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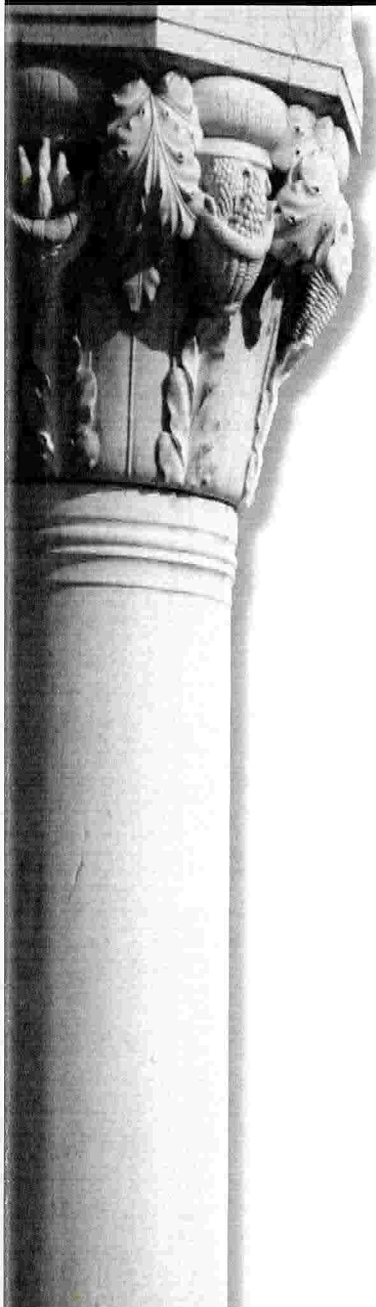

International Trade and Investment in Algeria: An Overview

Omar T. Mohammedi

INTERNATIONAL TRADE AND INVESTMENT IN ALGERIA: AN OVERVIEW

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I. INTRODUCTION

Algeria emerged from the turbulent 1990s with an eye towards economic expansion and openness toward the world economy. This trend continues to characterize Algeria's market reforms, demonstrated by ever-increasing market liberalization and international integration. Since entering office in 1999, President Abdelaziz Bouteflika has championed economic diversity by steering the country away from an overreliance on oil production and by attracting foreign trade and investment. While growth remains slow and unemployment continues to be a national concern, Algeria's efforts appear to be moving the country in the right direction. The actions of the last decade create an appealing environment to foreign investors and businesses, thereby assuring growth and development through investment. Such measures will ensure a continued influx of foreign partners that would not only introduce the Algerian economy to foreign markets but would also offer trade in services training to the Algerian labor force.

The beginning of the new century saw the implementation of many policies aimed at modernizing and liberalizing Algerian trade regulations. These measures include, for example, at the national level, the revision and streamlining of commercial codes aimed at easing business transactions and encouraging foreign investment.[1] Further developments include the creation of the National Investment Development Agency ("ANDI") and the National Investment Council ("CNI"), two entities whose purpose is to facilitate and advise on investment as well as to provide foreign investors with a "one-stop" shop for entering the Algerian market.[2] New investment laws were also implemented that reduced domestic-ownership requirements in a number of fields.[3]

On the international level, Algeria has ratified various international conventions and integrated those conventions into domestic law. For example, in June 1990, Algeria entered into an "incentive agreement" with the United States that provides, among other things, a collaboration between the Algerian government and the Overseas Private Investment Corporation ("OPIC"), an agency of the U.S. government that helps U.S. businesses

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1. KPMG ALGERIA, GUIDE TO INVESTING IN ALGERIA 27 (2009) [hereinafter KPMG GUIDE 2009].

2. U.S. & FOREIGN COMMERCIAL SERVICE & U.S. DEP'T OF STATE, DOING BUSINESS IN ALGERIA: A COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 20 (2007), *available at* http://www.buyusainfo.net/docs/x_3856727.pdf [hereinafter U.S. COMMERCIAL SERVICE]; *see also* Embassy of Algeria to the United States of America, Algeria Investment Legal Framework, http://www.algeria-us.org/content/view/110/89 (last visited April 2, 2010) [hereinafter Algeria Investment Legal Framework]; *see also id.* at 64.

3. Aidoud Law Firm, *Legal Aspects of Doing Business in Algeria*, http://www.aidoud.com/articles/legal_aspects.pdf (last visited April 2, 2010) [hereinafter Aidoud Law Firm].

invest overseas.[4] In February 1989, Algeria ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Agreement ("New York Convention"), allowing any judgments and arbitral awards issued by an arbitration tribunal to be fully enforced in every Algerian court.[5] The Algerian Code of Civil Procedure was modified in 1993 to accommodate the New York Convention, allowing, at the same time, both private and public sector companies full recourse to international arbitration at the International Centre for Settlement of Investment Disputes ("ICSID") or ad hoc arbitration through the U.N. Commission on International Trade Law ("UNCITRAL") model for dispute settlement between the Algerian State and private companies.[6]

The government enacted these and other measures during the last decade and moved Algeria one step closer to ascension into the World Trade Organization ("WTO"), creating further incentives towards foreign investment. Algeria initiated the WTO accession process in 1987 and has been part of a WTO Working Party aimed at bringing the country into the WTO fold since then.[7]

Despite a world-wide recession, Algeria has continued down the path towards market liberalization and domestic reform in this area, though it has recently readjusted these reforms slightly in light of continued levels of high unemployment and capital flight.[8] These readjustments are aimed at addressing the discrepancies between economic growth in certain sectors and continued stagnation in domestic job creation.[9] If properly implemented, these readjustments can create tremendous benefits for Algeria in the long run, as Algeria seems to be emphasizing domestic labor training and domestic participation in business ventures.[10] These measures

4. Investment Incentive Agreement Between the Government of the United States of America and the Government of the Democratic and Popular Republic of Algeria, U.S.-Alg., June 22, 1990, *available at* http://untreaty.un.org/unts/144078_158780/4/5/12320.pdf [hereinafter Investment Incentive Agreement].

5. KPMG GUIDE 2009, *supra* note 1, at 279.

6. D. Ben Abderrahmane, *The Algerian Law on International Arbitration*, http://www.hg.org/article.asp?id=4849 (last visited April 2, 2010) [hereinafter Abderrahmane]; *see also* CIVIL & ADMINISTRATIVE PROCEDURE CODE art. 1006 (Alg.), *available at* http://www.droit.mjustice.dz/legisl_fr_de_06_au_juil_08/code_proced_civ_et_adm/fr/index.html.

7. *See* World Trade Organization [WTO], Ascension Status: Algeria, http://www.wto.org/english/theWTO_e/acc_e/a1_algerie_e.htm (last visited Sept. 30, 2009). "Algeria's working party was established on June 17, 1987 and met for the first time in April 1998." *Id.* The multilateral examination of the foreign trade regime is ongoing and a revised draft Working Party Report was circulated in June 2006. *Id.* The tenth meeting of the Working Party took place in January 2008. *Id.*

8. Stanley Reed, *Algeria Is Open — Sort Of*, BUS. WEEK, Mar. 5, 2009, http://www.businessweek.com/magazine/content/09_11/b4123040670690.htm.

9. U.S. Dep't of State, Background Note: Algeria, Mar. 2009, http://www.state.gov/r/pa/ei/bgn/8005.htm.

10. *See* Reed, *supra* note 8.

are important steps towards preventing the lopsided gains that often keep non-industrialized countries from joining the world economy. Algeria's energy industry is indicative of such discrepancies, where large profits have been realized while resulting in little benefit to the Algerian populace as a whole.[11] Algeria's approach to market liberalization is characterized by a desire to open its economy to international investment while at the same time, ensuring that the Algerian economy and labor force grows in parallel to these investments. This Article seeks to highlight such changes and argues that the opening of the domestic market in Algeria to foreign investment can create mutual benefits for the Algerian workforce and outside investors. In many instances, the influx of trade and investment from abroad can stimulate a local economy and bolster employment among locals. This Article will argue that continued market reform will lead to increased economic potential in the long run.

Between 2000 and 2007, the Algerian government programmed a legislative agenda geared towards fostering growth through foreign investment in sectors other than energy.[12] The ultimate aim was to create jobs and bring about sustainable economic reform that a past overreliance on hydrocarbons had forestalled.[13] Termed the "Second Generation Reforms," these measures sought to promote the following goals:

- Integration into the global economy;
- Promotion of investments and corporate environment;
- Privatization and public sector reform;
- Reform of the banking and financial sector;
- Liberalization of infrastructures; and
- Modernization of public finances.[14]

Between 2008 and 2009, the government enacted updated legislation to address the discrepancies between growth in certain sectors and continued stagnation in the job market.[15] This new legislation aims at bringing about

11. *Id.*

12. *See* KPMG GUIDE 2009, *supra* note 1, at 25.

13. *See, e.g.*, Said Jameh, *Algeria Hopes to Attract U.S. Investments*, MAGHAREBIA, Feb. 24, 2009, http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2009/02/24/feature-01 (referencing U.S.-funded enterprises such as a cement manufacturing plant, a dairy plant, and a pharmaceutical company to be established in Algeria).

14. KPMG GUIDE 2009, *supra* note 1, at 25–26.

15. KPMG ALGERIA, THE KPMG REVIEW: QUARTERLY NEWS No. 1, 1 (Mar. 2009) [hereinafter KPMG QUARTERLY NEWS].

> Several changes, whether legislative, regulatory or other, have been implemented recently in various fields (corporate, trade, tax etc.). Such measures pose new principles, or conditions for investment or more generally, operations in Algeria. They are aimed at various fields and have been adopted in a number of ways – through prime

more broad-reaching growth to the country.[16] These measures are focused primarily on regulating foreign investment, reorganizing ANDI and CNI to better deal with such foreign investments, boosting Algerian production to increase its potential to compete internationally and, finally, regulating trade to enhance the development of Algerian industry and create competition between Algerian and foreign products and services.[17]

This Article will analyze the Algerian trade and investment landscape as defined by the reforms of the last decade, as well as their impact on such areas as franchising, taxation, and repatriation. The Article will follow by addressing the extent to which the Algerian trading system may benefit from implementing international trade law, addressing the areas where it has done so already, and analyzing those results from an Algerian perspective.

