

# Investment Treaty Arbitration

*Contributing editors*

Stephen Jagusch QC and Epaminontas Triantafylou



2018

GETTING THE  
DEAL THROUGH 

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# Egypt

**Girgis Abd El-Shahid and César R Ternieden**  
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## Background

### 1 What is the prevailing attitude towards foreign investment?

Egypt has obviously recognised the importance of foreign direct investments by engaging in extensive fiscal reforms in the 2016/2017 fiscal year. It has introduced a new Value Added Tax, issued a new Investment Law, further aggressively developed its Suez Canal Economic Zone as well as floating the Egyptian pound in the market and entering into an agreement with the International Monetary Fund (IMF), jump-starting the return of much-needed foreign investment into Egypt. It is also exploring avenues for developing a domestic automotive manufacturing industry.

### 2 What are the main sectors for foreign investment in the state?

The main sectors attracting foreign investment in Egypt are:

- agribusiness;
- engineering and electronics;
- healthcare;
- information and communications technology;
- logistics and transportation;
- infrastructure;
- mining;
- petrochemicals;
- pharmaceuticals;
- real estate and construction;
- renewable energy;
- retail;
- textiles; and
- tourism.

### 3 Is there a net inflow or outflow of foreign direct investment?

According to the World Investment Report, Egypt had an increase of 17.1 per cent to US\$ 8.1 billion in net inflow of foreign direct investments (FDI) in 2016, boosting net FDI inflow in North Africa. However, despite such growth, FDI inflows remain below the US\$11.4 billion reached in 2009.

Egypt continues to experience a decline of foreign tourism and limited growth in Suez Canal earnings.

### 4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

Egypt's accession to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, DC, 18 March 1965) (Washington Convention) was followed and supported by the inclusion of various arbitration mechanisms in the multiple bilateral investment treaties (BITs) Egypt has entered into, whether referring investor-state disputes to the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce's International Court of Arbitration (ICC), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), and other local or regional arbitration centres or ad hoc arbitrations.

Historically, the Investment Law previously made direct reference to ICSID arbitration, only to be later amended to require agreement by the parties. However, such shift does not affect the binding power

of the many BITs already concluded, by virtue of which the filing of a claim is considered an acceptance of the offer to arbitrate.

The main Egyptian legislation governing investment agreements with the Egyptian state or state-owned entities are:

- Law No. 27 of 1994 promulgating the Law on Arbitration in Civil and Commercial Matters (EAL or Arbitration Law). The Arbitration Law lays down general and default procedural rules that govern arbitration processes in Egypt;
- Law No. 72 of 2017, promulgating the Investment Law;
- Presidential Decree No. 171 of 1959, acceding to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, NY, 10 June 1958 (New York Convention);
- Law No. 90 of 1971, acceding to the Washington Convention; and
- more than 100 BITs concluded by the Egyptian state as detailed in question 5.

Law No. 72 of 2017 added a yet new process for settlement of investment disputes aimed at avoiding the court system altogether with the creation of the Egyptian Arbitration and Mediation Centre. The new Investment Law introduces a principle of preferential treatment that may be granted to foreign investors by virtue of a decree of the cabinet of ministers in certain cases, in addition to other investment incentives, inter alia residency and increased foreign-labour quotas for strategic projects.

With respect to arbitration agreements with state entities, article 1 of the Egyptian Arbitration Law states that any agreement to subject matters to arbitration with respect to administrative contracts requires the approval of the concerned Egyptian minister and that no delegation of such power is authorised. In Court of Cassation Nos. 13,313 and 13,460 of the Judicial Year 80, dated 12 May 2015, the Court recently affirmed a previous Cairo Court of Appeals decision, confirming that the concerned minister's approval to the arbitration clause in administrative contracts is a matter of public policy.

