasing tendency in that regard to rely blindly or uncritically on prior decisions (as if it were a *de facto stare decisis system*). This is a very dangerous tendency given the extreme discrepancy in quality of the legal reasoning of awards and the great variation in apparently similar applicable rules or factual circumstances. Wrongly or poorly reasoned decisions do not make “precedents” and their accumulation does not make a “jurisprudence”. In French, when one says that a judicial or arbitral decision “*fait jurisprudence*” this means that its reasoning is so persuasive and its motivation is so apposite and congruent with the applicable law and the circumstances of the case that it sets a “precedent” worth following in future similar situations. But such decisions are few and far between, and their striking power of conviction is a far cry from the run of the mill awards of international economic, particularly ICSID, arbitrations.

In sum, these recent heavy tendencies of international economic arbitration, ensuing from its progressive Americanization, in the form of growing complexity, proliferation and excessive contentiousness, have weighed and slowed down the process, and made it quite costly; far away from its original virtues of flexibility and time and cost efficiency.

This lead, as one author remarked, to the expansion of alternative dispute resolution methods (ADR) such as mediation, which “represents what arbitration originally represented, that is, a cheap, fast, professional and informal method of dispute resolution”.<sup>6</sup>

#### **D. A special “role in search of an actor” for the Euro-Mediterranean arbitral community: producing an international arbitral subsystem that swings the pendulum back towards the original virtues of arbitration**

As was mentioned earlier, given the developments described above in international arbitration, a catalyst for the emergence or consolidation of a feeling of community in the Euro-Mediterranean region can be a growing sense of common purpose and interest in developing a simplified and flexible subsystem of international arbitration, anchored in the common legal culture of civil law. Such a subsystem would facilitate recourse to arbitration intra-community, i.e. between the members of the community, without cutting them off from the wider universal community.

And if it is successful and proves itself within its partial community, this model or subsystem may rub off on to the universal system and pull it back in the direction of more flexibility, simplicity and civility.

<sup>6</sup>A. Belohlavek, “The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures”, *Law of Ukraine* (2011/2), p. 30.

# **AN ILLUSTRATION OF A MEDITERRANEAN ARBITRATION COMMUNITY: THE ISPRAMED NETWORK**

**Stefano Azzali**

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## **INTRODUCTION**

The Barcelona Process (or Euro-Mediterranean Partnership), launched in Barcelona in 1995 between 27 Members of the European Union and 12 southern Mediterranean States, is aimed at the creation of an area of peace, security and shared prosperity.

In this context, better cooperation in the field of justice has been indicated as one of the priorities of the Euro-Mediterranean Partnership. More specifically, arbitration has been expressly recognized—in the final declaration signed in Marseille on 3-4 November 2008 by the representatives of the countries involved in the Union for the Mediterranean—as a dispute resolution system to be developed, promoted and strengthened for the benefit of subject-matter experts (SMEs).

In view of the above, and also according to the aims of the Barcelona Process and of the Euro-Mediterranean Partnership, the Milan Chamber of Arbitration—a Special Agency of the Milan Chamber of Commerce—launched its own Mediterranean Project.

The Milan Chamber of Arbitration has given special attention to traders of the Mediterranean region as part of a more general strategy set by the Chamber of Commerce of Milan towards the area, aiming at strengthening economic relations between Milan, Italy and Mediterranean Countries.

## **I. A CONCRETE EXAMPLE OF REGIONAL INITIATIVE IN INTERNATIONAL COMMERCIAL ARBITRATION: THE MEDITERRANEAN PROJECT OF THE MILAN CHAMBER OF ARBITRATION**

As we may know, Italy is interested and involved in the Euro-Mediterranean Partnership. Southern Mediterranean countries are very important partners in the exchange of goods, ranking third in commercial exchange after the United States and Germany. North-west Italy, having its centre in Milan, is by far the leader in these exchanges, as well as in the exchange of services and direct investments.

Moreover, the vast majority of the Milan Chamber's members are small- and medium-sized companies, who happen to be the ones most active in the whole Mediterranean region and represent the core of the Euro-Mediterranean business.

We are all aware that a successful development of trade requires the existence of an effective system of commercial disputes resolution. State court systems often do not satisfy the needs of the modern business relationships, namely those involving players from different countries. In addition, business operators and professional advisers are not particularly happy to refer possible disputes to a legal system that may be substantially different from the one they know and to judicial procedures of which they have no experience. This applies even more in North-South relations, in a Euro-Mediterranean relation.

Arbitration seems to be—thanks to its features—the most effective dispute resolution system in case of cross-border relationships.

The Milan Mediterranean Project introduced a new approach in the promotion of arbitration, no longer based on a sort of “arbitration forum shopping” (where each system, each arbitral institution is trying to gain—competing with other centres—a higher market share and higher number of arbitration proceedings administered) but focused on a real cooperation among arbitral institutions providing arbitration services based on common principles and a shared philosophy.

The long-term objective of the Project was to create a Mediterranean system of private justice, agreed to and shared by all participants, for the use of SMEs and investors active in the Euro-Mediterranean region.

More specifically, the Project's general objects were to:

- Contribute to the strengthening of Euro-Mediterranean political and economic relationships
- Support the activity of small- and medium-sized enterprises in the Mediterranean region
- Offer to small- and medium-sized enterprises in the Mediterranean region alternative dispute resolution instruments suitable to their needs
- Develop, in cooperation with similar institutions of the southern Mediterranean countries, common standards and practices in the perspective of creating a system of private commercial justice, agreed to and shared by all participants
- Create an atmosphere favourable to the said alternative dispute resolution system

## II. THE ESTABLISHMENT OF ISPRAMED

The Milan Chamber of Arbitration, as a natural consequence of its Mediterranean Project, promoted the creation of an independent and autonomous body in charge with the development of the original project. In 2009, the Institute for the Promotion of Arbitration and Mediation in the Mediterranean—ISPRAMED ([www.ispramed.it](http://www.ispramed.it)) was created as a private association, with its legal seat in Milan and with the support of Euro-Mediterranean entities operating in promotion of economic and cultural exchanges (territorial entities, foundations, banks, training institutions).

Since its creation, the Institute has been performing the following tasks:

- Creating and coordinating a Network of Mediterranean Arbitration Centres (arbitral institutions already known to the business community, already in existence and working for several years in the local market)
- Supervising the exchange of best practices and drafting related reports
- Organizing training courses, conferences, seminars, workshops, etc.
- In general, promoting ADR tools in the business, legal and institutional communities

So far, ISPRAMED's Network is composed of seven centres:

Algeria	Centre for Arbitration, Mediation and Conciliation of Algiers
Egypt	Cairo Regional Centre for International Commercial Arbitration ( <a href="http://www.crcica.org.eg">www.crcica.org.eg</a> )
Lebanon	Lebanese Arbitration and Mediation Centre ( <a href="http://www.ccib.org.lb">www.ccib.org.lb</a> )
Morocco	Arbitration Court of Morocco
Tunisia	Tunis Mediation and Arbitration Centre
Turkey	Arbitration Centre of the Istanbul Chamber of Commerce
Italy	Milan Chamber of Arbitration

Of course, it is not a closed group and other centres may join the Network. In order to implement an alternative dispute resolution system throughout the Mediterranean, the seven Centres have agreed:

- To establish a working group for the elaboration of common principles and best practices
- To publish a report, collecting such principles and practices
- To train case managers
- To promote ADR through conferences, workshops, seminars, etc.

Each one of the centres elects a delegate who is involved in the work of comparison of practices and who is in charge of participating to the Network's annual meeting.

In order to assure a concrete development of the working group's activity, the members agreed to appoint a scientific coordinator to be in charge of the elaboration of the common principles. Today, the coordinator of the Network is Professor Charles Jarrosson from Paris, a renowned expert in the field of international arbitration with significant experience both on an academic and practical level and with a deep knowledge of the Euro-Mediterranean region.

The task of the working group is to elaborate a common practice, a similar approach—although through different rules of arbitration—in administering arbitration cases. This work will result in a significant advantage for economic operators because they may well use any of the seven arbitration centres (chosen according to the needs of the specific case) but with the guarantee that the same basic principles, and the same standards of administration, shall be applied.

The working group, which has met five times so far, has focused its attention on the following principles which are considered to be crucial for a “good” administration of arbitral proceedings:

1. Independence/impartiality of arbitrators
2. Criteria for the selection of arbitrators
3. Costs of the arbitral proceedings
4. Time of the arbitral proceedings
5. Transparency (of the process, of the institution)
6. Multi-party arbitration

Through this approach, we believe that business operators (especially, small and medium enterprises) operating in the Euro-Mediterranean region could take advantage of a dispute resolution service offered by different institutions and through different rules, but based on agreed principles, in full compliance with the international practice and respectful of the different legal cultures.

### III. A NETWORK OF CENTRES VS. A *SUPER* EURO-MEDITERRANEAN ARBITRAL CENTRE

The project of the Network, based on ideas of co-ownership and cooperation, is completely opposite to the project of the creation of a “*Super* Arbitral Centre”. We do believe that such a “*Super*” centre—likely to be promoted by international political entities with a top-down approach—will not be in the position to offer the advantages of a reputable arbitral institution, i.e.:

- The physical proximity necessary to facilitate contacts with parties, counsels, arbitrators in typical low-to-medium disputes between small and medium entrepreneurs
- Impartiality and independence, qualities to be shown and not simply presumed by the fact that the “super institution” will be third to the parties’ nationality
- Rapid procedures
- Quality of its functionaries and case managers

The above non-exhaustive list refers to features to be proved by an institution over the years, and not presumed by a name or by a title. Being named “Euro-Mediterranean” does not guarantee that the Euro-Med disputes will be handled and administered better than other existing and well-experienced centres (whose names may be not as attractive or “international” as the “super centre” but with extensive experience and practice).

We do not see any need for the creation of an additional arbitral institution. There is an existing network of arbitral institutions in the region, already engaged in active contacts and exchanges, organizing joint conferences, performing training programmes together, and exchanging know-how and input on their respective activities. An additional arbitral centre, unlikely to be economically viable, will not respond to any real needs of the users.

# UNCITRAL'S LEGISLATIVE WORK IN THE FIELD OF INTERNATIONAL COMMERCIAL ARBITRATION

*Overview by the UNCITRAL secretariat<sup>7</sup>*

The United Nations acknowledged arbitration as an effective dispute settlement mechanism in international commercial disputes before the establishment of the United Nations Commission on International Trade Law (UNCITRAL). In 1958, the United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), a Convention designed to ensure that foreign and non-domestic arbitral awards would not be discriminated against. The New York Convention entered into force one year later, and has since been ratified by 156 States worldwide. Three additional States ratified the New York Convention in 2015, which is an indication of its continued relevance and importance.

Based on the belief that divergent trade regulations in different States constitute an obstacle to the development of world trade, UNCITRAL was established by the General Assembly of the United Nations in 1966. UNCITRAL was given the mandate to further the progressive harmonization and unification of the law of international trade.

International commercial arbitration has been an important topic for UNCITRAL since the establishment of the Commission. During the first Commission Session of UNCITRAL in 1968, it was decided that UNCITRAL should focus both on arbitration in general and on promoting wider acceptance of the New York Convention, and that these topics were to be given priority.

UNCITRAL has since made significant contributions to promote harmonization and unification of international arbitration law, not only with its legislative activity but also with its work on the promotion of its instruments. For instance, in view of promoting a uniform interpretation and application of the New York Convention, the UNCITRAL secretariat prepared a guide in close cooperation with two experts and their teams.<sup>8</sup> The guide on the New York Convention<sup>9</sup> aims at avoiding problems of legal uncertainty resulting from the imperfect or partial implementation of the Convention and limiting the risk that practices of States diverged from the spirit of the Convention. Another significant tool prepared by the secretariat is the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (the Digest) for the dissemination of information on the Model Law on International Commercial Arbitration and promotion of its adoption as well as its

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<sup>7</sup> Mr. Michael Schneider, Vice-Chair of UNCITRAL and current Chair of WG II made a thorough presentation on this topic. This overview prepared by the UNCITRAL secretariat is a summary of Mr. Schneider's speech.

<sup>8</sup> Professor Emmanuel Gaillard (Sciences Po Paris, École de droit) and Professor George Bermann (Columbia University School of Law).

<sup>9</sup> [www.newyorkconvention1958.org](http://www.newyorkconvention1958.org)

uniform interpretation and application. The Digest is a tool specifically designed to present selected information in a clear, concise and objective manner in order to help judges, government officials, arbitrators, practitioners and academics use more efficiently the case law relating to the Model Law.

In 1976, the UNCITRAL Arbitration Rules were adopted by the Commission. The Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. The UNCITRAL Arbitration Rules are widely used in both ad hoc arbitrations and administered arbitrations. In addition, the UNCITRAL Rules can also be used as a model for institutional arbitration rules. For instance, the arbitration rules adopted by the Cairo Regional Centre for International Commercial Arbitration (the Cairo Centre) are largely based on the UNCITRAL Arbitration Rules, with only minor adjustments.<sup>10</sup> The Cairo Centre, which cheerfully agreed to co-organize this conference, is known in the region for actively promoting international commercial arbitration through organizing seminars and educational training and publishing on the topic.

Furthermore, in 1985, the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) was adopted by the Commission. This instrument was developed to assist States in reforming and modernizing their laws on arbitral procedure in a way that facilitates the needs of international commercial arbitration. The Model Law covers all stages of the arbitral process, from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention, to the recognition and enforcement of the arbitral award. Worldwide, 72 States of all regions and with different legal or economic systems have reformed their legislation based on the Model Law on International Commercial Arbitration, which indicates that it reflects a very broad consensus worldwide on key aspects of international arbitration practice.

In 2000, the UNCITRAL Working Group on Arbitration and Conciliation (the Working Group) was mandated to work towards further development of the law of international commercial arbitration. In 2006, it amended the UNCITRAL Model Law on International Commercial Arbitration in order for it to better conform with international contract practices. Moreover, the Working Group has modernized the UNCITRAL Arbitration Rules, first in 2010 by including several new provisions aiming at enhancing procedural efficiency and clarity, and then in 2013 by adding a provision reflecting the new rules on transparency pursuant to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

Following the revision of the Arbitration Rules, the Working Group worked on elaborating the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, a set of procedural rules that provide for transparency and public accessibility in treaty-based investor-State arbitration. Later, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration was prepared in order to provide for a mechanism enabling the application of the Rules. It was adopted in 2014. Those two texts have been thoroughly presented at the Conference and are therefore the subject of two contributions to this publication (see the last two contributions to the present publication).

The Working Group is currently working on revising and modernizing the UNCITRAL Notes on Organizing Arbitral Proceedings (the Notes) of 1996. The Notes were drafted to assist

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<sup>10</sup>[http://crica.org.eg/arbitration\\_rules.html](http://crica.org.eg/arbitration_rules.html)

arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings. The amendments are meant to ensure that the instrument will continue to be a useful tool for practitioners in the future. Given that procedural styles and practices in arbitration vary and that each of such practices has its own merit, the Notes do not seek to promote any practice as best practice.

As regards future work, the Working Group is currently considering whether to develop a code of ethics for arbitrators. In addition, in 2015, the Commission requested the secretariat to explore the topic of concurrent proceedings in close cooperation with experts in order to identify possible work that could be carried out in this area. Consequently, UNCITRAL will continue to be an important institution for further legal harmonization and unification within the area of international commercial arbitration in the years to come.

Representatives from the Middle East and North Africa region influence the work of UNCITRAL and contribute to its achievements in several ways. For instance, for many years, several States from this region and regional organizations such as the Gulf Cooperation Council have been attending Working Group sessions and have helped shape the work of UNCITRAL in the area of international commercial arbitration.