II. Domestic Trade Law in Algeria: Reforms and Promises

A. The Reforms of 2000–2007: The "Second Generation Reforms"

Between 2000 and 2007, Algeria implemented its most widespread reforms affecting the national economic system since gaining independence.[18] Dubbed the "Second Generation Reforms," these institutional changes sought to bring Algeria into the world economy in full force.[19] The initial push towards market liberalization, launched in 1995 and culminating with the issuance of Ordinance 01-03 of August 20, 2001, created several incentives for foreign investment in Algeria.[20] In order to better understand the state of foreign investment incentives and rules Algeria achieved today, it is important to provide a survey of these reforms and how they may affect investment within the country.

Ordinance 01-03, a landmark change in Algeria's position towards international economic integration, guaranteed all investors, residents and non-residents alike, the following rights:

- The ability to create a business entity governed by Algerian laws;

> ministerial instructions, instructions issued by the Ministry of Commerce or the Bank of Algeria or finance laws. These new measures or principles in some cases appear to be an attempt by the Algerian government to address currency exports issues and ensure that foreign investment actually benefits Algeria.

Id.

16. *Id.*
17. KPMG Guide 2009, *supra* note 1, at 51.
18. *Id.* at 25.
19. *See id*.
20. Ordonnance 01-03, Aug. 20, 2001 (Alg.), *available at* http://www.joradp.dz/JO2000/2001/047/F_Pag.htm [hereinafter Ordinance 01-03], *translated in* Ministry Delegate for Participation and Investment Promotion, Invest in Algeria, http://www.algeria-us.org/forms/Invest_in_Algeria.pdf (last visited Feb. 24, 2010).

- Enter into a partnership with one or more persons or legal entities governed by Algerian laws;
- Share in an existing company's capital; and
- Partially or totally privatize an existing public activity.[21]

Ordinance 01-03 also removed the restrictions on the percentage of capital that could be held by a foreign investor, changes that brought Algeria closer in line with WTO requirements. However, as will be discussed below, it appears that the government has altered its position on this policy. In December 2008 the government imposed a cap on the stakes foreign investors can hold in Algeria.

Chief among the changes brought about by the Ordinance are tax incentives aimed at foreign corporations as well as the easing of restrictions on the repatriation of capital earned in Algeria.

1. Tax Incentives

During the 2000 to 2007 period, Algeria adopted several tax exemptions for foreign investors in an effort to render investment in the country more appealing. In order to benefit from such exemptions, all foreign investors are required to declare their intentions to invest with ANDI.[22]

Furthermore, investors must then file "[a]nother application, namely, the request for fiscal benefits, [which] must be submitted to the ANDI, in order to take advantage of one of the preferential taxation packages provided for by the Code on Investments."[23]

After ANDI grants the benefits, foreign investments are then placed into one of two investment categories pursuant to the Ordinance 01-03 classification. The more beneficial to the national economy, the greater the tax benefit.[24]

The first category, known as the "general regime," refers to investments in projects outside the areas the country seeks to develop.[25] During the investment phase, a general regime project enjoys: exemption from the

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21. *Id.* at titre III.

22. Algeria Investment Legal Framework, *supra* note 2. ANDI is the agency created to oversee investments and administer benefits, such as tax breaks. *Id.* According to the Algerian embassy, investors must comply with the strict guidelines mandated by ANDI, which require that the submission of an "application form [which] must include the investment declaration and the request for fiscal benefits." *Id.* "Both documents must be presented simultaneously [to ANDI]. The investment declaration must be presented to ANDI and indicate, in particular, sector activity; location; jobs created; technology used; investment and financing plans; measures for environmental protection; anticipated length of time for materialization of investment; commitments related to investment materialization." *Id.*

23. *Id*.

24. D. Ben Abderrahmane, *Foreign Investment in Algeria*, H.G. ORG, Sept. 26, 2007, http://www.hg.org/article.asp?id=4848.

25. *Id*.

value added tax ("VAT"), a type of consumption tax, on certain goods and services; exemption from custom duties on certain imported equipment; and exemption from transfer taxes on real estate transactions.[26] In addition to the aforementioned benefits, during the execution phase of the project, a three-year period of tax exemption further applies to corporate income tax, normally taxed at 25%, and tax on professional activity, normally taxed at 2%.[27]

The second category, known as the "special regime," refers to investments made in specially-designated geographical zones where critical development is needed;[28] and investments bearing a special importance for the national economy, especially those that use clean technologies likely to help preserve the environment, protect natural resources, save energy and lead to sustainable development.[29]

During the investment phase, for investments in specially-designated geographical zones, this scheme enjoys all of the benefits of the general regime, in addition to:

- VAT franchise for goods and services, whether imported or acquired locally, if used in the benefit of the investment;
- Exemption from customs duties on goods and services, whether imported or acquired locally, if used in the benefit of the investment;
- Exemption from property transfer tax on all real estate purchases made as part of the investment;
- Application of a fixed duty, at a reduced rate of 0.2%, for the registration of the Articles of Association of the company and related capital increases;
- Support by the State (total or partial) of infrastructure expenses necessary for the implementation of the investment.[30]

During the execution phase, this scheme enjoys a ten-year tax exemption from company profit, professional activity, and land taxes.[31]

Investments bearing a special importance for the national economy result in an agreement between the investor and ANDI, as well as a determination by CNI that a certain sector is of particular interest to the national

26. *Id*.

27. *Id*.

28. *Id.*; *see also* Ordinance 01-03, *supra* note 20.

29. Ordinance 06-08, which amended and supplemented Ordinance 01-03 that did not provide a list of such investments, simply providing that such investments should be identified by such criteria set up by regulations after assent of the CNI. It appears however that a list of such investments bearing a special importance for the national economy has not been established to date. Ordonnance 06-08, July 15, 2006 (Alg.), *available at* http://www.droit-afrique.com/images/textes/Algerie/algerie_loi_zones_franches.pdf [hereinafter Ordinance 06-08].

30. Abderrahmane, *supra* note 24.

31. *Id*.

economy.[32] This category is referred to as the "investment agreement scheme." During the investment phase, the investment agreement scheme receives exemption from taxes, duties and levies on all imported or locally purchased goods and services; exemption from transfer duties on real estate acquisitions and legal advertising; exemption from registration duties; and exemption from the land tax.[33] During the execution phase, this scheme enjoys a ten-year exemption on tax from company profits and the professional activity tax.[34]

These measures are an important step towards stimulating growth in particular areas. They provide appealing incentives to investors, especially in areas in need of development in the case of the special regime and investment agreement scheme brackets. Furthermore, by establishing ten-year exemption periods, the government has targeted companies interested in establishing long-term relationships with Algeria. Such relationships are more beneficial, as long-term relationships often lead to investments in local training, local infrastructure, and local markets. On the other hand, companies who envision only short-term relationships with Algeria will likely not invest any time or money in such areas, and thus the benefits gained by Algeria are minimal. Ordinance 01-03 attempts to filter out those companies and investors whose presence in Algeria will not leave a positive mark.

A second important and beneficial feature of these tax brackets is their incremental nature. By adding further incentives to those areas in need of the most development, Algeria has taken the proper steps to ensure that underdeveloped sectors receive the interest and investment they require. It is no secret that the hydrocarbon sector is the main attraction for foreign investors and companies. It is also clear that this sector has done little to boost local employment or professional training for the Algerian workforce. By identifying underserviced sectors and incentivizing the entry of businesses into those sectors for long-term projects, Ordinance 01-03 targets the right type of growth for the right areas. It is only natural that foreign investors and businesses should seek out areas that provide the highest returns in the shortest amount of time. Thus Algeria must counter this by giving investors reasons to pursue long-term projects and utilize a domestic workforce. Ordinance 01-03 has established a legal framework to make this happen.

Although Ordinance 01-03 provides for tax exemptions for investment in specially-designated geographical zones, it appears that the Algerian government has not specifically designated the Special Economic Zones.[35]

32. *Id*.
33. *Id*.
34. Ordinance 06-08, *supra* note 30.
35. It should be noted that "special economic zones," "free zones," "free trade areas," "customs-free zones," "export processing zones," etc. are used almost

In 1997, Algeria saw the establishment of the first free trade zone, in Bellara, located next to the port of Jijel.[36] The free zone in Bellara started as a traditional duty free area next to the port, but authorities had the intention of developing it into an export zone attracting light industry from abroad and drawing on locally available resources (e.g. agriculture, fisheries, and forestry).[37]

However, the zone failed to attract the number of industrial enterprises anticipated.[38] In 2003, the Algerian authorities adopted Ordinance No. 03-02 of July 19, 2003 on Customs-Free Zones, aiming to enhance the legal basis for establishing Free Economic Zones.[39] One of the original features of this rule was that a customs-free zone could be set up on land in which full right is owned by a private person or corporate entity. This legislation applied to any entity in Algeria, resident or not. Five zones were planned, for the four coastal cities of Ghazaouet, Mostaganem, Annaba, and Skikda as well as for the southern border town of Tamanrasset.[40] Ordinance 03-02 also failed and was later repealed in 2006 by Law No. 06-10 of June 24, 2006.

Ordinance 01-03 charges the CNI to designate "these zones that require a special contribution from the government."[41] CNI has not made such a designation; thus, this scheme has not been applicable to date.[42]

As part of its efforts to attract investment outside the hydrocarbon industry and create jobs, the Algerian government should clearly designate the country's geographical zones to clarify and attract investment.

In the past, similar structures have been implemented by various other countries in order to ensure that the relationships established between investing entities and host countries are mutually beneficial. During its liberalization in the 1990s, for example, China aggressively sought to attract foreign investment but identified certain sectors that the government felt

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interchangeably in practice. Common to all such areas is the fact that they usually have a regulatory environment of their own, they are generally accessible to investors but are targeted at specific sectors or economic activities, and they might be restricted to companies in non-priority sectors.

36. HANS CHRISTIANSEN, MENA-OECD INVESTMENT PROGRAMME, INCENTIVES AND FREE ZONES IN THE MENA REGION: A PRELIMINARY STOCKTAKING 21 http://www.oecd.org/dataoecd/56/22/36086747.pdf (last visited Apr. 2, 2010).

37. *Id.*

38. *See* Algeria-Watch, Bellara, Un mythe qui sublime l'échec, Feb. 10, 2005, http://www.algeria-watch.org/fr/article/eco/bellara_echec.htm.

39. Ordonnance 03-02, July 2003 (Alg.) (Ordinance No. 03-02 on custom free zones), *available at* http://www.droit-afrique.com/images/textes/Algerie/algerie_loi_zones_franches.pdf [hereinafter Ordinance 03-02].

