King & Spalding

Africa *Bulletin*

Gas-to-Power in Africa: An Overview of Opportunities and Challenges

Ask the Expert: Investment Flows from the Gulf Cooperation Council (GCC) to Africa

Adapting Effective Models: How Lessons Learned from the GCC Could Increase Foreign Investment Opportunities in Egypt

Maghreb Countries: Is the Global Slowdown an Opportunity for Transformation? Investment Trends in Algeria, Morocco and Tunisia

Foreword

We are pleased to introduce the inaugural edition of King & Spalding's Africa Bulletin. *Africa has been for many years and remains a core part of King & Spalding's international offering.*

Our lawyers have decades of experience advising commercial, governmental and financial institutions on ground breaking, corporate, finance, oil and gas, power, and mining projects across Africa. We understand how to do business effectively and efficiently in Africa, and we work hard to develop and maintain good and rewarding relationships with our local partners. Our Africa team consists of lawyers who are passionate about the continent with many of our lawyers hailing from countries across Africa.

The importance of Africa in the world economy is undoubted, with analysts projecting strong economic growth on the continent over the coming years. 6 out of the top 10 fastest-growing economies in the world are in Africa, and half of the world's 25 fastest-growing nations are in Africa (The World Bank, 2018). Foreign direct investment is crucial to Africa achieving its objectives for sustainable economic growth and the well-being of its people. Our goal with this publication is to make a valuable contribution to economic development in Africa by exploring innovative legal structures for investment and providing insight into key trends in various sectors on the continent such as finance, oil and gas, power, and mining.

The following topics are covered in this issue:

- Nina Howell and Rory Connor discuss the opportunities and challenges of gas-to-power projects in Africa.
- Macky O'Sullivan and Ebele Okeke, managing partner of Altica Partners, explore Dubai as the gateway to Africa, and the outlook for private credit in Africa providing both legal and commercial insights.
- Nabil A. Issa and Macky O'Sullivan shed light on how lessons learned from structuring investments in the GCC could help increase foreign investment opportunities in Egypt.
- Mehdi Haroun and Nora Djeraba examine whether the global slowdown is an opportunity for transformation of Maghreb countries, and also cover investment trends in Algeria, Morocco and Tunisia.

We hope that you find the Africa Bulletin interesting, and we welcome any feedback you may have on this publication.

Jawad I. Ali

Managing Partner – Middle East Offices and Head of EMEA Corporate, Finance and Investment Team

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ENERGY

Gas-to-Power in Africa: An Overview of Opportunities and Challenges

WHAT IS GAS-TO-POWER?

"Gas-to-power" is a phrase that encompasses a trend of projects which involve directly using gas in power generation. The phrase "gas-to-power" covers both the supply of indigenous gas via pipeline to a power station (as contemplated in Mauritania and Mozambique) and "LNG-to-power", where imported LNG is regasified for power generation. Gas-to-power also encompasses both greenfield projects where there is no existing infrastructure and brownfield projects where new sources of gas supply are procured for supply to existing power plants.

THE AFRICAN LANDSCAPE

Africa is home to 1.2 billion people, which accounts for about 16% of the world's population. Its population is forecast to grow to 2.4 billion by 2050, and to 4.2 billion by the end of this century – which would account for almost 40% of the world's population. Parts of Africa (particularly Sub-Saharan Africa) have some of the fastest-growing economies in the world.

Africa's energy paradox is well documented. On the one hand, it enjoys a wealth of natural resources: at the end of 2016 Africa had proven gas reserves of 503.3 trillion cubic feet. Yet on the other hand, the continent suffers from chronic under-investment in the electricity sector, with ageing (or non-existent) infrastructure and a growing demand/supply deficit.

The development of large-scale power generation is dependent on the existence of demand for that power, whether for industrial, commercial or domestic use. Because Africa overall has a relatively low population density, with vast desert areas that are largely uninhabited, the requisite demand does not currently exist in many parts of the continent. There are areas of higher population density (and therefore demand) in parts of North Africa (notably Morocco, Algeria and Egypt), West Africa (notably Ghana and Nigeria), East Africa (notably Ethiopia and the parts of Kenya, Tanzania and Uganda around Lake Victoria) and South Africa.

Historically, fossil fuels have been the primary feedstock for power generation in Africa, together with some (not insignificant) regional hydro and renewable power generation. Installed electricity generation capacity remains relatively low across much of the continent, with only Algeria, Egypt and South Africa having more than 45 GW of installed capacity. The International Energy Agency said in its first Africa Energy Outlook that it expects the continent's electricity generation to quadruple by 2040, with gas-to-power growing its share from 17% today to 25%.

The development of large-scale power generation is dependent on the existence of demand for that power, whether for industrial, commercial or domestic use.

Africa's power problems are well documented. The World Bank estimates that electricity outages on average cost African countries 2.1% of GDP, with current electrical output meeting only about half of Africa's demand and with 70% of the continent's population living without electricity. As Africa's population and economies continue to grow, these power problems will be exacerbated unless viable solutions for power generation are put in place.

THE EMERGENCE OF LNG-TO-POWER IN AFRICA

The development of long-term "take-or-pay" LNG sales contracts fostered the development of gas-fired power generation in the large economies of Japan, Korea and China, but failed to create an impact on power development in most of Africa.

