Trading spaces: Lessons from NAFTA for a robust Investment Dispute Settlement

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Mechanism under Great Arab Free Trade Agreement (GAFTA)

By Mohamed R. Hassanien*

Arab leaders- in their last Summit held in Riyadh¹- have responded to many voices which called on Arabs to embark on their economic integration. In this summit, Arab leaders gathered to make some headway in the problems besieging the Middle East. In respect to Economic integration, King Abdullah² lauded the Egyptian/Kuwaiti initiative to devote -for the first time- a whole Arab summit to discuss thoroughly the economic integration within Arab countries³. Hence the Great Arab Free Trade Agreement (GAFTA) -the centerpiece of economic integration- has now bolted to the forefront of the Arab countries policy.

In the Middle East – a region notorious for its being unstable politically and economically- Arab countries have realized that they can not survive without having a regional bloc. Incomplete development, limited employment opportunities, infrequent interaction with potential trading partners are the main features of this region⁴. Hence it remains the least integrated in the world in terms of capital and trade flows⁵. In international trade term, The Middle East enjoys a historical legacy as the center of global trade, with the countries in the region once controlling the commerce in the Mediterranean Sea⁶, however currently; the region is lagging behind in terms of economic growth and development⁷. In fact, they represent the lowest share in international trade nowadays⁸.

Arab countries are in a great need to cooperate, build up trust and alliances with each others to create some economic balance in the global era. Globalization and Economic

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² The 19th Arab Summit, which concluded its deliberations in Riyadh under the chairmanship of the Custodian of the Two Holy Mosques King Abdullah bin Abdul-Azziz, The King of Saudi Arabia.
³ Decree No. 365 called on Arab leaders to have an Arab summit to discuss the economic integration among Arab countries, Arabic version is available at http://www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=3436&level_id=202 (last visited April 25, 2007).
⁴ Kevin Fandl, Terrorism, Development & Trade: Winning The War On Terror Without The War, 19 AM. U. INT’L L. REV. AT 589
⁵ Ahmed Galal and Bernard Hoekman, Arab Economic integration, BROOKINGS INSTITUTION PRESS AT 20
⁷ Hoekman and Zarrouk, Catching up with the competition: trade opportunities and challenges for Arab Countries (THE UNIVERSITY OF MICHIGAN PRESS ED, 2000), at preface.
⁸ Johnson, supra note 6, at 459
integration among countries, involving the formation of free trade areas, custom unions, common markets or full economic unions, has become widely successful in most of developed or Western Countries. European Union (EU) as well as other positive forms of economic integration like NAFTA has taken place in the global world, but not yet in the Arab world. The leaders – in the region – have no choice except to effectively move forward with their economic integration, Arab world is on a crossroad, either to get together and work on their bloc or they remain bystanders, watching others move by leaps and bounds while they are left behind. The economic welfare of one country is tied closely to that of another; and so international trade turns to be an inevitable necessity. Nonetheless challenges are immense and multilayered in the Middle East, with a general lack of coordination, individual Arab countries would face the worse in the future if they do not put their economic integration as a first priority.

While most of the writings about Middle East focus on the politico-economic analysis of Arab economic performance, a very slim literature has been devoted to the legal aspect of this topic. In this note I would focus on the legal framework – in which – this economic integration would survive and last longer. The Middle East is a lucrative market where a stable economic environment is a worthwhile goal, but the economic integration commitments will go meaningless without an effective and a robust dispute settlement mechanism (DSM). Any international agreement which lacks specific means to resolve possible disputes is worthless. Political institution and dispute settlement mechanism are necessary for any economic integration agreement between nations to exist. A DSM which can effectively resolve disputes and secure compliance with the legal obligations will go far in advancing any FTA substantive goals of economic integration. A weak system whether on the dispute-resolving or the compliance phase would more likely undermine the legitimacy of FTA and inhibit further progress.

Accordingly the article employs a comparative approach drawing on the experiences of NAFTA and building up on the existing provisions in GAFTA to examine the current dispute settlement mechanism in GAFTA. Part one presents a brief overview of the legal culture in the Arab world, GAFTA and its current dispute settlement provision in GAFTA. Part two will discuss NAFTA, its history and legitimacy of Chapter 11 in international law. Part three

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9 Available at http://www.smi.uib.no/pao/zineldin.html
14 Cherie Taylor, Dispute resolution as catalyst for Economic integration and an agent for deepening integration, 17 NW. J. INT’L L. & BUS. AT 850
15 David S. Huntington, Settling disputes under the North American Free Trade Agreement, 34 HARV. INT’L L.J. AT 419
proposes an effective and robust dispute settlement mechanism in GAFTA; this proposal would draw on the principles of NAFTA and the legal culture in the Middle East.

**Part 1: A Regional Free Trade Agreement emerges in the Arab world**

**a- Legal culture in the Arab world**

A region which enjoys rich natural resources and wealth of human capital, the Middle East yet is still struggling with development issues. Ethnically, the Middle East hosts many different peoples, including Arabs, Jews, Turks and Persians. If one traces back the human history, one can easily realize that the region was far ahead of Western Europe for all but five hundred of the five thousand or so years. Unsurprisingly, Middle Easterners have a profound sense of their own glorious past.

Culture in the Middle East is enmeshed with religion, Islam is not only an integral part of Middle Eastern heritage, it influences to varying degrees the general laws and policies in these countries. Islam is not limited to faith; it rather prescribes the lifestyle of any Middle Eastern. There is a consensus among Islamic thinkers to define religion as a multidimensional system of beliefs that embraces the spiritual and the material, the divine and the earthly, the heavenly soul and mortal worldly deeds. Islam remains at the rhetorical and actual discussions of law in contemporary Arab states. Many Arab constitutions clearly indorse Islam as the primary source for legislation. However, due to the non development of Islamic Shariaa and the penetration of Imperial western powers into the region starting the eighteenth century; Islam has been limited to Family Law and Inheritance in most of the Arab countries. Accordingly, Arab countries except Saudi Arabia maintain two bodies of law; secular law which governs the commercial and civil transactions and Islamic law regulating Family and inheritance issues. Nonetheless, free trade idea is fully compatible with Islamic notions and principles; isolation is not a tenet of Islam- the Quran itself, which is the constitution of all Muslims, teaches its followers to be...

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17 Id. at 596.
18 Id. at 577
19 Id. at 577
20 Amir Khoury, *Ancient and Islamic sources of intellectual property protection in the middle east: a focus on trademarks*, 43 IDEA 151
21 The Arab human development report, ARAD FUND FOR ECONOMIC AND SOCIAL DEVELOPMENT, 2003 AT 118
23 Carroll, supra note 21, at 577
helpful to one another according to piety and goodness. One can argue that, extending economic relations with other countries (whether Muslim or non-Muslim Countries) especially where it contributes to the improvement of the standard of living of Muslims is definitively within such Islamic principles and notions.

Arab countries -in their legal systems- present different legal families. Some countries patterns their rules after the Napoleonic code, some from Ottoman Empire, and others from the British common law; but all have the same denominator -Islam-which dominated the development and practice of law in the Arab world from the seventh century until present. Influences them all, Islam conceives cooperation as one of its basic values.

The legal environment in the Middle East is notorious for being unstable and not a favorite place for investors, litigation for instance in Egypt -a major Arab country- is lengthy and unpredictable, while in the Gulf countries, they enjoy having strong and competent judges but not very much sophisticated to the extent that they can handle the challenge to face new problems and areas of law which have not been explored yet in the region. Most multinational corporations prefer to stay away from litigation and focus primarily on settlements or arbitration. Accordingly, Arab world now has many arbitral institutions, among them the Cairo Regional Center for International Commercial Arbitration (CRCIA) which was intended to foster the arbitration in the region, and Dubai International Arbitration Center (DIAC).

