



BITs; An Alternative Dispute Settlement Mechanism for Foreign Renewable Energy Investors in Egypt

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A globalized and interconnected world has seen the emergence of bilateral investment treaties (BIT) between States. These agreements contain provisions aiming to protect private investment of a state in another state. Ever since the signature of the first BIT between Pakistan and Germany in 1959, many states have joined in the conclusion of these international instruments and the number of BIT's currently exceeds 2,500.

The Arab Republic of Egypt has, so far, signed several BITs reaching a number of 113. Canada, China, France, Germany, Italy, Japan, Republic of Korea, Kuwait, Malaysia, Singapore, South Africa, the United Kingdom and the United States of America are among the states with which Egypt has concluded BITs. Some states such as India, the United States of America have drafted model BITs that are used when entering into negotiation for the conclusion of an investor protection treaty. Those drafts are updated and amended to reflect the State's policy with regards the extent to which it desires to develop foreign direct investment (FDI) and the protection of its own investors in other states.

The significant chapters of a BIT include provisions that define investment and the scope of application of the BIT. The subsequent chapters elaborate on the states obligations as to the treatment of investors with regards to protection from expropriation, transfers and entry of investors. Another chapter provides provisions related to the investor, investment and the home state obligations.

More importantly, states agree on a dispute settlement mechanism organizing the manner by which the state parties can resolve disputes in relation to the BIT as well as between an investor and a state party. BITs provisions related to dispute settlement originated from the development of an important investor-state case law before various arbitral Institutions. The International Centre for Settlement of Investment Disputes (ICSID) seated in Washington D.C. and the Permanent Court

of Arbitration (PCA) seated in La Hague are the most preferable arbitration centers for settling investor-state disputes. The wording of these dispute settlement provisions varies and the manner by which an investor may have to choose either to commence proceedings before the courts of the host state or to resolve it via arbitration before an international center or use the United Nations Commission for Trade and Law arbitration rules for the administration of an ad hoc arbitration. Once state parties have signed and ratified the BITs, they become part of the national legal framework of these States. Accordingly, investors from those state parties can directly benefit from the dispute settlement mechanisms set forth in the BITs without having to incorporate any arbitration clause or for any state entity or authority to have to approve any additional arbitration agreement with that particular foreign investor.

Recently, reforms to the energy sector in Egypt have taken place, namely the Renewable Energy Law and the feed-in-tariff (FiT) program. These reforms have encouraged foreign renewable energy investors to invest in renewable energy production and sale in Egypt. During the implementation of the FiT program, difficulties emerged with regards to recourse to international arbitration in order to resolve disputes arising of these contracts. The Egyptian Authorities were hesitant in agreeing to dispute settlement clauses that refer to arbitration proceedings outside Egypt. However, the government settled to international arbitration seat but the venue remains in Egypt.

Notwithstanding these difficulties and potential change in direction with regards to the dispute resolution mechanism, an alternative remedy to this deadlock would be for each of these foreign energy companies to review their respective state's BIT concluded with the Arab Republic of Egypt. Should the process stated in that BIT be satisfactory to the investing company, there would be no need to reemphasize this dispute settlement process in any power purchasing agreement the investor would conclude with the Egyptian government, as the BIT's provision would provide an explicit acceptance of the Egyptian Government to resolve the dispute by arbitration before the center stipulated in the BIT.

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Email as a Form of Evidence in Egyptian Courts

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Email is messages distributed by electronic means from one computer user to one or more recipients via a network. Emails may be used as documentary evidence that can be admitted in courts the same way as can other forms of documentary evidence. The reliability of email evidence will be subject to scrutiny. This can be a particular issue in the context of email or other electronic evidence, since protection measures for the integrity or authenticity of electronic evidence, such as digital signature, are not always used. As a result, the reliability of email as evidence may be subject to question.

Email may be a tool to support or undermine a case. This is significant because prior to court proceedings taking place, a party may be required to disclose relevant emails to the adverse party. This can cause problems because of the means email is used. E-mail is something of an informal medium, and individuals may often write things in an e-mail that they would not include in a standard letter or memo. For example, individuals may send e-mails to each other discussing problems with a project and may make admissions of default that they would not have made had they been aware that such e-mails could be disclosed to the other party. Policies regulating the use of e-mail are therefore important. In addition, organizations can in some cases rely on particular legal rules to avoid the need to disclose e-mails in particular cases. However the rules in this area are complex and legal advice will be needed to confirm their application.

Within the scope of civil, commercial and administrative transactions, e-writing and electronically written messages shall have the same determinative effect that writing messages, whether official or unofficial, have under the provisions of the Evidence Law in the civil and commercial articles. The provisions of the Evidence Law in civil and commercial articles shall prevail in relation to proving the validity of the official and unofficial electronically written messages, e-signatures and e-writing.

