Investment Arbitration: The Chronicles of Egypt: A Perilous Path to Pass

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"An investment in knowledge pays the best interest", Benjamin Franklin

1. Introduction

Ever since the so-called "Arab Winter" that sprang up in 2011, Egypt and certain other Arab states have faced significant political and economic challenges and instability. These have had a negative impact on investments in the region and more specifically on Egypt. As a manifestation of such impact, Egypt has witnessed a significant increase in the number of investment-related arbitrations brought by foreign investors under diverse bilateral investment treaties (BITs).

Whilst not all investment arbitrations are founded on credible and substantiated claims, those credible and legitimate claims commenced by serious investors are indicative and demonstrative of the adverse changes to the legislative framework, the unpredictable variations in state policies, the revocation of consents, contracts and/or licences awarded to investors, and/or the diverse contractual and treaty breaches experienced by those investors.

With such colossal winds of change, it is very clear that most of the cases brought by foreign investors against Egypt have been initiated since 2011,[1] indicating the existence of a vivid direct correlation between the surge of investment claims and the gloomy "Arab Winter".

This article intends to provide an overview of the investment arbitration climate in Egypt, to ensure a better understanding of the applicable dispute resolution mechanism(s), to address the standards of protection available to foreign investors and to consider the enforcement of arbitral awards rendered in relation to foreign investments in Egypt.

2. Overview of the Investment Climate in Egypt

Statistics show that foreign direct investment (FDI) in Egypt increased by US $3,500.6 million in the first quarter of 2016. Moreover, FDI in Egypt averaged US $2,340.7 million from 2002 to 2016, reaching an all-time high of US $5,572.5 million in the fourth quarter of 2007 and a record low of US $40.7 million in the second quarter of 2002.[2]

Irrespective of the economic and investment implications of the events that have unfolded since January 2011, it is worth noting that Egypt has, in modern times, attempted to introduce pro-investment policies that can be traced back to the mid-1970s, when the state took steps to liberalise the economy with the enactment of Egypt Law No.43/1974 on the Investment

[*] The views expressed by the author in this article are his own and do not reflect the views of any of the institutions with which the author is affiliated.

[1] Amongst these cases are: *Champion Holding Co* ICSID Case No.ARB/16/2, *Al Jazeera Media Network* ICSID Case No.ARB/16/1, *ArcelorMittal S.A.* ICSID Case No.ARB/15/47, *Unión Fenosa Gas S.A.* ICSID Case No.ARB/14/4, *Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Helmut Jungbluth* ICSID Case No.ARB/13/37, *Cementos La Union S.A. and Aridos Jativa S.L.U.* ICSID Case No.ARB/13/29, *ASA International S.p.A.* ICSID Case No.ARB/13/23, *Ossama Al Sharif* ICSID Case No.ARB/13/3, ICSID Case No.ARB/13/4 and ICSID Case No.ARB/13/5, *Veolia Proprieté* ICSID Case No.ARB/12/15, *Ampal-American Israel Corp* ICSID Case No.ARB/12/11, *Indorama International Finance Ltd* ICSID Case No.ARB/11/32, *Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E.* ICSID Case No.ARB/11/16, *National Gas S.A.E.* ICSID Case No.ARB/11/7, *Bawabet Al Kuwait Holding Co* ICSID Case No.ARB/11/6.

[2] See Trading Economics, "Egypt Foreign Direct Investment", *http://www.tradingeconomics.com/egypt/foreign-direct-investment* [Accessed 15 December 2016].

of Arab and Foreign Capital and Free Zones. This liberalisation evolved with the enactment of new investment laws (the most recent of which is Presidential Decree No.17/2015 which introduced amendments to the Egypt Investment Law No.8/1997). We shall shed light on the development of investment laws in s.3 below.

The post-2011 investment proceedings against Egypt started with the mass revocation of earlier privatisations of state-owned enterprises and banks. These privatisations formed part of an economic reform policy that took place under the old regime, from 1991 to 2008. Furthermore, Egypt has had several programmes intended to attract FDI into special economic and trade zones. However, Egypt Law No.114 of 2008 revoked the licences for private free zones, an action which adversely impacted the investment of several investors and led to substantial investment claims against the state, some of which have been amicably settled by the state. The General Authority for Investment and Free Zones (GAFI), which operates under the auspices of the Ministry of Investment and is considered the principal governmental body regulating and facilitating investment in Egypt and is entrusted with implementing Egypt's policies and procedures for doing business and maintaining Egypt's "one-stop shop" for investors, did not manage to settle several investment disputes at their inception in a timely fashion, and this resulted in the commencement of investment arbitrations.

In 2015, the newly elected Government of Egypt demonstrated its willingness to encourage FDI in Egypt and took serious economic decisions, including cutting fuel subsidies by 30 per cent and taking measures to encourage and facilitate investments in diverse economic development areas, in an attempt to attract foreign investors. In this regard, the Government declared FDI to be a top priority.

In March 2015, Presidential Decree No.17/2015 was promulgated in the hope of reforming the Egyptian Investment Law, the Companies Law, the general Sales Tax Law and the Income Tax Law (the 2015 Amendment).[3]

The 2015 Amendment refined Egypt's one-stop shop system, stating that GAFI will serve as a means of liaison between investors and government agencies when applying for business licences. In addition, the decree offered non-tax incentives to investors in certain sectors or regions. It also offered new mechanisms for settlement of investment disputes and improved corporate veil protection, shielding senior executives from criminal prosecution. Finally, the 2015 Amendment limited the expansion of free zones and gave the cabinet the exclusive right to choose fields of investment in the free zones contingent on the state's economic strategy.[4]

In the specific context of investment disputes, the 2015 Amendment notably deleted the express reference to ICSID investment arbitration and expressly referred to the possible resort to ad hoc arbitration under Egypt Arbitration Law No.27 of 1994.[5] Whilst such deletion of the express reference to ICSID arbitration in the 2015 Amendment may evoke a negative impression on the part of investors, it is legally and practically of no adverse implication for two reasons:

[3] See Egypt Presidential Decree Law No.17/2015 amending some provisions of the Joint Stock Companies, Partnerships Limited by Shares and Limited Liability Companies Law promulgated by Egypt Law No.159/1981, the Egypt General Sales Tax Law No.11/1991, the Egypt Investment Guarantees and Incentives Law No.8/1997 and the Income Tax Law No.91/2005.

[4] The Egypt Presidential Decree Law No.17/2015 amending some provisions of the Egypt Joint Stock Companies, Partnerships Limited by Shares and Limited Liability Companies Law promulgated by Law No.159/1981, the Egypt General Sales Tax Law No.11/1991, the Egypt Investment Guarantees and Incentives Law No.8/1997 and the Egypt Income Tax Law No.91/20.

[5] See Egypt Presidential Decree No.17/2015 art.4 amending Egypt Law No.8/1997 art.7 which provides that: "Investment disputes related to the implementation of the provisions of this Law may be settled in the manner agreed upon with the investor or in accordance with the provisions of the Arbitration Law on Civil and Commercial Matters referred to herein."

1) Egypt remains a signatory to a significant number of BITs under which treaty claims could be brought in the context of investment arbitration proceedings; and
2) resorting to ICSID investment proceedings under the Egypt Investment Law No.8/1997 was, in any event, conditional upon the agreement of the contracting parties and not automatic or unilateral ever since Egypt Investment Law No.8/1997 and arguably before.[6]

The 2015 Amendment also added a new mechanism for settlement of investment disputes aimed at avoiding the court system altogether. In particular, the 2015 Amendment established a Ministerial Committee for Investment Contracts Disputes. This committee is responsible for the settlement of disputes arising from investment contracts to which the state, or a public or private entity affiliated therewith, is a party, and the committee has considerable powers and discretion to settle those disputes.[7]

The 2015 Amendment also established a Complaints Committee which considers challenges connected to the implementation of Egypt's amended 1997 Investment Law.[8]

Finally, the 2015 Amendment also established a Committee for [the] Resolution of Investment Disputes, which is distinct from the Ministerial Committee for [the] Investment Contracts Disputes. Whilst the requisite mandate of the latter is conditional upon the

[6] See Egypt Law No.8/1997 art.7 which provides that: "Investment disputes relating to the implementation of the provisions of this Law may be settled in the manner agreed upon with the investor. The parties may also agree to settle these disputes under treaties in force between the Arab Republic of Egypt and the investor's home State or under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which the Arab Republic of Egypt has joined by virtue of Law No.90 of 1971, in accordance with the terms, conditions and in cases where applicable. Disputes may also be settled in accordance with the provisions of the Arbitration Law on Civil and Commercial Matters issued by Law No.27 of 1994. The parties may also agree to settle the disputes referred to herein by arbitration before the Cairo Regional Centre for International Commercial Arbitration."

