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Can the Egyptian Government Vest A Municipal Court With The Power To Review ICSID Awards?

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On 6 January 2021, the Egyptian Government introduced a draft law for parliament's approval, seeking to expand the Egyptian Supreme Constitutional Court's ("ESCC") jurisdiction to scrutinize international arbitration awards rendered against the Egyptian State and acts of international organizations affecting the Egyptian State. The legislative amendment is in line with previous legislative measures designed to control arbitration proceedings involving the public sector. After a controversial discussion and some last-minute modifications, the draft law entered into force on 16 August 2021.

Background

Since 2011, Egypt has been facing a [significant increase](#) in investor-state disputes. Most of the cases concern so-called "[post-Arab Spring disputes](#)" that are related to investments which failed or were put on hold after the Egyptian revolution. Egypt has been a party to the ICSID Convention since 1972. According to the ICSID database, a total of 37 ICSID cases were filed against Egypt, out of which 27 were filed after January 2011. The Egyptian Government managed to settle a good deal of these cases and is generally endeavoring to amicably settle pending investor-state disputes. At the same time, the Government has taken measures to prevent further negative arbitral awards. In line with this objective, the Egyptian Government has resorted to introducing legislative measures. Notably, the Government pursued to vest the ESCC with the power to review international arbitration awards rendered against the Egyptian State, including ICSID awards, against the backdrop of the Egyptian Constitution.

Amending the Supreme Constitutional Court's Law

Legal basis

[Article 192 of the Egyptian Constitution](#) sets out the main competences of the ESCC. According to the said Article, the ESCC is *inter alia* exclusively competent to examine the constitutionality of laws and regulations, to interpret legislative texts and adjudicate disputes pertaining to the implementation of two contradictory final rulings. Article 192 then allows the legislator to further regulate the competences of the ESCC through laws as it states "[...] *The law defines the Court's*

other competencies and regulates the procedures that are to be followed before the Court.”

On this basis, the Government introduced a draft law (the “**Draft Law**”) to amend Law No. 48 of 1979 on the Supreme Constitutional Court (the “**ESCC Law**”), the law regulating the structure, competences, and procedures of the ESCC. Under the Egyptian Constitution, the laws regulating the judiciary are deemed “complementing laws to the constitution” and require a two-third majority of the Members of Parliament (“MPs”) to be approved in Parliament. Furthermore, the ESCC must be consulted on draft laws pertaining to the ESCC.

The Draft Law

The Draft Law introduced two amendments to the ESCC Law, specifically [Articles 27 bis and 33 bis](#). According to Article 27 bis, ESCC shall have the power “*to control the constitutionality of the decisions of international organizations and bodies and rulings of foreign courts and foreign arbitration bodies that shall be enforced against the state*”.

Article 37 bis of the Draft Law thereby grants the Government a tool to challenge these decisions and rulings before the ESCC and grants the ESCC, in turn, the competence to rule on decisions and awards to be disregarded if found to be in violation with the Egyptian Constitution.

The Egyptian Government argued, in its explanatory note on the Draft Law, that the amendments are necessary given that the constitution and the ESCC Law lack provisions granting the ESCC jurisdiction to examine international decisions that can affect the “national security” of Egypt.

On 14 June 2021, the legislative committee in the Egyptian Parliament [approved](#) the Draft Law as introduced and reported that the ESCC expressed its approval of the Draft Law. MPs in favour of the Draft Law argued therefore that there should be no doubt in respect of the constitutionality of the Draft Law. They considered the amendments necessary to safeguard Egypt’s strategic economic interests, arguing that many of the awards in investor-state disputes obtained against the Egyptian state in recent years were “[politicized](#).”

Review of International Arbitration Awards by the ESCC

The proposed amendments, of course, were not without controversy. Adversaries of the Draft Law argued that the proposed changes might harm the country’s investment climate and jeopardize the Government’s efforts to encourage foreign investment. In addition, there are concerns that the proposed constitutional review of ICSID awards falls afoul of Egypt’s obligations under international law.

Among the most vocal critics of the Draft Law is prominent Egyptian arbitrator Prof. Abdel Moneem Zamzam who published a [legal opinion](#) arguing the unconformity of the Draft Law with international law and urging Parliament not to approve it. He argued, amongst other things, that the Draft Law violates (i) the Egyptian Constitution and (ii) Egypt’s international obligation under the ICSID Convention, the New York Convention (the “**NYC**”) and BITs concluded between Egypt and many other states.

Indeed, by providing the Government with a tool to challenge an ICSID awards, the Draft Law falls afoul of Egypt's obligations under ICSID Convention which explicitly provides for the finality and binding force of the ICSID Awards and parties' obligation to comply with it.