40. CHRISTIANSEN, *supra* note 37.

41. Ordinance 01-03, *supra* note 20, at art. 10.

42. *Afrique du Nord*, LA LETTRE MEDITERRANEE ET ORIENT (Gide Loyrette Nouel, Paris, Fr.), Nov. 2006, at 4, *available at* http://www.gide.com/front/FR/actualites/PDF/GLN_nwsl_mediterranee3_fr.pdf, *translated in* http://www.gide.com/front/EN/actualites/PDF/GLN_nwsl_mediterranee3_gb.pdf.

needed development.[43] It incentivized investment in these identified areas such as "infrastructure improvements, advancement of technology in primary industries, financial institutions, insurance, securities, communications, capital intensive and high technology enterprises, commercial businesses, and tourism."[44] China identified certain areas that needed development through publication of a "Guiding Catalogue," which "lists 18 broad categories and 185 more specific areas of industries and projects as 'encouraged' for foreign investment."[45]

Algeria should identify specific zones for tax breaks and other economic incentives, thereby allowing "the foreign investment framework [to] be made to complement the economic policies of the country."[46]

Foreign investment can be used as a tool to implement these goals, so long as the proper incentives are placed in the right areas. The use of a tiered taxation system, which places the greatest incentives on long-term projects in neglected areas, and clear guidelines on Special Economic Zones should attract investments that will have long-term benefits for the country and the foreign investors.

2. Repatriation of Funds

During the 2000–2007 period, Algeria introduced several measures facilitating repatriation of the capital gain for the money invested in Algeria. Investors could repatriate documented foreign capital and the dividends earned on that capital from investments in Algeria, even if profits exceeded the original investment amount.[47] Initially governed by Ordinance 01-03, repatriation of funds was once limited to certain capital.[48]

With the adoption of Regulation 05-03 of June 6, 2005, more capital became freed up for repatriation.[49] Regulation 05-03 required banks and accredited institutions to "execute without delay the transfer of dividends, earnings, proceeds from the transfer of foreign investments, as well as

43. Li Mei Qin, *Attracting Foreign Investment into the PRC: The Enactment of Foreign Investment Laws*, 4 SING. J. INT'L & COMP. L. 159, 159 (2000).

44. *Id*.

45. *Id*. at 166.

46. *Id*.

47. Ordonnance 01-03, *supra* note 20 ("Investments realized by shareholdings through free convertible foreign currency regularly quoted and the importation of which is duly established by the Bank of Algeria, benefit from the transfer guarantee of the capital invested and the income generated. This guaranty [sic] concerns also the net real products generated by the cession or liquidation, even if that amount is higher than the initial capital invested.").

48. KPMG ALGERIA, GUIDE TO INVESTING IN ALGERIA 53 (2008), http://www.algeria.kpmg.com/fr/Documents/Kpmg%20book%20EN.pdf [hereinafter KPMG GUIDE 2008] ("Only the funds exported to Algeria as investment, not all upstream expenditures made in connection with the investment, are destined to serve as the base for calculating transferable capital and income.").

49. *Id.*

attendance fees and percentages of profits for foreign administrators."[50] The guarantee of repatriation also applied to mixed investments between local and foreign investors, although in such a situation the amount that could be repatriated was limited to the documented amount invested by the foreign investor.[51]

However, the repatriation laws have been encumbered by restrictions and reporting requirements.[52] While repatriation of capital from services was allowed without pre-approval from the Bank of Algeria, repatriation of capital derived from the sale of goods required prior permission from the central bank.[53] The relative inefficiency of the banking system and weighty bureaucracy legacy tended to frustrate investors with lengthy delays for both transfers and payments.[54] It is likely that such stumbling-blocks to the otherwise positive developments in the area of capital repatriation has led Algeria to receive low scores in its "Ease of Doing Business" assessment conducted by the World Bank.[55] Since the repatriation of profits is a cornerstone of foreign investment, Algeria needs to simplify this process to attract foreign investment outside of hydrocarbons.

B. 2008–2009 Reversals and Modifications of Benefits

Many of the measures adopted during the 2000–2007 period to liberalize the economy proved helpful, resulting in 5% annual growth in recent years.[56] However, unemployment rates have remained high, especially for those under thirty, causing many Algerians to blame their continuing struggles on foreign profiteering and capital flight.[57] This sentiment was echoed by President Bouteflika, who, in a summer 2008 speech given to municipal leaders, "accused certain investors of making gains at the expense of the Algerian people, incurring meager costs on projects in Algeria, then transferring huge amounts of money overseas."[58] These concerns have resulted in recent readjustments of some of the favorable investment laws of

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50. *Id*.
51. *Id*.
52. U.S. COMMERCIAL SERVICE, *supra* note 2, at 2.
53. *Id*.
54. *Id*. at 21.
55. The World Bank study concludes that in 2007, "Algeria's Doing Business overall rank was 125th (out of 178), slightly below the average for its regional and lower-middle-income country comparators; the country has a similar position on various governance dimensions." WORLD BANK, ALGERIA: TRADE BRIEF 1 (2008), http://info.worldbank.org/etools/wti2008/docs/brief3.pdf [hereinafter ALGERIA: TRADE BRIEF].
56. *See* Reed, *supra* note 8.
57. *Id*.
58. Said Jameh, *Algeria to Review Investment Policy*, MAGHAREBIA, July 30, 2008, *available at* http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2008/07/30/feature-01.

the 2000 to 2007 period in an effort by the government, particularly the President, to redirect investment.[59]

1. Investment-Related Measures

In an effort to boost Algerian participation in foreign enterprises, new Presidential and Ministerial decrees require Algerian partnership for most foreign companies by 2010.[60] Foreign companies whose only business is the importation of goods for resale will be bound to transfer 30% of their stock to an Algerian partner, while companies which invest directly in Algeria will have to transfer 51% of their stock to local partners.[61] These rules emanate from four ministerial instructions issued by the Prime Minister between December 20 and 22, 2008, affecting all sectors including energy, finance, and construction.[62] In relevant part, the Ministerial Decrees state that:

> All foreign investment in Algeria, under a provision of a foreign operator to make this investment alone or on an approach for establishing a partnership, should lead to a distribution of share capital in which national holdings shall constitute the majority shareholder. The majority of shares held by the national capital will be divided among several owners . . . .[63]

Another Directive requires that:

- Any new registration of foreign imports company will be subject from March 1, 2009, to a participation by Algerian individuals or legal entities in their capital for at least 30% of shares;
- All foreign companies already registered which are engaged in the business of imports are required to comply with the above-mentioned provisions within a period not exceeding September 30, 2009.[64]

These measures will be enforced by the Director General of the Trade Registry.[65] He must also ensure that in negotiation for foreign direct or partnership investments, any ventures "must include a clause providing that the project in question will result in a positive foreign exchange surplus balance in [favor] of Algeria for the entire duration . . . of its existence."[66]

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59. *See* Reed, *supra* note 8.
60. Jean-Michel Meyer, *Investissement : l'Algérie impose sa loi [Investment: Algeria Imposes Its Laws]*, JEUNE AFRIQUE, July 28, 2009, http://www.jeuneafrique.com/Articleimp_ARTJAJA2533p097.xml0_.
61. *Id*.
62. *Id*.
63. KPMG GUIDE 2009, *supra* note 1, at 52.
64. *Id*.
65. *Id*.
66. *Id*.

Such changes have prompted international backlash from investors previously keen on Algeria. Multiple projects have been derailed as a result, with investors and businesses withdrawing or cancelling plans for Algeria-based enterprises, particularly in manufacturing.[67]

Reactions to these measures indicate that most foreign corporations and investors do not look kindly upon being required to seek local partners. As one French businessman in Algiers declared, "*Ces mesures seront contre-productives. Un partenariat ne se décrète pas*" (These measures will be counter-productive. A partnership cannot be decreed.).[68]

However, not all reactions to these measures have been negative. The Spanish ambassador to Algeria, Gabriel Busquets Aparicio, said "that this law is not an obstacle to the Spanish investment in Algeria, as Spain will seek to sign a comprehensive agreement for the economic and financial cooperation which will allow tight bilateral and strategic relations."[69] These comments were made in response to those of the French Minister of Trade, Hervé Novelli, who called upon several European countries, including Italy and Spain,[70] to pressure Algeria to withdraw these measures.[71] These discrepant reactions are likely the result of differing affects of the Algerian measures on the French and Spanish economies. Spanish-Algerian trade relations have apparently continued to flourish in recent years, taking advantage of a trade treaty signed in 2002.[72] In France, on the other hand, a

67. *See, e.g.*, Meyer, *supra* note 61 (citing various European business leaders expressing concern over the measures); s*ee also* Nora Boudedja, *Les entreprises allemandes boudent le marché algérien [German Firms Shun the Algerian Market])*, EL WATAN, Oct. 13, 2009 *available at* http://www.elwatan.com/Les-entreprises-allemandes-boudent (discussing the withdrawal of German manufacturing company Weiskker GmbH from a microbead manufacturing plant that was to employ 240 people); Raissa Kasolowsky, *Dubai's Emaar Shuts Algeria Office as Projects Stall*, REUTERS, Jul. 4, 2009, http://af.reuters.com/article/investingNews/idAFJOE56306020090704 (discussing the withdrawal of Dubai real estate giant Emaar from investments in Algeria, which had had previously agreed to oversee $20 billion worth of real estate development projects in Algeria).

68. Meyer, *supra* note 61.

69. Delila Henache & Nouara Bachouche, *Gabriel Busquets Aparicio: "The Complementary Finance Act 2009 is not an Obstacle to the Spanish Investments in Algeria,"* ECHOROUK ONLINE, Oct. 25, 2009, http://www.echoroukonline.com/eng/index.php?news=8213.

70. Mohammed Meslem, *Algeria Trade Minister Rejects France Remarks on Finance Law*, ECHOROUK ONLINE, Oct. 26, 2009, http://www.echoroukonline.com/eng/index.php?news=8218.

71. Henache & Bachouche, *supra* note 71.

72. This treaty of friendship, cooperation, and neighborhood was signed in October 2002 in Madrid in the course of President Bouteflika's state visit to Spain. Embassy of the People's Democratic Republic of Algeria in Jakarta, Information Bulletin, http://www.algeria-id.org/presscommunique/revue_de_presse.php (last visited Feb. 15, 2010). It was signed in order to strengthen bilateral cooperation between the two countries in all fields. *Id.* This treaty specifies that a high level meeting would be held every year, alternatively in Algeria and Spain. *Id.*

few sectors have found importing into Algeria more difficult.[73] According to Echorouk Online, the new legislation caused obstruction in the port of Marseille which saw its activity diminished by 40% as its work with the port of Algiers dropped.[74] These divergent reactions demonstrate that the measures taken by Algeria do not necessarily affect international trade negatively. Algeria's measures are calculated to ensure that foreign investments that benefit Algeria can still reap their rewards.