The relatively recent development of more flexible LNG sales contracts – coupled with falling LNG prices, an LNG supply glut, and the expanded use of floating storage and regasification units (FSRUs), which are cheaper than onshore LNG import terminals and quicker to develop – has made LNG-to-power a viable solution to Africa's growing energy demand. LNG imports and regasification in FSRUs could facilitate small power-generation plants

serving regional markets that are not connected to a wider electricity transmission network. One of the recognised problems facing LNG-to-power projects in Africa is the absence of nationwide electricity grids and the prevalence instead of smaller local grids.

In Africa the phrase "gas-to-power" has become largely synonymous with "LNG-to-power", where imported LNG is regasified (typically in an FSRU) and then transported by pipeline to a power plant. Whilst LNG-to-power is widely recognised as a potential solution to Africa's growing energy demand, host governments and power offtakers must remain mindful that LNG-to-power does not immediately solve a power crisis; fully integrated LNG-to-power projects take years to develop, and LNG-to-power does not supply particularly low-cost power.

GAS-TO-POWER PROJECTS IN AFRICA

North and East Africa

Egypt began importing LNG for power generation in April 2015 in order to ease its chronic natural gas feedstock shortages. Today Egypt has two FSRUs which import LNG for use in existing gas and power infrastructure; following increased gas production from Egypt's offshore gas fields, however, it expects to halt LNG imports shortly. In 2015 **Morocco** announced plans for an integrated LNG and gas-to-power project, which would feature an LNG import facility and several combined-cycle gas turbine (CCGT) power plants. But the schedule for Morocco's much-anticipated project has been pushed back, with start-up now anticipated by 2025. In early 2018 **Kenya** made a U-turn and revived plans to build its first natural gas-fired power plant (700 MW) near Mombasa, after dropping the project in 2016. **Mozambique,** which has vast offshore gas resources in the Rovuma Basin, has decided to use a portion of the region's gas for domestic projects, including at least one gas-to-power project.

West Africa

In **Ghana,** three competing FSRU projects have been proposed along the nation's coast – two at Tema and one at Takoradi. In **Cote D'Ivoire** (Ivory Coast) Total and its partners are expected to make a final investment decision on the multi-phase Songon LNG-to-power project near Abidjan shortly. The project involves the construction of an FSRU with a capacity of 3 MTPA. In **Senegal,** plans to build an FSRU and a 400 MW power station as part of an LNG-to-power project are less advanced.

South Africa

South Africa announced its Gas to Power Programme in April 2015. The programme has faced a number of delays, yet as recently as September 2018 the South African government reiterated its support for the programme and its commitment to gas playing a major role in the country's energy mix. Today, South Africa has three potential LNG import projects – one in Richards Bay in KwaZulu-Natal Province, another in Ngqura (Coega) in the Eastern Province and a third in Saldanha Bay.

STRUCTURING A SUCCESSFUL LNG-TO-POWER PROJECT

There is no single model for a gas-to-power project, just as there is no standard approach to structuring LNG-to-power projects. That said, for any LNG-to-power project to be successful it must have, at a minimum, an effectively integrated LNG-to-power chain, credible project developers and power offtakers, and a sufficiently robust regulatory environment to support both sponsor and lender participation in the project. The success of an LNG-to-power project also typically requires compromise between the host government's

In Africa the phrase "gas-to-power" has become largely synonymous with "LNG-to-power", where imported LNG is regasified (typically in an FSRU) and then transported by pipeline to a power plant.

objectives and the LNG supply offering. The scope and structure of the project (e.g. infrastructure only versus a fully integrated supply chain) must be identified at the outset to avoid confusion and delay.

In simple terms, an LNG-to-power project involves the following components.

Ownership

LNG-to-power projects can accommodate a variety of ownership models. These range from common ownership across the supply chain to different ownership of the distinct project components. Developers will need to ascertain to what extent the laws of the host country require some form of state ownership in any part of the project. Due to the distinct components of an LNG-to-power project, there are often numerous distinct ownership groups involved in the chain: the LNG suppliers, the FSRU owner, the project company that leases the FSRU and (commonly) owns the gas pipeline connecting the FSRU to the power plant, the owner of the power plant, and finally the power offtakers who buy and sell the power generated by the plant.

Contractual structure

There is no one-size-fits-all contractual structure for an LNG-to-power project. The actual suite of project agreements and the parties to those agreements will depend on the chosen contractual structure and ownership model. However, the following project agreements are common to most LNG-to-power projects: the LNG Sale and Purchase Agreement (LNG SPA), the Terminal Use Agreement (TUA) for the regasification of LNG in the LNG import terminal/FSRU, the Gas Transportation Agreement (GTA) for the transportation of regasified LNG to the power plant, and the Power Purchase Agreement (PPA) for the offtake of electricity.

Construction

An LNG-to-power project will typically involve up to four main construction components, with a different contractor group for each of the FSRU (or onshore LNG import terminal), the FSRU connections, the pipeline between the FSRU and the power plant, and the power plant. Single, lump-sum EPC contracts are not available for integrated LNG-to-power projects, which raises both scheduling and financing issues.

Power offtake

The power offtake arrangements underpin the entire economics of an integrated gas-to-power project. Lenders and project sponsors will require robust contractual arrangements for the offtake of power which

yield sufficient revenues over the life of the project to cover debt service, operating costs and return on equity, and in turn to drive the demand for the gas and thus the use of the associated facilities. In the African context, the power offtaker will typically be a state-owned utility company, and the offtake arrangements will be documented using one of two contractual models: a tolling/energy conversion agreement or a PPA.

