Legal Treatment of Foreign Direct Investment In Egypt:

A Study on Investment Climate in Developing Countries

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In the Name of God, The Compassionate, The Merciful.

Knowledge is better than wealth.
Knowledge guards you whereas you guard wealth.
Wealth decreases with expenditure,
Whereas knowledge multiplies with dissemination.
A good material deed vanishes as the material resources behind it vanish,
Whereas to knowledge we are indebted forever.

Imam Ali Bin Abi-Talib
(556-619)

Dedications

To My Late Parents

To my family:
Fatima, my long suffering wife,
Mariam, Ahmed, and Farah

With Limitless Gratitude.

DEDICATIONS

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- Book Sections:
  - Two Cheers for the International Criminal Court 2006, International Humanitarian Law: Prospects, Translational Publishers.
- Articles:
  - John Bolton and the US Retreat from International Law 2005, Social and Legal Studies.
  - Goodbye to All That? The Rule of Law, International Law, the United States, and the Use of Force 2004-12, Journal of Law and Society, 31 (4), Blackwell.
- Books:
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- Current research projects include 'development and international debt' (with particular reference to Iraq); a consideration of the effect of the rise of human rights upon international law (problematising the status of the individual as a subject of international law); and a consideration of the significance of compensation arising from '9/11' upon the doctrine of tort.

CURRENT TEACHING:

- Professor Wade Mansell provides lectures for undergraduate Public International Law, convene the LLM in International Law with International Relations at both Canterbury and Brussels campus, and is responsible for a core module for that programme - 'Legal Aspects of Contemporary International Problems'.

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- Invited Professor at University of Paris X (Nanterre).
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- Founded, and remain Convenor of the LLM in International Law with International Relations both in Canterbury and Brussels.
- He is responsible for developing academic links with Hong Kong and China.
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- Keynote speaker for last two years at the University of Amsterdam's Symposium on Law Teaching.
- Keynote speaker at the University of Amsterdam's Conference on International Debt.
- Guest lecture at Southwest University of Politics and Law. Presented a 'Wang Tieya Memorial Lecture' at Peking University.

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The errors of this study are all mine.

ABSTRACT

In recent years, attitudes and policies of developing countries towards foreign direct investment have witnessed a clear change from suspicion to openness and competition. Nowadays, ideological differences between developed, developing countries are decreasing, and developing countries are moving from blocking the inflow of FDI into the mode, which welcome and promote FDI in their territory. It is recognised that the best way to achieve thus is through working on creating a sound investment climate.

For developing countries, such as Egypt, Foreign direct investment is a vital package of capital, technology, management skills, and expertise. Therefore, FDI is very important as it helps to strengthen the balance of payment of developing countries through the flow of foreign capital and through the generation of foreign exchange earnings in the long run. As a result, all states working for increasing the inflow of FDI tend to relax restrictions and to offer great inducements in order to create a favourable investment climate. The efforts have paid off in Egypt, but not enough.

An investment climate consists of three main factors: political, economic, and legal. The first two factors are clearly well covered by many article and books. The legal literature is still far behind. Much of the available legal literature is not comprehensive and focuses on some issues such as the BITs and others.

The purpose of this thesis is to examine the legislative framework governing foreign direct investment in Egypt. More specifically, it focuses on the regulatory control exerted over foreign entities in order to judge the success of the investment climate in attracting the required FDI. During Egypt's transition era from a centrally planned of a market-oriented economy, national legislation designed to attract foreign capital needed to be reformed and developed. Simultaneously, it had also to allow the authorities to effectively screen the entry of foreign investment and supervise the operations of foreign enterprises. The various control mechanisms in Egypt remains far from those required. This does not create an impediment to a greater inflow of FDI, but also account for an insufficient investment environment. Amidst efforts to reconcile the tenets of a market economy with socialist ideology, the handling of foreign interest in Egypt remains highly conditioned by various ideological, political, historical, and cultural factors. The objective of this study is to illuminate the current legal standards on the investment climate in developing countries. This study will be valuable as a source of information on issues affecting the investment climate in host states.

MAP OF EGYPT

Sea of Crete
GREECE
Ródhos
Kárpathos
Finike
Gulf of Antalya
Anamur
Burun Anamur
TURKEY
Silifke
Antakya
CYPRUS
Cape Andreas
Latakia
Cape Arnauti
Nicosia
Famagusta
Olympus 1951
Larnaca
Paphos
Limassol
Tartus
Trâblous
Beirut
LEBANON
Sour
Haifa
Golan Heights
Hadera
Irbid
Tel-Aviv-Yafo
Zarqa
Jerusalem
Amman
Gaza
Dead Sea
Al Karak
Beer Sheba
JORDAN
MEDITERRANEAN
SEA
Nile Delta
Baltim
Rashid (Rosette)
Dumyat
Port Said
Al Iskandariyah
Damanhûr
Al Mansura
Suez Canal
Al Arish
Tanta
Zagazig
Ismailiya
Great Bitter Lake
Lower Egypt
Shubra al Kheima
Al Qahirah
Giza
Suez
Pyramids
Memphis
Helwân
Nakhl
Sudr
Ain Sukhna
Wadi al Arish
Elat
Aqaba
Sinai
Peninsula
Katherina 2637
Nuweiba
Dahab
Gulf of Aqaba
Gulf of Suez
Ras Ghârib
Ofira
Gemsa
Ras Muhammad
Hurghada
Port Safaga
Qusair
Marsa Alam
Berenice
Ras Banas
Bir al Hasa
Tubruq
Al Adam
Al Burdi
Sîdi Barrâni
Sallûm
Marmarica
Mersa Matruh
Fuka
Al Alamein
Al Hammam
Libyan Plateau
Qattara Depression
Fort Qarain
Al Jaghbub
Jaghbub Oasis
Qara
Siwa
Siwa Oasis
Al Faiyûm
Beni Suef
Nile
Bahariya Oasis
Bawiti
Beni Mazâr
Al Minyâ
Dairût
Farafra
Farafra Oasis
Asyût
Abu Tig
Akhmin
Sohâg
Arabian Desert
Wadi Qena
Qena
Al Balyana
Qus
Karnak
Thebes
Luxor
Isna
Upper Egypt
Idfu
Kom Ombo
1st. Cataract
Aswân
Wadi Garara
EGYPT
Qasr
Dakhla Oasis
Mût
Al Khârga
Al Khârga Oasis
Bâris
Libyan Desert
Kufrah Oasis
Al Jawf
Gilf Kebir Plateau
Lake Nasser
Wadi Allaqi
Wadi Hadarba
Abu Simbel
Uweinat
2nd. Cataract
Wadi Halfa
Wadi Gabgaba
Kosha
Delgo
Nubian Desert
Dungur
Tabuk
Al Bad
Ash Sharmah
Duba
Al Wajh
Bayir
Ma'an

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Arabic Terms

Al Garida El Rasmeya	The official Gazette
Al-Idiaa Al-Aam	Public Prosecution
Al-Infitah	Openness
Al-Mahakim Al-Khasah	Special Courts
Al-Mahkama Al-Distoriah Al-Ulia	The Supreme Constitutional Court
Al-Mahkama Al-Idariah	Administrative Court
Al-Mahkim Al-Guz'iyya	Summary courts
Al-Mahkim Al-Ibtidaiyya	Primary courts
Al-Mahkim Al-Isti'nafiya	Courts of Appeal
Al-Sultah Al-Kada'yah	The Judiciary
Al-Sultah Al-Tanfiziyah	The Executive Authority
Al-Sultah Al-tashreyah	The legislative authority
Qanoun Al-Eib	Law of Shame
El Waquai El Masriyya	The supplement (the Official Gazette)
Fustat	The name of old Cairo
Hizb al Tajama al Wataniyah	Progressive National, Unionist
Hizb al-Ahrar	Liberal Party
Al-Hizb Al-Nasiri	Nasserite Party
Hizb al-Wafd-al-Jadid	New Delegation Party
Hizb al-Wafd-al-Jadid New	Delegation Party
Al-Hizb al-Watani al Dimoqrati	National Democratic Party
Jizyah	Capitation tax
Jumhuriyat Misr Al-Arabiyah	The Arab Republic of Egypt
Khedives	The viceroy of Egypt under Turkish rule (1867–1914
Majlis Al-Dawla	The Council of State
Majlis Al-Sha'ab	The People's Assembly
Mamelukes	A "Slaves" regime that ruled Egypt (1250–1517)
Shari'a Law	Sacred Law of Islam
Sultan	A Muslim sovereign
Sunna	Teachings of the Prophet Mohammed
Zakat	Obligatory payment made annually under Islamic law

Legal Abbreviations

A.D.I.L.:	Annual Digest and Reports of Public International Law Cases
A.J.C.L.:	American Journal of Comparative Law
A.J.I.L.:	American Journal of International Law
A.T.C	Annotated Tax Cases
AAIFI	Arab Agency for the Insurance of Foreign Investment
AOL	Arab Oil Company.
B.D.I.L.	British Digest of International Law
B.I.L.C.	British International Law Cases
B.L.R.	Business Law Review
B.Y.B.L.	British Yearbook of International Law
BITs	Bilateral Investment Treaties
Bus. Law	Business Lawyer
C.L.J.	Cambridge Law Journal
CCCP	Code of Civil and Commercial Procedures
C.L.Y.B.	Current Law Year Book
CERDS	Charter of Economic Rights and Duties of States
CLP	Current Legal Problems
CM	Council of Ministers
Col. L.R.	Columbia Law Review
Columb J Trans L	Columbia Journal of Translational Law
Columb LR	Columbia Law Review
COMESA	Common Market for Eastern and Southern Africa
CRO	Central Records Office
CS	Civil Suit
DAC	Development Association Committee
ECOSOC	Economic and Social Council (United Nations)
ECT	Energy Charter Treaty
EEC	European Economic Community
EECC	European Energy Charter Conference
ER	English Reports
FAO	Food and Agriculture Organization
FBJ	Federal Bar Journal
FCN	American Friendship, Commerce, and Navigation
FCSC	United States Foreign Claims Settlement
FDI	Foreign Direct Investment
FILJ	Foreign Investment Law Journal
Ford L Rev	Fordham Law Review
GA	General Assembly of the United Nations
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Co-operation Council
H.I.L.J.	Harvard International Law Journal
H.L.R.	Harvard Law Review
Harv Int LJ	Harvard International Law Journal
Harv LR	Harvard Law Review
I.C.J.	International Court of Justice

I.C.S.I.D.	ICSID Review
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
IBRD	International Bank for Reconstruction and
IBRD	International Bank for Reconstruction and
ICC	International Chamber of Commerce
Creep	International Court of Justice Reports
ICQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
DIB	Islamic Development Bank
IFC	International Finance Corporation
IXIA	International Investment Insurance Agency
ILK	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
Int LL	International Lawyer
Int. L.	International Lawyer
JWTL	Journal of World Trade Law
Law	Law Quarterly Review
MIA	Multilateral Investment Agreement
MIGA	Multilateral Investment Guarantee Agency
Neth Int LR	Netherlands International Law Review
NIOC	National Iranian Oil Company
OAPEC	Organization of Arab Petroleum Exporting Countries
OECD	Organization for Economic Co-operation and
OIC	Organization of the Islamic Conference
OPEC	Organization of Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
SAS	The Scandinavian Airlines Systems
SDR	Special Drawing Rights (IMF)
U.N.Y.B.	United Nations Year Book
UN	United Nations
UNAAR	United Nations Arbitral Award Reports
UNCITRAL	United Nations Commission on International Trade
UNCTAD	United Nations Conference on Trade and
UNDP	United Nations Development Programme
UNIDO	United Nations Industrial Development Organization
UNRIAA	United Nations Reports of International Arbitral
UNTS	United Nations Treaty Series
UNYBILC	United Nations Yearbook of the International Law
WTO	World Trade Organization
Y.B.I.L.C.	Yeabook of the International Law Commission
YBIL	Yearbook of International Law.

TABLE OF CASES

- LETCO Case, Liberian Eastern Timber Corporation v The Republic of Liberia, 26 ILM (1987).
- Liberian Eastern Timber Corporation v Liberia, ICSID Case No ARB/83/2, Award 1986.
- Lighthouses in Crete and Samos (France v. Greece), 1937 PCIJ Ser. A/B, No. 71.
- Marsella V. Langlais case- ILR, Vol. 22, 1955.
- Mavrommatis Concession Cases, 6 PCIJ, Series A, No. 2, 1924.
- Mines Ltd. and Reynolds Metals Company v. Government of Jamaica (Case ARB^74/4).
- Munster Administrative Court of Appeal. ILR, Vol. 21, 1954.
- Nationality Decree in Tunis and Morocco case, PCIJ, Ser. B, No. 4, 7, 1933.
- Nicolas Eustathiou & Co. v. United States, of Sep. 10, 1957,154 F. Supp. 515689 (E.D.N.Y. 1958).
- NIOC case, Sapphire International Petroleum Ltd. v. National Iranian Oil Co., ILM 152 (1970)
- North Sea Continental Shelf cases, 4 ICJ Reports, (1969).
- Nottebohm Case, 4 ICJ Reports, (1955).
- Orinoco Steamship Company Case, Permanent Court of Arbitration, Award of 25 October 1910, 11 RIAA 227.
- Panerzys-saldatiskis Railway. PCIJ. S. A/B No. 76, (1939).
- Parsons & Whittemore Overseas Co. v. RAKTA, 508 F.2d 969 (2d Cir. 1974) (Egyptian) Case.
- Petroleum Development Ltd. v. The Sheikh of Abu Dhabi (1951) 18 I.L.R. 144.
- Polish Upper Silesia Case, PCIJ, Series A, No. 7, (1929).
- Re Balseiro Case, ILR, Vol. 24, 1957, P. 600. ILR, Vol. 24, 1957.
- Re Benakila Case, ILR, Vol. 31, (1960).
- Re Boileau Case, ILR, Vol.23, 1956, P. 381, Dominican Republic Supreme Court, Feb. 3, (1956).
- Re Mannira Case, ILR, Vol. 27, 1963, Ontario Court of Appeal, March 5, (1959).
- Re Sastella case, France Court of Cessation, May 25, 1956. ILR, Vol. 23, (1956).
- Ruler of Abu Dhabi Case, Petroleum Development (Trucial Coast) v. the Ruler of Abu Dhabi Case (1951), International and Comparative Law Quarterly, Vol. I (April, 1952)
- Ruler of Qatar V. International Marine Oil Company case, Int'l L R (1953) P. 534.
- Salem Case, (US V. Egypt) Vol. II, U.N.R.I.A. A. PP., 1165-1187.
- Serbian Loans Case, 12 July 1929, PCIJ Ser. A, No. 20/21.
- Serbian loans case, PCIJ, ser. a, No. 20/21, (1929).
- Southern Pacific Properties (Middle East) Ltd. And Southern Pacific Properties Ltd. (Hon Kong) v. Arab Republic of Egypt, 3 ICSID Reports 112, 126 (1995).
- Starrett Housing Corporation v. Government of the Islamic Republic of Iran Award No. I.T.L.32-24-1, 19 Dec. 1983, 4 Iran-US C.T.R. 122.
- Suez Canal Case, US. Department of State Publications, No. 6392, (1956).
- Temple of Preah Vihear case, ICJ Rep., (1962) ICJ Rep.
- Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic, 53 ILR 389 (Preliminary Award 27 November 1975; Award on the Merits 19 January 1977)
- Underhill V. Hernandez Case, U. S. Supreme Court Reports 168, (1897), P. 250.
- Vacuum Salt Products Ltd. V. Republic of Ghana, ICSID Case No. ARB/92/1, Award (16 February 1994), 2 ICSID Reports 329 (1997).
- Valentine Petroleum And Chemical Corp. V. the USA, Agency for International Development, IX ILM P. 889 (1970).

Chapter One:
Introduction

CHAPTER ONE CONTENTS

Chapter One:
Introduction

In recent years, many theoretical and empirical studies have stressed the importance of foreign investments and their positive role in the economic and social development of developing countries. This question derives its importance from giving host states access to relevant elements of economic development such as; foreign currencies, advanced technology, and proper projects with needed expertise in planning and administration.

For this purpose, most developing countries, including Egypt, are striving towards achieving a sound investment climate, which would be able to attract more inflow of foreign capital. Since 1975 Egypt started to undertake important steps towards economic liberal reform. This reform was viewed as a major shift from the pre-1974 economic policies to a new policy known as Openness or *"Al-Infitah"* in Arabic. Accordingly, Egypt started a gradual reform of the legal framework regulating economic activities through revising much previous legislation which was promulgated in the 1950's and 1960's to regulate a centrally state oriented economy. The new tendency was manifested in many ways such as the promulgation of law 43 / 1974 concerning the Investment of Arab and Foreign Capital and the Free Zones, followed by six investment codes and lastly by Law No.8 of 1997, known as the Investment Incentives and Guarantees Law.

1. A State's Right to Economic Development

The independence of a huge number of nations from colonial domination has changed the character of the international community. This change transformed the international community from a homogeneous limited number of states to a community, which consists of a great number of states with unequal economic capabilities and un-similar political and social circumstances.

The newly independent states quickly recognised that their political and economic independence is interrelated. As most developing states inherited un-functioning and underdeveloped economic systems, economic development became their priority and their biggest challenge. Since this unjust gap in the standards of living between

developed and developing countries is widening, economic development issues have always been considered as a central problem needing solution by those who are working for the peace and security of the international community.

A state's right to economic development should not be considered only as a legal right, but also as a moral duty of governments for their own people. This right which is found in the UN Human Rights Conventions, the 1970 Declaration on the Principles of Friendly Relations Among States[1] and in the "Charter of Economic Rights and Duties of State"[2] is a repetition of the right of economic self-determination. This right constitutes "a frame work for the struggle of developing countries to attain the economic independence which has not followed automatically upon the attainment of political independence.[3]

Practically, the claim to the right to economic self-determination by developing countries represents an ideological confrontation with western claims for the principle of "acquired right" and the principle of "Pacta Sunt Servanda".[4] This expresses an economic contradiction and serves as a banner to mobilise developing countries in the context of North-South confrontation. Such an ideological use of this confrontation creates a hostile atmosphere of mistrust between newly independent states and their former colonisers.

As economic development is a combination of interacting factors, it is very difficult to formulate an exact definition of what usually has been considered not as " an abstract theoretical question but a concrete problem of vital importance".[5] Baldwin defined economic development, as "The study of the key economic relationships that determine the levels and growth rates of *per capita* income in less developed nations",[6] and he added that Development is "The Exploitation of all productive resources by a country in order to extend real income".[7]

On a theoretical level, many economists who have been searching and analysing reasons and methods of economic development have laid down the foundation of

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[1] UN Doc. G.A. 2625/XXV.
[2] UN Doc. E/CN4/Sub.2/404/Rev.1. (1981)
[3] Anthony Carty, "Form the Right to Economic Self- Determination to the right to Development: A Crisis in the Legal theory", (1989), P. 73.
[4] *Ibid., P. 74.*
[5] P. Albert, " Economic Development", London, (1963) P. 48.
[6] E. Baldwin, " Economic development and growth", Second Edition, Canada, (1972), P. 2.

economic development during the past century. One doctrine, for instance, relies on the concept of "stages" which depends on the market economy and exchange mechanisms. Meanwhile, Marx has translated such changes into a historical dialectic process of production means.[8] Malthus established a more classical theory of development, which was based on population growth, and the limitation of natural resources[9]. Recently, the crucial role of planning was raised and adopted by many economists as a mean to organise development programs and to "achieve greater static and dynamic efficiency in resource allocation".[10]

The above-mentioned theories, clearly, agree that the following factors: capital, land, Labour, and resources are dynamic and important. However, the aspect of technology, without which there will be no sufficient production either in quantity or quality approachable, is indispensable for any economic development[11]. As a result, adjusting the contemporary imbalance of technology between the underdeveloped and the developed states is one of the main objectives of the developing countries, which need a powerful, bargaining position against the industrialised states. Other elements could be taken into account due to their effects on economic development, such as good management[12] and socio-cultural factors.[13]

2. Economic Development and International Law

Law can be understood as an "Instrument through which development in all its dimensions may be pursued".[14] In such a context, foreign investment is not an exception to the fact that interaction exists among legal, economic, political and social factors in many areas of human life and society. Moreover, the interrelation of the effects of those factors shows explicitly that its correlation has a dialectical dimension. Consequently, foreign investment is related to a fundamental question central to the thinking about the relevancy of the current world economic system and the real need

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[7] *Ibid.*
[8] R. T. Gill, "Economic Development: Past and Present" USA, (1960), PP. 21-38
[9] *Ibid.*
[10] A. P. Thrilwall, "Growth And Development ", London, (1979), P. 3.
[11] J.A. Schumpeter, " The Theory of Economic Development" Oxford University Press, New York. (1961), P. 68.
[12] F. Harrison, "Entrepreneurial Organization as a Factor in Economic Development", Q. J. E., (1956), PP. 371- 373.
[13] A. Pepelasis," Economic Development", New York, (1961), P.165.
[14] Ebow Bondzi Simpson, "The Law and the Economic Development in the Third World", (Ed) "Over-viewing Confronting the Dilemmas of Development through law", P. 1.

for a change towards a New International Economic Order, also it should not be treated as an isolated question.

Contemporary international law - under its traditional principles and rules - has proven to be not capable of solving the problem of two thirds of the world population in the sense of offering them a fair and just solution for their economic problems. The north-south disagreement has gone far beyond the traditional rules of international law in a way, which represents a real threat to international peace and security. It is essential to develop new rules urgently, to establish a more sophisticated international law, which is able to tackle the newly rising issues including the issue of economic development in developing countries and considering them as a genuine part of international law.

The main theme of contemporary international order is based on the principle of equality among states, [15] which are not equal in terms of economic development. However, such a principle witnessed many cases of "factual" inoculate among the member states to international institutions such as the UN,[16] IMF and the World Bank.[17] Again, such a distinction was in-favour of rich countries. It is known that the foundations of international law were laid in the fifteenth century to govern a group of European states, which had, at the time, similar ideological and economic conditions. Such a laws do not recognise the recent development of the international community and the need for a new international order, which is supposed to take the new economic situation into account and to observe the differences of the level of economic development of the member states.

It is understandable that international co-operation was found in the first place to put an end to all that could threaten the security and the peace of the international community. Assuming that international law succeeded in easing East-West tensions through agreeing on group of rules which necessitate friendly relations among states of international community and in accordance with the meanings and aims of the UN Charter. On the other hand, such a group of rules has failed, so far, to find a proper solution for economic under-development in the developing countries, which

[15] Article 1 Paragraph 2 of the UN Charter.
[16] The right of Vito is practiced by the five strong states in the Security Council of the United Nations.
[17] These institutions distinguish between poor and rich countries through giving the rich states some privileges concerning the formation of their administration and the power of voting.

accommodates the seeds of a wider conflict between those who have and those who have not.

International legal efforts to solve the question of underdevelopment in developing countries took many faces and went through many phases. First of all, it is important to mention that the Charter of the UN did not make a clear distinction among the states of the international community on the basis of their level of economic development. However, the Charter mentioned that its purposes are " to maintain international peace and security"[18] through achieving "International co-operation in solving international problems of an economic, social, cultural or humanitarian character".[19] In addition to "the creation of the condition of stability and well being which are necessary for peaceful and friendly relations among nations".[20] Further, the Charter promoted "higher standards of living, full employment and conditions of economic and social development"[21] and to find a solution for "international economic, social... and related problems".[22] Finally, the Charter asks "All members ... To take joint and separate action... for the achievement of [such] purposes...".[23]

International legal efforts to achieve the above mentioned principles could be classified into the following three stages. First stage, (1946-1949), characterised by the recognition of the problem through the decisions of the General Assembly of the UN.[24] The requirement for a joint report to be done by all concerned agencies of the UN concerning the issue of development[25] and finally the creation of the UN program for Economic Development.[26]

Second stage (1949-1965), the UN G.A. established a special program,[27] and later the UN Special fund for economic development.[28] During this stage, the UN declared its ten-year plan for development aiming at increasing the level of development at the rate of 5% yearly. The plan failed in achieving the declared aims.

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[18] Article 1 Par 1 of the Charter.
[19] Article 1 Par 3 of the Charter.
[20] Article 55 of the Charter.
[21] Article 55 Par (A) of the Charter.
[22] Article 55 Par (B) of the Charter.
[23] Article 56 of the Charter.
[24] G.A. Decision No 52 (1) of 1946.
[25] G.A. Decision No 198 (3) of 1948.
[26] G.A. Decision No 200 (3) of 1948
[27] G.A. Decision No 304 (4) of 1949

Third stage, started in 1965, by the G.A. decision to create the UN Program for Economic Development[29] through the merges of both the UN Program and the Fund. This stage included the UN declaration of a new strategy for development[30]; this declaration was adopted in 1970,[31] without voting. The result of this step was not as successful.[32]

Reviewing the results of the UN attempts to improve economic conditions in developing countries, without going in depth into economic issues, shows clearly that the conditions of the developing countries deteriorated badly under contemporary international economic order. This was expressed explicitly in a report issued by the Social and Economic Council of the UN.[33] This report mentions that "the results of the first two years of the second plan for development proves that the problem is still widening and the situation of most developing countries is getting worse than that of the late sixties by the end of the first ten year-plan".[34]

In the shadow of this international system, developing states were forced to seek alternative means to achieve their economic development; capital was among other elements of development targeted by host states.

3. Sources of Capital

Economic development and prosperity in Egypt, similar to other countries, depends on the ability of providing a needed capital. This capital could be either from domestic or from foreign sources.

3.1. Domestic Savings

Undoubtedly, Foreign investors are not after sorting out host countries' economies problems, though they are keen to participate in existing process of economic growth. One major sign that the existing process of the domestic economy development is positive would be to see levels of domestic savings.

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[28] G.A. Decision No 124 (13) of 1958
[29] G.A. Decision No 2029 (20) of 1965
[30] G.A. Decision No 2218 (21) of 1966
[31] G.A. Decision No 2626 (25) of 1970
[32] See G.A. Decision No 1827 (45) of 1973 for the details of the failure of the UN strategy for economic development.
[33] Decision No. 1827 (45) of 1973.
[34] *Ibid.*

At this level, Egypt has one of the lowest per capita savings rates in the world. According to World Bank figures, Egypt stood at 14 per cent in 1999. The global average for the same year was 23 per cent while, more significantly, that of countries with income levels comparable to Egypt stood at 30 per cent. Egypt's low rate effectively sets a very low ceiling on the investments that can be financed domestically. According to the Egyptian Ministry of Economy and Foreign Trade, the ratio of domestic investment to GDP stood at only 19.8 per cent for 1999/2000.

In Millions of US $	**Domestic savings rates**	**FDI Flow / 1999**
China	%52	43751
Malaysia	%32	5000
South Korea	%34	5415
Thailand	%45	6941
Singapore	%42	7218
Egypt	%12.5	180

Figure 1: Source UNCTAD database on FDI and TNCs, 2000

Figure 1 indicates the relationship between the rates of domestic saving and the level of FDI inflow. Consequently, stimulating domestic investment should be a priority for the Egyptian government. Any improvement of the domestic savings profile must be done through a change in Egyptian life style. Consequently, if Egypt is to achieve the kind of development for which every body is looking, then the government, the wealthy -and to a lesser extent the middle classes -must begin to exercise restraint in their consumption patterns. Furthermore, they must work to foster a savings culture, and use that at their disposal to curb the excessive spending on luxuries and imports that consumes so much of their income. Simultaneously, Egyptian banks should develop a smarter saving schemes and currency policy should be shaped in such a way as to boost domestic savings.

3.2. Alternative Foreign Resources

In the case of insufficient domestic savings, there are two main alternative resources of capital. Firstly, it is possible to finance investment with foreign loans, through such a course carries with it the risk of dangerously increasing Egypt's foreign debt and could negatively be reflected on the country's overall economy. Secondly, another alternative is to attract foreign investment, either, indirectly through the purchase of shares and bonds that pump capital into private and public sector companies or directly through the establishment of manufacturing or service enterprises. The great advantage of

direct investment is that it stimulates the transfer of technology and managerial and marketing expertise into Egypt.

3.3. Foreign Direct Investment

Historically, the apprehension of developing countries towards FDI was based mainly on the international political atmosphere. Most developing countries became independent between the mid 1950's and the late 1960's. The pre-independence era was dominated by unequal and unjust economic and political practices from the side of the colonial powers. This created an atmosphere of protectionism to protect the sovereign economic and political rights of the newly independent states. In other words, foreign investment –foreign capital- was understood as new means of colonisation.

This sentiment of the early post-colonial period was reflected and supported by many decisions of the UN General Assembly. In 1950, the General Assembly stressed that nothing should "impede the exercise of the sovereignty of any state over its natural resources".[35] Subsequent resolutions stressed, as well, the "pre-eminence of sovereignty and economic independence" of the independent state.[36] This atmosphere of mistrust from the side of developing countries was reflected in the Declaration on the Establishment of a New International Economic Order.[37]

On the other side, scepticism of the developing countries was also reflected in legal terms. In 1868 Mr. Carlos Calvo, an Argentinean jurist, introduced what is known as the Calvo Doctrine and the Calvo close.[38] This doctrine is based on the principle of preserving a full national sovereignty over matters dealing with foreigners, especially over disputes involving foreigners.[39] According to the Calvo Doctrine, states enjoy exclusive jurisdiction in a way that waives foreigners' right of diplomatic protection from their own home states.[40]

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[35] Resolution on the Right to Exploit Freely Natural Wealth and Resources. G A Resolution 626 (VII) of 1952

[36] General Assembly Resolution 1803 (XVII) of 1962, Declaration on Permanent Sovereignty over Natural Resources.

[37] General Assembly Resolution 3201 (S-VI) adopted on 9th of May 1974, para1.

[38] Eduardo Wiesner, "Ancom: A New Attitude Toward Foreign Investment", 24 Inter-American Law Review, (1993), P. 493.

[39] *Ibid.*, P. 498.

[40] *Ibid.*

During the last two decades, the attitude of Developing countries witnessed a clear shift into the opposite direction, from suspicion and mistrust to openness and collaboration. This dramatic change of international economic policies is due, mainly, to a wave of political pragmatism triggered by economic difficulties. One of the best examples to manifest the complete shift of attitude towards more liberalisation is the experience of the Andean group,[41] as the restrictive law 24 of December 1970 was replaced with law 291 of March 1991.[42]

In addition, to the advice of international institutions that paved the way to more openness, this matter may have been stimulated by both economic and political circumstances. A changing international political atmosphere has clearly played a role in the new mood in the developing world. Political change started in 1989 with extremity of socialist states in Eastern Europe and continued with the disintegration of the Soviet Union in 1991. The economic implication of these major international political changes validated the principle of market-oriented economies through exposing the weakness of socialism and communism as a political economic philosophy.