According to the Electronic Signature Law, e-writing may be an admissible evidence before courts provided that the e-writing is readable, unamendable, unmodifiable, is saved for reference at any time in the future, solely attributed to the signatory and to the possibility to detect any amendment or modification to the e-writing or e-signature.

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Investment Incentives in Saudi Arabia

Ahmed Radwan

Saudi Arabia is the world's 19th largest economy, a member of the G20 and the largest economy in the MENA region with the third biggest current account surplus in the world. It is the world's 16th largest exporter and 29th largest importer. Saudi Arabia ranks 49th out of 189 countries for the overall 'Ease of Doing Business', according to the International Finance Corporation/World Bank's 'Doing Business' report in 2015.

Being in that position, Saudi Arabia has a well-developed legal framework that facilitates doing business. According to the World Bank's 2015 Ease of Doing Business, the tax environment in Saudi Arabia is very favorable to investors as it is ranked 3 of 189 countries for the ease tax payment. Foreign owned companies enjoy all the benefits, guarantees and incentives offered to the Saudi owned companies that include a 20 % tax rate on corporate profits, with losses carried

forward indefinitely to offset the future taxes, no personal income tax and no land or property tax. The full repatriation of capital, profit or dividends is allowed, subject to 5 % withholding tax. For the purpose of attracting more visitors, Saudi Arabia joined the World Trade Organization (WTO) in 2005, to liberalize its trade regime and offer an open, supportive and stable trade environment in accordance with WTO rules. In addition, Saudi Arabia signed bilateral trade and investment agreements with Austria, Belarus, Belgium Luxembourg Economic Union, China, Czech, France, Germany, India, Indonesia, Italy, Korea, Malaysia, Philippines, Singapore, Sweden, Switzerland and Turkey. It has also signed bilateral investment treaties (which are not yet in force) with Azerbaijan, Egypt, Japan, Spain, Taiwan, Ukraine and Uzbekistan.

Foreign direct investment represented 0.72 % of Saudi's GDP in 2014, which indicates a minor contribution of the foreign investment in the GDP. However, in light of the Vision 2030 national transformation plan issued last April, Saudi Arabia seeks a diversified economy by generating revenues from non-fossil resources. Vision 2030 shows Saudi Arabia's intention to attract more foreign investors and to be a major investment destination favorable to foreign investment.

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Unlike a minimum of two shareholders in an LLC, restructuring to a JSC requires three shareholders. This requires an increase in the number of shareholders in order to comply with the minimum legal shareholder requirement. In regards to the name of the JSC, it should reflect the activities or company purpose. Restructuring also changes the management of the entity, where a JSC is managed by a board of directors, which shall not exceed three members. A legal person

could be a member of the board of directors as long as it is represented by a natural person. Members of the board of directors should also have competence, financial, legal and business knowledge in order to properly conduct the management tasks of the company. Foreign persons could be members of the board of directors, contrary to LLCs that require a minimum of an Egyptian national manager. Restructuring would also trigger a potential capital increase, as the minimum JSC capital is EGP 250,000 which significantly exceeds the EGP 1,000 minimum capital for LLCs. The shares of a JSC can be owned by foreign persons subject to payment of shares in foreign convertible currencies. Similar to LLCs, shareholders of JSCs are not personally liable and their liability is limited to the share value.

Upon restructuring, the company should inform the government bodies of the legal restructure as part of the corporate governance on companies operating in Egypt.

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The Renewable Energy Investment Dilemma in Egypt

Muhammad El Haggan

In 2014, the Egyptian government reformed the energy sector legal framework through the New Electricity Law and the newly adopted feed-in-tariff (FiT) program, where the Egyptian government encourages renewable energy production of a total 4.3 gigawatts by the private sector and selling electricity to the government. This government initiative was to cover for the electricity shortage using solar and wind energy.

The feed-in-tariff law provided different rates per kilowatt depending on the amount of annual electricity production. Unexpectedly, the government inverted the pricing pyramid, whereby the higher the annual production, the higher the purchasing price per kilowatt. This rendered small-scale domestic production unfeasible. However, the US \$0.13 per kilowatt-hour for 500 kilowatts to 20 megawatts and US \$0.14 per kilowatt-hour for 20 megawatts to 50 megawatts annual capacities attracted foreign investors to participate in the feed-in-tariff program. The government's plans included a 1.8 gigawatt solar park in Benban, Upper Egypt, to be developed and operated under the FiT program.

Everything seemed to have been going in the right direction until the recent requirement of the Ministry of Electricity that investors should procure 70% of the projects finance from foreign financing institutions and 30% from local banks. This seemed contradictory to the Ministry's requirement that disputes over power-purchase agreements shall be resolved by resorting to local arbitration and not international arbitration. The recourse to local arbitration as opposed to international arbitration seemed to be a deal breaker to the foreign financing institutions, which include the International Finance Corporation (IFC) and the European Bank for Reconstruction and Development (EBRD).