Furthermore, UNCITRAL undertakes a range of technical assistance activities worldwide to promote its work and the use and adoption of the legislative and non-legislative texts it has developed. With this annual Conference, UNCITRAL aims at stimulating discussion, facilitating exchange of ideas and raising awareness of the benefits of harmonization of trade law both at the regional and global levels. With these benefits in mind, UNCITRAL also wishes to increase interest in and knowledge of UNCITRAL work in the Middle East and North Africa region and to help further develop arbitration as an effective dispute settlement mechanism in that region.



## **II.**

# **THE PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE EURO-MEDITERRANEAN REGION**



# PUBLIC POLICY EXCEPTION AS APPLIED BY THE COURTS OF THE MENA REGION

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Ladies and Gentlemen,

Having examined the applications of the public policy exception by the courts of several countries in the Middle East and North Africa (MENA) region, especially in the field of post-arbitral proceedings, I will try, in only 10 minutes, to draw some summarized findings of the trends of the said courts which reveal that, in spite of the existing differences from one jurisdiction to another in terms of terminology, impact of religion, formalism, the domestic vs. international public policy dichotomy, the degree of depth or shallowness of the post-arbitral judicial control, and concrete manifestations of public policy in general, I am saying that, in spite of the foregoing differences and variations, such jurisdictions still do have some common conceptions and applications of public policy.

1. A first interesting finding is that, in none of the covered jurisdictions is public policy statutorily defined, with a notable exception being the United Arab Emirates (UAE). In the UAE, article 3 of the Civil Transactions Law states in general (thus not limited to the context of arbitration) that public policy “include[s] matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individuals ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia.”<sup>11</sup>

In the other countries of the MENA region, public policy is defined by jurisprudence. For example, the Supreme Court of Egypt has provided a definition of public policy denoting “rules aiming to achieve a public interest and to safeguard the society’s fundamental values and which prevail over the individual’s interest”.<sup>12</sup>

2. A second finding concerns the terminology. With this regard, I have identified three different categories:

(a) First, some arbitration laws adopt a statutory domestic vs. international public policy dichotomy by using the term “international public policy” vs. “public policy”. This is the case of the Lebanese and Algerian arbitration laws, as they are inspired by

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<sup>11</sup> *Pendulum of public policy and the enforcement of arbitral awards in the UAE*, by Hassan Arab and Dalal Al Haouti, p. 6.

<sup>12</sup> Egyptian Court of Cassation, 24 April 1980, Challenge No. 385/44.

French arbitration law. In this very same category, which adopts a statutory dichotomy, one can add the Tunisian Arbitration Law, which adopts the term “public policy under private international law”.

(b) Another category of arbitration laws in the MENA region is more impacted by religion, since it adopts the terminology of “public policy and Islamic Sharia”, leaving no room for a distinction between domestic and international public policy and opening the door for religious principles to surge in the field of arbitration via public policy. This is the case of Saudi Arabian arbitration law.

(c) Finally, the majority of the other covered jurisdictions stand midway between the two aforementioned legal systems. Indeed, the Egyptian arbitration law refers to the term “public policy in the Arab Republic of Egypt”.<sup>13</sup> It neither refers to Islamic Sharia nor to international public policy. Indeed, since the middle of the twentieth century, Egyptian law and jurisprudence have adopted the well-known dual approach by distinguishing between a domestic conception of public policy and an international one pertinent to conflict of laws and extendable, *mutatis mutandis*, to recognition and enforcement of foreign judgements and foreign and international arbitral awards. The Explanatory Memorandum of the Egyptian Civil Code has afforded a narrower scope for Egyptian public policy in the realm of legal relationship containing a foreign element by stating that “the application of the conception of public policy and morality with the aim of causing the aforementioned effect concerning the eviction of foreign laws differs from the application of such conception in the domain of relations and obligations which do not contain any foreign element”.<sup>14</sup> The foregoing distinction has paved the way for a judicial distinction (by both Courts of Cassation and Cairo Court of Appeal), at least in the field of post-arbitral proceedings, between public policy on one hand and mandatory rules on the other hand, the scope of the former being narrower than the scope of the latter. In other words, the dichotomy under Egyptian law is based on a distinction between public policy and mandatory rules.

3. A third finding is that the Egyptian Court of Cassation has guaranteed an “objective” notion of public policy, by ruling that a judge shall set out the content of Egyptian public policy based on an objective criterion reflecting general trends of the Egyptian community at a certain era<sup>15</sup> rather than each judge’s subjective views on social justice, and I would also add that judges’ subjective views on religion and politics should also be disregarded when applying the public policy defence.
4. My fourth finding pertains to the differences in the degree of formalism. While some Courts of the MENA region do explicitly refer to the subdivision of public policy into procedural public policy and substantive public policy, they differ from a country to another as to the degree of formalism. An example of formalism is the position of the UAE courts which consider the unsworn witness’ testimony as contrary to public policy if the arbitral award relies on it.<sup>16</sup> This is so even if the parties agreed that the witness did not need to give evidence under oath. On the contrary, other courts, like the Lebanese and Egyptian ones, depart from formalism and do recognize that arbitration is based on party autonomy. The Egyptian Arbitration Law provides in its article 33/4 that “the Hearing of Witnesses shall not be under oath”.

<sup>13</sup> Public policy in Sudan, public policy in Oman, etc.

<sup>14</sup> *The Explanatory Memorandum of the Civil Code in the Collection of Preparatory Notes*, vol. 1, p. 317.

<sup>15</sup> Egyptian Court of Cassation, 11 May 2010; Challenge No. 10132/78; Egyptian Court of Cassation, 22 March 2011, Challenge No. 12790/75.

<sup>16</sup> *Pendulum of public policy and the enforcement of arbitral awards in the UAE*, by Hassan Arab and Dalal Al Haouti, p. 7.

5. The fifth finding concerns the adoption by the Lebanese courts of the French distinction between the *ordre public de direction* (directive public policy) on one hand and the *ordre public de protection* (protective public policy) on the other hand. The directive public policy denotes the arbitrator's application of a public policy rule as opposed to the protective public policy, the aim of which is to protect weak parties through the non-arbitrability of certain disputes in which they may be involved.

This is the case with disputes relating to commercial agency contracts and statutory issues relating to labour contracts, as well as lease contracts under article 21 of the law on leases No. 160/92, which has given exclusive jurisdiction for a sole judge in civil matters to rule on disputes relating to lease agreements.<sup>17</sup>

However, in a recent decision, Lebanon's highest court elaborated on its position and declared that, since the exclusive jurisdiction of Lebanese Courts is a measure aiming at protecting the agent's rights, such provision cannot be validly waived beforehand. However, the Lebanese Supreme Court asserted that, once the dispute has arisen, the agent may validly waive such a protection by submitting the dispute to arbitration.<sup>18</sup> In short, while arbitration clauses are forbidden in commercial agency agreements, submission agreements may still be validly concluded once the dispute has arisen.

6. My sixth and last finding sheds light on the shallow control operated by Egyptian and Lebanese courts on public policy as a bar to enforcement of arbitral awards or as a ground for their annulment.

Indeed, in order to avoid a revisiting of the merits of the disputes settled by arbitral awards, Egyptian and Lebanese courts adopt a shallow control of public policy as a bar to enforcement of arbitral awards or as a ground for their annulment.<sup>19</sup>

In this regard, the Lebanese Court of Appeals has expressly confirmed that "it has been established in Lebanese doctrine and case law that the court ruling on the request shall examine in this case whether the outcome reached in the arbitral award does not flagrantly violate the international public policy, without reviewing the adopted reasoning or the extent the legal rule is applicable to the dispute".

Rather than controlling the reasoning of the arbitrators, even with regard to their implementation of public policy rules, the Cairo Court of Appeal has decided that "it is established, under the jurisprudence of this Court, that the Court of Appeal Control of the award's compliance with article 53 (2) of the Arbitration Law applies to the solution given to the dispute, the annulment being decided only if the said solution contravenes Public Policy".<sup>20</sup>

Furthermore, the Cairo Court of Appeal has recently determined its method of controlling the award's compliance with public policy at the post-arbitral proceedings,<sup>21</sup> as follows:

<sup>17</sup> Ginsté Magellan Paley-Vincent, *Avocats à la cour, Jalal El Ahdab and Myriam Eid, IBA Report on Recognition and Enforcement of Arbitral Awards—study on public policy* (2015), Lebanon, p. 13, [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Recognntn\\_Enfrcemnt\\_Arbitl\\_Awrdr/publicpolicy15.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognntn_Enfrcemnt_Arbitl_Awrdr/publicpolicy15.aspx)

<sup>18</sup> Ginsté Magellan Paley-Vincent, *Avocats à la cour, Jalal El Ahdab and Myriam Eid, op.cit.*, p. 12.

<sup>19</sup> *Ibid.*, p. 12.

<sup>20</sup> Cairo Court of Appeal, Commercial Circuit No. 91, 23 January 2003, *ABB v. AMCO*.

<sup>21</sup> Ismail Selim, *IBA Report on Recognition and Enforcement of Arbitral Awards—study on public policy* (2015), Egypt, pp. 5 and 6. [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Recognntn\\_Enfrcemnt\\_Arbitl\\_Awrdr/publicpolicy15.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognntn_Enfrcemnt_Arbitl_Awrdr/publicpolicy15.aspx)

- (i) First, it has confirmed that such control is focused on the final solution provided by the award.<sup>22</sup>
- (ii) Secondly, such control is not deep,<sup>23</sup> but rather a *prima facie* one.<sup>24</sup>
- (iii) Thirdly, the Court sanctions “flagrant” violations of public policy which are perceived from the mere reading of the award.<sup>25</sup>
- (iv) Fourthly, while the Court is entitled to ensure that the arbitrator has addressed relevant public policy rules and has not ignored them when such disregard affects the final solution of the award in a manner contravening public policy, the arbitrator shall still decide, at his sole discretion, whether the said public policy rules apply to the dispute referred to him or does not apply thereto.
- (v) Finally, the aim of the shallow control operated by the State courts is to render Egypt “an attractive seat of arbitration given the benefits to the national economy resulting therefrom”.<sup>26</sup>

I thank you very much for your kind attention.

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<sup>22</sup> Cairo Court of Appeal, Commercial Circuit No. 7, 2 June 2014, Case No. 48/130, *GASCO v. EFC*.

<sup>23</sup> Cairo Court of Appeal, Commercial Circuit No. 7, 4 November 2013, Case No. 81/129.

<sup>24</sup> Cairo Court of Appeal, Commercial Circuit No. 7, 2 June 2014, Case No. 48/130, *GASCO v. EFC*.

<sup>25</sup> Cairo Court of Appeal, Commercial Circuit No. 7, 2 June 2014, Case No. 48/130, *GASCO v. EFC*.

<sup>26</sup> Cairo Court of Appeal, Commercial Circuit No. 7, 7 April 2013, Cases No. 20, 64/128 and 16, 20, 47/129.

# **CASE STUDY: ALGERIA, THE LEGAL FRAMEWORK FOR ARBITRATION UNDER ALGERIAN LAW**

**Chafika Bensaoula**

*Adviser to the Minister of Justice, Algeria*

International commercial arbitration was for a long time not recognized in Algeria as an alternative means of resolving disputes between national and foreign parties. This was because it was considered that arbitration would encroach on the roles and responsibilities of the judiciary, as was the case in other States that had adopted the planned economy model.

Despite the progress achieved in the international commercial arbitration regime in other States, we were reluctant to fully embrace arbitration without a comprehensive reform of the justice system. This was motivated by the desire to move away from the tendency towards particular geographical preferences and to take into account more realistic considerations that reflected the ways in which the interests of peoples and States intersect continuously in this ever more open, intertwined and interdependent world.

A firm conviction therefore arose in Algeria that openness and communication between peoples and nations could only take place where bridges were built between them through the adoption, by legislative bodies, of rules and regulations that were recognized in the field of financial transactions and commercial exchanges carried out within the international community.

Driven by this conviction, Algeria has taken steps towards introducing justice reforms, which are accorded priority under the National Plan for Comprehensive Reforms. This forms part of the programme initiated by His Excellency President Abdelaziz Bouteflika aiming at reviewing all legislative provisions in order to bring them in line with the principles embodied in the national Constitution and international charters, conventions and covenants to which Algeria has acceded, and to remove all obstacles to their implementation. The programme also involves complementing the legislative system by the adoption of modern legislation in all fields—in particular those about the protection of national security and economic stability—and a review of the provisions of the Commercial Code in order to bring them up to date with developments in the business sector in general. This latter objective is to be achieved via the adoption of provisions by virtue of which Algeria will enact legislation to encourage investment. This will be done by providing tangible guarantees for investors with regard to the movement of investment capital and of revenue generated from such capital, in addition to special financial incentives in the field of product investment, regardless of whether such investment is direct or capital-based, and irrespective of whether it is Algerian or foreign.

Given the agreement among jurists, historians and sociologists that access to justice is indicative of a civilized and civic society, arbitration—as a method of resolving disputes—is therefore indisputably one of the finest expressions of civilization and social advancement. This is the case in that arbitration represents the state of full development attained by society, aims at realizing both public and private benefits and symbolizes an implied compliance with the law. Arbitration for international trade is, furthermore, essential to achieving economic integration between States with different legal and judicial systems. It is the most appropriate method for protecting the interests of all parties as it grants them the right to agree on the form of protection most suited to their objectives.

To that end, and for the purposes of the deliberate policy of public authorities on the promotion of a market economy, Algeria adopted the international arbitration regime by establishing a legal framework for it.

### **Legal framework for international arbitration in Algeria**

The arbitration regime was established by Legislative Decree No. 93-09, issued on 25 April 1993. It amended and supplemented the Code of Civil Procedure, in which a chapter entitled “Provisions specific to international commercial arbitration” was inserted in articles 458 *bis* 1 to 458 *bis* 28.

Later, the legal framework for international commercial arbitration was radically amended by Law No. 08-09, issued on 25 February 2008, which incorporated the Code of Civil and Administrative Procedure by virtue of articles 1039 to 1061.

According to the above-mentioned articles, international arbitration is provided for by Algerian law where a dispute involves international trade (involving relationship of a commercial nature, whether contractual or not, across national borders).

This is the definition used by the Algerian lawmaker, which is similar to that used by States that long ago adopted this method of resolving disputes, such as France, and it is based on the existence of a contract involving interests closely linked to international trade. The implementation of such a contract is, therefore, based on the following two criteria:

- The geographical criterion
- The economic criterion

These two criteria presuppose the existence of commercial relations between actors in two different States, in addition to a necessary level of involvement in international trade. An arbitration agreement differs from the settlement agreement (that is drawn up after a dispute has arisen between two parties and terminates the commercial contract). Arbitration agreements apply to both current and future disputes.

The arbitration agreement is often discussed in, and incorporated into, a commercial contract in the form of an arbitration clause, in accordance with which the parties are obliged to submit to arbitration proceedings all potential disputes arising from the interpretation of the commercial terms of the contract to which both parties are bound. Although a clause or arbitration agreement is incorporated into the relevant international contract, it shall remain independent of the contract.

### **Terms of the arbitration agreement**

Under article 1040 of the Code of Civil and Administrative Procedure, an arbitration agreement must be drawn up in writing, or by any other means that may be substantiated in writing. Under the Algerian legislation, the terms of a contract remain valid as long as the contract complies with the applicable law (which is the law chosen by parties to the contract, or in the absence of such choice, the law that the arbitrator deems appropriate).

The Algerian law clearly grants the parties the freedom to choose the legal basis on which the arbitration agreement is to be assessed, thereby embodying the global principle of party autonomy. Upon signing the contract, the parties may choose either ad hoc arbitration or institutional arbitration. The arbitration agreement may not be challenged, even if the contract itself is invalid.