In addition, economic conditions in developing countries played an essential role in this transformation. A general non-functioning economy beside other elements such as debt crises and shortage of foreign exchange promoted the search for alternative financial resources namely "foreign direct investment".[43]

Political and economic pragmatism and the necessity to integrate into the interdependent and global international system urged developing countries to recognise the changing international system and to seek a better relationship with the developed countries. This resulted in adopting vast steps towards more liberalisation and integration with less ideological considerations. Moreover, some developing countries started urging the developed countries to apply the liberal economic principles they used to advocate.[44]

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[41] The Andean Group consists of Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela.
[42] See Arcaya Smith, "Treatment of Investment in the Andean Group", in OECD proceedings
[43] Sting Claessens "Alternative Forms of External Finance" 1 World Bank Working Paper, No. 812 (Washington DC: the World Bank, 1991).
[44] See Kofi Annan, Help Third, Third World Help it Self, The Wall Street Journal, (1999).

There is no doubt that FDI issues raised serious arguments, on both national and international levels, especially between capital exporting and capital importing countries. However, developing countries recognised that economic development requires additional elements, which will not be available unless they pave the way for the inflow of FDI through creating a friendly investment climate.

4. Egyptian Openness to Foreign Investment

The Government of Egypt has always recognised the importance of foreign direct investment in the process of the country's economic growth. In line with this understanding, Egypt put a substantial effort to stimulate more inflow of Arab and foreign capital and technology. This step is to be considered as a major change of policy after more than a decade of banning FDI from entering the country. The new policy was understood as a step to accomplish development goals through a threesome consists of Arab capital, western technology and Egypt's Labour force and big market.

4.1. Egyptian Efforts to Create a Sound Investment Climate

On a legislative level, Egypt approved, in the last few years, a series of measures designed to further streamline and strengthen laws related to foreign investment and to reduce limits on foreign ownership. Previous sharp legal distinctions between Egyptian and foreign-owned firms have been dropped. These essential current laws approved include:

- Investment Incentives and Guarantees Law 8 of 1997.[45]
- Law 3 of 1998 that amended Companies Law 159 of 1981.[46]
- Adjustments to Capital Markets Law 95 of 1992.[47]
- Banking Law 155 of 1998.[48]
- Law 156 of 1998 that amended Insurance Law 91 of 1995.[49]

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[45] Under this statute, which replaced a 1989 law governing foreign (as distinct from Egyptian) investment, projects in 16 high-priority activities benefit from special exemptions and incentives, and enjoy explicit guarantees, for example, against nationalisation.

[46] Law 3 streamlined the procedures for establishing a new company and provides for the right of petition for denial of incorporation.

[47] This law and related statutes govern the financial sector. The government amended Law 95 to strengthen stock market regulations to address concerns about fraud, price manipulation, and insider trading. Also, the government issued a decree amending the executive regulations of the Capital Markets Authority, which oversees the stock exchange. These changes are designed to protect investors and improve the efficiency of the stock exchange.

[48] The new banking law permits foreign ownership of Egyptian banks up to a 10-percent cap on shares owned by any one party. The changes will also allow the privatisation of one of the four public sector banks.

- Law 1 of 1998.[50]
- Law 18 of 1998 that amended Law 12 of 1996.[51]
- Law 19 of 1998.[52]
- Law 89 of 1998.[53]
- Barriers to Investment.[54]
- Public Enterprise Law 203 of 1991, Privatisation.[55]

Furthermore, actual privatisation of public sector companies has been slow but steady. As of March 1998, the government has sold majority stakes in 29 companies, liquidated 20 companies, sold 15 companies to employee shareholder associations, and 11 to anchor investors. This brings the number of privatised companies into 75. The government has also progressed with financial restructuring plans and early retirement schemes in the remaining state-owned firms, which will make these companies more attractive for future sales. Egypt's privatisation program broadened in the past two years with the government's opening the maritime, telecommunications, and infrastructure sectors to the private sector on a Build-Own-Operate-Transfer (BOOT) basis.[56]

More private sector companies, long known as closed or family businesses, are now expanding and going public, offering equity in the stock market. This represents a potentially good opportunity for domestic and overseas investors. Foreign investors

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[49] Law 156 removes the 49 percent ceiling on foreign ownership, permits privatisation of national insurance companies, and abolishes the ban on foreign nationals serving as corporate officers.

[50] This law amended the General Egyptian Maritime Organisation Law 12 of 1964. Law 1 permits the private sector, including foreign investors, to conduct most maritime transport activities, including loading, supplying, and repairing ships

[51] This Law allows the government to sell minority shares of electricity distribution companies to private shareholders.

[52] This law changed the status of the telecommunications authority (Telecom Egypt) to a shareholding company with the government as majority shareholder

[53] This law amends the Tenders and Bidding Law 9 of 1983 governing foreign companies' bids on public tenders. This law requires the government to consider both price and best value and to issue an explanation for a bid's refusal.

[54] Obstacles still include cumbersome Labour policies a shortage of skills in mid-level management, the sluggish pace of privatisation, continued shortfalls in credit facilities, inadequate IPR protection and enforcement, and non-tariff trade barriers.

[55] The Egyptian government launched its privatisation program with and executive regulations establishing the regulatory framework for the sale of 314 public enterprises. The law allows the sale of shares and assets of public enterprises to private sector investors and does not preclude purchase of assets by foreigners.

[56] Doing business (World Bank Group) 2001-2003 145 countries reports & 60 Firm surveys, World Competitiveness Reports/ annual by (World Economic forum), Index of Economic Freedom by (the Heritage Foundation). http://www.doingbusiness.org

are allowed to purchase stocks, and there are no restrictions or limits on the amount of shares acquired.[57]

That was a very brief description of the Egyptian legal framework, designed to enhance the foreign investment atmosphere, which shows how serious the Egyptian government is in considering the question of foreign investments.

Foreign enterprises and companies that bring capital, technology, and expertise to developing countries require an appropriate investment climate. Such a climate is made up by a number of factors. Among these are a welcome politically, a secure and stable social environment, a condition that Egypt meets.

Another prerequisite for an attractive investment climate is the existence of a large local market. Such a market should, firstly, demonstrate a commitment to product and service quality standards to ensure fair competition and, secondly, is deregulated enough to ensure that foreign investors have easy access to raw and intermediary materials whether produced domestically or abroad. This local base must also offer diverse and extensive marketing opportunities. There is no doubt that Egypt, with its enormous domestic market, along with its membership in the WTO, the Greater Arab Free Trade Zone and COMESA, and its economic partnership with the EU, is very well poised in this domain, a fact that enhances its attraction for foreign investors.

Simultaneously, Egypt offers potential investors a huge and relatively inexpensive work force, though with considerable room for improving the capacities and competitiveness of Egyptian labour through education, training programs, and technological development urgently.

Investors are also lured by tax incentives. Yet, while such incentives have certainly been made available, Egypt believes that adhering to a tax structure that ensures equal opportunity, shares the tax burden equitably, and, consequently, sustains the confidence of all better ensures a secure and resilient investment climate.

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[57] Doing business (World Bank Group) 2001-2003 145 countries reports & 60 Firm surveys, World Competitiveness Reports/ annual by (World Economic forum), Index of Economic Freedom by (the Heritage Foundation). http://www.doingbusiness.org

4.2. Results of Egyptian Efforts

More than thirty years after the official opening of Egypt's "open door policy", the general feeling in the country is still a sense of frustration. Official disappointment is due to a weak response from foreign investors. This resulted in a general public frustration, because of the official failure to raise the living standard of the Egyptian people.

Yet, although Egypt meets and even surpasses many of the criteria by which the investment climate can be assessed, it still faces an uphill struggle in securing a share of foreign investment correspondent with its potential. According to the General Investment Organisation, the total amount of Arab capital invested in companies established following the implementation of the Arab and Foreign Capital Investment Law up to mid 2003 reached no more than $3.5 billion, while cumulative foreign investment in Egypt during that period reached only $3.7 billion, i.e. just 8.5 per cent of the size of foreign investment that poured into China in 1998 alone, and only just over half of the amount of foreign investment in Thailand for that year.[58] These are very thin wedges of the overall Arab and foreign investment pie, and they give us no cause to pat ourselves on the back simply because direct foreign investment in Egypt is greater than in any other Arab country. The Arab countries, after all, remain, as a whole, marginal in this domain. Despite that, the flow of foreign investment did not reach the border of four billions Dollars.

The performance of the Egyptian economy is the best indicator in assessing the investment climate in Egypt. Indicators show that Egyptian economy over the last two decade is doing well but not well enough. According to the latest World Investment Report 2003, Egypt ranked at number 91 among 140 capital importing countries, and at number 7 among the top ten capital importing countries in Africa,[59] i.e.0.5percentage of the world FDI inflow.

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[58] Doing business (World Bank Group) 2001-2003 145 countries reports & 60 Firm surveys, World Competitiveness Reports/ annual by (World Economic forum), Index of Economic Freedom by (the Heritage Foundation). http://www.doingbusiness.org

[59] Before Tunisia, Côte d'Ivoire, Mozambique and after South Africa, Morocco, Algeria, Angola, Nigeria, and Sudan.

5. Statement of the Problem

Despite all efforts made by the Egyptian government to attract more foreign investments, the size of FDI inflow still modest and the following questions could be of special importance:

- Why did FDI inflow into Egypt not meet the declared targets?
- Is it because of the conditions of the Egyptian investment climate?
- Is it because of the Egyptian FDI policies?
- Is it because of both above-mentioned reasons?
- Is it because Egypt is a low-middle income country that has made the country less attractive to foreign investors who favour high-income host states?

Accordingly, this thesis looks at the following two questions; has the Egyptian government succeeded in creating a favourable investment climate? If the answer is positive, why has Egypt failed to attract enough foreign investments?

This thesis addresses such questions through presenting and discussing the way Egypt treats foreign direct investments, especially in the areas, which affect mostly foreign investors and through analyzing the reasons behind the lack of success of the Egyptian government in meeting its targets. I wish to make a contribution to the necessary reform of the legal framework concerning foreign investments.

6. Significance of the Study

The significance of this study based on the above highlighted problems. The effectiveness and efficiency of tax incentives in attracting FDI is important and vital as developing countries are increasingly convinced that FDI is essential for speeding up social and economic growt. At this point it is very important for policy makers in the developing countries to realise the importance of investment climate to attract FDI considering their effectiveness. And to show how important is to create an effective and viable means of promoting FDI inflow.

This study will be based on the assumption that FDI is a positive element in the process of economic development in developing countries, and it generates positive

consequence for host states[60]. Therefore, judging the effectiveness of FDI and its consequences on host-economies will be outside the scoop of this study.[61]

As the principle of the supremacy of law has been recognised by the Egyptian constitution and been understood to be, in part, as a reason of prosperity attained by developed countries. This thesis intends to emphasis on the role of law in the process of creating a healthy favourable investment climate. Then, the study will attempt to develop a reasonably wide understanding of Egypt's foreign investment environment, through providing a clear discussion about Egypt's foreign investment practices and traces their evaluation since early nineties.

7. Methodology and Sources

This thesis will be a literature-based work with special attention to the analysis of the relevant available material related to the subject matter. This study relies on both primary and secondary sources of literature. The primary sources of material consulted are Egyptian legislation; this includes laws, presidential Decrees, and decisions of the Council of Ministers either as executive regulations or as Ministerial Decisions.[62] BITs,[63] which are the most important source of protection for foreign investment, after national legislation, will be taken into consideration. In addition, other primary sources such as international instruments, case laws, declarations, general documents, international organisations, and state reports will be consulted.

International multinational agreements, which embodied international standards on FDI such as The North American Free Trade Agreement (NAFTA),[64] the Energy Charter Treaty (ECT),[65] and WTO will be consulted. Furthermore, the World Bank

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[60] For contrast opinion see, Gordon H. Hanson, "Should Countries Promote Foreign Direct Investment" UNCTAD G-4 Discussion Paper Series, No. 9, Feb 2001.

[61] There is clear need for much more research on the consequences of FDI on the economies of host states.

[62] All Egyptian legislation is published in the official Gazette (*Al Garida El Rasmeya*) or in its supplement the Official Gazette (*El Waquai El Masriyya*).

[63] More than 1600 BIT's were signed by the end of year 2000.

[64] NAFTA was concluded in 1992 and includes Canada, USA, and Mexico. It is true that this agreement deals with trade issues, but it contains a provision on foreign investment. This multilateral agreement is especially important because it includes in its membership both developed and developing countries.

[65] ECT was adopted in 1994 by the European Energy Charter Conference, which includes around 50 states. This agreement is relevant because it contains non-regional binding provisions on foreign investments.

Guidelines[66] on foreign investment will be used to judge the compatibility of national instruments with internationally accepted standards of treatment. Views and literature of organisations such as UNCATD[67] and OECD[68] will be looked at as well.

Considering secondary sources, reference will be taken from various background papers, books, and academic articles. Many Internet website will be consulted for relevant up-to-date data and information. On empirical level, this study will relay on a questionnaire conducted in Egypt to reflect the opinion of foreign firms working in Egypt.

8. Chapters Overview

This study is comprised of nine chapters. It is useful to visualize the general structure of the whole study as a guide to this thesis. Thus, I have delineated it into three sections and an introductory chapter. Section One consists of the second, third, and fourth chapters, and will be dealing with background issues and literature related to the subject of the thesis. Section Two explores the way foreign investments have been treated in Egypt, especially in areas, which closely affect the decisions of foreign investors. In addition, this thesis aims to study the compatibility of Egypt's practices with international rules and standards.

A brief description of the contents of each chapter is giving below.

The first chapter gives an introduction to certain preliminary areas related to the subject of the thesis and provides a perspective on the importance for FDI and the role of law in economic development. In addition, this chapter presents a general statement of the problem and the research methodology adopted.

Chapter two covers the question of FDI as an important element to achieve economic development. This will be conducted through representing definitions, types, and legal challenges.

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[66] A joint ministerial committee of the World Band and the IMF adopted this Guideline in 1992. The rules of the Guidelines are non-binding "soft law", and applicable to all member states of the World Bank. They represent the potential international law on foreign investment after the failure of the negotiations on a Multilateral Investment Agreement (MIA) under the auspices of (OECD).

[67] This Organisation is inclined to represent the interests of capital importing countries

Chapter three deals with the issue of an attractive investment climate. This is due to the importance of this matter on the location decisions of foreign investors.

Chapter four of this thesis examines the circumstances surrounding Egypt's efforts to achieve needed economic growth and to shift towards a market economy system. Furthermore, this chapter will review the history, geography, and political system of the country. Finally, it focuses on the development of the investment climate in Egypt, reflects the historical antecedents of Egyptian foreign investment policies, and traces their evaluation.

Chapter five will be examining two areas: Admission and Treatment of Foreign Investment in Egypt. The rules of admission derive its importance from being the first contact between foreign investors and host states, and from being a mechanism to control the inflow of foreign investments. Then this chapter will study what standards of treatment are granted to foreign investors by Egyptian authority, and whether they are based on the concept of national treatment or a fair and equitable treatment standard, or on both. Later, this chapter will shed some light on the stabilisation clauses, which guarantee the stability of some protective provisions of investment legislations and contracts from any possible reversal measures.

Chapter six deals with the evaluation of the FDI incentives of FDI and their effectiveness and efficiency. Egypt has long been using a tax incentives system to attract FDI. This will be done through examining Egypt's laws and practices concerning granting tax incentives. This chapter analyses the effectiveness of tax incentives in attracting FDI and focuses on the distorting effects of such policies on Egypt's evolving market economy. The compatibility of tax incentives with Egypt's international obligations will be also examined. Finally, this chapter concludes as to whether, in the long term, tax incentives will be enough or further changes are needed for creating a favourable investment climate.

Chapter seven tackles the question of the settlement of investment disputes between foreign investors and host states, under municipal law, international law, and investment treaties. In addition, this chapter shows a particular attention to the requirement of exhausting of local remedies under Egyptian law and the willingness of

[68] This Organisation tends to serve the interests of developed capital exporting countries.

the Egyptian authorities to refer their disputes with foreign investors to international dispute mechanisms. Also discussed in this chapter are the types of national, international dispute settlement mechanisms, and the types of disputes eligible to be characterised as foreign investment disputes.

Chapter eight reflects the opinion of foreign investors about the investment climate in Egypt and their suggestions. This will be done through an interview questionnaire forwarded to foreign investors doing business in Egypt. This questionnaire is divided into three sections. The first section deals with the characterisation of the firms concerned. The second section explores the opinion of foreign investors about the factors influencing and shaping the investment climate in Egypt. Section three emphasises the future prospects and foreign investors' expectations for the future FDI in Egypt. Finally, this chapter analyses the outcome of the questionnaire in order to highlight the impediment of FDI in Egypt, which may be considered as the weaknesses of its investment climate from the viewpoint of foreign investors.

Finally, chapter nine presents a tentative conclusion from the overall analysis presented in this study, by summing up strength and weaknesses observed in the Egyptian's investment climate.

Chapter Two:

Foreign Direct Investment:

Definition Types, and Governing Rules

CHAPTER TWO CONTENTS:

Chapter Two:
Foreign Direct Investment:
Definition, Types, and Governing Rules

1. Introduction

Foreign direct investment is an essential part of the international economic order, which is a modern branch of contemporary international law. Economists have always viewed the question of foreign direct investment with greater concern than jurists have. Thus, this subject was rarely studied as an independent topic in traditional literature of public and/or private international law.

By the beginning of the post-colonial era, many economic problems of the newly independent states were raised to an international level after being considered for a long time as national economic problems. In 1964, the first United Nations Conference on Trade and Development took place. This conference was considered as a logical result for the General Assembly's Resolution number 1803 of 1962, concerning permanent sovereignty over natural resources. These combined factors played a great role in attracting international attention to find judicial grounds for a new international law on foreign direct investment.

It is well established by economists that domestic savings play a major role in achieving an acceptable growth rate in developing countries. However, in the absence of enough domestic savings, developing countries will be forced to find alternative financial resources to achieve the required rate of economic growth. Such foreign resources could be either public of private foreign resources.

Since foreign direct investments are usually dominated by political considerations, developing countries tend to avoid them in order to prevent the abuse of their economic and political sovereignty. Accordingly, developing countries tend to target private foreign investments despite the historical abuse of this type of investments on their national economies during the colonial era.[1]

[1] See, I Shihata, "Legal Treatment of Foreign Investment, The World Bank Guidelines", Martinus Nijhoff, Boston, London, (1993), P. 11. See also, L. B. Pearson, and others, "Partners in Development", Report of the Commission on

As a natural introduction, this study explores the legal types of private foreign investment flow into developing countries with special attention to foreign direct investment.

The flow of private foreign investment may take one of two major types. The first form is foreign direct investment, i.e. capital, machinery, technology, expertise, and administrative expertise. The second form is private indirect investment i.e. loans and financial facilities from private banks and companies. It is worth mentioning that this type of foreign investment, in contrast with public foreign investment, is not affected by political considerations since their main target is the profitability of the project.

2. Types of Foreign Investment

The following table (1) illustrates the connections between the types of foreign investment. Accordingly, the flow of foreign private investment into developing countries could be either public or private. The first form is outside the scope of this study. The second type may take one of the following two forms. First, "Portfolio Investment" as it takes the shape of funds and loans provided by foreign private banks, commercial companies, and special agencies. Second, "Direct Investment" as it takes the shape of technical help such as factories, machinery, or productive projects achieved by the foreign private sector.

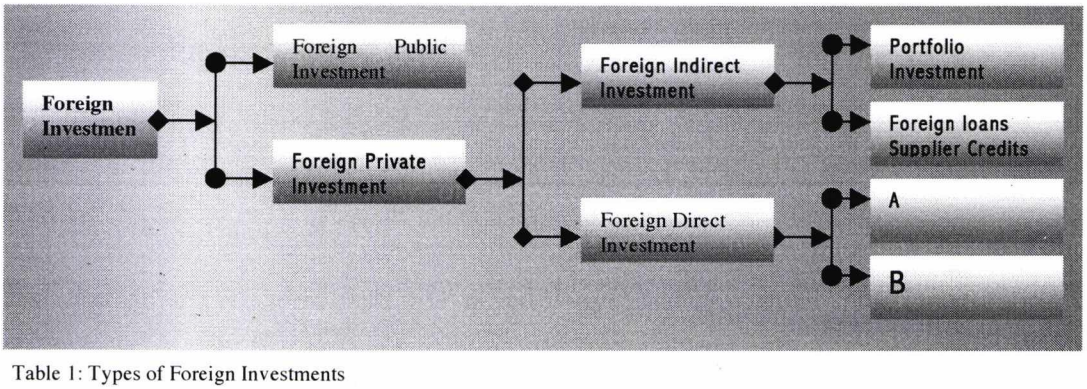

Table 1: Types of Foreign Investments

2.1. Public Foreign Investments

This is classified according to the source of the fund and the level of managerial contract done by foreign investors.

International Development, U.N. (1969), P. 99. See, F.P. Feliciano, "Legal Problems of Private International Business Enterprises", 118, R.C.A.D.I. (1966-II) P. 231.

2.1.1. Bilateral Loans

These loans are executed through agreements between the government of developing countries and one of the capitals exporting countries; this type constitutes 90% of the movement of foreign loans.[2] Deciding whether these loans are private or public depends on the description of the source of the capital. Generally, political considerations influence this type of loan, which is usually offered under unlimited supervision of the governments; meanwhile loans from private sources are based on economic bases.

2.1.2. Multilateral Loans

Multilateral Loans are offered by international organisations such as: The International Bank for Reconstruction and Development[3] "IBRD", the International Development Agency[4] "IDA" and IMF. Also by regional organisations such as: The European Bank of Investment, the European Development Fund, the Agency for International development Bank, the African Development Bank, the Asian Development Bank and the Arab Agency for Social and Economical Development. Loans through these international and regional development organisations are available only for their member states, and are usually accompanied with studies and plans, which limit the application of such loans to specific use.

It is clear that the success of such banks and institutions of development is based upon the financial strength of their parent organisations and on the good intentions of developed member states. Concerning the second point, the majority of rich states usually tend to have their own development institutions and funds, and it is enough to mention that the American Bank for Export and Import has given international loans between 1945-1953 three times more than IBRD during the same period of time. At regional level, the trend among rich Arab states such as Kuwait and Saudi Arabia to have their own development institutions has led the Arab Bank for Social and Economic Development of the Arab League to be an ineffective institution. Multilateral loans are affected largely by the policies and wishes of the developed member states since the voting power in such institutions is based on the financial contribution of its member states. Finally, it is clear that bureaucratic procedures of

[2] UN Statistical Year Book (1971-2005), P. 707.
[3] Such as The International Bank for Reconstruction and Development was founded in 1944.
[4] The International Development Agency was founded in 1960.

international organisations affect their efficacy and interrupts their competence as regards the fast and quick growth of international economic projects.

2.2. Private Foreign Investment

2.2.1. Definition of Private Foreign Investment

In principle, there is no one single agreed and comprehensive definition of foreign investments. However, it could be defined as "a transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation in the earnings of the enterprise".[5] The definition of foreign investment differs either according to the type of the investment[6] or to the party who is defining it. In both cases, foreign investment definition has been limited to the areas of interest to the definer.

In the first case, where the type of foreign investment dictates a definition, there are many issues to be observed. Sornarajah defined foreign investment as a "transfer of tangible and intangible assets from one country to another country ... to generate wealth".[7] In his definition, he combined tangible assets with intangible assets such as copyrights together. However, he excluded portfolio investment. This exclusion existed because portfolio investment is a "movement of money for the purpose of buying shares in a company formed and functioning in another country".[8] Later, this chapter will discuss the implication of such a distinction when it deals with the types of foreign investment.

In the second case where foreign investment reflects the interest of the party who is defining it, this definition took many shapes. Here, one can say that economists were more decisive than jurists in defining foreign investment. However, they still did not produce a comprehensive definition. In some cases, this definition was limited within the purposes of foreign investment, as being an operation either to " use capital for the sake of gaining or consuming what this money may give in return"[9] or " to use money to make more money out of something that will increase in value".[10] In other cases, where foreign investment is state-financed investment, it was defined as the " intention

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[5] Encyclopaedia of Public International Law, Vol. 8, (1989), P.246.

[6] Assets means tangible and intangible property. This means that intellectual properties such as copyrights, patents, and licensing agreement are included under term "foreign investment".

[7] M. Sornarajah, "The International Law On Foreign Investment", Cambridge University Press, (1994), P. 5.

[8] Ibid.

[9] Romoeuf, "Dictionary de Sciences Economiques", T.1 Vo, "Investtissement" Par Dictrlen.

to create a capital including all gains, which are due within the financial year of the state, and to add them to its belongings".[11]

Economists understood foreign investment as a method to increase the credentials of a state. While from a practical point of view they understood it as an act aiming to create a permanent economical enterprise in order to fulfil certain needs and to achieve financial interests.[12] Altogether, scientific approach has led some economists to narrow their definition within the limits of the purposes and aims of foreign investment and they ignored its elements, shapes, and tools.

From the legal point of view, many jurists, and international lawyers tried to produce such a definition and to find one legal system on foreign investment. In 1964 the International Law Association suggested many issues of international trade and development to be on the agenda of the 1966 conference in order to layout a legal framework for international foreign investment law. On 27 March 1965, the Association authorised a specialised committee to study the legal problems of foreign investment. After consulting many jurists, the committee defined foreign investment as "The movement of capital from investing countries to host countries without direct interference".[13] This definition attracted many opinions. On one side, some considered it as incomplete and they proposed to widen it to include the purposes of the investment.[14] On the other side, some opinions were for narrowing what they considered as too open definition, and they proposed to exclude all types of foreign investment but those which increase the productivity of the host state.[15]

Defining "foreign investment" is important because of its implications. Specifying certain assets as foreign investment means that they will benefit from any concessions and privileges provided by legislation and treaties governing foreign investments. Therefore, narrowing the definition of foreign investment on profit-making activities is not very accurate. There are many projects funded by foreign money, which didn't make a direct profit, but they facilitated the way for the profit-making project.

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[11] Longman Dictionary of Contemporary English. " Invest" and "Investment".
[12] M. Shafer. "Economic Development", Beirut, Dar El-Tadamon, (1971), P. 53.
[13] The International Law Association Report of the fifty-second conference.
[14] Philippe Kahn, "Les Problems Juridiques des Investments Etrangers Dane Les Pays en Voie De Development. Report Preliminary", Helsinki, (1966), P35.
[15] Ibid.

At the time when rules of public international law laid more stress on creating rules on the protection the rights and properties of foreign investors, defining "foreign investments" was left to the initiative of parties of host states, international agreements, and international institutions.

International institutions avoided giving a unified definition of foreign investment. In *Barcelona Traction case*,[16] the International Court of Justice mentioned "foreign investment" many times without defining it. However, judge Gross of ICJ defined it as an act, which "consists of a decision to assign assets to a productive activity".[17] The International Law Association defined "foreign investment" as a " movement of the capital of an investing country into another [host] country without direct management".[18] At the same time, the Havana Charter on Trade and Development mentioned the term "foreign investment",[19] without making any efforts to put forward a detailed definition.

Multilateral agreements mentioned "foreign investment" in many contexts. Most of the World Bank's agreements concerning the settlement of disputes between host states and foreigner investors ignored any definition of foreign investment in order to avoid any limitation or narrowing on the implications of the issue. Consequently, it is the party's will which determines the areas of their disputes that may be classified as foreign investment.[20] The International Investment Insurance Agency of the World Bank approved a comprehensive definition and mentioned that term "Investment" includes the contribution of assets in either monetary or non-monetary form and the reinvestment of earnings".[21]

The Agreement of the Arab Agency for Investment Guarantees listed what could be considered as an investment and mentioned that it includes " ... Direct investment its branches, agencies and the ownership of properties shares, etc. And all loans for more than three years..."[22] the Agency usually take into consideration the recommendations of the Intentional Monetary Fund in specifying the concerned investments.[23]

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[16] ICJ Reports, (1970), PP. 4,32,46, and 47.
[17] Ibid., P. 274. A separate opinion of judge Gross in *Barcelona Traction case*.
[18] ILA 52 conference, (1966), PP. 820 and 839.
[19] U.N. /Doc. E Conf. 2/78, (1984), P. 9.
[20] Delaume, "La Convention Portant Reglement des Differen Des Entre Etats et Ressortissent D'autre Etats, Clunet", (1966), Report of the Administration of the World Bank, PP. 35-36.
[21] Article 3/ 2/ B, says that investment includes all basics contributions whether it is cash money of not.
[22] Article 15 Paragraph 1 of the Arab Agreement.
[23] Ibid. Article 15/ 2.

Generally, multilateral agreements tend to adapt a wider definition of foreign investment and not to limit it within the nature of being a financial or physical contribution to the project. Such agreements did not tend to specify a legal or economic definition for foreign investment, but they primarily tried to list what could benefit from the terms of the agreement. Therefore, they did not come up with a uniform understanding about this point. Consequently, National Programs had different opinion on this matter. In this instance, the Japanese Insurance Program explicitly excluded all sorts of loans from being investment. Meanwhile, the Arab Agency for the Insurance of Foreign Investment considers long and even short-term loans as foreign direct investment.[24]

Bilateral Agreements vary in defining foreign investment. A good example on how they are different is the comparison between the following two examples. The first example is the bilateral agreement between the Federal Republic of Germany and Madagascar of 21 September 1962. It is very precise in listing what it considers as foreign investment,[25] in a way, which covers all types of foreign investments. The second example is an agreement between the Netherlands and Tunisia of 19 November 1964, which was very brief in defining foreign investments, as Article one of the Agreement mentioned that this term includes all "capitals and properties owned by foreigners" without any further details.[26] Another good example is the Egyptian-Sudanese agreement of May 1987, which mentioned what term "foreign investment" means and enlisted all activities and properties, which are included.[27]

Political considerations have always influenced the way law in developing countries defined and dealt with foreign investment. During the colonial era, foreign investment law promoted the inflow of foreign capital from the colonial powers, while after independence, the newly independent states adopted new more free legislation to encourage and control the inflow of foreign investment. Clearly, national interest dominated the new way of legislation.

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[24] Ibid. Article 15 Paragraph 1.
[25] Article 8 of the Agreement
[26] ILM. Vol. 4, (1965). P. 159. "Investments such as properties, rights and interests belonging to physical and juridical persons...".
[27] The publications of the General Secretary for the Sudanese -Egyptian Affair. Khartoum, (1987), P.66.

Definition of "foreign investment" in National laws tends to be narrow and restricted to include only the type, which, mainly, is able to establish new projects in host states. Article 223/A of the American Investment Law of 1961 mentioned that investment is every contribution by services, inventions, technology and production.

Under the Egyptian law, definition of "foreign investment" varied. According to the Egyptian Foreign Investment code of 1974 this definition was broad and included the planning cost of the project. Article 2/4 considered that the terms of this code cover foreign capital imported for the planning and preparation of the original foreign project.[28] This is in harmony with the tribunal decision in the Valentine Petroleum and Chemical Corp. V. the USA case, as the planning cost of the project was considered as an investment[29] in spite of the fact that such expenses do not raise any financial, return. Furthermore, it is worth mentioning that widening the definition of foreign investment may lead to the risk of letting some financial operations benefit from concessions given by the foreign investment code.