Foreign banks reconsidered financing renewable energy projects as a result of the newly imposed local arbitration clause. In addition, the Ministry seemed to be in a dilemma regarding payment terms, where there is an inclination that rates would be discounted and paid in Egyptian-pound equivalent of US Dollars, in contradiction with the rates set in the FiT law. The reduction of rates and recourse to local arbitration was seen as an escape route from the unrealistic FiT rates. Both the reduction and recourse to local arbitration impacted the feasibility of investment in renewable energy in Egypt. These several apparent contradictions of the government's announcements, in turn, led to the reconsideration of investing in renewable energy in Egypt, whether by the investors or financing institutions. The end result was that several investors elected to opt out of the FiT program in Egypt.

The most recent standing is that the Egyptian government called for prequalification for phase 2 of the FiT program. Only prequalified investors under phase 1 who were able to complete the financial close are eligible for prequalification for phase 2. These restrictive criteria show the government's inclination to limit the number of prequalified investors for phase 2. The government also reduced the rates to US \$7.8 cents per Kwh for 0.5-20MW annual production capacity and US \$8.4 cents per Kwh for 20-50MW annual production capacity. Payment terms were changed in terms of currency, where all payments will be in Egyptian-pound equivalent. The government tied 30% of payment to the current EGP 8.9 per US \$1 and the other 70% would be according to the exchange rate at the payment date. The government also agreed to the recourse to international arbitration seat but the venue remains in Egypt.

The persistent confusion caused by the contradictory announcements of the Ministry of Electricity would ultimately lead to the collapse of the FiT program in Egypt. Investors are still questioning the possibility of a second round of rates reduction, especially with Dubai's lowest world record of US \$2.99 cents per Kwh. However, hope still rises from independent power production, where producers can sell off-grid electricity directly to consumers, whether to residential, agricultural or industrial consumers. This would still contribute to reducing the consistent electricity shortage, in addition to saving tons of annual carbon dioxide emissions and fossil fuel consumption. Egypt's all-year sunrise is an asset that should be put to the best use, given the endless unoccupied lands east and west of the Nile River.

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Currency Devaluation! What is next?

Omar Rabie

The Egyptian economy has been going through many turbulences. The government has been trying to adopt different mechanism and tools to fix the economy, from promises with mega projects and foreign investments, to asking for loans and introducing the Value Added Tax (VAT).

The ongoing currency devaluation is estimated to be 40% since the beginning of 2016. The Egyptian government negotiated a long term \$12bn fund from the IMF over three years, in which a preliminary agreement has been reached. One of the fund conditions is to adopt a more flexible currency exchange system. However, the current economic status is not ready for full floatation at this stage.

In accordance to that, the Central Bank of Egypt (CBE) will adopt a gradual floatation to the Egyptian Pound. It is essential to increase the sources and balance the foreign currency in order to meet the domestic demand, given that Egypt imports most of its basic needs.

According to IMF's head of mission in Cairo, Chris Jarvis, says: "Moving to a flexible exchange rate regime will strengthen competitiveness, support exports and tourism and attract foreign direct investment. This would foster growth and jobs and reduce financing needs," he said.

This comes in an attempt to the shortage in the foreign currency in Egypt and to get the inflation below 10 percent. The Governor of the CBE Mr. Tarek Said; they made a mistake on fixing the Egyptian Pound but it would not be fully floated until at least \$25 billion of reserves are reached. However, the IMF Loan is taking part of a more comprehensive plan to get supported by over \$22.5 billion of reserves in the next three years. This money will completely go to support the general budget¹.

In March 2016, the devaluation contributed to the weakness of the Egyptian Pound in the parallel market to score 13.5 EGP. This devaluation widened the gap to 40% difference between the formal and the informal market. This mark one of the biggest reduction process ever recorded in the last seven years, which negatively impacted the private investments in Egypt.

¹ AlMal News, Nermeen Abbas, 15 August 2016. Link:
<http://www.almalnews.com/Pages/StoryDetails.aspx?ID=296618>

The last reduction did not lead to encourage foreign investment, which is required to a number of other actions in parallel with the devaluation of the Egyptian Pound, including the unification of the exchange rates in both the official and the parallel markets. and create a mechanism to facilitate the entry and exit of capital in hard currency, as well as the issuance of the new investment law and overcome bureaucratic dogging the Egyptian State.

Given the recent developments, a new round of subsidiary cuts is expected after receiving the first allotment of IMF loan

"In the near-term, a deal with the Fund is likely to lead to a devaluation of the Egyptian Pound and higher interest rates," Capital Economics said, forecasting the Egyptian Pound would be devalued to 9.5 to the dollar by year-end from about 8.78 now².

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² CNBC, Reuters, Thursday, 11 Aug 2016. Link: <http://www.cnbc.com/2016/08/11/imf-agrees-12-billion-3-year-loan-deal-for-egypt.html>

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