Arbitration is recognized under Islamic jurisprudence in the fields of commerce and investment. It hinges on freedom of parties concerned in selecting someone to judge for them and an atmosphere of conciliation against litigation seeking the predominance of stability in the international community in general and the Islamic community in particular whereby the latter gives the utmost regard to giving each party his right and maintaining the spirit of justice, fraternity and equality among members of the same society.

Ironically although arbitration is deeply rooted in Islamic culture, only recently have Islamic countries begun fully to embrace arbitration's classic international manifestation. They

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26 Zineldin, supra note 9, available at http://www.hf.uib.no/smi/pao/zineldin.html
27 Mednicoff, supra note 22 at 4
28 Mednicoff, supra note 22, at 3
29 Mohamed Hassanien and Amos Jones, Egypt’s Competitive Liberalization in services: Bilateral, Regional and Multilateral, 16 CURRENTS INT’L TRADE L.J. AT 74
30 Id. at 67
31 Available at http://www.crcica.org.eg/pub_journal.html
32 Brower and Sharpe, supra note 31, at 654
33 Available at http://www.jurisint.org/en/ctr/127.html
35 Id. at 643
36 Id. at 643
have learned why states from disparate legal and cultural traditions increasingly perceive international arbitration as the only effective mechanism for resolving international investment and other commercial disputes. A prominent Arab commentator has argued that "the evolution of the concept of Moslem arbitration and the adaptation thereof to the spirit of the century is not derogation from, or a betrayal of Moslem law, but is a return to its sources."\(^37\)

Roughly two-thirds of the members of the League of Arab States (15 of 23) are now party to the UN Convention on the Enforcement and Recognition of the Foreign Arbitral Award (hereinafter as NY Convention)\(^38\). Qatar's recent accession brings the total number of states parties to 133, making the New York Convention one of the most widely accepted and important conventions governing international commerce after the WTO (150 members). NY convention now includes 142 parties.\(^39\)

Investor-State awards are enforceable in national courts under the terms of NY convention. National courts have consistently held that non ICSID BIT arbitrations are reviewable as commercial for the purpose of article (13) of the NY convention and the UNICTRAL Model law.\(^40\) In addition the recourse to the national court is crucial here because there is no chance for appeal.\(^41\) Acceptance of the New York Convention is critical to the success of international arbitration. The Convention imposes two principal obligations on states parties: (1) to ensure that national courts, where appropriate, refer parties to arbitration and stay related judicial proceedings; and (2) to recognize and enforce foreign arbitral awards essentially as if they were domestic judgments. Historically, these obligations were absent from the arbitration laws of many Islamic states. Indeed, some Islamic states had no arbitration laws at all. Qatar and Oman, for example, had no legislation that enabled parties to compel arbitration or stay court actions pending arbitration, and arbitrating parties were forced to rely on general principles of Islamic law. International arbitration simply cannot function, however, absent national laws that enable parties, through national courts, to enforce agreements to arbitrate by compelling arbitration and staying duplicative judicial proceedings. In many Islamic states, laws were either nonexistent or deficient with respect to enforcement of international arbitral awards. To that end, Djibouti's arbitration law, as expressed in its preambular Statement of Principles, provides a progressive example of national legislation that explicitly strives for "a supporting judicial

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\(^{37}\) Id. at 644
\(^{38}\) Available at http://www.wipo.int/amc/en/arbitration/ny-convention/parties.html
\(^{39}\) Available at http://www.wipo.int/amc/en/arbitration/ny-convention/parties.html
\(^{41}\) Robert Paterson, A new Pandora's box? Private remedies for foreign investors under the North American Free Trade Agreement, 8 Willamette J. INT'l L. & DISPUTE RES. AT 103
framework” and that "calls for local courts to be prepared to lend their assistance in case of need." 42

Under the New York Convention, in order for a foreign arbitral award to be enforced by a national court, the award must be "binding," a requirement that may be satisfied prima facie through simple documentation— that is, by the petitioner providing either the original or certified copies of both the award and the parties' arbitration agreement. By contrast, the laws of many Islamic states have required a petitioner to prove the finality of a foreign arbitral award, typically through an enforcement order from a court of the country in which the award was made. 40 This "double exequatur" requirement needlessly consumed time and money, thus eviscerating one of the principal advantages of international arbitration over litigation: the comparative ease of enforcement of foreign arbitral awards. 43

The New York Convention strictly limits the grounds upon which national courts may refuse to recognize or enforce foreign arbitral awards. 44 Prior to their accession to the New York Convention, states such as Oman, Qatar, and Saudi Arabia required petitioners seeking enforcement of their foreign arbitral awards to survive domestic court review of the entire merits of the dispute; the foreign award was simply one element of proof of the parties' rights and obligations. 45 Even when parties were not forced to re-litigate the merits of their disputes, national courts often subjected foreign arbitral awards to the same invasive scrutiny with which they examined domestic awards. Indeed, the laws of many Islamic states failed even to distinguish between international and domestic arbitration. 46

In addition, national courts of Islamic states often have rejected foreign awards on domestic public policy grounds, including precepts of Islamic law. Although the New York Convention does authorize state courts to refuse to enforce awards that they find to be "contrary to the public policy of that country," the better view is that it is international, and not domestic, public policy that is at issue. Thus, Algeria, Djibouti, Lebanon, and Tunisia are progressive in their explicit incorporation of an exclusively international public policy exception in their international arbitration laws. Another favorable development accompanying some Islamic states' implementation of the New York Convention is their designation of a single court to hear annulment petitions. Although the New York Convention itself is not concerned with annulment proceedings, which are largely the preserve of national legislation, the process of acceding to the New York Convention appears to have focused attention in some states on rationalizing related matters. Thus, Egypt, for instance, now provides that, unless the parties agree otherwise, only the Cairo Court of Appeal has jurisdiction to hear petitions to set aside international arbitral awards.

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42 Brower and Sharpe, supra note 31, at 457
43 Brower and Sharpe, supra note 31, at 649
45 Brower and Sharpe, supra note 31, at 652
46 Id. at 656
Although this procedure cannot ensure that the Court will not impermissibly interfere with foreign arbitral awards, experience has shown that assigning all major cases involving international arbitration to a single court can foster the development of greater expertise and help ensure a reciprocally supportive relationship between national courts and international arbitral tribunals.47

Finally, accession to the New York Convention ameliorates reciprocity problems. The Convention provides that a state, when becoming a party to the Convention, can limit its application to awards made in other states parties. Given widespread acceptance of the New York Convention, however, the reciprocity reservation is losing its relevance. By contrast, many Islamic states have treated international arbitral awards like judgments of foreign courts. As such, those awards often were subject to the reciprocity requirements applicable to such judgments. Thus, for example, a Saudi court denied enforcement of an arbitral award rendered in the United Kingdom because UK courts do not enforce Saudi judicial decisions. Accession to the New York Convention largely has obviated this concern, thus permitting enforcement of foreign arbitral awards in Saudi Arabia, as elsewhere.48 With this, we can conclude that the full circle of protection is full.