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## International legal obligations

### 5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

According to the United Nations Conference on Trade and Development, Egypt is among the top 10 signatories of BITs worldwide with more than 100 BITs: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan (signed, not in force), Bahrain, Belarus, the Belgium-Luxembourg Economic Union, Bosnia and Herzegovina, Botswana (signed, not in force), Bulgaria, Cameroon (signed, not in force), Canada, Central African Republic (signed, not in force), Chad (signed, not in force), Chile (signed, not in force), China, Comoros, Democratic Republic of the Congo (signed, not in force), Croatia, Cyprus, Czech Republic, Denmark, Djibouti (signed, not in force), Ethiopia, Finland, France, Gabon (signed, not in force), Georgia (signed, not in force), Germany, Ghana (signed, not in force), Greece, Guinea (signed, not in force), Hungary, Iceland, India, Indonesia, Iran (signed, not in force), Italy, Jamaica (signed, not in force), Japan, Jordan, Kazakhstan, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Latvia, Lebanon, Libya, Macedonia (signed, not in force), Malawi, Malaysia, Mali, Malta, Mauritius (signed, not in

force), Mongolia, Morocco, Mozambique (signed, not in force), the Netherlands, Niger (signed, not in force), Nigeria (signed, not in force), occupied Palestinian territories, Oman, Pakistan (signed, not in force), Poland, Portugal, Qatar, Romania, the Russian Federation, Saudi Arabia (signed, not in force), Senegal (signed, not in force), Serbia, Seychelles (signed, not in force), Singapore, Slovakia, Slovenia, Somalia, South Africa (signed, not in force), Spain, Sri Lanka, Sudan, Swaziland (signed, not in force), Sweden, Switzerland, the Syrian Arab Republic, Tanzania (signed, not in force), Thailand, Tunisia, Turkey, Turkmenistan, Uganda (signed, not in force), Ukraine, the United Arab Emirates, the United Kingdom, the United States, Uzbekistan, Vietnam, Yemen, Zambia (signed, not in force) and Zimbabwe (signed, not in force).

Agreements to which Egypt is party are as follows:

- the Unified Agreement for the Investment of Arab Capital in the Arab States;
- the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference; and
- the Agreement on Investment and Free Movement of Arab Capital among Arab Countries.

In addition, according to the General Authority for Investment and Free Zones in Egypt (GAFI), Egypt is a member of the following agreements:

- the African Union Treaty;
- the Egypt-EU Association Agreement;
- the Egypt-EFTA Free Trade Agreement (Iceland, Liechtenstein, Norway and Switzerland);
- the Agadir Free Trade Agreement;
- the Greater Arab Free Trade Agreement;
- the Agreement on Arab Economic Unity;
- the Pan Arab Free Trade Agreement;
- the Common Market for Eastern and Southern Africa;
- the Egypt-Turkey Free Trade Agreement; and
- the Framework Agreement Between the Arab Republic of Egypt and the MERCOSUR.

**6 If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.**

Not applicable.

**7 Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?**

No.

**8 Has the state unilaterally terminated any bilateral or multilateral investment treaties to which it is a party?**

No.

**9 Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?**

The Framework Agreement Between the Arab Republic of Egypt and the MERCOSUR entered into force as of 1 September 2017, seven years after its signature.

**10 Is the state party to the ICSID Convention?**

Egypt is a contracting party to the Washington Convention. Having signed it on 11 February 1972, it entered into force with respect to Egypt on 2 June 1972.

**11 Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?**

No.

**12 Does the state have an investment treaty programme?**

To the best of our knowledge, Egypt does not have an officially approved or promulgated coherent investment treaty programme.

## Regulation of inbound foreign investment

**13 Does the state have a foreign investment promotion programme?**

Over the years, the GAFI has sought to launch differing strategies for foreign investment promotion, however, there is no one single overarching long-term programme.

**14 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.**

With very few exceptions, apart from those related to hotel management services, direct agreements with the Egyptian government and operating companies holding interests in concessions under the oil and gas industry, the general rule is that any entity must establish a legal presence in Egypt (with which the vast majority comply), whether under the Investment Law or under Law No. 159 of 1981 promulgating the Egyptian Companies Law (Companies Law). Even in the exceptions listed above, such entities must register a branch in Egypt.