In ad hoc arbitration, the parties must define the organization and composition of the arbitral tribunal that is to rule on the dispute, as well as the procedures for deliberation and for enforcing the arbitral award. However, parties rarely resort to this kind of arbitration.

Institutional arbitration is performed in accordance with the rules and regulations of the chosen settlement centre, such as the International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce.

The parties must designate an arbitrator or arbitrators either in the arbitration agreement or according to arbitration rules previously set by specialized bodies. In the absence of such an agreement, the parties may resort to judicial intervention. In those cases, the arbitrator or arbitrators are appointed by order of the relevant competent presiding judge of the court except where the presiding judge deems that there was no arbitration agreement in the first place. To ascertain which is the relevant competent presiding judge, the following criteria apply:

- Where the seat of arbitration is not in Algeria and the parties choose to apply Algerian procedural rules, the presiding judge shall be that of an Algerian court.
- Where the seat of arbitration is in Algeria, the presiding judge shall be from the court chosen by the parties in their arbitration agreement. In the absence of such a choice, the competent presiding judge shall be from the court of the seat of arbitration, or from the court in the place of residence of the defendant, or if the defendant does not live in Algeria, the court in the place of residence of the plaintiff.

### **Allocation of jurisdiction between the national judicial bodies and arbitral tribunals**

According to article 1045 of the Code of Civil and Administrative Procedure, the contract shall divest the national court of its jurisdiction only where one of the parties has recourse to the arbitrator or arbitrators specified in the arbitration clause or launches proceedings to form an arbitral tribunal, provided that the plea is submitted by one of the parties.

The lack of jurisdiction of the national court does not depend on the commencement of proceedings before the arbitral tribunal, but rather the national judge assigned to the dispute must steer the parties towards the best outcome, which, if an agreement has been concluded, shall be arbitration. This is provided for in article 2 (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), to which Algeria acceded,

in accordance with the principle of the supremacy of international conventions over domestic law. The national court must submit to the arbitral tribunal in all cases.

If the national court does not do so, it is incumbent on a party to submit a plea on the court's lack of jurisdiction before any plea related to the case is submitted; otherwise parties are deemed to have accepted the jurisdiction of the national court and to have waived the arbitration clause or agreement.

Nonetheless, the national court continues to play a role in international arbitration, as it may intervene in order to resolve problems that arise during the constitution of the arbitral tribunal, take urgent precautionary measures or assist in the management of evidence or the enforcement of arbitral awards, in accordance with article 1048 of the Code of Civil and Administrative Procedure. In such cases, the law applicable in the country in which the court is situated applies.

### **Constitution of the arbitral tribunal**

The arbitral tribunal is constituted by appointing an arbitrator or a group of arbitrators; however, in view of possible conflicts of interest, the parties often give preference to a group of arbitrators where each party appoints an arbitrator of their own choosing.

Arbitrators must have good knowledge of the legal rules applicable to the subject of the dispute. To avoid conflicts of interest, they must not have economic ties, either directly or indirectly, with any of the parties involved. Arbitrators must accept their appointment in writing.

Where the parties choose ad hoc arbitration, article 1041 of the Code of Civil and Administrative Procedure grants the parties complete freedom in the appointment of the arbitrators. If they choose institutional arbitration, the arbitrators must be appointed in accordance with the particular statute of the institution.

In the latter case, the parties retain the freedom to appoint arbitrators not included on the lists provided by the institution in question (such as the International Centre for Settlement of Investment Disputes (ICSID) or the Franco-Arab Chamber of Commerce). Where the parties fail to reach an agreement, the institution which administers the disputes select the arbitrators in accordance with their arbitral rules.

Where disputes concerning the constitution or conduct of the arbitral tribunal arise, the provisions of paragraph 1.2 of article 1041 entitle the parties to have recourse to the competent national court.

### **Laws applicable to arbitration**

The procedure for arbitration proceedings is provided for in article 1043, and subsequent articles, of the Code of Civil and Administrative Procedure.

Once a dispute has been submitted to the arbitrator or arbitrators designated in the relevant agreement or through the procedures for constituting the arbitral tribunal, arbitration proceedings are deemed to have commenced. The arbitration agreement may itself specify the applicable procedural rules or refer to a set of arbitration rules or to applicable domestic procedural rules.

The Algerian lawmaker also grants the parties the freedom to choose which law is applicable to the subject of the dispute.

The arbitral tribunal plays a complementary role if such choice is not made by the parties to the relevant contract. This is also the case with regard to the management of evidence and precautionary measures that the arbitral tribunal may take. The tribunal may request the intervention of the national judge where problems arise about the course of the proceedings.

### **Arbitral awards**

The last stage of the arbitration proceedings is the issuance of the arbitral award. In case there was no agreement in this respect, the arbitral award is issued either by the individual arbitrator or, where the arbitral tribunal is composed of several arbitrators, by a majority thereof.

Even where a sufficient majority is reached, the tribunal usually seeks consensus in order to facilitate the enforcement of the award. Once a decision has been reached on the subject of the dispute, the award is deemed to be final and the case cannot be litigated again under the principle of *res judicata*. The award must be reasoned, provided in written form and signed by the parties.

Once issued, the award becomes binding on the parties.

In general, where the award is accepted by the unsuccessful party, it is enforced on a voluntary basis. Otherwise, it is enforced by a ruling of the presiding judge of the court in the jurisdiction in which the arbitral award was rendered. Where an award is rendered by a foreign arbitral tribunal, the place of enforcement is decided in accordance with article 1051 of the Code of Civil and Administrative Procedure. The court jurisdiction in these cases is therefore limited to the courts of the seat of arbitration.

### **Appeals against arbitral awards**

The parties may, within one month, lodge an appeal before the court against an order issued by the presiding judge on the implementation or recognition of an arbitral award, in accordance with article 1057 of the Code of Civil and Administrative Procedure, on the basis of any of the following reasons:

- The arbitral tribunal wrongly declared itself competent.
- The arbitral tribunal has ruled without an arbitration agreement or on the basis of a false or expired agreement.
- There was an irregularity in the way the arbitral tribunal was constituted or the single arbitrator was designated.
- The award is not reasoned or is supported by insufficient grounds.
- The arbitral tribunal has made an error of jurisdiction (e.g. a mistake as to the issue to be addressed or applied the wrong law).
- The implementation of the award contravenes international public policy.

Enforcement of an arbitral award issued in Algeria may be refused in the above-mentioned circumstances.

Appeals filed within the prescribed timeframes have a suspensive effect. Decisions issued on the basis of requests to challenge an arbitral award shall be amenable to cassation appeal in accordance under article 1061 of the Code of Civil and Administrative Procedure.

### **Conclusion**

Development is not possible in the fields of investment and commercial transactions with foreign traders without an adequate legal framework capable of assisting people to recognize their rights.

According to the legislative and regulatory provisions regarding the development of investment in Algeria, where a bilateral or multilateral convention on arbitration is in force the competent authority for resolving disputes is, in each case, the one specified in the relevant items of such convention. Conventions on the development and protection of foreign investors in coordination with other States also apply this method of resolving disputes.

Under the current system, judges in Algeria can issue an enforceable version of an arbitral award even where the Algerian party rejects the claims made.

Finally, as confirmation of its significant interest in international arbitration and foreign investment, Algeria has enacted a law on the promotion of investment, with the aim of re-evaluating the country's legal framework regulating investment and reviewing the system of incentives and the process for granting benefits, with a view to removing any obstacles that hinder the production of goods and the supply of services and encouraging foreign and domestic investment benefiting Algeria.

Algeria has acceded in 1989 to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and in 1993 to the Washington Convention to establish the International Centre for Settlement of Investment Disputes (ICSID) (1965). In light of those international instruments, the regulatory provisions on arbitration, particularly those relating to international commercial arbitration, have closed many of the gaps in the country's legislation, as compared to legislation in other countries and have remedied many of the deficiencies brought about by the application of such texts in the field. It was for these reasons that, despite the economic and security challenges that the country was facing, Algeria has taken steps to include up-to-date provisions in its legislation on the regulation of international commercial arbitration, with a view to embracing fully the most important foundations and principles that underlie arbitration.

Given that international commercial arbitration is organically and inextricably linked to the policy of openness and economic development, which requires international commercial cooperation and the exchange of technologies and experience, special attention needed to be paid to arbitration as regulated in the Code of Civil and Administrative Procedure.

The section in the Code on international commercial arbitration mirrors the framework used in the most advanced countries and is based on the same jurisprudence and judicial interpretation in those countries, in particular as regards the following issues:

- The definition of international commercial arbitration as arbitration employed to resolve disputes relating to the international trade, without the requirement that either party possess a residence or place of business in Algeria
- The acceptance of proof of an arbitration agreement provided in writing or by any other means of communication
- The acceptance of an agreement as valid even if it is not in conformity with Algerian law, provided that it meets the conditions established by the applicable law
- The explicit inclusion by the lawmakers of arbitral awards within the category of enforceable documents, equivalent to judgements, as well as imposing several other controls and standards to ensure that arbitral awards are rendered and enforced in a fair and expeditious manner

Without a doubt, the development of international commercial arbitration is contributing greatly to encouraging investment and pushing forward development in our country. We all have a duty, therefore, to develop arbitration with a view to achieving its full objectives, by increasing the number of meetings of this kind, exchanging experience and expertise and making the most of technological developments.

# **CASE STUDY: SPAIN, THE PRACTICE OF ARBITRATION BY A REGIONAL CENTRE**

**Antonio Sánchez-Pedreño**

*Chairman, Madrid Court of Arbitration*

## **I. IS THERE A ROLE FOR REGIONAL ARBITRATION CENTRES?**

The substantial increase in international trade in the second half of the 20th century, which gave rise inevitably to more international litigation, the signing of the 1958 New York Convention, providing an easy international enforcement of arbitral awards, and the excellent work done by the International Chamber of Commerce (ICC) as the leading international arbitration centre have rendered international arbitration as the best tool available to solve international commercial disputes.

There is no doubt that ICC performs its role as a world arbitral institution excellently, and arbitrations involving parties from all over the world are held routinely under ICC rules. Against this general background, a fairly substantial number of arbitration centres with international aspirations have been developing. Arbitral institutions such as the London Court of International Arbitration (LCIA), Stockholm, Milan, Madrid, Cairo, the China International Economic and Trade Commission (CIETAC), Singapore and Hong Kong, to name but a few, are among those that present a progressively stronger projection in the international arena.

Is this a positive development for international arbitration or, on the contrary, does this bring confusion to the marketplace? After all, there can be too much of a good thing, and too many arbitral institutions, each with its own set of rules and philosophies, can cause perplexity to the uninitiated (and indeed, in some cases, to the initiated as well).

The answer is, in my opinion, that the development of regional centres is mainly a positive development. While it is true that an excessive offer of arbitral institutions can be somewhat confusing, there is no doubt that the professionals in the market have the experience to identify those centres that conform more readily to international standards and expectations.

On the positive side, regional centres can provide parties access to an arbitration institution that is closer to the parties' cultural and sociological backgrounds. This can encourage parties to submit to arbitration in an institutional setting that is closer to heart and home. Additionally, regional centres can be closer to the arbitration communities in their region, and thus be able to provide a wide pool of experienced arbitrators from the region. For example, in a recent case where a Spanish company wanted to arbitrate against a Czech corporation, VIAC, the Vienna International Arbitration Centre, was seen as an acceptable neutral (from

the parties) regional centre. Finally, though I say this with some reticence, regional arbitration centres may be on occasion more cost effective.

Regional arbitration institutions have a reasonably defined area of influence (hence the name regional). In general, they would tend to present an attractive offer to parties from the region, or where at least one party is from the region, or has close ties thereto. For example, the Madrid Arbitration Court can be an appropriate venue for an arbitration between, for instance, a Moroccan company and a French entity, or between a Peruvian company and a German corporation. Madrid would not be ideal, for example, for an arbitration proceeding between, for instance, a Chinese company and an Australian corporation.

I would conclude that the existence of regional institutional centres is a plus for international arbitration. It complements the offer by worldwide centres, providing an alternative that is closer to the cultural and sociological nuances of the region, and probably more suitable for regional disputes which may tend to have a lower financial range.

## II. WHAT REQUIREMENTS SHOULD A REGIONAL ARBITRATION CENTRE IDEALLY MEET TO ACCOMMODATE INTERNATIONAL EXPECTATIONS?

I would group these in four types of requirements:

### **(a) Seat: It must be located in a “safe” seat.**

For its recent centenary celebration, the Chartered Institute of Arbitrators approved ten principles necessary for an effective, efficient and “safe” seat for international arbitration.<sup>27</sup> These are:

1. Clear, effective, modern international arbitration law.
2. Independent, competent efficient judiciary respectful of international parties’ choice of arbitration.
3. Legal expertise: independent competent legal profession with expertise in international arbitration.
4. Education: commitment to education of counsel, arbitrators, judiciary, experts on character and autonomy of international arbitration.
5. Right of representation: right of parties to representation of their choice from inside or outside the seat.
6. Accessibility and safety: no undue constraints on entry or work of parties’ witnesses and counsel, and adequate safety of participants, documentation and information.
7. Facilities: functional facilities for the provision of international arbitration proceedings, including transcription services, hearing rooms, translation services.
8. Ethics: governing behaviour of arbitrators and counsel.
9. Enforceability: adherence to international treaties and agreements governing enforcement of arbitration proceedings.
10. Immunity: right to arbitrator immunity from civil liability for anything done or omitted in good faith.

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<sup>27</sup> Google: CI Arb and Centenary Principles.

**(b) Impartiality and independence**

The centre must be independent and impartial, free from any influences that may distort its freedom to decide how to conduct the administration of the arbitration proceedings.

**(c) Regional ties**

Ideally, the seat of the centre would have a recognizable historical, cultural, sociological and/or geographical area of preferential relationship.

It is because of its regional influence that this type of centre enjoys a degree of trust and acceptance. Sharing of historical, cultural and/or sociological ties may promote the parties confidence in the seat, the courts and, ultimately, in the relevant institution arbitration and that the proceedings will be administered in a fair and equitable manner.

**(d) Appropriate team and logistics**

Experienced teams can help arbitrators and parties to solve problems and provide advice.

International arbitration can be arduous, and in order to practice it properly, arbitration centres need to be comfortable, modern, with adequate hearing rooms and other rooms for parties, experts, witnesses, translators and others.

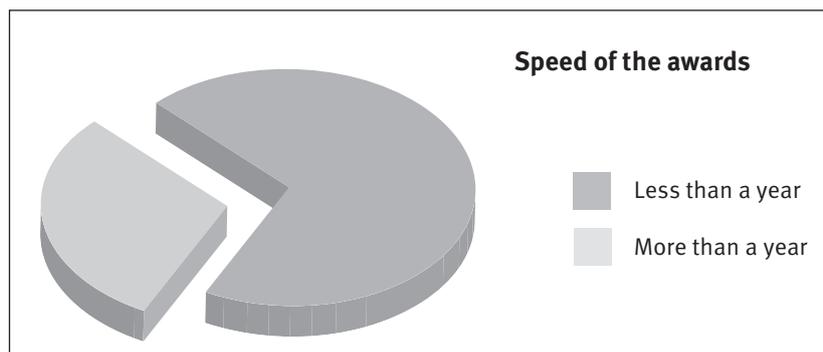
Additionally, location of the centre is additionally of some importance, distance to airports or other relevant modes of transport, and to hotel locations should also be taken into consideration.