In the former scenario, the offtaker procures the gas directly and enters into an energy conversion agreement with the power generator under which it pays to reserve the capacity of the power station and to "convert" such gas into power as and when required. In the latter, the power generator, procures the gas and enters into a PPA with the offtaker under which it undertakes to generate power and sell such power to the offtaker. In this scenario, the offtaker, will often make the decision as to which approach to follow, based on its determination as to who is best placed to procure the gas (and/or other strategic factors such as national energy policy agendas). Nevertheless, PPAs are the most common power offtake agreement and usually adopt one of the following tariff structures: take-or-pay, where the offtaker commits to take (and pay for) a minimum volume of power during each settlement period or to pay for volumes not taken below the minimum contracted volumes; and capacity based, where the offtaker pays for the available capacity of the power facility (whether or not actually dispatched) and pays an additional payment for power actually generated.

> *PPAs are complex agreements that present a broad range of commercial risks which require consideration and mitigation.*

PPAs are complex agreements that present a broad range of commercial risks which require consideration and mitigation. For gas-to-power projects, it is most important to ensure alignment between the power offtake arrangements on the one hand and the fuel supply arrangements on the other, so that (for example) nominations under the fuel supply arrangements follow forecasting for power offtake, and responsibility and liability for related issues (such as take-or-pay payments under fuel supply contracts, and fuel supply interruptions) can be appropriately allocated among the project participants.

FINANCING GAS-TO-POWER PROJECTS AND CREDIT SUPPORT

The financing of LNG-to-power projects is unavoidably complicated by the distinct components of the project chain, each (typically) with different ownership groups. This results in different specialist lenders to the different project components. Commercial banks, export credit agencies (ECAs) and multilateral agencies (MLAs) are the main sources of funding for gas-to-power projects in Africa.

The provision of credit support by ECAs and/or MLAs is often required where there is a perceived high political risk associated with the project, and therefore a need to improve the project's overall credit quality so that the project can be developed. Political risk may be present, for example, where the counterparty (or guarantor) is a host government with a low sovereign credit rating (as is the case in a number of African countries), where the project structure is such that the state counterparty does not have the usual recourse to its downstream counterparties (e.g. because its counterparty is also state-owned or controlled), or where there is political unrest in the host country. Multilateral credit support operates to enhance the credit quality of sovereign/state obligors and to mitigate against, amongst other things, critical government performance risks, therefore improving the overall credit quality of a project so that it is both viable and bankable.

Some MLAs (notably the World Bank) provide a partial risk guarantee (PRG). The PRG covers private lenders or investors against government performance risks in connection with a privately funded project. A PRG can, amongst other things, mitigate against liquidity risk by covering a state counterparty's failure to make certain ongoing payments under long-term supply/service agreements; it can also mitigate against termination risk by covering termination payment defaults by a state obligor in connection with a long-term supply-service agreement. Where there is project financing, the PRG may also cover debt service defaults.

With gas-to-power in its relative infancy in Africa, it remains to be seen to what extent gas-to-power projects there will require MLA credit support to attract private investment into the project. Certainly some form of ECA or MLA involvement may be required in those countries with a perceived high level of political risk, such as Mauritania. Participants seeking ECA or MLA credit support should be mindful that this approach will extend the period for project implementation. The provision of ECA or MLA credit support involves, amongst other things, a lengthy due diligence process and a lengthy approval process within the multilateral organisations. It also requires public disclosure and ongoing monitoring and information undertakings that go beyond the final investment decision and operational start of the project.

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Ask the Expert:

Macky O'Sullivan and Ebele Okeke discuss Dubai as the gateway to Africa and the outlook for private credit in Africa.

WE HAVE SEEN SIGNIFICANT INVESTMENT FLOWS FROM THE GULF COOPERATION COUNCIL (GCC) TO AFRICA, AND DUBAI IS OFTEN REFERRED TO AS A GATEWAY TO AFRICA. TO WHAT EXTENT IS THIS TRUE, AND IF SO, WHY DO YOU THINK THAT IS THE CASE?

There is no doubt that GCC-Africa investment flows are strong. In fact, I would argue that we are witnessing the revival of historic trading links similar to the ancient Silk Road. Middle Eastern investors have injected some US$100 billion into African infrastructure in the past decade. The United Arab Emirates (UAE), for example, was the second-largest investing country into Africa in 2016, with a capex of US$11 billion, a rise of 161% from 2015. Non-oil trade with Africa has risen steadily by more than 700% since 2002, according to the Dubai Chamber of Commerce & Industry.

When we talk to investors in the region, they see Sub-Saharan Africa (SSA) as a natural transition from the Middle East and North Africa region, which is increasingly saturated. They have questions, and they need support to identify and access the right opportunities. Creating the right fund products, including Sharia-compliant structures, with strong regulatory oversight is critical. We also see investors in Egypt and Morocco looking south for new growth opportunities. Equally, investors in South Africa want to diversify their portfolios and are more willing to invest northbound into Sub-Saharan Africa. The governments here have done a great job creating an environment where GCC-Africa trade can thrive.

Specifically, we see a lot of African companies that want to access the Saudi market or leverage the connectivity of the UAE (Emirates, Etihad, Flydubai, Ports and free zones) to accelerate their growth.

I think you will see a trend where GCC institutional investors and family offices increasingly target both direct and fund investments in specific industries such as agriculture, healthcare, education, fast-moving consumer goods, financial services and logistics.