See Egypt Law No.230/1989 art.55 which reads: "Without prejudice to the right to resort to Egyptian courts, investment disputes relating to the implementation of the provisions of this Law may be settled in the manner agreed upon with the investor. The relevant parties may also agree to settle these disputes by virtue of treaties in force between the Arab Republic of Egypt and the investor's home State or under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which the Arab Republic of Egypt has joined by virtue of Law 90 of 1971, in accordance with the terms, conditions and in cases where applicable. The parties may also agree to settle the disputes referred to herein to arbitration before the Cairo Regional Centre for International Commercial Arbitration."

See Egypt Law No.43/1974 art.8 which reads: "Investment disputes concerning the implementation of the provisions of this Law shall be settled according to the manner agreed upon with the investor or within the framework of treaties in force concluded between the Arab Republic of Egypt and the investor's home State or within the framework of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which the Arab Republic of Egypt has joined by virtue of Law No. 90 of 1971 where applicable. It may be agreed that disputes shall be settled by arbitration. The arbitral tribunal shall be composed by a member on behalf of each party to the dispute and a third presiding member who shall be appointed by the other two members. If both members do not agree upon the appointment of the third member within thirty days from the appointment of the last one, the third presiding member shall be appointed upon the request of either party by a decision of the Supreme Council of Judicial bodies from amongst the counselors of judicial bodies in the Arab Republic of Egypt."

[7] See Egypt Presidential Decree No.17/2015 art.108 which provides that: "A ministerial committee shall be established at the Cabinet of Ministers named 'Ministerial Committee for Settlement of Investment Contracts' Disputes'. The Committee shall be responsible for settling disputes arising from investment contracts which the state, or a public or private affiliated entity therewith, is a party thereto. Said Committee is constituted by virtue of a Prime Ministerial Decree and its members shall include one of the Vice Presidents of the state Council whom shall be appointed by the state Council. The Committee's decisions shall be approved by the Cabinet of Ministers and delegation for attendance of its sessions is not permitted. The Committee shall have a technical secretariat, the constitution and rules thereof shall be issued through a Prime Ministerial Decree." Presidential Decree No.17/2015 art.110 also reads: "The Committee shall investigate and examine the disputes arising between the parties to investment contracts. To this end, the Committee shall have the right, with the consent of the contracting parties, to conduct the necessary settlement for rectification of imbalances of said contracts, and to extend durations, terms or grace periods stated therein. The Committee shall also, if necessary, reschedule financial dues or rectify the procedures preceding the conclusion of contracts by achieving the contractual equilibrium and guaranteeing the achievement of the best economic position to preserve public funds. The Committee shall present to the Cabinet of Ministers a report reflecting all elements of the settlement reached. Said settlement shall be enforceable and binding after being approved by the Cabinet of Ministers."

[8] See Egypt Presidential Decree No.17/2015 art.101 which provides that: "A Committee or more shall be established by virtue of a Ministerial Decree by the competent Minister to consider the complaints filed against the Authority's administrative decisions in application of the provisions of this Law and its Executive Regulations."

existence of an investment contract, the mandate of the Committee for [the] Resolution of Investment Disputes pertains to the review of complaints or disputes between investors and the government related to the implementation of the Investment Law, in the absence of any investment contract or if the dispute is not contractual (i.e. extra-contractual) in nature.[9]

By and large, for the past two years the Government has pledged to promote and incentivise FDI, and has even undertaken mega projects that (it is hoped) will yield a myriad of appealing investment opportunities. Amongst such projects is the notable Suez Canal Development Project, which promises to build a major industrial and logistics services hub beside the Suez Canal.

3. Fast-Track Access to Investment Arbitration: International Investment Agreements and Investment Laws in Egypt

It is not surprising that disputes pertaining to foreign investments in Egypt are settled through international investment arbitration proceedings. Legally and practically, foreign investors in Egypt have several options for out-of-court dispute settlement of their investment disputes, namely:

- invoking the agreed dispute settlement mechanism existing in the investment agreements or contracts;
- invoking the dispute settlement provision(s) under an applicable BIT or multilateral investment treaty; and
- invoking the dispute settlement scheme under the national investment law.

Since most investment arbitration proceedings commenced against Egypt were oriented towards a BIT and/or an investment law, it appears necessary to address both options to the exclusion of the investment contracts option, which merits no special analysis in this context and for the purpose of the present article.

International Investment Agreements (IIAs) or BITs

Egypt ranks high amongst states which have concluded many Multilateral Investment Instruments (MITs), International Investment Agreements (IIAs) or BITs. Egypt signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention) in 1971,[10] which entered into force in Egypt on 2 June 1972.

The first ICSID case, after the ratification and entry into force of the ICSID Convention, in Egypt was *SPP v Arab Republic of Egypt* (1984),[11] and, over the past three decades, Egypt's share of investment arbitration proceedings has risen, peaking between 2011 and 2016. The most recent investment arbitration proceedings filed against Egypt is *Champion Holding Co v Arab Republic of Egypt* in 2016.[12] Twenty-eight international investment cases were filed against Egypt under the auspices of ICSID between 28 August 1984 and 28 January 2016, of which 20 have been concluded and eight remain pending. Furthermore, 16 of the 28 cases were filed following the 25 January 2011 revolution. Moreover, several

[9] See Egypt Presidential Decree No.17/2015 art.104 which provides that: "A ministerial committee shall be established at the Cabinet of Ministers named 'Ministerial Committee for Resolution of Investment Disputes'. The committee shall be responsible for examining any requests, complaints or disputes filed or submitted thereto, that may arise between investors and administrative bodies in application of the provisions of this Law. Said Committee is constituted by virtue of a Prime Ministerial Decree and its members shall include one of the Vice Presidents of the state Council whom shall be appointed by the state Council. The Committee's decisions shall be approved by the Cabinet of Ministers. The Committee's members may, when necessary, delegate representatives to attend the Committee's meetings and vote on their behalf on the decisions taken during the Committee's meeting. The Committee shall have a technical secretariat, the constitution and rules thereof shall be issued through a Prime Ministerial Decree."

[10] Egypt joined the ICSID Convention by virtue of Egypt Presidential Decree No.90/1971.

[11] *Southern Pacific Properties (Middle East) v Arab Republic of Egypt* ICSID Case No.ARB/84/3.

[12] *Champion Holding Co v Arab Republic of Egypt* ICSID Case No.ARB/16/2.

non-ICSID investment arbitration proceedings have been commenced against Egypt, with a clear upsurge between 2011 and 2016.

In this regard, it is worth noting that Egypt is a party to more than 105 BITs/IIAs,[13] which offer investors diverse options for bringing investment arbitration proceedings against the state, whether under the auspices of the ICSID,[14] the International Chamber of Commerce (ICC),[15] the Cairo Regional Centre for International Commercial Arbitration (CRCICA),[16] the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules[17] and/or the Stockholm Chamber of Commerce (SCC) rules.[18]

In addition to the ICSID Convention, Egypt is a party to other MITs, namely: the Unified Treaty on the Investment of Arab Capital in Arab Countries (1980),[19] the Agadir Agreement concluded with Jordan, Morocco and Tunisia,[20] the Organization of Islamic Countries,[21] the Common Market for Eastern and Southern Africa (COMESA)[22] and the Greater Arab Free Trade Area (GAFTA).[23] Moreover, in June 2001, Egypt signed an Association Agreement with the EU which entered into force on 1 June 2004, whereby Egyptian products

[13] The concluded BITs include: BIT between Egypt and France 1974; BIT between Argentina and Egypt 1992; BIT between Egypt and Germany 2005; BIT between Egypt and UK 1975; BIT between Egypt and USA 1986; BIT between Egypt and Spain 1992; BIT between Egypt and Qatar 1999; BIT between Egypt and Greece 1993; BIT between Bahrain and Egypt 1997; BIT between Cyprus and Egypt 1998, BIT between Egypt and UAE 1997, BIT between Egypt and Lebanon 16 March 1996, BIT between Egypt and Latvia 1997, BIT between Egypt and Japan 1977, BIT between Egypt and India 1997, BIT between Egypt and Albania 1993, BIT between Algeria and Egypt 1997, BIT between Australia and Egypt 2001, BIT between Canada and Egypt 1996, BIT between Croatia and Egypt 1997, BIT between Austria and Egypt 2001, BIT between Czech Republic and Egypt 1993, BIT between Denmark and Egypt 1999, BIT between Egypt and Hungary 1995, BIT between Egypt and Finland 2004, BIT between Egypt and Italy 1989, BIT between Egypt and Jordan 1996, BIT between Egypt and Mali 1998, BIT between Egypt and Malta 1999, BIT between Egypt and Morocco 1997, BIT between Egypt and Netherlands 1996, BIT between Egypt and Portugal 1999, BIT between Egypt and Saudi Arabia 1990, BIT between Egypt and Sweden 1978, BIT between Egypt and Tunisia 1989, BIT between Egypt and Yemen 1996, BIT between China and Egypt 1994, BIT between Egypt and Kuwait 2001, BIT between Egypt and Armenia 1996, BIT between Egypt and Belarus 1997, BIT between Egypt and BLEU (Belgium-Luxembourg Economic Union) 1999, BIT between Egypt and Bosnia and Herzegovina 1998, BIT between Egypt and Bulgaria 1998, BIT between Egypt and Comoros 1994, BIT between Egypt and Ethiopia 2006, BIT between Egypt and Iceland 8 January 2008, BIT between Egypt and Kazakhstan 1993, BIT between Egypt and Democratic People's Republic of Korea (North Korea) 1999, BIT between Egypt and Republic of Korea (South Korea) 1996, BIT between Egypt and Libya 1990, BIT between Egypt and Malawi 1997, BIT between Egypt and Malaysia 1997, BIT between Egypt and Mongolia 2004, BIT between Egypt and Palestine 1998, BIT between Egypt and Oman 1998, BIT between Egypt and Poland 1995, BIT between Egypt and Romania 1994, BIT between Egypt and Russian Federation 1997, BIT between Egypt and Serbia 2005, BIT between Egypt and Singapore 1997, BIT between Egypt and Slovakia 1997, BIT between Egypt and Slovenia 1998, BIT between Egypt and Somalia 1982, BIT between Egypt and Sri Lanka 1996, BIT between Egypt and Sudan 2001, BIT between Egypt and Switzerland 2010, BIT between Egypt and Syria 1997, BIT between Egypt and Thailand 2000, BIT between Egypt and Turkey 1996, BIT between Egypt and Turkmenistan 1995, BIT between Egypt and Ukraine 1992, BIT between Egypt and Uzbekistan 1992, and BIT between Egypt and Vietnam 1997.

