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Egypt: New Investment Law – ADR for Investor-State Disputes

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On 12 March 2015, substantial amendments were introduced to the Egyptian Investment Law no. 8/1997 (**Investment Law**). The amendments generally aim at attracting new investments to Egypt through offering further incentives and guarantees, removing obstacles, and streamlining the procedure.

Incentives include, for example, trimming sales tax to 5% from as high as 10%, and setting customs duties on equipment used for production at 2%. Further non-tax incentives are offered to labor-intensive projects or investments in remote areas or in certain sectors such as energy, agriculture and transportation. One of the long waited guarantees was shielding companies' executives from criminal prosecution for legal violations committed by the company.

The amendments authorized the General Authority for Investment (**GAFI**) to act as a one-stop-shop from which investors, in certain sectors, can get all licenses and approvals needed to establish and run their business. In addition, a new system for allocation of state land, pricing and zoning is introduced.

The amendments are dependent on a significant number of executive regulations to be issued in the near future to provide details on how it will be administrated.

In relation to dispute resolution, the amendments tried to limit Egypt's recent exposure to investor-state arbitration. The number of cases initiated against Egypt before ICSID alone has reached 14 since the 2011 uprising. Accordingly, a new chapter is added to the Investment Law creating alternative out-of-court forums to amicably settle investor-state disputes. Furthermore, the reference in the Investment Law to investor-state treaty arbitration or the ICSID has been removed.

Alternative Forums for Investor-State Disputes

A new Chapter Seven is added to the Investment Law under title "Investment Disputes Settlement". The chapter created three out-of-court forums to encourage amicable settlement of investment disputes with the government.

The Complaint Committee

The Complaint Committee 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 head of the committee shall be one of the vice presidents of the Conseil d'Etat. Members shall include two judges from the Conseil d'Etat, and two outside consultants with relevant expertise to be selected by the Investment Minister.

The investor shall submit its challenge to the committee within 15 business days from the date of being aware of the challenged decision. The Committee is authorized to order examination of the parties and the witnesses and to compel submission of documents. The enforceability of such orders is however doubtful.

The committee will issue its decision within 60 days from the date of submitting the challenge. The lapse of the 60 days without a reply is considered a refusal of the challenge. The decision of the committee will be final and binding on GAFI.

Resorting to the committee is voluntary and its decisions are not binding on the investor. In the meantime, the committee is not required to disclose the reasons beyond its decisions; it may even take a passive stance by not replying to the challenge for 60 days which will automatically be considered a rejection. This means that there will be no subsequent review of the committee's decisions. All this would render the effectiveness of this committee questionable.

The Committee for Resolution of Investment Disputes

A ministerial committee will be created at the Cabinet of Ministers to consider requests, complaints or disputes that may arise between an investor and a governmental body in connection with the implementation of the Investment Law. The familiar short name of this committee is the Dispute Resolution Committee (**DRC**) (Arabic: □□□□ □□□□).

The committee shall issue its decision with the reasons thereof within 30 days from finalizing the hearings. If approved by the Cabinet of Ministers, the decision shall be binding on the governmental party only. Investor, conversely, retains the right to resort to state courts or arbitral tribunals to initiate the claim anew.

The executive regulations to be issued in the near future are expected to provide details on the administration of the committee, the procedures and fees for submitting the request, and the appealability of its decisions.

It is worth mentioning that a similar committee was created at GAFI in 2012 by virtue of the Prime Minister Decree no. 1115/2012. The jurisdictional and functional boundaries between the two committees are not clear yet.

The Committee for Settlement of Investment Contract Disputes

This ministerial committee will be established and charged with settling disputes between investors and governmental bodies arising out of investment contracts. This committee is known as the Dispute Settlement Committee (**DSC**) (Arabic: □□□□

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The establishment of the committee is motivated by helping the parties to reach a fair and mutually acceptable settlement to their dispute. In carrying out its job, the committee can reschedule the financial dues, rectify inaccurate formalities taken to enter into the contract, or extend limitation periods specified in the contracts.

If a settlement is reached between the parties, it will be effective and binding only when approved by the Cabinet of Ministers. If no settlement is reached, each party can commence litigation or arbitration as the case may be. Submission to the committee is not a pre-requisite for commencement of a litigation or arbitration case.

Again, the DSC is quite similar to a committee that was established in 2012 by virtue of the Prime Minister Decree no. 1067/2012 for settlement of investor-state disputes. Differences between the two committees are unclear.

No More Legislative Offers to Arbitrate

Egypt, like many developing countries transitioning to open market economy, used to adopt special laws regulating foreign investments. These laws usually address international dispute resolution mechanism between the state and the foreign investor, and normally refer to arbitration under ICSID.

The first investment law Egypt adopted after acceding to ICSID Convention was Law 43/1974 concerning the Investment of Arab and Foreign Funds and the Free Zones. Article 8 of this law listed the methods of dispute resolution with clear reference to ICSID. In the landmark ICSID case of *Southern Pacific Properties v. Arab Republic of Egypt* (*SPP v. Egypt)*, Article 8 raised particular problems. It was interpreted to constitute a unilateral legislative consent by the Egyptian government to the ICSID jurisdiction. The tribunal concluded that reference to ICSID jurisdiction was formulated in mandatory terms focusing on the 'shall be settled' language used in the article. The 'consent' requirement was held to be fulfilled without the need to a subsequent agreement between the parties.