There is room for a new global trade hub linking investors, particularly from Asia and Europe, into Africa. The trend towards more open markets is in stark contrast to the protectionist tendencies in the "developed" world. Indeed, I see no reason why we won't see African companies listing on Nasdaq Dubai or any of the other exchanges in the region in a few years.

WHAT IS THE OUTLOOK FOR PRIVATE CREDIT/ DEBT IN AFRICA, AND WHERE ARE THE OPPORTUNITIES AND RISKS?

In recent years, private credit has become recognised as a strategic, mainstream asset class in international portfolios. Diversification via private credit strategies can help optimise the efficiency of investors' portfolios. Its appeal centres around attractive risk-adjusted returns with a built-in liquidity premium and a cash yield. It is important to remember that unlike private equity, private credit returns are contractual, so the investor has more visibility over the timing and quantum of return repayments over the life of the investment. Again, unlike in private equity, there is less reliance on an "exit" to lock in returns.

If things go wrong, debt has priority over equity in order of claims, and with adequate monitoring and covenant protection, your downside risk can be limited. These contractual returns, combined with downside capital protection, can act as a capital buffer in adverse market environments. You also have less duration sensitivity than competing credit sub-asset classes, as loans are typically based on floating rates.

The private debt opportunity in Africa is exciting. At the core of this is a fundamental demand/supply credit

imbalance: a shortage of adequate finance to mid-market corporate and financial institutions. The small and medium-sized enterprises (SME) credit gap in Sub-Saharan Africa is estimated by the International Finance Corporation to be US$140 billion. The World Economic Forum has estimated that SMEs comprise 80% of the continent's employment. Empirical studies have shown that the relative size of the SME sector and a country's economic growth are positively correlated.

Private equity (PE) alone cannot fill this gap – in fact, I would argue that many African companies lack the maturity to take on significant PE or are reluctant to sell equity stakes. They know the potential of their business, and an early sale would be premature.

At Altica Partners, we believe the best opportunities lie in the middle market. We see many companies with ambitions to be the next MTN or Dangote Group, but they are profoundly constrained in their ability to access capital that generates private-sector growth and jobs. These companies, including many local financial institutions, find US dollar funding a challenge due to high costs of local borrowing and a range of barriers to accessing international capital. They also often lack the flexibility to provide the right tenors and structures for the mid-market.

This opportunity is augmented by Africa's structurally superior investment and growth prospects. Sub-Saharan Africa has consistently been the second-fastest-growing global region after developing Asia since 2000. A structural demographic dividend and a growing labour force underpin higher and sustained long-term demand for goods and services. By 2034, Africa will have a larger workforce than either China or India. Burgeoning consumer markets are driven by urbanisation, with the UN forecasting SSA's urbanisation rate to reach 46% by 2030, up from 36% in 2010.

WHAT COUNTRIES AND SECTORS OFFER THE MOST POTENTIAL?

Africa now stands out as a continent of transition and reform. We find it encouraging to see more leaders focused on developing and executing market-orientated policy. 2018 witnessed the establishment of the Single African Air Transport Market, which will enhance connectivity between nations. The formation of the Continental Free Trade Area, currently comprising 44 of the 55 African Union states, creates a market of 1.2 billion people, with a GDP of US$2.5 trillion, which will raise competitiveness and facilitate trade integration. Only 12% of Africa's trade is intra-regional (versus 40% for North America, 50% for Asia and 70% for Europe).

We employ a comprehensive sovereign framework when selecting our target countries. Right now, we are looking at deals in countries like Rwanda, Kenya, Botswana, Ethiopia and Senegal, which score favourably on various ease-of-doing-business metrics and low corruption perception indices. Indeed, they score more highly than mainstream emerging markets like China, India, Brazil and Indonesia. Equally, the demographic and economic giants like Nigeria simply cannot be ignored. Ghana and Tanzania are also current favourites. We continuously monitor economic and political events across the continent to protect our investors. A presidential election cycle can easily derail efforts or cause economic paralysis. An on-the-ground network is critical here.

> *When we talk to investors in the region, they see Sub-Saharan Africa as a natural transition from the Middle East and North Africa region.*

WHAT ARE THE MAIN BARRIERS TO ENTRY FOR INTERNATIONAL INVESTORS LOOKING TO DO DEALS IN AFRICA?

The continent is not without its challenges, including: infrastructure, power generation/distribution, financial market development/liberalisation, to name but a few. But the directionality is in stark contrast to protectionist tendencies in the developed world, as I mentioned earlier with the emergence of the free trade area.

Due diligence is critical when evaluating deals and potential partners. Once you are invested, intensive portfolio monitoring is important to ensure you safeguard your investments. Currency fluctuations, regulatory changes and commodity price volatility can have significant positive and negative effects on your investments. Selecting an investment manager who understands local nuances and can execute risk management techniques can go a long way.