[14] See for example, BIT between Egypt and Poland 1995 art.8, BIT between Egypt and Turkey 1996 art.7, BIT between Egypt and Denmark 1999 art.9, BIT between Egypt and Austria 2001 art.9, BIT between Egypt and Australia 2001 art.13, BIT between Egypt and Germany 2005 art.9 and BIT between Egypt and Switzerland 2010 art.12.

[15] See for example, BIT between Egypt and Spain 1992 art.11, BIT between Egypt and Poland 1995 art.8, BIT between Egypt and Turkey 1996 art.7 and BIT between Egypt and Denmark 1999 art.9.

[16] See for example, BIT between Egypt and Turkey 1996 art.7, BIT between Egypt and Denmark 1999 art.9, BIT between Egypt and Austria 2001 art.9, BIT between Egypt and Australia 2001 art.13 and BIT between Egypt and Switzerland 2010 art.12.

[17] See for example, BIT between Egypt and Ukraine 1992 art.9, BIT between Egypt and Poland 1995 art.8, BIT between Egypt and Armenia 1996 art.8, BIT between Egypt and Turkey 1996 art.7, BIT between Egypt and Denmark 1999 art.9, BIT between Egypt and Austria 2001 art.9, BIT between Egypt and Finland 2004 art.9 and BIT between Egypt and Switzerland 2010 art.12.

[18] See for example, BIT between Egypt and Spain 1992 art.11, BIT between Egypt and Poland 1995 art.8, BIT between Egypt and Sri Lanka 1996 art.8 and BIT between Egypt and Cyprus 1998 art.9.

[19] Egypt joined the Unified Treaty by virtue of Egypt Presidential Decree No.51/1992.

[20] See the Agreement for the Establishment of a Free Trade Zone between the Arabic Mediterranean Nations 2004, *http://www.tas.gov.eg/NR/rdonlyres/613C11B1-69F3-43C7-A202-93567FC75C60/2941/AgreementEnglishtransPMc.pdf* [Accessed 15 December 2016).

[21] See the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference 1981, *http://investmentpolicyhub.unctad.org/Download/TreatyFile/2399* [Accessed 15 December 2016].

[22] Egypt Joined the COMESA in June 1998.

[23] See the Agreement on Facilitating and Developing Inter-Arab Trade 1981, *http://www.tas.gov.eg/NR/rdonlyres/164E81D4-27BB-4D63-9DA7-33C8A315ACFF/1074/Gafta2.pdf* [Accessed 15 December 2016).

enjoy an immediate duty free access into EU markets and EU products will benefit from a phased and gradual duty free access into Egypt over a 12-year period.[24] In 2010, Egypt and the EU completed an agricultural annex to their Free Trade Agreement (FTA),[25] liberalising trade in over 90 per cent of agricultural goods. Egypt also has an FTA with Turkey, in force since March 2007,[26] and an FTA with the MERCOSUR bloc of Latin American nations, ratified by Egypt in January 2013, but not yet in force.[27]

Egypt also acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), which is undoubtedly material to the enforcement of non-ICSID awards.[28]

From a detailed review of the BITs concluded by Egypt, it is evident that they are not uniform, in particular that they were concluded over a period of more than four decades. For example, some require the exhaustion of an amicable settlement period,[29] others require the "exhaustion of local remedies" before opting for arbitration.[30] Whilst some BITs offer investors the right to opt for settlement of disputes before several fora, with the choice of one not precluding recourse to others,[31] other BITs include a "fork-in-the-road" provision preventing investors from having recourse to other dispute resolution schemes.[32]

Amongst the most recent BITs concluded by Egypt is the Egypt-Mauritius BIT 2014.[33] The dispute settlement mechanism provided for in art.10 of this BIT adds a step before resorting to arbitration; this involves submitting to the domestic administrative procedures of the host state. Thereafter, the investor shall be entitled to initiate judicial action before a competent court of the host state and finally the parties may agree, by written consent, to submit their dispute to arbitration under the auspices of the CRCICA, the LCIA–MIAC, an ad hoc tribunal established under the UNCITRAL Rules, ICSID or any other national or international arbitration institution.[34]

[24] See the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part 2001, *http://www.tas.gov.eg/NR/rdonlyres/BA47607A-E4E3-4B9E-81EE-64D89BBDEDFC/0/Agreement_Eng.pdf* [Accessed 15 December 2016].

[25] See the Agreement on Agricultural, Processed Agricultural and Fisheries Products, in the form of an exchange of letters between the European Community and the Arab Republic of Egypt replacing Protocols 1 and 2 and their Annexes which amends the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2010.106.01.0041.01.ENG* [Accessed 6 December 2016].

[26] See the Agreement Establishing a Free Trade Area between the Republic of Turkey and the Arab Republic of Egypt 2005, *http://www.tas.gov.eg/English/Trade+Agreements/Countries+and+Regions/Europe/Turkey.htm* [Accessed 15 December 2016].

[27] See the Preferential Free Trade Agreement between the Arab Republic of Egypt and the Mercosur bloc, signed on 2 August 2010 and ratified by Egypt in January 2013, *http://www.mfa.gov.eg/english/ministry/news/pages/NewsDetails.aspx?Source=6781921f-3993-444a-859e-ee26ce851de8&newsID=049f811d-81de-4606-909e-aefa358d79e9* [Accessed 15 December 2016].

[28] Egypt joined the New York Convention by virtue of Egypt Presidential Decree No.171/1959. The Convention entered into force in Egypt on 7 June 1959. Egypt has made no reciprocal or commercial reservations on the application of the New York Convention, *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html* [Accessed 15 December 2016].

[29] See the BIT between Egypt and Poland 1995 art.8(2), the BIT between Egypt and Germany 2005 art.9(2), the BIT between Egypt and Oman 1998 art.10, the BIT between Egypt and Singapore 1997 art.13 and the BIT between Egypt and Portugal 1999 art.9.

[30] See the BIT between Egypt and UK 1975 art.8(1) and the BIT between Egypt and UAE 1997 art.10.

[31] See the BIT between Egypt and Turkey 1996 art.7, the BIT between Denmark and Egypt 1999 art.9 and the BIT between Egypt and Switzerland 2010 art.12.

[32] See the BIT between Egypt and US 1992 art.7 and the BIT between Egypt and Jordan 1996 art.6.

[33] See the Agreement between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments 2014.

[34] See the BIT between Egypt and Mauritius 2014 art.10 which provides: "1. Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement (hereinafter referred to as 'investment dispute') shall, without prejudice to Article 9 of this Agreement (Disputes between the Contracting Parties), to the extent possible, be settled through consultation, negotiation, mediation or conciliation after written notification of the alleged breach has been made. 2. Before submitting an investment dispute for settlement in accordance with paragraph (3), the investor may, in addition to the procedures in paragraph (1), submit the dispute to the domestic administrative procedures of the Contracting Party in whose territory the investment has been made in parallel or in conjunction with the procedures of settlement referred to in paragraph (1). 3. If the dispute cannot be settled through the procedures in paragraphs (1) and (2) within twelve months of the written notification, either party to the dispute shall be entitled to initiate judicial

In light of the above, it is clear that the Egyptian state is being exceedingly cautious as to the dispute settlement fora offered to investors. In fact, it is quite obvious that the dispute settlement clause of the Egypt-Mauritius BIT was cautiously drafted taking into consideration the sudden increase in the number of investment arbitration proceedings brought against Egypt post-2011.

