



REPORT

Legal investment reforms

Tunis, May 2017

This report contains the summary discussions, agendas, list of participants and presentations of the regional seminar on “Improving investment frameworks: A focus on regulatory reforms” held in Tunis on 16-17 May 2017, as well as the two background papers on the “stocktaking of investment laws and recent and on-going reforms in the Southern Mediterranean region” and the “regulatory reforms in the Southern Mediterranean economies: focus on FDI restrictions”.

PROGRAMME
ON PROMOTING INVESTMENT
in the Mediterranean

Report

Context and participants

The two-day workshop on “*Improving investment frameworks: A focus on regulatory reforms*” was the first regional activity under the EU-OECD Programme on Promoting Investment in the Mediterranean, which aims at supporting the implementation of sound investment policies and effective institutions in the Southern Mediterranean region.

The workshop took place against the background of recent and on-going legal and institutional reforms of the investment frameworks in the Southern Mediterranean region. It provided a **forum for discussion and capacity-building** to government representatives, and allowed taking stock of the regulatory reforms that have been undertaken in the region, discussing the challenges that remain to be tackled to create an enabling regulatory framework. It also allowed a better understanding of the rationale behind the regulatory restrictions on investment and their impact on attracting investors. (See agenda of the workshop in [Annex 1](#)).

The workshop was very well attended by over **50 participants** from eight beneficiaries’ countries of the Programme (Algeria, Egypt, Jordan, Libya, Lebanon, Morocco, Palestinian Authority, and Tunisia), representatives of the EU delegation in Tunis, Economic and Trade counsellors from several EU members countries (Belgium, France, Spain, Czech Republic), international and regional partners (UfM, IFC), private sector representatives from the region (Algeria, Egypt and Tunisia) and OECD experts.

A complete list of participants is attached as [Annex 2](#) to this report.

Discussions

The workshop was opened by Mr. Lars Flocke Larsen, Attaché de Coopération, Private Sector Development & economic integration (EU delegation in Tunis) together with Ms Mathilde Mesnard, Deputy Director, Directorate for Financial and Enterprise Affairs, OECD and Mr Mbarek, Directeur général au Comité général de l'encadrement de l'investissement, Ministry of Development, International Cooperation and Investment of Tunisia (MDCI). Ms. Michaela Dodini, Head of the Trade Section of the EU delegation, made the closing remarks.

- **Session 1** explored the **challenges and impact of reforming investment regulatory frameworks** and discussed how Mediterranean governments have progressively revised their investment regulatory frameworks. A draft background note on investment laws and recent and on-going reforms in the Southern

Mediterranean region, was circulated to participants ahead of the meeting to support such a dialogue (See [Annex 4](#)). After an introduction on the key features of investment regulatory reforms in the region, each country shared its experience in reforming the investment legislation (See presentations given by the countries in [Annex 3](#)). This roundtable allowed an interactive peer-learning discussion on *why* and *how* countries have amended their respective investment legislation, and on the remaining implementation challenges. While each country in the region has its own specific needs and context, it was clear from the discussions that there are common challenges when it comes to reforming the investment frameworks and implementing such reforms and that further measures need to be taken to strengthen the general business and investment climate, including issues such as administrative streamlining and facilitated access to land which are of key importance in signalling predictability to investors. Jordan suggested developing a **regular dialogue** and **peer-review mechanism** on investment legal reforms between countries with the view to join efforts to put in place a conducive environment for investors in the region. This idea was welcomed by the other participants. Lebanon also stressed the need to collaborate among the region, and the need to pursue a common reflection on how to develop the regional value chains between the different mediterannean countries.

- **Session 2** focussed on the issue of foreign investment restrictions in South Mediterranean countries. Discussions were based on the draft background note prepared by the OECD to present the results of the **FDI Regulatory Restrictiveness Index** (See [Annex 5](#)). Currently, the Index is available for **Egypt, Jordan, Morocco, and Tunisia**. The other beneficiary countries of the Programme will progressively be included into the OECD FDI Regulatory Restrictiveness Index, provided that they fill the questionnaire that will allow the OECD to gather the information needed to integrate them in the ranking. Participants also shared their recent or ongoing experiences in reforming their regulatory restrictions to foreign investment. For instance, Jordan explained the rationale behind revising its FDI restrictions list in 2016 while Tunisia shared with the participants the process it is currently undergoing to set up a negative list of FDI restrictions, as part of the new investment law enacted in early 2017.
- In **Session 3**, discussions focused on broader enabling regulatory environment policies, such as product market regulations, trade in services barriers and their impact on investment. The OECD Economic Department made a presentation explaining that regulations impeding competition in the goods and services market have a impact on the business climate. It presented the PMR (**Product Market Indicator**), which measures the degree of which policies promote or inhibit competition in areas where competition is viable. So far in the region, only Egypt and Tunisia are included to this Index. Other countries showed interest in joining this Index. The **Services Trade Restrictiveness Index** (STRI), which identifies

policy measures restricting trade in services, was also presented, though no countries of the region has joined the Index yet. Together with the FDI Regulatory Restrictiveness Index, these indicators could be effective tools to help governments focus on priority reforms.

This session also provided a venue for **public-private dialogue**: legal experts and representative of businesses chamber from the region reported on the main regulatory obstacles to market access from a private sector's perspective, including (i) the need of full implementation and application of the reforms, (ii) the importance of after care services for investors, (iii) the legal quality of relevant rules (laws, regulations...). All participants underlined the need to adopt a holistic approach : reforms of investment-related laws (notably on trade, business and competition) are needed to attract both domestic and international investment. It was also stressed that investment is an environment and that no fiscal incentives can compensate the absence of conducive environment.

In conclusion, it was recalled that countries of the region are not competitors but should join their efforts to attract quality investment in the region, which makes this regional platform very relevant.

Next steps

- Continue the dialogue among key stakeholders on national efforts to improve legal investment regimes and to overcome implementation challenges: organise a **follow-up workshop in second half of 2018** and consider, as suggested by participants, introducing a regular **peer-review mechanism**, among Southern Mediterranean countries, on investment regulatory reforms.
- Progressively integrate all the countries of the Programme into the FDI Restrictiveness Index. (see **questionnaire** sent to participants to collect the necessary regulatory information) and update the background note prepared for the workshop.
- Follow up bilaterally with countries having expressed interest for more specific technical assistance and capacity-building needs. Consider undertaking country missions to meet with governmental stakeholders to further discuss possible areas of cooperation.
- Consider the possibility, at future stage of the project, of organising a workshop focusing on the issue of investment incentives, as requested by several countries during the workshop.



ANNEX 1: AGENDA

REGIONAL WORKSHOP

Improving investment frameworks: A focus on regulatory reforms

16-17 May 2017

Hotel Sheraton Tunis • Tunisia

Avenue de la Ligue Arabe, Tunis Carthage

Background

The EU-OECD Programme on Promoting Investment in the Mediterranean, launched in October 2016 in Tunis, is aimed at implementing sound and attractive investment policies and establishing effective institutions in the Southern Mediterranean region, with a view to attract quality investments, supporting job creation opportunities, local development, economic diversification and stability.

The Programme is governed by an Advisory Group, co-chaired by the European Commission and the OECD, with the participation of representatives of beneficiary countries, the Secretariat of the Union for the Mediterranean and other regional partners.

Objectives of the Workshop

As various countries in the region have undertaken reforms of their legal and regulatory investment regime, it is timely to collectively reflect on the role, relevance and rationale of such reforms, including the restrictions and barriers to investment and trade contained in investment regimes.

The workshop will offer a forum for discussion and capacity-building to government representatives, with a view to take stock of the regulatory reforms that have been undertaken in the region and to better understand the rationale and impact of FDI restrictions. The experience of other countries and regions will also be discussed.

Through peer learning and benchmarking of regulatory restrictions to FDI, the event will provide a comparative overview of the main restrictions, in particular to foreign investment, in the light of OECD's standards and international practice.

Two background documents will be shared ahead of the meeting. One document will build on the OECD FDI Regulatory Restrictiveness Index to assess the degree of regulatory restrictiveness to FDI of each country in the region. The second document will look at investment legislations in the region and give an overview of recent and ongoing legal reforms.

Tuesday 16 May 2017

09h00-09h30 Welcoming and Registration

09h30-09h45 **Opening session**

- **Abdelmajid MBAREK**, Directeur général au Comité général de l'encadrement de l'investissement, Ministry of Development, International Cooperation and Investment (MDCI)
- **Mathilde MESNARD**, Deputy Director, Directorate for Financial and Enterprise Affairs

09h45-13h00 **Roundtable on reforming investment regulatory frameworks: challenges and impact**

With a significant decrease of FDI in the South Mediterranean region, some countries have undertaken reforms, over the past years, in order to improve their legal and institutional framework for investment. This session will discuss countries' investment legislations and address recent and ongoing reforms, with a focus on regulatory restrictions.

Moderator : Hélène FRANCOIS, Legal Advisor, Investment Division, OECD

- **Introduction : Overview of investment laws and related reforms in the region**
Diane PALLEZ, Policy Analyst, Middle East and North Africa Division, OECD
- **Investment legal reforms in the Mediterranean: countries' presentation of the main features of their respective investment legislation and of recent or ongoing reforms**

In particular, the following topics will be addressed:

- What are the main features of the Investment Law and of planned reforms?
- What are the reasons and rationale behind the regulatory investment framework? What are the expected impacts?
- What are the main existing restrictions to investment? What restrictions are expected to be removed or maintained? If so, why?

11h00-11h15 *Coffee break*

- What were the main challenges during the amendment process of investment laws and regulations?
- How do you ensure institutional coordination during the amendment process as well as the implementation phase?

Representatives of Algeria, Egypt, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority and Tunisia

Discussions – Q&A session

Background Document: Stocktaking of investment laws and recent reforms of the investment framework in South Mediterranean countries.

13 :00- 14h30 **Lunch break**

14h30-17h00 **Restrictions to Foreign Direct Investment : benchmarking and reform**

This session addresses the issue of FDI restrictions in South Mediterranean countries. The OECD will present the results of the FDI Regulatory Restrictiveness Index, which benchmarks restrictions to FDI in 62 countries, and covering 22 sectors. The Index is a useful tool for policy makers to assess recent reforms with regards to FDI restrictions.

Moderator: Fares AL-HUSSAMI, Policy Analyst, Investment Division, OECD

- **Presentation of the results of the OECD FDI Regulatory Restrictiveness Index for South Mediterranean countries**

Fernando MISTURA, Policy Analyst, Investment Division, OECD

- **Revising negative lists of restrictions to FDI**

Experience of Jordan in establishing a negative list

- **Tunisia's experience in reforming restrictions: the role of the Management Unit by objectives (*Unité de gestion par objectifs – UGPO*)**

Sonia AYACHI, Ministry of Development, International Cooperation and Investment

Mouna HAMDEN, International Finance Corporation (IFC) in Tunisia

Discussions

Background document: Results of the OECD FDI Regulatory Restrictiveness Index for South Mediterranean countries.

To position themselves as attractive investment destinations within a globalised economy, characterised by an increasing interdependence, countries need to go beyond robust investment legislations and to create a broader enabling regulatory environment. Coherent investment policies are part of a regulatory framework that facilitate market access, promote healthy competition and favour trade, especially trade in services. This session focuses on the role of such regulations in improving the business climate, their impact on investment and the integration into global value chains.

Moderator: Majdi HASSEN, Executive Director, Institut Arabe des Chefs d'Entreprise (IACE)

- **Product market regulations and their impact on growth and investment**

Alain de SERRES, Head, Structural Surveillance Division, Department of Economic Affairs, OECD

- **Barriers to trade in services and their impact on investment climate and global value chains**

Frédéric GONZALES, Statistical Expert, Trade in Services Division, OECD

- **Private sector's perspectives on regulatory obstacles to market access**

Rym LOUCIF, Counsel, Gide Law Firm, Algeria

Mohamad TALAAT, Managing Partner, Baker McKenzie, Egypt

Martin HENKELMANN, Director General of the German-Tunisian Chamber of Commerce and Industry

Discussions

12h00-12h30

Closing remarks and next steps of the Programme

- **Michaela DODINI**, Head of Trade Section, Delegation of European Union in Tunisia
- **Hélène FRANCOIS**, Legal Advisor, Investment Division, OECD

Group picture

13h00-16h00

Bilateral consultations on the OECD Investment Restrictiveness Index - ON COUNTRIES' REQUEST ONLY

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ANNEX 2 : PARTICIPANT LIST

Liste des participants / participant list

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Ambassade de la Belgique a Tunis*

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M. Pavel CERNY

*Affaires Économiques et Sociales
Ambassade de la République Tchèque a Tunis*

European Union /Union Européenne

Mme Michaela DODINI

*Première Secrétaire, Chef de la section commerciale
Délégation en Tunisie
Union Européenne*

M. Lars LARSEN

*Attaché de Coopération, Secteur privé et Intégration
économique*

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*Chargé de mission au Service Economique
Ambassade de France à Tunis*

Spain/ Espagne

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Ambassade d'Espagne à Tunis*

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M. Abdelnasir NAJM

Libyan privatization and investment board

Morocco/Maroc

M. Anass BENNANI

*Chef de Cabinet
Ministère des Affaires Générales*

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International coopération
Ministère des Affaires Générales*

M. Mohamed Hicham FERRASSI *Comité National de l'environnement des affaires*

Palestinian Authority/Autorité palestinienne

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Mme Hilda AL SHEIKH *Legal Advisor
Palestinian Investment Promotion Agency (PIPA)*

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Office of the President*

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Mr. Abir CHOUATI	<i>Chef de Service, Direction de la Coopération Internationale Agency of Promotion of Industry and Innovation (API)</i>
Mr. Hatem LOUATI	<i>Chargé des Affaires juridiques et du contentieux</i>
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M. Mohamad TALAAT	<i>Partner Baker & McKenzie, Egypt</i>

