Richmond Journal of Global Law & Business

Volume 11 | Issue 1 Article 4

2011

Arab Spring Brings Winds of Change to the Maghreb and Mena Region: Does That Spell Opportunity for Infrastructure Development and Project Finance?

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ARAB SPRING BRINGS WINDS OF CHANGE TO THE MAGHREB AND MENA REGION: DOES THAT SPELL OPPORTUNITY FOR INFRASTRUCTURE DEVELOPMENT AND PROJECT FINANCE?

*By Silvano Domenico Orsi**

"You must be the change you wish to see in the world."**

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I. INTRODUCTION

Turmoil and revolution accompanied the 2011 Arab Spring, beginning in Tunisia and spreading to Egypt and Libya, bringing change across the Maghreb and Middle East and North Africa ("MENA") region. Whether any of the new political, institutional or social reforms that might be implemented will actually work to attract international investment in the region, or work to increase opportunities for project finance and infrastructure development in general, remains to be seen.

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** Mahatma Gandhi, Indian philosopher, internationally esteemed for his doctrine of non-violence (1869-1948).

The outlook seems positive, however, especially in key areas such as clean energy, infrastructure development, and projects that export power, oil, gas, water, and renewable energy to more developed and energy-starved nations. Positive predictions by key players heavily involved in the region, such as the World Bank and EBRD, are also beginning to surface as the uprisings begin to subside, and as the region begins to favour new democracy, foreign investment, and greater social reform.

This article provides a positive perspective on what is currently transpiring in the MENA region, encouraging greater foreign investment in infrastructure development and project financing initiatives, as well as promoting increased trade with the region. It highlights the fact that enormous opportunities in these sectors will result once the period of unrest and revolution begins to decline. Growing international interest exists in Public-Private Partnership ("PPP") projects in the MENA region as outside investors seek greater access to functioning infrastructure that will help supply them with precious oil commodities and clean energy resources.[1] This article also discusses the need to strengthen the region's capital markets. Building stronger domestic financial markets in the region will also help ensure the availability of international funding for new infrastructure development and project-financings as the region rebuilds. This is definitely an area for foreign investors to involve themselves as they work to develop partnerships with the MENA region's newly formed governments, financial institutions, and regulators.[2]

Demand for projects that utilize flexible methods such as the Clean Development Mechanism ("CDM") and Carbon Financing are on the rise, as they enable developed nations to cost-effectively achieve emission reductions and removal of carbon from the atmosphere, via projects carried out in developing countries.[3] Developed nations seek credits under the Kyoto Protocol Rules for their clean energy projects in the developing MENA region.[4] High revenues from these projects

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[1] The World Bank, *Global Economic Prospects*, Regional Annex, Middle East and North Africa (2011); The World Bank, *Infrastructure Development: The Roles of the Public and Private Sectors* (2005); The World Bank, MENA Regional Conference on Infrastructure Reform and Regulation, *Taking the Infrastructure Agenda Forward in the Middle East and North Africa* (2009).

[2] *See* Abraham Akkawi, Developing the Financial Capital Market to Raise Adequate Levels of Infrastructure Financing, MENA Regional Conference on Infrastructure Reform and Regulations (2009).

[3] *See* Roland Berger, *Green Growth, Green Profit: How Green Transformation Boosts Business, in* STRATEGY CONSULTANTS GMBH (2011) ("The Middle East and North Africa (MENA) is the region to watch for remarkable solutions on a grand scale.").

[4] *Id.*

can be used to finance major infrastructure and re-building needs.[5] Exporting clean energy to areas like Europe, the United States, GCC countries, and Asia – all of whom are eager to move away from oil dependency and fossils fuels, so as to reduce their carbon footprints – will certainly result in massive revenues as well.[6] Governments of developed countries, *(as well as their corporations, banks, and investment funds),* will pursue hundreds of emission-reduction projects in the next ten years, seeking greater access to the virtually untapped renewable energy resources in the region; and many of these cost-effective clean energy projects will also involve the solar, wind, and water sectors.[7]

A growing need also exists for innovative methods to finance projects in the region and attract greater investment. Since the region is comprised primarily of Muslim populations, one solution may be to combine Islamic Finance and conventional Project-Financing, as this would attract both outside investors and wealthy Arab investors from the GCC countries on mutually beneficial and joint-partnership development projects. The importance of focusing on exportation-related projects in the region is also key to securing access to foreign investment and lending. This has proven to be scarce in the past,for fear of the usual currency devaluation issues, elevated project risks, and lack of stable local institutions across the region—especially in the dictatorial regimes found in North Africa. In short, if outside nations can also reap the benefits of any new or existing energy-producing projects and/or exporting projects in the region, (that give outside nations greater access to oil, gas, power, and renewable energy resources), then it may just be worth the risk for them to invest in the MENA region's development.

Western nations should act now and not wait for the dust to finish settling. They must do more to invest in the region's infrastructure development projects and truly "*internationalise*" them[8] by injecting stable currencies into the MENA region's projects and markets. The use of only local currencies generated by non-exporting projects would create a deadly formula – one that is certain to dissuade any outside investment, overburden the local banking structure, and ulti-

[5] Saleh S. Jallad, *The MENA Region and Global Energy Risk,* 1 MEES RESEARCH RPT. 1 (2010).

[6] AFRICAN DEVELOPMENT BANK AND THE WORLD BANK, MENA REGIONAL CONCENTRATED SOLAR POWER SCALE-P PROGRAM: 2ND JOINT CSP WORKSHOP (2009), http://www.docstoc.com/docs/20105419/MENA-Regional-Concentrated-Solar-Power-Scale-up-Program.

[7] *See* Nikolaus Wohlgemuth, Presentation before the MENA Carbon Forum, Carbon Financing for RE Projects: How to overcome the Barriers to unlock the CDM potential in the RE Sector (2009).

[8] *See* KFW Banken Gruppe & T. Prien, Financing Wind Energy in the MENA Region, Wind Energy and Development Dialogue (2010).

mately continue the general feeling of pessimism amongst the region's project owners, sponsors, and lenders.[9]

News has begun to flourish of positive changes sweeping through the MENA region since the Arab Spring uprisings, and many G20 countries have recognized the democracy-seeking rebel fractions as the new legitimate leaders of countries such as Tunisia and Egypt.[10] Even in Libya, the most resource-rich nation in the region, a new leadership has arisen to meet the demands of change.[11] The impact of very recent events, such as Gaddaffi's dictatorial regime's downfall in Libya and Osama bin Laden's death, may help elevate investor confidence in region projects and boost stock markets and increase positivity levels of world leaders, inside and outside the region.[12]

Change across the MENA region also means that both outside and regional governments must deliver on their promises of democracy, stability, and prosperity, before violence and extremism arrive in their place.[13] One terrorist's death does not mean terrorism's demise. Nor does it provide for the total elimination of any such project risk in the region. This also does not mean that we should totally forget the solid investment opportunities that are becoming available in this flourishing region.[14] Walking away now and not getting properly involved in re-building this region would be devastating to both local and global economic recovery. It would only ensure more gloom in the form

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[9] THE WORLD BANK, WORLD BANK AND PARTNERS JOIN EFFORTS TO TACKLE ARAB WORLD INFRASTRUCTURE CHALLENGE (2011).

[10] *A new Government in Tunisia: Out with the Old?,* THE ECONOMIST (Jan. 19, 2011), http://www.economist.com/blogs/newsbook/2011/01/new_government_tunisia; Nicole Gauoette, *Clinton meets with Egypt's Transitional Leadership, Visits Tahrir Square*, BLOOMBERG (Mar. 16, 2011), http://www.bloomberg.com/news/2011-03-16/clinton-visits-tahrir-square-site-of-egyptian-protests-1-.html.

[11] Stacey Meichtry & Jay Solomon, *Allies Plan Fund for Libyan Rebels,* WALL ST. J. (May 5, 2011), http://online.wsj.com/article/SB10001424052748703937104576303161699450494.html.

[12] *See* Julia Kollewe & Rowenna Davis, *Osama bin Laden's death boosts stock markets,* THE GUARDIAN (May 2, 2011), http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-stock-markets; *World Leaders Welcome Bin Laden's Death,* CNBC NEWS (May 2, 2011), http://www.cnbc.com/id/42852851.

[13] Dr. Amani Abeid Karume, Former President of Zanzibar, Inaugural Lecture before the Boston University African Presidential Archives and Research Center (Mar. 10, 2011), http://www.bu.edu/aparc/presidents/karume/.

[14] *See World Bank President: One Shock away from Crisis,* BBC NEWS (Apr. 17, 2011), http://www.bbc.co.uk/news/business-13108166 (quoting Robert Zoellick: "The crisis in the Middle East and North Africa underscores how we need to put the conclusions from our latest world development report into practice. . .waiting for the situation to stabilise will mean lost opportunities. In revolutionary moments, the status quo is not the winning hand.").

of an expanded global financial crisis and greater unemployment on all sides of the spectrum.[15] Additional elements required for the success of PFI and PPP infrastructure development projects in the MENA region are the better use of socially responsible governance strategies,[16] and the use of innovative financing techniques, such as the combination of Islamic Finance with conventional project-financing methods, to ensure the availability of investment, partnership, and non-recourse debt lending from outside sources.[17]

There are numerous opportunities available in the resource-rich MENA region, and it is important for those interested in progressing new and existing development projects to remain positive, as the region settles and becomes an ideal investor's market.[18] Our ultimate task as project managers and project financiers is to seize this new era of opportunity in the region, while mitigating risks and overcoming any of challenges that may arise. Thus, we may ultimately delve into the risky (but lucrative) world of project finance in a up-and-coming MENA region.[19]

For this author in particular, *"internationalized"* project financings, of mega-infrastructure development initiatives, and renewable energy projects that serve to export energy and commodities from the MENA region may be the best way forward for growth and stable recovery.[20] During these times of rapid change, there is also a notable lack of scholarly research in the project finance sector.[21] This note attempts to change that by providing insight on some of the important

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[15] Erin Williams, *The Mozal Smelter Project, River of Aluminium,* 16 PM NETWORK 20 (2002).

[16] The World Bank, World Bank Supports Social Accountability Network across Arab World, Press Release No. 2011/434/MENA (Apr. 15, 2011).

[17] *See* FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN 27-28 (Kluwer Law Int'l 1998).

[18] SEZNECK & KIRK, INDUSTRIALIZATION IN THE GULF: A SOCIOECONOMIC REVOLUTION (Routeledge Pub. 2011).

[19] WORLD BANK, INFRASTRUCTURE DEVELOPMENT: THE ROLES OF THE PUBLIC AND PRIVATE SECTORS (2005).

[20] *See also* INT'L FIN. CORP., LESSONS OF EXPERIENCE NO. 4: FINANCING PRIVATE INFRASTRUCTURE 43-44 (1996). *See generally* JEFFREY DELMON, PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: PROJECT FINANCE, PPP FINANCE AND RISKS (2d ed. 2009).

[21] Although the number of research articles on project finance has dramatically increased in latter part of this decade, it was reported by Benjamin Esty in early 2002 that, "there has been only one article directly on project finance published in the four leading finance journals, and not more than 15 articles in all finance journals, over the last 20 years,"; furthermore, the coverage of project finance in corporate finance text books is very thin compared to other financing mechanisms, such as IPO's, venture capital, and leasing. Benjamin C. Etsy, *Why Study Large Projects? An Introduction to Research on Project Finance,* EUROPEAN FIN. MGMT.

elements that those involved in infrastructure development and project finance in the MENA region and beyond should consider.

II. PROJECT FINANCE AND ITS CONSTRAINTS IN THE REGION

No single definition for Project Finance ("PF") exists.[22] One definition holds that PF involves the creation of a "legally independent project company financed with equity from one or more sponsoring firms and non-recourse debt, for the purpose of investing in," and financing a single purpose or multi-purpose industrial asset.[23] An essential feature of PF is that a Special Purpose Vehicle ("SPV") or "project company" must be established where the project is to take place.[24] The debt used to finance the project is "non-recourse debt," which means that sponsors are only liable for the amount of equity they put into projects, and that any debt repayment comes from the project company only, rather than from any other entity involved.[25] There are three key decisions to recognize in the use of PF. First, there is an *investment decision* involving an industrial asset (the term "industrial asset" includes infrastructure development projects).[26] Second, there is an *organizational decision* to create a legally independent entity to own and, if a concession is involved, run the asset.[27] Project assets do not appear on the sponsor's balance sheet, representing a form of "off-balance sheet" finance.[28] "The exact accounting treatment is, however, a function of the chosen organizational form for the SPV entity (corporation, partnership, etc.), and the sponsor's fractional interest in and control over the project."[29] In cases such as those involving only one sponsor, the project's assets and liabilities may appear on the sponsor's balance sheet.[30] "Lastly, there is a *financing decision* involving nonrecourse debt."[31] Since the SPV is a le-

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vol. 10, no. 2, 2004 at 213-24, *available at* http://www.blackwellpublishing.com/pdf/EUFM_Esty.pdf.

[22] "There is no single, generally agreed upon definition of project finance. A recent article in the *Wall Street Journal* illustrates the confusion that surrounds the definition. The article defined project finance as, 'a term that typically refers to money lent to build power plants or oil refineries.'" *Id.* at 213 n.1.

[23] *Id.* at 213.

[24] ANDREW FIGHT, INTRODUCTION TO PROJECT FINANCE 10 (Elsevier Linacre House ed., 2006).

[25] *Id.* at 3-5.

[26] BENJAMIN ETSY, MODERN PROJECT FINANCE 25 (John Wiley & Sons 2004).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

gally independent entity, "the debt can be structured without recourse to the sponsors."[32] Legal independence is important in other ways as well. Specifically, capital providers may assess a project's cash flows and assets. This assessment may be made independent of concerns regarding a sponsor's financial wellbeing or pre-existing claims on the assets of that sponsor.[33] Historically, private firms have only used PF to finance industrial projects such as mines, pipelines, and oil fields; but more recently, many private firms are becoming more involved in PF and are readily utilizing it to finance infrastructure projects in regions like the Maghreb and Middle East by providing greater access to mines, oil, gas, and other natural resources in those areas.[34]

According to the World Bank, the need for successful infrastructure investment and development in Asia and the MENA regions alone is "enormous."[35] Africa and the MENA region only receive a very small share of investment in its infrastructure from the outside due to difficulty in getting funding, low creditworthiness, limits on the local financial markets, its banks, and local currencies, and to the high risk profiles typical of infrastructure projects.[36] Whether the region will be able to attract foreign currency funds will depend highly on the ability to reduce foreign exchange risks, and reduce the risks/constraints associated with PF in the region.[37] One of the main constraints includes limited access to non-recourse debt, which actually damages an economy's ability to attract private investment in infrastructure because project sponsors are usually reluctant to finance infrastructure with equity only, or take the project's debts fully on their balance sheets.[38] Therefore, many such development projects never get underway. More importantly, the local infrastructure remains an-

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32 *Id.*

33 *Id.*; *see also* THE WORLD BANK, WORLD DEVELOPMENT REPORT 1994: INFRASTRUCTURE FOR DEVELOPMENT (Oxford Univ. Press 1994).