Egyptian investment laws

Given the dynamic and constant development of the Egyptian legal system and more specifically the evolution of the Egyptian investments laws, it is necessary to track and scrutinise the dispute resolution mechanisms set out in these laws.

The first Egyptian investment law of modern times was Egypt Law No.65 of 1971 which was followed by Egypt Law No.43 of 1974 on the Investment of Arab and Foreign Capital and Free Zones, which was repealed and replaced by Egypt Law No.230 of 1989 and the Egypt Investment Guarantees and Incentives Law No.8 of 1997; the latter repealed and replaced Egypt Law No.230 of 1989. In relation to the possibility of commencing investment arbitration, Egypt Presidential Decree No.17/2015 amended the relevant provision under Egypt Law No.8 of 1997.

For the purpose of examining the development of the dispute settlement mechanisms offered to investors under the above-mentioned investment laws, it may be useful to set out each pertinent provision and to provide a succinct analysis thereafter.

At the outset, Egypt Law No.65 of 1971 art.(2–3) stated:

> "And in the event a *dispute arises with regard to the quantification of the amount of compensation, the investor shall have the right [or shall be entitled] to request referring the dispute to an arbitral tribunal* composed of a member on behalf of the investor, a member on behalf of the Investment Authority and a third member presiding over the tribunal, on whose appointment both members referred to shall agree, from amongst the counselors of supreme judicial bodies in the Arab Republic of Egypt.
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> *The decision of the arbitral tribunal shall be rendered by the majority of votes*." [Emphasis added]

This was amended by virtue of Egypt Law No.43 of 1974 art.(8) which stated:

> "Investment disputes concerning the implementation of the provisions of this Law *shall be settled according to the manner agreed upon with the investor or within the framework of treaties in force concluded between the Arab Republic of Egypt and the investor's State or within the framework of the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, which the Arab Republic of Egypt has joined by virtue of Law No. 90 of 1971 where applicable.
>
> It may be agreed that disputes shall be settled by arbitration. The arbitral tribunal shall be composed by a member on behalf of each party to the dispute and a third presiding member who shall be appointed by the other two members. If both members do not agree upon the appointment of the third member within thirty days from the appointment of the last one, the third presiding member shall be appointed upon the request of either party by a decision of the Supreme Council of Judicial bodies from

action before the competent court of the Contracting Party in whose territory the investment was made. 4. If the investment dispute cannot be settled through the procedures of settlement referred to in paragraphs (1) and (2), within twelve months from the date of the written notification or neither party is interested in submitting the dispute to the courts of the Contracting Party in whose territory the investment has been made under paragraph (3), the Parties to the dispute may agree, through written consent, to submit it, either to: [the] Cairo Regional Centre for International Commercial Arbitration; the LCIA–MIAC Arbitration Centre in Mauritius; an ad-hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965; or any other national or international arbitration institution or under any other arbitration rules."

amongst the counselors of judicial bodies in the Arab Republic of Egypt." [Emphasis added]

Subsequently, Egypt Law No.230 of 1989 art.55 stated:

> *"Without prejudice to the right to resort to Egyptian courts, investment disputes relating to the implementation of the provisions of this Law may be settled in the manner agreed upon with the investor. The relevant parties may also agree to settle these disputes by virtue of treaties in force between the Arab Republic of Egypt and the investor's State or under the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, which the Arab Republic of Egypt has joined by virtue of Law No. 90 of 1971, in accordance with the terms, conditions and cases where applicable. *The parties may also agree to settle the disputes referred to arbitration before the Cairo Regional Center for International Commercial Arbitration*." [Emphasis added]

Thereafter, Egypt Law No.8 of 1997 art.7 stated:

> "Investment disputes relating to the implementation of the provisions of this Law *may be settled in the manner agreed upon with the investor. The parties may also agree to settle these disputes under treaties in force between the Arab Republic of Egypt and the investor's State or under the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, which the Arab Republic of Egypt has joined by virtue of Law No. 90 of 1971, in accordance with the terms, conditions and in cases where applicable. *Disputes may also be settled in accordance with the provisions of the Arbitration Law in Civil and Commercial Matters issued by Law no. 27 of 1994. The parties may also agree to settle the disputes referred to by arbitration before the Cairo Regional Center for International Commercial Arbitration*." [Emphasis added]

Finally, most recently, Egypt Presidential Decree No.17/2015 art.4 amended Egypt Law No.8 of 1997 art.7 to state:

> "Investment disputes relating to the implementation of the provisions of this Law *may be settled in the manner agreed upon with the investor or in accordance with the provisions of the Arbitration Law on Civil and Commercial matters referred to*." [Emphasis added]

Having set out the relevant provisions, the following comments merit a mention.

First, regarding investment dispute settlement by virtue of arbitration under Egypt Law No.65 of 1971, it appears that ad hoc arbitration was the only available option to settle certain disputes pertaining to the quantification of compensation due and payable to the investor, with no reference to a specific treaty. On a procedural level, each party had to appoint an arbitrator and the presiding arbitrator had to be appointed from amongst the judges of the supreme judicial bodies in Egypt, namely the Supreme Constitutional Court, the Supreme Administrative Court or the Court of Cassation.

Secondly, Egypt Law No.43 of 1974 art.8, as opposed to Egypt Law No.65 of 1971 art.2–3, broadened the scope of disputes arising out of an investment, by including all disputes relating to the implementation of the provisions of the investment law. Moreover, this law has given the investor several options with regard to the choice of the dispute settlement mechanism of any disputes, namely:

- the agreed dispute settlement mechanism under the contract or agreement concluded between the investor and the state;
- the dispute settlement scheme(s) enshrined in the BIT concluded between Egypt and the investor's state;

- the ICSID Convention; or
- ad hoc arbitration (the arbitral tribunal shall be composed of three arbitrators).

Under Egypt Law No.43 of 1974, it is clear that there had been an evolution in favour of granting the investor several options to choose from for the settlement of any dispute.

Thirdly, Egypt Law No.230 of 1989 art.55 introduced minor amendments. This provision expressly maintained the right to resort to state courts as an option in addition to arbitration. The investor was also granted several arbitration options including the right to invoke:

- the dispute settlement mechanism agreed between the investor and the state;
- the pertinent BIT;
- the ICSID; and
- the newly introduced option of agreeing on resorting to the Cairo Regional Center for International Commercial Arbitration.

However, this is not automatic, as the parties' agreement thereto is a requisite requirement.

Fourthly, Egypt Law No.8 of 1997 art.7 reiterated the wording of Egypt Law No.230 of 1989 art.55 with minor amendments. Article 7 deleted the futile reference to state courts and added the possibility for the parties to settle their disputes in accordance with Arbitration Law No.27 of 1994 (i.e. ad hoc arbitration). It also became clear that recourse to ICSID would not be automatic under the law at the investor's option, but would have to be agreed (i.e. either under the investment contract or available under an applicable BIT). In other words, an investor would not be able to commence ICSID proceedings solely on the basis of art.7, which no longer amounted to a standing unilateral offer by the state. This provision simply contemplated the possibility of resorting to ICSID subject to any existing form of consent.

Finally, Egypt Presidential Decree No.17 of 2015 art.4 amended Egypt Law No.8 of 1997 art.7, and expressly provided for two options, namely:

- the agreed mechanism under the investment contract/agreement between the investor and the state; and
- ad hoc arbitration under Egypt Law No.27 of 1994.

Accordingly, as previously mentioned, this present version of the Investment Law omitted any express reference to ICSID or any other institution in an unsupported expectation that such approach would restrict the investors' options and so limit the number of arbitration cases filed against Egypt. However, this provision achieves very little, if anything at all. This is because Egypt remains a signatory to a significant number of BITs that allow recourse to ICSID and/or other institutional proceedings, under the applicable terms of the pertinent BIT.

In any event, it is also worth noting that the 2015 Amendment, naturally aiming at encouraging and promoting investments, did not vary the basic fundamental rights and protections afforded to investors. These include:

- immunity from nationalisation, expropriation, requisition, or confiscation;
- immunity from administrative attachment or the freezing of assets;
- exemption from certain provisions of the Companies Law (including the mandatory distribution of 10 per cent of generated profits to employees); and
- foreign investors can invest in Egypt without any restrictions after obtaining security clearance from the competent authorities.

On a related note, the 2015 Amendment introduced some very useful and important non-tax incentives and protections, including the following.

- The possible allocation of government-owned land free of charge or at a discounted price.

- Shielding company executives from criminal prosecution for legal violations committed by the company (i.e. senior executives may only be liable if it is proved that they had knowledge of the crime and intended to commit it for their own benefit or the benefit of others).
- The selection from amongst investors qualified to obtain a licence for a project shall be on the basis of free competition and transparency and the Investment Law shall prevail over the Egypt Bids and Tenders Law No.89/1998 (i.e. the Public Procurement Law).
- Investors may freely withdraw without restrictions. Upon receipt of any such requests for withdrawal or liquidation, the authorities shall notify the investor of its pending obligations within 120 business days; if there is no notification from the authorities within that period the investor shall be deemed to be released from any further liability.