**III. WHAT ELSE SHOULD BE HIGHLIGHTED?****A. Unparalleled experience in Spain**

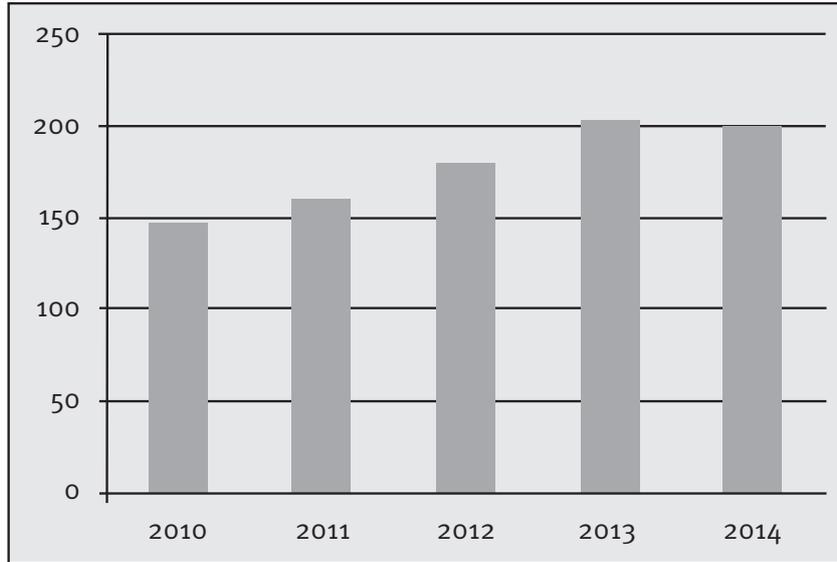
The experience and know-how accumulated after 25 five years of existence and more than 1,500 arbitration proceedings administered, have led the Madrid Court of Arbitration to be the leading arbitration institution in Spain. Let me give you some statistics:

**Speed**

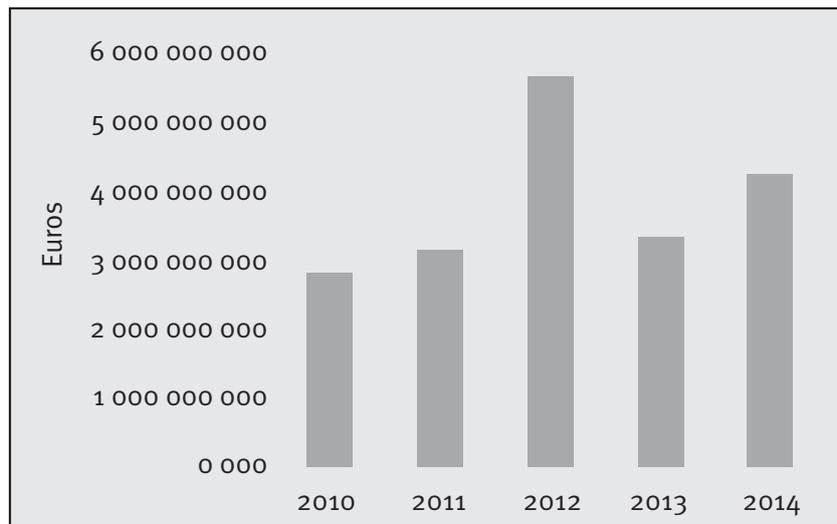
Between 2010 and 2014, more than 70 per cent of arbitrations were decided in less than one year since the request for arbitration was filled. Approximately 20 per cent of the cases administered by the Madrid Court of Arbitration were decided in less than 6 months.



**Cases administered**

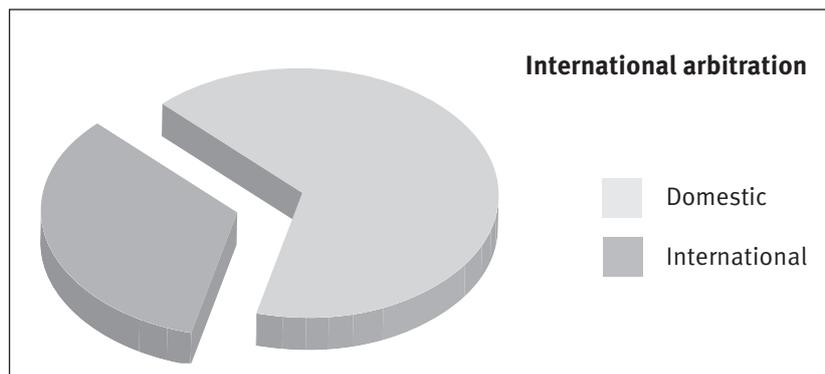


**Average amount of disputes**



**International cases**

Between 2010 and 2014, a third of cases administered by the Court were international.



## **B. International/regional focus**

The Madrid Court of Arbitration is focused on developing its regional activity. In this context, it has entered into a wide array of collaboration agreements with other institutions within and without the region:

- Austria (Vienna International Arbitral Centre)
- Germany (German Institution of Arbitration)
- Peru
- Cuba
- Mexico (Centro de Arbitraje de México)
- Brazil
- China (China International Economic and Trade Arbitration Commission)
- Soon: Colombia

The aim of these collaboration agreements is to facilitate the exchange of information, provide assistance in designation of arbitrators if necessary, and very importantly, to assure users an efficient logistical support.

And it is with this spirit that the Madrid Court of Arbitration is very pleased to participate in this Mediterranean forum. As part of this process, we are happy to meet with the major arbitration courts in the Arab countries, and we would be delighted to have similar agreements with them.

## **IV. MADRID AS AN OPEN MEDITERRANEAN SEAT—SHARIA LAW**

Madrid is an environment where all Mediterranean cultures and laws are welcome. There is no material impediment to have commercial agreements governed by Sharia law in commercial aspects, subject to arbitral proceedings in Madrid, and indeed I am aware of several leading Spanish arbitrators that have already participated in arbitral tribunals dealing with controversies where Sharia law was applicable.

## **CONCLUSION**

I believe that regional arbitration centres help promote the excellent work done by the major worldwide arbitration centres such as the ICC, offering alternatives to the middle market, and expanding the knowledge of, and trust in, arbitration as an effective method of resolving international disputes.

Spain, and Madrid as its capital, feels close to all the Mediterranean cultures, and welcomes the opportunity to work and collaborate with the relevant arbitration centres in this regard.

Thank you.

### **III.**

## **INVESTMENT FRAMEWORK IN THE EURO-MEDITERRANEAN AREA**



## **A. CURRENT ISSUES IN INVESTMENT ARBITRATION**



# THE CHALLENGES OF INVESTMENT ARBITRATION

**Walid Ben Hamida**

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The rise of State-investor arbitration accepted unilaterally by States is the most important innovation in investment law since the end of the last century. By providing direct access to international arbitration, international investment treaties and domestic investment laws granted the private investor a powerful instrument to ensure that States observe their treaty and law commitments. There is no doubt that investment arbitration has become accessible in a manner never before available to investors.

Investment arbitration faces today many challenges. Some of them are procedural (I). Others are substantial (II).

## I. PROCEDURAL CHALLENGES

### **The enforcement of the award**

The true test of investor-State arbitration is whether arbitral awards based on arbitration offers provided in investment instruments will be enforced by the national courts. As the number of arbitral awards based on offers provided in investment treaties and domestic investment laws grows swiftly, the issue of enforcement becomes increasingly important. Investment arbitration could be a complete system of justice only if the enforcement of the will of the arbitral decision makers is granted.

### **Abuse of the process and parallel proceedings**

Many States are currently facing parallel proceedings involving the same claim by investors at different levels. If the investment is made through a chain of companies incorporated in different States, companies at different levels of the corporate chain can initiate many arbitral proceedings under different investment treaties. Furthermore, shareholder claims for reflective loss have consistently been permitted under typical bilateral investment treaties (BITs) in recent years.

### **Lack of transparency**

Transparency is one of the hot topics in investment law. Many investment arbitrations are conducted outside the public spotlight even if they affect public interest. Indeed, investment disputes often involve taxpayers' money and disputes on, for instance, natural resources or environmental issues. However, we should note that there are new rules to tackle this challenge. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency"), which came into effect on 1 April 2014, comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration. On 17 March 2015, the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration was opened for signature.

### **Cost for the State and the investors**

It was asserted that investment arbitration is costly and that it leads to a diversion of public money from public goods and services. According to a recent study, the average claimant costs: US\$ 4,437,000; the average respondent costs: US\$ 4,559,000 and the average of tribunal costs (i.e. arbitrators' fees/expenses and institutional charges): US\$ 746,000.<sup>28</sup> However, there is no evidence that the domestic judicial system is cheaper. Besides, the recourse to third-party funding techniques (which raise a new challenge to investment arbitration) could cover the cost of arbitration and facilitate the access to the investor-State mechanism.

## **II. SUBSTANTIAL CHALLENGES**

### **Inconsistency and unpredictability of arbitral decisions**

There is massive inconsistency and unpredictability in international investment law. Conflicting jurisprudential trends can be seen most obviously on the question of the interpretation of the most-favoured nation (MFN) concept, the notion of investment, the umbrella clause. Methods of achieving consistency include the creation of an appellate system or an international court to deal with investment disputes.

### **Addressing investor behaviour and create a better balance in investment treaties**

Many scholars increasingly argued that international investment agreements take insufficient steps to balance the rights and obligations of the parties involved. The United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development (IPFSD) addresses these new challenges in line with the objective to make investment work for sustainable development and inclusive growth.

### **Investment arbitration has no economic impact**

There is no positive correlation between foreign direct investment (FDI) flows and investment treaties. Despite the absence investment treaties and arbitration, many countries attract flows of FDI. It was asserted, however, that the purpose of investment treaties is legal security and not the promotion of FDI flows.

<sup>28</sup> Matthew Hodgson, *Investment Treaty Arbitration: How much does it cost? How long does it take?*

# IMPACT OF THE CURRENT TTIP NEGOTIATIONS ON THE INVESTMENT POLICIES BETWEEN EU AND MENA COUNTRIES

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## INTRODUCTION

The European Union (EU) and the United States are in the process of negotiating a major agreement: the Transatlantic Trade and Investment Partnership (TTIP). The EU predicts that the agreement will cover as much as 45 per cent of global gross domestic product and produce as much as an additional €100 billion in global economic growth.<sup>30</sup> The TTIP is controversial and its prospects are uncertain. Also unclear are the implications of any eventual agreement for other States, including those like States in the Middle East and North Africa (MENA States), which have strong bilateral and regional trade and investment relations with the EU and the United States.<sup>31</sup> There is some research that suggests that the the TTIP might have negative economic consequences for MENA States; regardless, it will bring change.<sup>32</sup> How MENA States respond to the negotiation and passage of the TTIP could, therefore, significantly impact the region's success in maintaining strong economic ties with EU member States, as well as their ability to maintain and increase trade and investment flows to, from, and within the MENA region. This paper will thus consider the trade and investment ties between the EU and MENA States, provide an overview of the TTIP and its likely impact, and discuss a way forward for MENA States.

## I. TRADE AND INVESTMENT TIES BETWEEN THE EU AND MENA STATES

The EU and MENA States maintain strong economic ties, both in terms of trade and Foreign Direct Investment (FDI). EU–MENA trade and investment flows are governed by some 237 bilateral

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<sup>29</sup> Ian Kysel, an associate in the London office of Shearman & Sterling LLP, provided invaluable assistance in the preparation of this presentation.

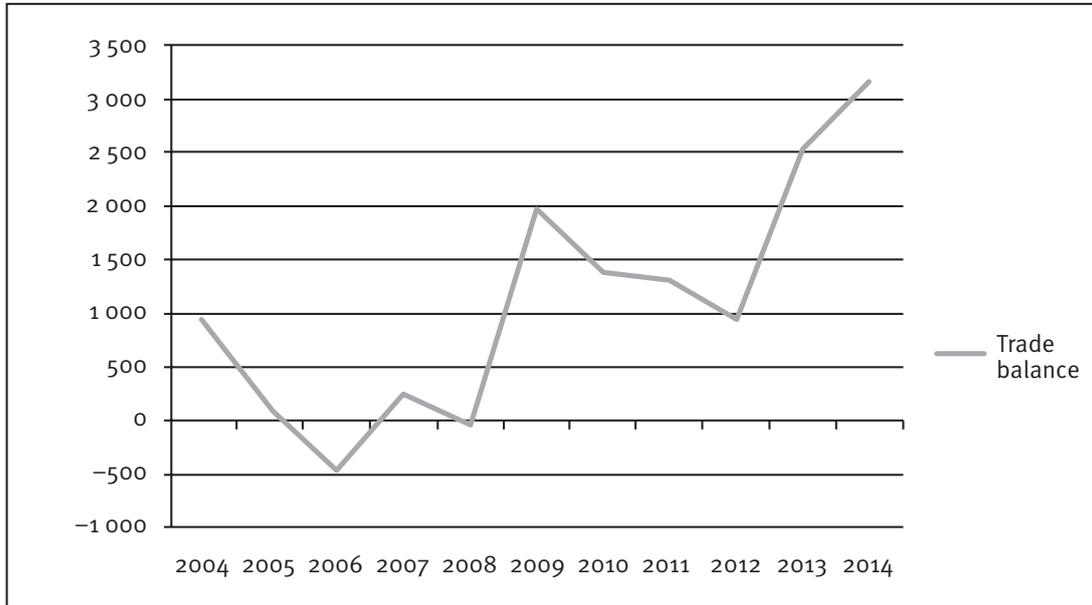
<sup>30</sup> European Commission, *The Transatlantic Trade and Investment Partnership: The Economic Analysis Explained* (September 2013). [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151787.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf)

<sup>31</sup> European Parliament, Directorate-General for External Policies, Policy Department, *In-Depth Analysis: The TTIP's potential impact on developing countries: A review of existing literature* (29 April 2015). [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549035/EXPO\\_IDA\(2015\)549035\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549035/EXPO_IDA(2015)549035_EN.pdf)

<sup>32</sup> European Parliament, Directorate-General for External Policies, Policy Department, *In-Depth Analysis: The TTIP's potential impact on developing countries: A review of existing literature* (29 April 2015). [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549035/EXPO\\_IDA\(2015\)549035\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549035/EXPO_IDA(2015)549035_EN.pdf)

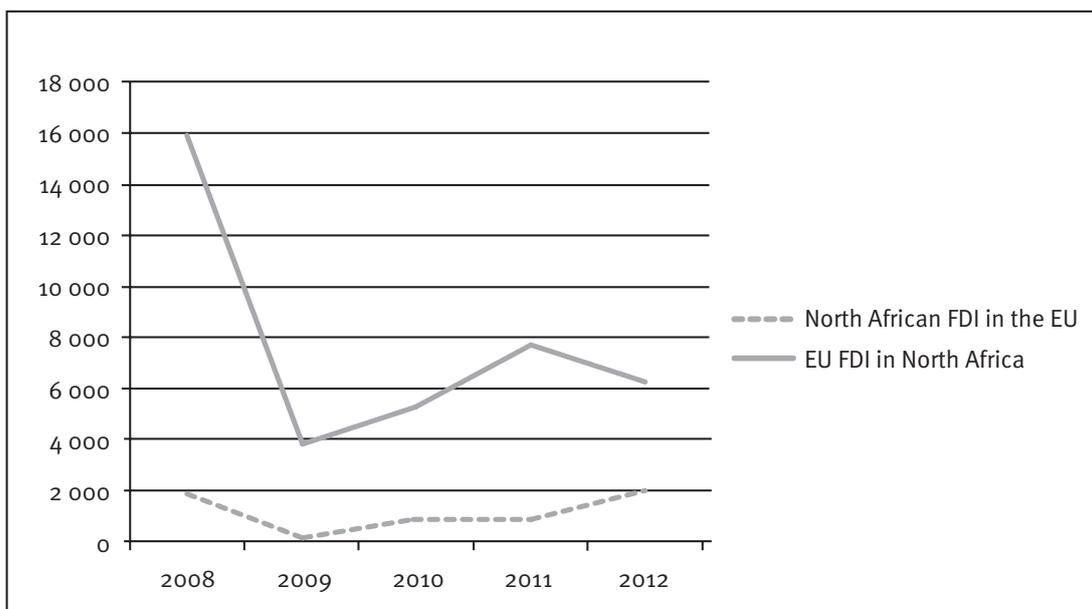
investment treaties (BITs),<sup>33</sup> as well as a number of association agreements.<sup>34</sup> The region has also seen some variation in the volume of trade and foreign direct investment with the EU.