34 Infrastructure includes investments in water, transportation, electricity, natural gas, clean energy, and telecommunications. *See* John W. Kesinger & John D. Martin, *Project Finance: Raising Money the Old-Fashioned Way*, 3 J. APPLIED CORP. FIN. 69 (1988); *see also* DAVID EITMANN, ARTHUR STONEHILL, & MICHAEL MOFFETT, MULTINATIONAL BUSINESS FINANCE (Denise Clinton et al. eds., 8th ed. 1998).

35 Boey Yin, *Reality Bites-A Quieter PF Horizon,* PFI ASIA PACIFIC REV. 2-3 (1998), http://www.pfie.com/reality-bites-a-quieter-pf-horizon/364187.article.

36 *See* Robert Sheppard, Stephen von Klaudy & Geeta Kumar, *Financing Infrastructure in Africa, in* GRIDLINES: NOTE NO. 13 (2006), http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/publication/Gridlines-13-Financing%20Infrastructure%20in%20Africa%20-%20RSheppard%20SvKlaudy%20GKumar.pdf.

37 *See generally* PRISCILLA AHMED, PROJECT FINANCE IN DEVELOPING COUNTRIES (Int'l Finance Corp. 1999).

38 *See* Sheppard et al., *supra* note 36 (discussing how the region can attract more project finance and its key constraints).

tiquated, and in some cases, non-existent. Even efforts to raise PF funds in capital markets via project bonds prove to be unsuccessful due primarily to the region's well-known devaluating currency issues.[39]

Three main factors limit the MENA region's ability to tap into foreign and local currency markets in its efforts to raise funds for infrastructure development projects, especially the long-term debt finance.[40] First, most African countries have low sovereign credit ratings, making foreign commercial lending difficult to come by, and even if accessed, it is only for short-term financing transactions.[41] One way to improve this is to have local projects export their "end product" (i.e. - whether it be gas, oil, water, clean energy, etc.) so that a project may mitigate debt repayment risks through the use of foreign currencies it generates.[42] Exportation to Asia, Europe, and other developed areas is key, as it ensures the ability to tap into more sophisticated financial markets, thus attracting investment.[43] "Second, most local markets have limited capacity to finance infrastructure projects," due to inferior domestic bank structures that do not permit long-term financing, and if they do, they often need to obtain guarantees from official agencies to attract local currency debt.[44] They "have longer payback and build-out periods" and tend to be more susceptible to unstable political and legal institutions, and to regulatory interference.[45]

Many of the past ruling regimes in the area also had a strong bias against projects that involved little regulatory intervention, or to those with U.S. dollar revenues, such as export-oriented ports, railways, and gas pipelines.[46] Their greed created serious regulatory risks to outsiders seeking to invest in those markets, and a quick trip throughout the region demonstrates the major need for the railways, modern roadways, ports and pipelines that would permit access to the regions valuable resources for resale and profit. Those significant profits could in turn be invested into infrastructure, in partnership with those nations that the MENA region could export to; creating what could become one the most advanced infrastructure systems in the world. Local banks must demonstrate that they are able finance

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[39] HENRY A. DAVIS, PROJECT FINANCE: PRACTICAL CASE STUDIES (1996).
[40] *See* Sheppard et al., *supra* note 36, at 13.
[41] *Id.*
[42] *Id.*
[43] Farida Mazhar, *Reform, Private Capital Needed to Develop Infrastructure in Africa: Problems and Prospects for Private Participation*, *in* GRIDLINES NO. 8 (2005).
[44] Sheppard et al., *supra* note 36, at 2 (explaining how virtually all infrastructure projects undertaken by African countries need credit enhancements to attract local currency financing).
[45] *Id.*
[46] *Id.* at 3.

long-term debt and themselves, so that outside investors will have confidence in their stability and in depositing foreign currencies into the region via long-term PF loans.[47]

Pension reforms are key to improving the local capital market structures, and to improve the availability of loans and funds for infrastructure development and PF. Pension reform could increase local savings and transform pension funds into *investment funds* for infrastructure projects by allowing governments to begin to offer long-term fixed rate debt—a key element in being able to provide local currency financing to projects in the region.[48] In time, local capital markets would develop, moving away from local full-guarantee bond issuances, to being able to finance most of the region's new infrastructure financing needs via the creation of investments funds, eliminating the heavy risk mitigation associated with guarantees that actually work to deter outside investment.[49]

The MENA region may become a major international center of economic development if it successfully transitions to democracy.[50] The mainly young population that spurred the uprisings witnessed in the Arab Spring of 2011 is due to increase by more than 60 percent by 2050, creating a gross MENA population of around 690 million people.[51] That growth increase will require a major investment in new infrastructure.[52] The region has ageing assets as well, and the population is moving rapidly into new areas with key asset sectors such as utilities, transport, and social infrastructure.[53] An estimated 500 Billion is to be spent in the MENA region by 2020 on infrastructure development via use of the Public Private Partnership ("PPP") model as a

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[47] THE WORLD BANK, INFRASTRUCTURE AT THE CROSSROADS: LESSONS FROM 20 YEARS OF WORLD BANK EXPERIENCE (2006), http://lnweb90.worldbank.org/EXT/epic.nsf/ImportDocs/F4431415FD5E1A738525739F00788A59?opendocument&query=CO.

[48] *Id.* at 2.

[49] *Id. See generally* Emmanuel Nyirinkinda, *The Uganda Distribution Concession* (2005), http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Financing%20Africa%20Through%20the%20Crisis%20and%20Beyond.pdf (discussing Africa in relation to the reforms referenced above).

[50] Abraham Akkawi, Head of Infrastructure and PPP Advisory Serv. Middle East, Address at the MENA Regional Conference on Infrastructure Reform and Regulations: Developing the Financial Capital Market to Raise Adequate Levels of Infrastructure Financing 3 (Dec. 7, 2009), http://siteresources.worldbank.org/INTMENA/Resources/Akkawi_MNAReg.Conference2009.pdf.

[51] *Id.*; Farzaneh Roudi-Fahimi & Mary Kent, *Challenges and Opportunities: The Population of the Middle East and North Africa,* 62 POPULATION REFERENCE BUREAU, No. 2, at 5 fig. 2 (2007).

[52] Akkawai, *supra* note 50.

[53] *Id.* at 4.

firmly established project delivery technique.[54] Future project pipelines include investments of over 500 Billion USD from the UAE, Saudi Arabia, Kuwait and Qatar in oil, gas, clean energy, power utilities, transport, water and tourism-related projects alone.[55] The scale of those investments requires a larger pool of lenders due to a lack of investment-grade bond funding.[56] The necessary national legal framework needs to be re-developed into new democratic-based institutions to attract outside investment and assure market confidence.[57] Political issues, foreign exchange rates, and country risk profiles are also constraints at the forefront, as the region's varied political forces all fight for prominence during this transitory period of political, legal, social, and institutional change.[58]

The use of the PPP model for projects in the region is a welcome solution for access to long-term financing (equity and debt).[59] Demand for over $100 Billion USD in investments exists for infrastructure PPP projects over the next several years.[60] PPP's can be an alternative way of funding projects by introducing private finance to public sector projects.[61] Thus, the public sector would define and buy a *service* (as opposed to an *asset*), and the private sector would deliver that service (and any necessary assets).[62] The PPP structure consists of creating an independent business financed and operated by the private sector.[63] The asset is created and then the service is delivered to the public sector client, in exchange for payment warranted by the level of service provided.[64]

In the immediate future, the MENA PF model should consist of a *"no payment until the asset is complete and available for use"* approach. This model shifts the risk of cost and time overruns to the private sector until it is later shared with the government.[65] New and poorly funded governments and related project institutions may develop as a result of the recent turmoil, and they will be unstable in the beginning. Therefore, risk must be alleviated if the region is to prosper and rebuild. Said infrastructure projects should fix their costs to the

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[54] Roudi-Fahimi & Kent, *supra* note 51.
[55] Akkawai, *supra* note 50, at 5.
[56] *Id.* at 8.
[57] *Id*.
[58] *Id.*
[59] *Id.* at 9.
[60] Dylan Bowman, *Region needs $100bn of PPP investment over next five years,* ArabianBusiness.com (Nov. 2, 2008).
[61] Akkawi, *supra* note 50, at 10.
[62] *Id.*
[63] *Id.*
[64] *Id*.
[65] *Id.*

government at the financial close of such projects, and for the length of any granted concessions.[66] This allows development of the region's financial and capital markets, as the demand that rests with government bodies and supply is enhanced by investment from banks, pension funds (as described above), infrastructure funds, outside sovereign wealth funds, and development funds.[67]

On the supply side, limits on investment bank involvement are largely due to the region's recent credit shortage.[68] Long-term financing remains an issue as well, as investment banks usually handle the debt portion under a PF structure, a typical financing structure in the early project developmental phase.[69] Notable limitations and constraints in the use of pension funds also exist because their governance rules often limit direct investment and lending of any borrowed funds. Equity houses usually have superiority in this area of finance. Pension funds could be utilized, however, to replace senior lenders and equity investors during refinance stages. Infrastructure funds are also struggling to raise cash, and are definitely more cautious lately, due to the recent uprisings. They are decreasing individual investment amounts. This could be due to fear of expropriation in the affected areas; a possibility further analyzed in the MENA region possible solutions sections of this note.

With the rise in commodity prices, however, (due mainly to the recent uprisings in the region), there are also positives such an increased cash flow to sovereign wealth funds. These may in turn be utilized as equity investment vehicles for infrastructure projects in the region. But this is often limited by national government protectionism and preference for commodity-only investments, rather than growing areas like infrastructure projects that benefit the community (i.e. - clinics, social programs, clean energy, and electricity or water projects). Although, as discussed below, some sovereigns are intently seizing the region's growth opportunities and moving towards diversifying their wealth fund investment portfolios into some of the aforementioned clean and renewable energy projects.

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[66] *Id.*

[67] *Id.*

[68] Andrew England, *Credit Shortage Blamed for Slow Growth*, FIN. TIMES (May 31, 2010, 4:58 PM), http://www.ft.com/intl/cms/s/0/b0a0a7d0-6cc5-11df-91c8-00144feab49a.html#axzz1ZHUZGUzo.

[69] Rajeev L. Sawant, *The Economies of Large-Scale Infrastructure FDI: the Case of Project Finance*, J. INT'L BUS. STUDIES 1036, 1037 (2010), *available at* http://www.palgrave-journals.com/jibs/journal/v41/n6/pdf/jibs200963a.pdf; *see also Taking the Infrastructure Agenda Forward in the Middle East and North Africa*, THE WORLD BANK, http://go.worldbank.org/UY6Y3FLP00 (discussing the issues addressed in the MENA Regional Conference on Infrastructure Reform and Regulation in December 2009) (last visited Sept. 28, 2011).

There are also constraints and limitations on development funds like the IBRD, World Bank, EBRD, UN Development Programme, African Development Bank, EIB, and the Asian Development bank. This is mainly due to their sector-specific criteria, geographic area criteria, requirements that funding made available only for specific outcomes, and insistence upon sovereign guarantees. They do not always match all funding and usually finance projects from *markets* rather than from their own *resources*. This adversely limits the Maghreb region, which has inferior markets and an inability to raise sufficient capital for mega-projects as stated above. On the demand side, an obvious need for the development of legal framework exists so as to underpin private finance. A great demand for power, water, oil, gas, and renewable energy projects also exists in the MENA region, with most governments already displaying their "open for business signs."[70]

The MENA region's current status, with regard to unity, challenges, and constraints are further evidenced by the recent politically motivated "change" of events associated with the Arab Spring of 2011.[71] The Arab people continue to aggressively demonstrate that they want equality, democracy, prosperity, and better public services, including more efficient and better-designed infrastructure.[72] At the same time, government budgets are still under heavy pressure in the region, and the private sector perceives the risk of political upheavals as extremely dangerous to any PF investment.[73] As a result, it has become harder to finance any necessary infrastructure project in the region. While most people have access to public services, the quality and reliability of services is a real challenge that constrains competitiveness, regional economic activities, and growth prospects.[74] Add to this one of the world's largest youth populations, and clearly infrastructure becomes both a *need* and a tremendous *opportunity* for creating jobs, and also for driving the region's prosperity and productivity.[75]

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[70] *See generally* Akkawi, *supra* note 50 (referencing the topic of defining project finance, its limitations, and its key constraints in the MENA region).

[71] Mehran Kamrava, *The Arab Spring and the Saudi-Led Counterrevolution*, 56 ORBIS 96, 96-104 (2011).

[72] Erin Snider & David Faris, *The Arab Spring: U.S. Democracy Promotion in Egypt,* 18 MIDDLE E. POL'Y, 49-62 (2011).

[73] Michael Ross, Nimah Mazaheri & K. Kaiser, *The Resource Curse in MENA? Political Transitions, Resource Wealth, Economic Shocks, and Conflict Risk* (World Bank Policy Research Working Paper No. 5742, 2011).

[74] Uri Dadush & Michele Dunne, *American and European Responses to the Arab Spring: What's the Big Idea?*, 34 WASH. Q. 131-45 (2011).

[75] *See generally* Rina Bhattacharya & Hirut Wolde, Constraints on Growth in the MENA Region (Int'l Monetary Fund, Working Paper No. 10/31, 2010), *available at* http://www.imf.org/external/pubs/ft/wp/2010/wp1031.pdf.