More recently, Egyptian legislators tend to list areas of economic activities covered by the foreign investment law instead of defining the term "foreign investment". Investment Law 8 of 97 enlisted 16 areas[30] of economic activities able to enjoy the protection and incentives of the investment law.[31] This, in addition to giving the cabinet a right to make an addition to such a list in accordance with the needs of the country.[32]

The above-mentioned Article shows clearly that Egyptian legislator went beyond defining "foreign investment" into listing what is considered as foreign investment. This law laid stress on FDI without dealing with other types of foreign investment

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[28] Free foreign currency spent on preliminary studies, research and incorporation and assured by the investors within a limits approved by the authorities' board of directors. See, Michael H. Davies, "Business Law in Egypt", the Netherlands, (1984), P. 260.

[29] *Valentine Petroleum And Chemical Corp. V. the USA, Agency for International Development*, IX ILM P. 889 (1970).

[30] 1) Reclamation and/or cultivation of arid and desert land, 2) livestock, poultry, and fish production, 3) Industry and mining, 4) Hotels, motels, hotel apartments, tourist villages, and tourist transport, 5) transport of cold-stored goods, cold storage rooms for the preservation of farm products, industrial products, food stuffs, 6) Overseas maritime transport, 7) Air transportation and directly related services, 8) Support oil services for drilling, exploration, and gas transport operations, 9) Housing units for unofficial leased use, 10) infrastructure facilities, including potable water, sanitary drainage, electricity, roads and telecommunications, 11) Hospitals, medical and therapeutic centres offering 10% of its capacity free of charge, 12) leasing and securities under writing, 13) venture capital, 14) Computer software industry, 15) Social Development Fund- financed projects.

[31] In comparison with other Arab countries, it is clear that the Egyptian list of what may constitute foreign investment is very wide. While Egypt listed 16 activities, Jordan listed six activities, Tunisia listed four activities, and Algeria listed 10 activities.

[32] Article ½.

because this type means foreign projects, with the ability to bring over their expertise, technology, and good opportunity for local Labour forces to gain experience.

Considering what has been said about defining "foreign investment", it is clear that such a definition is still vague and unclear because whenever it is defined, it only reflects the aims of the text drafter. Accordingly, we see that the best definition could be as the movement of one of the factors of production across international borders to take part, directly or indirectly, in the economic cycle in order to achieve distinguished financial gains.

2.2.2. Types of Private Foreign Investments

The importance of private foreign investment increased substantially after the foreign debt crises of the 1980's when Brazil and Mexico stopped paying back their foreign debts. Consequently, most developing countries turned towards private foreign investment to finance economic projects in their countries.

It is worth mentioning that the flow of private foreign investment is based on making-financial profit consideration, unlike public foreign investment, which is dominated, by political considerations.

According to the above mentioned, this section is divided into two main parts: Indirect private foreign investments and private foreign direct investment[33].

2.2.2.1. Foreign Indirect Investment

The distinguishing element of this type of foreign investment is the management and control of the project.[34] Unlike direct investment, this type does not involve any other element apart from the movement of money. Foreign indirect investments may either take the shape of loans from foreign private sources or the shape of a movement of money for buying shares in a company formed or functioning in the host state. This type is known as Portfolio Investment and is one of the most crucial sources of foreign capital for developing countries.[35]

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[33] For more details about the differences between direct and portfolio investments. See, Gerald M. Meier and Baldwin Robert, "Economic Development", Huntington, New York, (1976), PP. 419-436.

[34] Sornarajah, "The International Law on Foreign Investment" P. 5

[35] UN, "The External Financing of Economic Development, International Flow of Long Term Capital and Donation", (1936-1967), (1969), P. 7.

Accordingly, this part of the study will be divided into two main parts. The first part covers private foreign loans while the second part deals with booking shares and bonds issued by foreign governments in the private sector.

2.2.2.1.1. Private Foreign Loans

These loans come either as what is known as suppliers' credits or as loans from private banks.

2.2.2.1.1.1. Suppliers Credits

Suppliers' credits are one of three forms of loans named as hard term loans, which should be guaranteed by concerned governments.[36] This type of credit is usually accompanied with unsuitable conditions such as duration and interest rate.

The most dominant character of suppliers' credits is that it is a hard term credit. This means that it contains provisions of down payment of at least five percent of the total amount of the loan while the rest of the loan is payable within a period of seven to ten years or thereafter.[37]

Though the apparent credit terms may look favourable, it may not be so in reality. A low rate of interest such as two percent may mean that the real rate and the financing cost have been added to the price of good supplied. In some cases, there may be a "grant" element supplementing the real amount of credit to make it more attractive. Again, in such circumstances, the reality is something and the appearance is something else. An apparent grant such as thirty percent could be offset by a basic price fifty-percent or so higher than competitive prices available from other sources for the same goods or services.[38]

In addition, other characteristic of suppliers' credits which make them unfavourable are:

- Finalisation of prices and terms of procurement in a non-competitive environment.
- Attempts by the local agents of the suppliers to secure advantages for them employing various measures, most of which are non-ethical.
- The whole operation suffers of lack of transparency.

[36] The three types are 1) Buyers credits, 2) suppliers credits, and 3) commercial loans.
[37] See, R. Zaki, "Foreign Debt", P.125

Precipitated mainly by shortage of foreign exchange, developing countries are still seeking loans such as suppliers' credits despite all the above-mentioned negative characteristics.[39]

2.2.2.1.1.2. Private Foreign Banks Loans

Banks under the terms of a loan agreement may present international loans. They normally expect to receive a certificate or bond recording the terms of their loan, which they are able to transfer[40]. Loans from Private Foreign Banks, clearly, have a special importance in the process of economic development. Foreign private banks offer interested countries loans and financial facilities to achieve a balance between available national funds and making the best of them. Accordingly, foreign commercial banks constitute a good source of fund to cover states' temporary failure to fulfil their financial commitments.[41]

Conditions for obtaining such loans and the rate of their interest depend on each country's conditions. This type of loan is characterised by being short term with a high interest rate and because of that, they are categorised as hard loans. However, developing states still tend to seek such loans in the absence of other alternative sources to cover the cost of essential imported commodities.

2.2.2.2. Portfolio Foreign Investment.

Portfolio investment is the movement of capital aimed at buying shares in a company formed or functioning in anther country, particularly in the form of stocks and treasury bonds. Such investment is based on a divorce between management and control of the company and the share ownership. The importance of portfolio investment is that it enables developing countries to obtain foreign capital through issuing bonds designed for private sectors in foreign markets,[42] with commitments to pay back the value of such bonds when the time is due.

It is also possible for developing countries to put a portion of its public companies for sale in the shape of shares on the international market. Up until the end of the Second World War, portfolio investment was the most widely used type of foreign

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[38] Ibid., P 33.
[39] Stijn Claessens, "Alternative Forms of External Finance", 1 World Bank Working Paper, No. 812 (Washington, DC: The World Bank, (1991), P. 132.
[40] Philip Wood, "International Loans, Bonds, and Security Regulations", P. 3.
[41] Ibid.
[42] Ramzi Zaki, "Problem of Foreign Debts", P. 38.

investment. However, this type of foreign investment had lost most of its importance by early 1950's due to the following factors:

- Lack of trust that developing countries are able to fulfil their financial commitments.
- Restrictions imposed by developed countries against shares and bonds directed by developing countries towards the international stock market. For example, The USA imposes many restrictions on foreign financial stocks such as the limits on the value of stocks and treasury bonds and by the need for a prior authorisation. These restrictions largely affect the issuing and marketing of bonds and shares in developing countries.
- The existence of unfair competition between developed and developing countries and obviously foreign investors would rather invest in stocks, which belong to developed countries because they are more capable of fulfilling their financial pledges.[43]
- The bad condition of stock markets in the developing countries if they ever exist.[44]

There are a group of distinguishing elements between FDI and portfolio investment, but the most important one is the risk level involved of such investment. Portfolio investors take the risk involved in the investment. Whereas, foreign direct investors are entitled to some sort of protection, by both the host state through its national legislation and by his home state through many means of protection such as the diplomatic protection and FDI guarantees.

This distinction may be understood in many ways. Professor Ian Brownlie thinks that such a distinction is made on the basis that the portfolio investor should bear the risk of his freely chosen investment.[45] On the other side more internationally acceptable understanding for this distinction would be based on the following reasons:

- The portfolio investor moves out of his home state a useful capital into a foreign state, so he should endure the responsibilities.
- The portfolio investor is able, when detecting any risk, to withdraw his capital quickly or move it from one portfolio investment to another.
- The portfolio investor does not have to exist physically in a foreign state, whereas in the case of FDI the investor and his management staff must be present physically in the host state.

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[43] See, I. Shihata, "Political Limits of Foreign Capital", P. 67.
[44] Ramzi Zaki, "Problem of Foreign Debt", P. 329.
[45] See, I. Brownlie, "Treatment of Aliens: Assumption of Risk and International Law", in W. Flume, H.J. Haln, G. Kegel and K.R. Simmonds (eds.)", International Law and Economic order: Essays in Honour of F.A. Mann", (1977), P. 311.

Even if such investments are usually on individual contribution, they are still permitted by the home state. Then, there is no reason for not protecting them as the profits "will be repatriated or resources necessary for its industries will be made available".[46]

In other words, it could be said that the success of a portfolio investment depends largely on the reputation of the host states and on their ability to keep their financial promises. As developed countries have, usually, bad records about their ability to fulfil their financial commitments, this source of foreign capital is one of the least practical means of attracting foreign investments. Accordingly, developing states tend to consider FDI as an alternative source of not only foreign capital but western technology and expertise as well.

2.2.2.2. Foreign Direct Investment (FDI)

Today, FDI is the largest single source of external finance for developing countries. In 2000, FDI flow reached $1 trillion with 28 percent increase. Developing countries share of FDI flow grew 31 percent that is equivalent to US $ 240 billion; this trend was expected to continue. However, the following two figures show that FDI inflows declined in 2001 to $ 735 billion, which means a drop of 51 per cent, whereas FDI outflow decreased in 2001 to $ 621billion, which means a 55 per cent drop. This represents the first drop in FDI flow since 1991.[47] The decline of the FDI flow is likely to continue in most countries[48]. However, international production seems to set rise in its share of global economic activity.[49]

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[46] M. Sornarajah, "The International Law on Foreign Investment", (1994), P. 5 footnotes 11.

[47] See Note by the UNCTAD Secretariat: "Estimated FDI Flows in 2001 and the Impact of the Events in the United States", UNCTAD/ITE/Misc.49, (2 October 2001), P. 166.

[48] Decreases in FDI inflow are expected in both Latin America and Asia, while it will remain stable at $27 billion in Eastern Europe. See, Ibid.

Figure 1: Flow of FDI -Source: UNCTAD, FDI/TNC database

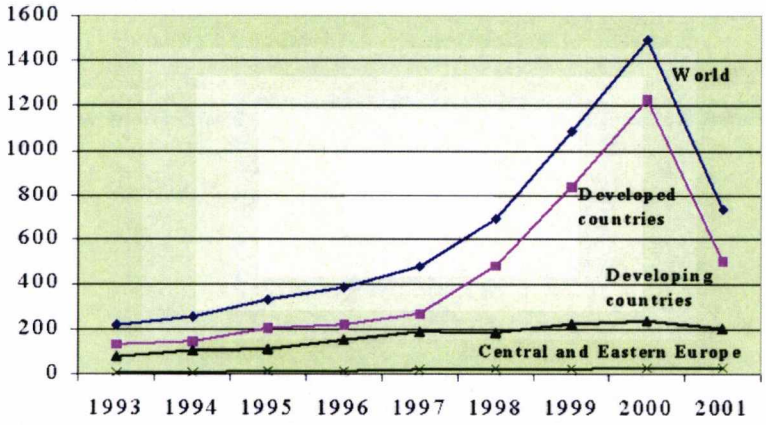

Figure 2: FDI inflows, by region – Source UNCTAD, FDI/TNC database

Region	*1998*	*1999*	*2000*	*2001*
World	693	1075	1271	760
Developed Countries	483	830	1005	510
Developing Countries	188	222	240	225
Africa	8	9	8	10
Latin America	83	110	86	80
Asia & the Pacific	96	100	144	125
South East & West Asia	86	96	137	120
Central & Eastern Europe	22	25	27	27

The decline of FDI inflows is, primarily, caused by the decrease in cross-border mergers and acquisitions, which account for the bulk of FDI; this is related to the slowdown in the world economy[50]. In addition, the tragic events of the 11th September had a negative influence on some of the principle determinants of FDI flows.[51]

FDI was not defined in the same way by different legal instruments such as national investment laws regulations and made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor"[52]. Whereas, the OECD defined FDI as every kind of asset owned and controlled, directly or indirectly by an

[49] UNCTAD, World Investment Report, "Chapter 1: Global Trends", (2002), P. 3.
[50] See Note by the UNCTAD Secretariat: "Estimated FDI flows in 2001 and the Impact of the events in the United States", UNCTAD/ITE/Misc.49, 2 October 2001.
[51] Ibid.
[52] IMF, "Balance of Payments Manual", (1980), Paragraph 408.

investor".[53] It is clear that the OECD definition is wide enough to include portfolio equity, debt instruments, contractual rights, and intellectual property. Such a wide definition "may cause friction with host states' conceptualisation of FDI".[54]

As mentioned in the previous section, foreign capital may be obtained from three main sources: debt finance such as loans and bonds, portfolio investment and foreign direct investment.[55] The distinguishing element between direct and indirect investment is the criterion of control over the assets of the enterprise. In the first case, the investor has the ability to control and manage the enterprise solely. While in the second case, the foreign investor's role is limited to moving a variety of financial instruments which are traded in organised and other financial market i.e. host state. Accordingly, we may classify FDI into two types: Bilateral FDI and the Multinational corporation.

Developing countries tend to avoid depending on foreign resources to achieve economic development, because this option is embodied with a variety of economic and political risks. However, they do work on attracting foreign investments under the pressure of insufficient domestic saving and the lack of needed expertise. In practice, developing countries impose some restrictions in order to achieve a balance between creating a sound investment climate and the aim of maintaining national control over their national economy. This type of foreign investment is well illustrated by what is known as "joint venture", in which a foreign investment project is based on a partner ship between national and foreign capital. The percentage of shares or voting power required is usually counted in accordance with the terms of the host state's laws and regulations.[56]

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[53] Article II/2 of the Draft text of the MIA agreement, 1998. This Article of the MIA agreement included the following activities as FDI: i) an enterprise (being a legal personal or any other entity constituted or organised under the applicable law of the contracting parties, whether or not for profit, and whether private or government owned or controlled, and includes a corporations, trust, partnership, sole proprietorship, branch, joint venture, association or Organisation). ii) Shares, stocks or other forms of equity participation in an enterprise, and rights derived there from. iii) Bonds, debentures, loans, and other forms of debt, and rights derived there from. iv) Rights under contracts, including turnkey, construction, management, production, or revenue sharing contracts. v) Claims to money and claims to performance. vi) Intellectual property rights. vii) Rights conferred pursuant to law or contract such as concessions, licences, authorisation, and permits. viii) And other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens, and pledges.

[54] D.D. Bradlow and A. Escher (eds.), "legal Aspects of Foreign Direct Investment", (1989), p. 23.

[55] OECD, "Economic Globalisation and the Environment", (1997), PP. 39-40.

[56] National law may state that foreign investment is established when a resident foreign investor owns certain percentage of the ordinary share or voting power of an incorporated enterprise. Article 19 of the Syrian investment law No10 of 1991 states that the Syrian public sector must own no less than twenty five per cent of a foreign investment enterprise. Article 4 of the Egyptian foreign investment law No 8 of 1997 did not touch on this area and left this matted for the involved parties –foreign and national- to determine the required percentage they agree about.

2.2.2.2.1. Legal Forms of FDI

The following most common legal forms of MNEs may provide a useful substance to the definitional issues discussed above.

2.2.2.2.1.1. Concession Agreements

A concession agreement is an arrangement between the government of one country- and any of its representatives- and a national of anther country, known as a foreign investor. This agreement defines the legal and financial relationship between the parties. Oil mining and administrating public utilities illustrate the best example on the nature of concession agreements.[57]

By the beginning of 1960's developing countries started to work towards benefiting more from their natural resources, without exposing foreign investors to any non-commercial risks, by tending to sign what is known as a "partnership agreement".[58] This shows that concession agreements have undergone a significant evolution. This helped to develop the theory of state contracts in the sense that it has introduced a new concept in contractual relations between states and nationals of another states. For instance, in 1957, Iran managed to sign an agreement with Azainda General Italian Petrol (AGIP) increasing Iran's share of profits into 75%.[59] During the same year, the Kingdom of Saudi Arabia amended its concession agreements with Japan Petroleum Trading Company (JPTC), and Kuwait did the same with the Arab Oil Company.[60] This trend was firmly established after the agreement of 1972 between (OPEC) and foreign investors regarding concessions in oil industries.

It is worth mentioning that "partnership agreements" made foreign investors more secure, because being a partner to a public authority means saving them a lot of non-commercial risks. In addition, this partnership may save them the problems of bureaucracy in most of the developing countries.[61]

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[57] Ingrid Delupis, "Finance and Protection of Investment in Developing Countries", UK, (1973), P. 43.
[58] M. Moughraby, "Permanent Sovereignty Over Oil Resources", Beirut, (1966), P. 55.
[59] William B. McClure, "Mining the Resources of the Third World, Concessions Agreements to Services Contracts", 67 AJIL (1973), P 74.
[60] Delupis, P. 157.
[61] Friedman and Kalmanoff, "Joint International Business Venture", Stevens, London, (1959) P. 99.

2.2.2.2.1.2. Joint Ventures

There is no precise legal meaning for the term "joint ventures"[62]. However, the attributes of the parties involved may determine its Legal forms, whether they are in public or private sectors. If the involved parties, foreigners and national, are classified as private sectors, the joint venture will take the shape of an ordinary national firm and it will be established in accordance with the relevant national law of the host states.[63] In case host state's law does not make out the required legal shape of such enterprises, this matter will be left to the will of the involved parties.

International joint ventures are very common in certain industries such as electrical engineering, pharmaceuticals, aero engines, and many others. The Scandinavian Airlines Systems (SAS) illustrates one of the best examples. This joint venture was established in 1951 by an agreement between the national airlines of Sweden,[64]Norway,[65]and Denmark.[66]

If the host government, or any of its representatives, is the national partner of a joint venture, the enterprise will take the shape of an ordinary national company. However, such a company is distinguished from the first type by enjoying many special privileges and incentives.[67]

Then, what legal shape would a joint venture take if both, national and foreign; parties were governments or their representatives? In this case, the enterprise will not be a joint venture, but it will take the legal shape of a "public international corporation"[68]. This determination is because a "joint venture" must be an economic partnership between a host state on one side and national of foreign state on the other side.[69] Concerning the legal shape of a "public international corporation", it depends on the will of involved states. However, it might take the legal shape of a national company with international or sub-international status. This means that the enterprise will have

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[62] See Brodley, "Joint Ventures and Anti Trust Policy", 95 Harvard Law Review, (1982) P. 1523.

[63] In principle, the "joint venture" may take the legal form of a contract, partnership, or limited liability company. For example, Article 19 of the Syrian investment Law No. 10 of 1991states that joint ventures take either the form of "limited liability Company" company or the shape of "joint-stock company". See E. Herzfeld, "Joint Venture", 3rd edition, Jordans, (1996), P. 55.

[64] AB Aerotransport, the Swedish National Airlines Companies.

[65] Det Norske Luftfartselskap, the Norway National Airlines Company.

[66] Det Danske Luftfartselskab A/B, the Denmark National Airlines Company.

[67] I. Shihata, "Joint Ventures in the Shadow of the Arab Co-operation", *Majalat Al-Siyasah Al-dawliyah*, issue 40, (1975), P.22 (Arabic).

[68] For example the French partner in Airbus industry, Aerospatiale, the Spanish partner in the Airbus industry, CASA, and Renault car industry is eighty per cent state- owned. See Muchlinski, P.75.

[69] I. Shihata, "International Economic Joint Venture", Ain Shams University Press, Cairo, (1969), P.6.

the nationality of one of the parties, while it will function in accordance with the terms of an agreement conclude d by the parties.

The confusion between a "Joint ventures" and a "public international corporation" is that both have an international status. However, it is important to make a clear distinction between "legal internationalisation" and "economic internationalisation".[70] Joint ventures gain their economic internationalisation from being an international economic activity and involve cross-border business. Whereas, "public international corporations" gain their legal internationalisation from being an economic activity done by international persons.[71]

This legal form of FDI was preferred by many states such as Eastern European states and the former USSR, where admitting FDI used to require the adoption of a joint venture between national and foreign partners. However, with the recent wave of liberalisation policies towards FDI, joint ventures have become a less common practice.[72]

2.2.2.2.1.3. Multinational Enterprises "MNEs"

It is widely accepted that multinational companies[73] are " the most significant class of global networks".[74] This is due to the role they continue to play in the dramatic growth of the world economy. However, MNEs are considered a risky type of FDI because of their impact on the economies of the developing states. MNEs, which started spreading after the Second World War, targeted all economic areas of national importance for developing countries such as natural resource, agriculture, and services. The monopolistic natures of the MNEs economic activities have a great affect on the world's economic and political[75] relations.[76]

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[70] Ibid., P. 14.
[71] Ibid., P. 15.
[72] P. T. Muchlinski, "Multinational Enterprises and the Law", Blackwell, (1999), P. 72.
[73] MNEs may come under many different names such as International corporations, Transitional corporations, Supra-national corporations, and Global Corporation.
[74] P. Muchlinski, "Global Burkowina Examined: Viewing the Multinational Enterprises as a Transitional Law-Making Community", in Teubner, ed., "Global Law Without a State", Brookfield, Dartmouth Publishing Company, (1997), P.79.
[75] See, Hadden, "Company Law and Capitalism", London: Weidenfeld & Nicolson, (1972), P.10.
[76] UN ECOSOC, "The Impact of Multinational Corporations on Development and on International Relations", E/5500, Rev., 1, (1974), P. 77.

In order to draw a comprehensive framework for MNEs, this section will deal with the definition of MNEs, their characterisations, and their impact on international economic relations.

Before defining MNE, it is worth noting that it is not accurate to deal legally with it as one legal entity. It is a group of corporations with different legal personalities and its offspring may take on many different nationalities.[77]

First, D.E. Lilienthal defined multinational enterprises in 1960 as " corporations which have their home in one country but which operate and live under the law and customs of other countries as well".[78] The weakness of this definition is that it considers multinational enterprises as a national enterprise with global operations. This makes the definition incomprehensive as it excludes other multinational enterprises.

Practically, it is not possible to define MNEs in a one comprehensive definition. Comparing the way economists[79] defined MNEs with the way international organisations such as UN[80] and OCED[81] did reflect some terminological confusion.[82] The best contemporary definition could be as "a group of "companies or other entities" of different nationalities which "own or control production or services facilities" in more than one country. One of those companies "parent company" control and manage the rest of the companies, which are known as controlled or affiliated companies.

According to the above-mentioned definition, it is difficult to list a coherent group of MNE characterisations. However, it is worth listing some of the most common characterisations as follows:

- MNEs' headquarters is located in one country whereas its economic activities take place in one or more other countries through the affiliated companies.

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[77] Vernon, "Sovereignty At Bay: the Multinational Spread of U.S. Enterprise", London: Longman, (1971), P. 5.

[78] Quoted in Muchlinski, "Multinational Enterprises and the Law", P. 12

[79] Economists defined MNEs as an "any corporation owns in part or in whole, controls, and manages income gathering assets in more than one country". See J. H. Dunning, "Multinational Enterprises and the Global Economy", Addison Wesley, (1992), PP.3-4. See also N. Hood and S. Young, "Multinational Enterprises", Longman, (1979), P. 3.

[80] The UN Group of Eminent Persons adopted a simpler definition of multinational enterprises, as they considered MNCs as "Enterprises, which own or control production or service facilities outside in which they are based". UN Doc. E/550/Add 1 (Part 1) 24 May 1974 / 13 ILM 800 (1974) P. 25.

[81] OECD Guidelines defined MNEs as "companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge and resources with the others" the OCED Declaration and Decisions on International Investment and Multinational Enterprises 1991 Review, Paris, (1992), p. 104.

[82] See, P. Muchlinski, P. 13.

- MNEs' parent company is able to control and mange the affiliate companies in accordance with one universal management and control system.
- MNEs common practice is not to create new companies abroad, but they tend to buy enough shares to acquire control over existing working companies.
- MNEs ability to control affiliate companies depend on their financial and expertise strength, not the political power of the country they hold its nationality.
- MNEs usually characterised with huge budgets based on the size of their sale power.

In the wake of the Second World War, MNEs considerably contributed to the development of the world economy and assumed an important role on world level. This role, in some cases, was not limited to economic and financial activities, but it was extended to include a political role.[83] Accordingly, developing countries raised their concern about the role of such a new phenomena. This resulted in many attempts to make international arrangements and agreement to control international investment and multinational enterprises.[84]

Developing countries' concerns resulted[85] in bringing this issue to discussion at academic levels and at international and regional levels such as the OCED, European Union, and even by the UN. Undoubtedly, the reactions of these international organisations reflect the economic risks the MNEs impose on the economics of developing countries and highlight the need for international collective efforts to curb any abuses that may result from MNEs activities. For this purpose, the commission on transitional corporation, under the auspices of the Organisation for Economic Co-operation and Development, was established to study the impact of MNEs on international economic relations and development. This committee presented its final report in the summer of 1974.[86]

The commission's report consists of three main sections. The first section dealt with the role of MNEs and their impact on world economic development. The second section deals with special issues such as the recommendations for host states governments. The last section consisted of some personal comments by the member experts. In reality, this report was meant to create an international unified mechanism

[83] The best example for MNEs intervention in political life of developing countries is the role of the ITT Enterprise in the election of the Chilean president in 1970 and his fall in 1973.
[84] OECD Press Release A (76) 20 of (June 21, 1976), reproduced in 15 ILM, (1976).
[85] See "OECD Declaration on International Investment and Multinational Enterprises", 15 ILM, (1976), P.967.

under international supervision to protect the economies of the developing world from MNEs abuses, but such a report has never been put into practice.

As the criticisms of MNEs behaviour mounted, developing countries lobbied for an international agreement able to set international standards on the conduct of MNEs. In May 1974, the UN General Assembly issued the "Code of Conduct on Transitional Corporations". According to this code of conduct, the committee for transitional businesses was established in late 1975. Later in 1976, the Committee met to discus further the Code of Conduct to draft it as a multinational agreement. This meeting ended with a clear disagreement between rich and poor countries.[87]

Fourteen years later, another meeting took place to discus a draft agreement presented to the Economic and Social Council of the UN. This draft agreement never been approved.[88]

According to this draft, MNEs were required to behave within the following principles:

- To abide by the laws and regulations and policies, as well as the "administrative practices" of the country in which they operate.
- To refrain from any interference in internal political affairs and activities of a political nature.
- To refrain from interfering in intergovernmental relations.
- To deal in an appropriate manner with matters that are the subject of other UN and specialised agency instruments, namely, those concerned with employment and labour relations, competition and restrictive business practices, corruption practices and transfer of technology.
- To carry out their personal policies in accordance with the national policies of the host states, in a way, which gives priority to employment promotion and enhances the participation of the national employee in the decision-making process?
- To contribute to the balance of payment of host countries.
- Not to use pricing policies that is not based on relevant market prices.
- To carry out their policies according to the national laws and regulation of host state relating to the preservation of the environment with due regard to relevant international standards.

Practically, it is quite difficult to put such code of conduct in practice. Conflict of interests between developing countries and the industrial world dictates that each side

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[86] This commission was consisted of 20 members, eight of them were from the developing countries, 2 members from the communist world, and the rest 10 members were from the developed countries.

[87] UNGA Decision No. 3203 of (1/5/1974).

[88] See the UNCTAD Report of the Secretariat on the outstanding issues in " The Draft Code of Conduct on Transitional Corporation", 23 ILM, (1984), P. 607. See also, UNCTAD- "Bilateral Investment Treaties-BITs". St/ctc/165. (1988), P. 157.

to adapt a different attitude towards this code. The developed countries as capital exporting countries desire a Code that is in-favour of a more liberal investment climate in host countries. Whereas the latter see such a code of conduct as an international mechanism to curb MNEs in order to preserve and protect their national economical and political interests. However, even if these two conflicting groups succeeded in sorting out their differences regarding the contents and the role of this code of conduct, the question of the legal shape of the code will remain as a troublesome problem. Developing countries desire the legal shape of this code to be a compulsory multinational agreement. The developed countries see it as non-compulsory guidelines.[89]

To sum up, if the above-mentioned Code of Conduct would have been implemented many productive aims could have been achieved. First, a balanced group of good practices could have been exercised for the benefit of both MNEs and the host states. Second, practising this code of conduct would grantee that MNEs activities would be in harmony with the development policies of the developing countries. This would definitely minimise investment disputes and create a sound investment climate in the developing countries.

3. Governing Law of FDI and Legal Challenges

International law made a clear distinction between two types of property situated abroad. The first type is a property owned by sovereign states, which enjoy immunity from the jurisdiction of host states' territorial sovereignty. This type is out side the scope of this study. The second type is the privately owned property, which is subject to the municipal law of the host states, this type acquires a minimum standards of treatment recognised and applicable by international law.[90]

Despite of its international nature, domestic law governs FDI, mainly. This widely recognised opinion is based on state's sovereignty under customary international rules. Accordingly, states enjoy a legitimate right to regulate freely the admission and establishment of foreigners within its own territories, unless they are committed

[89] For details on this point see, S. K. B. Asante, "International Law and Foreign Investments: A Reappraisal", 378 ICIQ, (1988), P.622. See, A. Catrains, "Transfer of Technology to Developing Countries: A Study on the Draft International Code of Conduct", 38 RHDI, (1985-86), P.92.

[90] See, G. Schwarzenberger, "Foreign Investment and International Law", Steven and Sons, London, (1969), P. 3.

otherwise by international agreements.[91] However, most developing countries have recently adopted more liberal investment codes and concluded BITs in order to enhance the legal framework governing FDI in host states.

No section of international law has attracted similar attention as the question on the limits of Host State's jurisdiction over FDI. Discussions about this issue started with nationalisation done by the Bolshevik government in 1917 and by the Mexican government in 1938. This question's importance is based on the substantial growth of FDI and on the attitude of the newly independent states towards the rules of customary international law. Most of these states considered that such international rules serve only the interests of the rich industrial states. This resulted in nationalising many foreign projects in the developing world and in calling for the creation of a new international economic order, which is able to protect their national sovereignty and to reflect their economic interests.

As foreign private investment proved to have a good impact on foreign investors' home states and on host states at the same time, it is inevitable to work on creating a legal regime aiming at encouraging and protecting the movement of foreign capital. This effort has been dealt with on more than one level. Capital-exporting states promoted the schemes of guarantees against non-commercial risks that their nationals might face in the developing countries. On host states level, most concerned states enacted "investment laws" and launched legislative reform on the treatment of foreign investments and the settlement of investment disputes. To understand such dynamic change, one should look further than national investment codes, specifically, at corporate, tax, labour, environmental, administrative laws and all other related laws and regulations.

