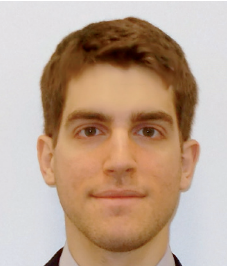

Investment in Libya: security, contracts, and a new constitution

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The era of elected government in Libya began on July 7, 2012, following elections for the General National Congress (GNC). Since its first meeting on August 9, 2012, the GNC has asserted itself in Libyan politics, passing laws guaranteeing the right to peaceful demonstration, mandating interest-free lending and finalizing a draft law to exclude former Qaddafi supporters from Libyan political life.

A new government was sworn in on November 14, 2012 under Prime Minister Ali Zidan, a former leader of the Libyan League for Human Rights. Zidan's government comprises ministers from both the Muslim Brotherhood-aligned Justice and Construction Party and the National Forces Alliance, led by former Interim Prime Minister Mahmoud Jibril. In December 2012, Zidan's Defence and Interior Ministers unveiled a comprehensive plan for increased public security, and in February 2013, the cabinet presented a new budget to the GNC for approval.

Over the next year, Zidan's government will work with the GNC to address challenges facing post-revolution Libya, including consolidating central government control over the use of physical force, holding elections for a constituent assembly that will draft the Libyan constitution, resolving issues of property ownership and creating an efficient and responsive public sector and prosperous private sector. The Zidan government's work toward these goals in collaboration with the GNC will affects the environment for domestic and foreign private investment in Libya.

Two developments would both facilitate the return of foreign companies to Libya: improved security conditions in the south and east of Libya, and increased awareness among foreign investors of the central government's achievements to date in improving the domestic security environment. The eventual ratification of a new Libyan constitution will bestow constancy and clarity to a presently muddled regulatory environment.

This article will review the investment climate in Libya and outline limited measures the Libyan and US governments may take to encourage foreign investment in Libya.

Security

The main barriers to companies returning to Libya are security concerns due to continued weak government control over armed groups within Libya in addition to a lack of knowledge about improved security conditions in Libya and the steps the Zidan government has taken to control these groups.

The Libyan government is caught in a difficult situation regarding security sector reform; it is accountable to the general population that elected the GNC in July 2012 and will judge the performance of its members when the GNC is replaced with a permanent parliamentary body. The government is balancing the demands of this national constituency against its reliance on armed groups (whose participation was instrumental in winning the 2011 revolution) to provide security in much of the country, especially in the east. Much of the Libyan public resists the impunity with which these groups act, as demonstrated by enormous anti-militia protests in Benghazi in September 2012.

There is a tension between the demands of public opinion, which is strongly in favour of government control over armed groups, and the reality that an alternative force on Libyan streets does not yet exist. The government relies on armed groups to maintain order in a number of cities and to provide security for nation-wide events like elections. Former Interim Prime Minister Abdurrahman al-Keib began an effort to recruit fighters into the official police and army under the Defence and Interior Ministries, while concurrently giving government salaries to members of armed groups as a way to purchase influence over them. This effort has progressed, notably with the upgrading of a computerized payments system intended to eliminate redundant payments and corruption.

The general security environment in Libya has improved over the past several months despite the important role that armed groups continue to play in Libya. This improvement is principally the result of progress on the Interior and Defence Ministers joint long-term security plans. Tripoli and other cities have witnessed an increased police presence, and a number of security cameras have been repaired and are now functional.

The Libyan government is seeking to develop a national guard with the guidance of American officials. This force would be free of Army's negative image in Libyan society. Finally, an EU civilian support team will deploy in Libya in June 2013 to assist with border security training. These efforts, combined with the further integration of former revolutionaries into the armed forces, will slowly extend the central government's authority over all areas of the country.

Restarting contracts signed before 2011

The Libyan government is presently in the process of reviewing contracts signed with foreign companies prior to February 2011. Estimates of the total number of pre-revolution contracts range between 12,000 and 17,000, valued at a total of at least $110 billion.

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In an interview with the *Libya Herald*, Planning Minister al-Mehdi Agenia says that he expects 80 percent of contracts to continue, and *"where the work is two-thirds complete, companies will be invited back, provided the cost of the project does not require recalculation."* While a relatively small percentage of the number of contracts are with foreign companies, these contracts are generally of much larger value than those with domestic entities.

According to Transportation Minister Abd al-Qader Mohamed Ahmed al-Ayib, once the 2013 budget has been approved by the GNC, foreign companies will be given a deadline of two or three months to return to work on outstanding contracts. According to the Minister, once companies have returned half of outstanding GOL debt will be paid to the contractor prior to restarting, with the remainder of debts paid in two to three blocks after work has resumed.

If the Libyan government were to terminate and re-tender outstanding contracts, it is very likely to set off a sequence of unintended consequences, including litigation and a deteriorated ability to attract high-quality construction sector bidders, especially given potentially high insurance costs and ongoing contract disputes.

Regulation

The two laws governing investment and business in Libya are Law 9 of 2010, the investment law, and Law 23 of 2010, the commercial law. Outside the Misrata and Zwara Free Trade Zones, there are two routes of foreign investment in Libya:

1. Under the auspices of Law 9 of 2010 by gaining approval of the PIB (Privatization and Investment Board, recently renamed the Public Board for Encouraging Investment and Privatization Affairs). Foreign investors (who meet certain size requirements and are not oil and gas companies) apply for approval for their proposed investment project from one of four PIB offices. If the PIB approves the project (requiring an Economy Ministry decision), the investment is exempt from taxes for five years and the PIB assists with bureaucratic obstacles.