Arab countries in the MENA region have been spending around 5 percent GDP per annum on infrastructure, whereas other developing countries like China have a comparative advantage in spending up to 15 percent GDP per annum.[76] Arab countries need to double their spending in infrastructure to 10 percent GDP per annum (the equivalent to $75-100 Billion USD) to sustain the growth rates that have been achieved in recent years and to boost economic competitiveness.[77] The importance of leveraging the *private sector* also comes into play as it adds value to PPP with the right risk allocation.[78] PPP's are crucial vehicles for the region's Arab countries to keep pace with their infrastructure needs and to ensure growth.[79] Involving the private sector in infrastructure development can be a cost-effective solution, and as alluded before, result in economic growth and recovery, and spur much needed job creation, both inside and outside the region.[80]

III. CURRENT SITUATION, SELECT PROJECTS, KEY AREAS OF OPPORTUNITY

1. Tunisia

Once known as the *"Switzerland"* of North Africa,[81] Tunisia was always one of the more stable areas in the region. It traditionally has had great success in attracting FDI and local project investment in areas of infrastructure development, power projects, social projects, as well as stable banking and tourism sector investment.[82] Tunisia, how-

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[76] Taking the Infrastructure Agenda Forward in the Middle East and North Africa (Dec. 7-8, 2009) (unpublished summary of conference, on file with the Richmond Journal of Global Law and Business), *available at* http://siteresources.worldbank.org/INTMENA/Resources/MENAInfr.Reg.Forum_ConferenceProceedings.pdf.

[77] *Id*. at 9.

[78] *See id*. at 23.

[79] *See id.* at 9.

[80] *See generally World Bank and Partners Join Efforts to Tackle Arab World Infrastructure Challenge*, ARAB WORLD INITIATIVE (Apr. 27, 2011), http://arabworld.worldbank.org/content/awi/en/home.html (addressing the challenges and constraints to project finance and to infrastructure projects in the MENA region in general).

[81] REBECCA HILLAUER, THE HISTORY OF THE CAMERA AND THE VEIL, ENCYCLOPAEDIA OF ARAB WOMEN FILM-MAKERS 22 (2005); Alison James, *Rome Rebuilt in Tunisia*, VARIETY (2002), http://www.variety.com/article/VR1117872554.

[82] *See* STEVE ONYEIWU, ANALYSIS OF FDI FLOWS TO DEVELOPING COUNTRIES: IS THE MENA REGION DIFFERENT? 4, 6, 12 (2003), http://www.mafhoum.com/press6/172E11.pdf; *Tunisia Welcomes FDI with Open Arms*, FEMISE (June 1, 2011), http://www.femise.org/en/2011/01/discussions/tunisie-terre-d%E2%80%99accueil-des-ide/.

ever, was the first Arab nation in the MENA region to protest and oust its long-standing dictatorial regime, headed by former President Zine Al-Bidine Ben Ali, in what became known as the "Jasmine Revolution."[83] A forerunner to larger demonstrations, on December 17, 2010, a Tunisian man set himself on fire in the capital city of Tunis because of low employment.[84] Through December and January, major protests spread to capital and dozens of deaths resulted from a violent government crackdown.[85] The government appealed for tranquillity to no avail, and in early January 2011, it attempted to appease the swell of uprisings by sacking its Interior Minister and promising political and legal reforms.[86] This also failed to pacify protestors, and the uprisings became more violent, leading eventually to President Ben Ali promising to step down by 2014.[87] Shortly thereafter, Ben Ali's fled to Saudi Arabia with his family and billions of dollars in Tunisian assets.[88] The new Tunisian regime subsequently sought extradition to prosecute the former President and his family for human rights violations and misuse of State funds.[89] Since then, the new government has made strides on its promises of reform and better infrastructure.[90] The most promising infrastructure projects proposed in Tunisia at this time (and since the Arab Spring) are those in the Independent Power Producer ("IPP") sector.[91]

With the demand for electricity rising annually, Tunisia has embarked on an aggressive programme to increase its electric and clean energy production capacity, focusing on the development of combined cycle gas turbine ("CCGT") facilities, and seeking PPP projects in partnership with its gas and electric company, "Société Tunisienne

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[83] *Arab Revolt: Tunisia's Stolen Revolution?,* BBC NEWS (Mar. 2, 2011), http://www.bbc.co.uk/news/world-africa-12629758.
[84] *Id.*
[85] *Id.*
[86] *Tunisia Protests: President Sacks Interior Minister*, BBC NEWS (Jan. 12, 2011, 11:45 PM), http://www.bbc.co.uk/news/world-africa-12171183.
[87] *Tunisia Leader to Step Down in 2014*, BELFAST TELEGRAPH (Jan. 13, 2011), http://www.belfasttelegraph.co.uk/news/world-news/tunisia-leader-to-step-down-in-2014-15053429.html#.
[88] Anthony Shadid, *Joy as Tunisian President Flees Offers Lesson to Arab Leaders*, N.Y. TIMES (Jan. 14, 2011), http://www.nytimes.com/2011/01/15/world/africa/15region.html?ref=zineelabidinebenali.
[89] *Tunisia Seeks Ben Ali's Extradition*, REUTERS (Feb. 20, 2011), http://www.reuters.com/article/2011/02/20/tunisia-benali-idUSLDE71J0LQ20110220.
[90] *See, e.g.*, Rachelle Younglai, *Tunisia Financial System Stabilizing – Central Banker*, REUTERS (Sept. 21, 2011), http://www.reuters.com/article/2011/09/22/imf-tunisia-idUSS1E78K29420110922 (asserting that Tunisia's financial system is stabilizing).
[91] Hisham Katib, *Power generation in the Middle East: can the boom continue?*, *in* MIDDLE E. ECON. SURVEY 46 (2007).

de l'Electricité et du Gaz" ("STEG").[92] The government has reportedly set itself the objective of establishing three new combined cycle plants at Ghannouch (by way of expanding the existing facility), Sousse, and in Bizerte, and a fourth combined cycle plant at Cap Bon, which will be used for both domestic and export needs.[93] The first of Tunisia's new projects at Ghannouch is already under construction.[94] The projects at Sousse, Bizerte, and Cap Bon should ensue each year from 2012 to 2015.[95] The upcoming projects in Tunisia, such as the Bizerte IPP project, consist of a proposed 350-500MW plant which is being tendered by the Ministry of Industry, Energy and Small and Medium Enterprises on a build, own, and operate basis ("BOO"), on a 20 year concession.[96] The Ministry has reportedly already received 17 expressions of interest.[97] Five or six companies have been short listed, and the bid date has not even been announced yet publicly; but the Ministry is reportedly seeking to select a preferred bidder by year-end. Financial close was targeted for May 2011 but that has been delayed until the end of the year due to the recent turmoil across the region.[98] The new plant is scheduled to become operational in the second quarter of 2014,[99] and is an excellent opportunity to revive this nation's economy.

The upcoming El Med/Cap Bon IPP project is also an interesting area for opportunity, as a tender is being prepared for a 1,200MW power plant in Al-Haouaria that will both supply the local market in Tunisia and export power to Italy; an ideal and vital export scenario, as detailed above.[100] STEG and Italian grid operator Terna agreed in June 2007 to carry out joint studies for the facility. Under their agreement, up to 800MW of power would be exported to Italy from 2015 via a 200 kilometer subsea transmission line. The other 400MW will be

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[92] Ulrich Laumanns, Regional Workshop on CDM PoA's, Utilization of Wind Energy by Large Industrial Companies in Tunisia 300-03 (Jan. 26-27, 2010), *available at* http://www.jiko-bmu.de/files/basisinformationen/application/force-download/poa_workshop_tunis_presentations.pdf.

[93] Andrea Pinna, European Investment Bank, Regional Workshop on CDM PoA's The Role of Project Mechanisms in the Southern & Eastern Mediterranean: Views from the European Investment Bank 300 (Jan. 26-27, 2010), *available at* http://www.jiko-bmu.de/files/basisinformationen/application/force-download/poa_workshop_tunis_presentations.pdf.

[94] Laumanns, *supra* note 92.

[95] *Id.*

[96] IN-MED & ASEM, INVESTMENT OPPORTUNITIES IN THE TUNISIAN AND EGYPTIAN ENERGY SECTORS 38 (2011), http://www.invest-in-med.eu/en/agenda/operation_485_medenergy_study_ve_2011_def-9_ms.pdf.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 37.

used to supply the local market.[101] STEG will buy the domestic power produced by the plant under a 20-year power purchase agreement.[102] In addition to the power produced by the plant, the related cable facilities could export up to 200MW of electricity generated by the project to neighbouring MENA countries or to cross-sea areas such as Europe. In Sousse, STEG is also seeking bids for a 380MW- 450MW turnkey combined cycle and "single shaft" power plant, to supply the industrial sector. The project is scheduled to come on-stream in the first quarter of 2013, and STEG will reportedly finance the scheme itself, with the successful bidder taking-on a 12-year operations and maintenance ("O&M") contract.[103]

There are also new and interesting gas-supply developments in Tunisia that should lead to increased natural gas and renewable energy PF projects. In May 2009, PERENCO, an independent Anglo-French oil and gas company started pumping gas through a new 73 kilometer pipeline connecting the El-Franig and Baguel fields directly to the national grid.[104] Gas production from the Hsadrubal field, a joint venture by British Gas Tunisia Limited ("BGT") and Enterprise Tunisienne D'Activités Pétrolières ("ETAP"), began in 2009.[105] Operation of this plant made British Gas ("BG") the largest gas producer in Tunisia.[106] Finally, additional gas is expected from an offshore oil field development in the Gulf of Hammamet, operated by ENI, a large Italian multi-national oil and gas company present in 70 countries and currently Italy's largest industrial company.[107] "Tunisia is also seeking ways to substantially increase its gas production in the south of the country."[108] "At present, there is no way to transport the gas in the south, to population centers in the center and north, and therefore

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101 *Id*.

102 *Id.*

103 *Id* at 37.

104 *Perenco Inaugurates LOOP Project at CPF in Matmata, Tunisia*, ENERGY BUS. REV.: DRILLING AND PRODUCTION (May 13, 2009), http://drillingandproduction.energy-business-review.com/news/perenco_inaugurates_loop_project_at_cpf_in_matamata_tunisia_090513.

105 *Hasdrubal Gas Processing Plant*, HYDROCARBONS-TECHNOLOGY.COM, http://www.hydrocarbons-technology.com/projects/hasdrubal (last visited Oct. 3, 2011).

106 *Tunisia*, BG GROUP, http://www.bg-group.com/OurBusiness/WhereWeOperate/Pages/pgTunisia.aspx (last visited Oct. 3, 2011).

107 *In Tunis Eni's CEO Paolo Scaroni met with Tunisia's Prime Minister Monsieur Mohamed Ghannouchi and Tunisia's Minister of Industry*, ENI, http://www.eni.com/en_IT/media/notes/2008-01-04-in-Tunis-CEO-Scaroni-met-Prime-Minister-Ghannouchi.shtml (last visited Oct. 3, 2011) [hereinafter ENI].

108 Charles Whitney, *Spotlight on the Tunisian Power Market*, NORTON ROSE LLP (2009), http://www.nortonrose.com/knowledge/publications/23144/spotlight-on-the-tunisian-power-market.

the government is planning a new 320 kilometer pipeline connecting a gas-gathering facility in the south with existing facilities in the north, also with a new liquefied gas terminal."[109] The pipeline is expected to be used for both domestic consumption and export, and would be developed by the Tunisian national oil company, "Enterprise Tunisienne d'Activitiés Pétrolières" ("ETAP"),[110] and three international oil companies are to be determined via the bidding and award process.[111] The Ministry of Industry, Energy and Small and Medium Enterprises is expected to make a final investment decision soon, launching EPC tenders by early 2012, and according to the current schedule, construction should be completed by the end of 2014.[112] "How ETAP will finance its share of the pipeline is currently under review."[113] "Negotiations are also under way between Tunisia and the Algerian national oil company, Sonatrach on an agreement which would allow Tunisia to use capacity in the Algerian Trans Med pipeline."[114] "The 20-year-old pipeline transports Algerian natural gas to Sicily, crossing the Mediterranean Sea from Cap Bon."[115] Tunisia receives royalties from the pipeline as payment for access through its territory.[116]

Investors in IPP's should also be aware of legal and commercial issues, such as Tunisia's privatization program. Tunisia has privatized and/or restructured over 200 enterprises since the start of its privatization program in 1987.[117] The new Tunisian government expects the privatization programme to enter into a new accelerated phase with the aim of improving the attractiveness of the Tunisian economy to new foreign investors.[118] The Tunisian Investment Code also provides a broad range of fiscal incentives for foreign developers, including tax relief on reinvested revenues and profits, exemptions on value-added tax on imported capital goods, and depreciation schedules

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[109] *Id.*

[110] ENI, *supra* note 107.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Tunisia Speeds up its Privatization Program,* WASH. TIMES (July 10, 2000); *see also Tunisia Enters a New Era,* PANGEA PARTNERS (1997), http://www.pangaeapartners.com/tunpriv.htm.