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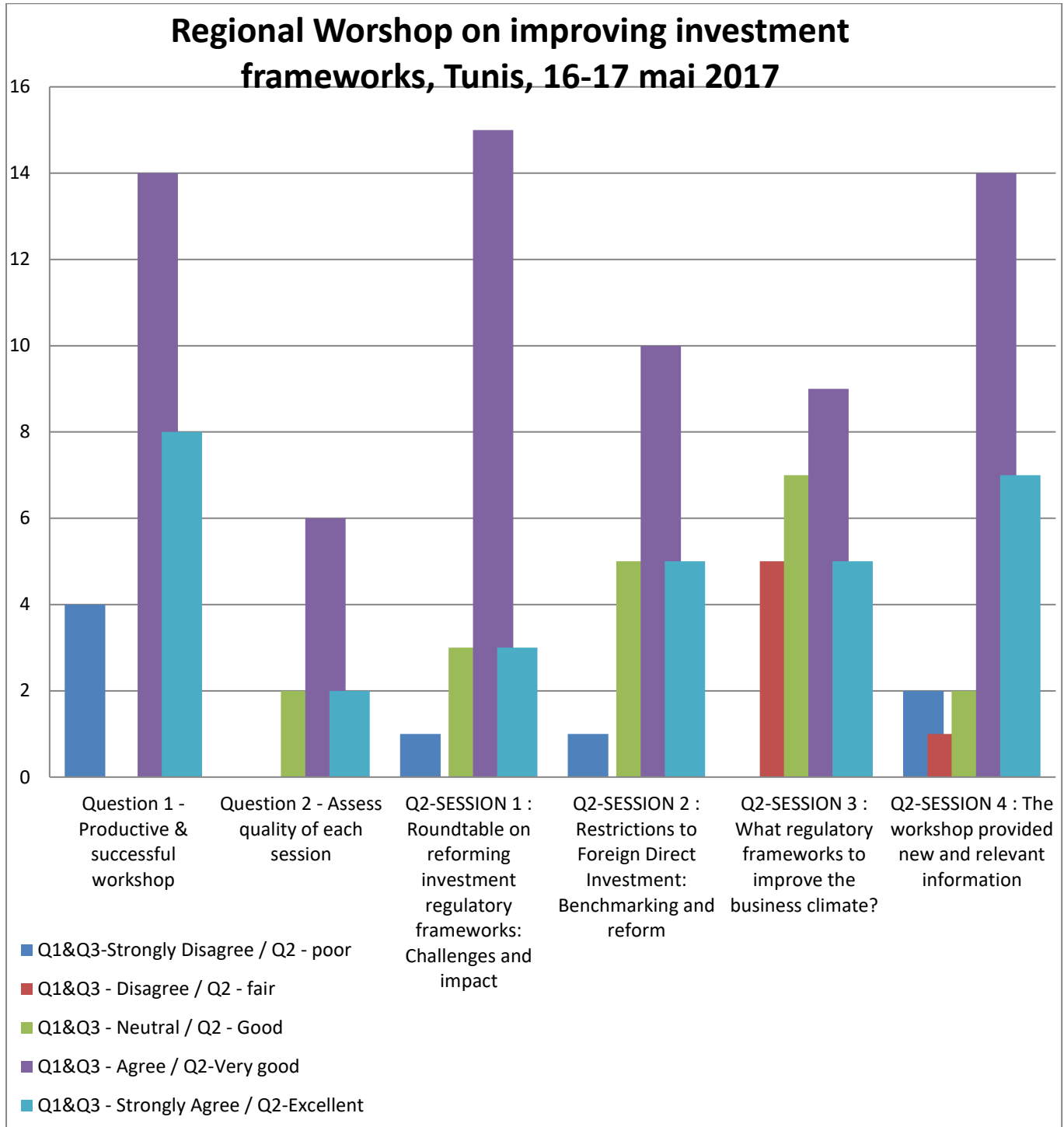
*Statistician
TAD/TSD*

Mme Nadia KAMELEDDINE

*Assistant
SGE/GRS/MEA*

Annex 3:

Feedbacks from participants (evaluation forms)



Annex 4:
Presentations given at the Workshop

Click [here](#) to access the presentations

Annex 5:
**Draft stocktaking of investment laws and recent and
on- going reforms in the Southern Mediterranean
region**

EU-OECD Programme on Promoting Investment in the Mediterranean

Draft stocktaking of investment laws and recent and on- going reforms in the Southern Mediterranean region

May 2017

This draft stocktaking has been prepared for the regional workshop “*Improving investment frameworks: A focus on regulatory reforms*” taking place on 16-17 May in Tunis. This workshop is part of the EU-OECD Programme on Promoting Investment in the Mediterranean, which aims at implementing sound and attractive investment policies and establishing effective institutions in the Southern Mediterranean region.

This draft takes stock of the investment legislation in the South Mediterranean region with a focus on the recent and on-going regulatory reforms. Following a brief overview of the region's recent FDI trends, it provides an overview of the investment laws and related reforms for each country, before presenting the key features of these laws.

Together with the draft on FDI restrictions (“*Background Note on Regulatory reforms in the Southern Mediterranean economies: Focus on FDI restrictions*”), it will serve as a reference document for discussions in the workshop. The draft will be revised, taking account of the workshop's discussion and additional comments provided by countries. It should not be cited while under review.

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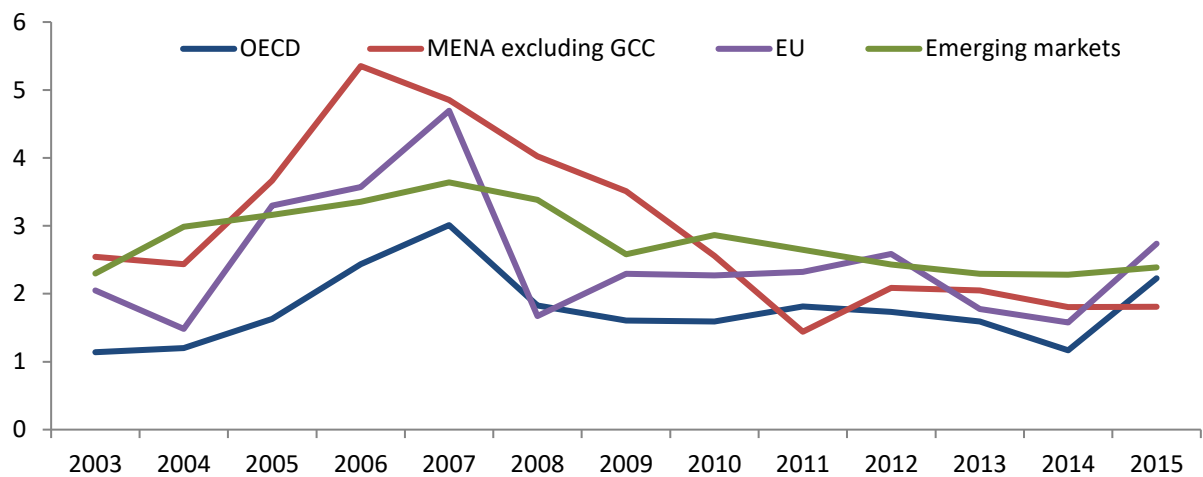
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1. The economic context in the MENA region

A drop of FDI flows in the MENA region

Over a couple of decades and prior to the global financial crisis of 2008, the Southern Mediterranean¹ region was experiencing an important economic expansion that translated into high-levels of growth, decreasing unemployment and higher openness to international markets. Relatively higher political stability during the 1990s and 2000s increased attention of foreign investors looking for new emerging opportunities. In this context, foreign direct investment (FDI) inflows to MENA countries peaked in 2006, representing more than 5% of the region's GDP, a value significantly higher than the average of 3.6% for the world's emerging markets².

Figure 1 FDI Inflows into the MENA region have fallen
(in % of GDP)



Source: UNCTAD latest data and OECD staff calculations

The weight of FDI in economies of the MENA region remained high until the outbreak of the global financial crisis of 2007-2008. Between 2008 and 2011, FDI inflows to the MENA region decreased by more than 60% (representing a drop of US 20 billion) due to the deceleration of global markets, and especially of the region's main economic and trade partners, namely EU countries. The drop was significantly more acute than that suffered by Emerging Markets in the same period – which averaged a fall of 20% on FDI inflows by 2011. Although MENA countries had registered a relatively dynamic economic growth even during the global economic and financial crisis, the worsened economic conditions contributed to a series of political uprisings across several countries which further weakened the international economic position of the region. After a feeble increase in 2012 FDI inflows decreased again, representing merely 45% of the pre-crisis levels in 2015. It is relevant to mention that a similar trend can be observed in Emerging Markets, as the recovery to pre-crisis levels of FDI inflows is still sluggish, even though the drop was significantly less severe than in the Southern Mediterranean region. Other

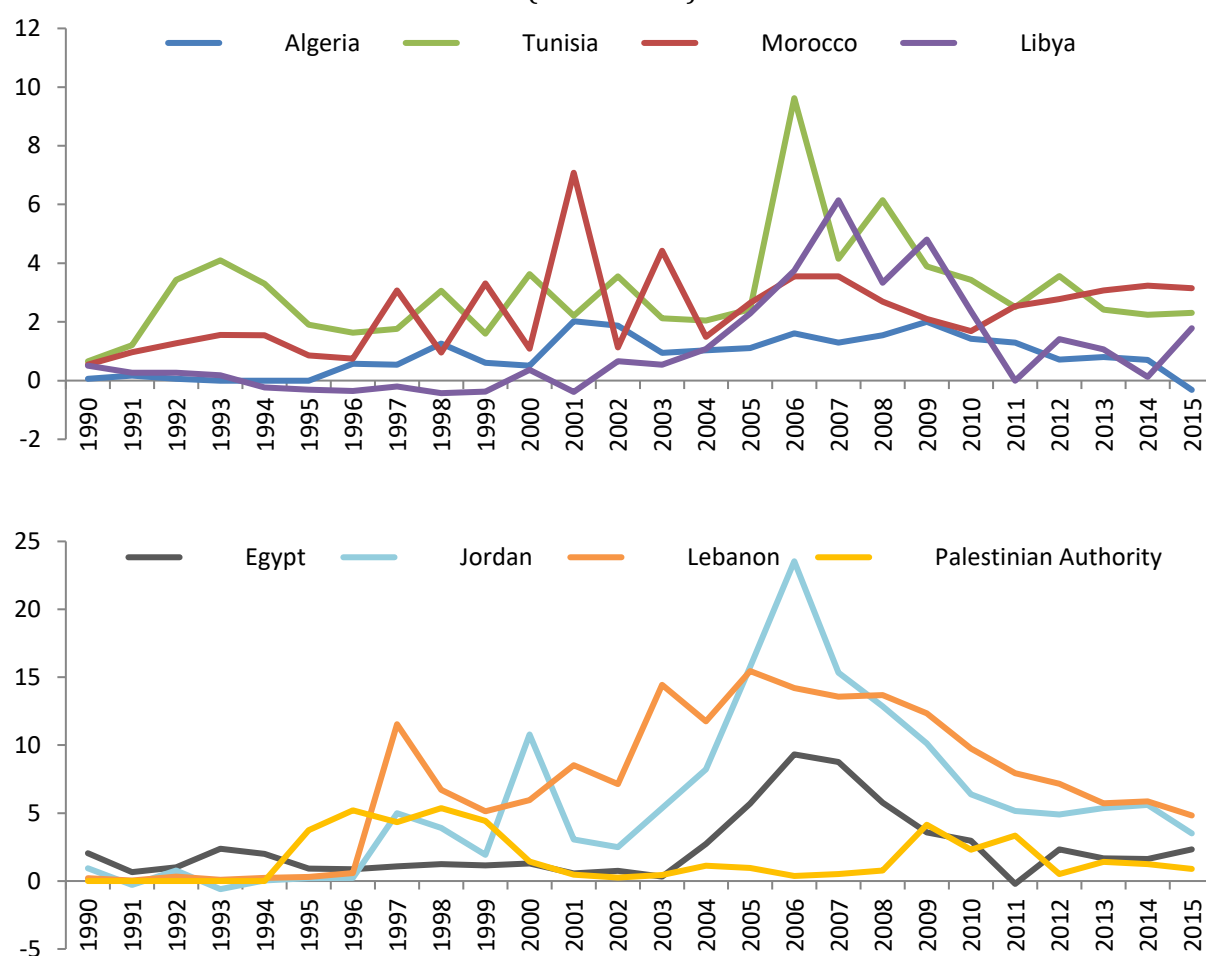
¹ The Southern Mediterranean region here designates the following jurisdictions: Algeria, Egypt, Jordan, Libya, Lebanon, Palestinian Authority, Morocco, Tunisia, which also fall into the category of MENA countries.

² Emerging Markets include economies of South East Asia, Latin America, Eastern Europe and the MENA region, such as Brazil, China, Egypt, Russia and South Africa.

regions that suffered important FDI drops have shown stronger recovery, as is the case of EU and OECD member countries.

Country statistics show a relative heterogeneity regarding the evolution of FDI. For instance, Morocco saw an increase of 27% of FDI inflows between 2008 and 2015, while Tunisia, Jordan, Egypt and Algeria experienced important drops (by respectively 63%, 54%, 27% and 122%). In Libya, previously the second top destination for FDI in North Africa after Egypt, FDI inflows were almost inexistent in 2014 but experienced a slow recovery in 2015. The weight of FDI inflows in the Palestinian Authority economy, while close to pre-crisis levels (0.9% of GDP), is also highly volatile.

Figure 2 The evolution of FDI Inflows into MENA countries is heterogeneous
(in % of GDP)

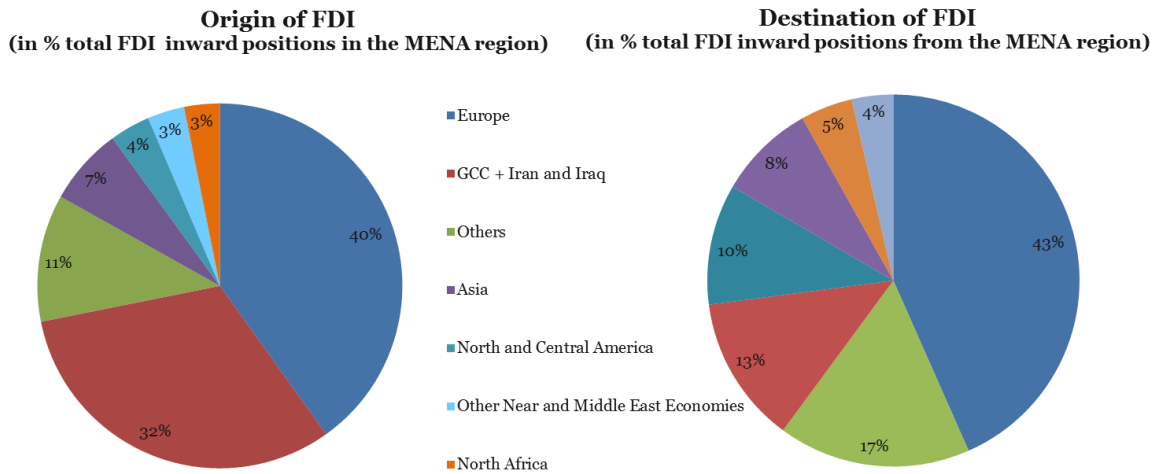


Source: UNCTAD latest data and OECD staff calculations

Limited availability of quality data and detailed FDI statistics in a number of MENA countries presents an obstacle for a more exhaustive assessment of country-by-country FDI characteristics. There is however enough aggregated data allowing for a preliminary analysis of intra- and inter-regional investment relations concerning the MENA region. Low regional economic integration and strong reliance on foreign sources of finance remain key features of the region. Despite the existence of regional investment and trade agreements, regional integration is limited and the main sources of FDI for MENA economies come from outside the

MENA region. Over 60% of total FDI positions in MENA countries originate from the European Union and other areas such as Asia and North America. The second major source of investments in the region comes from the GCC, which represents 32% of total FDI positions in the MENA region.

Figure 3 **There is room for improving the intra-regional investment**



Source: Data for 2015. 2015 IMF Coordinated Investment Survey and OECD staff calculations³

Intra-regional investments, excluding the Gulf Cooperation Council, represent less of 10% of total investments in the MENA (both in origin and destination). Non-GCC MENA countries only represent a total of 6% of total inward FDI positions. From the destinations perspective, the European Union remains the main destination of FDI from the MENA region and Gulf countries receive 13% of MENA countries direct investment.