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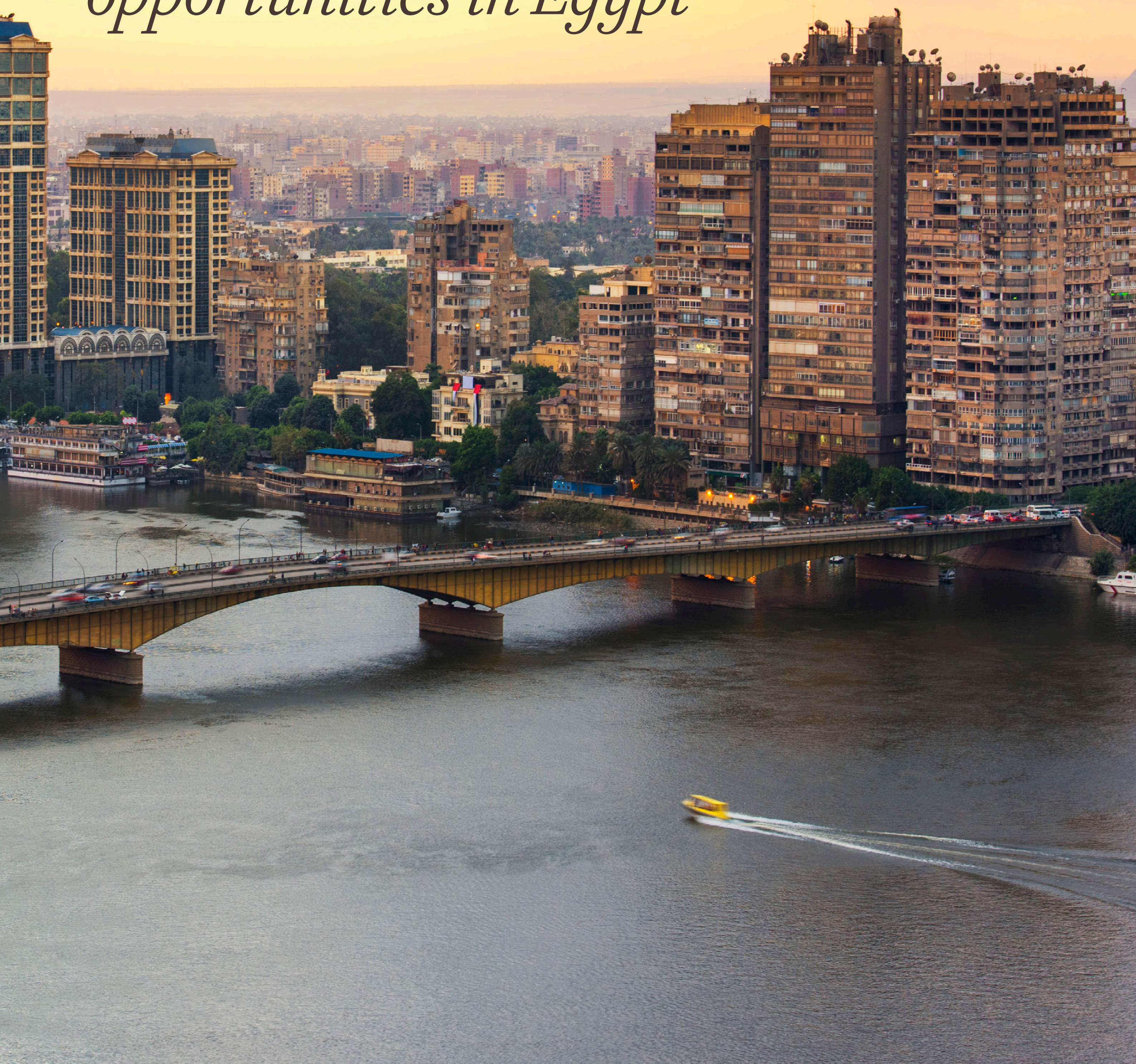
Adapting Effective Models: How lessons learned from the GCC could increase foreign investment opportunities in Egypt



Foreign investors are constantly looking for opportunities to invest in the Gulf Cooperation Council (GCC) and elsewhere in the Middle East, including Egypt. At the same time, these investors are often concerned with trying to figure out the best means of entry into the Middle East and the extent to which provisions in a shareholders' agreement or agency agreement are enforceable in the region. In spite of widely touted "ease of doing business" rankings, which show much of the GCC and Egypt to be constantly improving in this regard, many investors find that the laws and regulations are often less than uniform in application and are subject to unpublished policy changes by the government agencies charged with administering them. As new opportunities to invest in sectors undergoing privatisation arise, it has become increasingly important for parties to understand the full range of options available in order to maximise the enforceability of their joint venture agreements.

Most investors understand that the GCC and Egypt are not a uniform block. The laws, regulations and cultures of each jurisdiction differ dramatically from one country to the next. The vast majority of foreign investors will enter a new jurisdiction either through an agency agreement or through a joint venture with a local partner. This article seeks to provide an overview of existing structures aimed at decreasing local law risks in the United Arab Emirates (UAE) and the Kingdom of Saudi Arabia (Saudi Arabia), and invites the reader to consider the extent to which such models could be replicated in Egypt and elsewhere.

THE JOINT VENTURE MODEL

Regional joint ventures often lack an enforceable mechanism to enable parties to swiftly force defaulting counterparties to restructure their arrangements or, in a worst-case scenario, to force such defaulting counterparties to sell their shares in the joint venture at a pre-agreed exit price (which could be either at fair market value or, depending on the negotiated terms, significantly less than fair market value). In addition, many regional corporate structures are not ideal when it comes to raising debt and equity financing. This article addresses each of those issues by comparing regional structures to a fairly new structure utilising a private company limited by shares established in the Abu Dhabi Global Market (ADGM), a financial free zone located in the Emirate of Abu Dhabi.