In recent years, the legal framework governing FDI continued to witness profound law and treaty making. During the last five years, more than forty-five developing countries have enacted new investments codes[92] while, more than four hundred and twenty five BITs have been concluded.[93] Furthermore, in an attempt to help concerned states in their national and international efforts in law making on foreign investment, some multilateral forums such as MIGA issued, in 1992, a set of guidelines on the

[91] Many international instruments such as have stressed this matter: the UN Charter of Economic Rights and Duties of States, UNGA Res. 3281 (1975).
[92] See, "Investment Laws of the world", ICSID, loose-leaf, (1973- 2006).
[93] See, "Investment Promotion and Protection Treaties", ICSID, Loose-leaf, (1983-2006).

treatment of FDI.[94] In addition, many multilateral treaties with provisions on the treatment of FDI were concluded.[95]

The above-mentioned instruments form a comprehensive legal framework on FDI with special attention on areas, which are no longer controversial. National investment laws, BITs, and international instruments generally promote the liberalisation and protection of foreign investments. These legal instruments provide in principle to open admission, through exceptions exist in the shape of a "negative list" attached to the law.[96] Foreign investors are also assured that they will not be treated less favourably than national investors will.[97] Domestic investment laws and BITs echoed positively the guidelines' proposal to permit investment-related currency transfers without undue delay. Guarantees against uncompensated expropriation are provided and the Hull formula "Prompt, adequate, and effective" compensation has been adopted widely. In addition, most legal instruments provide for the settlement of investment disputes by arbitration means through either referring disputes to internationally recognised centres such as ICSID,[98] ICC, [99] or to be resolved under the UNCITRAL Arbitration rules.[100]

3.1. The Law Governing FDI

3.1.1. Unilateral Investment Measures (Domestic Regulations)

3.1.1.1.Role of Domestic Law

Recent policies of developing countries have witnessed evolution in their tendencies to more openness and calibration towards FDI. It is through law that host states are able to define their relationship with foreign investors. Investment law is the means of securing the rights and obligations of both parties and the means for creating a balance of interest between investors and host states. This balance, from a host states

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[94] These Guidelines are known as the "World Bank Guidelines on the Treatment of FDI". They are a "legal framework" consists of "the essential legal Principles" to promote FDI. The Guidelines on the Treatment of FDI and an accompanying Report to the Development Committee on the Legal Framework for the treatment of Foreign Investment are published in 7 ICSID Rev.-FILJ 295 (1992). For more detail on the subject, see I. Shihata, "The Legal Treatment of Foreign Investment: the World Bank Guidelines" (1993).

[95] For example, the (NAFTA) Agreement was reprinted at 32 ILM 289, 605 (1993); the Energy Charter Treaty, 34 ILM 360 (1995); the Colonia and Buenos Aires Investment Protocols of Mercosur, 30 ILM 1041 (1990).

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[97] Ibid., guideline III (2), III (3).

[98] See Broches, "Arbitration Under the ICSID Convention", ICSID Publication, (1991); and I. Shihata, "Towards a Greater Depoliticisation of Investment Disputes: the Roles of ICSID and MIGA", ICSID Publication, (1992).

[99] See, Ziade, "Selective Bibliography on the ICC's Dispute Settlement Mechanisms", 5 ICSID Rev.-FILJ 186 (1991).

[100] For details see, Nassib G. Ziade, "References on the UNCITRAL Arbitration and Conciliation Rules", 5 ICSID Rev.-FILJ 363 (1990); And D. Caron & M. Pellompa, "The UNICTRAL Arbitration Rules as Interrupted and Applied: Problems in the Light of the Practice of the Iran-USA Claims Tribunal", (1994).

perspective, means the ability to retain regulatory powers and to regulate their economic policies in a manner that could achieve the desired economic development. Whereas, for foreign investors, balanced investment laws and regulations means a proper protection for their properties and being treated fairly and impartially. Fair treatment could be any thing better than the minimum standards required by international customary law. Therefore, the national rules on foreign investment deserve a close examination and evaluation on their international legal validity.

National laws on FDI are usually referred to as "Investment codes". These codes seek to present, in one piece of legislation, the rules governing foreign investment in a given country, with the primary objective of facilitating the inflow of foreign capital. Typically, Investment codes regulate provisions such as: admission, establishment, taxes and financial incentives offered to foreign investors, protection and guarantees, as well as dealing with the transfer of funds abroad, and provisions on the settlement of foreign investment disputes. However, regulating foreign investment is not limited to the rules of "investment codes" but it goes beyond that to include laws such as labour, environment, and many others.

In the case of a FDI transaction, the domestic law of the host state will still have supremacy over many areas such as: labour contracts with a domestic labour force, local supplies and distributions, and insurance and financial arrangements with domestic institutions. If such contracts are concluded with international institutions such as MIGA and IBRD or with regional institutions, they are more likely to be governed by foreign laws or in accordance with international standards.

Foreign investors' attitude towards host states' national legislation is dominated by a general lack of confidence and mistrust. This has been justified by the fear of unilateral discriminatory measures taken by host states. Accordingly, this matter raises a question about the validity of national legislation and whether any unilateral changes constitute an international responsibility on the host state.

3.1.1.2. Validity of domestic law on international level

The rules of international customary law recognise states' national sovereignty and their ability to act unilaterally either to issue new regulatory measures or to amend existing measures if states' economic, social, and political interests require that.

Addressing this question requires the clarification of the following two important issues. First, the stability of domestic investment laws, as in principle, host states have the right to unilaterally repeal their investment legislation unless a "stabilisation" clause exists. In other words, foreign investors cannot force host states to maintain the longevity of certain laws. However, host states recognise clearly that an unstable and changeable legislative investment climate is not a healthy sign and abrogating favourable investment codes for more restrictive one has a bad impact on the trustworthiness of the host state.

Second, the limits of host state responsibilities, and whether they may be held accountable for breaching the rules of their investment code. A domestic investment code can be used as a standard at international level, but states breach of their domestic investment code does not constitute an international responsibility.

Therefore, host states are able to modify or abolish any incentives and guarantees given to foreign investors without being internationally responsible, as this act does not constitute a breach of the state's international commitments. This general rule is legitimate as far as such an act does not violate any of the state's international obligations, even if foreign nationals are subject to such act. Here, it is worth looking at the conceptual basis of such legitimacy, and whether it is possible to hold host states responsible for preaching their international responsibilities in accordance with either the doctrine of "Estoppel" or the doctrine of "vested / acquired rights". In other words, is it possible to establish an international responsibility for host states in case they act unilaterally to modify or to abolish incentives and guarantees already given to foreign investors under investment law?

Estoppel Doctrine

The estoppel doctrine could be defined as a "bar preventing one from making an allegation or a denial that contradicts what one has previously stated as truth".[101] This doctrine is based on the principle of good faith and aims to ensure the consistency of states' actions. Its essential aim is to preclude a state from benefiting by his own

[101] See "Webster's Revised Dictionary", (1998), MICRA. Inc. For more details about the doctrine of Estoppel as a principle of public international law see D. W. Bowett, "Estoppel Before International Tribunal and its Relation to Acquiescence", 33 B.Y.B.I.L., (1957), P. 176.

inconsistency to the detriment of another state that, in good faith, relied upon a representation of fact made by the other state. [102]

The doctrine of Estoppel has been recognised by international tribunal as a settled general principle of international law. The "Temple of Preah Vihear" case constitutes a clear example of the international recognition of this principle.[103]

If we apply this to investment law, it could mean that host states are not permitted to modify or abolish existing incentives and guarantees given to foreign investors under their investment law.[104] On the other hand, some jurists deny the possibility of applying the doctrine of Estoppel to national regulations such as investment law because this doctrine is applicable only when a state acts in contradiction with one of its previous actions at international level.[105] Furthermore, this doctrine is not applicable because foreign investors should be aware of the nature of national law and of the possibility of modifying or cancelling them.[106] Anyhow, there is no legal precedent as to apply this theory to cases of modification in investment laws.

Vested /Acquired Rights Doctrine

The principle of acquired rights is said to be a principle of international law and is recognised by most nations. According to this principle "once right has been acquired under the existing law, they can not validly be arbitrarily destroyed by another change of the legal system without obligation to make reparation".[107]

This general principle of international law is only applicable where concerned rights were required inside the territory of the host state and in accordance with its law and regulations.[108] This means that international law would only protect foreigners' acquired rights if they have been gained lawfully. In other words, incentives and guarantees were given to foreign investors under existing investment law, should not be violated by later legislation. However, it is a well established attitude that the "acquired rights" principle must not be interpreted as a limitation on the host state's

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[102] Bowett, 33 B.Y.B.I.L., (1957), P. 177.
[103] See "Temple of Preah Vihear", (1962) ICJ Rep., P.1.
[104] A. A. Fatouros, "Government Guarantees to Foreign Investors", Columbia University Press, (1962), P. 361.
[105] D. P. O'connell, "International Law", V.1, London, (1970), P. 208. See as well, C. F. Amerasinghe, "State Responsibility for Injuring Aliens". Clarendon Press, Oxford, (1967, p. 748.
[106] [106] D. P. O'connell, "International Law", V.1, London, (1970), P. 208. See also, I. Shihata, "Treatment of Foreign Investment in Egypt", P.121.
[107] O'Connell, P. 10. See also, A. Lalive, "The Doctrine of Acquired Rights' in Rights and Duties of Private Investors Abroad", South-western Legal Foundation, (1965), PP. 145-200.
[108] S. Friedman, "Expropriation in International Law", London (1953), PP. 120-126.

sovereign right to modify or abolish any of its national laws.[109] Furthermore, it should be known that national investment laws are not tailored on an individual basis, but actually, it is a general framework created to regulate the foreign investments issue and to share with other legal instruments their ability to be modified or abolished.[110] Giving foreign investors certain incentives and guarantees under investment law and enjoy it does not mean that they are permanent and unmodified by the competent authorities.[111] If this has been done, no international responsibility will be established on the host state and this will not give foreign investors the right for any compensation.[112]

In the shadow of such a controversial relationship, host states overcame the ideological consideration in many instances and went far beyond the rules of national laws through focusing on BITs and multilateral instruments on foreign investment in order to enhance their legal framework governing FDI.

3.1.2. Bilateral Measures BITs

Bilateral Investment Treaties are intended to be an integrative legal instrument to enhance the protection and encouragement measures given to foreign investments under domestic laws of host states. Regardless of what name they have been given,[113] BITs are considered under the Vienna Convention on the Law of Treaties[114] of 1969 as international treaties.[115] This means that they create international law obligation on the contracting parties.

Obviously, BITs are relatively a new legal instrument as they have been in existence only since late 1950's. However, their numbers have increased rapidly, especially during the last ten years. However, the effectiveness of such treaties depends on their substance not on their number. During this short period of time BITs evolved from being occasional agreements between European capital exporting countries with

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[109] Friedman, PP. 121-122.

[110] I. Shihata, "Treatment of Foreign Investments in Egypt", P. 122 (*Arabic*).

[111] Ibid., P. 121.

[112] Still, host states could be internationally responsible in the their act were in violation of the minimum standards of treatment of foreign investments as recognised by civilised nations.

[113] This legal instrument may be called "Agreement", "Convention", "Accord", or " Arrangement". Such a variety of names have no influence on international legal nature of the text in question.

[114] 81 ILM, P. 679.

[115] Article (2/a) of the Treaty says "Treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more instruments and whatever its particular designations". See the French-Egyptian Treaty of 22/12/1974 on the encouragement and protection of FDI between the two countries.

developing countries into "an important modality for establishing the framework for the host state's foreign investment climate".[116] This has been supported by the opinion of the 1988 Operational Regulations of the Multilateral Investment Agency as providing that "an investment will be regarded as having adequate legal protection if it is protected under the terms of a bilateral investment treaty between the host country and the home country of the investor".[117] Such treaties are of special importance for all concerned parties. For host states, they are designed to improve the investment climate, through providing non-discriminatory treatment as provisions concerning national-treatment, MFN, and fair and equitable treatment. Whereas, for foreign investors and their home states, these treaties provide protection against nationalisation and expropriation; finally, they provide for a dispute settlement mechanism. In addition, concerned parties worked out on a bilateral basis a substantial number of agreements on issues related to FDI such as double taxation agreements.

Under BITs, Each contracting party undertakes to admit, in accordance with its laws and regulations, investments from the other contracting party. Similar to national investment codes, BITs usually cover the following four main areas; Admission, treatment ("MFN", "National", and "Fair and equitable" treatment), protection ("Full protection and security") & ("freedom of money transfer abroad"). Finally, they place emphasis on the settlement of investment disputes submitting them to arbitration (ICSID, ICC or under the UNCITRAL Arbitration Rules) with special reference to the Hull equation of "Prompt, adequate and effective" compensation in case of nationalisation.[118]

3.1.2.1. Aims of BITs

BITs aim at setting forth necessary guarantees and protection for foreign investment in developing countries. These guarantees are higher and more reliable than those provided by domestic laws, which may be subject to unilateral modifications. In other words, BITs provide legal stability as one of the measures for attracting foreign investment by host states. The need for such co-operation is stimulated by the absence of a multilateral investment treaty, the ambiguity of customary international law, and a mistrust of national legislation from the side of foreign investors. In general, states'

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[116] Rudolf Dolzer & Margaret Stevens, "Bilateral Investment Treaties", P. xii.

[117] "Operational Regulations of the Multilateral Investment Agency", June 22nd, 1988, clause 3.16, reprinted in 3 ICSID Rev.-FILJ 364, 390 (1988).

[118] Rudolf Dolzer & Margaret Stevens, "Bilateral Investment Treaties", P. 26.

practice proves that encouraging FDI is better achieved by the introduction of a set of contractual legal measures that are able to increase the size of such investments in a given country. In the absence of international agreement on foreign investments, BITs play such an important role. This role derives its importance for being an instrument to form international liability on contracting states in case they violate their commitments under BITs.

3.1.2.2. The impact of BITs on international legal framework of FDI

BITs constitute a prevalent means to protect and encourage the flow of foreign investments into developing countries. In the shadow of developing countries' worries towards international customary rules and foreign investors' mistrust of host states' national legislation, both parties are bound to negotiate and conclude bilateral agreements. Those agreements, usually, detail the rights and duties of the contracting parties in an attempt to enhance the investment climate in host states and to avoid any future investment disputes.

Embodying BITs with some principles of customary international law is seen here as an advantageous treatment to foreign investors. However, this matter should not be understood as a compromise on the account of national jurisdiction over issues related to FDI, neither as a waver of their previous ideological attitudes towards issues approved by the UN such as permanent sovereignty over natural resources and the control of transitional corporation activities in the third world countries.

The wide spread of BITs and the similarity of their provisions raise the question as to whether these treaties constitute recognition of similar rules of customary international law on FDI. On one hand, Western writers tend to understand BITs and their implications within this context and in a way that reflects the interests of the developing countries. Such a trend, that contradicts the spirit of many UN resolutions, was advocated by developed nations and has been considered evidence on the existence and practicality of the rules of customary international law.

This was clearly reflected during the discussions of the International Law Association meetings in 1982.[119] Moreover, Dr. F. A. Mann justified such tendencies by saying that the importance of BITs "lies in the contribution they make to the development of

[119] International Law Association, Montreal Session, (1982).

customary international laws, in their being a source of law [and that these treaties] establish and accept and thus enlarge the force of traditional conception".[120] It is clear that opinions in favour of such understanding support their theory by saying that BITs emerged at the time when customary international rules on FDI were still in practice, and many clauses embodied in the treaties were similar to the customary rules.

On the other hand, this conclusion could not be accepted as it contradicts many UN reports that deny such a connection and minimised the influence of customary rules on BITs.[121] It could be true to say that rules of domestic investment codes, when they are commonly shared among different countries, might constitute general principles of law on foreign investment. Nevertheless, rules of BITs, even as a primary source of international law may not satisfy the requirement of becoming part of customary international law. In other words, it is difficult for BITs to satisfy the two main elements of customary international law, the *opinio juris*, and states practice, as it is not possible to prove that the states' practice under BITs may exist without the existence of these treaties themselves. This proves the impact of national investment codes on the creation and development of customary international law.

The ICJ confirmed this opinion in the *North Sea Continental Shelf cases* [ICJ Reports, (1969), P.4] and in the *Barcelona traction case* where the court denied the existence of binding international rules on FDI by saying that "considering the important development of the last half century, the growth of foreign investments and the expansion of the international activities of corporation, in particular of holding companies, which are often multinational. And considering the way in which the economy interest of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallised on the international plane". [122]

To sum up, it could be said that developing countries approached BITs only to enhance the conditions of their investment climate through committing themselves to more encouragement and protection of FDI. This practical step should not be understood as a move towards approving the existing customary international rules

[120] F. A. Mann, "British Treaties for the Promotion and Protection of Investment", 52 B.Y.I.L., (1981), P. 249.
[121] See, "The External Financing of Economic Development", UN Department of Economic and Social Affairs, E.68 II. D, Section 84, (1968), P. 31.
[122] *Barcelona Traction Light and Power Company Case*, ICJ Report, (5 Feb 1970).

on FDI or as shifting issues of FDI from national jurisdiction to international jurisdiction.

3.1.3. Multilateral Measures and Efforts

There is no global and comprehensive treaty with an effective enforcement mechanism with sole competence on FDI. However, there are many legal instruments to deal with individual issues.[123] In this instance, the World Bank has the greatest competence; Article I (ii) of the Bank's Agreement states that promotion of private foreign investment is one of the Bank's objectives.[124] This has been achieved through three platforms of the Bank.[125] In addition, there are two other organisations with limited competence related to FDI: firstly, the UNCTAD – DTCT (1993) Division on Transitional Corporation and Investment, this organisation represents the interest of the developing countries. `Secondly, the OECD – (1961), represents the interests of the developed countries. In 1995, OCED sponsored negotiations on Multilateral Investment Agreement, known as "MIA". Both organisations have overlapping jurisdiction; their constitutions cover only certain aspects of FDI.

Practically, the World Bank's Guidelines are the "ideal rules" by which host state practice can be tested to verify whether they are up to international standards or not. The reason behind acquiring such a description is because both developed and developing countries took part in the discussion leading to the adoption of these Guidelines. Undoubtedly, this Guideline was enriched by the comments of international organisations such as ICC, OECD, UN, and MIGA.

For developing countries, multinational agreements should be an instrument to create a balance between economic interests and ideological principles. This attitude is based on ideological considerations related to the question of national sovereignty and affected by being a part of the developing world, which work with the framework of the group of 77. Practically, developing countries avoid multinational agreements and tend either to conclude BITs or to adhere to multinational agreements that deal with

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[123] The UN & the ICJ promote friendly relations, sustainable development, human rights, and international peace. The World Bank Group promotes economic and social development. The IMF deals with monetary affairs. The International Labour Organisation (ILO), WTO (TRIMS / 1994), and finally, World Health Organisation (WHO)

[124] World Bank Annual Report, (1998), P. viii.

[125] I) The International Finance Corporation (IFC), which provide finance for private sectors, it was established in 1956. II) The International Centre for the settlement of Investment Disputes (ICSID), which provide state/governmental & national of another state arbitration, it was established in 1965. III) The Multilateral Investment Guarantee Agency (MIGA), which provide foreign private capital with insurance against non-commercial risk. It was established in 1985.

specific areas of FDI.[126]This shows that contemporary and future means of promoting and protecting FDI would be of contractor nature rather than adopting the rules of international customary law, whereas, developed countries believe that multilateral instruments ought to provide enough guarantees and protections and should be based on the rules of customary international law.

Contradictions in attitudes raise the question whether such regimes provide adequate incentives to investors, and whether they are able to create a favourable investment climate. In addition, it questions whose duty it is to identify the deficiencies and to suggest how to develop and improve a legal framework as a part of the new economic order? Such questions involve many sensitive issues related to the applicability of international law, rights and obligations of investors and host states, international minimum standards, standards of compensation and dispute settlements. These issues constitute a wide gap of interests between developed states and developing states. Such a gap is actually behind the failure of many attempts to create a successful legal framework for FDI.

Extreme positions on both sides, internationalisation of state contracts/foreign investment and exaggerated assertions of sovereignty and efforts to exclude rules of international law, have widened the gap. Objective and balanced treatment of rules governing foreign investment issues between international law and domestic rules would bridge the gap and reduce uncertainty as to the relevant rules of international law.

The need to put forward general recognised rules would urge countries devoted to improving the flow of FDI to adapt appropriate policies and legal and fiscal measures, to create sound investment climates, and to provide appropriate protection for foreign investments.

[126] Such as the ICSID Convention and the Convention, that created the Multilateral Investment Guarantee Agency (MIGA).

Chapter Three:
Investment Climate:
Definitions, Factors and Role

CHAPTER THREE CONTENTS:

Chapter Three:

Investment Climate: Definitions, Factors and Role

1. Introduction

During the last fifteen years, developing countries have achieved a faster growth rate than rich countries. This does not mean that all of them are progressing at the same level. Some developing countries, which had the same level of growth in 1990, achieved different levels of growth. China, for example, made the fastest growth in the world and countries like Bangladesh and Peru have grown moderately well, while Brazil and Pakistan have hardly grown at all. The answer to such a question about the diversity in the growth level among developing countries lies, partly, in their trade policies.

The association between growth rate and international integration is based on trade liberalisation, which must be accompanied with a sound investment climate. This will be the case if developing countries wish to achieve a greater foreign trade, foreign direct investment, and higher growth rate. In other words, if bureaucracy and corruption are prevalent in a given host state and no efficient reliable services are provided, this means that its investment climate is poor. Consequently, foreign investors would think twice before locating their business in such a country.

Under traditional international law, law-governing FDI is, in principle, domestic law. Host states are eligible to regulate issues related to this area unless they are committed otherwise under bilateral and/or multilateral investment agreements. However, the need for a sound investment climate influenced dramatically by host states' unquestioned right of legal supremacy over the entry of foreigners into their economy.[1]

Attractiveness of a foreign market to FDI depends largely on what is called an "investment climate". In this instance, an investment climate is the institutional, policy, and regulatory environment in which private national and foreign sectors operate. This term is usually used in relation to developing countries. Writers have used the term "investment climate" for many years. However, it has now a broader and more ambiguous meaning, which depends upon the party using it.

In this chapter we will start with defining the term "investment climate" to set the limits of this study. Then, after defining the term "investment climate" and inspecting its essential elements, we will examine the impediments that might deter foreign investment and how they are likely to influence foreign investors. The last section of this chapter will deal with the question of investment assessment through shedding light on the best methods available to achieve that and what the difficulties are in this area. Then this chapter will end with a short conclusion.

2. Definition and Importance of Investment Climate

2.1. What Does Term "Investment Climate" Mean

Not many people dispute that a favourable investment climate is more than important for attracting FDI. However, there is no consensus on one definition for such a term. Academics and scholars have always emphasized the importance of investment climate, which they defined as "the overall environment of a particular country, as consisted of its political, social, and economic conditions".[2] In addition, they stress that the investment climate, which attracts best FDI, is the one where "the host country efficiently integrates with the international economy on terms favourable to private enterprise ... mainly by offering stable economic, social, and political conditions for the growth of private investment and free market".[3]

This means that host states should put serious effort into "creating a sound general investment climate rather than on introducing incentive-oriented policies".[4] Still, it is important to mention that attractiveness of investment climate in host states varies according to the criteria used by foreign investors themselves. This means that the investment climate, which is considered by one company as attractive, may not be considered as such by another one.

Meanwhile, Dr Ibrahim Shihata considered that a sound investment climate is one that is structured in a manner that enables foreign investment to yield high rates of return

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[1] There are many UN resolutions in support of this understanding, for example, UN Friendly Relation Declaration, UNGA Res. 2625 (1970) and the Charter of Economic Rights and Duties of States, UNGA Res. 3281 (1975).

[2] Sanjay Lall, and Paul Sreeten. "Foreign Investment Translational and Developing Countries", London Macmillan, (1977), P. 194.

[3] Ibid.

[4] The World Investment Report, (1995).

at low non-commercial risk.[5] He added that such a climate could be enhanced if there is "political stability and a legal regime that guarantees the adequate protection".[6]

The term "investment climate" has a broad, general, and vague definition. The only means to set a limit to it depends on the party using it. Improving the whole investment climate in host states is an essential step without which even the most profitable opportunities may remain not attractive enough.

Creating a good investment climate requires bilateral and multilateral efforts and a strong consideration of the social and environmental issues beside the business issues in the host states, as investment climate is influenced by principles of humanitarianism and environmentalism.

Having defined the term "investment climate" and mentioned its importance, it is necessary to discuss the essential elements constituting an investment climate and their role.

2.2. Why Investment Climate Matters?

Earlier in this chapter investment climate was defined as "the overall environment of a particular country, as constituted by its political, social, and economic conditions",[7] both at present and as expected. Such conditions influence substantially the way foreign investors perceive returns of their investments and the risks accompanying them.

Focusing on the importance of investment climate highlights the obstacles associated with governance and institutions. Unless governments in developing countries take serious steps to encourage private sector and economic growth, poverty reduction is not going to take place. Entrepreneurship is of particular importance for achieving the above-mentioned aims. China, for example, launched its reform program just 26 years ago. Despite that short time, China succeeded in achieving a phenomenal rate of growth and reduction of poverty level.[8] Promoting Entrepreneurship has lead to more success in other countries such as the Soviet Union and India, particularly since 1991, this has engendered noticeable growth responses.

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[5] See I.F. Shihata, "Multilateral Investment Guarantee Agency and Foreign Investment" (1988), P. 7.
[6] Ibid.
[7] [Policy, institutional and behavioural environment]

In addition, there is growing evidence that improving the investment climate produces large gains for host states. In China, improving the investment climate in weak regions increased firms' productivity by 30 percent and investment rates from 14 percent to 19 percent.[9] While in India, regions with a better investment climate are doing far better than those with poor investment climate conditions. Therefore, a sound investment climate is a dynamic process that accelerate and self-enforced a real change. This brings static gains and a strong stable increase in growth rate. Moreover, such a healthy climate means that frontiers of opportunity expand, existing investments become more productive and the incentives for productive behaviour rises. Above all, a sound investment climate can be a powerful force not only to increase the inflow of FDI but it plays a crucial role in accelerating growth rate and job creation.

Theoretically, the importance of investment climate is obvious, but it is very important to produce hard evidence to prove that. Firm-level surveys are the best empirical evidence as they reflect firms' priorities and determine what firms' problems are. Figures in the surveys reflect clearly the conditions of an investment climate by going into the details of the national FDI regulations, time spent with authorities, length of procedures needed, quality and function of infrastructure, and so on. Such details trace the development of an investment climate; despite that, investment climate surveys do not exist in many developing countries, such as Egypt, for example. An investment climate survey is evidence of a special importance.

3. Key Elements and Role of Investment Climate

Literature has dealt substantially with the issue of elements of investment climate and the way to increase its attractiveness. No agreement has ever existed on one set of elements that should be considered as "the components of investment climate". Even if they agreed about such a matter, the question will then be as to what are the elements of each component. For instance, agreeing about the economic environment of a given country, as one of its investment climate components, does not answer the question about the elements forming the economic environment of this country. Obviously, the answer for all such arguable questions varies according to the research objectives.

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[8] See, Lanjouw, and Stern. Eds., "Economic Development in Palangur over Five Decades". Oxford University Press, Oxford, (1988), P. 23.

[9] World Bank, [b], (2003).

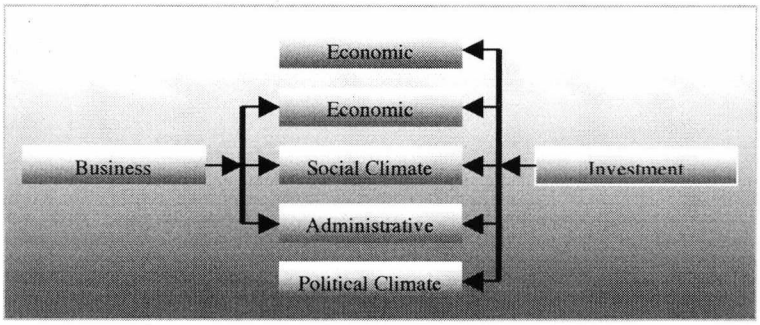

Table 1: The components of Business and Investment Climates

In addition, some writers have made a clear distinction between host states' policies towards foreign investments and their investment climate.[10] Dr Shihata stressed the importance of host states' policies by saying that "most of the negative features of FDI patterns are due to such governmental policies".[11] The World Bank emphasised the importance of such policies and especially the administration that follows up their implementation.[12] In this regard, the World Bank stresses that good administration means clear investment, clear procedures, and a smooth entry system and most importantly the availability of honest and trained officials, as Strove pointed out. The last component of host states' investment policy is the marketing program they adopt.[13]

The concept of investment climate has interrelated factors. These factors may be presented in more than one set of categories. Dr Shihata grouped all relevant factors into three broad categories: a) institutional, including national policy aspects. This aspect looks at the institutions that foster political stability and encourage the country's economic growth, b) infrastructure aspects, and c) legal aspects, which means the regulatory framework, the administrative body, which deals with foreign investment, and the mechanism for the settlement of investment disputes.[14] Meanwhile, Dr. Lee C. Nehrt considers that business climate is a combination of economic, social, and administrative climates. Whereas, the FDI climate consists of the same elements in addition to a wider economic approach and a political climate. Table 1 illustrates components of both the business and investment climate according to him.

[10] Jagdish Sachdev, P.54.
[11] Ibrahim Shihata, "MIGA and Foreign Investment", p 12.
[12] The World Bank [b], P. 979
[13] See Y Aharoni, P.176.
[14] Ibid.

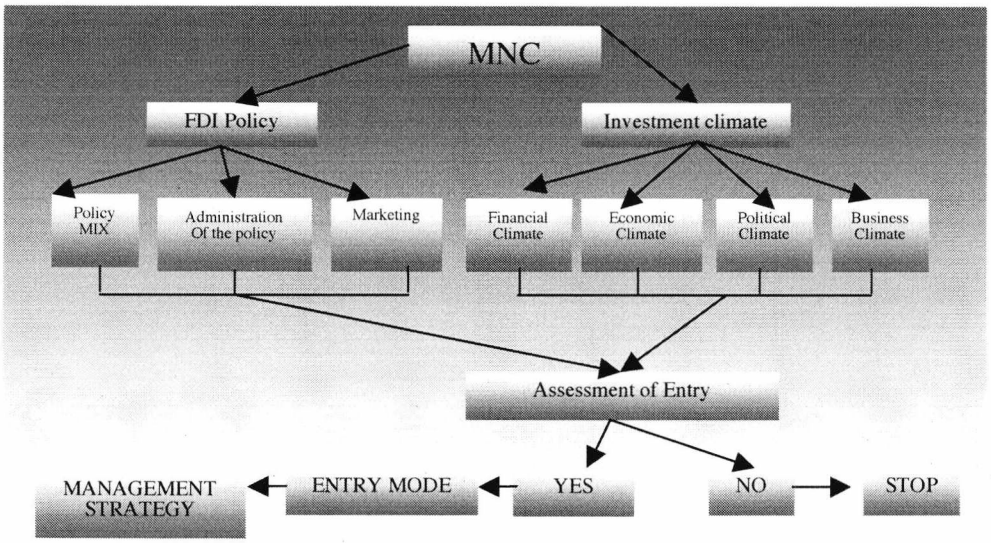

Table 2: This table illustrates the components of both business and investment climate.