   To gain PIB approval, a project must satisfy certain conditions, including that at least 30 percent of the workforce be Libyan nationals. Additionally, the investor must meet a number of requirements, including bringing modern technology or technical expertise, developing peripheral areas, utilizing local raw materials, and 'improving, developing, or rehabilitating' the Libyan economy. If an application is not approved, the PIB informs the company of the reason for denial. Once the investing entity addresses the reason given for the PIB's rejection, it can subsequently re-apply for PIB approval.

2. Law 23 of 2010 stipulates the terms under which business is done generally in Libya. All businesses – from taxi cab drivers and supermarkets to large domestic enterprises – are subject to this law. Article 375 of Law 23 of 2010 permits foreigners to own portions of Libyan companies (ie. enter into a joint venture with Libyan partners) or open offices (either a branch office or a representative office) in Libya.

   Article 375 stipulates that the 'governing authority' – in practice, the Economy Ministry – determines the percentage of shares that a foreign body can own in a company, the sectors that a foreign company can operate in, the time period permitted for investment, and other conditions. Foreign investors operating according to the commercial law do not need an Economy Ministry decision as is the case with the PIB. Investors may instead apply to the Economy Ministry's Licensing Administration for a license to operate.

During 2012, the Economy Ministry shifted its stance on the percentage of Libyan joint ventures foreign investors are permitted to own. Law 443 of 2006 originally permitted foreign investors to own up to 65 percent of shares in joint venture companies, and this allowance was reinforced by Article 3 of Economy Ministry Decision 103 of 2012, issued on May 13. Two months later, the Economy Ministry issued a new decision (number 207 of 2012, issued on July 5) prohibiting foreign investors from becoming majority stakeholders. Article 3 of Decision 207 of 2012 restricts foreign investors to owning 49 percent of shares in the majority of cases.

These decisions have been the subject of some debate among Libyans. Fairuz Smew of Tumi Law Firm has argued that Decision 207 of 2012 should be modified to permit limited liability companies registered abroad to own up to a 49 percent share of Libyan joint ventures, instead of only foreign joint stock companies as the law currently requires.

Abdullah Boulsien, a prominent Libyan investment banker, takes a dimmer view of the decision, calling for its repeal entirely. According to Boulsien, the minimums Decision 207 of 2012 establishes for Libyan ownership in joint venture companies reward established domestic enterprises who can 'buy foreign expertise' and shuts the door to foreign financing for less established Libyan entrepreneurs who are not able to self-finance a 51 percent share of a joint venture with a foreign partner.

Constitutional development in Libya

The interim National Transitional Council (NTC), which governed Libya from October 2011 to August 2012, took a gradual approach to changing the legal landscape in Libya. The NTC released an interim constitutional document on August 3, 2011, in the form of a 'constitutional declaration.' Article 35 of this declaration stated that all preceding laws (ie. from the previous regime) remained in effect unless they directly contradicted the declaration itself. As a result of this decision, Law 9 of 2010 and Law 23 of 2010 remain in effect.

The recent Economy Ministry decrees modify the provisions of Law 23 of 2010, but a new commercial law has not been written since 2010. The succession of decrees regulating investment in Libya are of less ultimate consequence than the future commercial and investment laws that will be written after a new constitution is passed.

In February 2013, Libyan officials took decisive steps toward drafting a constitution, including forming a committee to write a new law governing national elections to select a constituent assembly. Elections for the constituent assembly are expected in the second half of 2013, with a new constitution expected to be approved by national referendum in mid 2014.

There are a number of indications that Libyan political elites wish to encourage foreign investment in Libya, with this inclination toward facilitating investment manifesting itself in the future constitution. Economy Minister Mustafa Abufannas has given regional PIB offices greater authority to approve licenses for foreign investors to gain legal benefits under Law 9 of 2010. Prime Minister Zidan has spoken energetically in support of encouraging foreign investment. Libya has also been open to IMF counsel, and approved a Legal Protection Agreement and Local Currency Agreement to allow the World Bank's Multilateral Investment Guarantee Agency guarantee an investment in Tripoli.

Future steps

The democratically elected leaders of Libya have demonstrated prudence in building a prosperous, secure Libya. The formation of a democratically elected national body and the numerous peaceful transitions of power that Libya has already experienced inspire confidence in Libya's future. The measures outlined below would reinforce Libya's positive trajectory.

First, continued US government support for the Libyan government's security reform efforts is important to strengthening the bilateral relationship and guaranteeing the stability of the Libyan state.

Second, continued US government funding for commercial staff in US Embassy Tripoli beyond 2014 would demonstrate that American investors are supported in their efforts to rebuild Libya.

Third, an Overseas Private Investment Corporation (OPIC) Investment Incentive Agreement would allow Libya to access a portion of the $2 billion allotted to financial support for investment in the Middle East and North Africa in 2011. OPIC investment guarantees would facilitate American investments in Libya, leading to increased jobs for Libyans.

Fourth, the resumption of bilateral expert technical consultations under the US-Libya Trade and Investment Framework Agreement (following GNC ratification) would lead to increased US-Libya trade.

Fifth, given the importance of personal relationships in the Libyan private sector, foreign companies would benefit from opening representative offices under Law 23 of 2010 to get to know potential business partners.

Finally, the Libyan government's self-assessment of the national procurement system using the methodology and base line indicators of OECD Development Assistance Committee is an encouraging development for supporters of transparency. The Libyan government's continued collaboration with World Bank Procurement Specialists will ensure that contracts are awarded to the most qualified recipients.

The GNC's recent steps toward drafting the future Libyan constitution are positive steps toward instilling the primacy of law in Libyan public life, and the Libyan government's efforts toward security sector reform are supported by a large segment of the public. These two developments alone are cause for guarded optimism about stable representative democracy and prosperity in Libya. ■