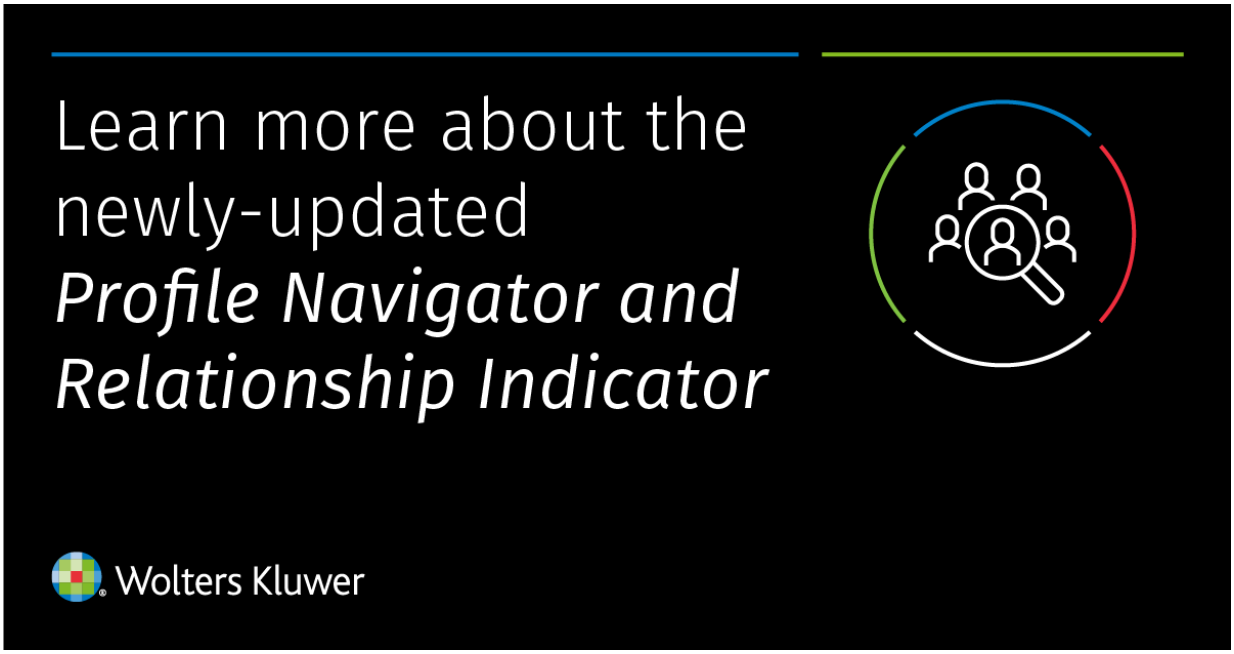
After the decision on jurisdiction in *SPP v. Egypt*, Egypt issued a new Investment Law 230/1989, referring again to ICSID, but this time in a more optional formulation. A quite similar language was imported to Article 7 of the current Investment Law no. 8/1997. The use of expressions such as 'may be settled' and the 'may agree' indicated that a further consent between parties is required before a dispute can be brought before the forum. Reference to ICSID was intended for 'declaratory' purposes only. The Egyptian legislator simply wanted to assure potential investors that Egypt respects its commitments under investment agreements and the ICSID Convention.

Nevertheless, skepticism continued as to whether the language of Article 7 is sufficient to shield Egypt from potential unconsented ICSID arbitration. Although consent to ICSID arbitration should never be presumed, the past years showed that if the domestic law is not crystal-clear in requiring a subsequent 'agreement', tribunals tend to interpret the 'consent' requirement too broadly to assume jurisdiction. This could be argued under several theories like 'good faith', the 'reasonable expectations' of an investor and the 'duty to avoid ambiguity'.

It is understood that the usage of investment legislation as the basis to establish jurisdiction for ICSID arbitration has significantly declined with the rapid proliferation of investment treaties. However, consent to ICSID included in investment legislation still has an importance for investors whose states have not entered into a BIT with Egypt or in cases where the BIT imposes some restrictions or limitations on investor-state arbitration jurisdiction.

In view of that, the new amendments to the Investment Law modified Article 7 to delete any reference to investment treaty arbitration or the ICSID. The Article now makes reference only to the methods of dispute resolution agreed between the parties as well as to the Egyptian Arbitration Law.

This amendment should not be construed as if Egypt is seeking to limit the protection offered to foreign investors. Egypt is rather willing to confirm that it does not offer a free-standing consent to international arbitration. Consent could rather be established on BITs or investment contracts. Egypt is a signatory to more than 100 BITs, most of them provide for alternative dispute resolution mechanisms, usually through international arbitration, and in particular arbitration at ICSID or ad hoc proceedings under the rules of UNCITRAL or other international arbitration centers.



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