This chapter and chapter ten group the aspects of investment climate into four main groups: 1) Infrastructure; 2) Political and social aspects; 2) economic aspects, and 3) Legal aspects.

3.1. **Infrastructural Conditions**

A firm's performance and infrastructure aspects interact in several ways. An investment climate's infrastructure means an adequate quality and quantity of physical and human resources.[15] Poor infrastructures require foreign investors to devote more resources for such tasks. These additional costs undermine the competitiveness of firms. This does not only increase the cost of operation but also affects its efficiency. Consequently, if such a cost is high, it constitutes enough reason to deter many firms from investing or entering at all.

According to many surveys[16] on the physical components of investment climate, physical infrastructure comprises issues such as transport (roads, Rail, harbours, and airports) time and cost, power reliability, water and sewage systems, access to telecommunication systems, and other essential determinants of firm competitiveness and profitability. i.e. housing arrangements, industrial estates, and free trade zones. Obviously, the infrastructure conditions reflect the country's strength and provide an insight of the challenges ahead. For example, in China, firms lose an average of 2 percent of sales to power outages, while in Pakistan they lose up to 6 percent. Again,

[15] See Shihata, "MIGA and Foreign Investment", p 12.
[16] See table (3)

in China, firms need 8 days to get shipments through customs. By contrast, in India, the figures are 11 days and in Pakistan, it is 18 days. Another infrastructural element that characterised a poor investment climate is that firms tend to have their own power generator; in Morocco (17 percent) of firms reported having their own generator compared with China (27 percent), Algeria 25 percent, and in India (69 percent).

Table 3 International Infrastructure Indicators

Source: World Bank, Investment Climate Surveys

Country	Firm Size	% With own Generator	Days without Electricity	Days Without water	% With own water well
Algeria	Small	16	18	54	27
	Large	53	13	17	43
Morocco	Small	14	16	03	28
	Large	25	16	03	32
China	Small	16	05	-	-
	Large	39	04	-	-
India	Small	61	-	-	43
	Large	84	-	-	65

The above table proves that poor infrastructure is particularly harmful for small firms, which are more likely to suffer days without electricity and water services. In Algeria, for example, small firms suffer an average of 18 days without electricity (50%more than large firms do) and averages of 54 days without water (3 times more that large firms). Taking into account that small firms do not have mechanisms to cope with inefficient infrastructure, this means that small firms are more likely to suffer from poor infrastructure than multinational investors, which have more means to overcome such barriers.

Human resources may be a powerful inducement for investors, who require access to skilled labour and technical managerial personnel. This matter requires the existence of educational infrastructure and training facilities. Therefore, the non-existence of such infrastructure indicates the necessity for the freedom to employ skilled foreign nationals.

In addition, there are many other elements that shape the infrastructure aspects of investment climate in host states such as: the availability of marketing arrangements and technological elements.[17]

In Egypt, comparable firm-level data is not at hand, but available indicators provide good evidence that infrastructure conditions in the country are much better than in many other developing countries, although there may be a room for improvement. Since 1990, substantial investments have been made in infrastructure areas and the outcome is better quality and quantity of infrastructure services.

To sum up, adequate infrastructure is an indispensable necessity for creating an attractive investment climate. The lack of such infrastructure put additional cost on foreign investors, which means that a project's financial return will be reduced. This constitutes enough factors to deter foreign investors and to spoil the whole investment climate. The main reason for the existence of poor infrastructure is that such services are usually monopolised by insufficient governmental agencies, which in most cases suffer from bureaucracy and serious under-investment in maintenance and capacity. Accordingly, opening up these sectors for private participation, accompanied by a comprehensive sound regulatory framework may help in enhancing the efficiency and increasing the size of investment in such an important services.

3.2. Political Conditions

The political climate in host states is one of the main prerequisites for foreign investors' arrival. It is important to clarify the term "political climate" in this sense as giving limits that only affect private investments, not the wider climate that includes politics in developing countries or the machination of their political parties.

The political climate for private investment may be defined as " the risk of nationalization or expropriation, the risk of being forced out of business by deliberate government action, the risk of forceful government participation in the capital of a company, and the risk of future direct competition from public owned companies".[18] The risk "of a change in government which could result in a government with [hostile] tendencies is included within the above-mentioned definition".[19] Therefore,

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[17] Ibid, p.12. See also, IBRD, "Draft Articles of Agreement of the International Investment Insurance Agency", Doc. M68-156, (1986).

[18] See lee Charles Nehrt, "The Political Climate for Foreign Investment", (1988), P.3.

[19] Ibid.

political risk is the probability that events in the non-market (political, economic and social) business environment will cause financial, strategic, or personal losses to foreign firms. These non-market forces lie within that parts of a firm's external environment that is not associated with purely industrial, technological or competitiveness dynamics.

In the process of the evaluation of the political environment of a given developing country, existing laws and regulations are of marginal importance. Governments' right of unilateral action and to nationalisation[20] and expropriation[21] always has a supremacy over existing laws and regulations.

The question remains as to what tangibles of the political climate foreign investors can study, evaluate etc., and on what are the bases, which allow them to assess the political risks attendant to their investments? The key to understand such a matter is to study the government's policy statements and that of the political leaders, and their compatibility with the actions of the government in a historical context. Statements of the government and political leader of the developing countries are not far from the economic ideology of their political system. However, it is rare that the leaders of developing countries agree on one understanding of such ideology, as they usually air their personal views about the attitude towards the treatment of the private sector.

Still, actions speak louder than words. The best way to evaluate the political climate of a given country is to study what the government has actually done to either encourage or discourage private investment. One of the most important things a foreign investor must take into account is the probable future change of government, which is a very complicated question. The complexity of such an issue depends on the existence and strength of the opposition parties and on the governmental efforts to improve the people's well being.

Accordingly, every potential investor should make sufficient efforts to assess the probable attitude of any future government towards private enterprises and FDI in particular.

[20] Nationalisation refers to the compulsory legal transfer of ownership of an entire industry to the public sector.
[21] Expropriation refers to the compulsory legal transfer of an individual enterprise from private to public ownership.

3.3. Economic Conditions

The economic environment relates to the state's current economic conditions and their prospects for future growth in GNP and per capita income, and this would include institutional and infrastructure frame work. Non-legal macroeconomics aspects have a special priority in the minds of foreign investors. Theoretically, these factors are beyond the aims of this study. However, this section deals briefly with these aspects only to understand their adverse effect on the legal rules regulating foreign investment.

Economic reform and stabilisation programs are a necessity for foreign investment and have been pursued in most developing countries. In Egypt, policies, which have a major impact on encouraging private investment, have shown a considerable improvement in areas such as budget deficit, which fell from 15.2 percent in 1991 to 2.6 percent in 2000, and inflation rates which were reduced from 15 percent in 1991 to 3 percent in 2000. However, currency uncertainties remain of special importance when studying economic condition in Egypt.

The second important element of the economic climate is the level of openness to trade and FDI. Most developing countries are more open and they have made great efforts in this trend. Within this context, being more open to trade and FDI means that tariff levels in the late 1990s were lower than those of the early 1980s even in countries like Mexico, Egypt, Uganda, and India. Obviously, such economic tendencies resulted in more integration with the global market and better access to international capital and goods, which means better opportunities for job creation in high productive projects. In the post-Doha era, benefiting from international integration requires state's ability of exportation. Adopting more open trade policies, which are able to sort out trade problems between developed and developing countries particularly in the agriculture sector, could enhance this matter. The above-mentioned two elements and other issues such as fiscal stability, low inflation, sound monetary and exchange rate policies are central to accelerate growth and to create the ideal environment for FDI.

In other words, a sound economic environment is characterised with the following aspects:

- Liberalisation and deregulation.
- A stable microeconomic policy, which encourages long-term sustainable growth, creates liberal exchange and interest rates, as controls on such

matters are unattractive for foreign investors. However, creating a stable microeconomic environment is not enough but-also the continuity is as important for foreign investors.

- Appropriate micro-economic policies, which ensure the availability of well-functioning financial institutions, particularly those encouraging price stability, fair wages regimes, and having a flexible labour market
- An effective financial system, including banks and other credit and financial services institutions, which are able to develop a well-regulated securities market.
- The existences of an open trading environment and the removal of subsidies and trade barriers allowing imports and exports without excessive tariffs and non-tariff barriers.
- A sound economic environment, which displays fiscal responsibility and offer a fair corporate taxing system including transparent and stable rates. In recent years, developing countries have concluded many treaties with capital exporting countries to safeguard foreign investors from tax hardship such as imposing double taxation of the same tax base.
- Display minimal distortion and lack of corruption and discrimination.
- Availability of physical and human infrastructure. [See Sarhan, P.34]

3.4. Legal Regime and Institutions

The second element shaping the investment climate in developing countries is the existence of an adequate regulatory framework; this includes a mechanism for the settlement of any potential investment disputes. Accordingly, there are two sets of legal factors in relation to this matter; first, substantive rules, which consist of many national and international sources. Second, procedural, which compromise a procedure for the settlement of investment disputes. Such a mechanism may be either national through applying domestic remedies, or international through embodying an investment contract what is known as arbitration close. This means the referral of the disputes either to ad hoc arbitration or to institutional arbitration such as ICC or ICSID.

In most developing countries, such regulatory schemes exist in a group of arrangements aimed at creating a secure and adequate legal environment for foreign investment. Among such arrangements are the enactment of domestic investment

codes[22] and the reform of other legislation affecting foreign investor such as corporate, tax, labour, and commercial law. Moreover, many developing countries have signed bilateral investment treaties (BITs)[23] with capital-exporting countries for the sake of arranging the shared expectations of foreign investors and host states. Additionally, efforts of the concerned governments and multinational organisations such as (MIGA), (ICSID), and (OPIC) have contributed to the creation of a more secure investment climate in developing countries. Lately private risk insurers have been active, as well, in many countries, which are attractive to foreign investors.

It is clear that the creation of a sound regulatory regime is vital for an attractive investment climate but it's not enough. Efforts in this direction are still facing many sorts of problems especially in countries undergoing a transitional period from a centrally planned to a market oriented economy. One of the most difficult problems in such economies is the enforceability of the existing legislation and the rigid bureaucratic institutions in charge of implementations.[24] According to Dr Shihata " Institutional and policy aspects" means the national policies that foster political stability, encourage economic growth and structure financial and administrative institutions, which facilitate foreign investment.[25] Foreign investors try hard to avoid countries suffering from political instability misguided economic policies and bad governance.

During the last ten years, most developing countries have headed towards adopting open market policies and constitutions that are more democratic.[26] At regional level, developing countries have attempted to develop policies that may help in facilitating the entry of foreign investment into their region. For example, COMESA[27] countries have attempted to develop regional initiative that overcomes development constraints and to create conditions that will enable them to gain access to the markets of the developed countries.[28] In addition, most developing countries have created specialised agencies to manage foreign investment in their countries. Such agencies approve

[22] See, ICSID, "Investment Laws of the World" loose-leaf collection, (1973-2006).
[23] See, ICSID, "Investment Treaties" loose-leaf collection, (1984-2006). There are more than 230 (BITs) in force for the time being.
[24] See, I. Shihata, "The World Bank in a Changing World" (1991), PP. 203, 225-232
[25] Shihata, "MIGA", P. 8
[26] See Baile and Breier, "A Turning Point for Southern Africa", 187 OCED Observer, (1994), PP. 20-21
[27] Ibid.
[28] See, A. P. Mutharika, "The Role of the UN Security Council in Africa. Peace Management: Some proposal", 17 Mich. J. Int'l. Law, (1996), PP. 537, 541.

permits and monitor the compliance of such projects with applicable law and contracts.[29]

However, the central question concerning the relationship between governments and the private sector is not whether to regulate or not, but and more importantly what policies are legislated and how to implement them. Answering this leads to the question about host states' FDI policies and the importance of creating competent institution to implement such policies. Recent studies have proved that governance and institutions are strongly linked with the level of development in host countries.[30]

The following table highlights how countries differ in their approach to regulate firms and gives insight on the impact of different regulatory approaches on entrepreneurial activity. For example, this table shows how certain types of regulations influence the cost of doing business or providing incentives for firms to invest and grow. The table outlines some important findings about the regulatory indicators in Egypt. These findings cover many areas especially the following most important three:

- Number of procedures needed to register a new business. In January 2002, it took thirteen procedures during fifty-two days with the cost of percentage 61 of per capita income to register a new company in Egypt. This practice is worse than what is considered as a good practice, as, for example, it takes two procedures and two days to register a new company in Canada. Furthermore, bureaucratic entry procedures in most developing countries, including Egypt, are usually associated with high level of corruption.
- Enforcement of a contract in Egypt needs seventeen procedures and two hundred and two days. Such indicators are better than those of some other developing countries such as MENA and almost similar to those of the OECD. Here it is worth mentioning that bureaucratic complexity still exists and usually is associated with less access to justice, lower enforceability and more corruption in the court system.[31]

[29] See, for example Article 12 of Egypt's Foreign Investment law, which provide that GAFI is entitled to ...

[30] See, D. Kaufman, A. Kraay, and Ziodo-Lobaton, "Governance Matters", Policy Research Working Paper 2196 (1999), the World Bank, Washington, D.C. and See, D. Kaufman, A. Kraay, and Ziodo-Lobaton, "Governance Matters II: Updated Indicators for 2000/01", Policy Research Working Paper 2772 (2002), the World Bank, Washington, D.C

[31] The most efficient dispute resolution system in this survey is in Tunisia; it takes seven days and 10 procedures to sort such matter out.

- Labour regulations. In comparison with the labour regulations in MENA and OECD, table (5) shows the Egyptian labour market regulations are not ideal and that they are far more rigid than required.

Obviously, reforming regulatory aspects of the investment climate in developing countries is a must as this provide a better potential for encouraging growth and accordingly more inward of FDI.

Table 5: Regulatory Indicators / Source: World Bank (2002a)

Indicators	Egypt	MENA (Average)	OECD (Average)	Best
No. of procedures to register a business	13	11	7	2
Days to register a business	52	60	33	2
Cost to register a business (% GNP per capita)	61.0	62.4	10.9	-
Days to enforce contract	202	302	205	170
Cost to enforce contract (% GNP per capita)	17	23	16	10
Index of bureaucratic complexity in courts	3.79	4.11	3.08	0.73
Index of rigidity of employment law	1.81	1.45	1.35	0.77
Index of rigidity of industrial relation law	1.74	1.10	1.24	0.25
Share of unofficial economy (%GNP)	35.10	27.48	17.40	8.80

4. Impediments to Investment Climate

Theoretically, while a sound investment climate and policy framework help to induce FDI flow, there are many factors that may discourage such flow. Most countries still implement some policies that block the flow of FDI into their economies. However, they always raise their intentions to eliminate such obstacles in order to improve their investment climate. The significance of such impediments is due to their ability to deter FDI and to increase the cost, and the risk that they may face after entering the host states. This, undoubtedly, imposes limitation on the flow of foreign capital into the markets of developing countries.

Dealing with all impediments is outside the scope of this study. It is difficult to list all elements hindering investment climate in host countries, because they vary from one country to another and they are different in extent and nature. Accordingly, judging this issue should be made on a country-by-country basis rather than in general terms. Despite that, the main impediments to FDI and to domestic private investment may fall into the following three broad interrelated categories; Administrative Restriction; Policy Impediments; and other Impediments. This section deals with such impediments and looks at their role and importance relative to commercial risks.

4.1. Administrative Restrictions

Administrative procedures are legitimate and exist in most countries and there is no doubt that excessive administrative regulation result in substantial delays and additional costs to foreign firms. Host states apply them to regulate the flow of FDI into their economies. Such procedures are justified by the "public interest" theory, which may take the shape of security considerations, environmental protection, health issues, or quality control. Still, countries differ in the way they apply such restrictions, as there is no single pattern of them. As administrative procedures differ from one country to another, it is not easy to inscribe a complete list of them. For the sake of more simplicity[32], however, the 26 most identified core procedures can be grouped into three principal categories.[33]

A- Entry and Establishment	B- Ownership of properties, Site development, and Utility.	C- Operational Requirements
1 Company registration	12 Access to Land (State Land)	20 Import-export Permits
2 Investment Code Registration	13 Town Planning Certificate	21 Import-export Clearance Process
3 Initial Bank Deposit	14 Site Inspections and Approvals	22 Foreign Exchange Controls
4 Residence and Working Permit	15 Building Permits	23 Fiscal Situation Certificate
5 Tax Office Registration	16 Power connection	24 Health and Safety Inspections
6 Foreign Investment Licensing	17 Telephone and Telex	25 Labor Inspections
7 Business and Trading Permit	18 Water and Sewerage	26 Social Welfare Plan Payments
8 Statistical Office Registration	19 Post, Box and Private Bag	
9 Existence, Conformity,		
10 Health Care & Pension Plans		
11 Social Security Registration		

Table 6: A list of the most identified administrative procedures. Source: WDR 2005

According to table (6), administrative barriers may be related to one of the following three groups of restrictions: Entry and establishment, Ownership, and operational requirements.

4.1.1. Barriers to Entry and Establishment

This usually includes many required steps such as company registration; special registration for foreign investment; applying for investment incentives; licenses for

[32] See Table 6.

[33] The WB-IFC Foreign Investment Advisory Service (FIAS) grouped administrative barriers into four main categories: a) General approvals and licenses required of all firms before operations. b) Pre-operational, sector or industry-specific approvals and licenses. c) Statutory inhibitions on land acquisitions and the provision of utility services for business purposes. d) Post-operating requirements and regulations. (www.fias.net/investment_climate.html)

business operation from a number of departments and ministries[34]; work and residence permits for expatriate staff; registration for company and excise taxation and a host of other registrations (e.g. patents, trademarks, brands, copyrights, with the central bank for overseas transactions); import and export licenses; and clearances after environmental impact assessments. Some host states have succeeded in simplifying the way to achieve such requirements by using one application form with one identification number through what is known as (one-stop-shop).[35] Meanwhile, some other states are still applying process, which are more complicated.

4.1.2. Restrictions on Foreign Ownership, Construction, and Utility

After the completion of an entry requirement, the foreign investor has to deal with other requirements related to land ownership, construction and connection to necessary utilities. This type of administrative barrier is very sensitive and usually encounters a great delay. Causes for delay start with the lack of co-ordination between different governmental departments and end with the confusion about land ownership titles. These conditions include; inadequate title records, inadequate arrangements for a title search, and for the final determination of property rights cumbersome legal procedures in establishing satisfactory titles for completing land purchase or lease transactions and establishing ownership, lessee or long-term tenancy rights.[36]

4.1.3. Operational Restrictions

After overcoming the above-mentioned two types of administrative restrictions, foreign investors may face other complications and restrictions. These restrictions are either unintentional, originating in excessively bureaucratic government agencies and regulatory authorities, or intentional, aimed at controlling unproductive foreign projects. Operational restrictions may involve limits on the employment of foreign nationals and give priority to the national labour force. They may also impose some requirements aimed at the promotion of exports, import substitution, or the encouragement of local production. However, the most damaging of these are regulations and controls on imports, exports, obtaining foreign exchange and getting exemptions from exchange controls recognised and accepted.

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[34] Such as the ministries of finance, environment, trade, labour, land, electricity, water, and telecommunications.

[35] See L. Wells Jr and A. Wint, "Facilitating Foreign Investment: Government Institutions to Screen, Monitor, and Service Investment from Abroad", FIAS Occasional Paper, N. 2, and 1992.

[36] In Australia, Owner restrictions are imposed on civil aviation, media, and telecommunications sectors, see (WWW.oecd.org/daf/cmis/country/austral.htm≠clcm); in Malaysia, ownership depends on the level of export

4.2. Screening of Foreign Direct Investment

Screening of foreign investment constitutes a typical example of obstacles to the flow of foreign investment. Under this measure, foreign investments need prior approval from the competent authorities in host states, which take the countries' general economic policies before making any decision.

From the Host State's point of view, "screening" measures are justified on many considerations, especially on economic grounds. Economic screening is usually used as means to avoid excessive concentration of foreign investment in certain locations of the state. In addition, "screening" is important to exclude foreign investors from certain sectors, which are reserved either for the state it self or for its nationals. This may be desired either for security reason or for the avoidance of foreign domination. Meanwhile, foreign investors consider "screening" as a serious obstacle to the flow of foreign capital. Accordingly, the removal of screening measures has been considered as a pre-condition for the flow of FDI, especially when it takes place as a governmental bureaucracy.

Some other administrative requirements are less complicated but still time consuming and costly. Obtaining periodic certifications from labour, health, and environment ministries is a good example of this type of restriction. Obviously, the reason behind the existence of such barriers is the prevalence of non-compliance culture in most developing countries. This culture usually flourishes in governmental bureaucracy and the absence of clear and transparent governmental frameworks that is able to enforce rules with a broad monitoring and surveillance mechanism to ensure compliance.

Administrative impediments have a great impact on a foreign investor's decision to go to a certain country. If they are considered individually, they do not appear so serious, but if they are considered together this means serious bureaucratic burdens on foreign investors. They might mean two to three years of procedural delay to sort out administrative requirements in some LDCs and developing countries before getting started with business.[37]

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proposed by the foreign companies, the level of technology, and location of the project. See, (www.oecd.org/daf/cmis/FDI/fdisix.htm≠asia).

[37] In some other countries such as Hong Kong and Singapore it take 2-3 months only while in Chile and Malaysia, which receives larger amount of FDI it takes 4-6 months.

Undoubtedly, excessive administrative regulations result in substantial delays and costs to foreign firms. Some governments have taken many steps, with the help of agencies like "FIAS",[38] to improve such conditions by mapping out contours of the investment approval process, eliminating duplications and unnecessary steps and through improving inter-departmental co-ordination. As FDI flow to developing countries continues to be elusive, the question, however, remains open on whether such efforts have gone far enough. Chapter five of this study deals with this subject in greater detail.

4.3. Policy Impediments

Foreign investors are not only concerned with matters that are related directly to the process of their business in the Host State, they also consider the quality of the overall economic governance. Certain macroeconomic policies and indicators matter to foreign investors as they reflect the general economic conditions of the Host State. Such as: 1) Fiscal Policies; 2) Monetary Policies; 3) Trade Policies; 4) Exchange Rate Policies; 5) Internal and External Debt.

4.3.1. Fiscal Policies[39]

Fiscal instability might be one of the most serious impediments to foreign investment; such risks are associated with fiscal destabilisation caused by sudden shortfalls in revenue or sudden increase in public expenditure. Its importance is evident. Fiscal policies of concern to foreign investors usually include basis of such instability is the shortage of foreign exchange and currency in developing states. In addition; many other factors could destabilise financial systems in developing countries such as increasing foreign debts, repeated devaluation of national currencies, and a dramatic rise of the rate of inflation. Since the beginning of the 1990's, efforts by developing countries have succeeded in improving the conditions of their fiscal policies and in bringing down budget deficits to more sustainable levels. However, most of these countries remain vulnerable to revenue fluctuation. Accordingly, it is understandable

[38] UNCTAD and the Foreign Investment Advisory Service (FIAS) run jointly by IFC and the World Bank have done such work and uncovered insightful findings. See Emery et al, 2000 and WIR, 1999 (pp.179 – 181).

[39] a) The stability and sustainability of fiscal policies in LDCs and the uncertainties/risks associated with fiscal destabilization caused by sudden shortfalls in revenue or sudden increases in public expenditure; b) the level and growth of tax revenues and the dependency of such revenues on commodity prices and taxes, trade taxes, foreign aid and foreign borrowing; c) the structure of taxes and the long-term stability of tax rates applicable to corporate income and capital gains; d) tax allowances for accelerated depreciation and amortization; e)excise taxes as well as taxes on imports, exports and value-addition or domestic sales; F)tax allowances or tax exemptions for export income; g)The size, sustainability and 'finance-ability ' of budget deficits with investors being particularly concerned that unsustainable large budget deficits in LDCs usually presage major economic disruptions in terms of future tax rises and/or severe adjustment in curtailing public expenditures.

that foreign investors try to avoid investing in countries carrying higher fiscal instability risk than other developing countries.

4.3.2. Monetary Policies Destabilisation

In relation to Monetary Policies of host states, foreign investors are mostly concerned with certain questions, which are related to their business. This concern usually focus on specific areas such as: the level and stability of the domestic interest rate, the impact of " crowding-out effects" of public borrowing on foreign and national firms, the level and trends of domestic inflation, and the conditions of the domestic financial system, in the sense of governmental borrowing.

In respect of the above-mentioned questions about the monetary conditions in developing countries, many countries still suffer from a high risk of monetary instability. A comparison between the 1980's and 1990's figures show that related conditions improved especially in bringing down the rate of domestic interest and in reducing the inflation rate as well. Still, the main threat of monetary destabilisation may come from governmental borrowing and finances rather than from private financial sector.

4.3.3. Trade Policies

The trade polices of host states may be of special interest to foreign investors as they may constitute an obstacle caused by import and export regulations and by the level of "market opining". Under pressure from both the IFIs and the WTO, most developing countries were forced to adjust and liberalise their trade policies. The impact of such a step on developing countries is losing rather than gaining as developing countries derived discernible benefit, except in one or two cases.[40] Furthermore, under the Cotonou Agreement, the EU renegotiations with "ACP" countries[41] were less generous than under the Lome' five Agreements. On the other hand, foreign firms were theoretically in favour of liberalised trade regimes, but in reality, they oppose that if it exposes them to competition.[42] The importance of open trade policies is now universally recognised, although empirical evidence of clear benefits to developing

[40] Bangladesh, for example, was given an access to EU and US garment market. In the OECD Countries, market opening (especially in areas of advantage to developing countries such as agriculture and textile) process is not as rapidly as anticipated.

[41] (ACP) stands for African Caribbean and Pacific countries.

countries is yet to be found. Although, the link between open export orientated economic policies and development exists[43] and closed economics are usually associated with development failure.

4.3.4. Exchange Rate and Convertibility

A stable and worthwhile regime of foreign exchange and convertibility is at the core of foreign investors' concerns. A sound exchange regime is the regime that permit foreign firms a trouble-free repatriation of profits, dividends and, eventually the most important, the capital. Although progress has been made in managing exchange regimes, the risk of inconvertibility still exists in some developing countries.

4.4. Other Impediments

Chapter five of this study deals with the question of admission and treatment of FDI. Accordingly, this section only tackles the issue that constitutes hindrance to foreign investment.

4.4.1. Inequitable Standards of FDI Treatment

Treatment of FDI becomes an obstacle for foreign firms whenever host states apply inequitable standards for foreign firm *vis-à-vis* domestic firms. Equal or national treatment to a foreign firm is the backbone of the investment liberalisation process and violating this principle represents a repulsive barrier to foreign investors especially, when discrimination is related to the requirement of establishment, ownership and control of the enterprise, access to courts and other authorities, and taxation. As a result, many developing countries have adopted the principle of "national treatment". However, there are some issues, which are not observed by the "national treatment" principle, such as the question of convertibility of funds that affect only foreign firms.

4.4.2. Transparency of Law, Regulations, and Administrative Procedures

A serious impediment usually encountered by foreign investors in developing countries is the unavailability of reliable information about foreign investment policies and practices. Moreover, all government measures related to FDI must be fully

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[42] In India, for example, foreign car manufacturing firms had been lobbying eight years ago for more liberal import regulations when the market was close to them. They are now against any more liberalisation of trade policies as this poses them to competition.

[43] This is the case in East Asian and Latin American economics.

disclosed and well presented in any language needed. This includes laws, regulations, and measures.

4.4.3. Inadequate Infrastructure

Poor conditions of basic infrastructure and facilities are serious impediment to foreign investors in third world countries. This failure may be expressed clearly in having poor communication systems, in unsophisticated transport networks, and in providing inadequate banking and credit facilities. There is no doubt that shortcomings in physical infrastructure and services deter the flow of FDI. That is proved by a number of surveys of foreign investors interested in investing in developing countries.

Lately, a survey conducted by MIGA showed that a reliable infrastructure is fourth important out of twenty top factors in evaluating a host country location.[44] In addition, Table (7) shows other aspects of infrastructure as the 12th, 13th, 16th, and 20th of the most important factors foreign investors take into consideration before going to a foreign market. These findings, which are supported by many other surveys,[45] are applicable to most developing countries

Access to customers	77%
Stable social and political environment	64%
Ease of Doing Business	54%
Reliability and quality of Infrastructure and Utilities	50%
Ability to hire technical professionals	39%
Ability to hire management staff	38%
Level of Corruption	36%
Cost of Labour	33%
Crime and Safety	33%
Ability to hire Skilled Labourers	32%
Level of Stability of National Taxes	29%
Cost of Utilities (electricity, water, gas, telecom)	28%
Quality of Roads	26%
Access to Natural Material	24%
Availability and Quality of University and Technical Training	24%
Availability of Land with all Utility in Place	24%
Local taxes	24%
Access to suppliers	23%
Labour Relations and Unionisation	23%
Air Connections and Services	23%

Table 7 -The 20 Most Critical Location Factor for FDI (per Cent cited by respondents as very influential)
Source: MIGA- Foreign Direct Investment Survey (January 2002) P. 13 Table 2.

In general, Physical infrastructure deficiencies are of special importance in a contemporary world of high competition. Developing countries are required to provide

[44] See table (7), MIGA, 2002.

a highly competitive infrastructure in order to avoid deterring the flow of clean high-valued FDI. Deficiency increases, substantially, capital and operation costs as foreign firms will be responsible of incorporating their own needed utilities, except in non-traditional investments such as Infrastructure services themselves, which produce non-tradable outputs, like electricity.[46]

Obviously, the link between deficient infrastructure and a weak flow of FDI is very clear. A comparative indicators study of the World Bank[47] suggests that countries with deficient infrastructure are more disadvantaged than other developing countries with better conditions in attracting FDI.

4.4.4. Human and Social Capital

Most economies, especially the developing countries, face a progressively more competitive environment in a fast moving world. In such an overwhelming state of globalised economy and trade liberalisation tendencies, competition is not only internal but also external. Theoretically, countries with higher competitive indicators of human resources are more attractive to foreign investors. Human resources in this context means; labour cost and productivity; educational achievements; number of skilled and knowledge-based professionals; composition of knowledge-based; and technological progress.

There are many factors that determine the competitiveness of a given economy; this includes human capital capacity. There is no doubt that the more the economy is competitive, the more likely it will gain through participation in market competition. In the case of FDI, the competitiveness of the investment climate is an important prerequisite to attract more inflow of foreign capital to host countries. This section focuses the discussion only on the following issues that are related to human capital capacity and competitiveness.