In international arbitration, Islamic states no longer are reluctant players. Mohammed Bedjaoui49, then a judge of the International Court of Justice (and later its president), noted in 1992 that “ICC Court of Arbitration plays a significantly prominent role in the settlement of inter-Arab arbitral disputes”. Egypt -the most frequent Arab parties to ICC cases- was a claimant in almost as many cases as it was as respondents, and that in a quarter of such cases the Egyptian party faced an Arab opponent.50 He concluded: “Arab partners have voluntarily chosen the international arbitration to resolve their inter disputes. International arbitration shifted from being a mere provision dictated by the stronger party (usually a west company) when dealing with any of the Arab government into one of the active mechanisms used by the Arabs themselves. Nonetheless Arabs turned to be rather an active proponent of this system.”51 Examples abound in which Islamic parties have arbitrated international disputes, including disputes at the heart of national sovereignty.52

To sum up, Islam condones both Free trade and international arbitration, with this designing a dispute settlement mechanism in GAFTA would be compatible with the tenets of

47 Id. at 653
48 Id. at 647
50 BROWER AND SHARPE, supra note 31, at 645
51 Id. at 645
52 Id. at 645
Islam. Hence the above arguments defeat the notion that Islam—the dominant religion in the region—is itself an inhibitor to economic performance.53

b- The Great Arab Free Trade Agreement (GAFTA)

In the previous part, we have discussed the legal culture in Middle East and how it tolerates both concepts of arbitration and free trade. We turn now to GAFTA, it is an agreement that comprises 18 members of the 22 Arab countries.54 It is the most comprehensive agreement reached by the Arab countries which was signed in 1997 and entered into force in January 1998.55

There are basically four legal documents which constitute the framework of the GAFTA, they are: (i) The Agreement of facilitating and developing Intra-Arab Trade; (ii) The Executive Program for the Agreement of facilitating and developing Intra-Arab Trade; (iii) Implementation committees; and (iv) The detailed rules of origin for Arab countries.56

The Arab Economic Integration

Six decades have witnessed more failures than accomplishments in Arab integration.57 Little thoughts or none has been given to the role of integration in enhancing the productive efficiency and competitiveness at the pan-Arab and global level.58 Arab Economic integration is the stated goal of 325 Million Arabs, a subject in the agenda of Arab politicians and intellectuals for over fifty years and a sign for how far the achievement of the Arab nationalism went. Paradoxically the Arabs have voiced the need for their regional integration over half a century just at the same time when Europe started thinking about its integration.59 However the outcome falls short than what have been expected, the regional bloc goes unenforced. The Arab world has both the means and intention in taking on a new role in the globalization, this implies a drastic change in the relationships among them at the beginning and then between them and other nations.60

The Great Arab Free Trade Agreement—an initiative by the Arab League—derives its importance from many perspectives. Arab countries share the same religion, ethnicity, language

54 Available at http://www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=350&level_id=110
55 The Agreement to Facilitate and Develop the Trade Among Arab Countries, 1997 available at http://www.bilaterals.org/article.php3?id_article=2309
56 Marcus Noland and Howard Pack, The Great Arab Free Trade Area, INTERNATIONAL ECONOMIC DEVELOPMENT, NBE-ECONOMIC BULLETIN-VOL.58 NO.1, AT 66
57 Hoekman & Galal, supra note 5, at 13
58 Arab Human Development Report, supra note 26, at 27
59 Available at http://en.wikipedia.org/wiki/Arab_world
60 Galal and Hoekman, supra note 5, at 1
61 Galal and Hoekman, supra note 5, at 13
and culture. These four factors are major conditions for an economic integration to do exist, yet there are some differences to come as well.

So far Arab Economic integration has gone through three waves, the first wave called the post independence period after World War II, it features the attempt to create the Arab Common market in 1964. At this distinct time, Arab leaders were focusing more on the political and military cooperation while economic integration received little attention. Arab leaders thought business and trade will result from rather than result in political action. This was followed by the agreement for the facilitation and promotion of the intra Arab trade. The impact of these agreements has been extremely limited, the 1981 was simply a declaration of intent rather than binding terms, most of the Arab economies were heavily dependent on the public sector and characterized by high protectionism. On a political side, Arab leaders did not have the incentive to accelerate the integration process. Consequently, Arab leaders diverted their attention to pursue smaller-scale regional blocs which is the feature of the second wave.

Successful regional trading arrangements around the globe motivated Arab countries in accelerating their movement towards their regional bloc with an idea that a comprehensive regional bloc will not be feasible. Arab leaders opted to sub-regional agreements like GCC Agreement between the Gulf Countries. The Agadir agreement which included Morocco, Tunisia, Egypt and Jordan and the Maghreb Union between the North African countries. Most of the literature considers the second wave which demonstrates these sub regional movements to be fragmenting the Arab Free Trade Agreement.

The last wave signifies a more serious approach from Arab countries in furthering their Economic integration. The approval of the executive program for the establishment of the Arab Free trade area came into effect on January 1, 1998. Basically the agreement provides for the elimination of imports and other barriers to trade in goods of Arabic origin over a ten year period. Recent events have been noticed, the GAFTA has transformed from a traditional FTA

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63 Hasan Al-Atrash and Tarik Youssef, Intra-Arab trade: is it too little?, IMF WORKING 00/10. WASHINGTON, INTERNATIONAL MONETARY FUND AT 1, 1999
64 Available at http://business.enotes.com/biz-encyclopedia/arab-common-market
65 Galal and Hoekman, supra note 5, at 13
66 Available at http://www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=350&level_id=110
67 Amr Abbas, Arab Free Trade Agreement,
68 Zineldin, supra note 9, available at http://www.hf.uib.no/smi/pao/zineldin.html
69 Galal and Hoekman, supra note 5, at 18
70 Available at http://www.bilaterals.org/article.php3?id_article=2513
71 Available at http://www.bilaterals.org/article.php3?id_article=7566
72 HÖKMAN AND ZARROUR, supra note 7, at 286
74 Marcus Noland and Howard Pack, supra note 60, at 69
to a WTO plus agreement. The Agreement is covering now services that have impact on the flow of investment. King Abdullah applauded the current negotiations on the liberalization of services in GAFTA. The executive program for the first time involves commitments by the Arab countries, however shortcomings is still obvious as the program allows carving out the agriculture which is 20% of Arab intra-trade. To sum up, Arabs decided to revisit the sustainability of their trading bloc.

**Current Intra-Arab Trade**

Arab countries are primarily agricultural countries, energy producers and others have an emerging industrial base. Intra-Arab trade is relatively low for various reasons, most importantly the trade policy of the countries, many countries employ a variety of measures, including restrictive licensing, bans, state trading/monopolies, restrictive foreign exchange allocation, and multiple exchange rates, to discourage imports. The Intra-Arab accounted for 45 Bn. US $ representing 9% of the total Arab foreign trade, it is clear that the value of the Intra-Arab trade is modest and does not reflect the volume and potentials of the Arab economies. Intra-Arab capital flows during the period from 1950 to 2000 were modest, host of reasons can attribute to this fact, non existence of capital market or if there is, it is underdeveloped, protectionist laws and regulations pushed Arab investors to go outwards and invest in the international market. Excess capital is deposited in foreign banks and amount to 600 Billions.

Regional liberalization would have a positive impact on the multilateral trading system, it is seen to be complementing rather than substituting for the multilateral framework. The benefit of the regional bloc is higher level of investment which promotes a deepening of capital markets and foster foreign direct investment, one way to increase the supply of equity capital and deepen markets is to accelerate the pace of integrating national markets into a larger regional market. Dispute settlement mechanism would create a favorable legal environment and contribute to this.

Regional trade among Arab countries finds more political and institutional support than any other time in the 20th century. Intra regional trade in any place in the world acquired a substantial portion in the trade among them; intra-Arab trade remains a constant portion of the total Arab trade. if you look at the Arab countries, they are sub divided into four groups.