Once the foreign entity has established a legal presence in Egypt, it becomes subject to all applicable Egyptian laws, such as:

- the Investment Law, designed to encourage domestic and foreign investment in targeted economic sectors and to promote decentralisation of industry from the crowded geographical area of the Nile Valley;
- the Companies Law, which applies to domestic and foreign investment in sectors not covered by the Investment Law;
- Law No. 95 of 1992, promulgating the Egyptian Capital Market Law;
- Law No. 88 of 2003, which replaced a number of laws that regulated the Central Bank of Egypt and the banking sector, dealings in foreign exchange, accounts secrecy and private ownership of public sector banks;
- Law No. 83 of 2002, which allows the establishment of special economic zones for industrial, agricultural and service activities that are mainly export-oriented (firms operating in these zones would enjoy incentives and facilities designed to encourage increased local and foreign investment in export-producing sectors); and
- laws relating to tax, antitrust, labour, social security, intellectual property and so on.

**15 Identify the state agency that regulates and promotes inbound foreign investment.**

The GAFI, an agency under the Ministry of Investment, is responsible for regulating, enabling and sustaining Egypt's economic growth through investment promotion, facilitation, efficient business services and advocacy of investor-friendly policies.

**16 Identify the state agency that must be served with process in a dispute with a foreign investor.**

Usually, the Egyptian Ministries of International Affairs and Justice are those commonly served.

Further, the Egyptian State Lawsuits Authority is usually served as well, as it is the Egyptian agency in charge of representing the state with respect to an international arbitration, within which the Department of Foreign Disputes is tasked with addressing such matters.

## Investment treaty practice

**17 Does the state have a model BIT?**

Egypt has a model BIT published; however, its applicability varies as a result of the relative negotiation positions and mutual interests. See <http://investmentpolicyhub.unctad.org/IIA/CountryIris/62#iaInnerMenu>.

**18 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?**

No.

**19 What is the typical scope of coverage of investment treaties?**

Typically, an Egyptian BIT contains a definition of 'investment', the 'investor' and the 'territory'.



## Investment

Despite great variation present in the numerous Egyptian BITs, the Egyptian model BIT defines what might be perhaps a typical definition of an 'investment' as follows:

*The term 'investment' shall comprise every kind of asset invested by a natural or juridical person including the Government of a Contracting Party, in the territory of the other Contracting Party in accordance with the laws and regulations of that Party.*

*Without restricting the generality of the foregoing the term 'investment' shall include:*

- (a) movable and immovable property as well as any other property rights in rem such as mortgages, guarantees, pledges, usufruct and similar rights;*
- (b) shares, stocks and debentures, or other rights or interests in such companies;*
- (c) claims to money, or to any performance having economic value associated with an investment;*
- (d) intellectual property rights including copyrights, trademarks, patents, industrial designs, technical processes, know-how, trade, juridical rights and goodwill; and*
- (e) any rights conferred by laws or under contract and any licences and permits granted pursuant to law, including the concession to search for, extract, cultivate and exploit natural resources. A change in the form in which assets are invested does not affect their character as investments.*

Often, there are limitations of the scope of an investment based on the timing of investment.

For example, article 13 of the Egypt-Russian Federation BIT (1997) provides that '[t]he present Agreement shall be applied with respect to all capital investments, carried out by the investors of one of the Contracting Parties on the territory of the other Contracting Party, beginning in January 1, 1987.'

Another example is article 12 of the Cyprus-Egypt BIT (1998), which states that '[t]his Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party after its entry into force'. In other words, this excludes the possibility of an arbitral tribunal extending its jurisdiction to disputes that arise out of investments established before the agreement enters into force.

Finally, article 10(1) of the Egypt-Germany BIT (2005) provides that '[f]rom the date of its entry into force, this Agreement shall apply to all investments, also those made prior to its entry into force, by the investors of either Contracting State in the territory of the other Contracting State. However, it shall not apply to any dispute concerning an investment which arose or any other claim which was settled before its entry into force.'