4.4.4.1. Labour Cost and Productivity

As foreign investors, usually, choose countries with a cheap labour force; this question must be of special concern to them. Accordingly, countries with a large cheap labour force have a huge competitive advantage in attracting large volumes of foreign capital over other countries, which do not have such facilities, especially when foreign

[45] This survey was conducted in East Africa countries: Ethiopia, Eritrea, Kenya, Tanzania, and Uganda.
[46] Such as electricity generator, communication system, water supplies and other utilities.

investors seek labour-intensive projects. In the UNCTAD report, Reinert suggests, "true competitiveness demands that an economy continue to produce more goods for international markets as wages rise and labour-intensive activities are upgraded to make higher-quality products that yield greater value-added industries".[48] Concerning human resources, competitiveness would mean providing a sufficient and suitably experienced labour force, which is needed to achieve such an aim.

4.4.4.2. Educational Realization

One area of special importance in the context of human resources is the education system profile of host states. This domain determines the quality of labour force required by the economy.

The following table (8) reflects samples of education profiles of twelve countries grouped as high,[49] medium,[50] and low[51] human development rank. Accordingly, there are many indicators to measure the level of education performance. For example, the size of public expenditure on education, adult literacy rate, and tertiary students in science may give a good indicator on the conditions of the education system in a given country.[52]

In terms of educational expenditure, most developing countries do spend substantial sums of their annual budgets on this matter. However, it is self evident that in some developing countries, allocation of public funds on education is not sufficient and the whole education system requires improvement and reform.[53] In addition, even in cases where funds for education are available, most developing countries suffer from insufficient orientation of higher education towards scientific, technological, and other applied studies. Table (8) show that the proportion of student enrolled in science and technological subjects at the tertiary level is relatively low, especially in comparison with the figures in developed/industrial countries. Realizing the role of these subjects in providing high-level technical manpower indicates how essential it is for host states to give this issue due attention.

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[47] World Bank indicators, 2002, the World Bank, Washington D.C.
[48] UNCTAD, "The Competitiveness Challenge: Transitional Corporations and Industrial Restructuring in Developing Countries", The United Nations. (2000), P. 3.
[49] Human Development Report, (2000), P194.
[50] Ibid., PP. 194-5.
[51] Ibid., P. 196.
[52] UNDP, Human Development Report (2000).
[53] See table (8)

Table 8 **Education profile - Source: Figures adopted from UNDP, Human Development Report 2000.**

			Age group enrolment ratios (Adjusted)			Public education expenditure	
Country	Adult Literacy Rate	Youth Literacy Rate	Primary age Group	Secondary Age Group	Tertiary Students In Science	As % of GNP 1995-97	As % of total Government Expenditure 1995-97
High Human Development							
Italy	98.3	99.8	99.9	95.0	28	4.9	9.1
Greece	96.9	99.7	99.9	91.4	30	3.1	8.2
Korea	97.5	99.8	99.9	98	34	3.7	17.5
Bahrain	86.5	98.0	98.2	87.2	39	4.4	12.0
Medium Human Development							
Mexico	90.8	96.6	99.9	66.1	31	4.9	23.0
Brazil	84.5	92.0	97.1	65.9	23	5.1	...
Lebanon	85.1	94.6	76.1	...	17	2.5	8.2
Egypt	**53.7**	**68.3**	**95.2**	**75.1**	**15**	**4.8**	**14.9**
Low Human Development							
Nepal	39.2	57.3	78.4	54.6	14	3.2	13.5
Senegal	35.5	48.7	59.5	19.8	...	3.7	33.1
Gambia	34.6	54.3	65.9	33.3	...	4.9	21.2
Niger	14.7	21.6	24.4	9.4	...	3.3	12.8

4.4.5. Size and Competitiveness of the Market

Small sized markets do not only affect the size of investment projects but also determine their type. The possibility of competing opportunity in highly profitable projects is a principle factor in the decision of investing in a foreign country. The absence of this factor may result in deterring foreign investors and pushing them to seek investment in the markets of developed countries, which are competitive.

5. Investment Climate Assessment

As it has been stressed in this chapter, improving and reforming the investment climate in developing countries is the first step forward in achieving more FDI inflow. However, the question remains where the starting point of the reform process is. The obvious answer lies definitely with a well-done and transparent assessment of their investment climate, which is able to diagnose investment problems and induce reform where it is needed. During the last few years, the World Bank Group introduced two tools to help developing countries in this area; the first, Doing Business Reports covers more than 145 countries, the second, which is known as "Firm Surveys" of

more than 60 countries. Other institutions have produced similar reports on this subject.[54]

5.1. What is Investment Climate Assessment?

Investment climate assessment is a tool to systematically analyse the conditions in the private sector, including foreign private investments, in a given country. By providing a practical foundation for policy recommendations and involving local partners throughout the process. The assessments are designed to support policy reforms that can speed the growth of the private sector and lead to faster economic growth and poverty reduction.

Investment climate assessment means a systematic analysis of the conditions for private investment in a given country, which aims at pinpointing the areas where reform is most needed to improve productivity and competitiveness. This provides a practical foundation for policy recommendations, which involve local partners throughout the process.

5.2. Investment Surveys

Investment climate assessments, which depend on diagnostics such as surveys[55] and indicators aim to diagnose problems of and to stimulate reform in developing countries. Surveys, as we will see in chapter ten of this study, capture private firms' conditions in different areas such as; financing, governance, regulation, tax policy, labour relations, dispute resolution, infrastructure etc., especially in the areas which can substantially increase the cost of doing business. The following table (5) provides a typical example of the areas touched by a survey conducted by the World Bank. The findings of such surveys, combined with facts from other sources, "provide a practical basis for identifying the most important areas for reform aimed at improving the investment climate". [56]

Dealing with diagnostics raises the issue about the usefulness of such tools and whether they are convincing enough for policy makers to act on investment climate reform in the

[54] http://www.doingbusiness.org Doing business (World Bank Group) 2001-2003 145 countries reports & 60 Firm surveys, World Competitiveness Reports/ annual by (World Economic forum), Index of Economic Freedom by (the Heritage Foundation).

[55] Such surveys are achieved by a joint effort of the World Bank and the private sector in the concerned country.

[56] See the World Bank definition for the term "investment Climate Assessment". See The Pilot Investment Climate Assessment "Improving the Investment Climate In Bangladesh", World Bank, (2003), P. 4.

absence of urgencies or hardships. This leads to questioning the need for such tools and their persuasiveness, given the high cost of original diagnostics.

Meanwhile, other problems may arise in relation to this question, such as: the shape of these diagnostics. The discussion comes in the shape of whether it is enough to have a uniform standardized survey or it must be a locally tailored investment climate survey, which observes local problems and needs in a more fitting way. In other words, there are two arguments about investment climate in this area; the first one says that surveys, as an evaluation tool should be specially tailored to every reform program, while the second argument defends a uniform internationalized survey.

New investment climate measures from the World Bank

	Investment Climate Surveys	Doing Business Project
Country coverage	Launched in 2001, this Report draws on over 26,000 firms in 53 countries. Each year an additional 15–20 surveys are fielded.	Initially covering 130 countries in 2003, additional countries are being added.
Investment climate dimensions covered	The standard questionnaire of 82 questions covers regulations, governance, access to finance, and infrastructure services. It also collects data on firm productivity, investment, and employment decisions.	Beginning with 5 areas of regulation (business, registration, insolvency, contract enforcement hiring and firing workers and accessing credit), additional topics are being added.
Types of variables	Covers both objective and Objective measures of perception data. The objective data includes the time to complete processes and monetary costs of various disruptions and regulations. In addition, respondents give perceptions of potential constraints and assessments of risks and competition.	Objective measures of the number of procedures, the time to compete them, and the fees and the costs associated with compliance.
Whose perspective	Surveys cover a diverse range of sizes and activities, with random samples of several hundred firms. Data is gathered through face-to-face interviews conducted with senior managers and accountants.	Use a single, defined, hypothetical firm and transaction. Judgments based on assessment- of up to 5 local experts (lawyers, accountants).
Differences within a country	Samples cover multiple locations within each country.	A single indicator is given for the largest city in the country. For some large countries, additional cities are available.
Basis of assessment	Indicators are based on the experience reported by firms, providing ranges of how policies are implemented in practice	Indicators measure formal regulatory requirements.

Table 9: Source: WDR 2005, a better Investment Climate for Everyone, p. 245.

Table (9) represents a good example of a survey that is able to overcome the challenges, which may face the process of evaluating investment climates. This table provides a comprehensive source of indicators leading to a new insight in studying investment climates.

In general, I support the option of having a tool, which is the right balance between local tailored information with standard measures that can be benchmarked internationally. This would better serve the aim, as internationalized tools will not fit

the conditions of every country and this leads to serious difficulties in detecting the weaknesses of investment climate.

Yet, it is important to mention that whatever the measuring tool is, the successfulness of the reform program depends greatly on host countries political intention to reform, and to obtain the right process for implementing their new policies. Again, the question is how to find a balance between local and international standards that can be benchmarked internationally? Thus, obtaining information on the current situation in developing countries is very useful for identifying the main problems of the investment climate and in selecting relevant indicators specifying the present conditions, the future objectives, and recommendations for essential reform.

6. Conclusion

It is agreed that for a country to take advantage of opportunities in the international market, it must have a sound investment climate. i.e. good infrastructure and a sound regulatory environment. The interaction of openness and a sound investment climate creates a good environment for investment and production. This actually makes a big difference among countries. China sets a good example. This country has been very successful, both in terms of international integration and rapid economic growth, while some other countries have a far lower level of success.

At present, the investment climate in most states is tolerant of FDI. Even Latin American states, which were traditionally hostile to foreign investors, started shifting towards a more liberal attitude in contrast with the Calvo doctrine. Many of these states entered into bilateral investment treaties, which permit the settlement of investment disputes by foreign arbitral tribunals. In addition, foreign investors have been offered more tax and other incentives and guarantees against expropriation through national legislation. This applies to states like China, Vietnam, and most of the Eastern European countries. Consequently, more favourable investment climates have been created as host states efficiently integrate with the international economy on terms favourable to private enterprises: mainly by offering stable economic, social, and political conditions for the growth of private investment and a free market system.

Generally, the investment climate is the institutional, policy, and regulatory environment in which firms operate. This means that high bureaucracy, corruption, and

unavailability of reliable services because of inefficient infrastructure and financial services will definitely deter foreign investors to locate to such a country or to get domestic entrepreneurs to make investment in response to potential export opportunities, if the investment climate is poor.

This chapter has proved that the first step in the right direction to improve and reform investment climate is to conduct what is called Firm level surveys. Such standardised surveys of random samples of firms reveals how foreign and national firms suffer bottlenecks and impediments in terms of time and cost, number of days to clear goods through customs, and number of days to get basic infrastructure needed. This matter differs from one country to another and sometimes from one region to another within the same country.

Finally, this chapter has emphasised, however, that the removal of investment impediments is more important than creating new incentives.

Chapter Four:

Development of Foreign Direct Investment Climate in Egypt

CHAPTER FOUR CONTENTS:

Chapter Four: Development of Foreign Direct Investment Climate in Egypt

An investment climate means the general business environment that may have an effect on the success of business operation. Evaluating the attractiveness of a given country dictates the study of the following factors: 1) political stability, 2) economic environment and 3) openness to foreign investments. However, an introduction about Egypt's portfolio and political structure is necessary. This chapter will be divided into two sections: First: Egypt's Portfolio. Second: Egypt's Investment's Climate.

1. The Country's Portfolio

1.1. Background

1.1.1. Land

The Arab Republic of Egypt[1] or (*Jumhuriyat Misr Al-Arabiyah / in Arabic*) is situated in the Northeast corner of Africa and includes parts of Asia (the Sinai Peninsula). Its total area is about 1,002,000 km3, 3.6% of which is inhabited.[2]

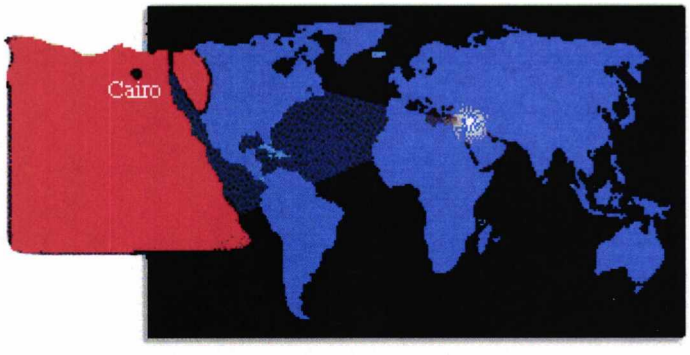

Figure 1: Egypt Geographical Location

Egypt's main target of its investment policies is to redistribute the population and to make full use of the so far un-exploited areas and natural resources available. For instance, great attention is presently directed to the new cities with special emphasis given to the development plan of the Sinai Peninsula, an area with huge economic and natural potential. Egypt is mainly dominated by a desert climate except for the northern Mediterranean fringe.[3] 90% of the population lives on the Nile floodplain.

[1] The capital is Cairo and the official language is Arabic. Islam is the principle religion of the country with a Coptic minority.

[2] The geographical regions as set in the urban plan are follows: Upper Egypt, Central Egypt, North Upper Egypt, Greater Cairo, the Canal Zone, the Delta, and Alexandria & Matrouh. Those regions are divided into 26 governorates

[3] Cambridge Encyclopaedia, Cambridge University Press, UK, (1993), P. 243.

1.1.2. Population

According to the 1998 census, the total number of Egypt's population rose to 72.6 million including 2.1 million temporary Egyptians immigrants, with an increase of around 17 million on the 1986 census. The latest census provided the following positive indicators: 1) Labour force rose to 17.79 million, i.e. 35.4% of total population. 2) The population growth rate dropped to 2.1%, indicating a fall by seven per thousand in overpopulation with the last ten years. 3) The number of the new cities rose to 19, with an increase of 2.9% compared to 1986 census.

1.1.3. Historical Perspective

Over its history, Egypt has seen Greek, Roman, Arab, Mameluke, Ottoman, French and British armies. Egyptians adopted a numerous number of faiths: ancient Pharaonic, Judaism, Christianity and Islam. Languages changed over time from Hieroglyphic to Greek, to Coptic and finally to Arabic.

1.1.3.1. Old Egypt

The Pharaonic era was ended by the defeat and death of Cleopatra. This brought Egypt to be under Roman control. The Romans ruled the country from 30BC till AD 639 and they considered the country as personal property of the Emperor. During such an era, Greek settlers became well established and Christianity flourished.[4]

Muslims entered Egypt from the east coming from Syria in AD 639. The native Coptic population welcomed the new comers because of the help they had given in driving the Greek "Byzantine" out of the country. Later, Islam was gradually embraced by many of the Copts and the Arabisation process began. The new comers established the new capital of Muslims in Egypt, later called "*Fustat*", which remained as such under the *Ummayads* who ruled from Damascus and later under *Abbacies* who ruled from Baghdad.[5]

In 870, after the power of these two dynasties declined, *Ahmed Ibn Talon*, the Turkish Commander of Egypt declared himself as an independent *Sultan* of the country. Later in 968 Egypt came under the Fatimids, who came originally from Syria and settled in

[4] David O'Connor, "A Short History of Ancient Egypt", Premier Book Marketing, (1990), P. 34.
[5] Afaf Lutfi Al-Sayyid Marsot, "A History of Egypt: From the Arab Conquest to the Present", Cambridge University Press, Second edition, Edinburgh, (2007), P. 22.

Kairowan, Tunisia. The commander of the Fatimids entered the Fustat City where he met little resistance then he decided to establish a new city, which would rival Baghdad the capital of the *Abbacies*. Thus the city of Cairo (*El Qahirah)* was conceived. Under the Fatimids, Egypt witnessed a noticeable economic stability and extended foreign trade to Europe and India.[6]

By 1079, the first Crusade entered Syria, from the Northeast, aiming to free Jerusalem from Muslim control. After occupying Jerusalem in 1099, the crusaders then turned their attention to Egypt, which they occupied in 1168. The crusaders' forays into Egypt were ended by the Kurdish Leader Salah el-Din, who extended his power over the whole country. Such development marked the beginning of a new period in Egypt's history that lasted until 1252.[7]

The Ottomans (1517-1805), a Turkish dynasty ruled Egypt after having crushed the weak military machine of the *Mamelukes* who ruled between 1252 and 1516. Under the Ottoman rulers, Pashas, Egypt's role as a religious fountainhead overshadowed its cultural role. During Turkish rule, Napoleon Bonaparte, of France, mounted his expedition to Egypt. While he was on his way to Cairo, after Landing at Alexandria, England's Admiral Horatio Nelson, who destroyed the French fleet at Abu Qir, confronted him. This resulted in the retreat of the French forces.

1.1.3.2. Modern Egypt

The French departure left Egypt in chaos and the only person to bring stability again was Mohammed Ali, a young Albanian officer in the Turkish army, in 1804. Despite his loyalty to the Turkish Sultan, Muhammad Ali took control and remained in power for over forty years as viceroy of Egypt, during which the country witnessed the modernization of its institutions and a wide-scale building program, including the construction of many canals. By the end of his era, Egypt had attained international status and had begun attracting the attention of Western states.[8]

Mohammed Ali 's successors, *Khedives*, continued his policies. During the khedive Ishmael rule, in 1860, the Suez Canal was opened to link the Red Sea with the

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[6] Afaf Lutfi Al-Sayyid Marsot, "A History of Egypt: From the Arab Conquest to the Present", Cambridge University Press, Second edition, Edinburgh, (2007), P. 22.
[7] Ibid., P. 29
[8] Agnieszka Dobrowolska, Khaled Fahmy, "Muhammad Ali Pasha", American University in Cairo Press, Cairo (May 2005), P. 17.

Mediterranean. Forty-four percent of the Canal's shares went to Egypt; six years later such shares were sold to British subscribers. The year 1882 witnessed a greater British influence in Egypt as a French-British consortium was set up to manage on Khedive finances after being faced with bankruptcy.[9]

During World War 1, Britain realized the threat posed to the Suez Canal by the alliance between Germany and Turkey. This resulted in turning Egypt into a fully-fledged protectorate by law. In 1922, Egypt was granted independence under a treaty that left the defense of the country, including the Canal, with the British forces. The new political system was based on a new Constitution and the reins of government, though the king retained his position.[10]

The accumulation of many elements such as the unpopularity of the monarchy, attitude against British intervention in internal Egyptian matters, the creation of the Jewish State in Palestine (1948) and the emergence of the militant Muslim Brotherhood group discredited the power of the king Farouk. In 1949, the failure of the Arab armies, including the Egyptian army, to liberate the occupied parts of Palestine led to violent riots in Cairo. Three years later such disturbances increased and a group of army officers (*Free Officers*) led by Jamal Abdul Nasser toppled the King who was forced to abdicate and seek exile in Italy. In June 1950 the Egyptian Arab Republic was proclaimed.[11]

President Nasser's main concern was to terminate Western influence in Egypt. Accordingly, he concluded an agreement with the British to evacuate the Canal Zone and then he replaced all high-ranking foreigners with Egyptian persons. In 1956 President Nasser nationalized the Suez Canal provoking a British-French armed attack with the help of Israeli forces, this assault was ended by American intervention. After the 1967 defeat against Israel, Nasser offered to resign but the Egyptian crowds forced him to stay in office. President Nasser died in 1970 and was succeeded by Anwar Sadat. This change in power marked yet again a change in the course of Egyptian history.[12]

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[9] Agnieszka Dobrowolska, Khaled Fahmy, "Muhammad Ali Pasha", American University in Cairo Press, Cairo (May 2005), P.29.
[10] Khaled Fahmy, "A History of Modern Egypt", Cambridge University Press (2008), P. 65
[11] Ibid., P.67.

President Sadat's policy was based on the termination of the Soviet influence in Egypt and on turning to the West to solve the country's economic and development problems. Such a policy paved the way for American influence in the region, which began with the construction of an oil pipeline between Suez and Alexandria.

Taking into account that his reform program was dependent on the stability of the region, President Sadat launched a military operation to liberate the Sinai Peninsula in 1973. This war led to peace talks and resulted in a peace treaty at the Camp David resort in 1979. Accordingly, Egypt was expelled from the Arab League and Muslim militants assassinated Sadat in 1981 on account of the peace treaty with Israel.

Vice-president Hosni Mubarak, who committed himself to Sadat's development and political policies, succeeded President Sadat. The new President inherited the burden to solve Egypt's economic problems and to reinstate the country in the Arab world again.

1.2. Development of the Legal System

Constitutionally, Egypt has gone through four major changes since 1571: under the Ottoman Empire (1571-1913), under the British Protectorate (1914-1922), under the Egyptian Monarchy (1922-1952) and last since the beginning of the Republican era in 1953. Egypt enjoys one of the best-articulated legal systems in the Middle East; some Egyptian laws were codified during the later half of the nineteenth century,[13] under the Ottoman Empire. Egypt's jurisdiction system witnessed many changes since it fell under Turkish authority and became part (a province) of the Ottoman Empire. These stages could be classified as follows:

1.2.1. Shari'a "Sacred Law of Islam" law era

Under the Ottoman Empire, Egypt "acquired an independence, both in fact and in law, greater than that of other provinces"[14] and was granted the right to apply Turkish law "in accordance with local needs and the principle of justice". Muhammad Ali's revolution modernized the Egyptian economy and shifted it from "subsistence economy to a modern industrialized one in two or three short decades",[15] however, "the Industries collapsed and the diversification of the economy was blocked due to foreign

[12] Khaled Fahmy, "A History of Modern Egypt", Cambridge University Press (2008), P. 66.
[13] Davis, "Business Law in Egypt", Graham and Trotman, London Sixth edition (1990),Vol.1. P. 1.0-1.
[14] Ibid. P.1.0-3.

intervention and the absence of an Egyptian entrepreneurial and professional class".[16] From the early days of Ottoman control over Egypt, until the beginning of the nineteenth century, *Shari'a* law (the sacred law of Islam) was the only law in practice. Later on, Muhammad Ali started a new legal era through the development of new penal legislation.[17]

In 1454, many treaties were concluded between the Ottoman Empire and some European countries intending to grant their nationals some privileges while staying in the Empire. This system was known as (Capitulation) and it was extended to Egypt in 1517 as soon as it became part of the Empire. The main features of the Capitulation were that the nationals of the contracting countries were supposed not to be subject to national jurisdiction and Consular courts should deal with their cases.[18] The above-mentioned system could have been based, theoretically, upon an Islamic principle, which differentiates between Muslims and non-Muslims in terms of the applicable law, i.e. the law of Islam must be applied to Muslim believers only.[19]

1.2.2. Mixed Courts (1875-1949) and Capitulation's era

A mixed court system was introduced, in 1876, under which the Egyptian courts system was divided between Consular Courts for foreigners and national courts for Egyptians. This court system was not abolished until the Montreux Convention of 1937, which took place in Montreux, Switzerland, and was attended by all the capitulatory authorities[20]. This convention provided for a transitional period of twelve years at the end of which the National court should enjoy full jurisdiction over all litigation. However, this did not take place until 1956.

1.2.3. The Republican era (1952).

The present court structure in Egypt shows that division in the system could be either civil-commercial or civil-criminal,[21] with three different levels of courts as follows; a) the Primary Jurisdiction (the Summary Courts and the First Instance Courts, b) the Court of Appeal and c) the Supreme Court of Appeal. There are some other courts in

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[15] B. Carr David W. "Foreign Investment and Development in Egypt", P. 12 (B/2)
[16] Ibid, P.12
[17] See M. Davis, "Business Law in Egypt", Graham and Trotman, Vol.1, (1990), PP. 1.0 -12
[18] Ibid., P. 24.
[19] Ibid., P. 25.
[20] The Capitulatory authorities consisted of the following; Austria, Belgium, Denmark, France, Germany, GB, Greece, Holland, Italy, Portugal, Russia, Spain, Sweden and the USA.

Egypt such as the summary *"Niyaba"* Court. On the other hand, there is a separate court hierarchy, which specializes, in administrative disputes.[22]

On 29th of July 1948, a new Civil Code was promulgated to replace the abolished Mixed Courts, and it was commenced on the 15th of October 1949. Even though the new Code was based, substantially, on the *Shari'a* law, it preserved some French influence in many instances such as "The French influence which can be seen in the distinction between movable and immovable properties and the way in which movable property can be treated as immovable by reason of its intended use"[23]. Besides, there are many other Codes which exist next to the Civil Code of 1948 such as the Commercial Code of 1883, the Maritime Code of 1883, the Penal Code of 1937, the Code of Criminal Procedure of 1950 and the Code of Civil and Commercial procedure of 1968, the Company Law of 1981 and the Foreign investment Law of 1989.

1.3. **Political Structure**

Egypt's contemporary Constitution[24] is the most sophisticated constitution in Egypt's modern history. This Constitution includes 211 articles in seven chapters covering bases of the state, essential constituents of society and its economic components. It also defines freedoms, rights, public duties, principles and the rule of law. It also defines the system of government, the executive, legislative and judicial authorities, local government and specialized national councils.

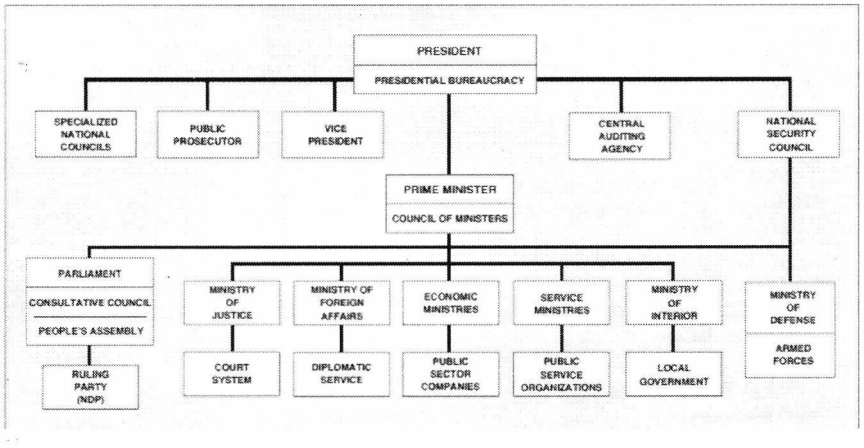

Table 1: the Egyptian Administrative System

[21] N. Bernard-Maugiron and B Dupret, "Egypt and Its Laws", Kluwer Law International, London, (2002), PP. 135-180.
[22] Ibid.
[23] Article 82 of the Civil Code, compared with Article 517 of the French Civil Code. See Davis, "Business Law in Egypt" P. 32.
[24] Egypt's Constitution issued on September 11, 1970 and amended on May 22, 1980.

The greatest attribute of the Egyptian constitution is the incorporation of the ideology of the supremacy of law. This tendency is based on the idea that the essential part of the western nations' prosperity is due to the strength and superiority of such an ideology.

However, depending on laws to make change is very idealistic and remains a distant goal in Egypt as in most other developing countries. Alternatively, they pursue a strategy of an authoritarian leadership and rigid development planning to speed up the development process, even if this requires them to suppress various democratic rights. In the presence of such a constitution, the question will be how to make it functioning? In addition-what controlling mechanism will ensure that? The actual controlling mechanisms are the legislative authority (*Al-Sultah Al-tashreyah*), The Executive Authority (*Al-Sultah Al-Tanfiziyah*), and the Judiciary (*Al-Sultah Al-Kada'yah*).

1.3.1. The Legislative Authority

1.3.1.1. The People's Assembly (Majlis Al-Sha'ab)

The People's Assembly exercises the legislative authority, approves the state's overall policy and controls the work of the executive authority.

> "The People's Assembly shall exercise the legislative power, approve the general policy of the State, the general plan of economic and social development and the general budget of the State. It shall exercise control over the work of the executive authority in the manner prescribed by the Constitution."[25]

The People's Assembly is elected for a term of five years[26] and composed of 454 members,[27] divided as follows: Ten are appointed by a presidential decree, while the rest are elected by direct public vote on an individual basis for a term of five years. All legitimate political powers in Egypt are entitled to candidature to the Assembly. Constitutionally, at least, fifty percent of total assembly members should be peasants and workers.[28]

Under the current assembly set-up, political parties are represented as follows: The Democratic National Party (the ruling party) is represented by 409 members, al-Wafd Party by 6, "At-Tagamu" Party by 5 and "Al-Ahrar", "Nasserite" and "Labor" parties

[25] Article 86 of the constitution
[26] Article 92 of the Constitution
[27] Article 87 of the Constitution
[28] Article 162 of the Constitution

by one member each; in addition to 31 independent members and 10 appointed by a presidential decree. Nine members of whom four were appointed are women.

1.3.1.2.The Consultative (Majlis Al-Shura) Council:[29]

The Consultative Council is mandated with studying and presenting proposals that can reinforce national unity and social peace at its discretion and protecting the alliance between the popular forces and basic constituents of the community. The Council functions in a purely consultative nature in the following matters:[30]

- Proposals for the amendment of the Constitution;
- Draft laws complementary to the Constitution;
- The draft plan for social and economic development;
- Peace treaties, alliances and all treaties affecting the territorial integrity of the state;
- Draft laws submitted to the council by the President;
- Subjects referred to the Council by the President relating to the general policy of the State or its policy regarding Arab and foreign affairs.

The Shura Council is composed of 264 members; of whom 13 are women. Term of membership is 6 years during which Members are not allowed to combine their membership with that of the People's Assembly.[31]

1.3.2. The Executive Authority

1.3.2.1.The President

He is the President of the Republic.[32] He must be nominated by the People's Assembly and then elected by a national Plebiscite.[33] The Candidate needs to obtain a two-thirds vote of the Assembly to be nominated. The nominated candidate must obtain a simple majority vote by the people to be elected as a President of the Republic. Under this system, the electorate has the right to vote either yes or no for only one candidate, if the candidate does obtain the required majority, the Assembly is supposed to nominate another candidate to stand for election.

Under Article 137, the president undertakes the executive authority, and in conjunction with the Cabinet, put down and supervises the implementation of public policy. He is also the Supreme Commander of the Armed Forces[34] and presides over the Supreme Police Council and the National Defence Council.

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[29] The Shoura Council was created under Articles 194 to 205 of the amended Constitution of 1980.
[30] Article 195 of the Constitution.
[31] Article 196 of the Constitution.
[32] Article 73 of the Constitution.
[33] Article 76 of the Constitution.
[34] Article 150 of the Constitution.

The President also has the following powers:

- He has the power to issue Presidential decrees, which have the force of law in cases of emergencies while the People's Assembly is "absent".[35]
- He is able to proclaim a state of emergency.
- He is empowered to issue decrees having the force of law: in case of necessity or in exceptional cases and on the authorization of the people's Assembly.[36]

On top of that, the President enjoys a number of other constitutional authorities in the legislative process.