TYPICAL CHALLENGES IN INVESTING IN THE GCC

(a) *Local ownership requirement:* Most GCC jurisdictions enforce a local ownership requirement. For example, companies in the UAE operating outside a free zone must typically have at least 51% Emirati ownership. In Saudi Arabia, companies in certain sectors such as retail and wholesale trade must be at least 25% owned by Saudi nationals.

(b) *Unenforceable joint venture provisions:* While most shareholder agreements contain drag-along rights, anti-dilution provisions and different classes of shares, such rights and provisions are generally not readily enforceable in most GCC jurisdictions.

(c) *Standard form articles of association:* Generally, it is not possible to draft bespoke articles of association for a Saudi or UAE limited liability company. There is little opportunity to draft articles that reflect the joint venture provisions.

(d) *Employee stock option provisions:* In most of the GCC, it is not really possible to register enforceable employee stock option plans. In fact, such plans could be viewed as a form of violating foreign ownership laws if the employees in question are not local nationals.

ALTERNATIVES TO CONSIDER TO CREATE AN ENFORCEABLE JOINT VENTURE

Investors are increasingly looking to form their joint venture special purpose vehicles in the ADGM, which is an independent jurisdiction that adopts the common law of England and Wales and applies it to civil and commercial matters. The ADGM regulatory structure consists of three bodies: namely (i) the Registration Authority, (ii) the Financial Services Regulatory Authority and (iii) the ADGM Courts.

An ADGM special purpose vehicle (SPV) is a private company limited by shares that is incorporated pursuant to the ADGM Companies Regulations of 2015 (as amended). An SPV is typically used by investors who wish to benefit from the ADGM's common law environment and to isolate financial and legal risks associated with any investment by ring-fencing assets and liabilities held under the SPV.

PROPOSED ADGM SOLUTION

While the SPV, as a free zone entity, would not be permitted to carry out business "onshore" in the UAE, it could – once established – form an onshore company in the UAE or Saudi Arabia.

Under this structure, the foreign investor could have beneficial interests in and management rights over the SPV, pursuant to certain contractual arrangements entered into with the GCC national. Such arrangements include the following:

> *Investors are increasingly looking to form their joint venture special purpose vehicles in the ADGM, which adopts the common law of England and Wales.*

(a) *Articles of association:* Since the ADGM adopts the common law of England and Wales, the parties can agree to a disproportionate distribution of the SPV's profits. The foreign investor and the GCC national could therefore agree in the articles of association of the SPV that the foreign investor was entitled to an agreed-upon larger share of profits, while including a mechanism for the GCC national to increase his/her shareholding as he/she offers evidence of providing agreed-upon contributions to the joint venture (e.g. introducing business or helping with collections). The articles of association may also state that the SPV is exclusively managed by the organisation's directors and that the GCC national, as a shareholder, may not interfere with its management. One can also build into the articles other provisions from the shareholders' agreement, such as tag-along, drag-along, anti-dilution and other clauses, creating an enforceable document governed by English law.

(b) *Restrictions on transfer entrenched in the articles:* The articles of association of the SPV could be drafted to ensure that the foreign investor must approve any transfer of shares by the GCC national.

The parties should work with licensed tax advisors to determine if, by moving the joint venture up to the ADGM level, they can reduce the impact of capital gains through the sale of shares at the ADGM level instead of selling shares in the underlying company.

A number of clients are also utilising foundation and trust structures in both the ADGM and the Dubai International Financial Centre (DIFC) with similar success due to the environments of both being governed by English law.

PROPOSED FUND SOLUTION

In a similar setup to the ADGM, some parties have structured funds at the country level. It is often possible with GCC-based funds to differentiate legal ownership at the funding level from the custodian level of the entity holding shares in the operating company.

In Saudi Arabia, for example, it is possible for foreign parties to control the board of directors of the fund and to

own all the units in a local fund but still have the fund appoint a licensed entity to act as custodian. It is possible to replicate a number of joint venture provisions in the fund documents (e.g. the private placement memorandum and the terms and conditions). Funds in Saudi Arabia have historically operated on a tax-free and zakat-free basis, making them a tax-efficient vehicle for both GCC and foreign parties. Moreover, while the structure is more complicated and costlier to establish, it is currently in some cases more tax-efficient than other structures, and therefore generally is preferred by larger companies due to its transparency to local regulators. As a result, this structure has been actively utilised by clients investing in healthcare, education, food and beverage, and certain project companies.

CONCLUSION

The UAE and Saudi Arabia have benefitted tremendously from foreign investment and have made it a priority to assess which organisational models can best be accommodated by local regulatory frameworks while also facilitating business opportunities. Although some parties continue to use arcane structures, many others are profiting from the advent of new structures that have been tested in various scenarios, so as to conduct their business more effectively. It is critical that lawyers, investment bankers and tax consultants all work together to create structures that will further attract foreign investment into Egypt and elsewhere in the Middle East and the entire African continent.

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NORTH AFRICA

Maghreb Countries: Is the global slowdown an opportunity for transformation? Investment trends in Algeria, Morocco and Tunisia

Despite the regional upheaval linked to the Arab Spring, North Africa still demonstrates potential for growth in the upcoming years, and the various governments have shown a willingness to take actions to attract foreign direct investments (FDIs). This is the case in the Maghreb countries, such as Morocco, Algeria and Tunisia.