## Investor

Despite the great variation that can be applied to this term, the Egyptian model BIT defines what might be perhaps a typical definition of an 'investor' as follows:

*The term 'investor' shall mean any natural or juridical person, including the Government of a Contracting Party who invests in the territory of the other Contracting Party.*

- a) 'Natural person' means with respect to either Contracting Party a natural person holding the nationality of that Party in accordance with its laws.*
- b) 'Juridical person' means, with respect to either Contracting Party, any entity established in accordance with, and recognized as a juridical person by its laws: such as public institutions; corporations; foundations; private companies; firms; establishments and other organisations; and having permanent residence in the territory of one of the Contracting Party.*

It is interesting to note that the Egyptian state has raised control requirements in a recent ICSID arbitration (see *National Gas SAE v Arab Republic of Egypt* (ICSID Case No. ARB/11/7), successfully adding the 'double keyhole' requirements under article 25 of the Washington Convention, even though it is typically satisfied by relying on the corporate formality of establishment 'in accordance with law'.

Further, the Egyptian state typically denies BIT protection to its own citizens in the case of dual nationality, to the detriment of Egyptian

nationals, even if the other state would allow it. See, for example, article 1(g) of the Egypt-Canada BIT: '[the] term 'natural person' means any natural person holding the nationality of the Arab Republic of Egypt in accordance with its laws and who does not possess the citizenship of Canada' ([www.treaty-accord.gc.ca/text-texte.aspx?id=101524](http://www.treaty-accord.gc.ca/text-texte.aspx?id=101524) (visited 9 September 2015)).

## Territory

Egyptian BITs typically extend the definition of the term 'territory' to any land, air space, territorial waters, exclusive economic zone and continental shelf area over which the contracting party has jurisdiction and sovereign rights pursuant to international law.

## 20 What substantive protections are typically available?

Egyptian BITs provide investors with the typical substantive protections falling under five main categories: guarantee of fair and equitable treatment; protection against expropriation; general protection and security; most-favoured-nation treatment guarantee; and, in certain BITs, umbrella clauses.

## Fair and equitable treatment

In most BITs entered into by Egypt, the fair and equitable (FET) standard is provided in general terms. However, in a few cases, BITs have added additional definitional language (eg, the BITs entered into with France and Chile provide that the fair and equitable protection ensures that the investor is not hindered by any obstacles in the exercise of the recognised rights).

In some other cases, the BITs contain language that deals with the FET standard together with, in light of or in connection with, other standards, such as full protection and security (eg, the BIT entered into with Comoros).

## Protection against expropriation

Almost all BITs entered into by Egypt contain protection against expropriation in general classic terms. Most BITs provide for the payment of an adequate compensation in the case of expropriation of the investment. In some cases, the BITs explicitly provide that compensation shall be equivalent to the real market value of the expropriated asset at the time the expropriation measure was announced (eg, France, Oman, Syria, the United Arab Emirates and Yemen) or shall amount to the market value of the investment expropriated immediately before expropriation was taken or became public knowledge (eg, (using comparable or similar language) the Czech Republic, Greece, Indonesia, Pakistan, Portugal and South Korea); or, further, certain BITs expressly provide for interest in addition to compensation (eg, Comoros, Jordan, Malta and Qatar).

Many of the BITs entered into by Egypt extend the guarantees against expropriation to indirect expropriating measures or measures tantamount to expropriation or of similar effect (eg, the United Arab Emirates and Yemen).

## Protection and security

Variations are noted in the language used to describe the obligation, with potential effects on the scope of the obligation to provide protection and security. In some BITs, the host state shall provide 'full protection and security' of qualifying investments (eg, Armenia, Canada, Denmark, Korea, the United Arab Emirates, the United Kingdom, etc). Other BITs refer to 'adequate protection and security' (eg, Sri Lanka), or to 'continuous protection and security' (eg, Belgium), or to 'constant protection and security' (eg, China). Other BITs simply provide for an obligation of 'protection and security' of investments (eg, Australia).