³ Note: GCC + Iran and Iraq reflects mainly the investment flows from the GCC countries, since the weight of Iran's and Iraq's is limited; Other Middle Eastern countries: Armenia, Azerbaijan, Georgia, Israel, Jordan, Lebanon, Syria, Palestinian Authority and Yemen; North Africa: Algeria, Egypt, Libya, Morocco, Tunisia; Others: Sub-Saharan Africa, Oceania, South America, North Atlantic and the Caribbean

2. Overview of the investment legislation and related-laws per country with a focus on recent and on-going reforms

Against the background of the substantial drop of FDI in the Southern Mediterranean region, governments have made significant efforts to implement measures to promote the development of the private sector and attract more investments, through improvements in the regulatory, institutional and administrative environment for investment.

Indeed, despite political and security challenges in the region, establishing a sound and conducive business climate for investors is a priority. The main constraint to private sector growth is a business environment characterized by complexity, uncertainty, and unequal treatment of investors. Investors are looking for transparency and legal predictability with respect to issues like entry regulations, investor guarantees, and administrative and legal procedures, as well as for legal coherence among all regulations composing the investment framework. Sound domestic investment regulations, together with international investment instruments, can contribute to higher economic growth and help the region to meet its potential for development.

In this context, a number of countries of the region have reformed their investment laws, other countries have begun, and all need to continue to attract more and better investments. Recent and on-going reforms include the revision of the investment legal regime, the promotion of investment and the improvement of the institutional environment, the removal or reduction of restrictions to investment flows, and the simplification of business regulations, among others.

In particular, Jordan and the Palestinian Authority (2014), Egypt (2015), Algeria and Tunisia (2016) have recently revised their investment laws with the view to create a sound investment regulatory framework and improve their country's attractiveness. The Investment Charter of Morocco is also currently under revision and further countries are considering revising their investment regimes. Besides, Governments have revised a number of business-related laws in addition to the investment legal regime.

These reforms demonstrate a strong political will to create a better business and investment climate by enhancing the legal and institutional investment framework, and shall be further supported with a view to attract higher levels of investment and ultimately lead to the creation of more and better job opportunities.

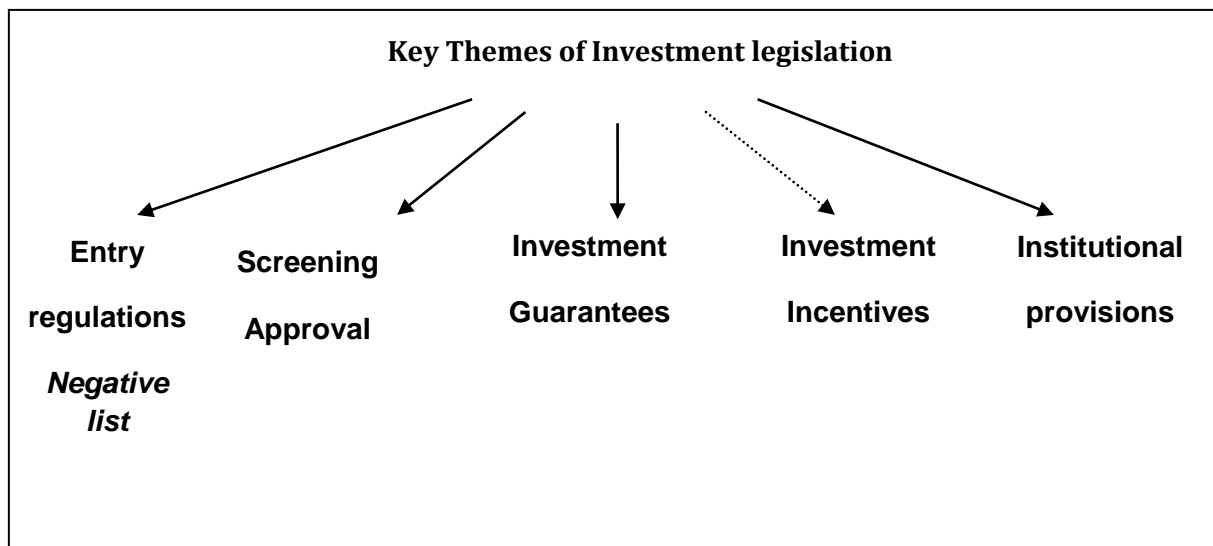
Country	Investment legislation	Recent investment-related reforms
Algeria	<ul style="list-style-type: none"> • New Investment Law No. 16-09 on the promotion of investment of 3 August 2016 (<i>Loi n°2016-09 du 3 juillet 2016 relative à la promotion de l'Investissement</i>) • Implementing Decrees of 5 March 2017 <p><i>See also the 2016 Finance Law in which some of the provisions of the former Ordinance n° 01-03 relating to the development of Investment have been moved to.</i></p>	<ul style="list-style-type: none"> • 2015 new public procurement regulation (<i>Décret présidentiel n° 15-247 du 16 septembre 2015 portant réglementation des marchés publics et des délégations de service public</i>)
Egypt	<ul style="list-style-type: none"> • 2015 Amendment to the Investment Law No 8 /1997 (Presidential Decree No 17/2015 of 12 March 2015) • Executive Regulations of 6 July 2015 • Presidential Decree Regarding the Establishment of the Supreme Council for Investment No 478/2016 of 16 October 2016 <p><i>→ 2017 draft Investment Law : the new draft has been approved by the House of Representatives on 7 May 2017 and is yet to be ratified by the President</i></p>	<ul style="list-style-type: none"> • Egypt's first bankruptcy law approved in January 2017 • New executive regulations of the movable collateral law of 22 December 2016 • New value-added tax (VAT) Law no. 67 of 2016 of 6 September 2016
Jordan	<ul style="list-style-type: none"> • New Investment Law No. 30 of October 2014 • Regulation for Organising Non-Jordanian Investments No 77 of 2016 	<ul style="list-style-type: none"> • On-going revision of the arbitration law • Public-Private Partnership Law No 31 of 2014
Lebanon	<ul style="list-style-type: none"> • Investment Development Law No.360 of 16 August 2001 	<ul style="list-style-type: none"> • Draft PPP law • Pending amendments to the Commercial Code
Libya	<ul style="list-style-type: none"> • Law No. 9/2010 on the Encouragement of both National and Foreign Investment • Executive decrees of 2012 and 2013 on foreign direct investments (Decree 22 of 2013, Decree 207 of 2012, Decree 103 of 2012, Decree 186 of 2012) 	
Morocco	<ul style="list-style-type: none"> • 1995 Investment Charter (<i>Charte de l'Investissement – Loi-cadre No.18-95 de 1995</i>) <p><i>→ On-going reform of the 1995 Investment Charter</i></p>	<ul style="list-style-type: none"> • 2017 reform of the Stock exchange law (<i>Loi 19-14 relative à la Bourse des valeurs de Casablanca, aux sociétés de Bourse ainsi qu'aux conseillers en investissement financier du 25 août 2016 publiée le 31 mars 2017</i>) • New law on limited liability companies of 21 January 2016 (<i>Loi n°78-12 modifiant et complétant la loi n°17-95 relative aux sociétés</i>)

Country	Investment legislation	Recent investment-related reforms
		<p><i>anonymes au Maroc</i>)</p> <ul style="list-style-type: none"> • New Law on Public- Private Partnerships of 24 December 2014 • Reform of the foreign exchange regime to be initiated in 2017
Palestinian Authority	<ul style="list-style-type: none"> • 2014 amendments to the Law on the Encouragement of Investment of 1998 (Law No.1 of 1998, amended by Presidential Decree n°2 of 2011 and Presidential Decree n°7 of 2014) 	
Tunisia	<ul style="list-style-type: none"> • New Investment Law of 30 September 2016 (<i>Loi n° 2016-71 portant loi de l'Investissement</i>), published on 7 October 2016 and entered into force on 1st April 2017 • Executive decrees of 30 March 2017 <ul style="list-style-type: none"> - <i>Décret gouvernemental n°2017-388 relatif à (i) La fixation de la composition du Conseil Supérieur d'Investissement et les modalités de son organisation ; et (ii) L'organisation administrative et financière de l'Instance Tunisienne de l'Investissement et du Fonds Tunisien de l'Investissement.</i> - <i>Décret gouvernemental n°2017-389 relatif aux Incitations financières au profit des investissements réalisés dans le cadre de la loi de l'investissement.</i> - <i>Décret gouvernemental n°2017-390 relatif à la création d'une unité de gestion par objectif.</i> 	<ul style="list-style-type: none"> • <i>Draft "Economic emergency law"</i> • <i>Ongoing reform on the exchange control regulations</i> • New 2016 banking law (<i>Loi relative aux banques et aux institutions bancaires N°2016-48 of 15 July 2016</i>) • 2015 new PPP Law (<i>Loi 2015-49 sur les partenariats publics-privés (PPP) du 27 novembre 2015</i>) • 2015 new competition law (<i>Loi n° 2015-36 du 15 septembre 2015, relative à la réorganisation de la concurrence et des prix</i>)

3. Key features of investment laws in the Southern Mediterranean countries and recent and on-going reforms

The key themes which are covered in most investment laws and implementing regulations include:

- Entry regulations including lists of exceptions to national treatment (“negative list”), provided for by implementing decrees;
- Screening and approval requirements for foreign investment, which shall also be included in separate decrees;
- Investors guarantees (expropriation/national treatment/free transfer guarantees/international settlement of disputes);
- Potentially a chapter on regulatory/fiscal/financial investment incentives, although it is not necessarily considered good practice to use special tax incentives to attract FDI.
- Institutional provisions regarding an investment promotion agency or/and a high level investment commission.



These key aspects will be discussed in the following paragraphs for each country, with a view to better understand the overall investment legal framework and the regulatory reforms which have been introduced to improve the business climate in the region.

Algeria: the 2016 Investment law

Algeria has adopted a new Investment Law in 2016⁴, which repeals most of the provisions of the Ordinance No. 01-03 on the development of investment and provides for significant changes to the

⁴ *Loi n°2016-09 du 3 juillet 2016 relative à la Promotion de l'Investissement*

legal framework governing investments. Six executive decrees dated March 2017 complete this new set of legal rules.

Overall, the new law brings more legal certainty and marks a significant step towards an easing of the regulatory framework applicable to investments in Algeria, through the removal of a number of regulatory constraints while maintaining fundamental guarantees for foreign investors and extending the missions of the Investment Promotion agency.

Entry regulations, approval procedures and business operating environment

The new Investment Law No. 16-09 applies, as in the 2001 Ordinance, to both domestic and foreign investment “*in economic activities for the production of goods and services*”. There are no sectors or activities which are specifically closed to FDI under this law. However, a number of activities, goods and services, listed in the implementing decrees⁵ are excluded from the benefits provided by the new Law. This includes retail and wholesale trade, over 150 types of services and 10 productive activities⁶, as well as all forms of importation, and some assembly handicraft activities and various products⁷.

In addition, in terms of entry regulations, it has to be noted that Algeria has introduced in 2015 a new specific import licensing system aimed to safeguard Algeria’s “*exterior financial balance*” which results in the extension of the import licensing system to new industrial and agricultural products, in particular from the European Union countries⁸.

Regarding approval procedures, according to the new Law, investments are merely subject to a prior registration with the National Agency for the Investment Development of investments, the ANDI⁹. The approval of the National Council for Investment (*Conseil National de l’Investissement*, CNI) is no longer required, except with regard to the exceptional advantages granted by the Law¹⁰.

The new Law also removes a number of regulatory constraints governing business operation, such as the obligation to present a positive foreign exchange balance to the benefit of Algeria for the duration of the project, and the annual information obligation to communicate the list of foreign shareholders in Algerian companies. On the other hand, the new Law still provides for a preemption right in favour of the State over share transfers from or to foreign investors.

In addition, a number of provisions of the 2001 Ordinance have been moved to the Finance Law for 2016, being thus still into force, including in particular:

⁵ See Executive Decree No. 17-101 of 5 March 2017 (*Décret exécutif n°17-101 du 5 mars 2017 fixant les listes négatives, les seuils d’éligibilité et les modalités d’application des avantages aux différents types d’investissement*)

⁶ Such as the concrete round, milling, mineral water production, tobacco manufacturing, gray cement manufacturing, brick Real estate development and the asbestos industry

⁷ Such as road transport equipment for goods and persons for own account, office and communication equipment not directly used in the production, Recoverable packaging, fixtures and fittings, social facilities,

⁸ Algerian authorities now required import licenses for certain European products such as cars, cement and concrete.

⁹ *Agence nationale pour le Développement de l’Investissement (ANDI)*

¹⁰ Executive Decree no 17-102 of 5 March 2017

- The “49/51” rule which requires foreign investments to be made through a partnership with national shareholders holding 51% of the share capital of the company ;
- The prohibition of foreign financing for investment projects, with a newly created exception for “strategic investments”, as approved by the Algerian authorities on a case by case basis.

Investors guarantees

The Algerian investment law provides essential guarantees to investors, in particular:

- Provision of fair and equitable compensation for expropriation;
- Granting of fair and equitable treatment to foreign investments
- Intangibility of the law: future revisions to the investment legislation will not apply to projects undertaken in the framework of the legislation in force at the time of the investment, unless the investor expressly requests it.
- Guarantee of transfer of fund, invested capital and investment proceeds, though the eligibility to this guarantee is now subject to thresholds.

Regarding the settlement of investment disputes, the new law provides the competence in principle of the Algerian tribunals, except where bilateral or multilateral conventions or an agreement including an arbitration clause are in place.

Investment incentives

The 2016 Investment Law reorganises the investment incentives scheme by offering three regimes of incentives depending on the level of investment and the contemplated activities: (i) the “ordinary” incentives regime, which apply to any eligible investment and which include various tax incentives, (ii) the additional incentives regime for specific sectors , namely tourism, industry and agriculture and/or employment-generating activities, (iii) the Investment agreement regime which allows granting exceptional incentives to investments of special interest for Algeria.

Institutional framework

The *Agence nationale pour le Développement de l’Investissement* (ANDI), created in 2006, is the main institution in charge of investment promotion in Algeria, which powers, organisation and functioning have been extended by the new investment regulations.

The ANDI is responsible for registering investments, monitoring progress of projects, preparing performance statistics and analysing them, as well as providing assistance and support to investors at all stages of the project, which include “after-care” services. The Agency is also responsible for managing the investment incentives and for simplifying procedures for investors, in collaboration with the concerned public entities.

Besides, the 2016 Investment Law establishes a new decentralised one stop shop system, which includes four regional centers dedicated to (i) the management of incentives, (ii) the completion of formalities, (iii) support for business creation and (iv) the territorial promotion.

Egypt: the 2015 Amended Investment Law and the 2017 draft Investment Law

Egypt has substantially reformed its Investment Law¹¹ in 2015¹² (the “Amended Investment Law”), with the view to enhance investors’ protections, simplify licensing procedures for investors, establish new dispute settlement mechanisms and create further tax and financial incentives. In addition, a full chapter of this law is dedicated to allocation of state land. The Amended Investment Law is currently under revision: a new draft, which is not yet publicly available, has been approved on 7 May 2017 by the Parliament and shall be ratified by Presidential Decree very soon.

Entry regulations, approval procedures and business operating environment

Since 1997, the Egyptian investment law allows 100% foreign ownership of investment projects. However, exceptions, provided for by sectorial laws, apply for specific sectors, such as agriculture, energy and mining.