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75 Mona Garaf, *Egyptian services sector at the bilateral, regional and multilateral levels*, presentation before the American Chamber of Commerce, July 18, 2006.
78 Al-Atrash and Youssef, supra note 65, at 4
79 Marcus Noland and Howard Pack, supra note 60, at 67
80 Galal and Hoekman, supra note 5, at 17
81 Jeffrey J, Schott, *Free trade agreements US priorities and strategies*, INSTITUTE FOR INTERNATIONAL ECONOMICS, AT 302, 2004
82 Al-Atrash and Yousef, supra note 65, at 5
Surprisingly the proportion of the trade within the four Arab sub groups is significantly higher than overall intra-Arab trade; arguably the trade impediments are lower within the sub groups than for the region as a whole.83

Nevertheless Investment across Arab countries is feasible; most of the investment flow is expected to come from the wealthy Arabs in the Gulf like Kuwaitis, Emiratis, Saudis and Qatars. While they indeed have some investment in some other Arab countries, yet it does not live up to the expectation of many analysts. Private participation is crucial for any successful regional integration, however in most Arab countries; the business environment has been conceived as less hospitable than elsewhere84. This was correct in the last decade, things have been changed and privatization is the prevailing policy theme in most Arab countries nowadays. With the increasing role of private participation, governments in the region have to bring them into the table when negotiating any free trade agreement like NAFTA and EU85. One can argue that the increasing role of private participation and the current trend of opening the trade will work as incentives to Economic integration. Nonetheless the current reform in this region created new role for both the government and the private sector, this may have many positive implications on the economic integration.86

Recent developments and future challenges

Arab countries remained a long time hesitant to extend GAFTA to cover investment and trade in services as well87. Trade in services for a long time has been a major issue and subject to great hesitation from Arab countries to incorporate in their agreement. The services sector acquires an escalating importance on both international and Arab level, moreover the accession to the WTO demonstrated the importance of extending this agreement to the services as well. Hence Arab countries have started liberalizing intra-Arab trade in services in 2001, the draft includes two parts, the first one is the general provisions while the second one is the additional commitments that provide further commitments to the other Arab countries.88 This is a step forward in the way towards a comprehensive GAFTA which would come closer to NAFTA day after day. Although it seems that GAFTA is far out from NAFTA in the scope of coverage, nevertheless put in mind how sophisticated the NAFTA members are in comparison to GAFTA members. I would remain optimistic towards the future of the GAFTA. There are a lot of challenges awaiting the negotiators of GAFTA, yet apart from the traditional challenges, I believe -negotiating the transformation of the dispute settlement mechanism under this agreement from a toothless process to more sound process in terms of institutional structure, remedies and enforcement- would be one of the turning points in mounting the economic

83 Id. at 6
84 Galal and Hoekman, supra note 5, at 26
85 Id. at 26
86 Id. at 33
87 Garaf, supra note 76, July 18, 2006.
88 Marcus Noland and Howard Pack, supra note 60, at 70
integration across Arab countries. Having a strong dispute settlement mechanism would boost the investment and trade within the Arab countries.

Host of challenges face the Arab economic integration\textsuperscript{89}, these challenges are more economically oriented which is beyond the scope of this research, yet the purpose of this paper is to focus on the legal challenges that hold back a free trade agreement between the Arab countries.

c. The Dispute settlement mechanism under GAFTA

In any free trade agreement, economic underpinnings enjoy more attention than parallel legal developments even though the process of defining the free trade is -in large part- a legal process\textsuperscript{90}. Since the signing of GAFTA in 1997, a question has remained unanswered and ignored by member states: will GAFTA take up the challenge and create a viable legal regime to support its privatization policy. As any international agreement, GAFTA starts with the preamble which sets out the aims and objectives of the Arab countries in signing this agreement. The introductory section lays out the definitions of some of the important terms in the agreement. One criticism may be the definitions are too short like the least developed countries, the member countries, etc…

Chapter one is the General provisions, this chapter puts together the substantive obligations on the member countries like lifting the tariffs between member states, leeway of the member states in according favorable treatment to others through bilateral or regional arrangements between them. Most importantly, The Economic Council will be responsible for imposing economic sanctions on the member states for specific reasons (this is one of the provisions that need to be changed as it puts a general restriction on imposing economic sanctions on the member states without elaborating more on the reasons behind this). The decree of the Economic and Social Council no. 1317 dated 19/2/1997 establishes the dispute settlement mechanism in article six. This article provides that: pursuant to article 13 of the agreement, a committee shall be established to look at all the disputes relating to the application of this agreement and the program” . Article nine comes again with the notion of the follow up, execution and dispute resolution and gives the Social and Economic Council the competence to do all of them. The composition of this Council is from all the representatives of all member states, non-governmental organizations are welcomed to join as observer, this Council convenes four times a year. In the dispute resolution part, this committee shall use Arab experts in international trade or compose ad hoc panels from not more than five experts, judges or arbitrators to take up the dispute and decide on it, the decision will be a recommendation which

\textsuperscript{89} Marcus Noland and Howard Pack, supra note 60, at 71 (citing: These challenges are mainly: unsuccessful experiences from the past, incomplete networks across Arab countries, non-custom barriers, over protection procedures, weak production structures, lack of integrated industrial base and conflict of obligations and agreements.

\textsuperscript{90} Jeffrey Kaplan, \textit{ASEAN’S Rubicon: A Dispute Settlement Mechanism for AFTA}, 14 UCLA PAC. BASIN L.J. AT 148
would be submitted to the committee to decide on. This committee will take decisions by the majority of two third the member states, in case no decision, the issue would be raised to the Economic and Social Council.

It is crystal clear that GAFTA has a very modest dispute settlement mechanism; the Arab countries- in signing this agreement- consider that future developments will bring about major changes in the dispute settlement mechanism. Most of the provisions in GAFTA are drafted in a general language; this language would create a whole lot of problem when it comes to execution. Despite the fact that there is a follow up and implementation committee which has a clear mandate of monitoring the enforcement of the different provisions, yet the dispute settlement mechanism has not been the focus of this monitoring system, on the other side lifting the tariff was one of the core issues which have been on spot.

Settling disputes always start with communications between the two parties; a certain authority or Ministry is specified in each member country. Then, two senior officials in charge of the communication point in that country are nominated. They will try to tackle the complaints, communicating with all competent authorities in charge of the implementation of the obligations set forth in the agreement. If they do not reach a settlement, the two conflicting parties may resort to an amicable solution or arbitration. The dispute in question will be referred to the Arab Investment Court (AIC). The disputes relating to GAFTA would be numerous and more complicated, many issues pertaining to dumping, subsidy, and rules of origin would arise which requires special training for the member countries and the panelists who will sit to decide all of them.\textsuperscript{91}

One of the major downside of this agreement is that the dispute settlement mechanism is not quite effective. Hence the enforcement is not recognized or honored. Nonetheless the preamble acknowledges the significance of International Law as one of the sources of the substantive obligations for the intra-Arab investment treaty; hence NAFTA provisions can be brought into attention. NAFTA has an effective dispute settlement mechanism in the regional agreements; it is very comprehensive and come up with different remedies. For the purpose of this agreement, I would focus on Chapter 11 (State-Investor mechanism) which has sparked a huge debate, try to adjust it to the legal culture in the Middle East, what can be done and should be done to bring in this system in the GAFTA. I would not start from scratch but rather build up on the existing provisions in the GAFTA.

\textbf{Part two: Chapter 11 in The North American Free Trade Agreement (NAFTA)}

I will launch my work with the history of negotiations of NAFTA, chapter 11 particularly exploring more about the current structure of chapter 11, legitimacy, progress and development. In my aim to propose a dispute settlement mechanism under GAFTA, I plan to examine the

\textsuperscript{91}Marcus Noland and Howard Pack, \textit{supra} note 60, at 70
dispute settlement mechanism of the major trade arrangements which are most relevant to GAFTA; NAFTA is one of the dominant examples for this.