In a limited number of BITs, the obligation to provide protection and security is expressly 'subject to national law' (eg, Australia, Austria and Cyprus).

## Most-favoured-nation treatment

In most BITs, the 'most favoured nation' (MFN) does not cover the benefits of membership of a customs union, monetary union or free trade area, or taxation agreements or taxation legislation. In some BITs, such exceptions to the standards have been omitted (eg the United Kingdom). As for the US-Egypt BIT, the wording is slightly different, providing for 'limited exceptions for the standard of national treatment'.

In most BITs, the MFN and 'national treatment' standards concern 'the management, maintenance, use, enjoyment or disposal' of investments. In some BITs, the scope of the MFN and national treatment standards is extended to 'associated activities' of the concerned investment or the activities involved in making the investment (eg, Germany, the Russian Federation, Turkey and the United States).

#### **Umbrella clauses**

A number of BITs signed by Egypt contain varying provisions that may be interpreted as an umbrella clause (eg, Algeria, Armenia, Turkmenistan, Ukraine and the United Kingdom).

If the clauses referred to above were to be interpreted as umbrella clauses, the language used refers to 'obligations entered into' or 'commitments' by the host state and is not limited only to contracts or contractual obligations.

#### **Other substantive protection**

Most BITs signed by Egypt provide for indemnification or compensation for any measures by the contracting state owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar events. This, evidently, is typical.

#### **21 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?**

While the model Egyptian BIT refers arbitration to an ad hoc tribunal, with a role played by the President of the International Court of Justice, most BITs, in fact, refer disputes to arbitration under the rules of ICSID, UNCITRAL, ICC, as well as either CRCICA or another relevant national or regional centre.

#### **22 Does the state have an established practice of requiring confidentiality in investment arbitration?**

In general, the Egyptian state prefers to maintain confidentiality in investment arbitration. In addition, the Arbitration Act provides that an arbitral award may not be published, in whole or in part, unless agreed by the parties. However once the arbitral award has been deposited at the secretariat of the competent court, for the purpose of issuing an enforcement order, the arbitral award becomes public.

#### **23 Does the state have an investment insurance agency or programme?**

No.

#### **Investment arbitration history**

#### **24 How many known investment treaty arbitrations has the state been involved in?**

Egypt has been involved in 30 cases before ICSID alone, with eight cases pending ICSID cases at the time of writing:

- *Future Pipe International B.V. v Arab Republic of Egypt* (ICSID Case No. ARB/17/31);
- *LP Egypt Holdings I, LLC, Fund III Egypt, LLC and OMLP Egypt Holdings I, LLC v Arab Republic of Egypt* (ICSID Case No. ARB/16/37);
- *Champion Holding Company and others v Arab Republic of Egypt* (ICSID Case No. ARB/16/2);
- *Al Jazeera Media Network v Arab Republic of Egypt* (ICSID Case No. ARB/16/1);
- *Unión Fenosa Gas, SA v Arab Republic of Egypt* (ICSID Case No. ARB/14/4);
- *Cementos La Union SA and Aridos Jativa SLU v Arab Republic of Egypt* (ICSID Case No. ARB/13/29) (currently suspended, awaiting the parties' agreement);
- *Veolia Propreté v Arab Republic of Egypt* (ICSID Case No. ARB/12/15); and
- *Ampal-American Israel Corporation and others v Arab Republic of Egypt* (ICSID Case No. ARB/12/11).

Of the above, the *Ampal-American Israel Corporation* case is notable as it is one of a cluster of four other interrelated claims brought in other forums including ICC, ad hoc arbitration under the Permanent Court of Arbitration and CRCICA.