1.3.2.2. The Government

According to Article 156 of the Constitution, the Government is represented by the Council of Ministers; the government is the highest administrative and executive body. The Council of Ministers administers the affairs of government as follows:

- Direct, co-ordinate, and monitor the performance of ministries and public authorities;
- Draft public state budget and state overall plan;
- Conclude and grant loans;
- Issue administrative and executive decisions in accordance with laws and decrees;
- Prepare draft laws and decrees;
- Supervise the implementation of laws maintaining State security and the protection of the rights of citizens and the interests of the State.

In today's Egypt, President Hosni Mubarak and the ruling National Democratic Party (NDP) control political life. The (NDP) party is an important prop to the rule of the president. It has a huge majority in the parliament.[37]

1.3.3. The Judicial Authority

The Judicial authority has played an outstanding role in protecting the rights and freedoms of the individual and community values. Under the Constitution[38], the

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[35] Article 147 of the Constitution.

[36] Article 108 of the Constitution.

[37] The NDP party won 77% of the parliament seats in 1995 elections. In the 2000 elections the (National Democratic Party) has 353 members while the remaining seats were distributed as follows: 'Independents' joining -35 seats, *Hizb al-Wafd-al-Jadid* (New Delegation Party, liberal) 7 seats, *Hizb al Tajamaa al Wataniyah al Tagadamm al Wahdwa* (Progressive National, Unionist Party, extreme left) 6 seats, *Hizb al-Ahrar* (Liberal Party, centrist) 1 seat, *Nasserist Party* (extreme left) 3 seats, Non-partisans 37 seats, vacant 2 seats, Nominated members 10 seats

[38] Articles 165 to173 of the Constitution.

judicial authority "shall be independent"[39] and "Judges shall be independent, subject to no other authority but the law". [40]

Moreover, no authority may intervene in judicial cases or in the affairs of justice. Courts issue their verdicts in accordance with the law. Judges are independent in performing their duties, being governed exclusively by the authority of the law. No other authority may intervene in the affairs of justice.

The Judicial authority plays a role in formalizing the political parties in such a way that enhances democracy in Egypt. It exercises judicial control to ensure that laws and regulations comply with the Constitution and undertakes the task of interpreting legislative provisions. Egypt's present judicial system consists of two main divisions:

1.3.3.1. Administrative Court system

An administrative Court system in Egypt is subdivided into the following:

1.3.3.1.1. The Supreme Constitutional Court (*Al-Mahkama Al-Distoriah Al-Olia*):

This body is an independent judicial body with jurisdiction over questions of constitutionality of laws and regulations and their interpretation. It rules on jurisdictional questions regarding other courts and on conflicting, non-appealable judgments issued by other judicial bodies.

1.3.3.1.2. The Council of State (*Majlis Al-Dawla*) and Administrative Court (*Al-Mahkama Al-Idariah*):

The Council of State gives legal advice to different ministries and government departments and adjudicates administrative litigation in which the state is involved. It also reviews draft legislation before it is considered by the Cabinet or introduced to Parliament.

The Administrative Court detects, investigates and judges any administrative or financial infraction within the government. These courts judge all disputes between private firms and the government unless contracts explicitly provide for alternative dispute resolution. The Administrative court operates under the authority of the Council of State, both of which are under the Ministry of Justice.

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[39] Article 165 of the Constitution.
[40] Article 166 of the Constitution.

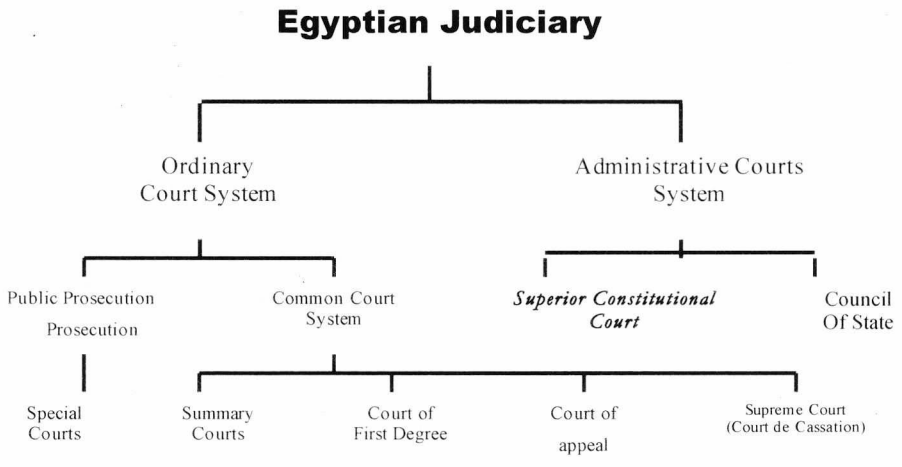
1.3.3.2.The Common Court System:

This is comprised of the following: i) the various national courts and ii) the public prosecution. There are two general types of national courts: 1) regular courts, including summary, primary, appeals, and cassation courts; and 2) special courts, including the court of ethics and state security courts.

1.3.3.2.1. National Court System:

Regular Courts

Regular Courts: Summary courts (*Al-Mahkim Al-Guz'iyya*)- cover civil litigation, cases of contravention and misdemeanours, and minor criminal offences punishable by imprisonment not exceeding three years. Primary courts (*Al-Mahkim Al-Ibtidaiyya*)- hear civil and criminal appeals from summary courts. They also function as first instance courts in matters that involve civil litigation exceeding LE 5000 and crimes of a more serious type. Courts of Appeal (*Al-Mahkim Al-Isti'nafiya*)- adjudicate appeals in both civil and criminal sentences passed by lower courts. The court of Cassation is the highest court of law in Egypt. Its jurisdiction lies in interpretation of the law and its application. Court of Appeals judgements are referred to the Court of Cassation only when a matter of legal interpretation is in question.



Special Courts

Special Courts: (*Al-Mahakim Al-Khasah*) the Court of Ethics (Law of Shame) - is divided into a lower and upper court. The two courts have jurisdiction over litigation brought by the Social Prosecutor against persons or groups alleged to be endangering society's "safety." It also acts as a brake on bureaucrats who might wish to deviate from regulations, minimizes compromises in negotiations, and exacerbates the fear of taking decisions, which might be challenged by the Social Public Prosecutor. State Security Courts - are also divided into lower and upper courts, which have jurisdiction

over crimes against the external and internal safety and security of the state, bribery, tariff offences, and "national unity".

1.3.3.2.2. **Public Prosecution**

Public Prosecution (*Al-Idiaa Al-Aam*): The Public Prosecutor is responsible for investigating crime as well as formulating cases against accused criminals. His office enforces court judgements. The Social Prosecutor: responsible for taking measures to secure people's rights and the safety of the society. Revisions to Ethics Law 95/80 removed the Social Prosecutor's jurisdiction over any political issue. Hence, the main responsibility of the Social Prosecutor is to look into crimes of illicit gains. The Social Prosecutor is subject to the control of the People's Assembly and is appointed by the President. Only the Social Prosecutor can refer cases to the Court of Ethics.

The government does not interfere in the court system. The acceptance of judgements of foreign courts and their enforcement[41] is determined by bilateral agreements between Egypt and other countries or under the provisions of the contract. Foreign and Egyptian parties can specify methods of settling contractual commercial disputes, including choice of law. In addition, under Egypt's new Arbitration Law 27/1994, parties can select arbitration under virtually any set of rules, including those of UNCITRAL, the International Chamber of Commerce (which follows the UNCITRAL rules), or any other organization.

2. Investment Climate in Egypt

2.1. Political Satiability

On a political level, while the legitimacy of Sadat's regime was based on both religious, as he promoted himself as "the believing president", and constitutionalism and democracy, under Mubarak democratization and institutionalization of state became the only source of legitimacy of the regime. However, that matter was implemented in a limited and relative manner.

The implementation of Mubarak's democracy varies according to the group dealt with. Dominance of presidential power in Egypt created a group of "core elite" who derived their influence from their closeness to the president, such as the confidants, regardless

[41] This matter will be discussed later in chapter seven of this study, which deals with the settlement of investment dispute.

of holding high offices or not. In accordance with local political tradition, Mubarak succeeded in distancing himself from Sadatists except those who are known as *infitah* bourgeoisie who benefited greatly from Sadat's open economic policies, and they are still powerful under the Mubarak regime.

Historically, Egypt enjoys a relative political stability. Since the October Revolution of 1957, many security and political upsets took place between 1975-1989. 1) The riots of January 1977 that were a reaction to the government's decision to raise prices on some basic goods; 2) the assassination of President Sadat in October 1981; 3) the rioting behavior of the Central Security Police occurring in 1986; and 4) in 1997, extremist groups attacked governmental institutions and foreign nationals in Luxor, upper Egypt, and in Cairo. Consequently, the Egyptian government put in tremendous efforts to stop such attacks and these efforts have prevented any attacks taking place since 1998.

There is an obvious link between Political stability and sound investment climates. It is clear that economic reform is not enough to assure national and foreign investors about the safety of their project against non-commercial risks unless it is accompanied by political stability. In Egypt, political conditions are not very supportive towards Egyptian economic efforts to enhance the inflow of FDI. Therefore, a number of political measures are needed to develop a better political climate that is able to aid the economic efforts to attract more FDI.

Such required political measures must be of internationally recognised standards, which are able to transform Egypt into a fully democratic country. This must start with the following major issues:

- The president must be elected directly by Egyptian nationals.
- The right to establish political parties and nOn-governmental organisations. This will give Egyptians the choice to take part in forming the political future of their own country.
- The termination of the unjustified "State of Emergency" that has been in force since 1979, the date of Sadat's killing, and to set up a new law which is able to prevent the government from applying emergency laws except in very strict conditions.
- The right to industrial actions, petitions, and peaceful demonstrations must be granted. Such freedoms provide citizens with legitimate means to express

opinions and to protect rights. The absence of these freedoms may lead to illegitimate political activities, which may develop into violence and acts of terrorism.

- Finally, the recognition of Egypt's multi religious society, but this must be done in harmony with the efforts to modernise Egypt's administration and society, on the basis of a full separation between political and religion.

Reforming Egypt's political system should not only aim at attracting foreign investment, but also the target must be the implementation of freedom, values and respect for human rights. Only then will the country enjoy the needed political stability and the Egyptians will contribute in good faith in the development of their country.

2.2 Economic Environment

2.2.1. Economic Reform

Since the beginning of the "Open Door" policy, the economic issue was targeted as a top priority of national assignment. It is firmly believed that stability could be achieved by boosting economic activity and social mobility as a means of realizing major national goals, mainly prosperity, an increased income, and improved standard of living for the Egyptian citizen.

The initial step in addressing the economic problem started with the call for a national economic conference in February 1982 with the participation of all-Egyptian experts and specialists in economics and development. The object was to lay down an integrated framework for development plans and propose a well-defined working strategy.

In his inaugural address to the conference, President Mubarak urged that the strategy for economic action should be based on radical reform, regardless of the costs and efforts involved, rather than ephemeral solutions, the consequences of which would be incurred by coming generations. The President also called for a sound groundwork to launch an overall development exercise.

After an unprecedented national consensus, it was the political leadership's decision to take the hard way of comprehensive economic reform. The starting-point was to build strong infrastructure to serve as a solid base for the take off of the development

process in the fields of modern agriculture, industry and other production sectors, to create a favourable atmosphere for a breakthrough in investment and place the Egyptian economy in a competitive position among emerging world economies.

At first, a long-term national socio-economic development plan (1982-2002) for economic and social restructuring was laid down. The 20-year plan was broken down into medium-term 5-year plans, sliced in turn into detailed annual plans. The long-term plan provided for a gradual and comprehensive economic reform process with due consideration to the social dimension as a strategic target in each phase. Naturally, under the 1st and 2nd 5-year plans, emphasis had to be laid on building basic infrastructure, providing utilities, energy, transportation and telecommunications, ports and new cities and modernizing means of production paving the way for a production spurt.

Constitutionally, an economic restructuring process was being undertaken through administrative, financial, and monetary reforms. These reforms mobilized the national economy for the next stage involving economic liberalization, urging the private sector to play an effective role in development, privatizing the public sector and encouraging investment and export-oriented production with competitive potential in world markets.

The main features of the economic reform in Egypt since the beginning of the Eighties can be summarized in the following:

- The transition from a centralized economic system based on state dominance and control of the national economy to a system of free-market economy based on individual initiatives, market forces and mechanisms, being the fundamental tools of the economic reform.
- Liberalizing the price-system including interest, exchange rates and products and production requirements prices.
- Controlling aggregate demand for money, encouraging saving and increasing state revenues.
- Enhancing the role of the private sector and encouraging investment and the Privatization of the public sector.
- Establishing the Social Fund for Development in 1991 with the object of creating real job opportunities and encouraging small industries, which may contribute to boosting the development process.

Despite unfavourable circumstances and huge costs incurred by state planning, This Egyptian model for economic reform has already achieved remarkable results. Since

1982/83 until 1998/99, Egypt has witnessed an accelerating growth as shown in the following indications:

- The gross Domestic Product (GDP) showed an average growth rate of 4.9% per annum during that period, with a 6% in the concluding year.
- The end-use consumption (including household and government) rose by 4.6% per annum, i.e. more than twice population growth rate.
- The public budget deficit dropped to less than 1%, while inflation rate came down to less than 4% in 1998.
- Interest rates dropped to about 9%, exchange rates remained stable against foreign currencies and foreign currency reserves with the Central Bank of Egypt showed about US Dollar 17 billion.
- The annual foreign debt service dropped from LE 7.6 billion to LE 5.2 billion (US Dollar 2.3 billion to US Dollar 1.5 billion) over the 5 years from 1993 to 1998.
- The share of private sector activity rose to about 65% of the total investment volume compared to 20% in 1981/82 accounting for about 73% of GDP against 53% in 1981/82.

2.2.2. Privatisation Scheme

In 1991, Egypt started the Privatisation process within the economic reform and liberalization policy by laying down a legal framework, preparing public opinion and encouraging the private sector to contribute to the development process.

The number of companies offered for sale by the state has reached 314, of which 119 were sold from 1996 to January 1999. Sale operations were undertaken by expanding the ownership base and floating shares on the stock market, issuing securities or sale-off to an anchor investor.

Since the initiation of the privatization program, sale-off proceeds have reached LE 11.5 billion of which LE 4.5 billion were paid to creditor banks, LE 5.5 billion to the public treasury and 1.5 billion as early retirement pensions to 50,000-60,000 workers. In 1999 only, the sale-off proceeds reached about LE 2.2 billion of which LE one billion was paid to the treasury, another one billion for debt settlement and LE 200 million as early retirement pensions for workers.

With due regard to the social dimension, and in order to alleviate the social impact of the privatization program on the workers of divested companies, the government has adopted several policies related to manpower. Compensation schemes were provided for workers wishing to quit on voluntary early retirement. Plans were devised and implemented to activate idle resources, by re-training and re-educating workers and addressing the problem of redundancy in badly performing companies. Three options

are made available for workers of companies to be divested: first, to get end-of-service award on a one-off instalment in addition to a pension. Second, to place the award as a deposit in his name until he has reached the age of retirement. Third, to give workers the chance to lease the company's equipment for use in their own private business.

In view of national security considerations, three sectors have been excluded from the privatization program, namely; military production, the Suez Canal and the petroleum sectors. Some other sectors related to the social aspects of development, such as pharmaceutical and flourmill companies can be partially privatized. However, Privatisation of such businesses has to allow for control of prices.
According to the International Monetary Fund (IMF), the Egyptian Privatisation program has progressed well since 1996 and that ranks fourth at world level, next to Hungary, Malaysia, and the Czech Republic.

Egyptian major variables of 1999/2000 plan show as follows:

- Gross Domestic Production: The 1999-2000 plan aims at raising the Gross Domestic Production by about 6.6%; from LE 448.6 billion in 1998/99 to about LE 478 billion with an increase of about LE 29.4 billion. The private sector is expected to contribute 73.9% of the Gross Domestic Production.
- Gross Domestic Product (GDP): Under 1999/2000 plan, GDP is expected to grow at a rate of about 6.8% to reach LE 286.6 billion against LE 268.4 billion in 1998/99 with an increase of LE 18.2 billion. The private and co-operative sector is expected to contribute 74.7% of total GDP.
- Investment Uses: Under the 1999/2000 plan, investments are estimated at about LE 71.2 billion, of which LE 48.7 billion or about 68.4% are to be undertaken by the private and co-operative sector.
- End-Use Consumption: Expenditure Costs on End-Use Consumption in 1999/2000 against 1998/99(LE billion).
- Work Force and Unemployment: Work Force, Number of Workers and Unemployment Volume.

2.2.3. Effects of Economic Reform on Foreign Investments

Since the beginning of phase III of economic reform (1996), local and foreign investments have increased at a rapid pace. The government has been exerting intensive efforts to remove investment barriers. A comprehensive umbrella of laws to protect and guarantee invested funds has been provided. This legislation was crowned with the Investment Incentives and Guarantees Law promulgated in May 1997. The law provides for improved advantages to investors, including an unobstructed right to repatriate capital and profits earned, tax holidays among others. Moreover, the state has strived to remove all bureaucratic and administrative barriers to investment projects. Besides, an investment map has been drawn up to identify suitable locations

for every project throughout the country. In parallel, efforts has been exerted to maintain the current high level of investment by implementing plans to promote direct local and foreign investments especially those bringing in advanced technology. The Public Investment Authority (PIA) plays an important role in this area by providing consulting services to businessmen and small investors. It also supervises investments in free zones.

The government has intensified its effort to organize the capital market as a principal channel to attract foreign and national capital. In the meantime, sustained efforts are being made to upgrade the banking sector. Small and medium projects are being assisted to obtain financing at rates proportionate to their resources. It is planned also to gradually raise real saving-GDP ratio to reach 27-28% leading to a growth rate of 7%.

2.3. Openness to Foreign Investment

2.3.1. Development of Foreign Investments Legislation

By the mid seventies, the Egyptian economy was overloaded with problems which led the country to the edge of economic collapse under the impact of the following elements: high military expenditure, foreign debts, the failure of the economic production system, the education system, the huge increase in population and the huge governmental subsidies for many essential commodities. As a step towards recovery the Egyptian government adopted a five year-plan (1976-1980) to lift up the economic situation, but only then realized that they were in need for almost £20 billions in addition to modern technology and sufficient expertise in production and management in order to achieve the plan.

This initiation of Open Door policy resulted in promulgating law No 43 of 1974. Such Egyptian tendencies did not start with the Law No. 43 of 1974, but in fact there were many previous codes on which Egypt relied to push its economy forward since 1952 when they believed that they had got many elements of development, such as a low-cost skilled labour force, fertile lands, and good natural resources. Then they worked on creating a legal framework, which may help in creating a suitable atmosphere for foreign investors.

It is clear that international economies are linked to each other in a way that the progress and development of a certain economy is difficult, unless it is open to other

economies and has links with them. This does not mean that it is supposed to adapt other economic philosophies or to be under the influence of another political system. In fact, openness means a way to manage a national economy, and to make the best of it in accordance with a modern and right economic basis, without interfering with the national, regional, and geographical interests of the concerned state.

Since the beginning, Egyptian lawmakers worked on laying down their own investment laws, taking into account the question of keeping the balance between controlling such foreign investments, according to the principle of economic sovereignty, and the need to attract the utmost of foreign capital. Here it is worth mentioning that Law making process in Egypt dictates the way laws could be issued in accordance with the following;

- The parliamentary process;
- Authority delegated to the President;
- The council of ministers;
- Individual ministers who enjoy the right to replace and amend decisions (without submission to/or approval of the People's assembly / *Shoura* Council);
- Decrees and decisions issued supplementary to the law in question.

Similarly to other developing countries, Egyptian investment laws enacted during the colonial period (1950's) aimed, mainly, at attracting foreign capital only from the colonial powers. After independence, Egyptians tried to adopt new legislations, which may keep the harmony between attracting foreign capital and promoting investments on the one hand and controlling and regulating such investments on the other. This understanding requires the existence of national authorities to control, promote and to settle the potential disputes of foreign investments.[42]

This trend was started with law No 212 of 1952, which established a permanent council for national production; this law pertained to both foreign and national capitals. Later on, in 1953, law 156 was issued aimed at promoting foreign investment as well, through permitting conditional repatriation of some profits (10% of the capital) annually and the capital it-self after five years from the beginning of the project (5% of the capital annually).[43] Afterwards, this situation was amended in 1954 by law 475, which allowed unconditional repatriation of benefit, and capital if it was not used within a year after bringing it into the country, this is supposed to be done in accordance with certain procedures. This didn't result in enough flow of private

[42] See M. Bennouna. "Droit International de Development", Berger Leverault, (1983), P. 235
[43] See law 150/1953

foreign investment, which maintained the limits of EP 1,9 million. As a result, the government became more dependent on international loans to finance their production projects.[44]

In 1956, in the aftermath of the Suez crisis and the nationalization of many British and French projects, the flow of foreign capital decreased severely. In Dec. 1960 a presidential decree No 2108 was announced and it was amended by decision No 437 of 1961. This decision mentioned that the president himself must ratify every case of foreign investment individually. By 1962, after the declaration of the National Decree (*El-Mithaque El-Watani*), the conservative trend against foreign investors started shifting toward more open understanding.[45]

As a step forward, in 1966 Law 51 concerning a free zone area at Port Said was enacted. The Articles of this law offered foreign capitals many privileges, such as exemption from nationalization law and no control over foreign currency transaction was to take place in the concerned area anymore.

Moreover, establishing joint projects between foreign and public domestic capital was allowed according to law No 32 of 1966.[46] Despite all the above-mentioned legislative steps, the flow of foreign capital into the Egyptian market did not reach the desired limit because foreign investors usually need a practically friendly atmosphere rather than just a written piece of legislation.

Under the pressure of the increased need to attract Arab finance, Law No 65 of 1971 was issued.[47] This law established what is known as the General Authority for Investment of Arab Capital and Free Zone areas. Accordingly, Arab investors were given some guarantees against nationalization within the limits of public interest and only after paying a fair and prompt compensation, and some exemptions from taxation, customs duties and from certain labour laws. Examining the conditions of foreign investment shows that the problems were not purely the lack of legislations, but

[44] See law 475/1954
[45] The National Decree mentions that since the people of Egypt has the power to control the operation of foreign investors, there will be no problem in adopting a softer approach toward them.
[46] Article 39 of Law 32 of 1966.
[47] The Egyptian official Gazette on September 30, (1971), P. 246.

"rather,the political climate prevailing at the time was the impediment to the incoming of foreign investment".[48]

Because law No 65 of 1971 distinguished between Arab and foreign capital and was meant to deal only with the flow of Arab capital,[49] non-Arab investment was affected badly in a way that led the government to draft and to adapt law No 43 of 1974. This was amended on June 19,1977 by law No 32 of 1977 after an "intense dialogue concerning the problems impending the effective implementation of the policy of economic openness".[50]

2.3.1.1.Open Door Policy "*Al Infitah*" Law 43/1974

The law of 1974, as amended, was a turning point in the field of foreign investment and "it represents a radical change in the Egyptian attitude toward private investments from that which prevailed for two decades prior to its enactment",[51] the main reason behind the 1977 amendment was to "remove many of the difficulties and uncertainties which foreign investors claimed were inhibiting investment in Egypt".[52]

Since law No 43 of 1974, as amended, is to be considered as the gate to the open door policy, it is important to shed some light on some of its objectives as listed in its explanatory;

- To "create areas of joint interest for the national economy and for Arab and foreign investors"; and
- To "broaden the participation of domestic capital with Arab and foreign capital"; and
- To " improve the climate to make it conductive to the movement of the Arab capital; and
- To " establish financial centers in Egypt to meet the need of the Arab region"; and
- To " offer adequate guarantees against non-commercial risks as well as incentives to encourage investments; and
- To "remove administrative and procedural barriers that might limit the growth of investment"; and
- To "increase employment opportunities and to increase the technical and administrative efficiencies through training on modern technology"; and
- To "make available goods and services that cannot be met by local production"; and
- To "utilize fully some of Egypt's natural resources which have not been exploited yet"; and
- To "introduce modern technology into Egypt".

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[48] Hala Zaki Hashim, P. 134.
[49] Article 18 of Law No 65 of 1971 mentions that. (Foreign investment should be authorized by the government and should be ratified by the president.
[50] Salacuse, "Legislation Adjustments", P. 760.
[51] Jeswald W. Salacuse and Panall, "Foreign Investment and Economic Openness in Egypt", P. 614
[52] Ibid., P. 761.

Law 43 of 1974 has established what is known as the General Authority for Investment and Free Zones and dealt with many issues such as the definition of the invested capital[53] and it classified the types of foreign investment allowed in Egypt as follows;

The first type is a sort of inland activities, located within the national marketplace aiming to manufacture and produce commodities for domestic use. Concerning this type, the Egyptian legislator "gave priority to those projects which generate exports, encourage tourism, or reduce the need to import basic commodities, as well as to projects which require technical experience or make use of patents or trademarks of worldwide reputation"[54]. Going back to Article 3 of the Law shows how it has specified the general field of investment.

Generally speaking, Law 43 of 1974 granted all approved foreign projects certain guarantees and privileges and treated them in accordance with the following provisions;

- Profit and capital of foreign projects, the law offers the right to maintain one or more foreign exchange account with no authorization needed to use such an account[55], and it allows the transfer of its annual profits within the limits of the balance of the proceeds of the project's exports.[56] Moreover, the capital may be repatriated after five years from the date of entry.[57]
- Exemption from taxation law[58] and customs duties law and from other certain national laws[59], like being exempted from restrictions imposed on the public sector and exempt from distributing a fixed amount of its profits on labors according to the Egyptian labor law.[60]
- Guarantees were given against expropriation. This law protects foreign investors against non-commercial risks and insures them against nationalization and confiscation but in the case of judicial procedures.[61]

The second type of foreign investment is that of the free zone areas which are presumed to deal with investments for sale out side the country. The importance of such zones is due to Egypt's geographical location at the crossroad of more than one continent, in addition to the availability of a low cost and skilled labour force. As a result, free zone areas have been established in Cairo (El-Naser City), Alexandria and

[53] Article 2 of the law No 43 of 1974.
[54] Arab Republic of Egypt, "Legal Guide to Investment in Egypt" PP. 25,28-29.
[55] Article 14.
[56] Ibid.
[57] Article 21 Par. 1.
[58] Articles 9,14,15, 16 17 and 18.
[59] Articles 10, 11, and 12.
[60] Article 19.

Suez city where foreign investors may rent a plot of land to establish their project".[62] Free zone areas could be either public[63] or private, for a single project[64] or entire cities could be designated as free zone.[65] Furthermore, the law specified the activities, which could be conducted inside the free zone areas,[66] and the privileges they may enjoy[67] in a way that "the importation and exportation of commodities to and from free zone areas are subject to special rules".[68]

To analyze the reasons which led the Egyptian legislator to amend and to replace Law No 43, which aimed at attracting foreign capital and investors, it is important to observe, beside the bad historical experience with foreign investors, that there were many other elements to prevent an effective success of the concept of the open door policy such as the political and economic instability, lack of foreign exchange and overloaded infrastructure. This is in addition to the restrictive provisions of law 43 dealing with repatriation of capital. But "It would be unrealistic, however, to expect that Egypt could change the policies [and conditions] of the past twenty-five years overnight".[69]

2.3.1.2. Investment Guarantees and Incentives Law 8 / 1997

The post law No 43 of 1974 era was characterized by more emphasis from the Egyptian government and more determination on freeing its economy and to promulgate more laws and legislations which may encourage more Egyptians to contribute to the development of their own national economy as well as to attract more flow of foreign capital. The outcome of this policy was the laying down of more legislation to facilitate the way for the fulfilment of government aims. That legislation may be listed as follows;

- Law No 157 of 1981;[70] this law concerns income tax in Egypt.
- Law No 159 of 1981;[71] this law was the result of a conference arranged by the General Authority of the Exchange Market in 1980 to replace law No 26 of 1954.

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[61] Article 7, which is the only article, tackles this point.
[62] Jeswald W. Salacuse and Panall, "Foreign Investment and Economic Openness in Egypt", P. 634.
[63] Established by the Authority for Investment and Free Zones and approved by the council of ministers.
[64] Established by a resolution from the Authority for Investment and Free Zones only.
[65] Article 30, the city of Port Said was designated in 1976 as a free zone city.
[66] Article 35.
[67] Articles 36,37,38 and 39.
[68] Article 36.
[69] See, G. McLaughlin, "Infitah in Egypt: An Appraisal of Egypt's Open Door Policy For Foreign Investment", 46 Fordham Law Review, (1977-78), P.889.
[70] Published in the official magazine, issue 37, 19/9/1981.
[71] Published in the *Al- Wakaa Al-Misriah*, issue 145, 23/6/1982.

- Law No 186 of 1986,[72] concerns duty tax exemptions and is aimed at reorganizing duty exemptions in different laws in accordance with new and clear rules.
- Law 230 of 1989,[73] concerning foreign investment and free zone areas, this law replaced law No 43 of 1974, and was amended by D, No. 22/19991 on Jan.13, 1991.
- Law No 11 of 1991,[74] this law replaced law 133 of 1981, and it was supposed to be implemented in three phases.
- 6) Law No 203 of 1991,[75] this Law concerns projects of the public sector and replaces law No 97 of 1983. This law aimed at: A) Restricting projects of public sector to within the limits of strategic importance. B) Selling public and joint projects which have no strategic importance to the public sector C) Separating the administration of public projects from public administration in order to liberalise them and let them work in accordance with the principles of market economy away from the bureaucracy of the public sector.[76] However, "Implementation of law 203 got off to a slow start"[77] and its central importance was the relation of (Holding companies) and (affiliated companies).
- Law No 95 of 1992,[78] this law concerns the exchange market.

At a lower level, ministerial and governmental decisions and those of some public sector institutions, such as the central bank, contributed also to the upward movement of the economy and to the encouragement of foreign investment. This happens only when the concerned laws are flexible and allows for such interference. In fact there are many cases where major changes which took place through lower channels resulted in amending the law itself, such as;

- Law No 120 of 1975, which imposed certain interest rates. This law was amended by a decision taken by the Egyptian Central Bank on 20,12,1990 after which the interest rate was partially liberalised. Later on by the power of another decision.[79]
- The law of foreign exchange, No 97 of 1976, was amended by a ministerial decision taken on 26.2.1991 by the minister of economy and foreign trade. Such amendment allowed non-banking companies to trade-in foreign currencies, allowed the exchange rate to be decided by the commercial banks themselves, and allowed the individuals to obtain and open bank accounts in foreign currency.
- Investment law No. 230 of 1989 was amended[80] many times by governmental decisions, such as law No 2 of 1992.[81] This step was taken in order to equalize between the different employees under the investment law, the law of the public

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[72] Published in the official magazine, issue 34, 21/8/1986.
[73] Published in the official magazine, issue 29, 20/6/1989.
[74] Published in the official magazine, issue 18 (A), 12/5/1991.
[75] Published in the official magazine, issue 24, 19/6/1991.
[76] Jeswald W. Salacuse and Panall, "Foreign Investment and Economic Openness in Egypt", P. 621.
[77] Hill Enid, "Laws of Foreign Investment, Privatisation and Labour in Egypt", Conference Paper was given in London, (1993), P. 18.
[78] Published in the official magazine, issue 22, 19/6/1992.
[79] This decision amended Paragraph (D) of Article 7 of Law No 37 of 26/2/1991.
[80] Paragraph 3 of Article 20 was amended.
[81] Published in the Official Gazette (*El Waqai El-Misriyya*), issue 3, and 16/1/1992.

sector[82] and the law of the private sector[83]. Later on, the Investment law was amended by another two governmental decisions taken by the Prime Minister.[84]

To sum up, Investment in Egypt is governed by at least eight essential laws and some articles of another seven different laws,[85] which are attached by one way or another to the investment atmosphere in Egypt.[86] Most of the above mentioned laws were promulgated and amended sometimes in order to fulfil the needs of economic development and to attract foreign investments. The level of such an instrument was varied between a law promulgated by the Council of the people *(Majlis As-shaab)* and lower level decisions taken either by the Council of ministers-the competent minister or by another public sector institutions. The aim of all this was to stimulate the growth of the economy and develop it, to modernise the country's technology and to promote exports.