While the motivation behind such measures is clear, their outcome is uncertain. The new directive requires all projects to post a positive foreign exchange surplus balance in favor of Algeria.[75] But if the immediate effect of such measures is to drive away the majority of investors, then these readjustments fail to accomplish what they set out to achieve *ipso facto*. On the other hand, establishing measures that promote long-term investments that provide continued growth for Algeria in terms of job creation, skills and workforce development, and general long-term economic growth is a legitimate goal of the government. The key is, therefore, to strike a balance between restrictive measures and total deregulation.

This can be achieved through a combination of the three-tiered taxation system of Ordinance 01-03 and the new partnership requirements of 2008. If, for example, Algeria were to include companies that were 50% or more locally owned within the highest tax-break bracket, then companies would have an incentive to reach out to local partners. This could be done in a tiered system along the lines of the general regime, special regime, and investment agreement scheme structure, thereby incentivizing local ownership, rather than imposing it outright. If tax breaks make local partnerships more attractive to international companies, they will be more inclined to pursue them to reap those benefits. Conversely, measures limiting or dictating corporate structuring are generally treated with aversion, and will likely result in decreased interest in Algeria as a potential market.

By imposing partnerships, Algeria creates an environment generally anathema to modern investors, one that would likely invoke negative memories of Algeria's socialist past, a landscape that was barren of foreign business. On the other hand, by incentivizing partnerships, the element of free negotiation is maintained, which is an important consideration in trying to attract business from abroad.

Regardless of the outcome, foreign investors should not see the local partnership requirement as a complete burden. Such requirements can have a positive impact on long-term relationships between investors and Algeria. Increased participation of Algerians will result in the development of savvier business partners in the region, increased local participation in the

73. *See* Meslem, *supra* note 72.
74. *Id*.
75. KPMG GUIDE 2009, *supra* note 1, at 52.

national economy, and broader distribution of wealth provided a monopoly on such ventures is avoided.

2. Repatriation and Taxation-Related Measures

The Bank of Algeria issued official Instruction No. 01-09 on February 15, 2009.[76] The instruction sets new guidelines on the taxation and repatriation of foreign assets.[77] These guidelines are further elaborated upon in the 2009 Finance Act.[78] These new measures appear to curtail somewhat the power of ANDI and boost the mandate of the CNI,[79] which is more closely overseen by the executive branch of government.[80] By doing so, the Bank Instructions and Finance Act have given the executive branch a more direct hand in the national economy. This measure can have positive effects if the Executive targets those economic opportunities that benefit the country as a whole.[81] While ANDI previously oversaw foreign investment projects, under the new directives all investment projects initiated by a foreign investor or by an Algerian national with a foreign partner must be submitted to CNI, regardless of the amount involved.[82] Further measures concerning ANDI require the following:

- Where investments receive ANDI benefits, the amounts equivalent to those benefits received, such as tax or customs breaks, will be deducted from the profits eligible for transfer outside Algeria, i.e. repatriation and must be reinvested into Algeria within four years;[83]
- Unpaid taxes, duties and excises become immediately payable if investments subject to benefits were not achieved or do not comply with the required conditions outlined above, and a 25% penalty is subsequently imposed as well; and[84]
- All fund transfers made to individuals or non-resident legal entities must be declared to the tax authorities before transfer;[85] declarations of

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76. KPMG QUARTERLY NEWS, *supra* note 15, at 2.
77. *Id*.
78. *Id*. at 3.
79. According to the KPMG Guide 2009, "the CNI is not an independent administrative body and . . . its decisions and/or recommendations are not addressed directly to the investor, but are meant for the authorities in charge of the implementation of the legal texts pertaining to the promotion of investments, meaning, first and foremost, and ANDI." KPMG GUIDE 2009, *supra* note 1, at 64.
80. *Id.* at 57.
81. *Id.* at 64.
82. *Id.* at 57.
83. KPMG QUARTERLY NEWS, *supra* note 15, at 2.
84. *Id*. at 3.
85. *Id*. at 4.

> transfer are made through the submission of a detailed dossier to the Bank of Algeria.[86]

The new directives and instructions for winter and spring 2009 establish two tax-break brackets for foreign investors: the general regime and the special regime.[87] Both of these require a written request to ANDI in order to obtain the benefits afforded under such schemes.[88] The methods to obtain such incentives have also been significantly revised in 2008 by Executive Decree 08-98 of March 24, 2008, and require a detailed "statement of investment" be signed by the investor(s), a local proxy or representative, and filed with the appropriate agencies.[89] The statement requires a detailed description of the goods and services being offered and a more detailed request for tax incentives.[90]

Once the statement of investment has been filed and the entity begins receiving tax benefits through ANDI, the Finance Act places a new burden which has detracted some foreign investors.[91] The Act now requires that all profits from the investment that otherwise would have been taxed (i.e. receiving general/special regime benefits) must be reinvested in Algeria.[92] This requirement heavily burdens repatriation of profits that were in receipt of tax breaks. The obligation lasts for a period of four years, beginning with the last year of receiving benefits.[93] The 2008 Finance Act imposes a reimbursement of benefits penalty along with an additional 30% penalty charge.[94] The 2009 Finance Act adds further penalties including the loss of benefits where fraudulent tax activity is discovered.[95]

As mentioned, the ability to repatriate funds made abroad is a linchpin for international investors. The reforms discussed in this section accomplish two divergent goals. On the one hand, they appear to make the entire investment process more transparent for both sides.[96] For the investor, the role of the banking system appears to be more defined and streamlined.[97] The application process, though more rigorous, has been clarified and standardized.[98] For the government of Algeria, there is a more comprehensive record of those doing business within the country, which

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86. *Id.* at 4–5 (providing a detailed list of the dossier requirements).
87. KPMG GUIDE 2009, *supra* note 1, at 57.
88. *Id*.
89. *Id*. at 60.
90. *Id*. at 61.
91. *Id*. at 63.
92. *Id*.
93. KPMG GUIDE 2009, *supra* note 1, at 63.
94. *Id*.
95. *Id*.
96. *Id*. at 60, 65.
97. *Id*. at 63.
98. *Id*. at 60 (requiring statement of investment and supporting documents from investors).

facilitates an easier and more accurate analysis of foreign investment. The reforms ensure a more stringent compliance with the rules and regulations established between 2000 and 2009 through monetary penalties on those who violate these requirements.[99] This is an important step as it ensures compliance across the board.

On the other hand, these reforms impose several restrictions that make investing in the country less attractive, and, in a sense, eliminate the benefits previously afforded foreign investors. For example, by limiting the repatriation of profits made on investments that receive tax breaks for a four-year period, the Finance Act of 2009 essentially eliminates those incentives previously created, i.e. the tax breaks of Ordinance 01-03.[100] Such a move will likely reverse those gains Ordinance 01-03 sought to accomplish.[101]

The recommended approach is to integrate certain aspects of the 2008 and 2009 measures with the reforms of the "Second Generation." Specifically, Algeria can monitor and ensure control over foreign investments through a streamlined reporting process and an increased role of the central banking system and the executive branch. Keeping tabs on those present and operating in the country is an important step to maximizing Algeria's revenue. By making the reporting process transparent, Algeria can ensure that these foreign entities do not have an excuse to avoid full compliance with these requirements. These aspects of the 2008–2009 reforms will ensure that Algeria obtains the information necessary from investors entering the country to make an assessment as to which benefits those companies should be granted. By integrating these two aspects of the 2008–2009 reforms with the reforms of the "Second Generation," Algeria can better achieve its goal of creating jobs, establishing long-term relationships with corporations, and providing training to its workforce. On the other hand, enforcement of some of the stricter measures of the new reforms, such as the partnership requirements or new repatriation requirements, may dull investor interest in the country and eliminate potential sources of growth.[102] However, if Algeria offered incentives to long-term associations with the country with the three-tiered tax system, it will be better equipped for getting the most out of foreign investment.

99. KPMG GUIDE 2009, *supra* note 1, at 63.
100. *See supra* notes 83–87 and accompanying text.
101. *See supra* note 88–90 and accompanying text.
102. *See* Christian Lowe, *Algeria's Rocky Road for Foreign Investors*, FORBES, Dec. 3, 2009, *available at* http://www.forbes.com/feeds/afx/2009/12/03/afx7179758.html.

III. ALGERIA'S INTERNATIONAL INITIATIVES

A. Algeria and the International Trading System

As Algeria's domestic laws on international trade continue to develop, the country has made significant strides in the last decade towards integration into the international economic and trade system. At the same time, the government has taken steps to ensure that the local market maintains its independence and viability as such integration occurs.[103] Beyond domestic reforms, Algeria has ratified various international conventions and integrated those conventions into law, albeit in a way that maintains the integrity of domestic markets. This protection of domestic markets is taken to ensure that the benefits of opening its economy are maximized for the country as well, rather than international investors only. This is a legitimate goal for a country with a small economy and high unemployment.

International investors will benefit significantly from Algeria's continued integration into the world economy. These benefits include, but are not limited to: familiarity with international trade customs and regulations as governed by the WTO, integration and increased accessibility to local markets, and standard protections offered by international dispute resolution mechanisms.

The advantages of such integration are innumerable, as integration into the global economy often means significant increases in investments from abroad. This section will survey the steps Algeria has taken to date with regard to integration into the international economic system, and discuss how such steps may prove beneficial to the country.

1. *World Trade Organization*[104]

Since 1987, Algeria has been part of a WTO Working Party aimed at bringing the country into the WTO fold,[105] with specific emphasis on

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103. *See supra* notes 62–66 and accompanying text.

104. The World Trade Organization ("WTO") is an international organization aimed at supervising and liberalizing international trade. The World Trade Organization, at 1, 2009, *available at* http://www.wto.org/english/res_e/doload_e/inbr_e.pdf. It provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development. *See id.* The organization officially commenced on January 1, 1995 replacing the General Agreement on Tariffs and Trade ("GATT"). *Id.* at 7–8. The WTO aims to liberalize trade by encouraging non-discrimination between goods from other member nations and transparency in trade regulations, amongst other principles. *Id.* at 4. The WTO also provides a forum for dispute resolution between member nations. *Id.* at 5. The WTO currently has 153 members and three official languages, English, French, and Spanish. *Id.* at 8.