In addition, there are 22 concluded ICSID cases, of which 11 were discontinued or settled:

- *ArcelorMittal SA v Arab Republic of Egypt* (ICSID Case No. ARB/15/47) (order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) issued on 5 December 2016);
- *Utsch MOVERS International GmbH, Erich Utsch Aktiengesellschaft and Helmut Jungbluth v Arab Republic of Egypt* (ICSID Case No. ARB/13/37) (order taking note of the discontinuance of the proceeding issued by the Tribunal pursuant to ICSID Arbitration Rule 44 issued on 18 April 2017);
- *Bawabet Al Kuwait Holding Company v Arab Republic of Egypt* (ICSID Case No. ARB/11/6) (order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) issued on 11 November 2016);
- *ASA International SpA v Arab Republic of Egypt* (ICSID Case No. ARB/13/23) (order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) issued on 3 August 2016);
- *H&H Enterprises Investments Inc v Arab Republic of Egypt* (ICSID Case No. ARB/09/15) (order taking note of the discontinuance of the proceeding for lack of payment of the required advances, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e), issued by the ad hoc committee on 25 April 2016);
- *Ossama Al Sharif v Arab Republic of Egypt* (ICSID Case Nos. ARB/13/3, ARB/13/4 and ARB/13/5) (order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) issued by the tribunal on 2 June 2015, 27 May 2015 and 3 June 2015 respectively);
- *Indorama International Finance Limited v Arab Republic of Egypt* (ICSID Case No. ARB/11/32) (the tribunal issued a procedural order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) on 2 July 2015);
- *Hussain Sajwani, Damac Park Avenue for Real Estate Development SAE, and Damac Gamsha Bay for Development SAE v Arab Republic of Egypt* (ICSID Case No. ARB/11/16) (order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 44 issued on 10 September 2014);
- *National Gas SAE v Arab Republic of Egypt* (ICSID Case No. ARB/11/7) (award on 3 April 2014);
- *Malicorp Limited v Arab Republic of Egypt* (ICSID Case No. ARB/08/18) (award on 7 February 2011) (decision on annulment on 3 July 2013);
- *Helman International Hotels A/S v Arab Republic of Egypt* (ICSID Case No. ARB/05/19) (award on 3 July 2008; decision of the tribunal on objections to jurisdiction (attached to the award on 17 October 2006) and the decision of the ad hoc committee on 14 June 2010);
- *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No. ARB/05/15) (decision on jurisdiction, and partial dissenting opinion of Professor Francisco Orrego Vicuña on 11 April 2007, dissenting opinion of Professor Francisco Orrego Vicuña of the award on 11 May 2009 and award on 1 June 2009);
- *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13) (decision on jurisdiction on 16 June 2006 and award on 6 November 2008);
- *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11) (introductory note on 6 August 2004, award on 6 August 2004 and order of the annulment committee pursuant to ICSID Arbitration Rule 43(1) on 16 December 2005);
- *Ahmonseto, Inc and others v Arab Republic of Egypt* (ICSID Case No. ARB/02/15) (the ad hoc committee issued an order for the discontinuance of the proceeding for lack of payment of the required advances, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e) on 13 October 2010);
- *Champion Trading Company and Ameritrade International, Inc v Arab Republic of Egypt* (ICSID Case No. ARB/02/9) (decision on jurisdiction on 21 October 2003 and award on 27 October 2006);
- *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No. ARB/99/6) (introductory note on 12 April 2002 and award of the tribunal on 12 April 2002);
- *Wena Hotels Limited v Arab Republic of Egypt* (ICSID Case No. ARB/98/4) (award of the tribunal on 8 December 2000, decision on annulment by ad hoc committee on 28 January 2002 and decision on the application by Wena Hotels Ltd. For Interpretation of

### Update and trends

Egypt is in the midst of a fiscal and an investment framework reform, keenly seeking to attract foreign direct investment, particularly since the flotation of the Egyptian pound in November 2016 and a renewed availability of foreign currency. The Zohr Gas field is expected to begin economic production by the end of 2017/beginning of 2018, which will further provide for an injection of foreign currency, resulting in an expected strong infrastructure development in Egypt in the medium and long term.

the Arbitral Award (31 October 2005) see [www.italaw.com/sites/default/files/case-documents/ita0904.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0904.pdf);

- *Manufacturers Hanover Trust Company v Arab Republic of Egypt and General Authority for Investment and Free Zones* (ICSID Case No. ARB/89/1) (settlement agreed by the claimant and one of the respondents and proceeding discontinued at their request (order taking note of the discontinuance issued by the tribunal on 24 June 1993 pursuant to Arbitration Rule 44 (not public)); and
- *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) (award of the tribunal on 20 May 1992 and dissenting opinion (attached to the award) on 20 May 1992).