As previously mentioned, the 2015 Amendment also introduced three state-sponsored initiatives to settle investment disputes.

1) The GAFI Complaints Committee, which is competent to consider challenges against administrative decisions issued by GAFI in connection with the implementation of the Investment Law and its executive regulations. The Committee will issue its decision within 60 days from the date of the submission of the challenge. If there is no reply within the 60 days, this may be considered a refusal of the challenge and the decision of the Committee will be final and binding on GAFI, but not binding on the investor.
2) The Committee for Resolution of Investment Disputes, which is created at the Cabinet of Ministers to consider requests, complaints or disputes that may arise between an investor and a government body in connection with the implementation of the Investment Law and the Committee shall issue its reasoned decision within 30 days from finalising the hearings and, if approved by the Cabinet of Ministers, the decision shall be binding on the government only while the investor retains its right to resort to state courts or arbitral tribunals to pursue its claim(s).
3) The Ministerial Committee for Investment Contracts Disputes, which has broad powers to settle disputes pertaining to investment contracts amicably at any stage, and if a settlement is reached between the parties, it will be effective and binding only when approved by the Cabinet of Ministers.

4. Standards of Protection Under the Egyptian Model BIT

It is interesting to examine Egypt's draft Model BIT of December 2013 to gain a better understanding of investment trends in the country. The Model BIT accords protection to: investments by investors of one Contracting Party, made in the territory of the other Contracting Party in accordance with its laws and regulations, and specifically registered pursuant to this Agreement with the relevant authorities of the Contracting Party in which the investment is made.[35]

It appears that this provision accords protection to investments that comply with the laws and regulations of the host state, and thereby limits the scope of protection to lawfully registered investments. It is worth noting that the Model BIT excludes the following activities from the scope of its protection:

- issues of taxation:
- funds tainted with corruption;

[35] See Egypt Model BIT art.2.

- state subsidies, loans, grants and/or insurance;
- public debt restructuring; and
- activities categorised as illicit under domestic law(s).[36]

The Model BIT grants investors protection against expropriation and provides for the fair and equitable treatment of investments and investors, the promotion and protection of investments and the free transfer of funds. However, these protections and guarantees include broadly drafted exclusions or exceptions that would affect their scope.

For example, the Model BIT art.13 gives the state the right to adopt measures to protect national security, public order and morals and so on.[37] Such references—although qualified as non-arbitrary, non-discriminatory and prohibited from being disguised restrictions—have some ambiguity that must be clarified and construed by arbitral tribunals if the Model BIT is formally adopted and disputes arise in relation to these exclusions of protection.

On another note, in relation to the protection of investment standards, the Model BIT adopts a national rather than an international standard,[38] thus confirming that the standard may not be perceived as "one size fits all". Rather, it is subject to specificities of each state according to the stage of development that it has reached. The provision adds an additional layer of uncertainty, as arbitral tribunals may have considerable discretion in assessing and discerning the applicable standard of protection on a case-by-case basis.

Likewise, with respect to the most-favoured nation (MFN) clause, the Model BIT provides for exceptions in relation to many sectors.[39] These sectoral exceptions would render the scope of the MFN clause quite narrow.

Finally, the Model BIT excludes umbrella clauses, as it explicitly excludes contract claims from its protection and coverage. Such claims remain governed by the dispute resolution scheme agreed under the relevant investment agreement.[40]

However, there are significant challenges to investments such as excessive bureaucracy, delays in transfers and lack of protection of intellectual property rights. Investors report that there can be delays of up to several months for legitimate transfers of foreign exchange to be executed and labour rules prevent companies from hiring more than 10 per cent of non-Egyptians (25 per cent in Free Zones), and foreigners are not allowed to operate sole proprietorships or simple partnerships.[41]

Another important challenge is corruption encountered by companies in the public sector, where corruption and bribery are reported in dealing with public services, customs, public

[36] See the Egypt Model BIT art.2(3), which provides: "This Agreement shall not apply to:Any matters related to taxation; Procurement by a Contracting Party or a State enterprise of that Contracting Party; Subsidies or grants provided by a Contracting Party or a State enterprise of that Contracting Party, including government-supported loans, guarantees and insurance; Operations of public debt restructuring taken by one of the [C]ontracting [P]arties; Investments made with capital or assets of illegal origin or resulting out of administrative corruption; Any other activities prohibited by the national laws of the Contracting Party in whose territories the investment is made."

[37] See the Egypt Model BIT art.13(1), which provides: "Subject to the requirement that such measures are not applied in an arbitrary or discriminatory manner or constitute a disguised restriction on investors and investments, nothing in this Agreement shall be construed to prevent a Contracting party from adopting or enforcing measures it considers necessary: To protect national security; To protect public order and morals; For the conservation of human life and health and protecting living or non-living exhaustible natural resources; To preserve cultural and linguistic diversity, and national treasures of artistic, historic and archeological value; To ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement."

[38] See the Egypt Model BIT art.4(5), which provides: "For greater certainty, it is understood that the Contracting Parties have different forms of administrative, legislative and judicial systems and that Contracting Parties at different levels of development may not achieve the same standards at the same time. Paragraph (1) of this Article do [sic] not establish a single international standard in this context."

[39] The sectors concerned are land and real estate, construction, maritime transport, air transport, courier services, commercial agents, import activities, journalism, employment intermediation (brokerage), engineering, legal services and auditing and accounting services.

[40] See the Egypt Model BIT art.16(9), which provides: "In the case where the investor and the Contracting Party in whose territory the investment is made have signed a State contract, the procedure relating to the settlement of disputes foreseen in that contract shall apply to the settlement of disputes arising from the breach or violation of that contract."

[41] See US Department of State, *2015 Investment Climate Statement* (May 2015), *http://www.state.gov/documents/organization/241756.pdf* [Accessed 15 December 2016].

utilities, construction permits and procurement, as well as in the private sector. Egyptian law naturally provides for criminal penalties for corruption. The state launched a very welcome anti-corruption initiative in 2014 involving a four-year national anti-corruption strategy empowering the new National Coordinating Committee for Combating Corruption to develop a holistic governmental strategy for addressing corruption. The long-term effectiveness of this strategy remains to be seen and assessed.[42]

5. Enforcement of Investment Arbitral Awards

It is worth noting that awards rendered with regard to investment disputes may be ICSID awards or non-ICSID awards. Therefore, it is necessary to distinguish between such awards, whether rendered in Egypt or abroad.

ICSID arbitral awards

Egypt understandably did not enact specific provisions addressing the recognition and enforcement of ICSID Convention awards, as the ICSID Convention suffices. Since Egypt ratified the ICSID Convention on 3 May 1972, it became part of the laws of Egypt, and so awards rendered under the auspices of the ICSID are governed by the convention and national law applies only to the extent permitted under the convention.

In any event, the recognition and enforcement of ICSID awards in Egypt remain, primarily, a theoretical matter, as practice has shown that:

- certain awards were rendered in favour of the Egyptian state;
- certain disputes were settled before a final award was rendered; or
- certain awards were rendered in favour of investors and either Egypt enforced them voluntarily or post-award settlements were reached between Egypt and the investors.

From a purely legal standpoint, should an investor seek enforcement of an ICSID award in Egypt, the ICSID Convention arts 53–55 would apply, and not the provisions of the Arbitration Law, thus giving primacy to an international convention.[43]

Article 53 of the ICSID Convention requires each party to ICSID arbitration to abide by the award and comply with its terms,[44] subject to remedies provided under arts 50–52.

Accordingly, the ICSID Convention imposes a treaty obligation on Egypt to comply with the award rendered. Should the state breach such obligation, this will qualify as a breach of the international law of treaties, which could in turn trigger the state's international responsibility. Moreover, the investor may resort to the diplomatic protection of its home state under the ICSID Convention art.27. There is also the possibility of the investor's state commencing proceedings against the host state in the International Court of Justice, by virtue of the ICSID Convention art.64.[45]

[42] See US Department of State, *2015 Investment Climate Statement*.

[43] See the Egypt Arbitration Law No.27 of 1994 art.1, which provides: "Without prejudice to international conventions in force in the Arab Republic of Egypt, the provisions of this Law shall govern any arbitration between public or private law persons irrespective of the legal relationship pertaining to the dispute, if such arbitration is conducted in Egypt, or if it is an international commercial arbitration conducted abroad which the parties thereto have agreed to subject to the provisions of this law."

[44] See the ICSID Convention art.53, which provides: "(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. (2) For the purposes of this Section, 'award' shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52."

[45] See the ICSID Convention art.64, which provides: "Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the states concerned agree to another method of settlement."