**Figure I. Average EU–MENA trade balance from the EU’s perspective (in millions of euros, 2004–2014)**



Source: European Commission Directorate General for Trade.

**Figure II. EU–North Africa foreign direct investment flows (in millions of euros, 2008–2012)**

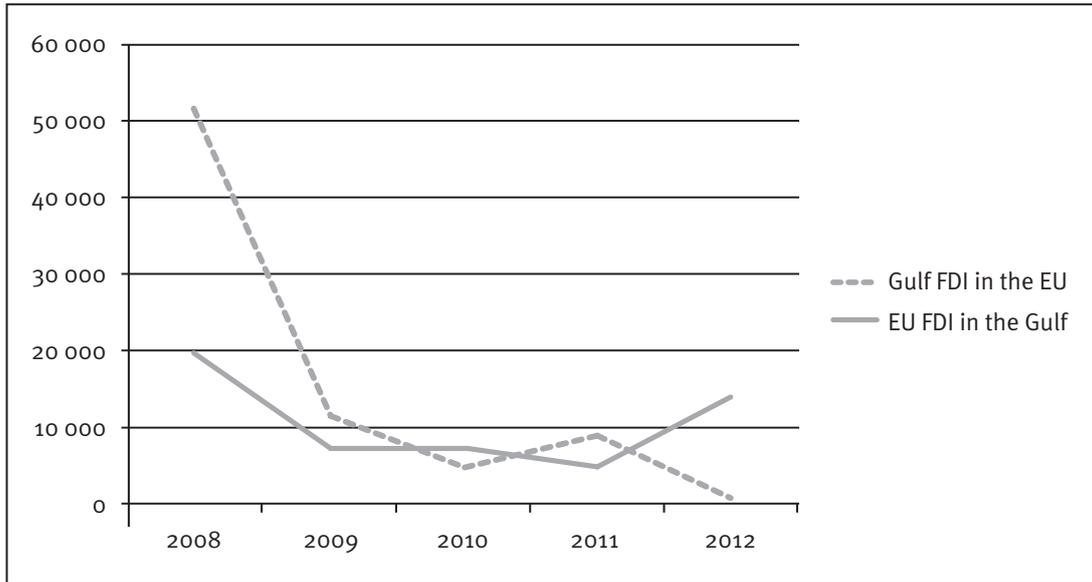


Source: European Commission Directorate General for Trade.

<sup>33</sup> UNCITRAL Investment Policy Hub. <http://investmentpolicyhub.unctad.org/> (author’s calculation).

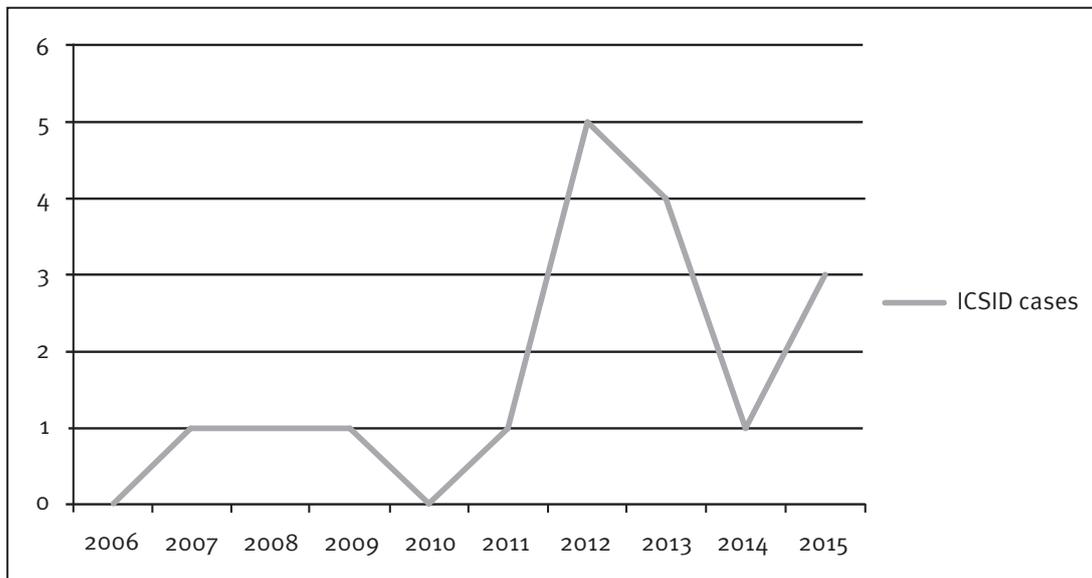
<sup>34</sup> European Commission, *Euro-Mediterranean Partnership*. <http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>

**Figure III. EU–Gulf foreign direct investment flows  
(in millions of euros, 2008–2014)**



Source: European Commission Directorate General for Trade.

**Figure IV. ICSID cases filed against MENA States  
(1 July 2004–present)**



Source: ICSID Case Database; author’s calculation.

In parallel with the strength of trade and investment relations, recent years have also seen a significant increase in investment arbitration. In the last 10 years, 41 cases have been filed with the International Centre for Settlement of Investment Disputes (ICSID) against MENA States (of those, 14 were filed by claimants with the nationality of a MENA State).<sup>35</sup> Twenty-three of those 41 cases were filed by claimants with the nationality of a current EU member State (Egypt

<sup>35</sup> International Centre for Settlement of Investment Disputes Database. <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx> (author’s calculation).

is or was the Respondent in 12 of those cases); 14 of those cases, or approximately two-thirds, were filed within the last 5 years and 11 of them are still pending.<sup>36</sup> By contrast, in that same time period, only two ICSID disputes were filed by claimants with the nationality of a MENA State against a current EU member States, one of which is pending.<sup>37</sup>

The increasing volume of investment disputes and the variation in trade and investment flows suggest that MENA States should consider how the TTIP may impact EU–MENA trade and investment relations, and in particular due to the market access provisions, the substantive investment protections, and the dispute settlement procedures that are likely to be included in the TTIP agreement.

## II. OVERVIEW OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

The Transatlantic Trade and Investment Partnership (TTIP) is a comprehensive trade and investment agreement currently being negotiated between the EU and the United States. The primary goal of the parties is to develop a treaty regime that will remove trade barriers and boost and facilitate the buying and selling of goods and services, as well as investment, in both economies, especially through market access.<sup>38</sup> There is no agreed-upon draft text of the agreement, and much about the TTIP remains shrouded in the secrecy of the trade negotiation process. Both parties have said that they hope to finalize the agreement by the end of 2016, after which the treaty would have to be ratified before it would enter into force—the prospect of which makes conclusion of any agreement even more uncertain. It is likely that any final agreement will contain provisions that provide for the following:

- Increased market access, including by removing customs duties on goods and restrictions on services, with a goal of providing better access to markets and making it easier for both parties to invest across the trade area
- Improved regulatory coherence and cooperation by dismantling unnecessary regulatory barriers, such as bureaucratic duplication of effort by State authorities
- Enhanced cooperation regarding the setting of international standards, such as on rules of origin
- Dispute settlement procedures, including provision for investor-State dispute settlement<sup>39</sup>

## III. LIKELY IMPACT OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

Because there is not yet a TTIP agreement, or even a complete, public, consensus working draft text, it is difficult to predict the impact of any eventual agreement on the parties, and

<sup>36</sup> International Centre for Settlement of Investment Disputes Database. <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx> (author's calculation).

<sup>37</sup> These were claims brought against Bulgaria and the Czech Republic. *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No. ARB/15/43 (registered 22 October 2015; pending); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05 (registered 23 March 2006; concluded).

<sup>38</sup> European Commission, *The Transatlantic Trade and Investment Partnership (TTIP): TTIP explained* (19 March 2015). [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152462.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf)

<sup>39</sup> *Ibid.*

even more challenging to determine how such an agreement might impact non-parties, such as MENA States (or how these impacts may differ among and between States in the region).<sup>40</sup>

As a proxy for evaluating the potential content and scope of the TTIP investment provisions, then, it is useful to consider the provisions of the Canada-EU Trade Agreement (CETA), which was concluded in September 2014; although it has not yet been ratified or entered into force, and has substantially the same goals as the TTIP with respect to market access and investment promotion, investment protection and investor-State dispute resolution.<sup>41</sup>

### A. Market access and investment promotion

The EU has said that the CETA reflects “a turning point in the European approach to investment policy.”<sup>42</sup> The CETA does, and therefore the TTIP likely will, include provisions that provide increased market access, including by removing duties on goods and excluding restrictions on services.<sup>43</sup> It also seeks to promote investment by excluding performance requirements and ensuring freedom of transfers.<sup>44</sup> A further feature is improved regulatory coherence and cooperation by dismantling unnecessary regulatory barriers.<sup>45</sup> Finally, it promotes enhanced cooperation in the setting of international standards, such as on rules of origin.<sup>46</sup>

Assuming that the TTIP reflects these same features, some research suggests that these agreements will result in an increase in EU investments made in the US and Canada with a correlative decrease in EU investments in MENA. For example, at least one study suggests that, “*exports to markets with which the EU or the US have [Preferential Trade Agreements would be] considerably reduced, especially trade with some EU countries.*”<sup>47</sup> Other researchers have made similar projections about reductions in trade volume (note that Egypt, Tunisia, Algeria, and Syria are particularly exposed, as more than 40 per cent of the exports from each of these MENA States goes to the EU or the United States).<sup>48</sup>

Finally, additional research suggests that the TTIP may also cause a reduction in the level of foreign direct investment in MENA States, because investors from Asia and sovereign wealth funds may increase their investments in the EU in order to reduce their exposure to

<sup>40</sup> Indeed, while the agreement is being negotiated between the EU and the United States, some have called for the TTIP to include a mechanism for non-member states to join or accede. Sinan Ulgen, *Locked in or Left Out? Transatlantic Trade Beyond Brussels and Washington*, pp. 5-7 (Carnegie Europe, 2014). The EU has proposed that its free trade agreements should include mechanisms to allow other interested countries to join them in the future. European Commission, *Trade for all: Towards a more responsible trade and investment policy*, p. 29 (October 2015). [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>41</sup> Consolidated CETA text (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>42</sup> European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)* (September 2014). [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf)

<sup>43</sup> European Commission, *CETA – Summary of the final negotiating results* (December 2013). [http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152982.pdf](http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf). See also *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.4 (26 September 2014).

<sup>44</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.5 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>45</sup> European Commission, *CETA – Summary of the final negotiating results* (December 2013). [http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152982.pdf](http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf)

<sup>46</sup> *Ibid.*

<sup>47</sup> Gabriel Felbermayr *et al.*, *Dimensions and Effects of a Transatlantic Free Trade Agreement Between the EU and US*, p. 7 (Ifo Institut, 2013).

<sup>48</sup> Giorgio Giovannetti and Mauro Lanati, *L'importance du partenariat transatlantique de commerce et d'investissement, et ses inconvénients potentiels pour les pays de la Méditerranée*, p. 296-297 (Annuaire IEMed 2014). See also, Rahel Aichele and Gabriel Felbermayr, *The impact of TTIP on third countries* in Sait Akman *et al.*, *CATALYST? TTIP'S IMPACT ON THE REST*, p. 29 (figure 1) (Centre for Economic Policy Research Press, 2015). See also, European Parliament, Directorate-General for External Policies, Policy Department, *In-Depth Analysis: The TTIP's potential impact on developing countries: A review of existing literature* (29 April 2015), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549035/EXPO\\_IDA\(2015\)549035\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549035/EXPO_IDA(2015)549035_EN.pdf) (providing a review of research to date on the topic).

tariff and non-tariff barriers.<sup>49</sup>

## B. Investment protections

The CETA also includes, and thus the TTIP is expected to include, a number of investment protections. With respect to the definition of investment, this includes a clarification that an investment is one, “which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk” and further clarifies that, “‘claims to money’ does not include claims to money that arise solely from commercial contracts for the sale of goods or services.”<sup>50</sup> With respect to the definition of investor, this includes a clarification that an enterprise of a State Party must have, “substantial business activities” in the territory of that Party.<sup>51</sup> With respect to the most-favoured nation (MFN) provision, the CETA clarifies that MFN does not extend to, “investor-to-State dispute settlement procedures” and that, “substantive obligations ... do not in themselves constitute ‘treatment,’ and thus cannot give rise to a breach of [the agreement], absent measures adopted by a Party pursuant to such obligations.”<sup>52</sup> Additionally, with respect to fair and equitable treatment (FET), the CETA clarifies that a strict test must be met in order to establish a breach of FET.<sup>53</sup> Finally, the CETA clarifies that full protection and security, “refers to the Party’s obligations relating to physical security of investors and covered investments.”<sup>54</sup> These provisions should promote legal certainty, discourage frivolous claims, and reduce the cost of litigation.

One instructive example with respect to the difference between the CETA (and the anticipated TTIP) and many existing BITs is the scope of the substantive protections. This is clearly illustrated in a comparison with the United Kingdom-Egypt BIT.<sup>55</sup>

## C. Investor-State dispute settlement mechanism

The CETA also includes a number of innovations with respect to investor-State dispute settlement (ISDS), and it is expected that the TTIP will include many of the same elements. These include provisions allowing for the dismissal of frivolous claims, for example, providing that, “the Respondent may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.”<sup>56</sup>

The CETA also includes presumptions of transparency, for example, that “hearings

<sup>49</sup> Giorgio Giovannetti and Mauro Lanati, *L'importanza del partenariato transatlantico de commerce et d'investissement, et ses inconvénients potentiels pour les pays de la Méditerranée*, p. 297 (Annuaire IEMed 2014) (discussing Mediterranean States in particular).

<sup>50</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.3 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>51</sup> *Ibid.*

<sup>52</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.7 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>53</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.9 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>54</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.9 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>55</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.5 (26 September 2014), [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf); *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments* (entered into force 24 February 1976).

<sup>56</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.29 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

**Table 1. Comparison of Canada–EU Trade Agreement and the United Kingdom–Egypt Bilateral Investment Treaty\***

	CETA provision	UK-Egypt BIT
<p><b>Fair and equitable treatment and Full protection and security</b></p>	<p><b>Article X.9. Treatment of investors and of covered investments</b></p> <p><b>Each Party shall accord</b> in its territory to covered investments of the other Party and to investors with respect to their covered investments <b>fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.</b></p> <p><b>A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:</b></p> <p><b>Denial of justice</b> in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.</p> <p><b>Manifest arbitrariness;</b></p> <p><b>Targeted discrimination</b> on manifestly wrongful grounds, such as gender, race or religious belief;</p> <p><b>Abusive treatment</b> of investors, such as coercion, duress and harassment; or A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with <b>paragraph 3</b> of this Article.</p> <p><b>The Parties shall regularly,</b> or upon request of a Party, <b>review the content of the obligation to provide fair and equitable treatment.</b> The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.</p> <p><b>When applying</b> the above <b>fair and equitable treatment</b> obligation, a tribunal may take into account whether a Party made <b>a specific representation</b> to an investor <b>to induce a covered investment,</b> that created a legitimate expectation, and <b>upon which the investor relied</b> in deciding to make or maintain the covered investment, but that <b>the Party subsequently frustrated.</b></p> <p><b>For greater certainty, ‘full protection and security’ refers to the Party’s obligations relating to physical security of investors and covered investments.</b></p> <p>For greater certainty, <b>a breach of another provision of this Agreement,</b> or of a separate international Agreement, <b>does not establish that there has been a breach of this Article.</b></p>	<p><b>Article 2. Promotion and protection of investment</b></p> <p>(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory and, subject to its right to exercise powers conferred by its laws, shall admit such capital</p> <p>(2) <b>Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.</b> Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.</p>

\* Emphasis in bold type has been added.

shall be open to the public.”<sup>57</sup> The CETA proposes the possible creation of an appellate mechanism, stating that “[t]he Committee on Services and Investment [created by the CETA] shall provide a forum for the Parties to consult on issues related to this Section, including ... whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a Tribunal under this Section, or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements.”<sup>58</sup> Finally, the CETA includes strong limitations on parallel proceedings.<sup>59</sup> These various provisions regarding ISDS will likely have the effect of limiting abusive litigation and may reduce the backlash against investment arbitration.