Of the above, *Malicorp, Helnan, Siag, Jan de Nul, Joy Mining, Middle East Cement, Wena* and *Southern Pacific Properties* have all been extensively studied and quoted as they each address important principles in investor-state disputes.

In addition, as noted above, Egypt has also ratified the Unified Agreement for the Investment of Arab Capital in the Arab States 1981 (the Unified Agreement), an agreement entered into under the auspices of the League of Arab States, which provides investment protection and a mechanism for the resolution of investment disputes between Arab investors that have made an investment in another Arab state. Article 28 of the Unified Agreement establishes the Arab Investment Court until the Arab Court of Justice has been established in the future. The seat of the Arab Investment Court is the permanent headquarters of the League of Arab States, which is in Cairo, Egypt. The Arab Investment Court has jurisdiction to hear investment disputes between Arab investors and states that are party to the Unified Agreement that relate to breaches of protections provided for in the Unified Agreement. The Unified Agreement provides a wide range of protection for investments; however, it is relatively new and untested, with only a few cases having been finalised under the Arab Investment Court.

Egypt has been involved in three cases before the Arab Investment Court:

- *Giza Lido Hotel v Egypt*, AIC Case 2/1 dated 21 August 2007;
- *Horizon Touristic v Egypt*, AIC Case 7/2 dated 27 April 2011;
- *Mr Amr Saleh Saeed Al Amoudi Batouk and Mr Walid Saeed Saleh Batouk, in his capacity as the representative of the heirs of Mr Saeed Saleh Batouk, v the Minister of Justice of Egypt*, the Public Prosecutor of Egypt and the Minister of Interior of Egypt, AIC Case 12/1 J dated 22 April 2014; and
- *Halawyat Batouk and the heirs of Said Salah v Egypt*, AIC Case 13/4, dated 7 February 2017.

Egypt has also been involved in other investment treaty arbitrations before the ICC, the CRCICA, ad hoc arbitration tribunals, etc.

### 25 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Investment treaty arbitrations initiated against Egypt usually concern disputes related to the construction, energy and oil and gas, tourism and hotel industries.

### 26 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

There appears to be no formal default mechanism for the appointment of arbitral tribunals, instead appointments are made on a case-by-case basis.

### 27 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

The Egyptian State Lawsuit Authority manages all disputes involving Egypt, including investment arbitrations. The members of the Department of Foreign Disputes are in charge of representing Egypt before the International Court of Justice, Permanent Court of Arbitration, the ICSID, the CRCICA, the ICC and any other international or foreign arbitral or judicial panel for the settlement of international disputes where Egypt is a party thereto.

However, with respect to actual legal representation before such tribunals, the Egyptian State Lawsuit Authority usually hires outside counsel to represent it.

### Enforcement of awards against the state

### 28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Egypt ratified the New York Convention in February 1959 pursuant to Presidential Decree No. 171 of 1959. Egypt has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159 (the Washington Convention) pursuant to Law No. 90 of 1971. In accordance with Article 54(2) of the Convention the competent authority in Egypt for the recognition and enforcement of arbitral awards rendered pursuant to the Washington Convention is the Ministry of Justice.