It is worth noting that the ICSID Convention art.54[46] requires the enforcing state to recognise the award as binding and to enforce the pecuniary obligations contained therein as if it were a final judgment of a court in that state. Thus, a domestic authority in Egypt before which recognition of an award is sought is restricted to determining the award's authenticity and has no discretion to review the award, even on public policy or international law grounds.

At the same time, the fact that art.54(1) of the convention affords ICSID awards the same status as final judgments of domestic courts implies that enforcement should be automatic with no possibility of treating ICSID awards as foreign awards or resorting to the New York Convention.

Accordingly, should an investor seek to enforce an award in Egypt, it must submit a certified copy of it to the designated authority, which is the Ministry of Justice, pursuant to art.54(2) of the ICSID Convention.[47] The Ministry has no power to review the award, but it must treat it as if it were a final judgment rendered by an Egyptian court. The Ministry's only power is to confirm the authenticity of the award.

With respect to the procedures for execution of ICSID awards in the unlikely situation of voluntary non-compliance, this would be subject to Egyptian law[48] under the ICSID Convention art.54(3).[49] Thus, compulsory execution of the enforceable ICSID awards is governed by the *lex loci executionis* (i.e. the law of the place where execution is sought), following the enforceability under the ICSID Convention art.54(2).

However, the ICSID Convention art.55[50] makes it clear that art.54 does not derogate from provisions governing sovereign immunity from execution of an award under the *lex loci executionis*. However, state immunity would apply in the same manner as it would apply to execution of a domestic court judgment.

Non-ICSID arbitral awards

In relation to other investment arbitration (i.e. non-ICSID) awards, a distinction may be drawn between investment arbitrations conducted in Egypt and those seated abroad and whose awards qualify as "foreign" under the New York Convention.

An investment arbitration conducted in Egypt would fall territorially within the scope of application of the Arbitration Law. Unless a relevant treaty includes specific provisions on enforcement, the resulting award will be governed by Egypt Arbitration Law No.27/1994 arts 55–58. The award may also be subject to annulment proceedings in accordance with the same Arbitration Law arts 52–54. This is provided for with an express legislative emphasis as reflected in the 2015 Amendment art.4 (i.e. Egypt Presidential Decree No.17/2015).

[46] See the ICSID Convention art.54(1), which provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."

[47] See the ICSID Convention art.54(2), which provides: "A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation."

[48] See the Code of Civil and Commercial Procedures (CCCP) art.280, which provides: "Compulsory enforcement may not be exercised unless with an enforcement deed to obtain an existing, specified and due right … Without prejudice to the exceptional cases stipulated under the law, enforcement may only take place by virtue of a copy of the enforcement deed having the following exequatur formula".

[49] See the ICSID Convention art.54(3), which provides: "Execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought."

[50] See the ICSID Convention art.55, which provides: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

An investor in whose favour an award has been rendered must wait for 90 days—the period within which an annulment action may be filed under the Arbitration Law—before seeking to enforce the award in Egypt.[51]

Following the elapse of the 90-day period or the filing of a nullity action (whichever is earlier), the investor may file a request to enforce the award before the Cairo Court of Appeal or such other court of appeal as may be designated by the parties.[52] Pursuant to the Egypt Arbitration Law No.27/1994 art.56, the following documents must be attached to the request for enforcement of the award in order to obtain the exequatur:

- the original award or a signed copy;
- a copy of the arbitration agreement;
- an Arabic translation of the award authenticated by the competent authority if the award is not issued in Arabic; and
- a copy of the *procès-verbal* evidencing the deposit of the award with the competent court in Egypt.

Regarding the deposit of an arbitral award in Egypt, this procedural step has been subject to supplementary regulation by virtue of three Ministerial Decrees. The first, Egypt Ministerial Decree No.8310/2008, was issued on 21 September 2008 and established a Technical Bureau for Arbitration. Pursuant to the Ministerial Decree, the application to deposit an arbitral award should be forwarded to the special Technical Bureau for Arbitration at the Ministry of Justice to determine whether such application is acceptable. The reasons for rejecting the deposit of the arbitral award were if the award:

- was a violation of public policy;
- related to any real estate title, its possession, delivery or the confirmation of its ownership or division;
- related to matters pertaining to the personal status or criminal issues;
- confirmed a settlement in any of the above matters; and
- was rendered with respect to matters that are non-arbitrable (i.e. not capable of a settlement).

This Ministerial Decree of 2008 was slightly amended by virtue of Egypt Ministerial Decree No.6570/2009 issued on 7 July 2009, confirming that the rejection of the deposit of the award relating to an estate is limited to rights in rem. In spite of this amendment the Ministerial Decree has been widely contested by the vast majority of Egyptian jurists and practitioners. The contestation of the decree was reflected in a very important judgment of the Cairo Court of Appeal,[53] which declined to apply the Ministerial Decree on the grounds that it was ultra vires and created unwarranted limitations.[54]

This development led to the third and latest amendment of the Ministerial Decree by virtue of Egypt Ministerial Decree No.9739/2011 issued on 5 October 2011, which neutralised the negative effects of the two previous decrees by stipulating that the role of the Technical Bureau on Arbitration of the Ministry of Justice is henceforth consultative. Thus, the bureau issues an opinion rather than a binding decision as to whether the deposit

[51] See the Egypt Arbitration Law No.27/1994 art.58(1), which provides: "The request to enforce an arbitral award shall not be permissible if the time limit to file a nullity action has not lapsed."

[52] See the Egypt Arbitration Law No.27/1994 art.56, which provides: "The President of the Court referred to in Article (9) of this Law or the member of said court who has been mandated for this purpose by delegation by the President shall be competent to grant exequatur". Article 9 provides: "arbitral matters which this Law refers to Egyptian Courts shall lie within the jurisdiction of the court originally competent to decide on the matters. In the case of international commercial arbitration, whether conducted in Egypt or abroad, the Cairo Court of Appeal shall be competent unless the parties agree on another court of appeal in Egypt."

[53] See Challenge No.10 of Judicial Year 127, Hearing Session of 6 September 2010, Cairo Court of Appeal.

[54] See M. Abdel Wahab, "Enforcement of Foreign Arbitral Awards in Egypt: Exequatur Requirements between Law and Regulation—Mitigating the Risks" (2011) March *IBA Arbitration Newsletter* 132.

of the arbitral award is warranted or not. The reasons for rejecting the deposit of an arbitral award are now limited to:

- contravention of Egyptian public policy;[55] and
- non-arbitrability of the matters subject to the award.

On a related note, the court may order the suspension of enforcement of an arbitral award if requested and insofar as such request is founded upon serious grounds. The court will also not grant an automatic exequatur; it must determine, pursuant to Egypt Arbitration Law art.58, that the award:

- does not contradict any prior judgment rendered by the Egyptian courts on the subject matter of the dispute;
- does not contravene any principle of Egyptian public policy; and
- has been duly and validly notified to the party against whom it was rendered.

On a different note, the enforcement of foreign awards (i.e. those rendered in proceedings seated abroad), is governed by the New York Convention.[56] This convention supersedes the provisions of the Arbitration Law by virtue of the Egypt Arbitration Law art.1, the Egypt Code of Civil and Commercial Procedures art.301[57] and the principles confirmed by the Court of Cassation.[58] Accordingly, a party seeking recognition and enforcement should submit to the Cairo Court of Appeal the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof, pursuant to the New York Convention art.IV.

In this regard, the enforcement procedures of investment awards in Egypt do not differ from those of commercial awards. That said, following an exequatur, a party seeking enforcement must serve notice on the party against which enforcement is sought, otherwise enforcement shall be null and void.[59] The rationale behind this requirement is to inform the debtor of the enforcement deed in order to afford it the opportunity to challenge it if warranted and justified.

By and large, whilst Egypt adheres to the principles of the New York Convention, actual enforcement over assets remains a daunting and time-consuming exercise, especially if in the context of investment arbitration awards, where sovereign immunity over certain assets militate against enforcement.

6. Conclusion

In light of the above analysis, it is clear that Egypt has a long-standing and well-established arbitration tradition and its policy of attempting to promote and encourage foreign investment remains at the core of Egypt's priorities. From time to time, however, certain prevailing

[55] On the topic of public policy and the utilisation thereof under the Egypt Arbitration Law No.27 of 1994 and more generally in the MENA region, see, S.A.F. Haridi and M. Abdel Wahab, "The Public Policy Exception under the New York Convention: The Unruly Arabian Horse in the MENA Region" (2015) 12(2) *Transnational Dispute Management*.

[56] See the New York Convention art.I(1), which provides: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought."

[57] See CCCP art.301, which provides: "The application of the rules set forth under the earlier Articles shall not prejudice the provisions of conventions concluded or to be concluded between the Republic and other States in this regard."

[58] See Challenge No.2660 of Judicial Year 59, Hearing Session of 27 March 1996, Egyptian Court of Cassation; Challenge No.10350 of Judicial Year 65, Hearing Session of 1 March 1999, Egyptian Court of Cassation; and Challenge No.966 of Judicial Year 73, Hearing Session of 10 January 2005, Egyptian Court of Cassation.