105. World Trade Organization, Summary of Accessions in Algeria's Workers Party, http://www.wto.org/english/theWTO_e/acc_e/a1_algerie_e.htm (last visited Feb. 17, 2010).

reforming the customs duties regime and opening external trade.[106] Since then, bilateral market access negotiations have been under way, specifically focusing on goods and services as well as revising Algeria's foreign trade regime.[107] In a 2008 report, the WTO's Working Group highlighted the following actions by the Algerian legislature that bring the country's policies closer in line with that of the WTO: "Algeria has passed new legislation on technical barriers to trade ("TBT"); sanitary and phytosanitary ("SPS") issues; intellectual property ("TRIPS"); antidumping, safeguards and countervailing measures; pricing policies; customs valuation; importation of pharmaceuticals . . . and exports of beef, sheep and palm trees."[108] Although quota or license applications (non-tariff measures) have been lifted, other controls applied during exports, including health controls, pyhtosanitary controls, tests and quality controls, are still applied.[109] With regards to protection of intellectual property rights, the government adopted new laws in July 2003 on copyright and related rights, trademarks, patents, and integrated circuits,[110] as part of Algeria's negotiations for WTO accession. However, implementation has been inconsistent, and enforcement remains spotty.[111] Nonetheless, the customs service has stepped-up the fight against counterfeit products.[112]

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106. KPMG GUIDE 2009, *supra* note 1, at 25.

107. *Id*.

108. WORLD TRADE ORGANIZATION, WORKING PARTY REVIEWS DRAFT REPORT ON ALGERIA'S TRADE REGIME, (Jan. 17, 2009), http://www.wto.org/english/news_e/news08_e/acc_algeria_17jan08_e.htm.

109. International Centre for Trade and Sustainable Development, *WTO In Brief - Energy, Services Holding Back Algeria's WTO Accession Talks*, SERVICES PROGRAMME, Feb. 6, 2008, http://ictsd.org/i/news/bridgesweekly/6622.

110. The Embassy of Algeria, Tokyo, Japan, The Protection of Intellectual Property, http://www.algerianembassy-japan.jp/economy.php?view=intellectual_property&lang=lilmfyfv&mode=print (last visited Feb. 16, 2010) (citing Act 03-17 that carries the approval of Ordinance No. 03-05 of July 19, 2003 relative to copyright and related rights, Act No. 03-18 that carries the approval of Ordinance 03-06 of July 19, 2003 relative to trademarks, Law No. 03-19 that approves Order No. 03-06 of July 19, 2003 on intervention patents, and Act No. 03-19 that carries approval of Ordinance 03-06 of July 19, 2003 relative to the protection of configuration schemes for integrated circuits). The law covers individuals or entities established in Algeria or abroad. *Id.*

111. This is due in part to the insufficiency of the number of officers assigned to fighting counterfeiting. Nazim Fethi, *Counterfeit Goods Flood the Algerian Market*, MAGHAREBIA, Jan. 18, 2007, http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2007/01/18/feature-01. According to *Magharebia*, there were only forty-five officers countrywide in 2007. *Id.*

112. *See Algeria Signs Agreement with Unilever in Battle Against Counterfeit Goods*, FORBES, June 18, 2007, *available at* http://www.forbes.com/feeds/afx/2007/06/18/afx3831982.html (listing a number of international brands operating in Algeria, including Pfizer, Unilever, Nestle, and Procter and Gamble, which make up an informal group working for better coordination with local customs officials in the battle against counterfeit goods).

Despite these improvements, the Working Group found that further reforms in the areas of SPS, TBT, and TRIPS were necessary.[113] Specifically, laws governing the following were in need of further reform according to the Working Group: state-owned enterprises, pricing on hydrocarbons, trading rights and commercial presence, taxation regime (VAT and other consumers taxes), and export subsidies.[114] Once reformed, these areas will not only bring Algeria into the WTO community, but will also create an easier environment for foreign investors since there is international familiarity with WTO standards. The main concern for Algeria is meeting these obligations while bringing about growth in the domestic economy, a feat this Article seeks to demonstrate can be accomplished. Despite the report's criticisms, the steps Algeria has taken to date towards improving the mechanisms of trade, particularly in the areas of competition and market transparency, cannot be overlooked. For example, a 2003 Ordinance, modified in 2008, prevents and penalizes anti-competitive measures taken by local firms or local governments, ensuring pricing freedoms and a market-driven economy, particularly in the areas of trade in goods and services.[115] Such measures that have brought Algeria further in line with WTO requirements and closer to market integration are significant steps towards the opening of the Algerian economy.

2. Most Favored Nation v. Generalized System of Preferences

As a developing nation, Algeria qualifies for the benefits afforded to similar countries by the Generalized System of Preferences ("GSP"),[116] a program initiated to foster international trade among developing countries.[117] The GSP allows developed countries to offer reduced tariff or

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113. The WTO Working Group did not specify what additional reforms could be made in those areas.

114. KPMG GUIDE 2009, *supra* note 1, at 63.

115. *Id.* at 29.

116. General Agreement on Tariffs and Trade [GATT], Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 ("[A]ny advantage, favour, privilege and immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all contracting parties.") Initially governed by the theory of Most Favored Nation ("MFN") treatment, the GATT initially sought to avoid preferential treatment among nations. *Most-Favored-Nation Treatment in International Investment Law* 1–2 (Directorate for Fin. & Enterprise Aff., Working Paper No. 2, 2004), *available at* http://www.oecd.org/dataoecd/21/37/33773085.pdf. But as an expanded and diversified membership was sought, numerous exceptions to the principle of MFN were established, including the creation of customs unions, free trade areas, bi-lateral and multi-lateral arrangements, and finally, the principle of the GSP. *See generally id*; European Union, The EU Generalised System of Preferences, Feb. 10, 2005, http://www.europa-eu-un.org/articles/fr/article_4337_fr.htm.

117. Omar T. Mohammedi, GATT, Developing Countries and the New Forms of Protectionism 4 (Aug. 1989) (unpublished L.L.M. thesis, University of Warwick) (on file

duty free treatment to imports from developing countries, thereby promoting trade with those non-industrialized and under-developed nations.[118] Through the GSP, countries like Algeria, at least initially, were able to participate fully in the liberalized system of international trade while protecting industry at home. Developing countries, believing that their markets were too small to support the development of manufacturing industries, initially advocated for the implementation of such a system.[119] In 1979, however, the GATT nations adopted a new framework for the GSP wherein each donor nation would determine its own scheme for the GSP.[120] Thus, no common, standardized system exists that gives all developing countries equal conditions with respect to developed countries. The countries and products that qualify for GSP treatment in the United States differ greatly from those in the European Union.

In the United States, the GSP program allows least developed countries ("LDCs") to enjoy duty-free treatment on a myriad of products that would otherwise be subject to customs duties.[121] As a result, goods imported into the United States from LDCs increased from $68 million to $2.9 billion between 1994 and 2001.[122] Despite these numbers, many LDCs fail to take full advantage of the benefits the program offers.

Algeria has established GSP relationships both with the United States as well as Europe, but whether those relationships have been beneficial to the country is up for debate. With the European Union, Algeria is the recipient of "specific product group" preferential treatment for Section V materials, covering mineral products, last renewed on July 23, 2008.[123] Algeria has

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with author); *see also* Veronica Lawrence, Note, *An Entrepreneur's Best Friend: The U.S. GSP Program and its Positive Impact On Small Businesses*, 2 ENTREPRENEURIAL BUS. L.J. 593, 594–95 (2007).

118. Initially, developed nations worked around MFN treatment by waiving it for a ten-year period. Lawrence, *supra* note 117, at 595. But the principle of GSP was fully and permanently enshrined into the GATT in 1979, codified in the "Enabling Clause," which permits preferential treatment for developing countries notwithstanding the provisions of Article I of GATT. *Id.* The GSP "derives its legitimacy from the recognition that developing and least-developed countries have a special need for preferential treatment in order to be able to participate meaningfully in the international market." *Id.*

119. Amy M. Mason, *The Degeneralization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP*, 54 DUKE L.J. 512, 517–18 (2004).

120. Mohammedi, *supra* note 119, at 60.

121. Caf Dowlah, *The Generalized System of Preferences of the United States: Does It Promote Industrialization and Economic Growth in Least Developed Countries?*, 1 L. & DEV. REV. 71, 82 (2008).

122. *Id.* at 83.

123. Press Release, European Trade Commission, European Union Maintains Trade Preferences for Developing Countries (July 23, 2008), http://trade.ec.europa.eu/doclib/press/index.cfm?id=206&serie=160&langId=en.

also been a GSP beneficiary of the United States since 2004, with duty-free treatment to 3,400 types of exports from Algeria.[124]

Among Middle East and North African markets, Algeria has consistently failed to take advantage of the bilateral GSP agreement with the United States.[125] Algeria's GSP exports to the United States account for *less than 0.1%* of its total exports to that country, since hydrocarbons and petroleum products make up the bulk of Algerian trade with the United States.[126] However, Algeria exports many GSP-eligible products to other countries such as natural cork items, car and bus tires, jewelry, rare gases and other chemicals.[127] These goods are not being imported into the United States from Algeria despite tariff preference and a high demand, a situation Algeria should rectify in order to take advantage of favorable terms. Algeria would benefit significantly by diversifying its trade regime, and encouraging industries in areas outside the oil and gas sector to do business with the United States, the European Union, and other countries.

Similar situations are not limited to Algeria alone, particularly in the Middle East and North Africa ("MENA") region. Egypt, for example, is the largest bilateral trading partner of the United States with $1.4 billion in exports in 2007.[128] However, only 2.6% of Egyptian exports arrive into the United States under the GSP program (roughly $34.7 million).[129] Egypt exports sugar confections, coffee preparations, hand-woven cotton fabrics, iron products, copper alloys and wires, wooden furniture and pure oils in large quantities to other countries in the world.[130] These goods could qualify for duty-free treatment in the United States under the GSP program if Egypt exported it under the preferential treatment theory.[131] With regard to GSP programs in particular, "imports under GSP represent only a small fraction (0.2% for 2005) of all imports from the Middle East Free Trade Area ("MEFTA")[132] region."[133]

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124. Marideth Sandler, Office of the U.S. Trade Representative, Executive Office of the President, *Expanding Algeria's Exports Under the GSP Program*, Apr. 2008, at 3, http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file885_14812.pdf.

125. President George W. Bush designated Algeria as a beneficiary developing country for the purposes of the Generalized System of Preferences on March 1, 2004, effective March 19, 2004. Proclamation No. 7758, 69 Fed. Reg. 43, 10, 131 (Mar. 1, 2004).

126. Sandler, *supra* note 126.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id*.

131. *Id*.