Indicative of the breadth of the ISDS provision is the CETA provision on parallel proceedings.

#### **CETA provision on parallel proceedings\***

*Article X.21. Procedural and Other Requirements for the Submission of a Claim to Arbitration*

**An investor may submit a claim** to arbitration under Article X.22 (Submission of a Claim to Arbitration) **only if the investor:**

- Delivers to the respondent, with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter;
- Allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;
- Fulfils the requirements of the notice requesting a determination of the respondent;
- Fulfils the requirements related to the request for consultations;
- Does not identify measures in its claim to arbitration that were not identified in its request for consultations;

**where it has initiated a claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that:**

<sup>57</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.33 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>58</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.42 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>59</sup> *EU-Canada Comprehensive Economic and Trade Agreement*, art. X.21 (26 September 2014). [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

- **A final award**, judgment or decision **has been made**; or
- It has **withdrawn any such claim** or proceeding;

The declaration shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding; **and waives its right to initiate** any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.

**Where the submission of a claim to arbitration is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise** that the investor owns or controls directly or indirectly, **both the investor and the locally established enterprise shall provide a declaration** pursuant to subparagraph 1 (f) **and a waiver** pursuant to subparagraph 1 (g).

The requirements of subparagraphs 1 (f), (g) and paragraph 2 do not apply in respect of a locally established enterprise where the respondent or the investor's host State has deprived an investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling such requirements.

Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.

The waiver provided pursuant to subparagraph 1 (g) or paragraph 2 as applicable shall cease to apply:

- Where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;
- Where the Tribunal dismisses the claim pursuant to Article X.29 (Claim manifestly without legal merit) or Article X.30 (Claims Unfounded as a Matter of Law); or
- Where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.

\*Emphasis in bold type has been added.

#### IV. THE WAY FORWARD FOR MENA STATES

There are a few options open to MENA States with respect to the possibility of success in the TTIP negotiations and the entry into force of the TTIP and the CETA. In order to counter the potential negative impact of the TTIP on EU–MENA trade and investment relations, States in the MENA region might seek—either independently or in a coordinated fashion—review or renegotiation of trade and investment association agreements between MENA States and EU member States. MENA States could also pursue the negotiation of a multilateral trade and investment agreement (for example, be reinitiating and updating the stalled Union for the

Mediterranean<sup>60</sup>). Finally, within the region, MENA States could hedge against the CETA and the TTIP by reforming their own bilateral trade and investment agreements between and among MENA States.

## CONCLUSION

The TTIP Agreement will bring significant trade and investment liberalization between EU States and the United States and innovation in investment protection and dispute settlement procedures. The terms of the Agreement, and whether it will ever be finalized or come into force, are still unknown. Also unknown is the extent to which the Agreement will affect non-TTIP States. However, there is some evidence that suggests that a TTIP Agreement could have a negative impact on MENA States—at least in the short to medium term—by reducing overall trade volume and inhibiting foreign investment. To prevent such negative consequences, MENA States should consider a number of steps to promote further trade liberalization, including pushing for review of existing trade and investment agreements with the EU to promote harmonization of trade and investment protections. MENA States might also consider undertaking steps to promote trade liberalization within the region, either by updating bilateral trade and investment agreements between MENA States or by promoting a new, multilateral trade and investment regime in the region.

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<sup>60</sup>The Barcelona Process was launched in 1995 by the Ministers of Foreign Affairs of 15 EU members and 12 Mediterranean partners as a framework to manage both bilateral and regional relations. The Barcelona Declaration adopted in November 1995 sets a goal of establishing a free trade area and to “creat[ing] a climate favourable to the removal of obstacles to investment, by giving greater thought to the definition of such obstacles and to means ... of promoting such investment.” *Barcelona Declaration*, section III, adopted at the Euro-Mediterranean Conference (27-28 November 1995), [http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc\\_124236.pdf](http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf). The Union’s formal existence followed from a declaration at the close of the Paris Summit for the Mediterranean in July 2008. That declaration envisioned, “the creation of a deep Free Trade Area in the Euromed region by 2010 and beyond, and the strengthening of regional economic integration in all its dimensions ... [and] to study the establishment of a smooth, efficient and business-friendly trade facilitation mechanism which would bring further transparency and trade and investment opportunities.” *Joint Declaration of the Paris Summit for the Mediterranean*, 11 (13 July 2008). [http://ufmsecretariat.org/wp-content/uploads/2012/09/ufm\\_paris\\_declaration1.pdf](http://ufmsecretariat.org/wp-content/uploads/2012/09/ufm_paris_declaration1.pdf)

# PROTECTION AND PROCESSES OF ARBITRATION UNDER MENA REGIONAL INVESTMENT TREATIES

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MENA region countries have been taking part for many years in the global trend of concluding bilateral investment treaties (BITs). Indeed, Egypt is the fifth most prolific State worldwide for concluding such treaties, with over 100 BITs signed (and Egypt has been subject to more investment claims than any other MENA region State). Other MENA region countries that have been in the forefront of concluding BITs include Jordan, Morocco and Kuwait. Iraq is the MENA region State with the least number of BITs, with nine signed and only one in force.

Traditionally, Gulf Cooperation Council (GCC) countries, with the exception of Kuwait, relied less heavily on BITs. This may reflect the fact that as resource-rich countries, these States felt less compelled to enter into such binding agreements. Nevertheless, the interest of GCC countries in securing the investments of their nationals in different parts of the world, including in Asia, where they are currently playing a strong capital-exporting role, has given these countries (mainly Oman and Qatar) a strong incentive to conclude BITs. It may also not be a complete coincidence that Kuwait, which has the largest number of BITs from among Gulf States, is also the largest capital exporter in this region.

MENA region countries as a whole are parties to a growing number of “South-South” BITs that in fact outnumber their “North-South” ones. Some of the BITs that have been entered into by Arab countries refer to International Centre for Settlement of Investment Disputes (ICSID) procedures. ICSID clauses may be found in BITs concluded by Arab countries not only with developed countries, but also with other developing countries, including Arab countries.

Indeed, in the *Desert Line Projects LLC v. Republic of Yemen* case, which involved an Omani company, the basis of jurisdiction was an ICSID clause in the Oman/Yemen BIT, which had been concluded in the Arabic language. In that case, the ICSID Tribunal held that the conduct of Yemen in pressuring the Omani investor to accept and execute a settlement agreement, instead of a final and binding Yemeni award, amounted to a breach of a provision of the Oman/Yemen BIT imposing on both Oman and Yemen a duty to ensure “fair and equitable treatment” to the investments of the other contracting State’s investors, and to eschew “legally unjustified measures.”

*Desert Line v. Yemen* was not the first case submitted to ICSID involving an Arab State and an Arab investor. The first such case, and indeed the first “South-South” ICSID arbitration, was the case of *Ghaith Pharaon v. Republic of Tunisia*. Unlike the *Desert Line* case,

however, consent to ICSID jurisdiction in the *Ghaith Pharaon* case was based on an arbitration clause contained in an investment agreement concluded between the Saudi investor and Tunisia. The case was in any event discontinued as a result of a settlement reached between the parties during the proceeding.

Since the *Desert Line* case, and as of 31 December 2015, ICSID has registered 10 further cases brought by Arab investors against Arab States (Egypt, Jordan, Sudan and Yemen) on the basis of BITs. The existence of such Arab/Arab disputes signals that Arab investors have come to realize that they too can rely on BITs to protect their investments abroad.

Interestingly, the BITs concluded between Arab countries in Arabic contain provisions similar to those concluded between countries from other regions of the world in other languages. These typically include provisions on non-discrimination, fair and equitable treatment, full protection and security, and compensation in case of expropriation. They also contain provisions on investor-State dispute settlement, with ICSID listed as one of the mechanisms available.

In addition to MENA region BITs, which typically have been relied upon soon after their conclusion, investors from the MENA region have come to realize at a rather late stage that they also have regional venues to which they can submit their disputes with other States from the MENA region. Principally, two regional multilateral investment treaties have recently gained prominence.

The first instrument is the 1980 Unified Agreement for the Investment of Arab Capital in the Arab Countries (“the Unified Agreement”). It initially lacked political commitment, which is changing now because of the increase in investment disputes within the region.

The Unified Agreement came into force in 1981 and was ratified by all member States of the Arab League, with the exception of Algeria and the Comoros. It covers the regulation of inter-Arab investments and aims to facilitate the free movement of Arab capital within Arab States.

Pursuant to the Unified Agreement, investor-State disputes may be settled by ad hoc conciliation or arbitration procedures detailed in the Agreement, or by the Arab Investment Court, a judicial body established by the Agreement.

The Arab Investment Court was established in 1985. It remained dormant for a further 19 years until it issued its first judgement in 2004 in a case involving a Saudi company and Tunisia. The Court has issued only a few judgements since then. All judgements rendered thus far by the Arab Investment Court, however, have been in favour of Arab host countries, which raises at least a problem of perception.

The Arab Investment Court may hear more cases in the future as several BITs concluded between Arab countries (such as the Oman/Yemen, Jordan/Bahrain, Bahrain/Syria, Jordan/Kuwait, Jordan/Syria and Bahrain/Lebanon BITs) refer to the Court among the various dispute-settlement options they provide. Also the laws of several Arab countries refer to the Arab Investment Court as an available venue for the resolution of investment disputes brought by nationals of other Arab States against those countries.

With respect to ad hoc arbitration under the Unified Agreement, the first case, brought in 2012 by Kuwaiti investors, Al Kharafi and sons, against Libya, resulted in 2013 in an award in favour of the investors. The investors were awarded as part of the compensation an unusually high amount of moral damages. It is true that there are two ICSID precedents in which moral damages have been awarded, *Benvenuti & Bonfant v. Congo* during the early years and more

recently *Desert Lines v. Yemen*, but neither award was of a similar magnitude. Had a decision on moral damages of that magnitude been awarded in an international context, it could have received critical disapproval. In this respect, the ICSID award of 6 May 2013 in the *Rompetrol v. Romania* case stated, at para. 293: “The Tribunal is firmly of the view that ‘moral damages’ cannot be admitted as a proxy for the inability to prove actual economic damage.”

Libya brought an action for annulment of the *Al-Kharafi* award before the courts in Egypt, the seat of the arbitration. The Cairo Court of Appeal rejected Libya’s application and stressed the need to comply with Egypt’s international commitments, and the award was subsequently granted leave for enforcement by the Paris Court of Appeal. However, on 4 November 2015, the Egyptian Court of Cassation overturned the decision of the Cairo Court of Appeal and referred the case to another circuit of the Cairo Court of Appeal. The saga therefore continues.

The Unified Agreement underwent substantial amendment in 2013, namely enhancing its investment protections. Among its many innovations, the amended Agreement: expands the scope of the investors that it covers (i.e., the Arab investor should hold at least 51 per cent of the capital of the juridical person); introduces a most-favoured-nation clause; includes an unqualified fair and equitable treatment standard; recognizes the right to transfer capital in the original investment currency or in a convertible currency recognized by the International Monetary Fund; and calls on host States to exert their utmost efforts to ensure that their domestic laws do not hinder the development of the investments.

It is too early to tell whether the amended Agreement will present the Middle East with a viable alternative to traditional investor-State dispute settlement facilities. As can be seen, there is still work to be done in this area.

The second important regional investment treaty that has been activated only recently is the agreement concluded in 1981 among members of the Organization of Islamic Cooperation (“the OIC Agreement”). This Agreement has been signed by 36 States that are members of the OIC, and 27 have ratified it.

The OIC Agreement was dormant for decades but recently has been the basis for several ad hoc arbitration claims. In one of these claims, which was brought by a Saudi investor (Hesham Talaat M. Al-Warraq) against Indonesia, the Tribunal assumed jurisdiction. It determined in a decision of 21 June 2012 that States parties to the OIC Agreement are deemed to have expressed prior consent to arbitration in relation to future disputes with investors in a way similar to traditional BITs.

In the merits phase, however, the Tribunal determined in an award rendered on 15 December 2014 that although Indonesia had breached the fair and equitable treatment standard in dealing with the Saudi investor, the investor was prevented, as a result of his own wrongdoing, from pursuing his claim, and that the doctrine of “clean hands” precluded the awarding of damages to him.

The OIC Agreement envisaged arbitration as a temporary way of resolving investment disputes pending the creation of an Islamic International Court of Justice in Kuwait. Although more than 30 years have elapsed since the creation of the OIC Agreement, the Court has yet to be established. There is thus much uncertainty remaining in this respect.

An Arab investor with an investment in an Arab State may now have to consider whether to institute arbitration proceeding against the Arab State under a traditional BIT (referring to ICSID) or under one of the regional investment treaties that have recently been resurrected.

If the investment arbitration is to take place within the region, it should be administered by one of the existing regional arbitration institutions instead of being conducted ad hoc. The involvement of an institution would give the arbitration a public perception of legitimacy, not to mention administrative efficiency and support. The institutions can also sensitively handle the delicate issue of transparency, and they have the potential to develop mechanisms to deal with the publicity surrounding high-profile cases.

For its part, the Cairo Regional Centre for International Commercial Arbitration has administered an investment arbitration. The request for arbitration was filed pursuant to the Libya-Morocco BIT providing for the Cairo Centre among the options offered to investors. Egypt has concluded a number of BITs, such as the ones with Chad, Cyprus, Switzerland and Zambia, which all include the Cairo Centre as one possible option available to investors.

The Bahrain Chamber for Dispute Resolution (BCDR-AAA) is trying to spread knowledge in this field and is preparing itself to start administering these types of cases.

At the same time, and in order to become attractive venues for administering similar cases, regional institutions ought to do their homework. Only good governance of these regional institutions will generate public trust.

I mentioned earlier that referring disputes involving an Arab State and an Arab investor to ICSID has been the traditional path. In my opinion, ICSID procedures need to be revisited in a number of respects, and I strongly caution ICSID to take certain measures that would bolster confidence in the Arab world.

First, there should be a better appreciation and understanding of the political conditions within the countries concerned if any reform of ICSID is undertaken. As States in the Middle East and North Africa continue their difficult transitions, ICSID must remain attentive to their special needs and circumstances, for example, in procedural matters, by recognizing that the strictness of timelines in registering a case or appointing a tribunal may be problematic.

Second, when called upon to appoint arbitrators, ICSID would do well to appoint persons who, if not from the region, at least have a deep understanding of the region and of its present problems. The number of arbitrators originating from the MENA region is lamentably low, and I barely need to stress the serious implications of these numbers, which affect the legitimacy of ICSID arbitration.