A statutory license is generally required to create a company in Egypt, and additional licenses and government approvals may be needed depending on the activity of the company (for example in the financial sector). Certain additional approvals are also required for national security reasons regarding investment projects taking place in the Sinai Peninsula.

According to the Minister of Investment public statements, the new 2017 draft law shall help to reduce bureaucracy and also provide many electronic services and tools that help the investors to establish their companies online.

Investment guarantees

The Amended Investment Law has significantly extended the rights and guarantees granted to investors, which include:

- Guarantee against nationalization and confiscation, sequestration and seizure of the companies, confiscation and freeze of property and funds
- Guarantee against administrative interference in pricing the companies and establishments products
- Right to establish, develop and expand the investment project and right to finance, possess, manage, use and dispose it

¹¹ Law No 8 /1997 concerning Investment Guarantees and Incentives, as previously modified inter alia by Law 13/2002, Law 13/2004, Law No 91/2005, Law No 94/2005

¹² Presidential Decree No 17/2015 of 12 March 2015 , completed by the Executive Regulations of 6 July 2015

- Right to repatriate profits
- Right to liquidate the investment and to repatriate liquidation proceeds
- Right to own land for foreign companies, with the exception of land located in areas determined by decrees or governed by special laws
- Improved corporate veil protection shielding senior executives from prosecution.

Regarding settlement of investment disputes, arbitration is recognized as a mean on which the parties may agree to settle their dispute. In addition, the Amended Investment Law offers three alternative forums for investor-state disputes to encourage amicable settlement of investment disputes with the State:

1. The Complaint Committee for complaints against administrative decisions issued by GAFI in connection with the implementation of the Amended Investment Law;
2. The Committee for Settlement of Investment Disputes between an investor and a governmental body in connection with the implementation of the Amended Investment Law.
3. The Committee for Settlement of Investment Contract Disputes between investors and governmental bodies arising out of investment contracts.

According to the Minister of Investment statements, in the context of the 2017 draft investment law, a new committee for solving investments disputes could be established under the authority of the prime minister.

Investment incentives

The Amended Investment Law provides a number of tax incentives, including incentives for import and export such as a reduced customs rate of 2% on imports of machinery, equipment and devices for companies subject to the Law, and special incentives applying to free zones projects.

Besides, further non tax incentives can be granted to investors, upon decree of the Cabinet of Ministers for projects which meet one or more of the criteria provided for by the law¹³, such as in particular intensive labor requirement, reinforcement of local components used in product production, agricultural projects, road, maritime, and railway projects and Investment in specific remote and deprived areas.

According to press release, the new 2017 draft law includes new series of tax incentives for investors.

Institutional framework

¹³ The 2015 Executive Regulations (art. 36 to 38) set out the controls and regulations for the granting of these incentives

The Amended Investment Law provides that the General Authority for Investment (GAFI) shall act as a one-stop-shop investment window and serve as a liaison between investors and government agencies when applying for business licenses.

GAFI is also responsible, among others, for providing investment services, managing and regulating investment and free zones, allocating State-owned lands and granting permits for the Free Zones, as well as studying and making proposals about investment legislations

The Amended Investment law also created the new ***“National Center for the Development and the Promotion of Investment”*** in charge of facilitating investment into Egypt for the development of foreign investment within GAFI. Activities of this Center include preparing strategies to attract investors, preparing and implementing the government plan for investment promotion, coordinating with the concerned authorities and communicating with investors, international organizations, the press and the business community.

Jordan: the 2014 Investment Law and the 2016 Regulation for Organising Non-Jordanian Investments

For several years, Jordan has engaged into a reform process of its investment regime, resulting in a new Investment Law (Law No. 30 of 2014) that has been enacted in October 2014.

The Investment Law contains lengthy provisions on incentives and advantages, establishes a new investment institutional and facilitation framework, regulates Development Areas and Free Zones, and contains a chapter entitled General Provisions which provides for investment protection and guarantees. In addition, Jordan has enacted a new Regulation in 2016 for Organising Non-Jordanian Investments¹⁴.

Entry regulations, approval procedures and business operating environment

The 2016 Regulation for Organising Non-Jordanian Investments lists the economic activities that foreign investors are allowed to undertake, whether independently or in partnership with Jordanians.

The new Regulation distinguishes with regard to foreign investments between:

- Activities that allow full ownership by non-Jordanians which have been extended in the new Regulation.
- Activities that require 50% local ownership: the new Regulation broadens the scope of activities that non-Jordanian investors are permitted to participate in with a shareholding of no more than 50%.

¹⁴ Regulation for Organising Non-Jordanian Investments No 77 of 2016 published in the Official Gazette on 16/6/2016, which replaces the previous regulation No.47 of 2000

- Activities that require 51% local ownership: the new Regulation reduces the allowed participation of non-Jordanian from 50% to 49%, in several activities such as the maintenance of road transport means and the maintenance of radio and television broadcasting equipment.
- Restricted Activities, in which non-Jordanians are prohibited to invest in, including activities relating to security services.

In addition, the new Regulation now allows the full ownership by non-Jordanian in some activities which were previously limited to foreign participation, such as those relating to railway services.

Besides, the new Regulation removes the requirement for a minimum share capital contribution of JOD 50,000 for non-Jordanian investors.

Investment guarantees

There are only a few provisions on investors' guarantees and protection, which are drafted in a rather undetailed manner. The law provides for a standard of national treatment, a principle of equal treatment, guarantees against expropriation, transfer of capital and profits rights, including currency convertibility and profit repatriation rights.

An important provision introduced by the Law relates to dispute settlement. While the interim Investment Law of 2003, previously applicable, did not contain dispute settlement provisions per se and only referred to international conventions, the new Law gives foreign investors' access to arbitration in the event of a conflict between a foreign capital investor and the Jordanian governmental authorities. Such investment disputes shall first be amicably settled between the parties to the dispute. If such dispute does not reach settlement within a period of six months from the date the dispute has arisen, any of the parties may settle the dispute through arbitration in accordance with provisions of Jordan Arbitration Law or refer the dispute to an international centre for settlement of investment disputes according to the applicable conventions on settlement of investment disputes.

Investment incentives

The primary focus of the Investment Law is to provide investors with an incentives regime. The Law contains two series of detailed tax incentives, respectively applicable inside and outside the Free Zones and Development Zones.

Institutional framework

The main innovation of the new Investment Law is to merge the previous institutions involved in investment promotion into one umbrella body – the Investment Commission – and to establish an oversight body – the Investment Council. The Investment Commission shall host a one-stop-shop Investment Window in charge of granting licenses. Under the supervision of the Investment Council, the Commission is in charge of the preparation and annual update of a Licensing Manual.

Lebanon: the 2001 Investment Development Law

Investments in Lebanon are mainly governed by the Investment Development Law No.360 of 2001, which focuses on investment incentives.

Entry regulations, approval procedures and business operating environment

The Investment Development Law of 2001 does not differentiate between foreign and local investors and there are only few sectoral restrictions.

Foreign investors are generally allowed to establish a Lebanese company, a joint venture or a local branch or subsidiary of their company. There is no limitation on foreign participation into local companies, with a small number of exceptions (such as real estate, media companies, and banks, where specific requirements apply). The unlimited foreign participation principle is however mitigated by requirements that majority of the board of directors is Lebanese and each member of the board is holder of a limited number of shares.

In addition, investments projects need the prior approval of the Investment Development Authority of Lebanon (IDAL) to benefit from the advantages provided for by the Law.

Investment guarantees

The 2001 Investment Development Law does not include the usual investment guarantees found in most investment laws. Lebanese law however provides for essential guarantees for investors, which are disseminated in various laws. In particular:

- Banking laws guarantees the free repatriation of capital, including profits and funds.
- The Law on Expropriation¹⁵ as well as the Constitution clearly specifies that expropriation must be “for the public utility” and calls for fair and adequate compensation.

Regarding investment dispute settlement, the 2001 Investment Development Law provides that disputes between IDAL and an investor resulting from the incentive package deal contract shall be solved amicably. In the absence of an amicable solution, arbitration shall be sought in Lebanon or in any other international arbitration center, provided that this is determined in advance when applying to subject the project to the provisions of the Law and provided that the request meets the approval of the Board of Directors and is endorsed by the tutorship authority (The Prime Minister).

Investment incentives

The Investment Development Law aimed to encourage investments in targeted sectors, such as technology, information, telecommunications and media, tourism, industry, and agriculture and agro-industry.

¹⁵ Law No. 58, dated May 29, 1991

Under this Law, Lebanon is divided into three investment zones with different investment incentives for each zone. Incentives include facilitating issuance of permits for foreign labor, tax reductions on income tax and on the distribution of dividends.

Additional incentives may be granted through a “Package Deal Contract” in case of large investment projects regardless of the project’s location. These incentives include obtaining work permits for all categories of staff, full exemption from income taxes and from taxes on project dividends for up to 10 years, up to 50% reduction on construction permits fees as well as full exemption from land registration fees

Further incentives can also be found in other laws and legislative decrees depending on the type of investment and its geographical location.

Institutional framework

The “Investment Development Authority of Lebanon” (IDAL), created in 1994, is the main institution involved in investment promotion and its responsibilities have been reinforced with the 2001 Investment Development Law.

IDAL operates as a one stop shop for investors, by helping investors to obtain required permits for industrial, tourism and real estate projects, in addition to residence and work permits, and other similar formalities, and providing necessary information to investors on the legal and administrative aspects, financing options, location choice.

IDAL is also in charge of providing investors with fiscal incentives provided for by the law. Other responsibilities of IDAL include “after-care” services to investors as well as advisory services to the government on investment matters.

Libya: the 2010 Investment Law

Libya adopted a new investment law in 2010, “the Encouragement of both National and Foreign Investment Law No. 9/2010” which replaced the previous foreign investment laws. This new law lifted many FDI restrictions and introduced a number of investors’ guarantee. In addition, a new investment promotion institution, the Privatisation and Investment Board (PIB), was created in 2009.

Entry regulations, approvals and business operating environment

According to the 2010 Investment Law, investments are allowed “in all production and service areas”, with some exceptions provided for by Executive Regulations. Oil projects are excluded from the scope of the Investment Law at Article 27. In any cases, investments are subject to approval by the General People’s Committee.

According to the 2010 Investment Law, companies can be fully owned by foreign investors if the initial foreign investment exceeds LYD 5 million, with exceptions in some “areas of production and services”¹⁶ defined by Executive Regulations, which are restricted to Libyans only or in which foreign investors are required to establish a joint venture company with Libyan nationals owning the majority of the share capital of the company. This notably includes oil services, construction, industry, electricity, communications, transportation, agribusiness and the marine sector. The more recent Decrees of 2012 and 2013 on foreign direct investments created additional restrictions for foreign investors with regard to the type of company they are allowed to establish and the percentage of share capital they can own.

The 2010 Investment Law also regulates the setting up of branches and representative offices. Branches are allowed to be opened in a large number of sectors. This includes construction for contracts over LYD 50 million; electricity works; oil exploration, drilling and installation projects; telecommunications construction and installation; industry; surveying and planning; installation and maintenance of medical machines and equipment; and hospital management.

The investment Law also requires 30% of workers to be Libyan nationals and receive training. Foreign investors are still prevented from owning land and property in Libya and are allowed only the temporary use of real estate.

Investment guarantees

One of the most significant benefits included in the new investment law is the provision of legislative protection against nationalisation and expropriation unless accompanied by a law or judicial ruling.

Nevertheless, the law does not outline specific procedures to be followed in disputes between the state and the investor and leaves some decisions and rulings regarding the extension, suspension or halting of foreign projects to the discretion of the minister of economy.

Investment incentives

The 2010 Investment Law provides a series of incentives, such as tax and customs exemptions on equipment, a five-year income tax exemption, a tax exemption on re-invested profits and exemptions on production tax and export fees for goods produced for export markets. It also allows foreign investors to transfer net profits overseas, defer losses to future years, import necessary goods and hire foreign labour if local labour is unavailable. Foreign workers can acquire residency permits and entry/re-entry visas, renewable for five years, and transfer earnings overseas.

Institutional framework

The Privatisation and Investment Board (PIB) is the most important investment promotion institution in Libya, established in 2009 to assume responsibility for the Libyan privatisation

¹⁶ Article 8 of the 2010 Investment Law

programme and oversee and regulate FDI activities in the industrial sector under the investment law.

The PIB is in particular responsible for granting investment licenses for investments realised under the Investment Law No.9. A single window system for investors within the PIB was indeed introduced in 2013, offering a range of services, such as issuing licenses for entities registered under Law No.9. , processing customs duty and tax exemptions, approving project supplies and supervising labour contracts, including worker visas and residency permits.

Morocco: the on-going revision of the 1995 Investment Charter

Investments in Morocco, both foreign and domestic, are governed by the 1995 Investment Charter, initially in force for ten years. A new Investment Charter is currently being prepared by the government and shall be issued in the very next future. In addition, Morocco restructured in 2016 its investment promotion activities under the centralised Moroccan Agency for Investment Development and Export (*Agence Marocaine pour le Développement de l'Investissement et l'Export-AMDIE*).

Entry regulations, approval procedures and business operating environment

The 1995 Investment Charter provides for alleviation and simplification of administrative procedures related to the realisation of investments. The investment law makes no distinction between national and foreign investments and there is no regulatory discrimination for foreign investments based on national security interests or public order.

As per sectoral restrictions, foreign investments are allowed in almost all sectors except in a few sectors including air and maritime transport and fisheries, banking sector and rail transport allowing for only a minority stake. Several negative lists are publicly available and restrictions have been lifted on several sectors. Foreigners are also prohibited to carry out certain types of activities (regulated professions such as notary, lawyer, architect, or director of a higher education institution).

In addition, there are several categories of regulated activities and services that require a license issued in advance by the relevant oversight authorities, including telecommunications, road transport and insurance.

Investors do not have to obtain any prior approval for investment projects. Only a report to the Foreign Exchange Office is required in the six months following the completion of the operation.

Finally, access to agricultural lands is restricted for foreigners who may lease but not purchase.

Investment guarantees

The principle of non-discrimination is not expressly affirmed in the Investment Charter; however since the abrogation in 1983 of the Law on “Marocanisation”, discrimination towards foreigners no longer exists. In addition, the bilateral investment treaties signed with Morocco provide for non-discriminatory treatment of foreign investors covered by those treaties, i.e. national treatment, most-favoured nation and fair and equitable treatment standards.

The 1995 Charter also guarantees free transfer of funds and gives foreign investors the freedom to transfer profits and capital for persons who make investments in foreign currency.

The 1995 has no provision for systematic resort to international arbitration in investment disputes, although this is allowed by Moroccan law. In practice, before a dispute is submitted to the Administrative Tribunal of Rabat or to international arbitration, friendly settlement may be attempted at the local or central level. The regional investment centres may serve as the interface for receiving investors’ grievances and transmitting them to the local administration concerned. In the absence of a friendly settlement, the complaint is examined by the regional investment commission. However, if no solution can be found locally, the investor’s complaint will be sent to the Investment Commission chaired by the Prime Minister.

Investment incentives

The 1995 Investment Charter offers a wide range of incentives to all investors, regardless of the industry in which they operate (except agriculture), including corporate tax exemptions during the first five years of business, VAT exemptions on some equipment goods and materials for a limited period of time, and import duty exemptions for businesses that commit to making an investment of an amount higher than or equal to 200 million dirhams within the framework of an agreement concluded with the state.