Egypt has also ratified the Riyadh Agreement for Arab Judicial Cooperation, dated 6 April 1983 (the Riyadh Agreement). See also Presidential Decree No. 286 of 2014, as well as, Ministerial Decree No. 43 of 2014, confirming ratification of the Riyadh Agreement. Unlike the New York Convention, the Riyadh Agreement requires a double exequatur allowing a signatory to reject enforcement of an award if it has not been recognised by the court of the seat of arbitration. In a concerning development, the Unified Agreement currently does not address enforcement of awards; however, a draft amendment to the Unified Agreement would, once in force, specifically subject enforcement to article 37 of the Riyadh Agreement.

Pursuant to article 151 of the Egyptian Constitution, international conventions have the force of law upon ratification by the legislator and publication in the Official Gazette. Accordingly, the substantive provisions of the New York Convention and the Washington Convention are directly binding on Egyptian courts.

### 29 Does the state usually comply voluntarily with investment treaty awards rendered against it?

With respect to awards issued under the auspices of the Washington Convention, in all cases where investment treaty awards have been issued against Egypt, there is no instance where Egypt was found in violation of its obligation.

In other cases, where arbitral awards are issued by arbitral tribunals seated abroad and not subjected to the Egyptian Arbitration Law, the Egyptian state is expected to challenge its enforcement and execution in Egypt under article 58 of the EAL, inter alia, to the extent that it may contradict a previously issued Egyptian court decision, violate Egyptian public order or for lack of proper notice.

Further, where such arbitral awards are issued by an arbitral tribunal seated in Egypt and are, therefore, subject to the provisions of the Egyptian Arbitration Law, the Egyptian state is expected to challenge an award issued against it through nullification under article 53 of the EAL, which provides a very wide range of possible grounds for nullification of an award.

### 30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

The EAL, article 53, provides for a process of nullification available to the party against which the award was issued, but only with respect to awards issued by arbitral tribunals either seated in Egypt or in proceedings expressly subject to the EAL.

Otherwise, the EAL provides for a process of challenging an award's enforcement in which a limited number of grounds are available,



meaning, if the award contradicts a previously issued Egyptian court decision, violates Egyptian public order or lacks proper notice.

Beyond a writ of exequatur, any and all further procedural hurdles available to domestic defendants under domestic law are also available to the state if the successful party wishes to proceed with final enforcement.

Egypt has exercised its right to appeal to the courts where the arbitration was seated against unfavourable awards. For example, in a recent ICC award seated in Geneva, Switzerland, two companies held directly or indirectly by the Arab Republic of Egypt appealed to the local competent authorities seeking nullification, but that was dismissed.

**31 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.**

Under article 58 of the EAL, inter alia, no writ of exequatur may be issued by an Egyptian court where the foreign arbitral award (ie, an award issued in arbitral proceedings seated abroad and not subject to the EAL) contradicts with a previously issued Egyptian court decision, violates Egyptian public policy or for lack of proper notice. It is an understatement that the Egyptian law on public policy is problematic and ever growing.

As noted above, article 1 of the EAL requires that any agreement to subject disputes to arbitration with respect to administrative contracts requires the approval of the concerned Egyptian minister and that no delegation of such power is authorised. In confirming the nullification of a previously issued CRCICA award in a dispute between the Egyptian General Petroleum Corporation (EGPC) and a private company, the Court of Cassation confirmed that the concerned minister's approval to the arbitration clause in administrative contracts is a matter of public policy.

Another important aspect to consider is the fact that often the Egyptian state tasks an independent juristic entity, whether wholly owned and controlled by the state or not, to carry out important national policy tasks, for example, the EGPC, the Egyptian Natural Gas Holding Company, the Egyptian Petrochemicals Holding Company and so on, raising important state responsibility considerations. In this context, often the promulgating law of such public or private entities determines that their 'funds shall be considered privately owned state funds' (see, for example, article 5, Law No. 20 of 1976 (establishing the EGPC)). As such, a serious question arises as to whether, under Egyptian law, there can ever be any eventual collection against such entities in the event of an award against them in the face of such entities' unwillingness to comply with the award, particularly since Egyptian law establishes that state funds cannot be disposed of, attached or appropriated (see article 87 of the Egyptian Civil Code).



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