Lastly, I firmly believe that ICSID should embark on internal reforms that seek to eliminate legitimate concerns raised by certain member States with respect to arbitrators' real or apparent conflicts of interest. These conflicts remain unregulated by any internal code of conduct or authoritative guidelines. Such a code of conduct should address a diverse range of issues, such as that presented when a person simultaneously holds counsel and arbitrator roles in cases featuring the same legal issues. Addressing such problematic relationships would assuage the concerns of member States, provide clear guidelines to parties and arbitrators alike, bring predictability and consistency to the smooth conduct of arbitration proceedings, and help to maintain trust, especially in regions undergoing major transitions.

It is reassuring to observe that certain recent agreements, such as the EU-Singapore Free Trade Agreement and the Canada-EU Comprehensive Economic and Trade Agreement, include annexes setting out codes of conduct for arbitrators and mediators who act pursuant to these agreements.

## **B. CASE STUDY: EGYPT**



# THE MAGNITUDE OF INVESTMENT ADJUDICATION INVOLVING EGYPT

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During the period of January 2011 until now Egypt has been subject to a proliferation of investment cases. The instrument triggering investment adjudication (arbitration mainly but also litigation) remains bilateral investment treaties (BITs), although a few disputes have arisen as a result of multilateral investment treaties (MITs). The 1980 Unified Agreement for the Investment of Arab Capital in Arab Countries (UAIAC) was signed and ratified by Egypt as well as most of the member States of the Arab League. Litigation at the Arab Investment Court is one of the dispute settlement mechanisms under the treaty.

Investor-State dispute settlement (ISDS) mechanisms pertaining to Egypt vary. There are plenty of disputes concluded through arbitration, others through litigation, some through dispute settlement committee. There is potential for allocating mediation or conciliation as an ISDS tool.

Most of the investment cases are brought before the International Centre for Settlement of Investment Disputes (ICSID) (16 cases). A number of favourable awards to Egypt have been rendered at different stages of the arbitral proceedings. At the jurisdictional phase, the National Gas Tribunal declined its jurisdiction.<sup>61</sup> At the merits phase, two tribunals ruled against the investor, the Malicorp case<sup>62</sup> and the H&H Enterprises case.<sup>63</sup> The Annulment Committee in the Malicorp case refused the application for annulment.<sup>64</sup> The total pending cases before ICSID are nine.<sup>65</sup>

A number of cases have been concluded through amicable settlement through the Committee for Settlement of Investment Disputes which was established pursuant to the Prime Ministerial Decrees.<sup>66</sup>

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\* Any views expressed are not attributed to my work affiliation.

<sup>61</sup> ICSID Case No. ARB/11/7, National Gas S.A.E, award dated 3 April 2014.

<sup>62</sup> ICSID Case No. ARB/08/18, Malicorp Limited, award dated 7 February 2011.

<sup>63</sup> ICSID Case No. ARB/09/15, H&H Enterprises, award dated 6 May 2014. This case is currently subject to annulment proceedings.

<sup>64</sup> ICSID Case No. ARB/08/18, Malicorp Limited (annulment proceedings), decision dated 3 July 2013.

<sup>65</sup> The current pending cases before ICSID are the following:

ARB/15/47, ArcelorMittal S.A.;

ARB/14/4, Union Fenosa Gas, S.A.;

ARB/13/37, Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft and Helmut Jungbluth;

ARB/13/29, Cementos La Union S.A. and Aridos Jativa S.L.U.;

ARB/13/23, ASA International S.P.A.;

ARB/12/15, Veolia Properte;

ARB/12/11, Ampal-American Israel Corporation and others;

ARB/09/15, H&H Enterprises Investments, Inc. (annulment proceedings).

<sup>66</sup> The first decree is Prime Ministerial Decree No. 1067 of 2012, published in the official Gazette, Issue 44, 1 November 2012. Such Decree was subject to subsequent amendments.

Whereas the ICSID Arbitration Rules remain the most frequently applied, there are some cases where the UNCITRAL Arbitration Rules are applicable and others where the UAIAC is invoked.

The Arab Investment Court is an adjudicating body that issues binding judgements. The Court is composed of at least five judges (article 28 of UAIAC). There is a system of Commissioners for the Court, which prepares the case for the judges, similar to the system at State Council Courts. The hearings are public. The dissenting judge can outline the reason for his opinion at the end of the judgement. Finally, after the judgement is issued, any of the parties can file a petition for reconsideration<sup>67</sup> thereof (article 35 of UAIAC). This overview shows that the Arab Investment Court is a hybrid of litigation and arbitration mechanisms. The trend is towards litigation.

Since 2011, two judgements involving Egypt as defendant were rendered by the Arab Investment Court; the two decisions related to the jurisdiction of the Court. In the first case, the Court confirmed its jurisdiction over the dispute in its decision dated 27 April 2011.<sup>68</sup> In the second case, the Court declined its jurisdiction over the dispute in its decision dated 21 April 2015.<sup>69</sup> Both decisions are publicly available on the League of Arab States website.<sup>70</sup>

It is worth mentioning that mediation or conciliation as an ISDS tool is still not utilized. This is despite the reference to such means of dispute resolution in various legal instruments. Some BITS (e.g. the 2014 Egypt–Mauritius BIT) and MITs (e.g. UAIAC) mention it as a dispute settlement mechanism. Most BITS tackle mediation/conciliation as a mechanism to be invoked during the cooling-off period either expressly, e.g. Mauritius BIT,<sup>71</sup> or impliedly (which remains the general trend in most of BITS).

Also, there are mediation and conciliation rules in the realm of ISDS, such as the ICSID Conciliation Rules and the IBA Rules on Investor-State Mediation. According to the ICSID website, only nine cases were subject to conciliation. The reluctance to invoke mediation or conciliation in ISDS is not confined to cases where Egypt is involved.

As a conclusion, in Egypt the mainstream ISDS remains arbitration before different forums, although some cases were resolved via litigation before the Arab Investment Court. Resort to other means of dispute resolution, namely mediation or conciliation, remains theoretical.

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<sup>67</sup>This procedure enables the parties to reopen the case after the issuance of a judgement in case a conclusive fact has been discovered by one of the Parties which was not known during the proceedings. It is one of the inherent procedures to the court system in Egypt and several other countries.

<sup>68</sup>Case No. 2/7. It is worth noting that the Claimant later withdrew from such proceedings.

<sup>69</sup>Case No. 1/12.

<sup>70</sup>Available in Arabic from [www.iasportal.org/ar/legalnetwork/pages/investment\\_courtrulings.aspx](http://www.iasportal.org/ar/legalnetwork/pages/investment_courtrulings.aspx)

<sup>71</sup>Article 10 of the 2014 Egypt–Mauritius BIT stipulates that investment disputes shall to the extent possible, ... be settled through consultation, negotiation, mediation or conciliation after written notification of the alleged breach has been made.

## **C. TRANSPARENCY IN INVESTMENT ARBITRATION**



# UNCITRAL'S WORK ON TRANSPARENCY IN INVESTOR-STATE ARBITRATION

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## INTRODUCTION

Previous speakers highlighted the importance of the works of UNCITRAL on the topic of transparency. The Commission considered this issue in 2008, but deemed it desirable to maintain the generic nature of the UNCITRAL Arbitration Rules, which were being revised at the time, and decided to deal with the topic of transparency as a matter of priority once the revision of these arbitration rules was completed. In 2010, the Commission gave a mandate to the UNCITRAL Working Group II (Arbitration and Conciliation) to focus on the preparation of a legal standard on transparency in treaty-based investor-State arbitration. In July 2013, the Commission adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (eight articles), and amended the UNCITRAL Arbitration Rules as revised in 2010 to include, in a new article 1, para. 4, a reference to the Rules on Transparency.<sup>72</sup> These Rules are also available for use in investor-State arbitrations initiated under rules other than UNCITRAL, or in ad hoc proceedings.<sup>73</sup>

## I. THE UNCITRAL RULES ON TRANSPARENCY

### A. Context

The need for ensuring transparency in treaty-based investor-State arbitration is to be considered in the context of foreign direct investment as a tool for the long-term sustainable growth of developing countries.<sup>74</sup> In addition to this broader objective, ensuring transparency and meaningful opportunities for public participation in treaty-based investor-State arbitration is said to constitute a means to promote the rule of law, good governance, due process, fairness, equity and rights to access information. It is also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such.<sup>75</sup>

In this context, the UNCITRAL Arbitration Rules are the second most widely used rules—after the ICSID Rules, for resolving treaty-based investor-State disputes. The rules and

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<sup>72</sup>A/CN.9/794.3.

<sup>73</sup>United Nations General Assembly resolution 68/109 of 16 December 2013.

<sup>74</sup>A/CN.9/712.16.

<sup>75</sup>A/CN.9/712.17.

regulations of ICSID were amended in 2006 to incorporate greater transparency and opportunity for public access to treaty-based investor-State arbitrations.<sup>76</sup>

## B. Content and issues raised

### 1. *How the Rules apply—or article 1 of the Rules (Scope of application)*

#### (a) *Opt-in/Opt-out*

Consent is a key issue for the application of a legal standard on transparency to future investment treaties. The main question to be considered relates to the manner in which that consent would be expressed. A consensus was reached in the Working Group for a presumption in the legal standard on transparency that the standard would apply to future treaties referring to the UNCITRAL Arbitration Rules. Under that approach, the legal standard on transparency would apply, unless States otherwise provide by opting out of that legal standard (the “opt-out” solution). This solution was deemed to ensure a wider application of the legal standard on transparency than the second option tabled, which required the express consent of States that the legal standard on transparency would apply (the “opt-in” solution).<sup>77</sup>

#### (b) *Applicability of the legal standard to existing investment treaties?*

Concerns were expressed in the Working Group on any automatic application of this legal standard on transparency to existing investment treaties; any reference to the UNCITRAL Arbitration Rules should be interpreted in the light of public international law, as it is included in a treaty, and the Vienna Convention on the Law of Treaties would therefore apply. Hence, any application of the legal standard on transparency would not be possible without the consent of the States parties to the investment treaty, as UNCITRAL doesn’t have the authority to impose on States the application of UNCITRAL texts, investment treaties being the outcome of negotiations between States based on their consent.<sup>78</sup>

#### (c) *The chosen process*

The process is therefore an opt-out for future treaties (after 1 April 2014); and an opt-in for existing treaties (before 1 April 2014), the opt-in process meaning that: (i) the parties to an arbitration (“disputing parties”) agree to the application of the Rules on transparency in respect of the arbitration; (ii) the parties to the treaty, or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after 1 April 2014 to their application.

### 2. *The effect of the Transparency Rules, or what information/proceedings are made public—the rule and the exception*

#### (a) *The rule*

Article 2 provides for the publication of information at the commencement of arbitral proceedings: both parties have an obligation to provide the notice of arbitration to the repository provided for in the legal standard under article 8. The repository is to promptly make available to the public information regarding: (i) the name of the disputing parties; (ii) the economic sector involved; and (iii) the treaty under which the claim is being made.

<sup>76</sup>A/CN.9/712.20.

<sup>77</sup>A/CN.9/717.19&20.

<sup>78</sup>A/CN.9/717.38.

Article 3 addresses the documents to be made public: subject to the exceptions/carve-outs of article 7 of the Rules, the Rules provide for a list of documents to be made available to the public, to include: (i) the notice and response of arbitration; (ii) written submissions, including those of third persons and non-disputing party (or parties); as well as (iii) transcripts, orders, decisions and awards.

Article 6 addresses the hearings: unless there is a need to protect confidential information or the integrity of the arbitral tribunal (the carve-outs under article 7), the Rules provide for the presentation of evidence or for oral argument to be public (arts. 6 (1) and (2)). After consultation with the disputing parties, the tribunal may also decide to hold all or part of the hearing in private, for logistical reasons (art. 6 (3)).

Article 8 provides for a repository of published information: the Working Group retained the solution of a single registry/repository, under the aegis of the United Nations Commission on International Trade Law (UNCITRAL). ICSID and the PCA were also willing to accept that role.<sup>79</sup>

*(b) The exceptions/carve-outs*

Article 7 provides for the exceptions to transparency. There are two reasons why information shall not be made available to the public: (i) where information is considered confidential or protected; and (ii) where it is considered that disclosing information would jeopardize the integrity of the arbitral process. Article 7 (5) should also be flagged, as it provides that “nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.”

Confidential or protected information under article 7 (2) means: (i) confidential business information; (ii) information that is protected against being made available to the public under the treaty; (iii) information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (iv) information, the disclosure of which would impede law enforcement.

The arbitral tribunal will determine whether information is confidential or protected, after consultation with the disputing parties (art. 7 (3) in fine).

### 3. *Who is involved in the process?*

*(a) Submissions by a third person (article 4)*

A third person is defined as neither a disputing party, nor a non-disputing Party to the treaty; a third person wishing to make a submission shall apply to the arbitral tribunal in a concise written statement, providing information (listed under art. 4 (2), to include: (i) who this third person is (legal status, objectives, etc.); (ii) disclosure of any connection with a disputing party; (iii) disclosure of any financial assistance received; (iv) the nature of this third person’s interest in this arbitration; and (v) identification of the specific issues of fact or law it wishes to address.

The arbitral tribunal has discretion to accept written submissions by a third person, after consultation with the disputing parties, provided some conditions are met. The tribunal shall

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<sup>79</sup> A/CN.9/765.84 and 85.

also take into consideration the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties (art. 4 (3) (b)). An *amicus curiae* application comes indeed from a “friend of the court”, and is supposed to help the arbitral tribunal.

(b) *Submission by a non-disputing party to the treaty (article 5):*

The non-disputing party would be the home State of the investor, hence the other party to the underlying treaty, and would have access to the “*travaux préparatoires*” which could help the tribunal. Article 5 addresses two situations: (i) where it is an issue of treaty interpretation (art. 5 (1)); and (ii) where further matters are involved (art. 5 (2)):

Where it is an issue of treaty interpretation (art. 5 (1)), the arbitral tribunal: (i) shall allow submissions from a non-disputing party to the treaty, subject to the requirements of article 4 mentioned previously; (ii) may invite submissions from a non-disputing party to the treaty, after consultation with the parties.

For further matters (other than issues of treaty interpretation) (art. 5 (2)): Within the scope of the dispute, the tribunal may allow submissions from a non-disputing party to the treaty, after consultation with the disputing parties. In deciding, the tribunal shall not only take into consideration the factors listed in article 4 of the Rules, but also the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

It is interesting to note that the Rules provide for the arbitral tribunal not to draw any inference from the absence of any submission or response to any invitation under this provision (art. 5 (3)).

## II. THE CONVENTION

### A. Mandate and adoption

In 2013, UNCITRAL recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency on 1 April 2014. The Commission agreed by consensus to entrust the Working Group with the task of preparing a convention on the application of the Rules on Transparency to existing investment treaties.<sup>80</sup> In December 2014, the United Nations General Assembly adopted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“the Mauritius Convention on Transparency” or “the Transparency Convention” or “the Convention”).<sup>81</sup> It contains 11 articles, in addition to a preamble.

### B. Content and issues raised

#### 1. Scope of application

The Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before

<sup>80</sup>United Nations General Assembly resolution 69/116; see also A/CN.9/794.3.

<sup>81</sup>United Nations General Assembly resolution 69/116 of 10 December 2014.

1 April 2014. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules: (a) if the State of the investor and the respondent State are both party to the Convention on Transparency (bilateral or multilateral application); or (b) only if the respondent State is party to the Convention (unilateral offer of application). The Convention (and any reservation or withdrawal of a reservation) shall apply only to investor-State arbitrations that are commenced after the date when the Convention (reservation or withdrawal of a reservation) enters into force or takes effect in respect of each party concerned.