[118] THE GOVERNMENT OF TUNISIA, PRIVATIZATION IN TUNISIA, http://www.privatisation.gov.tn/www/en/doc.asp?mcat=1&mrub=50&msrub=13&dev=true (last visited Oct. 31, 2011).

for production equipment.[119] Political risks must also be well-considered and allocated at this critical time in Tunisia's development, before any FDI is made into Tunisian projects, especially because of the change that occurred in the government structure. Yet, even these changes have not adversely affected the general Tunisian business environment, as the environment is constantly improving.[120]

The new Tunisian government has also concluded many Bilateral Investment Treaties ("BITS"),[121] which offer added risk and dispute resolution protections with approximately eighty-one countries. In that regard, Tunisia's Association Agreement with the EU, which came into effect in 2008, is vital to investment protection from the EU investors with the aim of creating a free trade zone between Tunisia and EU member states. Developers are advised, however, to check whether a bilateral trade treaty is in place with their country of incorporation/domicile. Lastly, investors must be aware that developers and their bankers may be required to apply for the approval of the Tunisian Central Bank in relation to several aspects of funding of a PPP or IPP project-financing, including when funding any debt and equity by offshore investors. The Tunisian "dinar" is generally a convertible currency, but Central Bank authorisation is needed for foreign exchange transactions.[122] In particular, developers should consider whether Tunisian Central Bank approval would be required for repatriation of dividends to sponsors or payments of principal and interest to offshore lenders, increases in the share capital of the project company following its formation, and for the sale or acquisition of shares in the project company by a non-resident company.[123]

In what was called the "African Transport Deal of the Year" in 2008, Tunisia also boasted of its capability to realize major PPP projects with a recent $605 million project-financing backed by the IFC, where TAV of Turkey partnered with the Tunisian government and created an SPV called *"TAV Tunisie,"* which will be the concessionaire of two linked airport projects. The project, with total costs of

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119 *Investment Incentives*, FOREIGN INVESTMENT PROMOTION AGENCY: FIPA-TUNIS., http://www.investintunisia.tn/site/en/article.php?id_article=789 (last visited Oct. 4, 2011).
120 *Tunisia: Increase in Exports, Signs of Improvement*, GLOBAL ARAB NETWORK, http://www.english.globalarabnetwork.com/2011061411063/Economics/tunisia-increase-in-exports-signs-of-improvement.html (last visited Oct. 4, 2011).
121 *See generally* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a bit. . .and they could bite* (World Bank Research Dept., Working Paper No. 3121, 2003).
122 U.S. DEPT. OF STATE, BACKGROUND NOTE: TUNISIA (2011), http://www.state.gov/r/pa/ei/bgn/5439.htm.
123 *See generally* Whitney, *supra* note 108 (discussing Tunisia's power market opportunities and associated risks).

approximately $1 Billion USD, is one the largest recent private sector investments in Tunisia, and the first airport private sector concession in the Maghreb region.[124] The concession project owes much of its success to the participation of the IFC, which not only helped provide longer-term debt from the commercial banks, but also helped TAV resolve a number of legal hurdles while it attempted to get financial close in its Tunisia deal. The project consists of two linked concessions, one for the design, building, financing and operation ("DBFO") of a new international airport at Enfidha (for an initial capacity of 7 million passengers), and the second for the operation and upgrade of the existing Monastir International Airport (4.2 million passengers in 2006).[125] The tender for the PPP project was originally launched in 2004 as a single "green-field" airport concession, and has expanded to two linked concessions.[126]

In all of the projects the World Bank is involved in across the MENA region, it is also important to note that it extends its support via a growing network of civil society organizations, development practitioners, and government agencies from across the MENA region, to foster the exchange of ideas, build capacity, and help members learn about participatory governance and social accountability mechanisms that are vital to success in this developing region. Active citizen participation and social accountability on all sides is fully encouraged, and Ms. Shamshad Akhtar, Vice President of the World Bank's MENA Region is quoted in this regard as stressing that: "Development can only be strengthened if we are all partners in the effort."[127]

2. *Egypt*

Known as a stable MENA nation and as a valuable strategic partner of the United States and Israel, Egypt quickly followed in Tunisia's footsteps, ousting its dictator of thirty years, President Hosni

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[124] *Summary of Proposed Investment,* INT'L FIN. CORP. (Apr. 2008), http://www.ifc.org/ifcext/spiwebsite1.nsf/0/9F0D31A0EFB9FC06852576BA000E2B83 (discussing the TAV Tunisie Project).

[125] *Id.*

[126] *See African Transport Deal of the Year 2008,* PROJECT FIN. MAG. (Feb. 2009), http://www.projectfinancemagazine.com/Article/2409597/African-Transport-Deal-of-the-Year-2008.html.; *see also Summary of Proposed Investment*, INT'L FIN. CORP. (Apr. 2008), http://www.ifc.org/ifcext/spiwebsite1.nsf/0/9F0D31A0EFB9FC06852576BA000E2B83 (discussing the TAV Tunisie Project).

[127] Press Release, The World Bank, World Bank Supports Social Accountability Network across Arab World (Apr. 15, 2011), *available at:* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/LEBANONEXTN/0,,contentMDK:22891131~menuPK:294909~pagePK:2865066~piPK:2865079~theSitePK:294904,00.html.

Mubarak.[128] Egypt has since moved aggressively towards political and constitutional reform.[129] In January 2011, soon after the Tunisian President fled to Saudi Arabia, protests began to rock Cairo's now famous *Tahrir Square*.[130] It quickly became the headquarters and principal site of Egypt's revolution.[131] Clashes between protesters, the government, and its seemingly peaceful military forces continued until early February, leading to the ruling party stepping down—including the powerful sons of Egypt's former President.[132] On the eighteenth day of protests, President Mubarak stepped down, exiling himself to his private residence in Sharm el-Sheikh, a Red Sea resort town on the eastern coast of Egypt.[133] Currently, he and his sons are being prosecuted in Cairo for alleged corruption and misuse of state funds.[134]

Power or lack thereof, became the top agenda item in Middle Eastern countries, including Egypt, this past summer when power shortages increased due to the combination of high summer temperatures and Ramadan occurring at the same time.[135] Bidders for the 1,500MW Dairut independent power project ("IPP"), the first IPP in Egypt for a decade, started to form a consortium.[136] The Electricity & Energy Ministry is offering to pay for the project, and Egyptian Electricity Transmission Company ("EETC") will be supplying the power under a 20-year power purchase agreement ("PPA").[137] "The scheme will be a BOO plant."[138] The IFC is believed to be advising on the project, since it has also been actively advising on PPPs.[139] However, unlike the PPPs above, the IPP project is likely to have currency guarantees to encourage international banks to fund the project.[140] The PPPs are likely to be funded by *"ban teams"* that are believed to have

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128 *Spreading Revolution*, N.Y. Times, http://www.nytimes.com/interactive/world/middleeast/2011-spreading-revolutions.html#intro (last visited Oct. 5, 2011).
129 *Id*.
130 *Egypt Protests: Key Moments in Unrest*, BBC News (Feb. 11, 2011, 11:57 AM), http://www.bbc.co.uk/news/world-middle-east-12425375.
131 *See id.*
132 *See id*.
133 *Id.*; *Sharm el-Sheikh, Mubarak's New Home*, Huffington Post (Feb. 11, 2011), http://www.huffingtonpost.com/2011/02/11/sharm-el-sheikh-egypt-mubarak_n_821913.html#s238655&title=Sharm_elSheikh_Tourists.
134 Iskandar El-Amrani, *The Resumption of Hosni Mubarak's Trial in Cairo*, The Guardian (Sept. 5, 2011, 12:35 AM), http://www.guardian.co.uk/commentisfree/2011/sep/05/mubarak-trial-cairo-egypt.
135 Rob Morrison, *PFI: Power Tops the Middle East Agenda*, Reuters (Sept. 14, 2010), http://uk.reuters.com/article/2010/09/14/idUKLDE68D18F20100914.
136 *Id.*
137 *Id*.
138 *Id.*
139 *Id*.
140 *Id.*

formed between foreign and local companies that were shortlisted in June of last year.[141]

With internationalized PPP projects such as these, it appears that Egypt, like Tunisia, is looking at ways of creating power generation capacity more quickly. This seems to be one of the best areas of opportunity for new PF related projects in the region at this time. Local banks are also expected to play an important part in such PF deals considering that the risks are lower than on a normal green-field IPPs and PPPs, and the amounts required for financing are not too high.[142] International banks could become involved in these projects, but they should be aware of typical Egyptian withholding tax issues.[143] The PF schemes are however, long-term dollar financings, so international banks could be required; and they should view this as an area for great returns, via possible power exportation to Europe, GCC countries, Asia, and beyond.[144]

Another interesting Egyptian PPP project that may lead to opportunity for FDI is the "EAgrium" petro-chemical and fertilizers project.[145] It was one of the largest and most expansive oil and gas deals to be project-financed in Egypt, and the deal was completed with no export credit agency or EIB support.[146] The $1 billion debt was placed in a mix of international and local banks.[147] EAgrium was a joint venture between Canada's Agrium (60%), state-owned companies Echem and EGAS (24%), the national operator of the gas distribution grid GASCO (9%), and Arab Petroleum Investment Corporation (Apicorp) (7%).[148] The project was to consist of a nitrogen facility located in Damietta, scheduled for completion in 2010-2011,[149] but disputes related to environmental concerns have cancelled it (at least momentarily).[150] This project could be awaiting "opportunity-sniffing" investors from the international community to pounce upon the project, better

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141 *Id.*
142 *Id.*
143 *Id*.
144 *Id*.
145 *See Structured Finance*, COM. INT'L BANK (Oct. 6, 2011, 10:44 AM), http://www.cibeg.com/en/InstitutionalBanking/StructuredFinance/Pages/default.aspx (discussing the EAgrium project's award for the "Middle East Petrochemicals Deal of The Year 2007" by Project Finance).
146 *EAgrium: Fully Banked*, PROJECT FIN. MAG. (Aug. 1, 2007), http://www.projectfinancemagazine.com/Article/2412149/EAgrium-Fully-banked.html.
147 *Id.*
148 *Id*.
149 *Id.*
150 *Egypt Cancels Agrium Project*, EDMONTON J. (Aug. 6, 2008), http://www.canada.com/edmontonjournal/news/business/story.html?id=43442844-b819-48b0-8479-ccd9a208be93.

mitigate and allocate the environmental risks involved, and get it back on its feet again as it appears creditworthy and bankable.[151] In August 2008, Agrium reportedly sold their stake in the project for 26 percent share in the MISR Oil Processing Company ("MOPCO"). Under the deal, EAgrium was to be a wholly owned subsidiary of MOPCO.[152] In 2008, the Egyptian government decided to relocate the fertilizer complex plant away from Damietta[153] since it was to produce potentially hazardous ammonia and urea that would cause environmental concerns near the heavily populated capital city of Cairo.[154] The original projects contracts awarded were Engineering, Procurement, and Construction ("EPC") based contracts, and the project itself was to be paid back on Lump Sum Turnkey ("LSTK") payment terms.[155] A dispute between the Egyptian government and the Canadian fertilizer producing company Agrium followed the project's cancellation, but it was quickly resolved, and EFG-Hermes, the Egypt-based private investment bank has stated that, "The relatively quick resolution of the dispute should send a signal, from a regulatory and political risk standpoint, that foreign investment environment in Egypt is still favourable."[156] New site selection, FDI, and a thorough environmental study could be possible solutions to get the project back on its feet again.

Water supply and sanitation in Egypt is an area for possibly vast PF expansion, as it is characterized by urgent need (and along with that need a host of achievements and challenges). Among the achievements in this sector are increases of piped water supply between 1990 and 2006 from 89 percent to 99 percent in urban areas, and from 39 percent to 82 percent in rural areas.[157] These improve-

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[151] *Cf. EAgrium: Fully Banked, supra* note 146 (describing EAgrium's financing history).

[152] *See, e.g.*, *Agrium Reaches Agreement on Egyptian Nitrogen Facility*, AGRIUM (Aug. 11, 2008), http://www.agrium.com/news/05784_9078.jsp.

[153] *See, e.g., Egyptian Parliament Fails to Support EAgrium Project on Existing Site*, AGRIUM (June 20, 2008), http://www.agrium.com/news/05784_8886.jsp.

[154] *See* Abdel-Rahman Hussein, *Cairo Protest against Agrium Dispersed as Experts Condemn Plant*, DAILY NEWS EGYPT (May 26, 2008), http://www.thedailynewsegypt.com/archive/cairo-protest-against-agrium-dispersed-as-experts-condemn-plant-dp1.html.

[155] Sharif Elmusa & Jeannie Sowers, *Damietta Mobilizes for Its Environment, in* MIDDLE E. RESEARCH & INFO. PROJECT (Oct. 21, 2009), http://www.merip.org/mero/mero102109.

[156] Heba Saleh, *Egypt Resolves Project Dispute,* FIN. TIMES (Aug. 13, 2008), http://www.ft.com/cms/s/0/2b902e0e-68de-11dd-a4e5-0000779fd18c.html#axzz1L3MquRN8.

[157] Christine Haffner-Sifakis & Christoph Sommer, *Horizon 2020- Elaboration of a Mediterranean Hot Spot Investment Programme (MeHSIP),* EUROPEAN INV. BANK (Jan. 2008), http://ec.europa.eu/enviroment.enlarg/med/pdf/mehsip_report.pdf.

ments are despite rapid population growth (with the elimination of open defecation in rural areas during that same period), and in general, with a relatively high level of investment in infrastructure during that period.[158] Access to improved water sources in Egypt is now practically universal. On the institutional side, the separation between regulation and service provision has been improved through the creation of a "National Holding Company for Water and Wastewater" in 2004, and of an economic regulator, the "Egyptian Water Regulatory Agency" ("EWRA"), in 2006.[159]

Many challenges remain, however, in this area for Egypt, which could be turned to PF opportunities. Only about one third of the population is connected to sanitary sewers. Due to low sanitation coverage, about 17,000 children die each year because of diarrhea.[160] Low-cost water recovery, due to water tariffs that are among the lowest in the world, are also a challenge and require government subsidies to the country's fourteen public water and sewer companies, even for simple operating costs.[161] Poor facilities operation, such as wastewater treatment plants, is also a major issue, but it may be viewed by eager investors as an area of opportunity for foreign investment and partnership/participation.[162] Foreign aid from the United States, the European Union, France, Germany, the World Bank, and Arab donors remains important in terms of financing and technical assistance.[163] This is particularly important in the case of Western donors, who promote sector reform that aims at higher levels of cost recovery and more efficient water service provision.[164] Private sector participation in operating water and sanitation systems has so far been limited, mainly to Build-Operate-Transfer ("BOT") arrangements for large facilities, but PF for new projects is aggressively underway, and will hopefully lead to success stories in this area for the region.[165]

One interesting Egyptian project in this sector, which may likely open doors for many others, is the Gabal El-Asfar Waste-Water Treatment Plant ("GAWWTP") Project in Cairo. This project received approval in October 2009 from the Board of Directors of the African Development Bank Group ("AfDB") for €53 Million Euros in initial project financing.[166] The project's objective is to "improve the quality

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[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *See generally Egypt: AfDB Approves €53 Million Loan to Finance Waste Water Treatment Project*, AFR. DEV. BANK GRP. (Oct. 7, 2009), http://www.afdb.org/en/

of waste-water discharged into the drainage system in Cairo East, thereby contributing to improved sanitation and a cleaner environment for the nearly 8 million people living in the area."[167] The proposed additional treatment capacity will serve an additional 2.5 million people.[168] Other project beneficiaries include downstream villagers and those living along the system draining the effluent from the plant into Lake Manzala.[169] The project corresponds with the AfDB's 2008-2012 Medium-Term Strategy, which highlights the AfDB's focus on infrastructure development and better governance in PF, promoting a more robust private sector in the MENA region.[170]

3. Libya

After witnessing popular revolutions in Tunisia and Egypt, the Libyans were a bit more hesitant to bring about their own. This appears to be a result of the Libyan people living in utmost fear and oppression for the past 42 years, under the iron-fist rule of their leader, Colonel Muammar Gaddaffi. Gaddaffi was toppled and killed in October 2011, and his 42 year oppressive ruling was also removed. Gaddaffi's regime had targeted its own people, and "kill[ed] innocent civilians," to stay in power.[171] Many lives were lost but the Libyan opposition forces, NATO, and Libyan rebels collaborated and captured the capital city of Tripoli and other pro-Gaddaffi strongholds.[172] These efforts have led to a new leadership in Libya, now called the National Transition Council ("NTC"). The NTC is preparing the country for its first free elections under a democratic Parliamentary system, apparently based on a Islamic law, with a promise to the Libyan people and

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news-and-events/article/egypt-afdb-approves-eur-53-million-loan-to-finance-waste-water-treatment-project-5160 (discussing the Egyptian water project and other related initiatives).