MOROCCO

Investors have seen Morocco over the past 10 years as the most stable country in the North Africa region and the most advanced in terms of business and attractiveness for foreign investments. The factors which drive investment decisions usually include the domestic market growth potential; the investment climate (including business regulations, incentives and government support); the availability of a skilled workforce; infrastructure and logistics; and, to a certain extent, natural resources. Although the Moroccan market is now becoming relatively saturated, which makes it more difficult for newcomers to emerge, the country still offers a large scope of opportunities, and a vast project of economic modernisation has been launched to boost FDIs, including the following:

- *Several sector strategies*, such as the Green Morocco Plan to boost agriculture and the Tourism Vision 2020 strategy.
- *Development of the financial sector,* with efforts to boost the stock exchange and introduce new banking products. In June 2016, Morocco carried out its first privatisation through the capital markets, floating a 40% stake in the state-owned port operator Marsa Maroc on the Casablanca Stock Exchange. Ten other state-owned entities are still on a short list of companies intended to be privatised, including Maroc Telecom, Sonacos, Biopharma and CIH Bank. In January 2017, the Moroccan Central Bank granted authorisations to five Islamic banks, and Morocco is preparing to issue its first sovereign Islamic bond, or sukuk, worth 1 billion dirhams (US$105 million), after adopting a regulatory framework governing sukuk sales. In addition, the introduction of Islamic insurance (takaful) is expected in 2019.
- *2015-2020 strategic development plan for Casablanca.* The commercial capital aims at becoming an international financial centre.
- *Moroccan Energy Strategy 2020-2030 and changes to the energy mix.* Morocco has embarked on an ambitious plan to reduce its dependency on foreign markets and to implement important changes to its energy mix, which includes taking advantage of its favourable geography and climate to increase the country's installed renewables capacity to 42% by 2020, with solar, wind and hydropower each contributing 14%. Morocco is building the world's largest concentrated solar power plant (named Noor) which, with its intended 580 MW installed capacity, was expected to be operational by 2018 but has been facing some delays. Morocco also launched a National Development Plan for LNG in 2014, aiming at a massive introduction of LNG into its energy mix (with plans to increase gas from 16% in 2014 to 32% by 2025), and the launch of a bidding round for the construction of a US$4.6 billion gas-to-power project is expected soon.

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- *African integration strategy.* Morocco is working to position itself as a gateway to Sub-Saharan Africa, and multinational companies are relocating their activities to Morocco to expand further into southern Africa. The country is becoming a regional manufacturing and export base for international companies.
- *A new investment code* announced by the government to be published, together with the expected creation of new free zones in different regions of the country.

There are several encouraging projects in Morocco which are highly capital intensive. However, they relate to the domestic market and are not therefore expected to generate foreign currency. Given that the current level of Moroccan foreign currency reserves is relatively low (in June 2018, they covered around 5.5 months of imports), certain tensions surrounding the capacity to transfer dividends and capital abroad are to be expected.

ALGERIA

From a geopolitical point of view, Algeria is currently a relatively stable platform which has not been affected by the Arab Spring to the same extent as its Libyan and Tunisian neighbours. However, the commercial players may have seen the country as a less attractive host than Morocco, for example, due to an unstable investment and legal framework. The current particularly blurred political situation with respect to the succession of the president is not helping to provide visibility on the future.

Algeria's economy has been largely reliant on hydrocarbons for decades and did not effectively encourage investments in other sectors. What is more, Algeria has placed restrictions upon foreign investments in the activities of production of goods, services and importation since 2009, obliging foreign investors to set up an Algerian company whose share capital is held at least at 51% by one or more Algerian nationals residing in Algeria (thus limiting foreign investment in an Algerian entity to 49% of its share capital). For decades, hydrocarbons have accounted for more than 90% of the country's exports (approximately 93.6% in the first

quarter of 2018). The economic contribution of the hydrocarbons sector has substantially decreased with the fall in oil prices since mid-2014. As an illustration, hydrocarbons constituted around 60% of the country's revenues in 2014, and this figure fell to 47% in 2016 (with a slight improvement, though, in 2017, thanks to an increase in the price of Algerian oil). This had significant consequences for the economy, exacerbated by constraints linked to the sector (maturing fields) and unattractiveness of the latest oil and gas upstream bidding rounds. This has forced the Algerian government to rethink its economic plan for the coming years, and a new impulsion is expected, both in the hydrocarbons sector and in the non-oil economy.

- *Developments expected in the oil and gas sector.* Even in the current low-price environment, Algeria still offers important opportunities to increase production and revenues from the oil and gas sector. Algeria is the third-largest producer of crude oil in Africa (fourth in terms of estimated reserves), and with two thirds of the territory still unexplored, the European export market just across the Mediterranean Sea and the existing infrastructure, the country still has great potential. Algerian authorities announced that they were working on amendments to the hydrocarbons laws and regulations, with expected changes to the fiscal terms which were seen as unattractive in the latest upstream bidding rounds. Certain major oil companies are still engaged in Algeria, and a lot is

expected from the next bid round, which should be launched after the publication of the amendments to the hydrocarbons law, announced to be adopted in early 2019. (In order for this bid round to be successful, however, substantial amendments to the current hydrocarbons law will be necessary.) Moreover, downstream oil and gas industries, such as refining and petrochemicals, offer development potential.