**Historical overview of the Dispute settlement mechanism under NAFTA Chapter 11 (STATE-INVESTOR)**

United States, Canada and Mexico launched their free trade negotiations on June 12, 1991 in Toronto, Canada hosted the first trilateral trade ministers meeting. The negotiations took almost more than a year; it was concluded on August 12, 1992. While both NAFTA and CUSFTA (Canadian/US free trade area) have pretty much the same provisions, effectively CUSFTA merged into NAFTA; NAFTA goes beyond CUSFTA in many respects. NAFTA incorporates broad rules on investment within the region; investment barriers may have consequences akin to those of trade barriers, thus the private rights of the investors are remarkable. Dispute settlement mechanism under NAFTA is a decentralized mechanism; five major dispute settlement mechanisms are incorporated in NAFTA to resolve disputes pertinent to the free trade agreement. Chapter 11 came from the host/investor dispute settlement mechanism established in US bilateral investment treaties (BIT).

Although most of the literature traces back NAFTA chapter 11 as the ultimate conclusion of the long tradition of treaties of Friendship, Commerce and Navigation and then later the bilateral investment treaties pursued by the United States. The policy goal of the protection of foreign investment dates back to Jay Treaty 1794 between Britain and U.S.A. Investment rules in general figure prominently in any free trade agreements nowadays, the U.S. has long been advocating for subjected the sovereign actions to scrutiny under international law. Chapter 11 derives its importance of being a multilateral dispute settlement mechanism which has been for a long time a main feature of BIT. Chapter 11 did not arise in vacuum; it confirms the long relationship between the three countries in trade and less in investment. FTA is the other coin of liberalizing and regulating foreign investment multilaterally, while on WTO level, many attempts have been endeavored starting with the TRIM, GATS and TRIPS, however the liberalization of the foreign direct investment is limited on the multilateral level. Nonetheless

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93 Jackson, supra note 10, at 467
94 Id. at 1137
95 Kaplan, supra note 91, at 161 (citing: The four-track dispute resolution framework under NAFTA are: Chapter 11 (investor-state dispute), 14 (financial services), 19 (Antidumping and countervailing duties laws disputes and 20 (state-state disputes).
96 Taylor, supra note 14, at 854
99 Franziska Tschofen, *Multilateral Approach to the Treatment of foreign investment*, 7 ICSID REV. at 393
these aforementioned agreements provided the FTA with the basic provisions that are initial components of investment chapters nowadays. Many argue that, drawing upon the experiences of FCN, BIT and GATT agreements, NAFTA provides for the most aggressive investor-state dispute resolution to date.\textsuperscript{100} Chapter 11 NAFTA represents the current link between international law, economics and politics in the globalization that we are noticing.\textsuperscript{101}

Dispute settlement mechanism under chapter 11 depoliticizes the disputes between state-investor. It relieves the governments from taking up the case of the investor and pursues it against the other government, basically taking the case out of the political realm and put them in the international arbitration realm.\textsuperscript{102} The Three countries employed chapter 11 procedures to ensure the predictable commercial framework for the investment, by creating effective procedures for the resolution of the disputes; it was meant that investment opportunities would be substantially created.\textsuperscript{103} In negotiating this chapter, no one has foreseen the threats that may be posed to the legislative, executive and judicial systems of NAFTA parties, all what they were thinking is how the developed countries in NAFTA (US and Canada) can protect their investors in Mexico (the developing country).

The time of negotiation between the three countries guide us to the objectives of each one of them; the U.S. had an experience with many of the terms in chapter 11 because of its extensive experience with BIT. Canada has a considerable interest in the effective dispute mechanism because it clearly wanted to get rid of the excessive US trade remedy law. Mexico in a bid for technology and capital shifted to liberalizing the investment regulation. Although DSM was not the center piece of NAFTA negotiations, however it turned later to be one of the most critical and highly contested issues under NAFTA after all these awards come out. It ended in a way that when the people are criticizing NAFTA, they by in large target chapter 11. I will talk about the recent development and the framework for this controversial chapter later in this note. Investment dispute is taken from the realm of the politics to the realm of arbitration\textsuperscript{104}. Hence investors are more secured and willing to spend their money in another country without their usual fear of expropriation and other political issues which may forbid their own country from raising the issue against the host country.

Structure of Chapter 11

Two sections exist in any investment dispute settlement mechanism:

\textsuperscript{100} David Adair, Investor’s rights, the evolutionary process of investment treaties, 6 Tulsa J. Comp. & Int’l L. at 200
\textsuperscript{101} Scott Jablonski, NAFTA chapter 11 dispute resolution and Mexico; a healthy mix of international law, economics and politics 32 Denv. J. Int’l L. & Pol’y at 491
\textsuperscript{102} Price, supra note 98, at 6
\textsuperscript{103} Charles H. Brower, Structure, legitimacy and NAFTA investment chapter, 36 Vand. J. Transnat’l L. at 45
\textsuperscript{104} David Livshiz, Public participation under regional free trade agreements: how much is too much- the case for a limited right of intervention, 61 N.Y.U. Ann. Surv. Am. L. at 555
The substantive rights and obligations: the first section of the chapter puts down a whole set of substantive obligations that NAFTA members must follow with respect to the investment in their territories. These obligations may codify existing customary international law obligations like the treatment in accordance with international law while other obligations are simply treaty based with no equivalent in customary international law.105

b- The second chapter lays down the arbitration procedure, if any of the obligations under section one is violated, the investor may choose among three sets of arbitral rules.

Chapter 11 gives the investor the option to either go through arbitration if there is any harm alleged or use the domestic court. The investor has to submit a notice to the other party claiming that they breached certain provisions in NAFTA; the claim will be heard by a tribunal of three members. Each party will chose its own arbitrator, and then they would agree on the third member. The panel enjoys a discretionary power in awarding monetary damages or restitution of property against a party, the award is binding, compliance has to be without any delay.106

The most significant innovations –NAFTA came up with- are:

1. Compliance: NAFTA is providing for compliance with the international legal standards so it leaves the sovereignty of each member intact, there is no direct effect on the national legal system of the member states.107

2. Private right of action: investors for the first time have the right to obtain monetary damages against the government, although it may be conceived as chilling effect on the economic regulation, it nevertheless prohibits the governments from treating the investors in a manner that is discriminatory.108 One scholar has pointed to the need for an alternative to generate some kind of jurisprudence that balances legitimate local interests with those of the investors.109 To sum it up, individuals have standing in the international legal order.110

Legitimacy of Chapter 11 NAFTA

The legitimacy of Chapter 11 has sparked a lot of theoretical debates, I am planning to cover the pros and cons of this mechanism, hence one can get the sense of how it works in the light of the

105 Barton legume, supra note 99, at 532-533
107 Patricia Isela Hansen, Dispute settlement in the NAFTA and beyond, 40 TEX. INT’L L.J. AT 418
108 Id. at 420
109 Villanueva and Serna, supra note 13 at 1031
110 Oelstrom, supra note 107, at 802
ramifications and implications of NAFTA panel decisions. The survival of any international legal system depends primarily on its legitimacy.\textsuperscript{111}

The cons of chapter 11:

a- The origins of international investment agreements: it is argued that it is a major departure from the principle of privity of contract between the investor and the government, in addition the principle of consent to arbitration. Investors enjoy a standing to bring an action against the government which is at odd with the principles of privity of contract, there is no contract between investor and government. However the tribunals found themselves ruling judgments which encroach into the domestic framework policy\textsuperscript{112}.

b- Chapter 11 of NAFTA: Matters which have been routinely subject to the exclusive sovereignty of every country are now subject to adjudication originally designed to resolve private international commercial disputes\textsuperscript{113}, due to the wide extension of the arbitral jurisdiction. Section A sets a lot of substantive obligations that may enhance the power of the arbitral tribunal.

c- The impact of the investor-state procedure on the sovereignty, rule of law, and constitutional norms of member states: experience showed that international tribunals are no longer limited to economical or commercial matters, their decisions turned to be touching on cultural, political and moral objectives that derives governmental actions. Furthermore such tribunals have often deferred to the rights of the investors and being less sympathetic to the public policy objectives of the government. Hence, Investors when they invoke international arbitration, the states on the other side would defend their domestic policies and laws before these tribunals\textsuperscript{114}.

d- The dubious foundations and uncertain future of investor-state procedures: developed countries have been marketing the idea of enforcing the rule of law through the inclusion of state-investor dispute in the free trade agreement, arguing that it would attract the foreign investment. However for the large part, the investment is still flowing to the wealthiest countries and even worse the gap has grown between the poor and rich nations. The developments noticed through the jurisprudence of NAFTA brought into light the implications of having a binding arbitration against other nations, representing an exceeding skepticism and opposition to the

\textsuperscript{111} Brower, \textit{supra} note104, \textit{cf} 51
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
establishment of the investor-state arbitral regime. On a separate front, BIT has little or no impact on increasing the investment flow to developing countries.