## 2. Reservations

There is the possibility for a State to exclude from the scope of application of the Convention: (a) a specific investment treaty; (b) a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules; (c) the unilateral offer to apply the Rules on Transparency. In the event of a revision of the UNCITRAL Rules on Transparency, there is the possibility for a State to declare, within six months of the adoption of such a revision, that it shall not apply that revised version of the Rules.

## 3. Entry into force of the Convention

The Convention was opened for signature in Port Louis on 17 March 2015, and after that at the United Nations Headquarters in New York by: (a) any State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty. The Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession (art. IX (1)). To date, 16 countries have signed the Convention, and Mauritius has ratified it.

## CONCLUSION

The Rules and the Convention came to be after a process, bringing together delegates representing countries from very different horizons and legal cultures, and bringing them to a common ground. Given the political nature of the instruments prepared, consensus was sometimes hard to find, and some concessions had to be made to move the process forward. The result has brought rules to life, that are not only applicable where the UNCITRAL arbitration rules apply, but also as a stand-alone text, the Rules on transparency being available for use in investor-State arbitrations initiated under rules other than UNCITRAL, or in ad hoc proceedings. The Rules have already been made applicable under a number of treaties concluded since 2014, including by reproducing provisions of the Rules in treaties. It will be interesting to watch how these Rules will be used, how practice will develop to protect the integrity of the arbitral process, and whether the goal of striking the right balance between opposing interests will be achieved in practice. It is early days yet, but these will certainly be interesting instruments to follow.

# **TRANSPARENCY IS A WAY AND A MEANS TO A MUCH BROADER END**

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It is my great pleasure to take the floor after the excellent presentation by my dear friend Rabab Yasseen, and what I have to say about transparency in international investment law and investment arbitration should nicely dovetail with the explanation that Rabab has given of the process that resulted in the adoption of the UNCITRAL Rules on Transparency and more recently, the adoption by the United Nations General Assembly, in its resolution 69/116, of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

I can only but congratulate my former colleagues of UNCITRAL for the inspiration, the tremendous work, the persistence and the achievement. With the amendments adopted to the International Centre for Settlement of Investment Disputes (ICSID) rules in 2006 and the provisions on transparency in most of the recent international investment agreements, transparency has now become a core element, a pillar of international investment law.

But to me, transparency is not an end in itself. Transparency is not a principle of international law or an obligation undertaken by States in and by itself. Its content or the ways to achieve it are too manifold and are bound to evolve over time. It is a means to an end. Transparency is a way and it is for the international community to continue to travel the route of transparency and not to stop with the signature of a convention or provisions of a treaty.

In a system as integrated and sophisticated as the World Trade Organization, transparency is a means to guarantee the functioning of the agreements, to achieve the balance of the international trading system, to ensure fairness, to ensure free trade of goods and services, to ensure that the playing field remains level for all players. It is not a target that can be achieved once and for all if it is not used to take the system to further levels. Achieving levels of transparency that will respond to these objectives require capacity-building, technical assistance, financial and institutional support to ensure that it moves from being a burden to an actual enhancer of international cooperation.

Similarly, in international investment law and particularly in investment arbitration, transparency is a means that is being used to achieve greater legitimacy of the system, to ensure public access and awareness, to ensure participation, to explain outcomes, to strengthen the rule of law. Transparency is a means to access knowledge, to ensure coherence and consistency, to ensure fairness in the decisions and awards, to guarantee accountability. However, I am sure that it is not a standard that will be reached once and for all, but rather an aim and an approach.

If you allow me, I would like to illustrate this view with three examples from the international investment system. I would like to explore how transparency could be further used to solve new issues as they arise, to deal with new circumstances and with new players, as they emerge.

Let me start with the recent appearance on the international investment scene of third-party funding. Three years ago, third-party funding did not exist on the radar screen of international investment arbitration. It had begun to find its way into funding of commercial arbitration, starting in Australia and then spreading through the United Kingdom into Europe and the United States. Today, it has become an important phenomenon in investment treaty arbitration, with funds and funders specializing in investment treaty disputes and funding more and more cases. Let me give you some data in this respect: 65 per cent of the law firms surveyed for an Arbitration Scorecard, July 2015 edition, have responded that they accept third-party financing for arbitrations.<sup>82</sup>

According to the statistics of one funder, in 2014, at least 60 per cent of the claimants in registered ICSID cases enquired about (but not necessarily sought or obtained) third-party funding before their cases were lodged.

How does that concern us in investment arbitration? It does because it raises technical issues of conflict of interest or of impecuniosity of claimants and the need for security for costs. But these are technical issues that can be addressed if they are known and transparency is clearly a means to deal with such issues.

The 2014 revision of the International Bar Association (IBA) *Guidelines on Conflicts of Interests in International Arbitration* includes wording that would require third party funding to be disclosed for the purposes of arbitrator conflicts.

But it concerns us beyond the technicalities, it concerns us because while the system of international investment law and investment arbitration is under the fire of sharp criticism by public opinion fearing dark rooms and unaccountable arbitrators, here comes yet another player that may further rock the boat. How will you explain to your taxpayers, if you are the Minister of Finance of a country, that the damages you had to pay will end in the pocket of “investors” in a fund that has speculated about the outcome of a dispute brought against your country by an investor, that will most likely see less than half of the damages in the end?

This is where transparency as a core element of the international investment system can offer a response and see to it that the existence of a financing by a third-party funder is disclosed to the tribunal or to the president of the tribunal and subjected to the transparency requirements foreseen in the Transparency Convention.

The EU proposal for the Transatlantic Trade and Investment Partnership (TTIP) has a specific article addressing third-party funding as follows:

**Article 8. Third-party funding**

1. Where there is a third-party funding, the disputing party benefiting from it shall notify to the other disputing party and to the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third-party funder.

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<sup>82</sup>Michael Goldhaber, Arbitration Scorecard, July 2015.

2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

And this is a first step as the involvement of third-party funding in investment arbitration is gaining traction in many regions and in disputes in the energy, oil and mining sectors.

Another set of issues where transparency can show the way is when dealing with corruption, bribery and other illicit payments and money-laundering. Corruption is tainting too many commercial and investment transactions in spite of drastic regulation at the domestic and international levels. International cooperation ensures that neither the corrupt official nor the briber will fall between the cracks of domestic legal systems and strengthens exchanges of information and investigation of corrupt business transactions. Not surprisingly, corruption, suspicion of corruption and accusations of corruption have also featured in several recent investment arbitration cases. An interesting and comprehensive study in this regard was written by Aloysius Llamzon, entitled *Corruption in International Investment Arbitration*.<sup>83</sup> Here again, transparency as a guiding principle can help tribunals in addressing corrupt business transactions and behaviours under international investment treaties.

It is clear to me from these three examples that transparency is an essential ingredient of the international investment system, not as a target but as a way and a means to a much broader end.

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<sup>83</sup>Aloysius P. Llamzon, *Corruption in International Investment Arbitration*, Oxford University Press (2014), the International Arbitration Series.

## **CLOSING REMARKS**



## **Mohamed Abdel Raouf**

*Director, Cairo Regional Centre for International Commercial Arbitration (CRCICA), Egypt*

The Conference managed to bring together 151 experts and professionals in international arbitration and investment from 22 nationalities from four continents (Africa, Asia, Europe and North America). It aimed at promoting a sustainable Euro-Mediterranean arbitration community as part of a broader agenda for securing investments, key for stabilization and economic growth in the South and the East of the Mediterranean.

After the opening statements, an introductory session was dedicated to discussing whether a Euro-Mediterranean legal and arbitral community exists as well as UNCITRAL's work in the field of international commercial arbitration.

The programme then covered the practice of international commercial arbitration in the Euro-Mediterranean area with special emphasis on the use of public policy exceptions by the MENA courts as well as the regional initiatives in international commercial arbitration.

The conference also dedicated two sessions to tackling the investment framework in the Euro-Mediterranean area, while focusing on the impact of the current TTIP negotiations on the investment policies between EU and MENA countries, the issues, challenges and changing landscape pertaining to investment arbitrations, including those involving MENA countries like Egypt, the current negotiation of investment treaties at a regional level and the protection and processes of arbitration under MENA regional investment treaties as well as transparency in investment arbitration.

Speakers highlighted the existence of some problems and challenges that international arbitration encounters, stressing the important role that a Euro-Mediterranean arbitration community should play in facing them.

In the introductory speeches, speakers demonstrated the geographical proximity and the common history shared by the countries of the region, which militate in favour of the existence of a Euro-Mediterranean community in general. A common legal culture also exists, since all the countries of the region adopt the civil law legal system rather than the common law system. Accordingly, the requirements for a legal community that shares legal culture are met. A Euro-Mediterranean legal community exists and has the capacity of establishing a Euro-Mediterranean arbitration community. Such capacity is reinforced by UNCITRAL's efforts in harmonizing the laws on arbitration and dispute settlement in the region.

Speakers also noted that there is a drift in the original purposes of international arbitration. Arbitration was conceived to be faster, less expensive and less adversarial than court proceedings. This is not the case anymore; the mechanism has lost many of its original advantages. The Euro-Mediterranean community, with the values it shares and the opportunities it has, may contribute to remedying these defects and hence ensuring justice and due process.

One of the successful examples of the common initiative for the creation and the maintenance of common values within the region is the Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED), which is a network that currently encompasses seven arbitration institutions in the region. ISPRAMED already issued best practices and common principles that institutions undertake to follow and apply regarding the independence and impartiality of arbitrators as well as the criteria for their selection. Such an initiative demonstrates that there is probably no need to create a Euro-Mediterranean arbitral institution, but rather a network between the already existing arbitral institutions to ensure that they are performing according to the best practices that they share and contribute to create.

Speakers also pointed out that, despite the important role that this region can play, there is little representation of Arab States in the international forums such as UNCITRAL. Arab States do not participate effectively in the elaboration of international instruments related to arbitration and dispute settlement. There is also a limited participation and presence of arbitrators from the region in international arbitration cases, which demonstrates a remarkable imbalance that may call into question the legitimacy of the process.

Some speakers also underlined that investment arbitration increasingly involves developed States that finally realized the deficiencies of the regime, and are seeking to reform it, although this might be, in the views of some speakers, a transformation of the system rather than a mere reform.

It was also indicated that investment arbitration faces many challenges and raises many issues, especially with respect to the enforcement of arbitral awards, the lack of transparency, the exorbitant costs and sometimes the abuse of the right to litigate by some foreign investors.

The speakers pointed out that there is a need to change the current system in order to strike a balance between the substantive and procedural rights and obligations of the host States and foreign investors. Indeed, in certain jurisdictions of the region, some local investors are making claims for equal treatment with foreign investors.

The speakers also highlighted the importance of transparency and the fighting of corruption as well as the issues pertaining to third-party funding.

In conclusion, the Euro-Mediterranean arbitration community is expected to play an important role in facing these challenges and in participating actively and efficiently in the reform of the current regime. It is also important that this community work on the elaboration and establishment of a common arbitration and legal culture, as well as the formation and the introduction of new arbitrators.

## Olivier de Saint-Lager

### *Co-président du groupe de travail sur la sécurité des investissements de la zone MENA (ISMED) du programme MENA-OCDE pour l'investissement*

M. de Saint-Lager a souligné, en clôture des travaux, le succès de cette seconde réunion, sa nombreuse participation (185 participants provenant de 25 pays) ainsi que l'importance et la qualité des contributions des 27 intervenants sur des sujets très variés décrivant un large panorama de la situation de l'arbitrage international dans la région. Ce tableau d'ensemble a permis à M. de Saint-Lager de relever les trois paradoxes suivants:

- D'abord, si les progrès de la matière sont manifestes dans la région aux différents plans *national* (amélioration continue des cadres législatifs nationaux), *international* (croissance du nombre et mise à jour des traités bilatéraux ou BIT, récents succès de la CNUDCI dans la conclusion des travaux sur la transparence de l'arbitrage-investissement et sur le guide d'application de la Convention de New York) et *institutionnel* (multiplication des centres régionaux d'arbitrage), on doit constater que l'expression de certains doutes n'a pas disparu, concernant la parfaite adéquation de cette procédure pour prendre en compte correctement les intérêts des États, mais aussi plus largement des intérêts publics ou tout simplement des parties privées les plus faibles économiquement. En outre, et de manière plus récente, on note l'émergence de critiques apparemment fondées, clairement exposées durant cette conférence, sur une multiplication des cas d'abus dans l'utilisation — voire l'exploitation — de certaines pratiques procédurales excessivement complexes dans la conduite de l'arbitrage international. Cette dérive est source de lourdeurs et d'un accroissement considérable des délais, des coûts et, par suite, constitue un ferment de rupture d'égalité entre les parties;
- Le second paradoxe vient du fait que si l'on peut se réjouir d'une très large internationalisation des pratiques de l'arbitrage, source de cohérence et d'harmonisation, on peut également s'interroger, dans le prolongement de ce qui vient d'être évoqué au sujet de dérives identifiées, sur les manifestations d'une certaine forme d'acculturation, ou d'une absence quasi-totale d'identité régionale dans le fonctionnement des procédures arbitrales. Il serait pourtant intéressant, au contraire, avec le souci d'enrichir la matière et de préserver une forme de pluriculturalisme, que les professionnels impliqués s'attachent à identifier ou à valoriser certains usages régionaux (fondés par exemple sur un sens profond de l'équité), qui contribuent à renforcer la légitimité régionale de cette forme particulière de règlement des différends, conduisant ainsi à une meilleure adhésion à la formule elle-même, à une meilleure exécution des sentences arbitrales, et enfin à canaliser certains défauts procéduraux dont les traits s'accusent progressivement et qui risquent à terme de nuire au succès de l'arbitrage;
- Enfin, le troisième paradoxe est la conséquence du double mouvement concomitant observé à l'échelle mondiale, d'intégration progressive de grands espaces économiques, et d'autre part, dans le même temps, la multiplication de phénomènes de

fragmentation sous-régionale, qu'ils soient dus à des situations de conflits géopolitiques installés ou consécutifs à des évènements générateurs d'instabilité transitoire. Ces deux mouvements combinés peuvent exercer des effets déstabilisants sur les Etats et accentuer, au Nord comme au Sud, les craintes exprimées de manière classique ou plus récente et finalement engendrer une forme de nouvelle défiance vis-à-vis de l'arbitrage international. Certaines réactions de parlementaires européens à l'égard du projet de traité sur le grand marché transatlantique (TTIP) illustrent bien cette tendance.

Bien entendu, cette conférence n'a pas reçu pour mandat de résoudre ces questions, mais les évoquer permet peut-être de prendre la mesure de nouveaux défis et, pour une prochaine fois, d'inscrire certains thèmes à l'ordre du jour, ce qui permettrait d'aller plus avant dans l'analyse, dans la perspective d'encourager la recherche de solutions.

Cette perspective réflexive est justement celle des travaux conduits par le groupe de travail de l'OCDE pour la sécurité des investissements dans la région MENA (ISMED) qui revisitent, sous certains angles à améliorer, certains thèmes économiques qui sont des éléments clefs de cette sécurisation des investissements, si nécessaires aujourd'hui, comme les partenariats public-privé (PPPs), la gestion des risques la fourniture de garanties, la contribution de la finance islamique au financement des grandes infrastructures, et bien entendu l'arbitrage international.

Cette conférence qui a stimulé notre réflexion et qui constitue une étape pour faire émerger des propositions innovantes afin de faire progresser l'arbitrage international dans la région MENA, a donc parfaitement rempli son rôle et l'organisateur principal de cette rencontre réussie, le Dr. Abdel Raouf et l'excellent centre d'arbitrage du Caire qu'il anime avec talent, avec toute son équipe et ses sponsors dont l'équipe de la CNUDCI, qui l'ont aidé à nous accueillir de manière aussi agréable et efficace, doivent tous en être très chaleureusement remerciés.