Morocco has set up many free zones to offer companies incentives ranging from tax breaks, subsidies, and reduced customs duties.

Additionally, businesses associated with Casablanca Finance City (CFC) receive a variety of incentives, including exemption from corporate taxes for the first five years after receiving CFC status.

The new legislation shall create free zones in each of the country’s twelve regions and recognize the status of indirect exporter as well as create incentives for export-oriented and industrial companies.

Institutional framework

The draft law 60-16 approved by the Government in July 2016 institutes the Moroccan Agency for investments Development and exports (*Agence marocaine de développement des investissements et des exportations - AMDIE*), placed under the authority of the Ministry of Industry. This new entity is the result of the merger of three existing structures: the Moroccan Investment Development Agency

(AMDI), the Moroccan Center for Export Promotion (CPME) and the Office of Fairs and Exhibitions of Casablanca (OFEC).

Under this law, the new Agency will notably carry out the implementation of the State's strategy for the development of domestic and foreign investment and exports of all products and services, as well as their encouragement and promotion.

In addition to this centralised agency, regional Investment Centres (*Centres régionaux d'investissement – IRCs*) exist and operate as decentralized one-stop shops.

Palestinian Authority: the Investment Encouragement Law and its 2014 Amendment

Investments in the Palestinian Authority are mainly governed by the Investment Encouragement Law of 1998, which has been amended in 2014 by Presidential decree. The 2014 Amendment created in particular further tax incentives for investors.

Entry regulations, approval procedures and business operating environment

The Palestinian Investment Law does not itself contain any restrictions to foreign investments. According to the 2014 Investment Law, any investor may invest in any sector of the Palestinian economy, unless it contravenes other laws. However sectorial restrictions are provided for by other laws.

In addition, certain activities and sectors require the Council of Ministers' pre-approval, such as electrical power generation/distribution, waste and solid waste reprocessing, wired and wireless telecommunication, and radio and television, as well as purchase of land by foreigners.

Besides, the Palestinian company law provides for limits on foreign participation into local companies. A foreign investor should own no more than 49 percent of a company, with exceptions that can be granted by the Ministry of National Economy.

Investors guarantees

The 2014 Palestinian Investment law makes no distinction between foreign or local investors and contains a whole chapter on investment guarantees, including:

- guarantee of non-discrimination of investors, except in exceptional cases for a public purpose with due process of law, and fair compensation
- guarantee that investments cannot be nationalised, confiscated or expropriated except for public purposes in which case a compensation of the fair market value must be paid.
- guarantee of free transfer of funds except in cases where this is in conflict with bankruptcy or insolvency laws, laws to security issues, criminal or penal laws, tax laws or other laws applying in this case

Regarding dispute settlement between the investor and official agencies, the 2014 Amendment to the Investment Law provides for binding arbitration or for the competence of Palestinian domestic courts. These provisions are to be further detailed by Executive Regulations.

Investment incentives

The Palestinian Investment Law offers a number of tax incentives for investors, including exemption from income tax for a limited period of time varying according to the amount of the investment and its sector.

In addition, the 2014 Amendment creates an “ Incentives Package Contract” under which PIPA may grant the investor either tax or non-tax incentives in exchange of the investor's commitment to the implementation of the project in accordance with the conditions set forth in this contract.

The 2014 Amendment defined the targeted sectors, which are: agriculture, industry and tourism.

Institutional framework

The Palestinian Investment Promotion Agency (PIPA), placed under the authority of the Ministry of National Economy, is the main institution in charge of the investment promotion in Palestine. It was established in 2000 and its powers have been strengthened by the 2014 amendment to the Investment Law. It is composed of both representatives from both the private and the public sector.

PIPA is responsible for facilitating investment establishment in Palestine through reviewing investment laws and giving recommendations and promoting Palestine as an attractive location for FDI. It operates as a one stop window for investors, and is in charge of maintaining after care services for investors.

The new amendment gave PIPA the right to ratify the Incentives Package Contracts with investors as well as to issue licenses and registration for projects if the concerned agencies have failed to do so within thirty working days.

Besides, in 2003, the Palestinian Investment Fund (PIF) was created to strengthen the Palestinian economy through key strategic investments.

Tunisia: the new 2016 Investment Law

Tunisia has undertaken a major reform in 2016 with the enactment of a new Investment Law¹⁷, entered into force in April 2017.

¹⁷ *Loi n° 2016-71 du 30 septembre 2016, portant loi de l'investissement which repeals the 1993 Investment incentive code*

This new Investment Law addresses all the classical key themes for investors: market access conditions, guarantees and obligations of the investors, investment incentives and institutional issues. In addition, the new Law provides a specific chapter on the settlement of disputes between the State and investors, with the provision of alternative dispute settlement mechanisms such as conciliation and arbitration.

Besides, the Tunisian government is currently preparing an "economic emergency law" "aimed at reducing the administrative obstacles, for priority national projects which have a great capacity of recruitment especially in the interior of the country.

Entry regulations, approval procedures and business operating environment

The new Investment Law reiterates the principle of freedom to invest in Tunisia.

Regarding entry regulations and authorizations, a decree establishing a "negative list" of all activities that will require prior approval shall be adopted by the end of the year. To that end, a regulatory unit within the Ministry of Investment (*Unité de Gestion Par Objectifs – UGPO*) has been appointed in April 2017 which is in charge of setting up licenses/authorisations for investment operations.

This list will provide some clarity on the different administrative authorisations, procedures, delays and conditions required for the realisation of an investment in Tunisia.

Investors guarantees

The new Law provides for the essential rights and guarantees for investors, including:

- Provision of fair and equitable compensation for expropriation;
- Free transfer of funds abroad
- Guarantee of non-discrimination
- Guarantees regarding the administrative authorizations on investments which have to be grounded in writing.

In addition, the new Law grants investors the right to recruit foreign management up to 30% of the management staff during the first three years, and 10% from the fourth year onwards, under certain conditions.

Institutional framework

The 2016 Investment Law reorganises the investment institutional framework by establishing three new entities:

- 1) The Tunisian instance for investment (*Instance Tunisienne de l'Investissement*), under the authority of the Minister of investment. This new instance, which shall be operational in January 2018, will be responsible for investment authorizations for projects above 15 million dinars; below this threshold the existing Industry Promotion agency (APII) remains in charge. In addition, a specific position (« *Interlocuteur Unique de l'Investisseur* ») is created within the

Instance to assist investors to obtain the required authorisations for their projects. This new entity will also propose investment policies reforms to the Higher Council for Investment

- 2) The Higher council for investment (*Conseil Supérieur de l'Investissement*), chaired by the Tunisian Prime Minister, and composed of ministers in charge of investment policies will define investment strategies of the country and be responsible for the promotion of investments and the improvement of the business climate in Tunisia.
- 3) The Tunisian fund for investment (*Fonds Tunisien de l'Investissement*), in charge of granting the incentives provided for by the law and taking participations in venture capital funds.

Investment incentives

The new Investment Law provides many incentives to be granted to direct investments made in Tunisia under certain conditions. These incentives apply for priority sectors, determined by decree. Specific “Regional development” and “Sustainable development” grants are also provided.

The investments of “national interest”, to be defined by decree, may benefit from a reduction of tax rate for a maximum period of ten years, the payment of an incentive and the payment of infrastructure expenses by the Tunisian State.

Conclusion on the investment frameworks in the Southern Mediterranean region

-

Key features and challenges

- Governments have undertaken **major legal and institutional reforms** to improve their investment frameworks. The vast majority of policies adopted by the countries of the region took place in very recent years, as the political and economic context was not favourable for different reasons. **A full and effective implementation** of reforms is yet needed to enhance the business climate and operational environment, and ensure/restore investors’ confidence.
- Investment laws of the region provide for **essential investment guarantees**, including free transfer of funds, recourse to arbitration and guarantee against expropriation. General Exceptions to national treatment provided in “negative lists” exist in some legislation and **sectorial restrictions to FDI, found in several different legal texts, are still numerous.**
- **A single window system (“one stop shop”)** has been introduced in most investment laws of the region to help investors overcome administrative hurdles. However in practice, most **IPAs are still establishing** these one stop shops and IPAs services and investment promotion strategies are not fully implemented.
- **Investment incentives** have been significantly reinforced in the recent investment reforms. While these incentives pursue the legitimate aim of attracting more investment for job creation and territorial development, incentive schemes shall be **based on a formal cost-benefit analysis.**

Annex 6:

**BACKGROUND NOTE ON REGULATORY REFORMS IN
THE SOUTHERN MEDITERRANEAN ECONOMIES: FOCUS
ON FDI RESTRICTIONS**

EU-OECD Programme on Promoting Investment in the Mediterranean

BACKGROUND NOTE ON REGULATORY REFORMS IN THE SOUTHERN MEDITERRANEAN ECONOMIES:

FOCUS ON FDI RESTRICTIONS

May 2017



**EU-OECD PROGRAMME ON
PROMOTING INVESTMENT**
in the Mediterranean

This background note is a draft document. Please do not quote or cite. Comments are welcome.

This background note has been prepared for the regional workshop “Improving investment frameworks: A focus on regulatory reforms” taking place on 16-17 May in Tunis. This workshop is part of EU-OECD Programme on Promoting Investment in the Mediterranean launched in October 2016, which aims at supporting the implementation of sound investment policies and effective institutions in the Southern Mediterranean region (MED region). As various governments in the region have recently introduced changes in their legal and regulatory regime to foreign investment, or are in the process of doing so, it is timely to collectively reflect on the role, relevance and rationale of such reforms. This is the focus of the first pillar of the EU-OECD Programme on Promoting Investment in the Mediterranean.

This note was elaborated to support such dialogue. It provides an initial overview of the main regulatory restrictions to foreign investment in the MED region and presents the analytical framework and tools which will be used to monitor FDI regulatory reforms in the region over the next two years of the Programme. This monitoring of FDI regulations is expected to help identify priorities for reform and communicate success and progress in region.

Particularly, it presents the OECD FDI Regulatory Restrictiveness Index, which will be used as the analytical tool behind this work. The Index is a useful tool for policy makers to assess recent reforms with regards to FDI restrictions. It allows the benchmarking of FDI restrictions in 62 countries across 22 sectors. All MED economies participating in this project are expected to be integrated into the Index by the end of the Programme. Currently, the Index is available for five of the nine MED economies participating in the Programme, notably: Egypt, Israel, Jordan, Morocco, and Tunisia, which are adherents to the OECD Declaration on International Investment and Multinational Enterprises. For the integration of the remaining economies (i.e. Algeria, Lebanon, Libya, and the Palestinian Authority), a questionnaire has been elaborated and annexed to this note to allow the appropriate collection of the necessary regulatory information from participating economies. The OECD Secretariat will support MED economies authorities in filling the questionnaire during the next months. Answers to the questionnaire are expected to be sent to the OECD Secretariat before *15 September 2017*. An updated and final version of this background note benchmarking MED countries FDI regulatory environment will be circulated once the results for all MED economies are available.

For further information on the OECD FDI Regulatory Restrictiveness Index please visit: <http://www.oecd.org/investment/fdiindex.htm>

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I. Introduction

1. As various governments in the southern Mediterranean region (MED region) have recently introduced changes in their legal and regulatory investment regime, or are in the process of doing so, it is timely to collectively reflect on the role, relevance and rationale of such reforms.¹⁸ This is the objective of the first pillar of the EU-OECD Programme on Promoting Investment in the Mediterranean, funded by the EU and implemented by the OECD. In particular, contrasting regulatory trends are taking place in the region with regards to foreign direct investment (FDI): while some economies are progressively opening their regime to foreign investment or maintain a status-quo, others are introducing further regulatory restrictions to FDI.

2. The objective of this background note is to support this work programme. It provides an initial overview of the main regulatory restrictions to foreign investment in the MED region and presents the analytical framework and tools which will be used to monitor FDI regulatory reforms in the region over the next two years of the Programme. This monitoring of FDI regulations is expected to help identify priorities for reform and communicate success and progress in the region.

3. The proposed framework builds on the OECD's instruments and principles for an enabling investment environment. It also draws on the OECD FDI Regulatory Restrictiveness Index (the Index) to shed a comparative light on restrictions on foreign investment across MED economies. The Index measures statutory barriers against foreign investment in over 60 countries worldwide and in 22 sectors, and also allows tracking reforms overtime for significant number of countries. By looking only at discrimination on the books and not at how rules are implemented, the Index can only provide part of the answer to shortcoming in the investment climate for FDI, but it does provide an objective reality check on the question of whether the policy setting is relatively stringent for foreign investment.

4. The Index is currently available for five of the nine MED economies participating in the Programme, notably: Egypt, Israel, Jordan, Morocco, and Tunisia, which are adherents to the OECD Declaration on International Investment and Multinational Enterprises. As such, the Index reflects these countries' list of exceptions to national treatment under the OECD National Treatment Instrument, updated yearly for the purposes of the Index, thus essentially reflecting discriminatory measures in their legal framework as of December 2016. The remaining MED economies not yet covered by the index, i.e. Algeria, Lebanon, Libya, and the Palestinian Authority, are expected to be integrated into the Index by the end of this Programme. For this, a questionnaire has been prepared to collect the necessary information with the competent authorities involved. To make sure information is up to date, the OECD will follow-up bilaterally with all delegations participating in this project to implement the questionnaire.

5. Subsequent versions of this background note will be prepared to reflect a more thorough comparison of the regulatory environment for FDI across the MED economies based on the collected information and the integration of the remaining MED economies to the OECD FDI Regulatory Restrictiveness Index.

II. The OECD's framework for an open and non-discriminatory investment regime

6. The OECD has long acknowledged the long term benefits of an open and non-discriminatory international investment environment. Investment is a critical condition to spur growth and sustainable development. It expands the productive capacity of an economy, drives job creation and income growth.

¹⁸ Please see the other background note prepared for this workshop "Stocktaking of investment laws and recent and on-going reforms in the Southern Mediterranean region" for further information.

While investment is mostly undertaken by domestic firms, international investment can sometimes provide additional advantages. Beyond bringing additional capital to a host economy, evidence suggests that FDI can help to improve resource allocation and production capabilities, can act as a conduit for the local diffusion of technological and managerial expertise such as through the creation of local supplier linkages, and can provide improved access to international markets (Moran, Graham and Blomström, 2005).

7. The potential benefits of FDI are now mostly accepted across governments and attracting FDI has become an important policy tool to finance development in many countries. Nonetheless, concerns over the loss of national sovereignty in certain situations and the protection of national industries continue to lead governments to impose restrictions on such capital flows. While in manufacturing industries great FDI liberalisation efforts have been undertaken as governments have more easily accepted the benefits of FDI in those industries, service sectors and primary industries are still relatively more restrictive to foreign investors, although this varies greatly across countries.