[167] *Id*.

[168] *Id*.

[169] *Id*.

[170] *Id.*

[171] *Zuma tells Gaddaffi: Stop Killing Innocent Civilians,* YA LIBNAN (Mar. 13, 2011), http://www.yalibnan.com/2011/03/13/zuma-tells-gaddafi-stop-killing-innocent-civilians; *see also Gaddaffi killed in hometown, Libya eyes future,* REUTERS (Oct. 21, 2011), http://uk.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020.

[172] Damien McElroy, *Libya: Battle for Tripoli Turns Bloody as Gaddafi Holds Out to the End*, THE TELEGRAPH (Aug. 23, 2011, 6:30 AM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8716884/Libya-battle-for-Tripoli-turns-bloody-as-Gaddafi-holds-out-to-the-end.html.

international community of respect for the rule of law and for human rights.[173]

Libya presents itself as the most challenging situation in the MENA region, but at the same time, also the best possible 'hot-spot' for PF opportunity after the Gaddaffi regime's fall. There will be major legal, institutional, operational, and political issues to address, once the country's new Parliament is elected and its Constitution is drawn. FDI and project investment from the outside world will quickly present itself to Libyan projects in the oil, gas, clean energy, and natural resources sectors, as is already occurring in its rebel-controlled and resource-rich cities, such as Ras Lanuf, Mizrata, and Benghazi.[174] These are places where some European nations and the United States have quickly recognized the rebel leadership as legitimate, so as to be the first players on the new mega-project scene in those cities.[175]

Notably, the first international project-financing in Libya was reported in 2007, when ABC International Bank Plc and Standard Bank Plc jointly arranged $16 Million USD financing for the redevelopment and expansion of the historic Al-Waddan Hotel in Tripoli.[176] The project sponsors provided a debt service undertaking with both onshore and offshore security over the project's assets.[177] The Libyan economy however, predominantly depends on revenues from petroleum so internal projects such as this were usually frowned upon, mainly due to the closed anti-tourism society that had been created under the Gaddaffi regime. It is reported that strong diversification efforts are being sought, however, with clean energy projects and tourism as prime examples of opportunity in the non-oil sector.[178] Despite tourists not being allowed into the country under the former 2003 UN sanctions, the tourism industry is now growing and likely to become an attractive option for foreign investors.[179]

Abu Dhabi's Al-Maskari Holding is funding a new $3 Billion USD project to build an integrated "energy hub" in Libya and to de-

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[173] *See A Vision of a Democratic Libya,* NAT'L TRANSITION COUNCIL (Oct. 2011), http://www.ntclibya.org/english/libya/.

[174] *See generally* Sami Zaptia, *Libya Launches $54 billion 'Energy Cities' Master Plan*, THE TRIPOLI POST (Jan. 11, 2010), http://tripolipost.com/articledetail.asp?c=2&i=5046.

[175] *See* Mary E. Stonaker, *What Formal Recognition Given to Libyan Rebels Means for the Oil Markets*, AL ARABIYA NEWS (July 15, 2011), http://www.alarabiya.net/articles/2011/07/15/157799.html.

[176] *See First-ever International Project Financing Funds in Libya*, WHITE & CASE LLP (Oct. 13, 2011, 10:36 AM), http://www.whitecase.com/press_10262007/.

[177] *Id*.

[178] *Id*.

[179] *Id*. (quoting White & Case partner Jason Kerr).

velop an underwater cable for exporting electricity to Europe.[180] The project will include solar power and conventional electricity generation from fuels such as natural gas, and a high-voltage undersea transmission line from Libya to southern Italy.[181] An agreement for the project was signed in Tripoli on December 12, 2010, according to the Libyan General Board of Privatization and Investment.[182] Libya is proving to be an immense resource for solar projects and other clean energy projects that can be easily exported to Europe.[183] The Al-Maskari project's goals are to compete with Russia and cover any European gas shortages by sending Libya's clean energy to Europe via cables under the sea; these cables extend from northern Libya to southern Europe.[184] Sheikha Aisha Al-Maskari, the chairwoman of Al-Maskari Holding, said the group was interested in investing in all sectors of Libya's energy industry, including solar energy; she asserted that Libya has "the best solar resources in the world."[185]

Other upcoming projects in Libya that present new areas of opportunity are, of course, in the oil and gas sector. Libya, a member of the Organization of Petroleum Exporting Countries ("OPEC"), is the fourth largest oil producer in Africa after Nigeria, Algeria, and Angola (with nearly 1.8 million barrels per day and has reserves estimated at 42 billion barrels).[186] Projects in infrastructure development and construction sectors are also successfully underway,[187] and will probably increase after the current civil-war-like conflict areas settle. Optimism is driving Libya's construction sector as well, with 2011 and 2012 expected to present the strongest growth.[188] Despite an optimistic outlook, there are still a number of risks for investors to consider, stemming predominantly from the business environment.[189] The major barrier to growth in Libya is related to Libya's own business environment, which has long been unpredictable and in desperate need of reform.[190] Libya scores 45.7 out of 100 for risks in BMI's infrastruc-

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[180] *See* Tasmin Carlisle, *Al Maskari Holding in $3bn Libya Energy Plan*, THE NAT'L (Dec. 27, 2010), http://www.thenational.ae/business/energy/al-maskari-holding-in-3bn-libya-energy-plan.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *See id*.
[185] *Id*.
[186] *Libya: Fourth Largest Oil Producer in Africa*, ENNAHAR ONLINE (Feb. 22, 2011), http://www.ennaharonline.com/en/economy/5839.html.
[187] BUS. MONITOR INT'L, LIBYA INFRASTRUCTURE REPORT 2011 (2011), http://www.businessmonitor.com/infra/libya.html.
[188] *Id*.
[189] *Id.*
[190] *Id*.

ture business environment scale, however, a rewards score of 53.2 from the same review scale reflects the tremendous opportunities for PF investors.[191]

The UN lifting of sanctions in 2003 increased investor interest in Libya, and the government has since actively pursued international private investment.[192] Any new government must offer the same stability and security to an investor as the Gaddaffi regime to ensure future growth. But, arbitrary decision-making and non-transparent investment laws may make this difficult.[193] Libya "is ranked the worst in North Africa according to Transparency International's 2010 Corruptions Perception Index (coming in at 146 out of 178 states rated), while the World Economic Forum placed the country at 100 out of 139 economies in terms of competitiveness."[194] The government's recent liberalization of the economy is movement in the right direction, but current unrest may slow progress.[195] The business environment may remain, at least for the next six months to one year, the primary risk to any positive forecast.[196] But once the fighting ceases, this author predicts that outside investment will flourish into Libya. Investors will come just to get at the nation's oil, gas, and clean energy resources. Not to mention that Libya's ancient Mediterranean sea-resort areas and coastlines are developable and attractive tourism prospects.[197] In fact, the Marriott Hotels Corporation, and the new MENA regional offices of IATA have made efforts to gain an initial foothold in Libya.[198]

Abu Dhabi financial services company Invest AD has also launched a Libyan investment fund. Invest AD has already committed its own capital to the fund, which will invest in Libya's $2.2 billion in the stock market, as well as participating in initial public offerings ("IPO"), and taking pre-IPO stakes in companies.[199] "Libya has taken positive steps to open its economy and is reaping the rewards, with

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[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *See generally Libya Offers Incredible Opportunity – But Only the Bold Need Apply*, LIBYANINVESTMENT.COM (Aug. 2, 2010), http://www.libyaninvestment.com/libya-news/8193.html.
[198] Alexandra Berzon, *Marriott Taps Mideast, Africa Chief*, WALL ST. J. (Oct. 3, 2011), http://online.wsj.com/article/SB1000142405297020379190457660713332367 5082.html.
[199] *Abu Dhabi Investment Company Launches Libya Fund*, GLOBAL ARAB NETWORK (Jan. 20, 2011), http://www.english.globalarabnetwork.com/201101208707/Economics/uae-abu-dhabi-investment-company-launches-libya-fund.html.

very high rates of economic growth," said Invest AD Chief Executive Officer Nazem Fawwaz Al-Kudsi.[200] Al-Kudsi further noted the firm was "glad to be [in Libya] at an early stage of this process, and [that Invest AD is] very much [a] long-term investor. This fund will contribute capital to some of the country's most promising businesses to help them grow for years to come."[201] The risk is that this optimism may vanish with the onset of war in Libya. With the end of conflict, investor confidence and financing opportunities in infrastructure development, renewable energy exportation, and solar and fuel-related projects may yet be restored.

Perhaps the most interesting and important of all possible new developments in Libya, and for the MENA region as a whole, is Italy's proposed Libyan Motorway project.[202] The project will act as a foundational first project that will bring greater connectivity and greater accessibility throughout the region, permit increased future trade and commerce throughout the area, and foster subsequent PF projects in general once connected. The $5 Billion USD cross-country motorway project that is to be constructed for Libya by the Italian government, will stretch from the Libya's border with Tunisia to Libya's border with Egypt.[203] Italian firms have presented twenty different plans for the 1,700 kilometer motorway across Libya, which Italy's Infrastructure Minister, Altero Matteoli, says is "the biggest project of its kind in Africa."[204] Italy will finance the project according to the terms of a friendship treaty signed by Italian Prime Minister Silvio Berlusconi and Libyan leader Muammar Gaddafi in 2008.[205] Building of the motorway will be awarded to three different firms, which will divide the work between them.[206] Italy will invest $5 billion in Libya over the next twenty years under the terms of the treaty, primarily in infrastructure projects reserved exclusively to Italian firms, as the scheme is designed to compensate Libya for Italy's colonial misdeeds in the first half of the twentieth-century.[207] The two largest builders in Italy filed for pre-qualification to bid for the new motorway project connect-

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[200] *Abu Dhabi Invest AD launches Libya Fund to Tap High Growth*, AME-INFO (Jan. 19, 2011), http://www.ameinfo.com/254206.html.
[201] *Id*.
[202] Gulliver Cragg, *Berlusconi and Gaddafi launch Libya motorway project*, FRANCE 24 (Aug. 31, 2009), http://www.france24.com/en/20090831-berlusconi-gaddafi-launch-libya-motorway-project.
[203] *Id*.
[204] *See 20 Firms Bid for 1,700 km Libya Motorway,* TRADE ARABIA (Aug. 24, 2010, 12:33 PM), http://www.tradearabia.com/news/cons_184934.html (discussing the new motorway and its financing).
[205] *Id*.
[206] *Id*.
[207] *Id.*

ing Tunisia and Egypt.[208] The road, expected to span four lanes, will span from Ras Ajdir, on the border with Tunisia, to Imsaad, close to Egypt.[209]

A recent change of strategy by the Italian government has seen it turn its back on its Libyan "friends" from the former Gaddaffi regime, when Italy joined the NATO-led bombing campaign.[210] The campaign sought to enforce a UN resolution on the protection of civilians in Libya, who were targeted by pro-Gaddaffi forces during the conflict.[211] Additionally, Gazprom, a Russian oil giant, also intends to become involved in Libya by joining with the Italian oil company ENI in its "Elephant Oil" projects in Libya.[212]

Another major but risky development in new Libyan housing infrastructure projects are those managed by the U.S. project management company AECOM, which already has a large American expatriate presence in Libya. AECOM recently signed a contract for a joint venture ("JV") with Libya's Housing and Infrastructure Board ("HIB").[213] The new JV would allow several thousand HIB employees to leave Government of Libya ("GOL") employment, enter the private sector; and prompt a sizeable increase in the number of expatriate Americans working in Libya under AECOM.[214] The new JV would initially focus on projects in Libya; however, the long-term goal is to implement projects throughout the African continent and MENA region under a Libyan banner. AECOM will capitalize the new JV and it believes funding for its project is secure.

Nonetheless, AECOM's success to date has stemmed mainly from the relationship of its chairman with the chairman of the HIB, who was rumoured to be a potential candidate to take over as Prime

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[208] *Id.*

[209] *Id.*

[210] *Libya: Berlusconi backs NATO strikes by Italy jets*, BBC NEWS (Apr. 25, 2011 3:34 PM), http://www.bbc.co.uk/news/world-africa-13188951.

[211] *Id.*

[212] Lyubov Pronina, *Gazprom Agrees to Join ENI's Oil Project in Libya,* BLOOMBERG (Feb. 16, 2011, 10:21 AM), http://www.bloomberg.com/news/2011-02-16/gazprom-agrees-to-join-eni-s-elephant-oil-project-in-libya.html.

[213] *See* Press Release, AECOM Technology Corp., AECOM Announces Contract with Libya Housing and Infrastructure Board with Potential Value of $574 Million (Dec. 13, 2007), *available at* http://investors.aecom.com/phoenix.zhtml?c=131318&p=irol-newsArticle_print&ID=1087083&highlight=.

[214] *See Risky Business? American Construction Firm Enters Joint Venture with GOL*, THE DAILY TELEGRAPH (Jan. 28, 2009), http://www.telegraph.co.uk/news/wikileaks-files/libya-wikileaks/8294919/RISKY-BUSINESS-AMERICAN-CONSTRUCTION-FIRM-ENTERS-JOINT-VENTURE-WITH-GOL.html (releasing the content of a United States embassy cable to Washington, D.C. which was passed on by the Wikileaks organization).