[59] See CCCP art.281, which provides: "Before undertaking enforcement, the deed for enforcement has to be notified to the debtor at its original domicile or otherwise enforcement shall be null and void." See also Challenges Nos 236 and 83 of Judicial Years 54 and 55, Hearing Session of 12 July 1995, Egyptian Court of Cassation.

challenges will discourage and deter investors from injecting foreign funds into the Egyptian economy.

These challenges include: political instability (which has now come to an end following the political stabilisation brought about by the adoption of the new Constitution and the subsequent presidential and parliamentary elections in 2014), bureaucracy, incompetence and corruption. However, the Egyptian state is aware of these challenges and is implementing new legislation and strategies to attract foreign investors and to promote Egypt's unfailing ability to serve as a business hub for world-leading businesses.

On the investment disputes front, even though many arbitration proceedings are filed against Egypt, publicly available information shows that the state has prevailed in a number of cases and managed to settle others despite awards that have been rendered in favour of investors.[60] From the 28 ICSID cases filed against Egypt, eight are currently pending.[61] With regard to the 20 other cases, eight have been discontinued and settled with the investor[62] and 12 cases concluded.

It is worth noting that the latest discontinued and settled case is *Bawabet Al Kuwait*,[63] which settled in October 2016. There have been eight ICSID cases concluded in favour of the state[64] and four ICSID cases concluded in favour of the investor.[65]

A glance through the ICSID awards involving Egypt reveals that the first ICSID case filed against Egypt was the infamous *SPP*, which pertained to the development of a tourism project at the Pyramids.[66] That case resulted in an award in the investor's favour whereby the investor was granted total compensation of US $27,661,000. The state commenced ICSID annulment proceedings, but the case was settled and the annulment proceedings were discontinued by agreement.

Subsequently, *Wena Hotels* was filed under the Egypt–UK BIT 1975 in relation to a claimed expropriation, where the Egyptian Hotels Company took possession of a hotel managed by the investor, following disagreement with the managing company Wena Hotels. The arbitral tribunal rendered its award in favour of the investor and held that even if the Egyptian Government did not protect the investor's investment its failure to do so gave rise to liability and its actions amounted to expropriation.[67] In *Middle East Cement*, filed under

[60] It is worth noting that there have been eight ICSID cases decided in favour of the state, eight ICSID cases discontinued and settled and four ICSID cases decided in favour of the investor, while the other cases remain pending. However, among non-ICSID arbitrations the number of pending cases may be higher, with no publicly available record of wins and losses.

[61] See *Champion Holding Co v Egypt* ICSID Case No.ARB/16/2, *Al Jazeera Media Network v Egypt* ICSID Case No.ARB/16/1, *ArcelorMittal v Egypt* ICSID Case No.ARB/15/47, *Unión Fenosa Gas v Egypt* ICSID Case No.ARB/14/4, *Utsch MOVERS International v Egypt* ICSID Case No.ARB/13/37, *Cementos La Union v Egypt* ICSID Case No.ARB/13/29, *Veolia Propreté v Egypt* ICSID Case No.ARB/12/15 and *Ampal-American Israel Corporation v Egypt* ICSID Case No.ARB/12/11.

[62] See *Bawabet Al Kuwait Holding Co v Egypt* ICSID Case No.ARB/11/6, *ASA International SpA v Egypt* ICSID Case No.ARB/13/23, *Ossama Al Sharif v Egypt* ICSID Case No.ARB/13/3, ICSID Case No.ARB/13/4 and ICSID Case No.ARB/13/5, *Indorma International Finance Ltd v Egypt* ICSID Case No.ARB/11/32, *Hussain Sajwani, Damac Park Avenue for Real Estate Development SAE and Damac Gamasha Bay for Development SAE v Egypt* ICSID Case No.ARB/11/16 and *Manufacturers Hanover Trust Co v Egypt* ICSID Case No.ARB/89/1.

[63] See *Bawabet Al Kuwait Holding Co v Egypt* ICSID Case No.ARB/11/6.

[64] See *National Gas SAE v Egypt* ICSID Case No.ARB/11/7, *H&H Enterprises Investments, Inc v Egypt* ICSID Case No.ARB/09/15, *Malicorp Ltd v Egypt* ICSID Case No.ARB/08/18, *Helnan International Hotels v Egypt* ICSID Case No.ARB/05/19, *Jan de Nul NV and Dredging International NV v Egypt* ICSID Case No.ARB/04/13, *Joy Mining Machinery Ltd v Egypt* ICSID Case No.ARB/03/11, *Ahmonseto, Inc v Egypt* ICSID Case No.ARB/02/15 and *Champion Trading Co and Ameritrade International, Inc v Egypt* ICSID Case No.ARB/02/9.

[65] See *Waguih Elie George Siag and Clorinda Vecchi v Egypt* ICSID Case No.ARB/05/15, *Middle East Cement Shipping and Handling Co SA v Egypt* ICSID Case No.ARB/99/6, *Wena Hotels Ltd v Egypt* ICSID Case No.ARB/98/4 and *Southern Pacific Properties (Middle East) Ltd v Egypt* ICSID Case No.ARB/84/3.

[66] See *Southern Pacific Properties (Middle East) Ltd v Egypt* ICSID Case No.ARB/84/3.

[67] See *Wena Hotels Ltd v Egypt* ICSID Case No.ARB/98/4, Arbitral Award of 8 December 2000 at [131] which states: "In sum, the Tribunal concludes that Egypt breached its obligations under Article 2(2) of the IPPA by failing to accord Wena's investments in Egypt 'fair and equitable treatment' and 'full protection and security'. Even if the Egyptian Government did not authorize or participate in the attacks, its failure to prevent the seizures and subsequent failure to protect Wena's investments give rise to liability. The Tribunal also finds that Egypt's actions amounted to an expropriation—transferring control of the hotels from Wena to EHC without 'prompt, adequate and effective compensation' in violation of Article 5 of the IPPA."

the Egypt-Greece BIT 1993, the arbitral tribunal rendered an award in favour of the investor, granting him total compensation of US $2,190,430.[68] However, settlement was reached in both cases.

In *Siag*, the investors' land on which their project was to have been built was claimed to have been confiscated,[69] and the award granted the investors compensation of US $74,550,794 (the largest compensation granted to individuals under the auspices of ICSID). However, following the filing of annulment proceedings by the state, the parties reached an amicable settlement as to the compensation payable.

With regard to the cases decided in favour of the state, there is *Ahmonseto*,[70] which pertained to a textile enterprise, and *Joy Mining Machinery*,[71] where the tribunal declined jurisdiction over the investor's claims. The state also prevailed in *Jan de Nul*,[72] which

[68] See *Middle East Cement Shipping and Handling Co SA v Egypt* ICSID Case No.ARB/99/6, Arbitral Award of 12 April 2002. Here, the investor alleged that the Egyptian state expropriated Middle East Cement's interests in a business concession located in Egypt and failed to ensure the re-exportation of its assets. The claimant's branch in Egypt had been granted the right to import, store, pack and dispatch bulk cement within Egypt to both the private and public sectors. The Egyptian Government subsequently issued a decree prohibiting the importing of all types of Portland cement by all sectors, with the exception of imports under Egypt's Border Agreement and those covered by existing contracts with the Egyptian Cement Office, thus prejudicing the investor's business. Moreover, for a significant period, the Government withheld its approval to re-export the investor's remaining assets, in violation of Egypt's investment law.

[69] See *Waguih Elie George Siag and Clorinda Vecchi v Egypt* ICSID Case No.ARB/05/15, Arbitral Award of 1 June 2009 at [465] which states: "The Tribunal finds that the evidence clearly establishes that Egypt has unlawfully expropriated Claimants' investment, in breach of Article 5(1)(ii) of the BIT; that Egypt failed to provide full protection to Claimants' investment, in breach of Article 4(1) of the BIT; that Egypt failed to ensure the fair and equitable treatment of Claimants' investment, in breach of Article 2(2) of the BIT; and that Egypt allowed Claimants' investment to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT."

[70] See *Ahmonseto, Inc v Egypt* ICSID Case No.ARB/02/15. The award was not published. The investor initiated annulment proceedings, which were subsequently discontinued due to failure to pay the requested advances.

[71] See *Joy Mining Machinery Ltd v Egypt* ICSID Case No.ARB/03/11. This case was filed with respect to an agreement entered into by the investor with the General Organization for Industrial and Mining Projects of Egypt for the provision of a longwall mining system and supporting equipment for a phosphate mining project. The investor, which alleged that Egypt had violated the BIT between Egypt and UK 1975, submitted that the agreement constituted an "investment" for the purpose of the BIT. Egypt relied on the forum selection clause under the agreement, the absence of any treaty breaches and that certain conditions required under arts 25 and 26 of the ICSID Convention had not been fulfilled. The tribunal declined jurisdiction and concluded that the definition of "investment" under the BIT did not apply to this case. In addition, the tribunal held that there was no treaty-based claim, that contract claims were not protected by virtue of an umbrella clause and that the investor was bound by the forum selection clause.