8. At the OECD, the challenge of setting up an enabling framework for investment that works towards the public interest has been treated prominently within its investment policy community. The OECD Investment Committee has been a forum for intergovernmental dialogue on how governments can reconcile the need to preserve and expand an open international investment environment with their duty to safeguard the essential security interests of their people. As the custodian of key international investment instruments – the *Code of Liberalisation of Capital Movements* and the *Declaration on International Investment and Multinational Enterprises* – the Organisation has overseen progress in liberalisation for more than 40 years.¹⁹ Discussions to date under the *Freedom of Investment Roundtables* hosted at the Investment Committee since early 2006 have confirmed the continuing relevance of the basic principles underpinning these instruments – transparency, liberalisation and non-discrimination. In 2009, OECD members and other participating governments developed additional guidance for the one exception to non-discriminatory investment policies provided for in these instruments – that governments may take measures they “consider necessary to protect essential security interests” and to maintain “public order or the protection of public health, morals and safety”. The discussions have revealed strong support for three principles for investment policy measures addressing essential security interests: 1) transparency and predictability, 2) proportionality; and 3) accountability (Box 1).

¹⁹ Countries which have adhered to the Declaration on *International Investment and Multinational Enterprises*, as well as the related Decisions and Recommendations by the OECD Council, including the National Treatment instrument, are the 35 OECD member countries and 27 non-member economies, including Egypt (2007), Jordan (2013), Morocco (2009), and Tunisia (2012).

Box 1. OECD Investment Policy Principles and Guidelines for Recipient Country Investment Policies Relating to National Security

Non-discrimination: Governments should be guided by the principle of non-discrimination. In general governments should rely on measures of general application which treat similarly situated investors in a similar fashion. Where such measures are deemed inadequate to protect national security, specific measures taken with respect to individual investments should be based on the specific circumstances of the individual investment which pose a risk to national security.

Transparency/predictability – Information on restrictions on foreign investment should be comprehensive and accessible to everyone. While it is in investors’ and governments’ interests to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as possible so as to increase the predictability of outcomes.

Codification and publication. Primary and subordinate laws should be codified and made available to the public in a convenient form (e.g. in a public register; on internet). In particular, evaluation criteria used in reviews should be made available to the public.

Prior notification and Consultation. Governments should take steps to notify interested parties about plans to change investment policies. Governments should seek the views of interested parties when they are considering changing investment policies.

Procedural fairness and predictability. Strict time limits should be applied to review procedures for foreign investments. Commercially-sensitive information provided by the investor should be protected. Where possible, rules providing for approval of transactions if action is not taken to restrict or condition a transaction within a specified time frame should be considered.

Disclosure of investment policy actions is the first step in assuring accountability. Governments should ensure that they adequately disclose investment policy actions (e.g. through press releases, annual reports or reports to Parliament), while also protecting commercially-sensitive and classified information.

Regulatory proportionality –restrictions on investment, or conditions on transaction, should not be greater than needed to protect national security and they should be avoided when other existing measures are adequate and appropriate to address a national security concern.

Essential security concerns are self-judging. OECD investment instruments recognise that each country has a right to determine what is necessary to protect its national security. This determination should be made using risk assessment techniques that are rigorous and reflect the country’s circumstances, institutions and resources. The relationship between investment restrictions and the national security risks identified should be clear.

Narrow focus. Investment restrictions should be narrowly focused on concerns related to national security.

Appropriate expertise. Security-related investment measures should be designed so that they benefit from adequate national security expertise as well as expertise necessary to weigh the implications of actions with respect to the benefits of open investment policies and the impact of restrictions.

Tailored responses. If used at all, restrictive investment measures should be tailored to the specific risks posed by specific investment proposals. This would include providing for policy measures (especially risk mitigation agreements) that address security concerns, but fall short of blocking investments.

Last resort. Restrictive investment measures should be used, if at all, as a last resort when other policies (e.g. sectoral licensing, competition policy, financial market regulations) cannot be used to eliminate security-related concerns.

Accountability – procedures for parliamentary oversight, judicial review, periodic regulatory impact assessments, and requirements that decisions to block an investment should be taken at high government levels should be considered to ensure accountability of the implementing authorities.

Source : based on OECD (2008)

9. The recent update of the OECD Policy Framework for Investment (OECD, 2015) also attests the validity of these principles as a sound framework for countries to assess and implement investment policies that serve the public interest. The *PFI* addresses the issue of discrimination in many policy areas, pointing out the potential costs in terms of forgone investment and efficiency gains, but without questioning the right of governments to favour some investors over others in order to achieve other social, economic or environmental goals. The *PFI* recommends that governments evaluate exceptions to national treatment with a view to determining whether the original motivation behind an exception remains valid, supported by an evaluation of the costs and benefits, including an assessment of the proportionality of the measure. It also stresses the importance of having a transparent and predictable regulatory framework to minimize uncertainty for investors.

III. Typical rationale for discrimination towards foreign direct investors and their potential costs

10. Almost all governments discriminate among investors in one way or another, sometimes deliberately, sometimes unwittingly. Foreign investors, for example, commonly face restrictions on their ownership in a local company, particularly in key sectors. This is the case even in OECD member countries where restrictions on foreign investment tend, on average, to be lower than in other parts of the world. While restrictions on FDI have been found to result in less FDI overall, when other attributes of the investment climate are favourable, investors may still come even if they face some operational restrictions once established. But this is not likely to occur without costs. Any policy that favours some firms over others involves a cost, notably less competition and hence lower firm-level efficiency (OECD, 2015).

11. In the past, one common reason for imposing restrictions on capital flows, including on FDI, was the concern over its potential effects on macroeconomic stability, notably over reconciling free capital movements, exchange rate targeting policies and independent monetary policy. As countries moved towards greater exchange rate flexibility, and greater use of market-based instrument of monetary policy, the existing tensions were reduced, allowing countries to undertake greater liberalisation of capital movements, including of FDI (OECD, 2011; Kalinova et al., 2010).

12. Nowadays, restrictions on foreign investment are sometimes motivated by countries' concerns over the loss of national sovereignty to "protect essential security interests" and to maintain "public order or the protection of public health, morals and safety". They serve to safeguard national defence systems, including, for instance, against threats of leakage of technology and expertise to foreign-controlled entities that can be used in a harmful manner against the host country, and risks of infiltration, surveillance and sabotage by foreign investors; or to secure the proper functioning of the economy against threats of denial or disruption of the supply of critical goods and services to the economy (Moran, 2009).

13. However, most countries participating in the OECD *Freedom of Investment Roundtables* recognise a limited role for investment policies in addressing national security concerns and protecting critical infrastructure. Most countries have restrained the use of investment policy for addressing national security concerns only to a narrow range of activities, for instance through restrictions on foreign investment in weapons and military equipment-related industries. In protecting critical infrastructure, some countries see no real value-added by investment policy measures in comparison to alternative non-discriminatory measures. Others note, however, that investment policy can be effectively used to address a narrow range of identified risks, notably those related to national security, and if used as a measure of last resort, *i.e.* only if other, less restrictive and non-discriminatory measures cannot adequately mitigate the identified risks. To put it simply, countries agree that national security is a legitimate concern but should not be a cover for protectionist policies (OECD, 2008).

14. Nonetheless, a number of countries still impose restrictions on FDI based on broad economic reasons (e.g. protection based on infant industry argument, employment, technology transfer etc.). The right of governments to favour some investors over others in order to achieve social, economic or environmental goals is without question, but discriminatory measures only serve the broader public interest to the extent that their potential costs in terms of forgone investment and efficiency gains are compensated by broader economic and social benefits. For this reason, exceptions to non-discrimination need to be evaluated with a view to determining whether the original motivation behind an exception (e.g. protection based on the infant industry argument) remains valid, supported by an evaluation of the costs and benefits, including an assessment of the proportionality of the measure to ensure they are not greater than needed to address specific concerns. Broad consideration of the costs and benefits is especially important in service sectors that support a wide range of economic activities across the economy (OECD, 2015).

15. In most countries, FDI restrictions are dominated by foreign equity limits. Foreign equity restrictions are usually a sector-based measure limiting the extent of foreign ownership allowed in companies or in the aggregate of companies in a particular sector. Sometimes the scope is limited to only acquisitions and sometimes to both acquisitions and greenfield projects; sometimes it applies only to listed companies or to investments in a specific company, most notably in former state monopoly holders; sometimes there is an overall cap of foreign investment in the entire sector stimulating competition only among foreign investors when the limited is reached. In addition to legitimate national security concerns, the rationale for imposing any sort of equity restriction or joint-venture requirement is usually to protect domestic investors from foreign competition based on the infant industry argument or to push domestic investors to upgrade by forcing linkages between foreign investors and the domestic economy.

16. But such policies may not necessarily achieve the intended purpose. The exercise of control over operations is one key underlying characteristic of foreign investment by multinational firms (Hymer, 1960; Grossman and Hart, 1986). Foreign ownership restrictions limit investors' ability to exercise this control and influence the distribution of a project's *ex-post* surplus, affecting therefore investors' *ex-ante* investment decisions (Karabay, 2010). As such, FDI restrictions may diminish a country's relative competitiveness to attract FDI in the first place by limiting market reach or raising transaction costs relative to competing locations both to firms in the particularly restrictive sector and to firms in downstream industries.

17. Restrictions on foreign equity participation may also decrease the potential overall surplus of a project, for instance, by inducing the inefficient use of local resources in some situations or by limiting the potential spillovers from such investments. For example, when faced against equity restrictions or joint-venture requirements, foreign investors may have incentives to deploy older technologies and production techniques as compared to the frontier in international industry (Moran, Graham and Blomström, 2005). Nonetheless, whether the degree of foreign ownership affects or not local firms' potential to absorb FDI spillovers is also subject to foreign firms' FDI motives and sourcing strategies (Farole and Winkler, 2014). Evidence shows that not all types of FDI seek to develop joint ventures. For example, export-oriented foreign investors strongly prefer full equity ownership while market-seeking ones are far more likely to seek joint ventures (Echandi et al., 2015).

18. Another way countries sometimes regulate the entry and behaviour of foreign investors is through screening and approval mechanisms, although the number of countries resorting to screening to regulate the behaviour of foreign direct investors has declined substantially over time, although such measures still exist in some economies.²⁰ Practices and motives can vary widely, encompassing elements

²⁰ Countries have normally eliminated such mechanisms as part of more general liberalisation and as the economic and political concerns that screening had been intended to address diminished. While 30 years ago, 75% of the OECD countries for instance screened FDI projects, now fewer than one in six still do. Despite this trend, several

of national security and national interest. When applied, screening generally forms part of the overall approval process for foreign investors, including a possible review by the competition authority, licensing requirements of sectoral regulators and more general business registration procedures. What distinguishes screening from other licensing and authorisation processes is its discriminatory nature against foreign-owned investments. For this reason, screening based on economic criteria is listed as an exception to national treatment in international agreements and under the OECD *Declaration and Decisions on International Investment and Multinational Enterprises*, as well as a reservation under the OECD *Code of Liberalisation of Capital Movements*. Screening which is exclusively for considerations of public order and essential security is listed for transparency purposes under the *Declaration*, and is not considered in the OECD FDI Regulatory Restrictiveness Index.

19. Where general screening still exists, governments have done much to alleviate the burden, including by raising the threshold, focusing on specific sectors or only on investments by state-owned enterprises/sovereign wealth funds, alleviating the burden of proof, offering automatic approval after a period of time has elapsed and providing the right of appeal. The most frequent reforms completely replaced previous general screening systems by *ex ante* or *ex post* notification requirements, or narrowed their scope to more sensitive industries, often delimited by national security concerns. In other cases, screening of foreign investment was replaced by screening for the granting of investment incentives, normally with consequent changes to the criteria supporting decisions. In these cases, the focus became much narrower (e.g. job creation, location of the investment, foreign exchange needs), compared to previously broader criteria which often included, *inter alia*, analysis of the project's financial viability (Safarian, 1993; Wells and Wint, 1991).

20. Advocates of screening policies often argue that it can lead to a more open regime for FDI overall by reassuring local stakeholders, including businesses, that their interests will be safeguarded. Governments also argue that screening can protect large local firms with a significant role in the economy from falling into foreign hands. And by imposing conditions – or undertakings – on foreign investors, it is argued that the government is able to extract the maximum potential benefit for the local economy in terms of, for example, employment, management responsibilities or research and development. At the same time, the practice of screening seems inconsistent with countries' promotional efforts to attract FDI, raising concerns about the extent to which they are motivated by economic protectionism or create unpredictable and costly barriers to investors which are disproportionate to the concerns they are intended to address. Criteria upon which decisions are rendered are often vague, as national interest is rarely defined and, in some cases, decisions do not have to be justified. As such, it may have a potentially dissuasive impact on FDI through the signal it sends, the projects actually rejected or reconfigured and the uncertainty it imposes on potential investors. In the extreme case, screening can amount to a highly restrictive regime where restrictions are imposed on a case-by-case basis. Besides, they entail additional transaction costs which are sometimes forgotten, such as administrative costs to the government and to investors (e.g. legal fees, delays and uncertainty).

21. Therefore, while concerns are legitimate, discriminatory policies may not always be optimal for tackling identified risks (see example in Box 2). As noted above, restrictions on foreign investment are likely to involve economic costs, potentially affecting the people, the government and the domestic private

countries have reintroduced or expanded screening recently, generating a renewed debate on their efficacy in achieving policy objectives and their potential externalities. But in most cases, these policies re-emerged out of national security concerns and their scope of application has been limited to such risks (Wehrlé and Pohl, 2016). Beyond more traditional national security risks of infiltration, sabotage or surveillance and disturbance of the public order (Moran, 2009), policymakers are also adapting to changes in the global investment scene, notably the increasing investments by state-owned enterprises, sovereign wealth funds and new economic players (OECD, 2013; Marchik and Slaughter, 2008).

sector (e.g. lower competition, lower productivity and higher prices; forgone government revenues; and loss of business/partnership and technology transfer opportunities for local companies). In addressing a number of concerns, for instance, in relation to public health, workers' rights and the environment, the nationality of the investor is likely to be irrelevant and thus not a sufficient condition to justify discriminatory treatment. In such situations, alternative non-discriminatory measures (e.g., non-distortionary taxation and redistribution of rents, social and environmental regulations) may be available and adequate to address the identified risks to the national interest. At the end of the day, governments remain the regulatory authority in their jurisdictions, and can deploy laws and regulations to regulate investments and address specific concerns (Forneris, 2012).

Box 2. To what extent foreign investors pose a genuine threat to the proper functioning of the economy?

Moran (2009) explores to what extent the acquisition in 2006 of a steel company from the United States by a Russian company with potentially close relationship with the Russian government constitutes a credible threat to the economy of the United States. The hypothesis is that such investment would make the US economy dependent on a foreign-controlled supplier of a crucial good to the well-functioning of the economy. Steel is a critical input to more than 4 thousand kinds of military equipment, and the uninterrupted supply of steel is critical for the day-to-day functioning of the US civilian economy. Hence, any delay, denial or conditions imposed by the foreign-controlled company in the supply of steel can be potentially disruptive to the economy.

The credibility of the threat, however, depends on a few factors, notably the extent to which: a) the industry is tightly concentrated, which would give a particular leverage for the investor if it decided to impose conditions for the supply of steel to the US economy; b) the number of close substitutes are limited; and c) the switching costs to available alternative suppliers/products is high.