Minister in an upcoming cabinet shuffle.[215] AECOM's increased profile places it in the crosshairs of those seeking to extract rents, such as foreign investors and lenders, but the endeavour remains a potentially risky proposition.[216] As a consequence of the uncertainty in Libya, AECOM had difficulty determining whether the project should continue, and it previously completed a pullback of expat employees and their families working on Libyan infrastructure projects.[217]

IV. OBLIGATIONS AND RISK MANAGEMENT

1. Obligation to Deliver

A recent lecture by H.E. Dr. Amani Abeid Karume, the former President of Zanzibar, best summarizes the obligations of the players involved in infrastructure development and PF in the conflict-stricken MENA region.[218] In his lecture, Mr Karume stressed that, "the West must now intervene and 'deliver' on its democracy model, otherwise terror, lack of legal, political, and social institutions, and severe poverty may come in democracy's place."[219] He added that local governments and regional institutions must also help to deliver on this promise, and not that they should simply "wait on the West to do it for them."[220] Mr. Karume also stressed the importance of "human relations" as being the "number one" skill that individuals working in the field of PF must have, since it is an important feature to use during conflicts and disputes.[221] Having those skills in place before a project begins is the best way to mitigate risk and prevent lengthy and costly litigation.

Mr. Karume mentioned the social duties we each have as lawyers and managers to help create prosperity and opportunity for the people of the MENA region. Furthermore, finance leaders should act upon those duties to propose new projects and seeing them through to the end.[222] As stated above, doing so means less unemployment, a safer environment, more competitive markets, less delinquency and violence, greater access to cleaner energy, and access to very precious

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[215] *See id.*
[216] *See id.*
[217] *See AECOM Says Libyan Withdrawal Will Scuff Earnings*, FORBES (Feb. 3, 2011), http://www.forbes.com/2011/03/02/aecom-withdraws-from-libya-unrest-buoys-oil-marketnewsvideo.html.
[218] Dr. Amani Abeid Karume, Former President of Zanzibar, Inaugural Lecture before the Boston University African Presidential Archives and Research Center (Mar. 10, 2011), http://www.bu.edu/aparc/presidents/karume/.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*

commodity resources that act as the "life-blood fuel" of our economies. Lessons learned from major infrastructure mega-projects, such as the Mozal Smelter Project in Mozambique, teach us the same idea: getting involved in riskier projects is what PF is all about, and that the secret to PF success is allocating those risks in a manner that is mutually beneficial to the local communities and investors involved. The true "key elements" to creating investor confidence in MENA's future and expanding the PF sector is to follow the Mozal Smelter Project's motto, "Together, We Can Make a Difference," and getting the local communities involved to work on and buy into any development project undertaken in the region only bolsters such efforts.[223]

2. *Risk Management "Musts"*

Every project entails unique challenges that generate key considerations on risk management, allocation of risk, and project governance and documentation. Risk management affects project value and can be a valuable tool in reducing costly market imperfections and under-investment in positive net-present value ("NPV") projects as well.[224] One of the primary reasons why managers say they use project finance is to "achieve better risk mitigation and improved risk allocation."[225] Cases like Poland's A2 Motorway and *Petrozuata* illustrate a four-stage process for successful risk management: identification, assessment, mitigation, and allocation.[226] In the identification stage, the objective is to identify and classify project risks into four different categories: completion risks (completion on time and budget), operating risks (market demand and throughput, etc.), political/sovereign risks (expropriation, *force majeure* events, etc.), and financial risks (interest rate and exchange rate exposures).[227] *Force majeure* events come in two forms: acts of God (such as floods, earthquakes, or other natural disasters), which are considered operating failures, and wars,

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[223] *See* Williams, *supra* note 15; *see also* James J. Emery et al., ADMINISTRATIVE BARRIERS TO FOREIGN INVESTMENT: REDUCING RED TAPE IN AFRICA 142, 158 (2000); Kathryn McPhail & Aidan Davy, *Integrating Social Concerns into Private Infrastructure Projects* (World Bank, Discussion Paper No. 384, 1998).

[224] Tom Marshella, *Three R's: Risk, Return, & Rating,* PROJECT FIN. MAG., May 15, 2001, at 5-8.

[225] ETSY, *supra* note 29.

[226] *Id.* at 279-320.

[227] *See generally Rating Criteria for Infrastructure and Project Finance*, FITCH RATINGS (Sept. 29, 2009), http://www.finance-quebec.com/Fitch%20Rating%20Criteria%20project%20finance.pdf (describing various types of risk as categorized by one financial services firm).

strikes, riots, and expropriation, which are considered political/sovereign risks.[228]

After identifying the risks, the next step in the process is to assess the most important risks and then identify risks that may require active mitigation and management.[229] The goal of risk mitigation is to reduce, in a cost-effective manner, cash flow variability to increase the project's debt capacity.[230] By narrowing the distribution of possible returns, risk management allows projects to support leverage ratios in excess of 90 percent.[231] The final step is allocating risk to the parties that are best able to control the risks and that can bear them at least cost, as typically established through long-term contracts.[232] To induce optimal contractual behaviour between parties and reduce incentive conflicts between key decision makers, other governance measures, such as "shared ownership," are required to prevent and resolve conflicts.[233]

Governments must have the ability to negotiate, monitor, and enforce agreements to develop certain types of infrastructure.[234] When these contracts are unenforceable, the project's property rights are uncertain, cash flows are high, and there is a high risk for expropriation.[235] Many infrastructure projects in the MENA region, in particular where countries have non-existent, untested, or unpredictable legal systems, managing sovereign risk becomes one of the most important and critical tasks of the project manager.[236] This is where the newer "structural" approach, illustrated above, better suits con-

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[228] C. Richard Tinsley, A Practical Introduction on Project Finance Risks, Structures and Financeability (1996).

[229] *See* Etsy, *supra* note 29.

[230] *Id*.

[231] Timothy C. Irwin, The World Bank: Allocating and Valuing Risk in Privately Financed Infrastructure Projects 30 (2007).

[232] *See* Etsy, *supra* note 29; *see also* Dep't of Her Majesty's Treasury, PFI: Strengthening Long-Term Partnerships 76, 82-83 (Mar. 2006), http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/7/F/bud06_pfi_618.pdf.

[233] Irwin, *supra* note 231, at 33.

[234] The World Bank, Infrastructure Development: The Roles of the Public and Private Sectors 15 (Nov. 2005), http://siteresources.worldbank.org/INTINFNETWORK/Resources/Rolesupdt.pdf.

[235] J.R. Markusen, *Contracts, intellectual property rights, and multinational investment in developing countries*, 53 J. Int'l Econ. 189-204 (2001).

[236] Nasser Saidi, Forum on Corporate Governance in Banks and Financial Institutions in Line with International Standards and Practices, Corporate Governance in the Arab countries: Role of the Banking System in ensuring Transparency & Disclosure (Jan. 2005), http://iodlebanon.org/iodl/Files/13_1.Arab%20Banks.pdf; M. Haddad & Sam Hakim, *The cost of sovereign lending in the Middle East after September 11*, 1 J. Global Bus. Advancement 127-39 (2007).

temporary risk management needs (with respect to management of sovereign risk), as opposed to the older and more limited "financial" approach to risk management. Under the "financial" approach, sponsors simply increase the project's hurdle rate, and accept only those projects that generate sufficiently higher returns.[237] This may actually increase project risk, because it makes the sponsors and lenders appear as if they are profiting at the expense of the local community. The idea that high rates of return can actually increase and induce higher project risk is known as the "paradox of infrastructure investment."[238] Evaluators of project risk must also remember to include not only negative risks, but also positive risks, such as accepting the initiatives advanced by an intergovernmental organization that may be adverse to a nation's domestic industry. Likewise, high toll collection from roadway infrastructure projects can result in money which is unaccounted for in a project that individuals seek to claim. Finally, evaluators must consider scenarios where one nation is linked to other nations for commerce and trade, resulting in unfair competition and higher duty tariffs.

Other factors that must be considered when assessing and allocating project risk are: unexpected natural and operational catastrophes that may impact operations, climate change and greenhouse effects that may adversely impact operations and markets, human resource talent pools that may not be adequate in the region to support growth, and breaches in information technology that may impact the region's conduct of business and confidentiality/privacy requirements.[239] The identification and management of risk ensures better corporate governance structure, and good governance combined with social responsibility is key to delivering long-term value to project shareholders.[240]

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[237] BENJAMIN ETSY, THE ECONOMIC MOTIVATIONS FOR USING PROJECT FINANCE (2003), http://www.people.hbs.edu/besty/BCE%20PF%20Motivations%202-14-03.pdf; SCOTT HOFFMAN, THE LAW AND BUSINESS OF PROJECT FINANCE (Cambridge Univ. Press 2008).

[238] Andrew F. Haughwout, *The Paradox of Infrastructure Investment: Can a Productive Good Reduce Productivity?,* BROOKINGS REVIEW (2000), http://www.brookings.edu/articles/2000/summer_productivity.aspx.

[239] BHP BILLITON, 2010 ANN. REPORT 13 (2010), http://www.youblisher.com/p/156535-2010-BHP-Billiton-Annual-Report [hereinafter BILLITON ANNUAL REPORT]. For example, the EU has very strict privacy laws, and breaches/disclosures of private data can result in huge sanctions if not properly mitigated and reported, under the EU's Data Privacy Directive.

[240] *See generally id*. (providing insight into risk management and good corporate governance techniques utilized by one company to enhance their shareholder value and project returns).

An ideal project finance check-list would include the following items: (a) PF Goals List (define the goals and interests of the organization, goals of the project, and of your client in the project); (b) List of Advantages for using PF (such as non-recourse and limited-recourse debt, off balance sheet financing, leveraged debt, equity finance, political risk diversification, and credit opportunities), as opposed to other available financing methods for your project (such as the many risk allocation challenges, lender risk, higher interest rates, higher taxes and fees, lender monitoring, transaction costs, reporting requirements, and cost of insurance); (c) Project Finance Risk Management List, which includes identification, allocation, and mitigation of risks, and the development of a "risk matrix" that includes assessing developmental risk, financial risk, design risks, construction risks, start-up costs, operational risk, environmental risk, completion risk, and political risk, and with a section on the possible parties to whom you may allocate risk, and another section detailing risk mitigation from the pre-construction stage, to the local partners level, and for project phases.[241]

Infrastructure project checklists should always include an environmental feasibility study, and project managers should look into warranty risks, contractual risks and remedies, contingency reserves and management reserves, guarantees and completion agreements, indemnification and liquidated damages policies, and plan on how to internationalize the project if possible. Foreign Direct Investment PF checklists should include structural solutions to possible agency conflicts, with detailed plans on organizational structure, ownership structure, capital structure, contractual structure, governance structure, and board structure.[242] Lastly, a sound project checklist will include project valuation details with the source and value of projected revenues, a revenue management plan with details of needed long-term contracts, a list of subsidies and guaranteed cash flow streams with premiums added to the values of the project and to investments (if they are risky), an outline of the social cost and internal benefits of the project, an equity cash flow valuation, and a corporate responsibility plan detailing the project's benefits to the local community.[243]

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[241] *See generally* GRAHAM D. VINTER & GARETH PRICE, PROJECT FINANCE: A LEGAL GUIDE (3d ed. 2006).

[242] Louis T. Wells & Eric S. Gleason, *Is Foreign Infrastructure Investment Still Risky?* HARV. BUS. REV., Sept. 1995, at 44-45.

[243] *See generally* Theodore H. Moran, *Transnational Strategies of Protection and Defence by Multi-National Corporations: Spreading the Risk and Raising the Cost for Nationalization in Natural Resources,* 27 INT'L ORG. 273 (1973).

V. POSSIBLE SOLUTIONS AFTER THE STORM

1. *Internationalization and Partnership*

The MENA region needs to invest between $75-100 billion a year in infrastructure to sustain the growth rates achieved in recent years, and to boost its economic competitiveness.[244] Recent events in the region have demonstrated that people want better public services, and the World Bank Group, in cooperation with the Islamic Development Bank, is setting up a regional initiative that could raise up to $1 billion in FDI to close the infrastructure gap in the MENA region.[245] A new initiative aims to address this shortfall and brings together the World Bank Group with the Islamic Development Bank as potential anchor investors in a regional FDI investment, and as vehicles to support both conventional and Shariah-compliant investment in infrastructure.[246] The new initiative is known as the *"Arab Financing Facility for Infrastructure"* ("AFFI"), and it is a partnership of the World Bank, International Finance Corporation ("IFC"), and the Islamic Development Bank ("IsDB").[247] This initiative "is an integrated facility which aims at fostering infrastructure development and regional dialogue in the Arab countries."[248] "[The AFFI] focuses on regional infrastructure programs and developing [more FDI for] PPPs.[249] AFFI will support infrastructure projects designed to boost regional connectivity," including electricity, rail, road and maritime networks.[250] "A private sector window with IFC and IsDB as anchor investors will provide private investment to support PPP deals and the possibility of Shariah-compliant financing."[251] It is important to note

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[244] THE WORLD BANK, BANK ANNOUNCES FACILITY TO ADDRESS CRITICAL MENA INFRASTRUCTURE GAP (Oct. 9, 2010), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22730539~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[245] *Id.*

[246] THE WORLD BANK, WORLD BANK & PARTNERS JOIN EFFORTS TO TACKLE ARAB WORLD INFRASTRUCTURE CHALLENGE (Apr. 27, 2011), http://arabworld.worldbank.org/content/awi/en/home/featured/infrastructure.html [hereinafter WORLD BANK & PARTNERS].