132. Middle East Free Trade Agreement ("MEFTA"), a geographical area covering the MENA region. Office of the United States Trade Representative, Middle East Free Trade Area Initiative [MEFTA], http://www.ustr.gov/trade-agreements/other-initiatives/middle-east-free-trade-area-initiative-mefta (last visited Feb. 20, 2010).

133. Susan Sakmar, *Globalization and Trade Initiatives in the Arab World: Historical Context, Progress to Date, and Prospects for the Future*, 42 U.S.F. L. Rev. 919, 930 (2008).

In order to benefit from trade preference programs, Algerian companies should familiarize themselves with the requirements of filing for GSP benefits. According to the U.S. Trade Representative, the failure to claim GSP status is primarily due to uncertainty concerning which goods are GSP eligible since no universal mechanism is in place.[134] With regard to U.S.-based benefits, products exported from Algeria must meet the following requirements: (1) must be included in the U.S. tariff list of GSP-eligible articles; (2) must be imported directly from Algeria to the United States or pass through another country on a "bill of lading" with a U.S. destination, and (3) must conform to the 35% "value-added" rule.[135]

LDCs and developing countries, particularly those of the MENA region, including Algeria, are failing to take advantage of benefits and incentives that are available to them, both with the United States and the European Union. Failure to do so means that the Algerian economy is being deprived of significant trade benefits that would positively impact the economic development of the country.

B. The Role of Bilateral and Multilateral Treaties

1. Multilateral Agreements

In addition to those programs provided for by the GATT and WTO, countries have utilized bilateral and other multilateral treaties to establish trade relations on an individual or regional scale, often in the form of free trade agreements such as the Middle Eastern Free Trade Agreement ("MEFTA"). Algeria is a signatory to several bilateral and multilateral agreements,[136] but as with the GSP program, Algeria has failed to take advantage of the benefits offered by such agreements.

The use of such bilateral and multilateral agreements has steadily increased in the last two decades, with "[a]lmost seventy regional agreements . . . notified to the WTO from 2003 to 2008."[137] There is "widespread agreement that this pace has been in response to [a] . . . lack of progress in the multilateral trading system. When the WTO does not deliver continued trade liberalization and growth opportunities, countries begin seeking alternative paths to trade liberalization and trade reform."[138]

134. Sandler, *supra* note 126.

135. The 35% Value-Added Rule states that the "[c]ost of local inputs and labor must equal 35% of product's FOB price. If imported item, it must be 'substantially transformed' in Algeria and then used in product production. 'Substantially transformed' means the item's name, character, or use differs from when it was imported." *Id.*

136. Such as The Arab Magrheb Union ("AMU") and The OPEC Fund for International Development ("OFID").

137. C. O'Neal Taylor, *Regionalism: The Second Best Option?* 28 ST. LOUIS U. PUB. L. REV. 155, 156 (2008).

138. *Id.*

Regional trade seems to dominate certain areas, making up, for example, 75% of all trade in Europe, and 50% of all trade in Asia.[139]

In the MENA region, as with participation in GSP programs, regional trade is abysmally low. The region's share of overall world exports peaked at 12% in 1981, but dropped to less than 5% in 2001.[140] According to the U.N. statistics, "[r]egional trade was particularly low, and in 2001, it accounted for only 8% of the region's total trade."[141] The World Bank's assessment of MENA regional trade is equally negative, finding that

> 'the MENA countries had entered the new millennium at a significant deficit with respect to most other regions of the world in terms of its integration into the world economy.' While the volume of trade increased in most regions of the world over the prior two decades, trade in the MENA region declined. The ratio of trade to gross domestic product ("GDP") fell from an average of 100% in 1980 to about 60% by 2000. Regional exports were dominated by oil, and '[o]nly a few countries had established growing non-oil export sectors.'[142]

Not only is inter-MENA trade drastically lower than the world average, MENA trade with the world's strongest economies, the United States and the European Union is also negligible. There is "considerable evidence that . . . [Arab] countries trade significantly less than countries with similar incomes and geographic proximity to trading partners in other parts of the world."[143] With regard to the EU, one study "examined fifteen Arab countries' exports to Europe and concluded that, on average, they were 33.5% lower than they would be, assuming that these countries' export behavior to the European Union market is identical to any European Union country."[144] In relation to the United States, a "2005 economic study that examined the bilateral trade of six MENA countries (Algeria, Tunisia, Morocco, Egypt, Jordan, and Syria) with the United States found that these countries 'seriously underexploited their trade potential with the United States.'"[145]

Algeria is unfortunately no exception to the aforementioned trend. In terms of general free trade and MFN compliance, according to a World

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139. Sakmar, *supra* note 134, at 922.

140. *Id*.

141. *Id.* (citing Press Release, E. Anthony Wayne, Assistant Sec'y for Econ. & Bus. Affairs, Remarks to the International Arab Banking Summit, Creating Free and Dynamic Economies in the Arab World, Montreal, Canada (June 25, 2003)).

142. *Id*. at 922–23 (quoting WORLD BANK, MIDDLE EAST AND NORTH AFRICA REGION, ECONOMIC DEVELOPMENTS AND PROSPECTS: JOB CREATION IN AN ERA OF HIGH GROWTH 73–74 (2007)).

143. ROBERT Z. LAWRENCE, A US-MIDDLE EAST TRADE AGREEMENT: A CIRCLE OF OPPORTUNITY? 29 (2006).

144. Sakmar, *supra* note 137, at 924 (citing R. Lawrence, *supra* note 144, at 33).

145. *Id*. (citing R. Lawrence, *supra* note 144, at 33).

Bank study conducted in 2008, Algeria's "Trade Tariff Restrictiveness Index ("TTRI") at 12.7 percent is higher than group averages for the MENA region (12.6 percent) and lower-middle-income (8.6 percent) countries, yielding a rank of 106th out of 125."[146] Non-tariff measures are equally restrictive, earning a 38.1% compared to a regional average of 26.6% in terms of the Overall Trade Tariff Restrictiveness Index ("OTRI"), as calculated by the World Bank.[147] These low numbers are attributed to various factors.[148] The World Bank study concludes that in 2007,

> Algeria's Doing Business[149] overall rank was 125th (out of 178)[150], slightly below the average for its regional and lower-middle-income country comparators; the country has a similar position on various governance dimensions. Lagging behind its comparators on nearly all components, Algeria was ranked 141th (out of 151) on the 2007 Logistics Performance Index.[151] *Its weakest logistics category was efficiency of customs and other border procedures*[152] *(1.6 on a scale of 1 to 5).*[153]

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146. ALGERIA: TRADE BRIEF, *supra* note 56, at 1.

147. *Id*.

148. For instance, in *Doing Business 2010*, Algeria is ranked 148th overall with regard to starting a business in Algeria. The World Bank Group, Doing Business, http://www.doingbusiness.org/ (select Algeria, Egypt, or Morocco under "select an economy") (last visited Feb. 10, 2010). It takes twenty-four days to start a business in Algeria and there are fourteen procedures to undertake whereas it takes only seven days in Egypt to start a business and there are only six procedures to undertake. *Id.* With regard to protecting investors, Algeria is ranked seventy-three, with strength of investor protection index of 5.3 (on a scale of 0–10); Egypt has the same index of 5.3 while Morocco has 3.0. With regard to enforcement of contracts, Algeria is ranked 123. *Id.* It takes 630 days to enforce contracts and there are forty-six procedures to undertake. *Id.* Egypt and Morocco are not particularly better ranked; it takes respectively 1010 and 615 days to enforce contracts in these countries and there are forty-one procedures to undertake in Egypt and forty procedures in Morocco. *Id.*

149. The ease of doing business index does not account for an economy's proximity to large markets, the quality of its infrastructure services (other than services related to trading across borders), the strength of the financial system, the security of property from theft and looting, macroeconomic conditions or the strength of underlying institutions.

150. However, in the *Doing Business 2010*, some of Algeria 2008–2009 reforms were qualified as making it easier to do business in the country. Among these reforms are reforms in areas relating to enforcing contracts; paying taxes; dealing with construction permits; transferring property. The World Bank Group, Doing Business in Algeria, http://www.doingbusiness.org/ExploreEconomies/?economyid=4 (last visited Feb. 10, 2010).

151. Logistics Performance Index ("LPI") is the simple average of the country scores on the seven key dimensions: Efficiency and effectiveness of the clearance process by Customs and other border control agencies; Quality of Transport and IT infrastructure for logistics; Ease and affordability of arranging shipments; Competence in the local logistics industry (e.g., transport operators, customs brokers); Ability to track and trace shipments; Domestic logistics costs (e.g., local transportation, terminal handling, warehousing); and Timeliness of shipments in reaching destination. Monica Alina Mustra, World Bank Group, International Trade Department, *Trade Facilitation Performance Indicators: What Gets Measured, Gets Managed*, 2009, at 18 http://www.unescap.org/tid/artnet/mtg/

Algeria needs to boost trade not only with its neighbors, but also with the world's economic powerhouses, the United States and the European Union. To do so, further liberalization is necessary to counter the restrictiveness of its tariff barriers as well as its general domestic trade procedures. In recent times, Algeria has taken definitive steps in that direction: "Regarding tariffs, the level of protection has considerably diminished. This trend has been confirmed with the effective application since September 2005 of the Association Agreement with the European Union . . . and since [January 1,] 2009 with the Arab Free Trade Zone."[154] Reduction in such protective measures is necessary to boost regional and international trade with respect to Algeria. Such liberalization measures are important to bring the country in line with international standards in this field. While these steps are effective, they continue to be hampered by additional laws that muddy the situation. For example, the Finance Act of 2001 imposed temporary additional duties (*droit additionell provisoire*) on 500 items, later reduced to 380 in 2005.[155] While these duties continue to be reduced, they present an additional burden for outside investors that likely resulted in the low OTRI rank offered by the World Bank.

2. *Bilateral Agreements*

In addition to the multilateral agreements discussed above, Algeria is signatory to forty-five bilateral trade agreements[156] that deal specifically with the protection of investments and double taxation.[157] Such double taxation treaties are mostly based on the Organisation for Economic Co-operation and Development ("OECD") model treaty.[158] Under the OECD model, corporate profits of a firm from a contracting state are only taxable in that state unless the firm maintains a permanent establishment in the other contracting state.[159] Salaries and compensation for workers are only

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gravity09_wed_mustra1.pdf (noting that in terms of LPI scoring, 1 is the lowest score – 5 is the maximum score). LPI can assess a country bottlenecks and opportunities for reform. *Id.*

152. ALGERIA: TRADE BRIEF, *supra* note 56, at 1 (commenting on the efficiency and effectiveness of the clearance process by Customs and other border control agencies).