As Moran (2009) concludes, in this particular case it is unlikely that one foreign-controlled supplier would be able to withhold steel from US purchasers or place conditions for delivery. Steel suppliers are spread around the world, with the top 4 steel exporters accounting for no more than 40% of the global steel trade. Hence, there are a number of alternative potential suppliers with relatively large volume potential that could substitute the related foreign-controlled investor. The credibility of the potential threat to the proper functioning of the economy posed by a foreign-controlled investment depends not only on the degree of foreign ownership and control but also on the costs of substituting to an alternative good/supplier is high to the economy. This case does not suggest that investment policies will always be ineffective to address national security concerns and national development strategies. Instead, it suggests that governments must carefully evaluate their adequacy to address specific concerns with the view of minimizing any potential negative impact on investment flows and avoid they serve as a cover for protectionist policies.

Source: based on Moran (2009).

IV. MED economies exceptions to National Treatment: overview of restrictions to foreign investment

22. Non-discrimination is a central tenet of an attractive investment climate. The non-discrimination principle provides that all investors in like circumstances are treated equally, irrespective of their ownership. It can feature as a general principle in the Constitution or at lower regulatory levels, such as in the investment law, and may vary greatly in its scope of application. One of the concepts derived from the principle of non-discrimination in the context of foreign investment is that of national treatment, which requires that a government treat foreign-owned or -controlled enterprises no less favourably than domestic enterprises in like situations (OECD, 2015a).

23. Exceptions to National Treatment are assessed here through the OECD FDI Regulatory Restrictiveness Index, which gauges the level of restrictiveness of a country's statutory measures on FDI by looking at four main types of restrictions on FDI (see Box 3). Among MED economies, the *Index* is

available for *Egypt, Israel, Jordan, Morocco, and Tunisia*, which are adherents to the OECD Declaration on International Investment and Multinational Enterprises. As such, the available scores reflect countries' reported list of exceptions to national treatment under the OECD National Treatment Instrument, updated yearly for the purposes of the Index, thus essentially reflecting discriminatory measures in their legal framework as of December 2016.²¹ For the MED economies not yet covered by the index, i.e. *Algeria, Lebanon, Libya, and the Palestinian Authority*, this section provides only a brief overview of their regulatory restrictions to FDI. It is expected that by the end of this project, all these economies be integrated into the Index. For this, a questionnaire has been prepared to collect the necessary information with the competent authorities involved in this project.

Box 3. Calculating the OECD FDI Regulatory Restrictiveness Index

The OECD *FDI Regulatory Restrictiveness Index* (Index) seeks to gauge the restrictiveness of a country's FDI rules. The Index is currently available for all OECD countries and other 27 non-OECD countries, including all G20 members and non-OECD countries adhering to the OECD *Declaration on International Investment and Multinational Enterprises*. It is used on a stand-alone basis to assess the restrictiveness of FDI policies in reviews of candidates for OECD accession and in OECD *Investment Policy Reviews*, including reviews of new adherent countries to the OECD *Declaration*. The Index does not provide a full measure of a country's investment climate as it does not score the actual implementation of formal restrictions and does not take into account other aspects of the investment regulatory framework, such as the extent of state ownership, and other institutional and informal restrictions which may also impinge on the FDI climate. Nonetheless, FDI rules are a critical determinant of a country's attractiveness to foreign investors and the Index, used in combination with other indicators measuring various aspects of the FDI climate, contributes to assessing countries' international investment policies and to explaining variations among countries in attracting FDI.

The Index covers 22 sectors, including agriculture, mining, electricity, manufacturing and main services (transports, construction, distribution, communications, real estate, financial and professional services).

For each sector, the scoring is based on the following elements:

- the level of foreign equity ownership permitted;
- the screening and approval procedures applied to inward foreign direct investment;
- restrictions on key foreign personnel; and
- other restrictions such as on land ownership, corporate organisation (e.g. branching).

Restrictions are evaluated on a 0 (open) to 1 (closed) scale. The overall restrictiveness index is the average of individual sectoral scores. The measures taken into account by the index are limited to statutory regulatory restrictions on FDI as reflected in the countries' lists of exceptions to *National Treatment* and measures notified for transparency under OECD instruments without assessing their actual enforcement. The discriminatory nature of measures, i.e. when they apply to foreign investors only, is the central criterion for scoring a measure. State ownership and state monopolies, to the extent they are not discriminatory towards foreigners, are not scored.

Source: Kalinova et al (2010). For the latest scores, see: www.oecd.org/investment/index

24. As can be seen by the Index, no government applies national treatment across the board, including in OECD member countries where restrictions on foreign investment tend, on average, to be

²¹ As with all other countries adherents to the OECD Declaration on International Investment and Multinational Enterprises, the four MED countries are required to maintain an updated list of exceptions to national treatment under the instrument.

lower than in other parts of the world. Overall, FDI restrictiveness varies greatly across countries and regions (Figure 1). Countries in the Asia-Pacific region tend to be more restrictive. This finding may somewhat seem at odds with the notion that these countries have often relied on FDI as part of their export-led development, but the regime in export processing zones in these countries, which is often more liberal, is not captured in the Index (OECD, 2017). Larger countries also tend to be more restrictive, partly because they may be richer in natural resources, but also because they often have larger markets which offer host governments more scope to impose discriminatory conditions on investors (*ibid*). But to the extent possible, countries should ensure that measures protecting national interests are proportional to the specific risks associated with foreign investment, in order to minimise any potential negative effects on such measures on investment flows.

25. While FDI rules are a critical element influencing foreign investors' decisions, a coherent investment policy, however, needs to be imbedded in a regulatory framework that facilitates market entry, promotes fair competition, and encourages international trade, including in services. Therefore, the Index needs to be used in combination with other indicators measuring various aspects of the business climate, in order to better assess countries' international investment policies and to explaining variations among countries in attracting FDI. In the MED region, many markets remain dominated by state-owned enterprises and high levels of state control persist through regulations that protect current market structures (Ianchovichina et Mottaghi, 2013). These restrictions are sometimes initiated by crony-owned firms, particularly *de facto* restrictions on market-seeking FDI (World Bank, 2013).

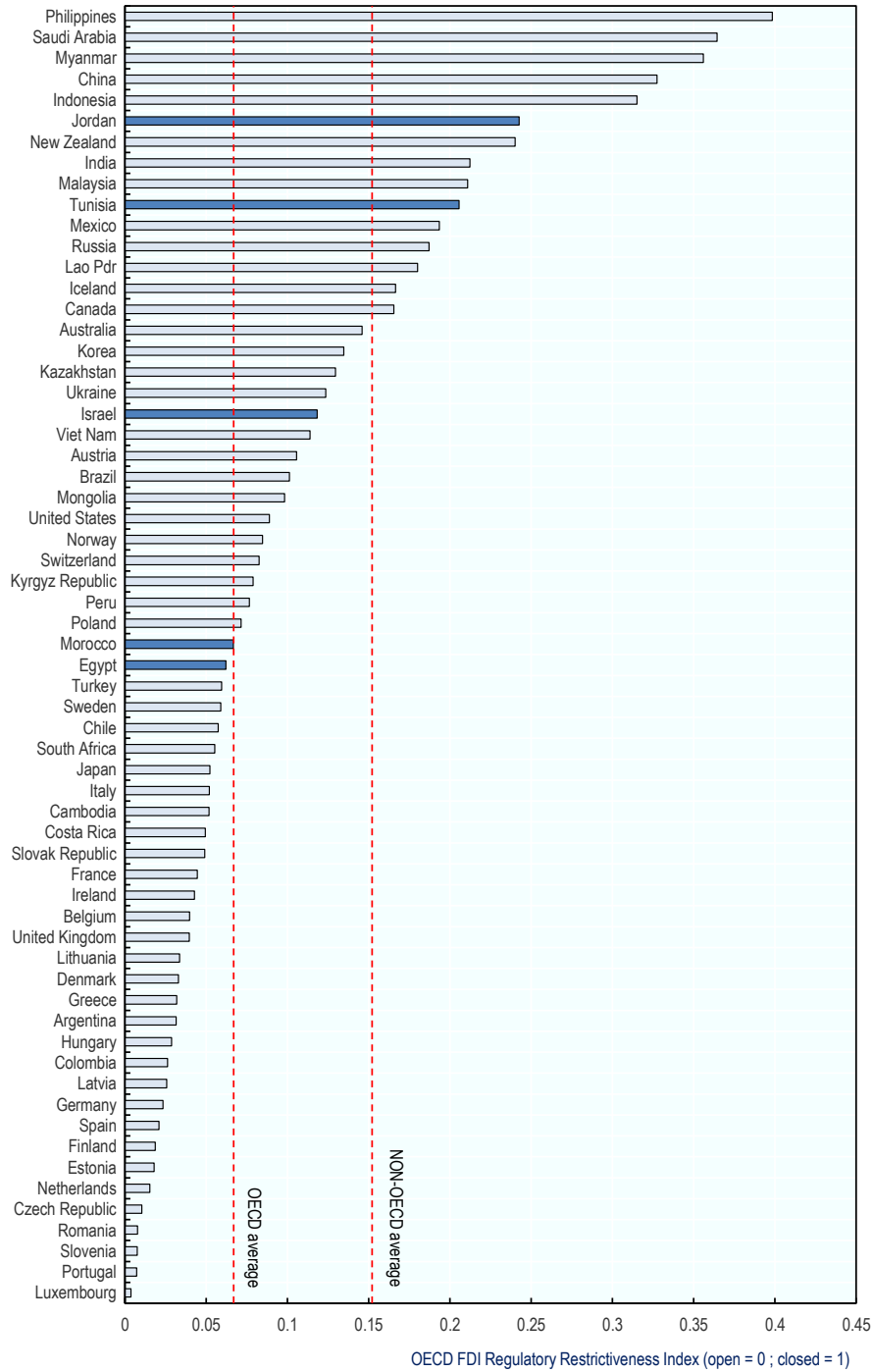
A. Egypt, Israel, Jordan, Morocco and Tunisia in the OECD FDI Regulatory Restrictiveness Index

26. Within the MED region, Egypt and Morocco impose foreign investment restrictions which are close to the OECD average level. Jordan and Tunisia, on the other hand, display significantly higher levels of FDI restrictions, beyond the non-OECD average (Figure 1). As for most countries covered by the *Index*, sector-specific limits on foreign equity ownership are the most prevailing forms of discrimination faced by foreign investors in these four countries. In the case of Tunisia, the *Index* is also reflective of its previous screening procedure for foreign investments which applied horizontally across economic sectors. However, this discriminatory procedure was only recently repealed with the entering into force of Tunisia's new Investment Code in April 2017. Likewise, Jordan also imposes some horizontal restrictions which contribute to its final score, such as an approval requirement for the acquisition of land for business purposes by foreigners and a preference to Jordanian-owned firms in government procurement.

27. The presence and stringency of FDI restrictions also varies substantially across sectors, including in the MED4 economies (Figure 2). As in most countries covered by the *Index*, FDI in manufacturing is mostly allowed without or with minor restrictions, except when a horizontal measure applies across the board. However, primary and service sectors remain partly off limits to foreign investors, holding back potential economy-wide productivity gains (OECD, 2017). While the sectoral pattern of restrictions tends to be similar in both advanced and emerging economies, the extent of restrictiveness is generally higher in the latter group of countries (*ibid*). This pattern holds within the MED region, and more predominantly in Tunisia and Jordan, where foreign investment in certain services remain unusually and highly restricted.

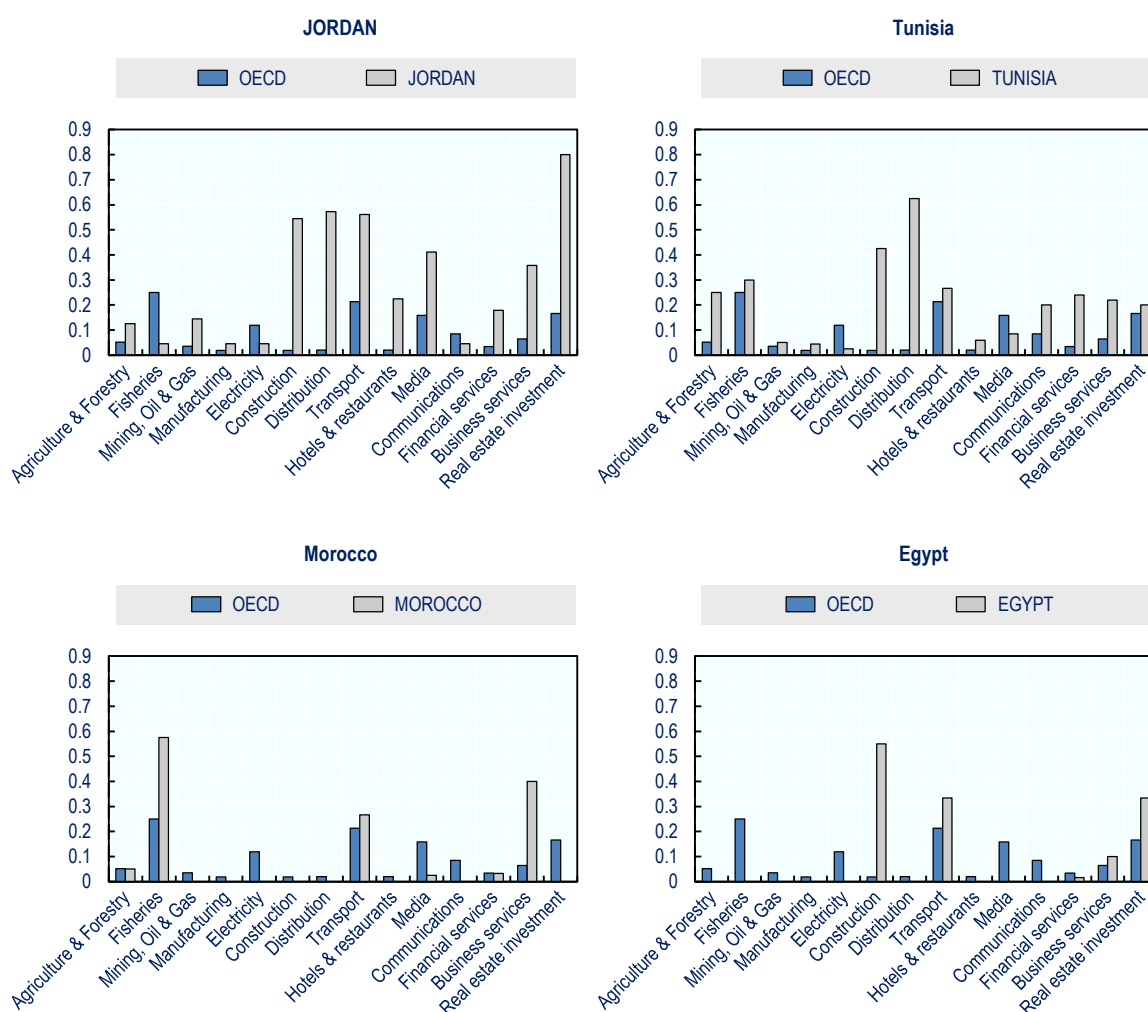
1. Figure 1. OECD FDI Regulatory Restrictiveness Index, 2016

(open = 0; closed=1)



Source: OECD FDI Regulatory Restrictiveness Index database, <http://www.oecd.org/investment/fdiindex.htm>.

2. Figure 2. OECD FDI Regulatory Restrictiveness Index: MED-4 vs OECD, by sector, 2016
(open = 0; closed=1)



Source: OECD FDI Regulatory Restrictiveness Index database, <http://www.oecd.org/investment/fdiindex.htm>.