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.* The World Bank, Arab World Initiative (ABI), is a partnership with the countries of the Arab world "designed to foster effective cooperation and collaboration in the interests of economic integration and knowledge sharing. The Food and Agriculture Organization of the United Nations Regional Office for the Near East's website offers access to the latest data, research, feature stories, briefs, multimedia presentations and project documentation about efforts in the Arab world to find opportunity and advantage in economic integration both across the

here that "World Bank ("IBRD") lending to the MENA region for infrastructure projects. . .has already exceeded $1 billion a year and is expected to increase further in the years ahead to help close the infrastructure gap."[252] "In addition, over the past four years, IFC has invested more than $1 billion in infrastructure projects in the region as well."[253] "IsDB investment in infrastructure projects in the region over the past 5 years has exceeded $1.3 billion a year, including about $300 million in PPP projects."[254]

In a recent ABI website feature story,[255] Mr. Robert B. Zoellick, World Bank Group President stated, "This regional initiative will unlock new flows of private sector investment to help countries like Egypt, Morocco, Jordan or Tunisia, eager to push ahead with critical infrastructure projects that will drive competitiveness and boost much needed job creation."[256] He added that the proposed regional initiative would include technical assistance to help governments tackle legal, policy, and institutional constraints to PPP projects, and develop cross-border infrastructure projects vital to regional integration and competitiveness.[257] Dr. Ahmad Mohamed Ali, President of the Islamic Development Bank, headquartered in Jeddah, stated, "The Islamic Development Bank is excited to be part of this initiative as we know there is a pipeline of viable infrastructure projects out there and unmet demand," and that, "The facility will have the flexibility to structure investments in accordance with Shariah principles, which will attract untapped, alternative sources of financing."[258] Both the IsDB and the IFC will work together to explore ways of providing project finance in both conventional and Shariah-compliant products, which would seek to attract private investors, especially from the wealthier and developed Gulf ("GCC") nations.[259] Mr. Lars Tunnel, Executive Vice President and CEO of IFC also elaborated that:

> Infrastructure is one of our most important priorities in the Middle East and North. . .Large investments in in-

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region and with the wider world." FOOD & AGRICULTURE ORG. OF THE UNITED STATES, THE ARAB WORLD INITIATIVE AND THE WORLD BANK GROUP (Oct. 18, 2011), http://neareast.fao.org/Pages/NewsDetails.aspx?ID=2402384&lang=EN&I=0&DId=0&CId=0&CMSId=5000912.

252 WORLD BANK & PARTNERS, *supra* note 246.

253 *Id.*

254 *Id.*

255 *Id.*

256 Press Release, The World Bank, Bank announces Facility to Address Critical MENA Infrastructure Gap (Oct. 9, 2010) (on file with the University of Richmond Law School Library).

257 *Id.*

258 *Id.*

259 *Id.*

> frastructure are needed across the region. This facility will demonstrate the viability of infrastructure investments for both the private sector and governments, and will help increase investments in this sector and improve services for a growing population.[260]

With the internationalization of infrastructure development project-financings, local government institutions and agencies become more reluctant to enact laws that permit expropriation of project assets. Prior to the recent period of turmoil, the region's dictatorial regimes frequently nationalized private property.[261] To mitigate such risks, local authorities should encourage developed areas like the U.S., Europe, Asia, and the GCC nations to invest in projects. This would trigger protections provided by the Bilateral Investment Treaty ("BIT"), the Multi-Lateral Investment Treaty ("MIT"), the ICSID Convention,[262] and other public and private laws.[263]

2. *Combining Conventional Project Finance and Islamic Finance*

The MENA region is comprised of primarily Islamic countries with large Muslim populations that do business with Asia, Eurasia, the United States, South America, Europe, and most of the Western secular world. These countries also do business with the GCC and

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260 *Id.*

261 Martin Amison, *Privatization and Project Finance in the Middle East*, 14 INT'L FIN. L. REV. 14 (1995).

262 *See* Andreas F. Lowenfeld, INT'L ECON. L., 536-40, 544-70 (2d ed. 2008) (discussing the ICSID address investment disputes, the limitations of the ICJ, as an arbiter in expropriation-related FDI disputes and the "Hull Formula", a formula available in most BIT's, and which provides prompt, adequate, and effective relief in cases of expropriation and investment-related disputes); *see, e.g., Lanco Int'l Inc. v. Argentine Republic*, 40 I.L.M. 457 (2001), ICSID case No. ARB/97/B; *Wena Hotels, Ltd. v. Arab Republic of Egypt,* 41 I.L.M. 881 (2002), ICSID case No. ARB/98/4 (discussing ICSID investment disputes and related protections); *Feldman v. Mexico*, 42 I.L.M. 625 (2003), ICSID case No. ARB (AF) 99/1 (discussing specific NAFTA related protections); *see also* United States v. Kay, 359 F.3d 738 (5th Cir. 2004) (discussing the Foreign Corrupt Practices Act (FCPA) protections that may be available in the U.S. Courts, to a government or corporation/lender/sponsor/owner that may be subject to the Act, when they are parties to an investment project and have payment-related disputes). *Accord* Harris Corp. v. Nat'l. Iranian Radio & T.V., 691 F.2d 1344 (11th Cir. 1982) (discussing disputes that involve Letters of Credit); American Bell Intl., Inc. v. Islamic Republic of Iran, 474 F. Supp. 420 (S.D.N.Y. 1979).

263 *See* DANIEL C. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 375, 444 (Aspen Publishers 2010). *See generally* Elettronica Sicula S.p.A. (U.S. v. It.), 1989 I.C.J. 15 (July 20) (regarding to expropriation and a discussion on BIT and MIT protection and concerns).

Southeast Asian nations, which represent the other predominantly Muslim societies.[264] Attracting Muslim investors and Shariah-compliant loans from those outside areas, and combining Islamic Finance ("IF") and Islamic Banking ("IB") with traditional PF methods, is quickly becoming one of the best ways to secure project financing in the MENA region .[265] It will also prove to be one of the most utilized strategies to PF in the region, as Muslim investors become more confident in PF to provide a solid return on their investments.[266] N.B. Many project ventures also fail in the region because the people they employ from outside do not have specific knowledge in Islamic Finance or do not pursue it as a possible means to financing their projects in the region.

Muslims now represent one quarter of the world's population, and Muslim countries control 10% of the global GDP.[267] They represent an increasingly important segment of the global economy, but nevertheless, few know much about Islamic finance, other than the basic and rudimentary requirement that interest is forbidden. What essentially is Islamic finance then? To start with, even the term "*Islamic*," when applied to banking or finance is considered inappropriate by some based on the belief that *Allah's* word applies to both Muslims and non-Muslims alike.[268] Some Muslims prefer terms such as *profit bank* and *equity investor* instead of *Islamic bank* or *Islamic investor*.[269]

Shariah law lays down the main prohibitions that distinguish Islamic Finance from traditional finance.[270] Interest returned on any investment is prohibited to prevent social exploitation and maximize social benefits.[271] This highlights the emphasis on social welfare over individual welfare in Islam in general, as directed by *Allah* and the Muslim holy book, the *Qur'an*. Uncertainty in contracts is also considered un-Islamic and is prohibited under Shariah law, which again, dictates Islamic Finance.[272] For example, the sale of a building, prior to

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[264] Masood Ahmed et al., *Trade Competitiveness and Growth MENA*, THE WORLD ECONOMIC FORUM'S ARAB WORLD COMPETITIVENESS REVIEW (2010), *available at* http://www.imf.org/external/np/vc/2010/103010.htm.
[265] *Id.*
[266] *See* Paul Wouters, Islamic Private Equity and Venture Capital Conference, Islamic Private Equity Opportunities in the Middle East (2009).
[267] *See generally The Future of the Global Muslim Population*, THE PEW FORUM ON RELIGION & PUB. LIFE (Jan. 27, 2011), http://pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx.
[268] VOGEL & HAYES, *supra* note 17, at 27.
[269] *Id*.
[270] *Id*. at 23.
[271] *Id.* at 2; MUHAMMAD AYUB, UNDERSTANDING ISLAMIC FINANCE 54-57 (2007).
[272] AYUB, *supra* note 271.

its constructing is forbidden, due to the uncertainty of its existence at the time of contract.[273] Shariah also prohibits any financing or commercial transactions related to the use of pork products or alcohol.[274] But more than the interpretive uncertainty that surrounds various IF topics, the real issues that divide Islamic countries is the degree to which the state and government institutions integrate Islamic principles into everyday life and business.[275] There are countries such as Pakistan, Iran and Sudan, where the entire economic and political system is tied to Islamic principles;[276] and others more moderate nations such as Bahrain, Kuwait and Turkey, which embrace Islamic banking via support of a dual banking system with conventional banks.[277] There are countries that neither discourage nor support IF and IB, such as Egypt, Singapore, and Indonesia;[278] and yet others that totally discourage IB and IF, such as Saudi Arabia and Oman, which believe that by declaring certain financial institutions as *Islamic*, they would be implicitly branding others as *un-Islamic,* and therefore prefer not to distinguish them.[279]

Profit is not the sole purpose of an IB or IF, as opposed to our profit-mined conventional banks.[280] The IB's prefer to share in the financial risks and reward with customers, rather than view the relationship as creditor and debtor.[281] A Shariah committee oversees the operation of IB institution, and they meet quarterly to discuss the IB's products and transactions.[282] The committees determine what is permissible, known as *halal,* and what is not, known as *haram.*[283] IBs derive their deposit base from two main sources, *"transaction deposits,"* which do not pay interest and do not have insurance on deposits but are treated as if they were shares in a firm where the IB pays a

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[273] *Id*.

[274] Shah M. Nizami, Note, *Islamic Finance: The United Kingdom's Drive to Become the Global Islamic Finance Hub and the United States' Irrational Indifference to Islamic Finance*, 34 SUFFOLK TRANSNAT'L L. REV. 219, 223 (2011).

[275] *See generally* AYUB, *supra* note 271, at 459 (discussing many Muslim countries reluctance to promote Islamic Finance).

[276] Mone Wai Nie & Ramin Maysami, *Empirical Evidence on Islamic Banking: Iran, Pakistan and Sudan*, 3 E. ASIAN ECON. ISSUES 387-401 (1997).

[277] INDUSTRIALIZATION IN THE GULF: A SOCIOECONOMIC REVOLUTION (Jean-François Sezneck & Mimi Kirk eds., Routeledge Pub. 2011).

[278] *Id.*

[279] *Id.*

[280] *See* AYUB, *supra* note 271, at 9.

[281] ISLAMIC BANKING AND FINANCE: NEW PERSPECTIVES AND PROFIT-SHARING AND RISK (Munawar Iqbal & David T. Llewellyn eds., Edward Eldgar Pub. 2002).

[282] *See* AYUB, *supra* note 271, at 387-88 (describing a Shariah committee's responsibilities in overseeing an IB institution).

[283] *Business & Economics,*THE ECONOMIST (2002).

return only based any profit earned by the investment of the deposits, and *"equity capital."*[284]

The main instruments used by IB institutions in IF are: (a) *Modaraba* (trust financing) where under a contract, an IB provides the capital to finance a project, and the entrepreneur provides the management skills to manage the project; (b) *Moshakara* (profit sharing) where the contract is similar to the Modaraba except that the partners are not confined to distinct roles, as either financier or manager, and the provision of capital and expertise are shared; and (c) *Preferred Stock,* where the offering of different dividend pay-offs is not permitted, but the utilization of different classes of common stock is.[285] Debt-like instruments in IF include: (a) *Morabaha* (cost-plus financing) the IB's profit is the difference between the price paid for the commodity and the price paid by its client; (b) *Ijara* (leasing), where the IB purchase the asset and then leases it for a rate that is periodically reviewed; (c) *Mukarada,* which is similar to a revenue bond issued by an IB to finance a specific project, but the investors have no voting rights and are only entitled to a proportional interests in profits and losses of the venture; (d) *Salam* (a forward purchase) where payment is made at the time of signing the contract; and (e) *Istisna'* (commissioned manufacture) which is a contract where one party agrees to buy goods from a second party, with payment occurring at a future date.[286] The strengths of IF are best demonstrated by the qualitative changes that are occurring in the industry. Rather than becoming entangled in ideological debates, practitioners have instead created new product lines that are now available for investors, the corporate world, and wealth managers. . .The MENA region now accounts for three-fourths of global Shariah-compliant assets. This dominant position is often obscured by the uneven developments in the region.[287]

The GCC, however, the most stable area of the MENA region, appears to be taking the lead on the operational side, and IF now accounts for 10% of the GCC's project finance.[288] A substantial number of deals are emerging to finance mega infrastructure projects with a

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[284] THE HANDBOOK OF ISLAMIC BANKING 106 (M. Kabir Hassan & Mervyn K. Lewis eds., 2007).

[285] SUDIN HARON & NURSOFIZA WAN AZMI, ISLAMIC FINANCE BANKING SYSTEM (2009).

[286] ABU UMAR FARUQ AHMAD, THEORY AND PRACTICE OF MODERN ISLAMIC FINANCE: THE CASE ANALYSIS FROM AUSTRALIA (2010).

[287] Shamshad Akhtar, Vice President, Middle East and N. Afr. World Bank, Symposium on Islamic Finance in Roma, Developments in the MENA Region: Islamic Finance Seminar (Nov. 11, 2009), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/0,,contentMDK:22391906~menuPK:2246554~pagePK:2865106~piPK:2865128~theSitePK:256299,00.html.