- *Diversification of the economy to non-hydrocarbons sectors*. In the summer of 2016 Algeria adopted a new economic growth model aimed at the diversification and transformation of the economy and defining objectives to be reached by 2020-2030. This plan includes, in particular:
    - the diversification of sources of financing for equipment, with the announcement of a new law on public-private partnerships expected to boost the sector;
    - the development of a bond market to finance private and public infrastructure;
    - the reform of the banking sector, with the aim of modernising banking products and services;
    - the development of capital markets, notably by putting in place a regulatory framework for capital investment funds and through the simplification of stock exchange introductions and bond issues;
    - a valorisation plan for the phosphates and mining sector (in July 2016, a US$4.5 billion deal was concluded between the Algerian state-owned phosphates company and Indonesian Indorama, to develop a phosphate mine and the construction of two processing and fertilizer production facilities); and
    - the development of renewables – initially, an ambitious bidding round for a 4,000 MW solar project was announced to be launched by the end of 2017, and in summer 2018, the Algerian Minister of Energy announced the launch of the first national call for tenders for a 150 MW solar project.

Algeria is quite a virgin market, which will offer investment opportunities in a wide range of sectors, such as infrastructure, including digital, 4G, optic fibre, unbundling local loop, hospitality, education, services, and automobile and automobile parts manufacturing (Renault set up a car plant in 2014, and other companies such as Volkswagen followed). In 2016, the government announced a US$3.3 billion mega port project in Cherchell (90 km west of Algiers) on 1,000 hectares with an industrial zone of 300 hectares.

A new investment law (No. 16-09) was published in summer 2016, which includes a set of incentives to foreign investments. This new law no longer contains the 49%-51% rule, now included in a finance law, which hopefully augurs the removal of this rule in the near future. However, even within the current legal framework, investors benefit from a set of legal tools to organise and accommodate the governance and management of the companies, including through contractual arrangements such as shareholder agreements.

Nevertheless, for Algeria, the success of the new laws will lie primarily in the government's ability to deal with and limit the heavy bureaucracy, which is currently the most likely first hurdle to investment in Algeria.

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TUNISIA

Tunisia has been significantly affected by the Arab Spring in 2011, and the unstable geopolitical situation which followed has led to an important decrease of foreign investments in the country. As an illustration, FDIs fell by 24% between 2010 and 2011, and the annual average GDP growth was around 1.5% between 2011 and 2015. The ambitious 2016-2020 development plan put in place by the Tunisian government aims at increasing this annual rate to 4%.

Taking advantage of the return to relative political stability, Tunisia has engaged in actions to promote foreign investment, including:

- *A new investment law (No. 71-2016)* which entered into force on 1 April 2017 and which aims at boosting the economic development of the country. The former investment law of 1993 contained incentives, such as tax exemptions, but imposed restrictions on the entry of foreign investors. For example, the new law:
  - removed the requirement of prior authorisation from the authorities in most sectors;
  - introduced the right of foreign investors to acquire and exploit real estate (except agricultural lands), whereas under the former regime they could do so only in industrial or tourist areas;
  - extended the possibility of hiring foreigners in company management to 30% of the staff during the first three years, and then 10% from the fourth year onwards, whereas the former regime limited the number of foreign managers to four persons in each company;
  - aims at reducing bureaucracy constraints (when an authorisation is required for certain sectors, the failure of the administration to respond within a certain time frame will be deemed an approval); and
  - creates bonuses (to be detailed in implementing regulations which are yet to be published), such as bonuses for the increase of added value and competitiveness, for regional development, and for sustainable development.
- *Amendments to the Hydrocarbons Code* were published in June 2017, with the main purpose of improving transparency and harmonising the Hydrocarbons Code with the Tunisian Constitution, which provides that all petroleum agreements have to be approved by law. However, with the willingness of important players such as Eni, EnQuest and Shell to exit, and with the fall in crude oil production from 80,000b/d in 2010 to 40,000b/d in the first quarter of 2018, one may expect the Tunisian government to be working on a more incentive-based hydrocarbons regime, with more favourable fiscal terms and with specific provisions for exploration in deep water and onshore and for unconventional hydrocarbons.
- *Diversification of the energy mix.* In November 2016, Tunisia announced the launch of the 2030 Tunisian Renewable Energy Action Plan. This plan will be implemented by improving energy intensity by 3% per year during the 2016-2030 period and by reducing energy use by 17% during this period. Moreover, the plan aims at producing 30% of Tunisia's electricity from renewable energy sources by 2030, to be carried out by both the public and private sectors, by installing 1,000 MW in the first phase (2017-2020) and 1,250 MW in the second phase (2021-2030). In this framework, in May 2018, the Tunisian Ministry of Energy gave its approval for the launch of 10

> *In May 2018, the Tunisian Ministry of Energy gave its approval for the launch of 10 renewable projects.*

renewable projects: six 10 MW solar parks and four 1 MW ground-mounted photovoltaic installations. This was followed by a call for pre-qualification for the development of 500 MW solar photovoltaic power plants and 500 MW wind farms. The deadline to submit pre-qualification applications was extended to October 2018.

Aside from putting in place more attractive reforms, the biggest task facing Tunisia is undoubtedly appeasing the social tensions which currently paralyse a number of sectors in the country.

CONCLUSION

Although the past years have been challenging for the economy of Maghreb countries, Algeria, Morocco and Tunisia are still expected to offer foreign investors a wide range of opportunities in the future, subject to those investors preparing their entry carefully in these countries. The region is still under pressure, and the success of investment projects, from an investor's perspective, will largely depend on the structuring of the investment and the creativity of the contractual frameworks.

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