

# INFORMATIVE NOTE

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## ARBITRATION

# SOCIAL UNREST AND PROTECTION OF FOREIGN INVESTMENTS

## THE ROLE OF INTERNATIONAL ARBITRATION

The recent events in Tunisia, Egypt and Libya and which may well spread to other countries, could have negative consequences for the foreign investment carried out in those countries.

In fact, it may not be possible to obtain compensation for the damage caused by those social disturbances under the domestic law of those countries and it may also be the case that their courts are not the appropriate forum to deal with these disputes.

It is precisely to resolve these types of international disputes involving foreign investment that the Washington Convention was approved in 1965. To date, this convention has been ratified by 146 States including Portugal. This international convention created the *ICSID – International Centre for Settlement of Investment Disputes* that functions alongside the World Bank and has characteristics that make it particularly useful in situations such as those that may occur in the countries referred to above or in others where the same type of social unrest arises.

For any of the parties to the dispute to be able to have recourse to this arbitration centre, it is necessary for both the States involved (the State where the investment was made and the State of the nationality of the investor) to be signatories to the Washington Convention and for the State where the investment was made to have given specific consent and for the foreign investor to have accepted

the jurisdiction of the said arbitration centre.

This consent may be given through an arbitration clause in the investment contract itself. It is also possible and common for signatory States to have a “reciprocal offer of arbitration” inserted in a bilateral investment treaty (BIT). In this case, the States give the investors from another signatory State the assurance of a set of rights in relation to the protection of their investments and accepting, from the outset, that any disputes that arise from the violation of these rights are resolved by way of ICSID arbitration. In these cases, the consent of the investor is only given at the moment the arbitration begins.

Recourse to ICSID arbitration may result from the breach of the investment contract itself (contract claims) or from a violation of the rights guaranteed by the signatory State in the BIT made with the State of the nationality of the foreign investor (treaty claims).

Among the types of rights that the States normally guarantee to foreign investors by signing BITs are that of guaranteeing treatment identical to that given to domestic investors (national treatment clause), of granting foreign investors from a given foreign country treatment equal to that which is given to investors that benefit from most favoured investment agreements (most favoured-nation treatment clause), that of protecting the investments against unreasonable arbitrary measures that

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may cause damage (arbitrary and unreasonable measures clause), that of granting the investor fair and equitable treatment (fair and equitable treatment clause), that of ensuring high levels of protection and security in face of foreign investments (full protection and security clause) or of ensuring that any compulsory purchase of measure of equivalent effect is done legally and upon payment of fair compensation (legality of expropriations clause and indirect expropriation clause).

The advantage of ICSID arbitrations lies in (i) the fact that once consent is given by both parties (even if given at different times), it cannot be unilaterally revoked, (ii) the fact that arbitrations are not subject to appeal or annulment by national courts. The (very limited) annulment process provided for in the Convention itself is done by other international arbitrators,

(iii) the fact that the arbitral judgments are not subject to the New York Convention as regards their execution (with the limitations provided for in that convention) and may be executed in any State that is a signatory to the Washington Convention, in respect of assets located there.

Tunisia and Egypt are parties to the Washington Convention and have signed bilateral investment treaties with Portugal, consenting to any disputes relating to Portuguese investments in these States to being resolved by ICSID arbitration. Libya is not a party to the Washington Convention but entered into a BIT with Portugal allowing for recourse to ICSID arbitration under the additional facility rules provided for in the Washington Convention and which allow limited use of the rules of this Convention even for States that are not a party to it.

For more information:

Tiago Duarte, *O reconhecimento e a execução de sentenças ICSID/CIRDI: Portugal à espera da primeira vez*, in Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa, 2008; *O Consentimento nas Arbitragens Internacionais (ICSID)*, in Estudos em Homenagem ao Prof. Doutor Sérvulo Correia, 2010; *Treaty Claims, Contract Claims e Umbrella Clauses na Arbitragem Internacional de Protecção de Investimentos*, in Estudos em Homenagem ao Prof. Doutor Carlos Ferreira de Almeida, 2011.

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- “Client Choice Award” from ILO – International Law Office as best Public Law Lawyer.

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