

# Attracting Investment in Libya: The Foreign Investor's Perspective

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*Third International Conference on Arbitration in Libya  
Milan, 19 November 2019*

## Introduction

### There are two key determinants of foreign investment in Libya

The age of hydrocarbons is ending. Thus, once stability returns to Libya, attracting inbound investments and technology transfers will be crucial to ensuring Libya's long-term economic and social development.

Efforts to increase Libya's competitiveness as an investment destination should begin now.

- 1) The **Libyan market opportunity** is huge and financially attractive – but by itself this factor will not be enough to attract foreign investment – especially outside of the energy sector.
- 2) When deciding whether or not to enter Libya, foreign investors will also assess the **quality of Libya's legal regime**, in two key respects:
  - the substance of Libya's legal and tax rules; and
  - the reliability of available dispute resolution mechanisms.

# Libya's legal regime for inbound investment

## The substance is better than you think...

- Libya has already put in place key components of an effective inbound investment regime:
  - ✓ The **Law on Investment Promotion** – Law No. 9 of 2010 contains remarkably favorable provisions for eligible projects, such as a 5-year exemption from all duties and income taxes (including on reinvested profits).
  - ✓ **Special Investment Zones** – Law No. 14 of 2010, which established the Zouara-Ras Ajdir development region, grants additional tax incentives and immunities to investors and allows English to be used as an official language.
  - ✓ The **Italy-Libya Friendship Treaty** (*Trattato Italia-Libia di Amicizia, Partnerariato e Cooperazione*), signed in Benghazi in August 2008 and reaffirmed by the **Tripoli Declaration** (*Dichiarazione di Tripoli*) in January 2012, grants significant preferences to Italian investors.

# Libya's legal regime for inbound investment

## ...but there is still room for improvement

- Libyan policymakers should launch a concerted effort to further improve the national investment regime:
  - ✓ **Upgrade legislation/regulation** – Engage in a benchmarking exercise to identify “best in class” legal rules from around the world with a view to enacting a world-class regulatory framework tailored to Libya’s unique needs and characteristics. (The UAE did this a few years ago.)
    - Need to clear up current confusion about the Shariah-based legal ban on interest.
  - ✓ **Improve rankings** – Create a task force to improve Libya’s current ranking of 186 in the World Bank’s global Ease of Doing Business survey and set clear targets and timescales – for example, enter the global top 50 by 2025 and the top 25 by 2030. (Saudi Arabia did this a few years ago.)
  - ✓ **Conduct experiments** – For example: implement multiple Special Investment Zones with different characteristics to see what rules work best; establish special tribunals for business disputes; etc.

# Protecting foreign investors

## The real issue: Libya needs to strengthen its perceived legal security

- Even the best legal rules will have little impact if foreign investors do not believe that their rights will be well protected. Libya has a rich legal tradition, and its judicial system is highly respected within the country, but the current perception is that Libya lacks legal security.
- What is to be done?
  - 1) **Upgrade Libya's domestic dispute resolution system** – This is a critically important long-term goal. However, achieving it – and changing investor perceptions – will require many years of consistent effort. Realistically speaking, it will be hard to achieve meaningful progress in the short term.
  - 2) **Improve the effectiveness of international arbitration in Libya** – This is a more realistic objective that could pay significant dividends for Libya in the short- to medium-term.
- The remainder of this presentation sets out some suggestions for strengthening Libya's international arbitration regime.

# Strengthening Libya's international arbitration regime

## Recommendations

First – Over time, Libya should become a full member of the international arbitration community:

- Libya is not yet a party to the New York Convention, the ICSID Convention or the UN Commission on International Trade Law (UNCITRAL). This is a major problem in the eyes of foreign investors since these institutions are the foundational building blocks of the modern arbitration system.
- Libya should accede to all three of these instruments as soon as possible, as an essential first step toward becoming a full member of the international arbitration community.
- This would send a strong signal about Libya's commitment to increase investor protections and de-politicize investment disputes, which in turn would help grow inbound cross-border trade and investment flows.

# Strengthening Libya's international arbitration regime

## Recommendations

### Second – Libya should upgrade and modernize its network of Bilateral Investment Treaties (BITs):

- BITs grant legal protections to home state investors in the territory of the host state (e.g., no expropriation without fair compensation) and usually provide access to Investor-State Dispute Settlement (ISDS) mechanisms.
- Today Libya is a party to 37 BITs, of which 25 are currently in force (including those with Italy, Egypt, France, Germany, India, Russia, Spain, Switzerland, Tunisia and Turkey) and 12 are signed but not yet in force (including those with Algeria, China, Malta and the UK).
- Libya should finalize the BITs that are already signed but not yet in force and should negotiate additional BITs with nations that are key potential sources of future investment (such as the US, Japan, Canada, the Netherlands, etc.).

# Strengthening Libya's international arbitration regime

## Recommendations

### Third – Libya should modernize its national arbitration law:

- Libyan should enact a modernized arbitration law based on the UNCITRAL Model Law in order to signal its clear commitment to protecting foreign investments.
- In particular, this new arbitration law should:
  - clarify in detail how arbitration agreements will be enforced;
  - establish clear rules on arbitrability;
  - facilitate the grant of interim measures by Libyan courts; and
  - streamline procedures for the domestic enforcement and recognition of arbitral awards.



# Strengthening Libya's international arbitration regime

## Recommendations

### Fourth – Libyan policymakers should invest more in capacity building:

- The capabilities of the General Authority for Investment Promotion and Privatization should be expanded – it needs to select and train the core group of managers who will lead Libya's investment regime for the next 20 years.
- LCICA has a key role to play in capacity building. For example, it could help: (1) establish a “Legal Assistance Center” to ensure that Libya is able to access the legal expertise it needs when defending itself in arbitral proceedings or negotiating new BITs; (2) create an “Arbitration Academy” to train a cadre of Libyan arbitrators; and (3) develop criteria to promote the selection of Libyan arbitrators in Libyan disputes.
- International conferences like this one are an important part of such capacity building.

# Strengthening Libya's international arbitration regime

## A modest proposal: create an ad-hoc Libyan Claims Tribunal

Fifth – Libyan policymakers should establish a specialized, quasi-judicial, “Libyan Claims Tribunal” dedicated to handling existing investor claims v. Libya:

- Taking an approach modeled on the US-Iran Claims Tribunal of the 1980s would have numerous advantages:
  - Such a Libyan Claims Tribunal should provide for **co-equal Libyan staffing and management rights**. This would make it an excellent training ground for Libyan professionals and allow lessons learned and knowhow acquired to strengthen the domestic judicial system.
  - The LCT could **help reduce the backlog of existing disputes more quickly while promoting more consistent outcomes** (and avoiding Al-Kharafi-type results). This would help build confidence and clear the ground for new investment.
  - Although designing and launching such a tribunal would require significant up-front work, **much of this work could be done now so that the tribunal is ready to go as soon as Libya re-stabilizes**.

# Grazie!

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