[288] *Id.*

combination of IF and traditional finance methods.[289] A prime example, Abu Dhabi's recent project-financing for a $1.6 Billion USD independent water and power plant in the city's Shuweihat District, included a significant Islamic tranche.[290] "This deal stands out as the longest tenor for any IF deal in the region at 20 years."[291]

IF has a varied presence in the MENA region. For example, IF initially had a strong presence in Egypt.[292] Today, IB only has about a seven percent market share in the region, which indicates the country's more cautious approach following the collapse of numerous Islamic money management firms in the 1980s.[293] In Tunisia, on the other hand, there is only one active Islamic bank, which opened in 2010.[294] Similarly, Morocco only recently authorized fully-fledged Islamic Banking. The government previously permitted limited Islamic Banking, and only allowed conventional banks to offer *Ijara* leasing products, *Murabaha* contracts to buy and re-sell underlying goods, and *Musharaka* co-ownership financing structures.[295] It also imposed higher taxes on IF products than on conventional banking products.[296]

Unlike other countries, which depend on a regulator-led approach to IF, MENA takes a distinctive, industry-driven approach.[297] One of the key concerns with this approach is the lack of regulatory infrastructure development.[298] For example, some MENA countries do not have a specific IF policy for regulators or laws mandating industry regulation in general.[299] Nor do they have laws mandating Shariah compliance within their country or any adopted Islamic banking regulations for neighbouring countries.[300] These Islamic banks are thus regulated and supervised within conventional, prudential regulatory frameworks similar to traditional banks.[301]

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[289] *Id.*
[290] *Id.; see also Shuweihat Independence Water and Power: Expanding Water in Abu Dhabi,* PARSONS BRINCKERHOFF CORP., http://www.pbworld.com/capabilities_projects/shuweihat_independent_water_and_power_project.aspx (last visited Oct. 24, 2011).
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] Mona Yahia, *Islamic Bank a first for Tunisia*, MAGHAREBIA (June 2, 2010), http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2010/06/02/feature-03.
[295] *See* Akhtar, *supra* note 287.
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*

Although IBs did report greater losses than conventional banks during the first half of 2009, due in large part to their greater exposure to the real estate and construction sectors, they tend to be less affected by financial crises than conventional banks due to their large capital, liquidity, and the risk-sharing aspect of Shariah-compliant contracts that allow banks to pass some losses on to investors.[302] While the unique features of IBs may provide additional robustness to risk and uncertainty, they still face many of the same credit risk exposures as traditional finance; mainly because, at the heart of their businesses, IBs operate on similar lines in terms of raising cash flow resources and recycling them.[303] IF's *"exclusion principles,"* such as the ban on transactions and activities that are interest-based, or that deal with speculative products, do keep IB's risks better contained.[304] This also helps discourage leveraging.[305]

The counter-argument holds that a comparatively small and concentrated market in Shariah-compliant products leads to the concentration of risk, and *"real asset"* transactions required by IBs are usually complex and costly, while involving greater bank risk exposure to the underlying tangible assets.[306] Unrecognized legal and transactions risks in IBs could also be higher if banks are involved in newer Shariah-compliant products and services. Almost all IBs face Shariah compliance risks that are subject to different interpretations, depending on the Islamic jurisprudence followed in each nation.[307] Therefore, in view of the recent uprisings in the region, and the aforementioned risks, it is important that arrival of democracy in the region also means a steady launch and sustained effort to strengthen regulatory and supervisory infrastructures.[308] The Islamic Financial Services Board ("IFSB") has already played a valuable role in this regard, by developing an Islamic financial regulatory and supervisory infrastructure, and it is now providing capacity building to its members.[309] The World Bank group also recognizes the IF industry's potential.[310] Besides support to the IFSB, the World Bank has been selectively supporting specific transactions in the region, with the objective of promoting innovative Shariah-compliant financing vehicles and the development of regulatory systems and corporate governance to under-

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302 *Id.*
303 *Id.*
304 *Id.*
305 *Id.*
306 *Id.*
307 *Id.*
308 *Id.*
309 *Id.*
310 *Id.*

pin those operations.[311] The Multilateral Investment Guarantee Agency ("MIGA"), which provides investment guarantees against political risk, was hired recently to provide political risk insurance for an IF structure funded Djibouti project.[312]

The World Bank has also set up an Islamic development working group to promote IF.[313] The group will work with regulators and banks to promote the introduction of Shariah-compliant financial services, and examine ways on how to exploit IF in the MENA region. This will promote access to social development, product development, infrastructure financing via PPP's, and regional infrastructure projects.[314] Asian companies and financial players are also becoming increasingly active in the Middle East to secure access to energy resources.[315] The MENA region in general has seen a surge in bidders from Malaysia, Singapore, Korea, Japan, India, China, and others, as evidenced by bids for the regional IWPP's, such as the UAE project mentioned above.[316] For many large-scale projects in the Middle East, funding procurement is now commonly done through a combination of conventional financing and Islamic financing. Sovereign Wealth Funds are diversifying as well, and combining IF with traditional finance on energy and infrastructure projects.[317] In fact, the use of combined finance methods is becoming so popular, that the Islamic Development Bank ("IDB") is raising capital for a second infrastructure fund, called the EMP Energy Fund, and it plans to invest 80 percent in energy and 20 percent in infrastructure projects throughout the GCC and MENA region, as well as South-East Asia.[318]

Over the past several years, even larger institutions such as the Dow Jones have created Islamic investment funds, due to the growing interest in IF.[319] One of the biggest challenges and opportunities in the Islamic world today is infrastructure development and attracting investment to PF in this area – the main theme of this

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311 *Id.*

312 *Id.*

313 *Id.*

314 *Id.*

315 Terry Newendorp, Chairman & CEO, Taylor-DeJongh, Presentation at the Taylor-DeJongh Merchant Banking Corporation's forum, The East-East Corridor: MENA-Asia Energy and Trade (June 10, 2008), *available at* http://siteresources.worldbank.org/INTOGMC/Resources/336099-1204142303639/4716098-1213972331102/newendorp-energy-trade.pdf.

316 *Id.*

317 *Id.*

318 *Id.*

319 Benjamin C. Etsy, Fuaad A. Qureshi & Mathew M. Millett, Note, *An Introduction to Islamic Finance*, HARV. BUS. REV., 1999, at 6.

note.[320] By one estimate, over the next ten years, the potential market for infrastructure projects in the MENA region is $45-60 Billion USD, and there are now well over 300 project-financed infrastructure projects pending in the MENA region - not including those in the oil, gas, and petroleum sectors.[321] Localized currency financing of these and the many projects that are emerge in the region daily will stress the local banking structure and soon outstrip its capabilities, given that most MENA region countries are poor and make few actual deposits.[322]

To capitalize on the possibility of prosperity, infrastructure building or other economic development opportunities in the region requires international investment capital. The key will be to create co-financing or *"combined financing"* structures, which integrate international capital with regional Islamic principles, linking traditional financing formats with Shariah-compliant IF methods and instruments.[323] Through innovations like co-funding and co-financing, Islamic countries of the MENA region will be able to invest in their much-needed local infrastructure projects, while simultaneously meeting the interests of Islamic investors and citizens in those developing Muslim communities.[324] To do so, however, Islamic bankers will have to resolve complex legal, financial, and religious issues that fall into play with IF.[325] The continued evolution of Shariah principles is not only necessary for the growth of IF institutions, but also for the successful development and growth of Islamic countries in the MENA region.[326]

3. CDM and Carbon Financing for Renewable Energy Projects

Unlocking the potential of clean energy sources and carbon assets in the MENA region is crucial in securing its growth and prosperity in the immediate future. It is also necessary to combat climate change and to ensure the health of the global environment in gen-

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320 *See id.* at 7.
321 Germana Canzi, *You Cannot Afford to Wait,* PROJECT FIN. MAG., July 1999, at 18, 20; *see also id.*
322 Canzi, *supra* note 321.
323 *See Islamic institutions plan private infrastructure fund,* 322 INT'L TRADE FIN. 1, 6 (1998).
324 Esty et al., *supra* note 319, at 7.
325 *Id.*
326 *Id. See generally* Lauren Page Ambinder, Nimali De Silva, & John Dewar, *The Mirage Becomes Reality: Privatization and Project Finance Developments in the Middle East Power Market,* 24 FORDHAM INT'L L. J. 1029 (2000) (discussing combining IF and traditional finance and what is essential in tapping the multitude of growth opportunities in the MENA region).

eral.[327] Solar, wind, and other clean energy exportation projects are vital, and are already under way in the region.[328] High revenues from these types of projects can be used to finance the major infrastructure and re-building needs of the region.[329] Currently, investment from the outside is bountiful for clean energy and exportation-related projects in the region. Infrastructure development, however, still requires investment, and that will be achieved when conflict moves out of the region. Increasingly, foreign owners, sponsors, and lenders seek to improve their social responsibility efforts in the MENA region. They make it a point to deliver better governance on projects, so as to add value for their shareholders.[330] Investors also seek access to the large revenues that can be achieved when exporting clean energy to areas like Europe, the U.S., and Asia – all of whom are eager to move away from foreign oil dependency and reduce their carbon imprints.[331]

Financing for such projects is done via an innovative process known as Carbon Financing ("CF"), which utilizes Clean Development Mechanism ("CDM"), (one of the "flexibility" mechanisms defined in the Kyoto Protocol).[332] Annex I parties are industrialized countries and non-Annex I parties are developing countries.[333] CDM is defined in Article 12 of the Protocol, and is intended to assist parties not included in Annex I to achieve sustainable development and contribute

[327] *See* RONALD BERGER, GREEN GROWTH, GREEN PROFIT: HOW GREEN TRANSFORMATION BOOSTS BUSINESS (2011) ("[T]he Middle East and North Africa (MENA) is the region to watch for remarkable solutions on a grand scale.").

[328] *Id*. at 202.

[329] Saleh S. Jallad, *The MENA Region and Global Energy Risk*, 1 ENERGY & GEOPOLITICAL RISK, Jan. 2010, at 7, http://www.mees.com/system/assets/000/000/610/original_jan2010.pdf.

[330] THE WORLD BANK, CORPORATE SOC. RESPONSIBILITY IN THE MENA REGION: YOUNG LEADERS SPEAK OUT (Nov. 21, 2007), http://siteresources.worldbank.org/CGCSRLP/Resources/VC-Summary-OECD.pdf.

[331] MARIO RAGWITZ & CHRISTOPH KOST, MENA REGIONAL CONCENTRATED SOLAR POWER SCALE-UP PROGRAM (Oct. 2009), *available at* http://www.medemip.eu/Calc/FM/MED-EMIP/OtherDownloads/Docs_related_to_renewable_energies/AfDB_Workshop_Oct_2009/Policy_and_regulation_%20aspects_of%20CSP_scale-up_in_MENA.pdf.

[332] *See* Ben Thornley et al., *Impact Investing: A Framework for Policy Design and Analysis, in* PACIFIC COMMUNITY VENTURES CASE STUDY 5 (2011), *available at* http://www.pacificcommunityventures.org/insight/impactinvesting/report/05-Clean_Development_Mechanism.pdf; *see also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOSSARY J-P (2007), http://www.ipcc.ch/publications_and_data/ar4/wg3/en/annex1sglossary-j-p.html (providing basic definitions and historical development of the Kyoto Protocol and "Carbon Financing" utilization of CDM).

[333] GLOBAL CARBON MECHANISMS: EMERGING LESSONS AND IMPLICATIONS, CARBON TRUST 12 (Oct. 2009), http://www.carbontrust.co.uk/Publications/pages/publication detail.aspx?id=CTC748.

to the ultimate objective of the United Nations Framework Convention on Climate Change ("UNFCCC"): to prevent dangerous climate change.[334] It also assists parties included in Annex I to achieve compliance with their quantified emission limitation and reduction commitments (greenhouse gas and emission caps).[335] How CF works is that Annex I countries are permitted to meet part of their caps by using "Certified Emission Reductions" from CDM emission reduction projects in developing countries (such as all of the MENA region nations discussed in this note).[336] This is subject to oversight, so as to ensure that emission reductions are real and "additional."[337] The CDM and Carbon Financing process is supervised by the CDM Executive Board ("CDM EB") and is under the guidance of the Conference of the Parties ("COP/MOP") of the UNFCCC.[338]

CDM allows industrialized countries to direct emission-reduction investment into the cheapest option.[339] Countries began registering CDM projects in 2001 and the Kyoto commitment period will end in 2012.[340] During that span, the CDM is expected to reduce emissions by about 1.5 billion tons of carbon dioxide.[341]

A new modality of CDM also addresses several weaknesses. Named as the "Programme of Activities," it moves away from accrediting single projects, and instead bundles all projects of one type of activity and accredits them all together.[342] Emissions reductions by Annex I countries are allowed to use flexible mechanisms for financing emission reduction projects, renewable energy projects, reforestation projects, and fossil fuel projects abroad, via the Kyoto Protocol (i.e. – in the MENA region, where there are no emissions targets for non-Annex

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[334] *Id*. at 7.

[335] *Id*. at 18, 81.

[336] *Id.*

[337] *Id*. at 14.

[338] *See, e.g.,* UNITED NATIONS, STATUS OF RATIFICATION OF THE KYOTO PROTOCOL, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (referencing article 25, which entered into force February 16, 2005, with 84 signatories and 192 parties) (last visited Nov. 1, 2011).

[339] Michael Grubb, *The Economics of the Kyoto Protocol*, 4 WORLD ECON. 143, 159 (2003), *available at* http://www.econ.cam.ac.uk/rstaff/grubb/publications/J36.pdf.

[340] WORLD BANK, WORLD DEV. REPORT 2010, GENERATING THE FUNDING NEEDED FOR MITIGATION AND ADAPTATION 262 (2010), http://siteresources.worldbank.org/INTWDR2010/Resources/5287678-1226014527953/Chapter-6.pdf.

[341] *Id*.

[342] FRANÇOIS BEAURAIN & GUIDO SCHMIDT-TRAUB, DEVELOPING CDM PROGRAMMES OF ACTIVITIES 10 (2010).

I countries).[343] Flexible finance mechanisms include CDM, Joint Implementation, and International Emissions Trading.[344]

Carbon financing funds mainly consist of carbon credit purchasing funds and there are only a few PF funds in this area (again room for improvement and opportunity).[345] Fortunately, new funds are on the rise and project finance in this area of investment will grow rapidly as governments of Annex I countries, as well as their corporations, banks, and investment funds, all vie for emission reduction credits in the next ten years.[346] These organizations will also compete for priority positioning to these renewable energy projects in the vastly untapped MENA region.[347]

VI. CONCLUSION

The Arab Spring's "winds of change" will generate increased opportunities for the utilisation of Project Finance in infrastructure development projects and renewable energy projects in the MENA region. It should be cantered on the exportation of various forms of clean energy, fuels, and commodities to more developed partner nations. The international community has a lot of work to do now in this region, and should not wait for things to settle down before investigating and proposing new projects. We should be more involved in existing projects as per our social responsibilities. Any lawyer, analyst, sponsor, lender or project manager involved, must always keep a level head. Many agree that *this* is the time for us to deliver on our promises of prosperity and freedom; especially with the fresh advent of democracy throughout the MENA region. By making funds, knowledge, institutions and other resources more readily available, we will provide a much-needed boost to the region and to its markets and projects, and also help prevent other non-productive ideologies from taking a foothold in their place.

This form of new and positive activity will assist in greater prosperity for the region's inhabitants, and thus trigger the facilitation of increased trade between the region and its partners, spurring global economic recovery. The WTO must take the lead on the trade facilitation end, and assess the legal infrastructure that is in place as the region rebuilds. The WTO should work closely with its members to address any competition and antitrust concerns as well, as part of its

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[343] Nicholaus Wohlgemuth, Regional Manager MENA & Pakistan, Presentation to MENA Carbon Forum: Carbon Financing for RE Projects (May 7, 2009).
[344] *Id.*
[345] *Id.*
[346] *Id.*
[347] *See id.* (discussing CDMs, Carbon Financing, and the vast opportunities available in the MENA region for renewable energy exportation projects).

overall re-vamping processes. The international community should be looking at the future of Project Finance and Infrastructure Development in this region optimistically.

Project financiers should be prudent during the region's development process and not fear risk to achieve our desired benefits. For those who have an interest in the worlds of Project Finance, Global Trade, and Infrastructure Development, the joys of managing the unique challenges, risks, and benefits mentioned above are just now beginning to unfold across a prospering and revitalized region.