The pros of chapter 11:

a- Recourse to Chapter 11 is distinct and separate from recourse available under internal law: a breach of the obligations in chapter 11 is different question from the breach of the internal law. Vivendi case, Waste management case. Thus the mechanism provided by Chapter 11 is additional to the mechanism already exists under Internal law.

b- Chapter 11 is not providing an appellate jurisdiction: the jurisprudence of NAFTA agreed on not providing any kind of appeal against the decision of domestic courts. There are three cases which consistently rejected to bypass the appellate courts within the host state and violate the notions of hierarchy of courts established by the constitution and enables the executive to defeat judicial control over domestic matters. chapter 11 does not have authority to review the legality of individual judicial determinations under national laws, nor do they have any power of correction, revision or remand. All the arbitrators who sat on the panels have demonstrated this fact carefully, they are not getting into the review of the judicial decisions. Arbitral tribunals will never be the court of appeal of the domestic courts.

c- Chapter 11 tribunals are accountable under NAFTA and their decisions are subject to appropriate forms of review: it is argued that the members of NAFTA had voluntarily chose to limit their review by signing this international agreement.

d- NAFTA does not impede the parties’ ability to act in the public interest: it is international commitments which are undertaken by the state. It restricts the state’s freedom to take action contrary to the treaty.

e- Chapter 11 tribunals form a historically attested and widely accepted patter for addressing abuses of state power: human rights courts also apply international standards expressly accepted by states; ICJ has ruled that “any convention puts some

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115 Id.
117 Id.
118 Id.
119 Id.
120 Id.
restrictions on the state sovereignty; nevertheless the right of engagement is an attribute of state sovereignty”\textsuperscript{121}.

\textbf{Part three: A Proposed Investment Dispute Settlement System in GAFTA}

The last part is the salient part of this paper; it would suggest incorporating provisions of NAFTA in GAFTA. The designed dispute settlement mechanism under GAFTA would have the inputs of both the legal culture in the Middle East and the recent developments in the NAFTA. Nonetheless any dispute settlement mechanism has to be read in the context, the best designed dispute settlement mechanism is not the most powerful one, instead the one which contributes most to the achievement of the economic objectives of the Agreement itself.\textsuperscript{122}

\textbf{The importance of Investment Chapter in GAFTA}

\textit{i. Attracting foreign direct investment}

Some scholars have argued that there is a positive correlation between signing investment chapters and attracting foreign investment\textsuperscript{123}. Thus this extra judicial body would protect the foreign investors from the prejudices of the national court system, from the state’s perspective; it may be a necessary means of attracting foreign direct investment\textsuperscript{124}. Other scholars have argued that from the empirical research which has been conducted developing countries still not able to attract foreign investment even with the signing of investment chapters\textsuperscript{125}. Investment chapter is not the dispositive factor in shifting foreign investment from one place to another; nonetheless it is one of the elements that pave the way to this decision of foreign investment.

\textit{ii. Increasing intra-inter Arab investment}

One of the major obstacles to the increase of investment within the Arab countries is the lack of trust and confidence in the other country’s legal environment. Many Arab investors prefer to send their money abroad and invest in the developed countries, this take away a lot of investment opportunities and capital from the region. My thesis is that by internationalizing the dispute between Arab investor and any other Arab government, this would help build up the mutual trust and confidence and promote for more inter-Arab investment opportunities, keep the Arab capital inside the Arab countries, more fair allocation of resources across Arab countries. Since 1996, the region started to clamor to attract private domestic and foreign investors.\textsuperscript{126}

\begin{itemize}
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Taylor, supra note 14, at 851
  \item \textsuperscript{123} Jeswald Salacuse & Nicholas Sullivan, Do BIT’s really work? An evaluation of bilateral investment treaties and their grand bargain, 46 Harvard International Law Journal 69
  \item \textsuperscript{124} Craig Forcese, Does the sky fall? NAFTA Chapter 11 Dispute Settlement and Democratic accountability, 14 Mich. St. J. Int’l L. at 316
  \item \textsuperscript{125} Salacuse & Sullivan, supra note 124, at 71
  \item \textsuperscript{126} Brower and Sharpe, supra note 31, at 644
\end{itemize}
iii. Reinforcing rule of law in the Middle East

One of the main criticisms to this part of the world is the lack of rule of law there. Bringing international standards into this region would vastly benefit the countries in this region, as their domestic legal system has by a way or another respond to the international standards incorporated within the international agreements which would be signed or adhered to by the countries in the Middle East. Before proceeding with the model of the dispute settlement mechanism.

b- Chapter 11 in GAFTA

After I have demonstrated the importance of having an investment chapter in GAFTA, now I will turn to discuss the structure of the Intra-Arab investment agreement, then I will propose how a dispute settlement mechanism look like in the GAFTA.

The structure of Intra-Arab investment agreement

The Unified Agreement for the Arab Capital investment in Arab Countries was signed in Amman 1980\(^{127}\); the preamble points out the importance of intra-Arab investment. A favorable environment for investment where the Arab capital can flow from one place to the other, require a clear framework that embodies legal rules and conditions that facilitate the flow of intra-Arab investment for the development and raising the standard of their people. The preamble sets forth some of these guarantees for the flow of investment, the national treatment to the Arab investors, a specific judicial body for the enforcement of this protection, in addition to granting any favorable treatment. These commitments constitute the minimum standard of treatment of investors across Arab countries. Preliminary provisions incorporated the definitions like Arab capital, the Arab citizen, council and court.

Chapter one lists the general provisions which highlight the general framework of this agreement. These provisions suggest that every member state shall work on stabilizing the legal rules, permit the promotion of the flow of the Arab capital according to their own economic and development strategy and protection of the investment and its revenues. In case there is any conflict between the provisions of this agreement and any of the domestic laws or regulations, the provisions of this agreement shall prevail. The last one provides that in the interpretation of the provisions of this agreement. The principles and goals embodied in different Arab countries legislations in interpreting provisions of this agreement shall be the guidelines then the general principles of International Law. Most importantly is article four which incorporates the general principles of International law as one of the sources of interpreting the agreement. Substantive obligations on members towards Arab investors are laid down in chapter two. Chapter three is establishing the preferential treatment exception to the agreement. These substantive provisions

\(^{127}\) Available at [http://www.transnational-dispute-management.com/samples/freearticles/tv1-4-article_1.htm](http://www.transnational-dispute-management.com/samples/freearticles/tv1-4-article_1.htm)
constitute a whole range of protection like national treatment principle, free movement of the capital, performance requirements, compensation in case there is any violation to any of the provisions in this agreement. Chapter three provides for the most favored treatment, it has some requirements relating to the host country and the importance of the project.