Egypt

28. As one can observe above, FDI restrictions in *Egypt* are slightly less stringent than OECD members and mostly impinge on activities in the services sector, particularly construction and air and maritime transport sectors. In the construction and maritime transport sectors, for instance, foreign investment is only allowed in the form of joint-venture companies in which foreign equity does not exceed 49%. Likewise, foreign investment in air transport is allowed up to 49% in companies involved in regular international and domestic flights (for both passenger and cargo services). But foreign investment up to 100% is permitted in ancillary services including maintenance and repair of aircraft, selling and marketing of air services and computer reservation systems. A new investment law has been adopted in early May in 2017. Subsequent versions of this background note will reflect any changes that remove or add new discriminations to the list of exceptions to National Treatment.

Israel

29. According to the Index in 2016, the level of FDI restrictions in Israel is higher than the average for OECD countries. Israel's list of exceptions to national treatment reports a number of foreign equity restrictions, including in services such as transport, electricity, telecommunication, medias, and educational services. For instance, maritime and air transport must be under Israeli majority ownership. To invest in the electricity sector, a foreign applicant for a license to transmit, distribute or produce a substantial part of electricity must fulfil a number of conditions, including that the controlling interest of the licensee is held by a national who is incorporated in Israel. With respect to educational services, although not covered by the Index, the co-operation between an affiliate of a foreign university and equivalent Israeli institutions is subject to the approval of the Council for Higher Education.

Jordan

30. In *Jordan*, Regulation No. 77 regulating non-Jordanian investments for the year 2016 included important liberalising changes to the previous corresponding regulation No. 54 of 2000 (see Figure 3). A key amendment was the removal of the discriminatory minimum capital requirement that was imposed on foreign investors. Such measure placed foreign investors at a disadvantage to Jordanian competitors, notably in low-capital intensive industries, such as knowledge-intensive industries, and likely diminished Jordan's competitiveness vis-à-vis other economies where such measure was inexistent (*ibid*). Regulation No. 77 also removed the previous threshold of 50% foreign ownership on rail transport auxiliary services as well as the prohibition on foreign investments in passenger and freight road transport services, which are now allowed up to 49%.²²

31. Yet, Jordan's investment framework remains fairly restrictive to foreign direct investors. As measured by the *index*, the level of FDI restrictions in the country is above the average of OECD and non-OECD economies. Among the countries with similar levels of FDI restrictions, Jordan is an outlier: its level of FDI restrictions stand at comparable levels to some of the largest and resource-rich economies covered in the Index, despite its relatively small economic size and limited resource base. Statutory restrictions on FDI in Jordan are also relatively higher than in other MED economies included in the sample. Many service sectors remain partly off limits to foreign investors, holding back the potential productivity gains for the whole economy. Jordan also maintains FDI restrictions in some service sectors where such practice is rather unusual or greatly limited, such as in the distribution sector (OECD, 2015b).

Morocco

32. The investment regime in *Morocco* is relatively liberalised, with a level of FDI restrictions that is comparable to the OECD average, according to the *index* for the year 2016. Nonetheless, some restrictions are present in some key sectors, notably in transport (air and maritime transport), fisheries, and business services (architecture services and accounting and audit services). In air transport companies, foreign investment is limited to 49% of capital while in maritime transport, in order to fly the Moroccan flag, a vessel must be 75% Moroccan-owned (in the case of individuals). For vessels owned by corporations or partnerships, this condition is deemed fulfilled if the majority of members of the board of directors or the supervisory board are Moroccan citizens. To undertake a maritime fisheries business activity, a mandatory fishing license may be granted only for Moroccan-flag vessels or for foreign-flag vessels chartered by

²² Regulation No. 77 also provided for a definition of the notion of "foreign investor", a definition that is not made in the 2014 Investment Law. The definitional section of an investment law (or the corresponding by-laws) is crucial, as it determines the scope of the law, and hence the extent of the obligations, rights and guarantees that are provided in the law (OECD, 2015b). The lack of definition may lead to uncertainty for companies on whether they are or not covered by some provisions of the law.

Moroccan natural or legal persons. With respect to accounting and audit services, at least 75% of the shares or corporate rights of the firms must be held by members of the Moroccan College of Accountants.

Tunisia

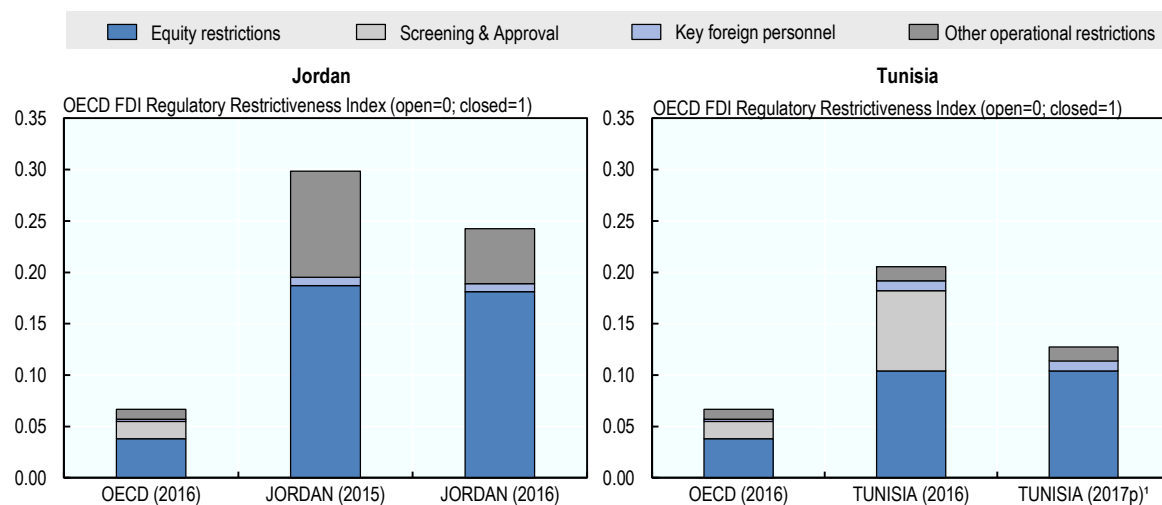
33. According to the Index in 2016, FDI restrictions in *Tunisia* were significantly higher than in the OECD and in other MED economies such as Morocco or Egypt. Tunisia's list of exceptions to national treatment reports a number of foreign equity restrictions, particularly in some services such as distribution, transport or the financial sector. In the transport sector, participation by foreign individuals or legal persons is limited to 49% of the capital in non-scheduled (charter) air transport of freight and of passengers. In commercial activities such as wholesale and retail trade or construction, foreign investors may not conduct a commercial activity, directly or indirectly, unless they meet a number of conditions, including that their capital is represented to the extent of at least 50% by registered shares held by Tunisian individuals or legal persons.

34. The relatively stringent FDI restrictiveness index for Tunisia in 2016 was also due to the pre-approval requirement for foreign investments that exceed 50% of companies' capital in some services activities, unless these activities are wholly for export. However, Tunisia's new code for investments²³, which entered into force in April 2017, repeals this pre-approval requirement and guarantees foreign investors' national treatment, except if stipulated differently in the relevant sectoral laws. A decree establishing a negative list of the sectors in which foreign investment requires approval is planned for September 2017. The new code further sets out the principles of free acquisition and exploitation of non-agricultural land by investors. It also provides for free transfer of funds and greater liberty to recruit foreign key personnel, now capped at 30% of key personnel.

35. The implementation of Tunisia's new investment code will impact Tunisia's position in the Index for 2017. Preliminary scores for Tunisia (2017) reflecting the new provisions of the Investment Code have been elaborated for comparison (Figure 3). This simulation refers only to the removal of Tunisia's previous prior approval mechanism for FDI, but already provides a sense on the extent to which Tunisia's reform may bring its FDI regime closer to international levels. If indeed screening is removed horizontally across all economic sectors, Tunisia's is expected to be significantly less restrictive than currently the case as measured by the Index, featuring below the non-OECD average. This simulation exercise is expected to be extended to encompass all regulatory reforms undertaken by Tunisia in the course of the EU-OECD Programme on Promoting Investment in the Mediterranean.

²³ Law No. 71 of 30 September 2016.

3. Figure 3. OECD FDI Regulatory Restrictiveness Index: tracking of FDI reforms in Jordan and Tunisia¹



Source: OECD FDI Regulatory Restrictiveness Index database, <http://www.oecd.org/investment/fdiindex.htm>. Note: (1) Preliminary scores for Tunisia (2017) reflects the entering into force of the Investment Code in April 2017. The simulation refers only to the removal of Tunisia's previous prior approval mechanism for FDI.

B. Algeria, Lebanon, Libya, and the Palestinian Authority: Brief overview of restrictions to FDI

36. This section provides a brief overview of regulatory restrictions to FDI for the MED economies not yet covered by the Index, i.e. Algeria, Lebanon, Libya, and the Palestinian Authority. However, the information collected for this overview is partial and does not allow benchmarking FDI restrictiveness levels of these economies with the other 62 economies included in the Index. To achieve such purposes, a questionnaire has been prepared to collect the necessary information with the competent authorities involved in the Programme. It is expected that by the end of the EU-OECD Programme, all these economies will be integrated into the Index and benchmarked in an updated version of this background note.

Algeria

37. Despite some recent reforms aiming at liberalising foreign investment, *Algeria's* legal investment framework seems to remain one of the most restrictive in the MED region. While the new investment law No. 16-09, dated 3 August 2016, does not discriminate against foreign investors, the 2016 Finance Law has maintained the rule limiting foreign ownership to 49% of capital to all economic sectors. Initially introduced in 2008, this restriction is relatively stringent and is uncommon in comparison with other countries covered by the *index*, including those displaying the highest scores such as the Philippines and Saudi Arabia. In addition to the 49/51 rule that applies horizontally, a number of sectors are totally closed to foreign investors. According to the World Bank Services Trade Restriction Index (STRI), which measures, *inter alia*, barriers to foreign entry and ownership in services, domestic air passenger, maritime auxiliary services, and domestic road and rail freights are closed to foreign investors. It should be noted that the World Bank STRI information was collected between 2008 and 2010 and, therefore, would not reflect reforms introduced after this period.

Lebanon

38. In *Lebanon*, the investment legal framework did not witness any significant changes since the investment law No. 360 was issued in 2001. The Lebanese investment law defines an investor as a natural person or legal entity, whether Lebanese, Arab or foreign investing in the country. According to several reports, Lebanon's banking sector is one of the most open in the MED region, with nearly no restrictions in the sector (Marouani et Munro, 2009; Ianchovichina et Mottaghi, 2013). Yet, the World Bank STRI database reveals a number of restrictions in the services sector that discriminate between foreign and domestic investors. For instance, market entry is prohibited in maritime auxiliary services as well as in legal services. In the telecommunication sector, foreign ownership is limited to 66% and acquiring state-owned entities is not allowed. For domestic road freight, foreign ownership cannot exceed 49% of capital for all legal forms of entry.

Libya

39. *Libya's* investment legal framework went through several revisions since the issuing of the Investment law No. 9 in 2010. These revisions imposed all additional FDI restrictions. Foreign investors that wish to invest in Libya face two key discriminations. In case of a joint venture, foreign equity participation is limited to 49% of the company capital, down from the 65% threshold that applied before 2012.²⁴ Furthermore, in 2013, the government issued a decree that prohibits foreign investors from establishing joint ventures in the form of a Limited Liability Company.²⁵ As a consequence, it seems that the only company form for a foreign investor involved in a joint venture with a Libyan entity is the Joint Stock Company form. In case a foreign investor seeks full ownership, a minimum capital requirement of five millions Libyan dinars is imposed (3.6 USD million) (OECD, 2016). The capital includes all investments made, including the real estate acquired. While discriminatory application of minimum capital requirements between foreign and domestic investors is rather an exception in international practice, it is still a practice in very few countries (OECD, 2015).²⁶ Beyond its discriminatory nature, the minimum capital requirement imposed on foreign investors (for full ownership) is also much higher than capital requirements imposed on both domestic and foreign investors in OECD countries and large developing economies, such as China, Indonesia, India and Russia (*ibid*).

Palestinian Authority

40. The legal framework for foreign investment in the Palestinian Authority is mainly composed of the 1998 Law on the Encouragement of Investment in Palestine (Investment Law) No. 1, as amended by Presidential Decrees in 2011 and 2014, as well as of the Companies Laws (ref. needed). While the rule providing that foreign investors should own no more than 49% of a company appears to remain in force, it seems that the regime applying to foreign investment is *de facto* much more favourable and that foreign investors can readily obtain exceptions to this policy from the Ministry of National Economy, which issues exceptions promptly.

41. Whether or not this restriction is still in force, and if so, what is its territorial scope, remains to be clarified. The legal framework governing the entry and operations of foreign investors lacks clarity and certainty, with two concurrent laws, namely the investment law and the companies law, whose provisions seem to contradict each other. While the investment law does not impose the 49% ownership rule, nor any

²⁴ Decree No. 207 of 2012.

²⁵ Decree No. 22 of 2013.

²⁶ For instance, in Saudi Arabia, the minimum capital requirement to establish a foreign company with full ownership in the trading sector reaches 30 million Saudi Riyals (8 USD million). However, restrictions on foreign investors do not apply to GCC nationals investing in Saudi Arabia.

particular restrictions on FDI, the companies regime, which seems to be still governed, in parts of the territory, by the former Jordanian Companies law, imposes such requirement. Once further information is collected and allows for a clarification of the regulatory regime applicable to foreign investment, the Palestine Authority will be fully introduced into the Index.

V. The way forward and next steps

42. Various governments in the MED region have recently introduced changes in their legal and regulatory investment regime, or are in the process of doing so. This background note revealed a heterogeneous MED region with respect to levels of regulatory restrictions on foreign investment. Nonetheless, some MED economies have been progressively opening their regime to foreign investment, albeit to various degrees. Subsequent versions of this background note are expected to provide a more comprehensive comparison of FDI regimes in the MED region. This monitoring will help to identify priorities for reform and communicate success and progress in the region.

43. In order to do a full-fledged monitoring of FDI restrictions in the MED region, Algeria, Lebanon, Libya, and the Palestinian Authority will be added to the list of economies integrated in the Index. To this end, a questionnaire has been prepared to collect the necessary information with the competent authorities involved in the Programme. The OECD Secretariat will support MED economies authorities in filling the questionnaire during the next months. Answers to the questionnaire are expected to be sent to the OECD Secretariat before *15 September 2017*. It is planned that by the end of the EU-OECD Programme, all MED economies will be integrated into the Index and benchmarked in an updated version of the background note.

44. While FDI rules are a critical element influencing foreign investors' decisions, they are not the only determinant of a country's attractiveness. In an increasingly interlinked global economy, a favourable business climate goes beyond an investment legal framework in line with international best practices. Therefore, while there will be an important focus on restrictions affecting foreign investment, the EU-OECD Programme will also organise peer-learning regional workshops that discuss broader regulatory impediments affecting the investment environment. Next workshops will also discuss best practices in protection provisions in investment laws, as well as provisions governing investment disputes. MED economies will exchange their experience in reforming their regulatory frameworks with a view to create a more enabling ecosystem for investment.

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