[72] See *Jan de Nul NV and Dredging International NV v Egypt* ICSID Case No.ARB/04/13, Arbitral Award of 6 November 2008. In that case, the claimants alleged that the state had induced them to make an investment in Egypt, negotiated in bad faith, fraudulently misrepresented facts of crucial relevance, failed to repair damage and breached its international obligations under BIT between BLEU and Egypt 1999, notably by failing to ensure fair and equitable treatment and to honour the full protection and security obligations thereunder. The claimants initiated court proceedings before the Egyptian courts which lasted for around 10 years, but were then dismissed. In the arbitration, the tribunal confirmed its jurisdiction but dismissed the investors' claims.

pertained to a dredging project, *Helnan Hotels*,[73] *Malicorp*,[74] *National Gas*,[75] whereby the arbitral tribunal concluded during the jurisdictional phase that the claimant was not under foreign control and thus did not qualify as a foreign investor, and finally *H&H Enterprises*,[76] where the arbitral tribunal dismissed the majority of claims brought by the claimant on the basis of a "fork-in-the-road" provision, while other claims based on denial of justice were rejected.

Other ICSID cases pending against Egypt involve the following: the construction of a steel plant,[77] the suspension of gas supplies by the Egyptian Government to a liquefied natural gas plant,[78] the granting by the state of an operating licence for a cement manufacturing plant,[79] the termination of a licence plate supply and manufacturing contract,[80] the prolonged interruption of natural gas supply and failure to deliver the agreed volume of gas,[81] and disagreements over the performance of a waste management services contract.[82]

Amongst the most recent ICSID cases filed against Egypt are: *Al Jazeera Media Network v Egypt*[83] and *Champion Holding Co v Egypt*.[84]

[73] See *Helnan International Hotels v Egypt* ICSID Case No.ARB/05/19, Arbitral Award of 3 July 2008. Helnan and the Egyptian Organization for Tourism and Hotels (EGOTH) entered into an agreement by virtue of which the former would manage the Shephard Hotel owned by the latter. Subsequently, an amendment to the agreement was introduced, by virtue of which EGOTH was entitled to sell the hotel without prejudice to Helnan's right to manage it or to surrender its management rights and receive compensation. Following the downgrading of the hotel, EGOTH initiated arbitration proceedings which resulted in termination of the agreement and Helnan was awarded compensation for settlement of debts in performing its management obligations. The investor commenced investment proceedings, alleging that the state undertook a series of actions, starting with the downgrading of the hotel, the arbitral proceedings in Cairo and Helnan's eviction from the hotel, so as to be able to sell it. The arbitral tribunal dismissed Helnan's claims due to its failure to prove any breach of the BIT, and the subsequent annulment proceedings filed by Helnan involved claims that were equally dismissed.

[74] See *Malicorp Ltd v Egypt* ICSID Case No.ARB/08/18, Arbitral Award of 7 February 2011. The dispute pertained to the construction of an airport in Ras Sudr. The contract was terminated by the state on the ground that the claimant failed to honour its contractual obligations. The claimant contended that the contract had been terminated due to national security reasons and that it was entitled to compensation under the principle of fair treatment and for expropriation of its investment. It filed arbitration proceedings before the CRCICA based on the arbitration clause in the contract. Subsequently, the investor filed an investment arbitration case before ICSID, alleging expropriation of its investment by means of wrongfully terminating the agreement. The arbitral tribunal held, however, that the reasons given by the state for rescinding the agreement were adequate and serious, and that termination was justified in fact and in law and could not be interpreted as an expropriatory measure. The claimant subsequently applied for annulment of the award, which was rejected in its entirety.

[75] See *National Gas SAE v Egypt* ICSID Case No.ARB/11/7, Arbitral Award of 3 April 2014. The investor alleged that the state violated its commercial rights under a concession agreement. Following bifurcation of the proceedings to address jurisdictional objections first, the tribunal concluded that the ICSID Convention art.25(2)(b) set forth a subjective test for discerning whether the entity was under the control of a State other than the state party to the dispute, and that this test had not been met in the case, as the investor was under the control of a UAE company controlled in turn by an Egyptian national. In this regard, the arbitral tribunal stated its Award at [44]: "The Tribunal decides that the factual evidence shows unequivocally that CTIP is a shell company of UAE nationality wholly owned by REGI, which is also a shell company of UAE nationality wholly owned by Mr Reda Ginena, an Egyptian national (who is also a Canadian national). Share ownership is not, of course, conclusive proof of control; but, in this case, it is clear that in fact the controller of both CTIP and REGI is Mr Ginena, with these two UAE companies acting as holding companies for Mr Ginena's 90% indirect interest in the Claimant, which have to be added to the 5% direct interest of Mr Ginena, which were not held through these companies. Indeed, the Claimant agrees that Mr Ginena controls CTIP and that CTIP controls the Claimant, as was confirmed at the hearing. Each of these two UAE companies exists independently from Mr Ginena in juridical theory, but not in practice. Indeed, REGI is clearly named after Mr Reda Ginena. In commercial reality, as a fact, Mr Ginena controls the Claimant."

[76] See *H&H Enterprises Investments, Inc v Egypt* ICSID Case No.ARB/09/15. The award was not published. The investor initiated annulment proceedings, which were subsequently discontinued.

[77] See *ArcelorMittal v Egypt* ICSID Case No.ARB/15/47, registered on 9 December 2015.

[78] See *Unión Fenosa Gas v Egypt* ICSID Case No.ARB/14/4, registered on 27 February 2014.

[79] See *Cementos La Union v Egypt* ICSID Case No.ARB/13/29, registered on 22 November 2013.

[80] See *Utsch MOVERS International v Egypt* ICSID Case No.ARB/13/37, registered on 24 December 2013.

[81] See *Ampal-American Israel Corporation v Egypt* ICSID Case No.ARB/12/11, registered on 23 May 2012.

[82] See *Veolia Proprieté v Egypt* ICSID Case No.ARB/12/15 registered on 25 June 2012.

[83] *Al Jazeera Media Network v Egypt* ICSID Case No.ARB/16/1.

[84] *Champion Holding Co v Egypt* ICSID Case No.ARB/16/2.

Champion Holding Co v Egypt was registered on 28 January 2016, and is quite interesting, as it was filed against Egypt by a US-based family of Egyptian descent, 13 years after an ICSID tribunal dismissed claims in an earlier case based on nationality grounds.[85]

Al Jazeera Media Network v Egypt was registered on 20 January 2016 (i.e. just a few days prior to the registration of the new *Champion Holding* case on 28 January 2016) and is the first case brought against Egypt in the broadcasting and journalism sector. The Qatari news broadcaster Al Jazeera has brought a US $150 million case against the Egyptian state on the basis of alleged measures against the broadcaster's operations in Egypt in 2013.

It is clear that in recent years Egypt has gained much attention in the field of investment disputes and now ranks high amongst respondent states in ICSID proceedings, and only time will tell whether the post-2011 trend of progressive investment proceedings will continue or not. Egypt has embarked on reforming its BITs and adopting a model BIT, and it remains to be seen whether the newly introduced investment reform policies and legislative amendments will incentivise economic development and investment in Egypt, restore the trust of credible foreign investors in investing in Egypt, in the hope that this will signify a new era in which fewer investment proceedings are commenced against the state and more investment opportunities are thereby offered.

It is submitted that all the attempted reform initiatives, the pre-award settlement of credible investment claims, and the investment-oriented policies adopted or to be adopted by the state will mark a glistening path to development that is well deserved and propitious for Egypt.

[85] In *Champion Trading and Ameritrade v Egypt* ICSID Case No.ARB/02/9, Champion Trading Company and other companies in which the Wahba brothers held shares filed a case against Egypt in 2002, alleging that the state had expropriated their investments through a series of measures, including a prohibition on the export of cotton. In the jurisdictional phase of the proceedings, the Egyptian state argued that the Wahba brothers were US-Egyptian dual nationals. The Egyptian State invoked the ICSID Convention art.25 which prohibits claims by dual nationals against one of their countries of nationality. However, the brothers denied being Egyptian nationals, arguing that they did not acquire Egyptian nationality. They further argued that the tribunal must consider their real and effective nationality. In this regard, the tribunal issued a decision on jurisdiction on 21 October 2003 and held that it did not have jurisdiction over the claims of the three individual claimants and stated that "the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality. … The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on article 25(2)(a) excludes them from invoking the Convention." However, in the same decision, the tribunal concluded that it had jurisdiction over the claims of the corporate claimants which were Champion Trading Company and Ameritrade International Inc. On 27 October 2006, the tribunal rendered its final award in favour of the Egyptian state and dismissed all of the claimants' claims.