Chapter four is about the enforcement of the agreement. The Economic Council is the responsible body to supervise the execution of the agreement, set up the relevant committees and the like. Chapter five articulates the investment guarantees. Chapter six is the most important chapter here; it is the dispute settlement chapter. Article 25 provides for any of the three, conciliation, arbitration or the investment court as means of resolving disputes. The arbitration or the conciliation shall comply with the rules set out in the annex. Article 27 provides for the situations where you can resort to the domestic legal system, article 28 established the investment court which shall look at the disputes on a temporary basis till the establishment of the Permanent Arabian Court of Justice (ACJ); it sets the composition of this court. Article 29 is about the jurisdiction of this court, the other provisions tackle the issue of the jurisdiction and the ruling of the court and the authority of this court. Chapter seven is putting down final provisions. Chapter eight provides for transitory provisions. And the last thing is the annex of the conciliation and arbitration.

It is beyond the purpose of this paper to tackle all of the provisions in this agreement; I would rather focus on the pertinent provisions for both the substantive obligations on the member states and the dispute mechanism. These provisions are mostly subject to the comparative analysis with NAFTA provisions under the famous two sections of Chapter 11. From the outset, it is pretty obvious that the provisions in the GAFTA fall short of meeting the international law requirements in the arbitration procedure.

The drafters –in this agreement- did not have any clear vision for how to effectively create a strong dispute settlement mechanism. While it seems that the drafters opted to a standing tribunal, there are no clear provisions in respect to how to bring the claims to this tribunal and no steps have taken further in establishing this kind of court. The crux here is that there is no provision that gives the investor the right to bring a claim against the host country. The purpose of dispute settlement under any investment agreement (whether it is chapter in a free trade agreement or a whole investment agreement like BIT) is to make the investor whole in case he/she is subject to any discriminatory action by the host country government. The other issue if the political system in the Arab countries is prepared to deal with and digest trade agreements. In a south-south relationship, are the developing countries ready to cut little piece of their sovereignty to attract investment from other developing countries.

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128 The First Decision Delivered by the Arab Investment Court is available at http://ita.law.uvic.ca/documents/Tanmiah.pdf (Arabic version) (last visited May, 1 2007)
129 Price, supra note 98, at 3
Moreover it does not have any definition for “investment”. I would suggest that starting with incorporating a clear definition of investment in the GAFTA, this investment should refer to a whole range of activities, the enormous broad coverage of the investment is essential for the determination of the scope of the agreement.\textsuperscript{130}Moving further to the substantive obligations: the agreement includes the two manifolds of the obligations: the first is the set of comparative and relative obligations and second is series of absolute promises, not qualified by any reference to domestic legislation.\textsuperscript{131}

A model dispute settlement mechanism under GAFTA

Drawing upon the experience of NAFTA, if GAFTA countries want to employ a robust dispute settlement mechanism, capable of resolving their disputes, there is no way except to follow the steps that have taken by the NAFTA countries. Iraq has suggested when negotiating this agreement that any provisions in GAFTA should be derived from the legal culture in the Middle East and not rather be dictated by other countries. According to one of the scholars, the following requirements are needed for an effective DSM\textsuperscript{132}:

\begin{enumerate}
\item a- Formal mechanism established by states: that means that states are responsible for the creation of the settlement of the disputes\textsuperscript{133}.
\item b- Prospective orientation: the primary goal of the DSM is to resolve disputes that may arise in the future\textsuperscript{134}.
\item c- Compulsory jurisdiction: states are compelled to to show up before the tribunal to resolve their disputes\textsuperscript{135}.
\item d- Sovereignty-impinging nature: the rulings coming down from this tribunal will touch on matters that have traditionally and exclusively been made within the sovereign realm of a state, for instance the legality of the state laws, validity of the state’s application of its own laws. The decision of these tribunals will have some implications on the national policy of the states.\textsuperscript{136}
\item e- Effective compliance: the affected parties should be forced to comply with the decisions of the tribunals\textsuperscript{137}. On a related front, the tribunals should have the power
\end{enumerate}

\textsuperscript{130}\textit{Id} at 3
\textsuperscript{131}\textit{Id} at 4
\textsuperscript{132}Sullivan, \textit{supra} note 93, at 2370
\textsuperscript{133}\textit{Id} at 2371
\textsuperscript{134}\textit{Id} at 2371
\textsuperscript{135}\textit{Id} at 2371
\textsuperscript{136}\textit{Id} at 2371
\textsuperscript{137}\textit{Id} at 2371
to investigate complaints on a timely basis and reach principled conclusions binding and enforceable.

Like NAFTA, GAFTA’s dispute settlement system can be designed primarily as a dispute avoidance mechanism. With that goal in mind, this section discusses the issues that GAFTA must address to create such a mechanism. This part does not incorporate every conceivable provision which GAFTA should include in a dispute settlement agreement. Rather it offers a road map of the key issues for GAFTA to address; they are basically the core issues that GAFTA must unavoidably consider.

In the following part, I will lay down the proposed dispute settlement mechanism in GAFTA, for ease we will split the dispute mechanism into two sections, the first section includes the term investment obligations (substantive obligations) and the second one is the dispute settlement mechanism which would provide for the required procedure. This part proposes a comprehensive dispute settlement mechanism for GAFTA that accommodates the private sector disputes.

NAFTA will come at the top of these agreements. Recent events have been noticed that one of the most enduring legacies of NAFTA is its strong influence on subsequent regional trade agreements. Not surprisingly, NAFTA is providing one of the most sound dispute settlement mechanisms in matters involving regional trade agreements in terms of variety and breadth. I would argue that - using the model of NAFTA- economic integration between Arab Countries could be strengthened through incorporating a robust dispute settlement mechanism in GAFTA. However, the incorporation process would be accompanied with some adjustments to the current provisions in NAFTA, so these provisions could fit the legal and cultural background of the countries in the Middle East. Through the process tested in this paper, it is not merely a copy and paste process, the legal culture in the Middle East would have some implications on this kind of incorporation.

Through this paper I will try to shed light on one of the issues that should be one of the priorities for the Arab summit to look at in their first meeting towards furthering their economic integration, I argue that creating an efficient dispute mechanism is a feasible idea. This is one of the early notes that call the attention of the Economic and Social Council of the Arab league (ESC) to the importance of a robust DSM. Bringing development and prosperity to this part of the world would definitely dovetail with the national security of other developed countries particularly the United States. Eliminating poverty and raising the standard of living helps root

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140 David Gantz, *Government to Government dispute resolution under NAFTA chapter 20: a commentary on the process*, 11 AM. REV. INT’L ARB. 481
out the reasons of hatred, jealous and the anti American sentiments. Nonetheless, for the good of
this region, regional trade agreement in this region would be a significant component of the
economic relations that will be inevitable to sustain peaceful relations in the region.\textsuperscript{141}

Section one

Article one: scope and coverage\textsuperscript{142}: this chapter applies to the measure adopted or maintained by
a party relating to:

\begin{itemize}
  \item a- Investors of another party;
  \item b- Investments of investors of another party in the territory of the party.
\end{itemize}

Nothing in this chapter shall be construed to prevent a party from providing a service or
performing a function such as law enforcement. Correctional services, income security or
insurance, social security or insurance, social welfare, public education, public training, health,
and child care, in a manner that is not inconsistent with this chapter.

Article two: National treatment\textsuperscript{143}

1. Each party shall accord to investors of another party treatment no less favorable than that
it accords, in like circumstances, to its own investors with respect to the establishment,
acquisition, management, expansion, conduct, operation, and sale or other disposition of
investments.

2. Each party shall accord to investments of investors of another party no less favorable than
that it accords, in like circumstances, to investments of its own investors with respect to
the establishment, acquisition, expansion, management, conduct, operation, and sale or
other disposition of investments.