153. *Id*. (emphasis added) (noting one is the lowest score, five is the maximum score).

154. KPMG GUIDE 2009, *supra* note 1, at 97.

155. *Id*.

156. According to the KPMG GUIDE 2009, Algeria has signed forty-five bilateral treaties for the protection and promotion of investments, in addition to the multilateral treaties to the same effect. *Id.* at 53–54. Among the countries which have concluded such agreements with Algeria are France (1993), Germany (1996), China (1996), Portugal (2004), Greece (2000), Denmark (1999), Russia (2006), Tunisia (2008), Switzerland (2004), Nigeria (2002), Mauritania (2008), Kuwait (2001), Malaysia (2000), Mozambique (1998), Niger (1998), Poland (2004), Czech Republic (2000), Yemen (1999), and others. *Id.* Most of these bilateral investment agreements contain provisions against double taxation. *Id.*

157. *Id.* at 53.

158. KPMG GUIDE 2009, *supra* note 1, at 216.

159. *Id.*

taxable in the state where the workers reside.[160] Corporate dividends are taxable only in the state where the beneficiary resides.[161] The treaties provide that the country of residence provide exemptions for income already taxed in Algeria, or provide tax credits for the amount of tax already paid in Algeria.[162] Frequently, bilateral treaties also contain other provisions that help bolster trade such as provisions to exempt certain goods from customs taxation and cooperate in eliminating smuggling of goods.[163]

These bilateral investment treaties are a positive step that should provide peace of mind for investors. But of the forty-five bilateral agreements, only sixteen are with MENA countries.[164] As cited above, inter-regional trade accounts for only 8% of total trade in the MENA region, indicating that Algeria exploits neither its bilateral nor multilateral agreements to their full potential.[165]

To date, there is also no bilateral investment treaty or double taxation treaty between Algeria and the world's strongest economy — the United States.[166] However, the United States and Algeria signed a Trade and Investment Framework Agreement ("TIFA")[167] in 2001 that creates a platform for future bilateral treaties between the two nations and a discussion on Algeria's WTO accession. TIFA council meetings have been held to assess the status of trade relations and to encourage closer cooperation. The last such meeting was held in 2004.[168]

While the nature of these bilateral agreements is a positive step in the right direction (i.e. the protection of international investments), without finalizing and utilizing those agreements to trade, particularly within the MENA region, Algeria is wasting a potential source of growth and revenue.

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160. *Id.* at 217.

161. *Id.*

162. *Id.* at 218.

163. *Algeria & Tunishia Hold Bilateral Meeting*, ALGERIA TODAY (EMBASSY OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA, Washington, D.C.), Dec. 12, 2008, at 3, *available at* http://www.algeria-us.org/ALGERIA%20TODAY/ISSUE1208.pdf.

164. *See* KPMG GUIDE 2009, *supra* note 1, at 215.

165. *See* Sakmar, *supra* note 135, at 922.

166. U.S. Dep't of State, 2009 Investment Climate Statement – Algeria, Feb. 2009, http://www.state.gov/e/eeb/rls/othr/ics/2009/117836.htm [hereinafter Investment Climate].

167. TIFAs are precursors or stepping stones to Free Trade Agreements and/or Bilateral Investment Treaties. U.S. COMMERCIAL SERVICE, *supra* note 2, at 58. They establish a political and legal commitment between the United States and another government to enhance bilateral trade and investment through increased liberalization. *Id.* TIFAs normally involve the setting up of a joint council to plan, monitor and review action. *Id.*

168. *Id*.

C. Algeria's Ratification of International Agreements on the Enforcement and Protection of International Investments

1. The Overseas Private Investment Corporation

Algeria has entered into a unique agreement with the United States that has the potential to mutually benefit U.S. investors as well as Algerian businesses and the national economy. The Overseas Private Investment Corporation ("OPIC") is an American-based mechanism meant to provide security and peace of mind for American investors dealing in participating countries, of which Algeria is a member.[169]

Given the scope and scale of most OPIC projects, foreign direct investment brings capital and technology to put local labor to work in emerging markets. It also brings quality control mechanisms and management/marketing techniques that allow host-economy actors to undertake entirely new activities and continue existing activities more efficiently. OPIC's sole project in Algeria, a $200 million reverse osmosis desalination plant, has exhibited a number of positive externalities that traditional impact studies have failed to account for.[170] Additionally, OPIC has recently streamlined the process through which small businesses may apply for loan guarantees and insurance, thereby further reducing barriers to entry into Algeria for small and medium businesses.[171]

The benefits of OPIC coverage are extensive. As outlined in the *Investment Incentive Agreement Between the Government of the United States of America and the Government of the Democratic and Popular Republic of Algeria*, interest and fees on loans made or guaranteed by OPIC are exempt from tax within Algeria for up to twenty years, even if Algeria terminates the Investment Incentive Agreement.[172] More importantly, Article 6(a) brings the full weight of the U.S. government to bear in case of disputes arising from questions of international law. In such an event,

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169. OPIC's purpose "is to mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United States." OPIC, Our Mission, http://www.opic.gov/about/mission (last visited Feb. 11, 2010). Over its "34-year history, OPIC has supported $145 billion worth of investments that have helped developing countries generate over $11 billion in host-government revenues and create over 680,000 host-country jobs." Theodore H. Moran, *Overseas Private Investment Corporation Needs Substantial Changes in Authorizing Legislation and Modified Operating Procedures*, PETERSON INST. FOR INT'L ECON., May 13, 2003, http://www.iie.com/publications/newsreleases/newsrelease.cfm?id=92.

170. U.S. COMMERCIAL SERVICE, *supra* note 2, at 71.

171. *See* OPIC, Forms and Applications, http://www.opic.gov/publications/forms (last visited Feb. 11, 2010) (streamlining its application process by allowing certain forms and applications to be submitted online).

172. Investment Incentive Agreement, *supra* note 4.

Article 6(a) provides for three months of negotiation between the respective governments, and in case of failure, for binding international arbitration, the costs of which shall not be born by the insured party.[173]

One area where OPIC's role is extremely beneficial is in the establishment of franchises, a heretofore untapped market in Algeria. OPIC provides long-term financing in emerging markets around the world, particularly to businesses involved in international franchise relationships.[174]

To qualify for franchise benefits under the OPIC framework, OPIC requires significant U.S. involvement in franchising transactions.[175] This is accomplished through 25% ownership by a U.S. small business in the franchisee, or significant involvement of the U.S. franchiser in the project, including:[176]

- business concepts and systems employed by the franchisee be originally developed by the U.S. small-business franchiser;
- long-term franchise agreement among the U.S. franchiser, the local in-country master franchiser, and the franchisee;
- local use of the U.S. franchiser's trademark or brand-name; and
- U.S. franchiser has a long-term financial interest through receipt of franchise fees.[177]

"Loan terms for franchise loans generally range between three to eight years, with an interest-only grace period not to exceed six months."[178]

OPIC seeks only commercially and financially sound investments.[179] The application process for financing is the same for franchising as it is for all other projects even though financing can range from as small as $100,000 or up to $250 million.[180] The application requests an in-depth analysis of the project and its social, environmental and economic impact on both the United States and the host country.[181]

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173. *Id.* at 33–34.

174. OPIC, Franchise Loan, http://www.opic.gov/financing/loan-structures/franchise-loan (last visited Dec. 10, 2009).

175. *Id*.

176. *Id*.

177. *Id*.

178. *Id*.

179. OPIC, Financing Details, http://www.opic.gov/financing/financing-details (last visited Feb. 11, 2010).

180. *Id.*

181. Investors must complete OPIC Form 115 which asks for, *inter alia*, project details, sources of funding besides OPIC, the company's business plan and other financial data, the impact of the operation on the U.S. economy including which U.S. suppliers will be used, the economic impact on the project country and the health and environmental impacts of the project. *See* OPIC Apply: Forms and Instructions, http://www.opic.gov/financing/apply (last visited Feb. 10, 2010).

While Algeria has historically restricted capital flows to the detriment of prospective franchise companies, such restrictions seem to be easing. But due to continued restrictions and confusion surrounding recent changes to taxation laws, discussed in Section II, franchises have been slow to move into the country.[182] This debilitates a potentially significant source of revenue and jobs in the country. In addition to restrictive laws on repatriation of capital revenue streams, a total lack of franchising laws in Algeria is a significant impediment. Therefore, despite the obvious benefits to establishing a franchise set up by OPIC, without the proper protections and guarantees of revenue repatriation in Algeria, such investments will be slow to trickle in. For these reasons, the Algerian economy and foreign investors would benefit significantly from uniform franchise laws and repatriation laws that conform to WTO standards — particularly when such strong incentives towards franchising like those offered by OPIC exist.

The franchises currently in existence in Algeria were established via the principle of an "International Contract" that allows the two parties, both the franchisor and the franchisee, to enter into a type of franchise agreement.[183] This contract, however, does not solve the issue of paying the initial fees and royalties.[184] To compensate for a lack of legislation on franchising, other African countries, which use franchising as a mean of attracting foreign investment,[185] address some of the pitfalls traditionally associated with an unregulated franchise industry by formalizing rules on disclosure obligations of the franchise company and creating a statutory obligation to act in a commercially reasonable manner.[186] One of the other challenges these countries work on is the strengthening of intellectual-property regimes to allow franchise companies to transmit knowledge and franchise system concepts with the confidence that such know-how will be protected.[187] Increased capacity for regional enforcement of intellectual property rights will encourage the establishment of new franchises and the expansion of existing business through the franchise format.[188]

182. U.S. COMMERCIAL SERVICE, *supra* note 2, at 12.
183. *Id*.
184. *Id*.
185. *See* John Sotos & Sam Hall, *African Franchising: Cross-Continent Momentum*, FRANCHISE WORLD, June 2007, *available at* http://www.franchise.org/Franchise-News-Detail.aspx?id=34922 (last visited Apr. 20, 2010) (providing that South Africa, Botswana, and Egypt have encouraged franchising as a means of attracting foreign investment).
186. *Id.*
187. *Id*.
188. *Id.*

2. *Enforcement of International Arbitration and Dispute Resolution Decisions*

Like the securities offered by such institutions as OPIC, participation in international arbitration standards and bodies provides investors with the peace of mind that dispute resolution can be accomplish in a manner that conforms to the standards expected in modern business practices. This is particularly true for developing and LDC countries, where judicial systems either do not instill confidence abroad or are unfamiliar to outsiders, or both.