It is also questionable whether the Draft Law is compliant with the NYC. In contrast to the ICSID Convention, Article V(2)(b) of the NYC does permit national courts to review an arbitral award on the basis of public order before granting a writ of execution. However, this review is concentrated in the civil courts (which in case of international commercial arbitration would be the Cairo Court of Appeal and the Court of Cassation). The additional tool provided by the Draft Law and the proposed dual system of review is at odds with the NYC, as it arguably violates the "non-discrimination rule" under Article III NYC. NYC, which aims to facilitate the recognition and enforcement of arbitral awards at the international level, prohibits imposing substantially more onerous conditions on the recognition or enforcement of arbitral awards to which NYC applies than are imposed on the recognition or enforcement of domestic arbitral awards. While it is true that the Draft Law only targets arbitral awards rendered against the state and not all foreign arbitral awards, it however specifically refers to "rulings of foreign arbitration bodies" as opposed to domestic arbitral awards rendered against the state.

Constitution–treaty Relationship

In spite of these objections from the perspective of international and municipal constitutional law, the ESCC explicitly condoned the Draft Law. The approval of the ESCC was a heavy setback to the adversaries of the Draft Law. Yet, it is consistent with ESCC's stance as to the qualification of international treaties and their order of priority in relation to the Constitution. The ESCC previously ruled that a treaty once ratified has the status of a law in Egypt and as such is subjected to the supremacy of the Constitution. A national law that conflicts with a treaty is not necessarily unconstitutional (*Case no. 7 of 2 JY*). Furthermore, the ESCC is of the position that it is competent to scrutinize ratified treaties *a posteriori* based on Article 151 (3) of the Constitution which states "*In all cases, no treaty may be concluded which is contrary to the provisions of the Constitution*" (*Case no. 12 of 39 JY*).

However, even by following this position, the constitutionality of the Draft Law appears to be questionable as it does not grant the ESCC the power to scrutinize international treaties per se, but rather decisions and rulings issued by bodies established on the basis of such treaties.

From an international law perspective, the constitutionality of the Draft Law and the Constitution itself is irrelevant. Once a treaty is ratified, all state authorities, including in this case its supreme courts, are bound by these treaties regardless of conflicting domestic laws. Article 27 of the Vienna Convention on the Law of Treaties (1969), to which Egypt acceded in 1982, clearly regulates that states cannot invoke a domestic law as a justification for its failure to enforce a treaty. Consequently, any law or act in Egypt that undermines the finality and binding force of an ICSID award violates Article 53 (1) of the ICSID Convention and constitutes a breach of Egypt's obligation under the Convention.

Last Minute Amendments: Egyptian Government Carves out Arbitral Awards from the Draft Law

Shortly before the vote to pass the Draft Law in the parliamentary sessions of 27 and 28 June 2021, upon the Government's request the words "arbitration bodies" were deleted from the proposed wording of Article 27 bis of the Draft Law. The Draft Law subsequently was passed and enacted into law, [Law 137/2021](#) on Amending the Supreme Constitutional Law 48/1979, in force as of 16 August 2021 (the "**Law**"). Article 27 bis now reads, "*The ESCC shall undertake the control of the constitutionality of the decisions of international organizations and bodies and rulings of foreign courts that shall be enforced against the state*".

According to the [minutes](#) of the [debate](#) in the Parliament, the last-minute amendment was meant to exclude investment arbitral awards from the review by the ESCC, thereby acknowledging the criticism made against this mechanism from the perspective of international and municipal law. This means the ESCC jurisdiction, as amended, only permits ESCC to review the decisions of international organizations and of foreign courts. Its jurisdiction does not extend to scrutinizing arbitral awards. Yet, the vague wording that remains, in particular the reference to "*decisions of international organizations and bodies*", bears the risk of the Government instrumentalizing this Law towards challenging the enforcement of international arbitral awards rendered against Egypt. Furthermore, the Law remains controversial as it may be used to undermine binding resolutions or recommendations of inter-governmental bodies rendered against Egypt, in particular in the field of the protection of human rights.

Outlook

The Law is part of a general arbitration sceptic tendency in Egypt, where in particular investment arbitration is seen as contravening the national interest. It conforms to a global trend critical towards investment arbitration. Since the start of this millennium, [several countries](#) have already resorted to constitutional arguments to prohibit submitting to international arbitration or to support the possibility of reviewing international arbitration awards against the backdrop of their constitutions. A recent example is the introduction of [Article 125 \(5\)\(b\) of the Russian Constitution](#), which came into force on 4 July 2020, granting the Russian Supreme Court the competence to declare an international arbitral award unenforceable, if it finds it to be in violation of the Russian public policy.

This tendency is a serious challenge to the international system of investment arbitration (as it puts municipal law above the international laws under which the ICSID system operates). The rewording of the Draft Law before the adoption by Parliament is welcome, however ambiguities remain. The practical implications of the application of the Law remain to be seen.

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