3. For greater certainty, no party may:

\begin{itemize}
  \item a. Impose on an investor of another party a requirement that a minimum level of
equity in an enterprise in the territory of the party to be held by its nationals, other
than nominal qualifying shares for directors of incorporators of corporations: or
  \item b. Requires an investor of another party, by reason of its nationality, to sell or
otherwise dispose of an investment in the territory of the party.
\end{itemize}

Article 3: Most Favored Nation Treatment\textsuperscript{144}

\textsuperscript{141} David Karasik, \textit{Securing the peace dividend in the Middle East: Amending GATT article XXIV to allow sectoral
preferences in free trade areas}, 18 \textit{Mich. J. Int’l L.} 529
\textsuperscript{142} \textit{North American Free Trade Agreement}, Article 1101
\textsuperscript{143} \textit{Id.}, article 1102
1. Each party shall accord to investors of another party treatment no less favorable than that it accords, in like circumstances, to investors of any other party of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each party shall accord to investments of investors of another party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other party or of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 4: standard of treatment: each party shall accord to investors of another party and to investments of investors of another party the better of the treatment required by article 2 and 3.

Article 5: minimum standard of treatment:\textsuperscript{145}

1. Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. Each party shall accord to investors of another party, and to investments of investors of another party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

Article 6: performance requirement:\textsuperscript{146}

1. No party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in accordance with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a party or of a non-party in its territory:
   a. To export a given level or percentage of goods or services;
   b. To achieve a given level or percentage of domestic content;
   c. To purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods of services from persons in its territory;
   d. To relate in any way the volume or value of imports to the volume of value of experts or to the amount of foreign exchange inflows associated with such investment;

\footnotesize\textsuperscript{145} Id. article 1105 \\
\footnotesize\textsuperscript{146} Id. article 1106
e. To restrict sales of goods or services in its territory that such investment producers of provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

f. To transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violations of competition laws or to act in a manner not inconsistent with other provisions of this agreement; or

g. To act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

Article 7: transfers

1- A party shall permit all transfers relating to an investment of an investors of another party in the territory of the party to be made freely and without delay. Such transfer include:

a. Profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;

b. Proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

c. Payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

d. Payments made pursuant to article 8 and

e. Payments arising under section two

2- Each party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

3- No party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another party.

4- Notwithstanding paragraphs 1 and 2, a party may prevent a transfer through the equitable, non-discriminatory and good faith applications of its laws relating to:

a. Bankruptcy, insolvency, or the protection of the rights of creditors

147 Id. article 1109
b. Issuing, trading, or dealing in securities

c. Criminal or penal offences

d. Reports of transfers of currency or other monetary instruments; or

e. Ensuring the satisfaction of judgments in adjudicatory proceedings.

Article 8: Expropriation and compensation

1- No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (expropriation), except:

   a. For a public purpose;
   b. On a non-discriminatory basis;
   c. In accordance with due process of law and article 5 (1); and
   d. On payment of compensation in accordance with paragraphs 2 through 6

2- Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (date of expropriation), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset, value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3- Compensation shall be paid without delay and be fully realizable.

4- If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5- If a party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of the compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6- On payment, compensation shall be freely transferable as provided in article 7.

\[148\] Id. article 1110
7- This article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights.

Article 9: denial of benefits

1. A party may deny the benefits of this chapter to an investor of another party that is an enterprise of such party and to investments of such investor if investors of a non-party own or control the enterprise and the denying party:
   a. Does not maintain diplomatic relations with the non-party; or
   b. Adopts or maintains measures with respect to the non-party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this chapter were accorded to the enterprise or to its investments.

Article 10: environmental measures

1. Nothing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, or retention in its territory of an investment of an investor. If a party considers that another party has offered such an encouragement, it may request consultations with the other party and the two parties shall consult with a view to avoiding any such encouragement. (Please consider if it is really important for GAFTA or not).

Section two: Settlement of Disputes between a party and an investor of another party

Article 1: purpose: this section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 2: scope of the agreement: claim by an investor of a party on its own behalf

1. An investor of a party may submit to arbitration under this section a claim that another party has breached an obligation under:

149 Id. article 1113
150 Id. article 1114
151 Id. article 1115
152 Id. article 1116
a. Section one; or

And the investor has incurred loss or damage by reason of, arising out of, that breach.

2- An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 3: claim by an investor of a party on behalf of an enterprise

1- An investor of a party, on behalf of an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this section a claim that the other party has breached an obligation under:

a. Section one

And that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2- An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged and knowledge that the enterprise has incurred loss or damage.

Article 4: settlement of a claim through consultation and negotiation

The disputing parties should first attempt to settle a claim through consultation or negotiation.

Article 5: notice of intent to submit a claim to arbitration

The disputing investor shall deliver to the disputing investor written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

i- The name and address of the disputing investor and, where a claim is made under article 3, the name and address of the enterprise;

ii- The provisions of this agreement alleged to have been breached and any other relevant provisions;

iii- The issue and the factual basis for the claim; and

iv- The relief sought and the appropriate amount of damages claimed.

153 Id. article 1117
154 Id. article 1118
155 Id. article 1119
Article 6: submission of a claim to arbitration

1- A disputing investor may submit the claim to arbitration under:
   a. The ICSID convention, provided that both the disputing party and the party of the investor are parties to the convention;
   b. The additional facility rules of ICSID, provided that either the disputing party of the party of the investor; but not both, is a party to the ICSID convention; or
   c. The UNICTRAL arbitration rules.

2- The applicable arbitration rules shall govern the arbitration except to the extent modified by this section.

Article 7: conditions precedent to submission of a claim to arbitration

1. A disputing investor may submit a claim under article 2 to arbitration only if:
   a. The investor consents to arbitration in accordance with the procedures set out in this agreement; and
   b. The investor and, where the claim is for loss or damage to an interest in an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to in article 2, except for proceedings for injunctive, declaratory, or other extra-ordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing party.

2. A disputing investor may submit a claim under article 3 to arbitration only if both the investor and the enterprise:
   a. Consent to arbitration in accordance with the procedures set out in this agreement; and
   b. Waive their right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing party that is alleged to be a breach referred to in article 3, except for proceedings for injunctive, declaratory

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156 Id. article 1120
157 Id. article 1121
or other extraordinary relief, not involving the payment of damages, before any administrative tribunal or court under the law of the disputing party.

3. A consent and waiver required by this article shall be in writing, shall be delivered to the disputing party and shall be included in the submission of a claim to arbitration.

Conclusion

Arab countries may benefit from NAFTA experience if they seriously consider effecting their economic integration. The protection granted to Arab investors represents the core and lies at the heart of GAFTA. Hence designing an effective dispute settlement mechanism is one of the challenges GAFTA has to face; this mechanism has to be both politically acceptable to the GAFTA members and supportive of the privatization policy taking place nowadays in most Arab countries. Given these parameters, creating an acceptable and workable dispute settlement mechanism remains feasible. Throughout this paper, I have tried to point out that, First and foremost, establishing an investment chapter in the GAFTA is quite essential, building on the current provisions of the Intra-Arab investment agreement signed in 1982 and drawing on the experiences of NAFTA. GAFTA may have a robust investment dispute mechanism which would secure GAFTA as an ambitious, effective free trade area in which private sector will feel encouraged in their trading activities, therefore increasing the flow of investment across Arab countries, and importantly reinforcing the rule of law in the Arab world by bringing in international law norms on the protection of foreign investment.

If this DSM did not incorporate fundamental values shared by all Arab countries, this mechanism may be pushed to the brink of rejection and failure. Last but not least, on an institutional level, I suggest The Economic and Social Council (ESC) put the design of an effective dispute settlement mechanism in GAFTA as on the top of their priorities. Pan-Arab unity has long been central to Arab culture and history, however Arab economic relations remain limited even though Arabs were among the pioneers calling for regional integration in the mid of the last century. 158

158 Galal and Hoekman, supra note 5, at 13