The government of Algeria has taken initial steps to create a friendlier environment for international investment, such as the enforcement of international arbitration clauses in investment contracts, thereby conforming to international arbitration standards.[189] Early foreign investors needed to be certain that contracts with international arbitration clauses would be upheld in unfamiliar Algerian courts and Algeria's ascension to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Agreement since 1988 guaranteed fair and binding arbitration.[190] This treaty allowed any judgments and arbitral awards issued by an arbitration tribunal to be fully enforced in every Algerian court.[191] The Algerian Code of Civil Procedure was modified to accommodate the New York Convention in 1993 by Legislative Decree No. 93-09. It appears that while compliance with international standards has been slow, it has been consistent.[192] In adopting this decree, the legislature "took into account the UNCITRAL Model Law, as well as new arbitration laws passed in various countries," to ensure that Algeria's arbitral system was up to speed with the most current arbitration agreements.[193] A new reform, which was expected as a logical follow up of the Decree No. 93-09, came with the Law No. 08-09 of February 25, 2008, which entered in force on February 25, 2009, pertaining to the New Algerian Code of Civil and Administrative Procedure.[194] This reform has further cemented the use of institutional arbitration in Algeria (i.e. International Center for Settlement of Investment Disputes or International Chamber of Commerce[195] ("ICC") arbitration) by

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189. Aidoud Law Firm, *supra* note 3, at 3.

190. *Id.*

191. Investment Climate, *supra* note 170.

192. *Id*. ("The code of civil procedure allows both private and public sector companies' full recourse to international arbitration. Algeria permits the inclusion of international arbitration clauses in contracts. . . . The process for negotiation, non-binding conciliation and binding arbitration has been slow but apparently consistent with the dispute resolution clauses of the contract."). *See also* Abderrahmane, *supra* note 6.

193. Abderrahmane, *supra* note 6.

194. *Id*.

195. International Chamber of Commerce International Court of Arbitration homepage, http://www.iccwbo.org/court/arbitration/ (last visited Feb. 10, 2010). The International Chamber of Commerce's dispute resolution mechanism offers another

both foreign entities and domestic ones.[196] The reforms of Law No. 08-09 continue those started in 1993, but allow further flexibility in choice of venue, choice of arbitrator, and provide further security in enforcement mechanisms.[197]

The New Algerian Code of Civil and Administrative Procedure ("ACCP") retains a modern approach of arbitration.[198] It uses an economic criterion to define international arbitration.[199] It provides that: "[w]ithin the meaning of this code the arbitration is international which concerns disputes relating to economic interests of at least two States."[200] The difference in the place of residence of the parties, used in the former Code of Civil Procedure, is abandoned.[201]

Two important characteristics of Algerian arbitration legislation provide that: (1) the validity of an arbitration agreement cannot be contested on the basis of the invalidity of the main contract;[202] and (2) an arbitration agreement must be made in writing, or by any other means of communication which allows the written proof of its existence; it would be otherwise null and void.[203] The new legislation of February 2008 takes into account the new technologies of the information and communication by accepting any other means of communication such as letters, faxes, or e-mails.[204] It should also be noted that the new Algerian arbitration law is in harmony with the New York Convention, which provides in Article II (1) that "[e]ach contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship . . . ."[205]

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internationally recognized standard that parties can voluntarily agree to implement. *Id.* The ICC standard clause, which can be incorporated into contracts, provides for a full system of rules and regulations, addressing such issues as costs, appointment of authorities, pre-arbitral mediation and refereeing, and other such mechanisms meant to streamline and standardize dispute resolution. *Id.*

196. *Id*.

197. KPMG GUIDE 2009, *supra* note 1, at 279 ("In the few cases of arbitration rulings brought to the attention of an Algerian judge over the past three years (which demonstrates that most arbitration rulings are voluntarily executed), the Algerian judge has adopted a resolutely favorable attitude towards international arbitration, by accepting to enforce foreign and international rulings, which in some cases condemned Algerian firms.").

198. Abderrahmane, *supra* note 6.

199. *Id*.

200. Abderrahmane, *supra* note 6 (referring to ACCP Article 1039).

201. *Id*. (referring to former article 458 (bis) 1 of the ACCP, which defined international arbitration as one that "cumulatively (a) involves a dispute relating to international trade, and (b) in which at least one party has its registered office or its residence abroad").

202. *Id*. (referring to ACCP Article 1040 (bis) 4).

203. *Id*. (referring to ACCP Article 1040 (bis) 2).

204. Abderrahmane, *supra* note 6.

205. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

In determining choice of law in disputes arbitrated in Algeria, three important considerations must be taken into account. First, the arbitration agreement can be governed by law chosen by the parties themselves (i.e., contractually).[206] Second, "in Algerian arbitration law, the arbitrator or judge can refer to the law applicable to the main contract to decide upon the validity of the substance of the arbitration agreement." [207] Finally, "the validity of the substance of the arbitration agreement can be determined under Algerian arbitration law. This rather subsidiary role given to Algerian arbitration law will rarely come into play except in disputes brought before an Algerian national court."[208]

In addition to the above changes, the modifications of 1993 also eased restrictions previously in place on Algerian "public economic enterprises," which were not allowed to arbitrate disagreements unless those disagreements stemmed from their international commercial transactions.[209] Now, these enterprises are free to partake in arbitration, regardless of the source of the transaction. The more recent amendments to the Algerian arbitration law benefit not just foreign investors and companies, but domestic ones as well.[210]

Further, Law No. 08-09 offers the enforcement mechanisms pursuant to the New York Convention's Article IV(1)(a-b).[211] Article 1051 of the new Code of Civil and Administrative Procedure provides:

> [a]rbitral awards are recognized in Algeria if their existence is proved by the claimant and if their recognition is not contrary to international public policy. Subject to the same conditions, they are declared enforceable in Algeria by the presiding judge of the court in whose local jurisdiction they were pronounced or by the presiding judge of the court of the place of enforcement, if the seat of arbitration was outside the territory of the Republic.[212]

The Algerian court competent to recognize or enforce an arbitral award is the one in whose geographical jurisdiction the award was rendered.[213] If the decision was made outside of Algeria, parties must apply to the jurisdiction where enforcement is sought.[214]

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206. Abderrahmane, *supra* note 6.
207. *Id*.
208. *Id*.
209. *Id*.
210. *Id*.
211. *Id*. ("The existence of an arbitral award is proved upon production of the original copy together with the arbitration agreement or copies of these documents subject to the conditions required for [establishing] their authenticity") (quoting ACCP Article 458 (bis) 18).
212. Abderrahmane, *supra* note 6.
213. *Id*.
214. *Id*.

Algeria has gone further than compliance with the New York Convention when it comes to arbitration.[215] It signed the International Center for Settlement of Investment Disputes ("ICSID") of the World Bank on February 21, 1996,[216] as well as the Seoul Convention on the Multilateral Investment Guarantee Agency.[217] Since Algeria has ratified these conventions, international arbitration has become the favored method for resolving disputes between Algeria and foreign firms.[218]

Algeria's enforcement of international arbitration clauses protects the rights of foreign investors who are unfamiliar with the Algerian legal system. It provides investors with the confidence that disputes will be judiciously heard and enforced.[219] In particular, this is beneficial where investors come from countries rooted in common law, as opposed to the Algerian civil law system, as Algeria's enforcement of international arbitration standards allows international investors to avoid litigation in an unfamiliar court system. The provisions of Law No. 08-09 on civil and administrative procedure give greater freedom to the parties when it comes to the choice of arbitrators, the location of arbitration and the applicable procedural law or even of substantive law.[220] The prominent use and enforcement of arbitral decisions is a great boon to the Algerian economy. It gives foreign investors confidence that the disputes will be adequately resolved and enforced in accordance with international standards.

IV. CONCLUSION

Despite recent readjustments to finance laws that seek to protect local markets by imposing increased tax burdens, ownership requirements and limitations on repatriation, Algeria has made significant strides towards

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215. KPMG GUIDE 2009, *supra* note 1, at 279.

216. ICSID is an international dispute resolution mechanism established by the World Bank which aims to provide a reliable and consistent standard of international arbitration. The primary purpose of ICSID is to "provide facilities for conciliation and arbitration of international investment disputes." ICSID, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/Index.jsp (last visited Feb. 10, 2010).

217. Convention Establishing the Multilateral Investment Guarantee Agency ch. 1, art. 2, Oct. 11, 1985, *available at* http://www.miga.org/quickref/index_sv.cfm?stid=1583 ("The objective of the Agency shall be to encourage the flow of investments for productive purposes among member countries, and in particular to develop member countries, thus supplementing the activities of the International Bank for Reconstruction and Development, . . . the International Finance Corporation and other international development finance institutions.") These goals are accomplished mainly by the issuance of guarantees on loans and investments. *Id.*

218. KPMG GUIDE 2009, *supra* note 1, at 279.

219. Embassy of Algeria to the United States of America, Algeria Investment Legal Framework, http://www.algeria-us.org/content/view/110/89/ (last visited April 20, 2010) (stating a benefit of registering as a foreign investor is a guarantee of "non-discrimination; legal security and inviolability of the law; [and] settlement of disputes").

220. KPMG GUIDE 2009, *supra* note 1, at 279.

market liberalization and integration over the last decade. Not only has the country moved closer towards WTO ascension, it has in many ways streamlined its domestic laws and regulations in a way that benefit not just foreign investors, but domestic businesses as well. While the current round of reforms appear to stall some of these gains, as their implementation and legality has yet to be carried out, their impact has yet to be seen. While many of the most recent reforms may appear to be detrimental to foreign investment, in the long term several measures will result in more positive relationships between outside investors and their domestic partners. Higher burdens on Algerian partners will lead to a more skilled labor force in Algeria, savvier domestic partners, and diversified industry. By integrating a few of the latest reforms with those of the "Second Generation," Algeria can maximize its role within the international trading system while maintaining the integrity and independence of its domestic economy. However, Algeria needs to simplify the procedural issues that may hamper the development of foreign investment. The heavy bureaucratic attitude in doing business in Algeria from establishment to repatriation of money undermines the great efforts Algeria has made to liberalize trade, attract investment and develop domestic industry through foreign partnership.

Finally, Algerian ratification of international conventions on arbitration as well as its new legislation, which implement international standards into domestic laws are other factors that demonstrate Algeria's good will in favor of international investment. By adopting a rather liberal international arbitration legislation Algeria is assuring improved protection of foreign investment.