2.3.2. Foreign Investment Policies in Egypt

The imbalance - of high population and limited resources- has always affected Egypt's ability to manage the country's economic problems. This question has always been a major concern for successive leaders. Following the 1952 revolution, President Nasser tried to deal with this problem in accordance with the Soviet model. These economic policies resulted in 60 % of the new capital gone to the public sector, which accounted for only 18% of the GDP.

In 1974, President Sadat introduced his "Open Door" policy (*Infitah*) in an attempt to end Egypt's isolation from the international market. This policy focused on two major elements: first, modernizing the country's infrastructure. And second, offering investors a group of fiscal and other incentives. However, early practices of "open door' policies did not fulfil the required targets. This happened because most of the incoming capital was foreign aid, which put Egypt under the burden of massive debt, or as joint ventures with Egyptian State owned firms.

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[82] Law No 203 of 1991

[83] Law No 159 of 1981

[84] The first one was taken on 14/9/1991 to widen the fields of investments; the Second is No 621 of 11/5/1991 and aimed at adding article 49 which allow the capital of investment companies to evaluate in foreign currency.

[85] Such as articles 505-537 of the civil law, articles 19-65 of the commercial law, (laws No 1 & 2 of 1973,law No 38 of 1977 concerning tourism and hotel business in Egypt), law of commercial records No 34 of 1976 and law of Sahara lands No 143 of 1981.

[86] Jeswald W. Salacuse and Panall, "Foreign Investment and Economic Openness in Egypt", PP.9-20.

President Mubarak continued the path of his predecessor in depending on foreign aid to modernize the country's infrastructure. Consequently, Egypt's foreign debt reached the border of $ 50 billions by the end of 1990. The economic situation deteriorated further because of the Gulf War.

Under such circumstances, Egypt turned to the IMF for help to solve its financial and economic problems. By the beginning of 1991 the Egyptian government agreed on a package of reforms, proposed by the IMF and aimed at a radical restructuring of the economy. This package included the following measures: 1) the promotion of private sectors in all areas of the national economy. 2) Minimizing governmental control over private investment. 3) Reduction of consumer subsidies and public expenditure. These measures dictated a number of new legislations, which have considerably improved Egyptian economic performance as shown in the following table.

	1991	1999
Budget deficit as % of GD	17.7	1.3
Inflation rate %	20	3
Interest rate %	20	13

Table 2: Improvement of Economic Performance 1991-1999, Ministry of Economy, Egypt (2000)

3. Conclusion

Looking at the investment climate in Egypt shows, clearly, that president Mubarak is trying to find a balance between the concepts of business and social harmony. In this context, he is trying to drive the country in the way of reformists without facing the conservatives who still believe in President Nasser's ideas. As a result, an increase in the number and authority of reforming and technocrat ministers has been observed.

The investment climate in Egypt has benefited largely from the government's reform program, which is based on giving greater scope for the private sector and on providing foreign investors with what is needed to encourage them. However, There are still many problems to be solved, related mainly to bureaucracy and to structural weakness.

Chapter Five:
Admission and Establishment of Foreign Direct Investment

Chapter Five Contents

Chapter Five:
Admission and Establishment of Foreign Direct Investment

1. Introduction

The relationship between foreign investors and host states may be classified within two sets: per-entry (admission), and post-entry (establishment). In both cases, host states reserve an absolute right, recognised in international law, to regulate them. Such a right "to regulate" is of a special importance as it is essential to understand the development of the international investment law and policy.[1] This principle is quite alarming for most states because it raises the question of the growing loss of the host states' national sovereignty when facing growing trade and investment obligations at an international level and an increasing number of cases where trade and investment agreements challenge host states' "public welfare legislation".[2]

Regulating provisions concerning admission and establishment of FDI have always been at the heart of international investment negotiations and were a point of disagreement between developed and developing countries during the negotiation of the Multilateral Agreement of Investment (MAI). In addition, this issue was part of the discussion in the WTO Working Group on Trade and Investment (WGTI).

The WTO working group discussed the possibility of using the GATS type of "positive list" approach indicating the future shape of measures concerning admission of FDI.[3] Some developing countries and a number of developed countries, including the EU, supported this approach. However, most developed countries prefer to combine the principles of the "National Treatment" and the "Most-Favoured-Nation" and consider the "Negative List" principle as an exception. Later, at the Cancun, admission and establishment of FDI were among the issues that made developing countries insist on not negotiating controversial areas in the WTO Doha Round.

Studying the question of admission and establishment of FDI can be either procedural; this means the analysis of the number of procedures, official time, and the cost needed

[1] The principle of "right to regulate" has been discussed earlier in chapter three of this thesis.
[2] Ibid.
[3] *WTO Modifications for Pre-Establishment Commitments Based on GATS-Type Positive List Approach" Note by the Secretariat WT/WGTI/120 (19 June 2002)*

before foreign firms can operate legally, or substantive through studying the existing policies regarding the degree of regulation or openness adopted by host states.

Historically, treatment of foreigners in Egypt went through three main stages: The first was prior to the Montreux Agreement of 1937, which offered foreigners vast judicial rights. The second stage started in 1937 until 1949, the year of the abolition of the mixed court system. The third stage started after the Egyptian national courts took jurisdiction over all foreigners living in Egypt. This stage witnessed the end of all Capitulation Agreements, which were signed by the Ottoman Empire and enforced on Egypt as part of the Empire. Those Agreements provided foreigners in Egypt with a vast variety of privileges.

According to the Montreux Agreement, of October 1949, the Egyptian legislators recovered some jurisdiction from the Mixed Court System based on the following[4]:

- Maintaining all international minimum standards of foreigners' treatment.
- Observing the principles of modern legislation.
- Adopting non- discriminate financial laws concerning companies owned, fully or partially, by foreigners.

After the abolition of the Mixed Court System, the Egyptian legislators became under no condition but that which was required by all independent states, which guarantees every foreigner a minimum standard of treatment.

The above-mentioned developments witnessed the emergence of a new phase in the history of the Egyptian judicial system, but this was never meant to be considered as a total liberation from foreign economic domination. Consequently, many legal steps were taken by the national authorities in order to limit foreign influence upon industrial and commercial enterprises, which have national interests, through minimizing foreign administrative and financial contributions. This resulted in some measures related to the way Egypt should deal with admitting foreigners, their employment, and their contribution in the country's economic projects.

This chapter explores the rules and standards governing the admission and establishment of foreign direct investment and their scope, speed and nature as a part

[4] Article 2 of the Agreement.

of the process of liberalisation in host states. Such rules and standards are so important as they regulate the first contact between foreign investors and host states, as they constitute the mechanism that controls the inflow of foreign direct investment. This chapter will divide the issue in question into two main parts: firstly, requirements of admitting nationals of other countries and secondly, their position after reception, in view of international law, Egypt's national legislation, and Bilateral and Multilateral Investment Treaties. The purpose of this chapter is to clarify the general rules of admission and establishment policies adopted by host states, with special attention to Egypt, in the pursuit of liberalisation of FDI policies. However, the theme of this work will be more about substantive rules than procedural rules.

2. The Admission of Foreign Direct Investment

The entry and admission of foreign direct investment always gained significance in the discussion of dealing with nationals of other states. This question derives its importance from two factors: first, a foreign investor find himself in a legal relationship with two states, his national state and the state in which he resides and establishes his project.[5] Second, unless the authorities of the host states approve the investment projects, foreign investors will not be able to enjoy any incentives and protection given under BITs or investment codes.[6]

This section highlights admission policies adopted by host states. This section evolves around the following three issues: The role of national legislation, the control of FDI Entry, and forms of Entry Control.

Historically, attitudes toward this matter were divided into two major trends: the first one[7] is based on the theory of "natural law" which is reclaimed from Roman and Greek philosophies.[8] Such theories adopted the principle of interdependence and recognized the right of individuals to the freedom of movement as a "Common gift of nature" which includes their right to social communication. The second trend was Vitoria's

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[5] Z. Kronfol "Protection of Foreign Investment: A Study in International Law" A.W. Sijthoff, Leiden, USA. (1972), P. 13.

[6] Sornarajah, "State Responsibility and Bilateral Investment Treaties", 20 Journal of World Trade Law (1986) PP. 79-98.

[7] This opinion was adopted mainly by European and Latin American publicists

[8] Plato wrote: " Any foreigner who pleases may become a resident in the country on certain express conditions. It shall be understood that we offer a home to any alien who desires to take up his abode with us and is able to do so. But he must have a craft, and his residency must not be prolonged more than twenty years for the date of his registration" Quoted by J. Nafzigar, P. 48.

concept, which restricted aliens' freedom to move across borders. Both Gentili and Grotius accepted this view too.[9]

Later, a new school of thought emerged as a result of the development of the concept of territorial sovereignty. This concept motivated many writers to describe Vitoria's theory as being unrealistic and incompatible with the concept of a state's sovereignty over its territories.[10] The trend was justified because the "right of exclusion is usually considered an attribute of sovereignty and territoriality and is defended as an inherent power necessary for the self-preservation of the state"[11]. In other words, if a sovereign "could not exclude an alien it would be to that extent subject to the control of another power".[12]

Many scholars such as Emmerich de Vittel[13] approved this way of thinking and considered that whoever enjoys territorial sovereignty should have the right to exclude aliens from entering his territory, if the interests of the state dictate so.[14] This view was also accepted by Oppenheim who wrote: "Apart from special treaties of commerce, friendship, and the like, no state can claim the right for its subjects to enter into, and reside on, the territory of a foreign state. The receipt of aliens is a matter of discretion, and every state is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory".[15]

However, observing both trends proves that they have many common points and they share, almost, the same results. Both schools put some limitations on their theories, where the first group accepted the principle of "sovereignty" but they render diplomatically and considered that excluding aliens for no crucial reason will be considered as "unjust act".[16] On the other side, those who believed in individuals' freedom of movement affirmed that such a right should not violate the state's rights to

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9 Vitoria, "Classics of International Law", De Indis De Iure Belli Relations, text of 1696, Carnegie Institution of Washington, (1917), P. 469.

10 This opinion was mainly adopted by Anglo- American publicists.

11 James A. R. Nafzigar, "The General Admission of Aliens Under International Law", (1985), P. 804.

12 *Chae Chan Ping V. USA, the Chinese exclusion case*, (1989).

13 In his publication, "le Droit des Gens".

14 O' Connell, "International Law", Vol. 2, 2nd Edition, (1970), P.695.

15 Oppenheim, "International Law of Treaties", Vol. 1, (1967), P. 675.

16 E. Borchard, "The Diplomatic Protection of Citizens Abroad or the Law of International Claims", (1914), P. 46.

protect its territories through excluding some aliens who may threaten the security of its nationals and territory.[17]

2.1. The Role of National Legislation

It is indisputable that no customary international rule confers an absolute right of entry and establishment to foreign investors. In addition, it is agreed that Host States' sovereign right to regulate the admission of foreigners is a part of their jurisdiction over its territory,[18] as far as this does not violate international customary rules and agreements. In the *Residency of Alien Trader* Case ,[19] the German Administrative Court of Appeal decided "While a state is not allowed to shut itself off from general international intercourse, *it is under no duty*, according to the general principles of international law to admit individual aliens". Moreover, the court added, "no state is under legal obligation to admit aliens into its territory and every state is entitled, in its discretion, to restrict or refuse the admission of aliens".[20]

This opinion was earlier adopted by the International Conference on the Treatment of Aliens of 1929, which concluded "each of the contracting parties remain free to regulate the admission of foreigners to its territory and to make this admission subject to conditions limiting its duration".[21]

The OECD Draft Convention on the Protection of Foreign Property of 1967 acclaimed a similar opinion where it provides that "the provisions of these convention shall not affect the right of any party to allow or prohibit the acquisition of property or the investment of the capital within its territory by nationals of other party.[22] In the same direction, the UNCTC calls for foreign investment projects to be conducted in

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[17] Ibid. He stated that the "Grounds of exclusion are fixed by the public interests of each state" with respect with "dangerous and undesirable" aliens. See Sultan, H. "Public International Law in Peacetime", (Arabic), *Dar El-Nahda El-Arabia*, Cairo, 1962, PP. 384-385.

[18] See Kohona, "Investment Protection Agreements: An Australian Perspective", (1997), P. 91. For more details see G. Schwarzenberger and E. Brown, "A Manual of International Law", 6th edition, (1976), PP. 76-77. See also Fatouros, "Government Guarantee to Foreign Investors", (1962), PP. 40-41; See also Oppenheim, "International Law", Jennings and A. Watts Eds. 9th Edition (1992), PP. 383-384. Article 1(2) of the Charter of Economic Rights and Duties of States confirms this right. Which says that " Each state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities" G.A. Res. 3281, 29 UN GOAP, Sup p. (No 31) UN Doc. A/9631 (1974)

[19] ILR, Vol. 21, 1954, P.209. Decision of 13th of April 1954 in Munster Administrative Court of Appeal.

[20] Ibid., P. 210.

[21] L.N. Doc., cite, 62, 1930, 11,5,p. 419. http://www.oecd.org/dataoecd/3/20/37579220.pdf

[22] Ibid., Paragraph B.

conformity with host states development objectives,[23] While the World Bank draft guideline calls for a more "Progressive and conciliatory" approach.[24]

Bilateral investment agreements, usually, confirm that each contracting party, as a host state, has a right to "promote as far as possible the investment of capital by nationals or companies of the other contracting party and admit such investments in accordance *with its legislation*".[25] Besides they, usually, place no limitations on the nature and extent of the restriction that may be introduced by the national legislation of the host states.[26]

When examining most existing BITs, it can be seen that there are two approaches in dealing with the issue of admitting foreign investors. The first, reflected in most BITs, deals with this issue in the general provision on "encouragement" and "promotion" of foreign investment. These treaties state that both party states "shall", admit investment "in accordance with the legislation" of the host states.[27] It seems clear that BITs obligation to admit foreign investment must be subject to all restrictions existing in the laws of the host states, even if such legislation is embodied by extensive restriction in the shape of "negative lists" as in some investment codes.

According to the second approach, the US BITs[28] contains no separate clause on the admission of foreign investment, since this matter is dealt with in the provisions on the standards of treatment of investment.[29] This approach aim at developing a system, which is "based on national treatment and most-favoured-nation principles, which permit investment flow to respond more freely to market forces".[30] US BITs incorporate such standards in a way, which is not common in the majority of BITs, where the US in not a party. These standards are to be applied under most BITs only to post-admission activities, while the US insist on applying them alongside the

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[23] See Paragraph 9 of the "UNCTC" Draft United Nations Code of Conduct on Transitional Corporation (1986) http://unctc.unctad.org/html/docmaster90.htm

[24] Ibrahim Shihata, "Legal Treatment of Foreign Investment: the World Bank Guidelines" (1993) P.74.

[25] Article 2 of the agreement between Federal Republic of Germany and the Syrian Arab Republic concerning the encouragement and reciprocal protection of investments, 1282 UNTS Ino 21135-21139 181(1982).

[26] See Article 3 of the Great Britain - India agreement of 1994 34 ILM 940 (1995), Article 2 of the agreement between Britain and the Soviet Republics of 1981, 29 ILM 371(1990).

[27] See for example, Article III of the Norway-Lithuania BIT of (1992), Article 3 of the Netherlands - Poland BIT P (1992) and Article 4 of the Switzerland – Ghana BIT of (1992).

[28] See Article II of the US Model BIT. (1992)

[29] See US BIT with Jamaica and Estonia of 1994 and Article II of its BIT with Sri Lanka of (1991)

[30] US President Statement, 19 Weekly Comp. Pres. Doc. 1214 (1983).

standard of "fair and equitable" treatment to the issue of admitting foreign investment also.

In the absence of any other legislation or agreement, Egyptian Law 89 of 1960, as amended by law 49 of 1968, regulates the entrance and establishment of aliens into Egypt. Under this law, any alien who wishes to be admitted into Egypt should obtain a valid passport or a travel document issued by a competent authority of his own state or any other recognized authority. The Egyptian interior minister or any other appointed authority such as tourism or consulate authorities should stamp this passport.[31] The above-mentioned regulations should be determined by the interior minister and approved by the foreign minister[32]. Besides, the director of the immigration and nationality department is given the authority to exempt some aliens form having stamped passports in order to enter the country.[33] On the other hand, the interior minister is given the same authority to exclude some Arab nationals from fulfilling such conditions.[34]

However, Egypt, in common with all enthusiastic states to attract foreign investment, has enacted a special law to deal with foreign investors including their admission. As mentioned before, this law combines all foreign investment matters in a single legislation to be implemented by a "One-stop shop" style organization Known as the General Authority for Investment (GAFI). This body enjoys screening authority over all investment projects.

2.2. The Control of FDI Entry

Despite their eagerness for more foreign investments, most Host States affirm the right to regulate economic activities within their territories. This attitude is based on the assumption that not all-foreign investment brings benefit. On the contrary, they may harm the economy and the development aims of the Host State. Such a right is well established under international law as an attribute of the state's sovereignty and has been recognized by international conventions,[35] decisions of international

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[31] Article 2 of law No 89 of 1960 as amended by law no. 49 of 1968. http://www.egyptlaws.com/comprehensive03.html

[32] Ibid., Article 32.

[33] Ibid., Article 3.

[34] Ibid., Articles of the law.

[35] The Convention on the Settlement of Investment Disputes Between States and Nationals of another states 1965 (UNTS 159) Article 193 of the Treaty of Rome (15 UKTS 1979, UNTS 298) and Convention on the Law of the Sea (1982) [21 ILM 1261 (1982)].

tribunals,[36] and a General Assembly Resolution.[37] Controlling the flow-in of foreign investments is one of the faces to regulate economic activities. Despite this, host states tend to safeguard their essential interests either through applying a screening policy or through incorporating into their legislation a group of pre-set conditions and regulation known as "performance requirements".

According to a study done by A. Parra,[38] national investment codes deal with the question of admission in two manners: firstly, where there are no special restrictions on the admission of foreign investment, which can be "freely made"[39] into host states' territories,[40] and secondly, where admission of foreign investment requires the approval [41] of the competent authority in the host state.[42] Such requirements exist not only in developing countries but in developed countries as well. For example, in the United Kingdom only British nationals may conduct certain activities such as owning a British ship.[43]

It is clear, however, that states behave in accordance with the theory of sovereign inherent powers in order to exclude some foreign investments and to put conditions on their admission into the country.[44] Such an understanding was revealed in the decisions of many municipal courts. In *the Re Marina Case*, the Ontario High Court, Canada, decided on 19,11,1958 that "an alien has no right to enter Canada except in accordance with conditions imposed by the Canadian Authorities".[45] This court's judgement quoted some paragraphs from the judgement of the Supreme Court of

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[36] For example see *Starrett Housing Corporation v. Government of the Islamic Republic of Iran Award* No. I.T.L.32-24-1, 19 Dec. 1983, 4 Iran-US C.T.R. 122, the Texaco Case 53 I.L.R. 389 (1979), the Amin oil Case (1982) 21 ILM 976 (1982), and *the Anglo-Iranian Oil Co. Case* (UK v. Iran 1955) 93 I.C.J. Rep. (1952)

[37] Charter of Economic Rights and Duties of States, G. A. Res. 3281(XXIX) of 12 Dec. 1974 (UN Doc. A/Res. 3281 (XXIX)), and the G.A> Resolution on Permanent Sovereignty Over Natural Resources, G.A.Res. 1803 (XVII) of 14 Dec. 1962 (UN Doc. A/Res, 1803 (XVII)).

[38] A. R. Parra, "Principles Governing Foreign Investment, as Reflected in National Investment Codes", 7 ICSID Rev. FILJ, (1992), 428.

[39] Ibid., P. 430.

[40] This type of investment codes reflects a less restrictive approach, the areas of the national economy where foreign investment may be permitted. See the national investment codes of, Congo, Zaire, Hungary, Haiti, Bolivia Korea, and many other countries.

[41] A. Parra, "Principles Governing Foreign Investment as Reflected in National Investment Codes", P.431.

[42] See the investment codes of Egypt, Sudan, Korea, Bulgaria, Poland, Portugal, Argentina, Chile, and Venezuela. See also the Tanzania National Investment Act No. 10 of 1990, which is based on the principle of open admission with investment in certain listed areas being prohibited.

[43] Hood Philips, "Constitutional and Administrative Law", Seventh ed., (1987), P. 449.

[44] Oppenheim, P. 676.

[45] ILR, Vol. 27, 1963, P. 247.

Canada in *Marsella V. Langlais case*[46] stipulating that "immigration to Canada by persons other than Canadian citizens having a Canadian domicile is a privilege determined by statute and it is not a right".

Moreover, state practice shows that there is no rule in customary international law, requiring equal treatment and protection for all foreigners and no state is under obligation to admit aliens. There are many reasons to exclude foreigners based on their criminal records, ill health and limited financial means. They may also be seen as a threat to the culture, public order, and security of the host state.

The Egyptian Investment Law is a typical example of the second approach. This law advocates a liberal admission policy, with some exceptions to exclude certain types of investments which are " in the considered opinion of the state" [47] inconsistent with the requirements of national security or economic development plans of the host state. Accordingly, Investment law 8 provides GAFI with the power to screen all foreign investment projects before admitting them.[48] If investment projects fit the description of any of the sixteen activities in the "Positive List" of the Investment Law they will be approved automatically. While the activities of the "Negative List" still require "prior approval" from the concerned ministries before approaching GAFI for an approval.[49] Every potential investor must submit a two-page "notification form" giving detailed information on the project's objectives, location, capital and other related information.

Meanwhile, if the project is to be formed under Companies Law 159, a request must be submitted to the company department at the Ministry of Economy and International Corporation. After obtaining approval, the company must obtain a permit from the local chamber of commerce before registration in the Commercial Register- the point at which the company becomes a legal entity. Approval to carry out activities must be obtained from the relevant authorities such as the General Organization for Industrialization, GAFI or the Central Bank. The Companies Department also obtains the necessary security approval from the Ministry of the Interior, for the foreign partner.

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[46] ILR, Vol. 22, 1955, P. 490.

[47] World Bank Guidelines. See Ibrahim Shihata, "Legal Treatment of Foreign Investment", Martinus Nijhoff Publishers, (1993) P. 157.

[48] Article 1 of Prime Minister's Decree No. 2108/1997. *El Waquai El-Misriya* No 176/August 9, 1997.

[49] The "negative list" mentions the following activities: A) All military products and related industries, B) tobacco and tobacco products and C) any investment in the Sinai Desert.

2.3. Forms of Entry Control

As mentioned above, Sovereign states enjoy unlimited authority to control the entry of foreigners, including foreign investors whether they are natural or legal entities, into their territory.[50] Admission provisions and procedures have been recognised as "the primary legal mean possessed by states to exclude, or impose conditions upon a prospective foreign investor".[51] Under national investment regulations, such provisions and practices vary considerably. However, no state offers entirely unrestricted access to FDI.[52] Even in industrial countries, the preoccupation of the stature relating to FDI is centred on the control and supervision of incoming FDI. This means that admission of FDI is a critical control point for foreign direct investment.[53]

States with liberal regimes may adapt an "open" or even "very open" legal climate regarding entry restrictions[54] but still they utilize certain techniques to control the inflowing FDI when it is necessary to protect certain sectors of their economy or to protect the interests of the state. Many developed states were forced to review past liberal policies allowing unlimited and unmonitored flow of FDI.

The following are forms of admission control:

2.3.1. Total Exclusion

Denial of entry is the fullest utilization of a state's sovereign power to forbid foreign investors from entering its territory. This technique is lawful but definitely is not desired nor compatible with the contemporary international economic climate of free trade and modern tendencies of bilateral investment treaties (BITs). In other words, this extreme choice is not practised widely by host states and even a state like Japan, which is known to be in favour of such a technique has realised that enforcing total exclusion can be counter productive.[55] Most states adopting restrictive policies toward the inflow of FDI,

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[50] Akehurst, "Jurisdiction in International Law", 46 the British Yearbook of International Law (1972-1973), PP. 149-150.

[51] Geist, "Toward a General Agreement on the Regulation of Foreign Direct Investment", 26 Law and Policy in International Business", (1995) P. 677.

[52] Shihata, "Legal Treatment of Foreign Investment", the world Bank Guidelines", (Dordrecht: Martinus Nijhoff, 1993). Also in 7 ICSID Review- Foreign Investment Journal (1992) P. 297.

[53] Ibid., P. 434.

[54] Such as the USA, the UK, Germany, Canada, and others.

[55] Okita and Miki, "Treatment of Foreign Capital: A Case Study for Japan", in Adler, ed., Capital Movement and Economics Proceedings of a Conference Held by the International Economic Association (London: Macmillan, (1967), P. 139.

using their legitimate right of total exclusion, have gradually relaxed such measures and started applying new liberalised techniques in order to be in harmony with the contemporary international system.[56]

2.3.2. "Key Sectors" Exclusion

Exclusion for "Key Sectors" or "certain Sectors" means that foreign investors are excluded from certain categories of economic activities vital to host states' national interests. These categories include areas usually related to defence security, and may be economic in nature relating to minerals, electricity, banking, and religious and cultural areas.

Internationally, there is a general acceptance of the OECD concept of "key Sectors" exclusion.[57] Classifying whether a given sector should be protected or not varies not only from one country to another, but also from one government to another in the same country. However, states' practice became very predictable and clearly conforms to the OECD Code of Liberalisation of Capital Movement.[58] Legal analysts may still argue that the "Key Sector" technique is not successful in achieving the desired results because of the number of exception allowed[59] and to the fact that this approach is often ill-defined and can vary greatly from one country to another. "Key Sectors" restrictions continue to be widely used with the need to be re-examined regularly in order to avoid being controlled by inefficient public sector protection.[60]

2.3.2. Conditional Entry: Right to Impose "Performance Requirements"

Under their recognized right to regulate admission of foreign investment, Host States may apply certain conditions known as "performance requirements".[61] These requirements are, usually, listed either in national investment codes or in investment contracts.[62] They aim at maximizing the benefit of foreign investment through creating

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[56] Vagets, "The Host Country Races the International Enterprise", 53 Boston University Law Review (1973) P. 271.

[57] See OECD Capital movement Code for the statues of OECD member countries reservations on the Code of Liberalisation of Capital Movement as at January 1, (1997).

[58] IBID.

[59] Vagts, " The United States of America and the Multinational Enterprises" in Hahlo, ed., Nationalism and Multinational Enterprises: Legal Economic and Managerial Aspects, Dobbs Ferry, N.Y.: Oceana, (1973) P. 16.

[60] Julius, "Direct Investment Among Developed Countries: Lessons for the Developing World", 22 IDS Bulletin Institute of development Studies, (1991-92), P. 9.

[61] Oppenheim, "International Law: A Treaties". Vol. 1, Eighth edition, London, New York (1955) P. 690.

[62] See Article 2 of Angola Investment code and section 13 of the Tanzania investment Code.

more local employment, increasing national exports, and generating more goods and services needed for their national economy.

Accordingly, if foreign investment is admitted, they have to be committed to such requirements. These conditions constitute a proper method for developing countries to control the inflow of foreign direct investment in a way that makes the best of foreign projects. In comparison, some developed countries consider that such requirements mean more economic commitment from foreign investors and clearly present impediments to investment. For this reason, some developing states are keen on embodying in their investment agreements a clause prohibiting host states from imposing any "performance requirements". For example, article two of the Egypt–US treaty[63] of 1982 says "each party shall seek to avoid the imposing of performance requirements on the investments of nationals and companies of the other party".[64]

In any case, it could be said that giving BITs protection only to approved investments is well recognized internationally, and the above-mentioned clause, to avoid screening devices, exists only under American model BITs. Moreover, the refusal of some states to sign BITs with the USA is mainly based on the attitude towards such clauses.

2.4. Admission of Foreigners Under Egyptian Law

2.4.1. Admission to Egypt

A states territorial sovereignty over foreigners does not mean that host state may prevent them from leaving the country, unless they have "fulfilled [their] local obligations, such as payment of rates and taxes, of fines, of private debts, and the alike".[65] Such an opinion was expressed clearly in Article 12/2 of the International Covenant on Civil and Political Rights of Dec. 16, 1966 which mentioned that "Everyone shall be free to leave any country, including his own". [66] Such international opinions were reflected clearly in the decision of Burma's Supreme Court of 1958, which considered that a "foreigner had the right to leave a country, as basic human

[63] Egypt–United States: Treaty Concerning the Reciprocal Encouragement and Protection of Investment. September 29, 21 ILM 933, (1982).

[64] See Article 2(7) of the Turkish-United States Treaty of 1985 and Article 5(2) of the Argentina-United States Treaty of (1991)

[65] Oppenheim, P. 690.

[66] ILM, Vol. 6, (1966), P.372.

right, that could not be denied".[67] However, it is understandable that foreigners may be asked to pay tax before leaving the country.[68] Contemporary states' practice shows that foreigners, especially foreign investors, are able to leave the country after fulfilling their duties and only in rare cases have foreigners been banned from leaving a foreign country.

According to Egyptian laws, a foreigner's departure may take place in three cases: first, if the foreigner himself decides to leave the country before the expiry of his visa, secondly, at the time his visa expires and thirdly, whenever, the competent authorities deport him in accordance with the terms of the law. In the first two cases a foreigner's right to leave the country is recognised and protected by national and international laws, and he is free to leave any time he wishes unless there are some commitments he did not fulfil.

Concerning Egypt's right to deport foreigners, this right was denied under the Capitulation System which was enforced in Egypt as a part of the Ottoman Empire and this situation was maintained even after the enforcement of the Montreux Agreement of 1937. Later, in 1952 after the enactment of law No 74, Egypt was allowed to deport undesired foreigners in accordance with its national interests.

Law 43 of 1952 authorises the Egyptian interior minister to deport foreigners, whether they are a national of another country or stateless. This was approved by Law No 89 of 1960, as amended by law No 49 of 1968. This authority was limited to the type of visas held by foreigners. For instance, foreigners who had a special visa could not be deported unless a special committee, which was usually formed for this purpose, took the deportation decision.[69] Nevertheless, the general nature of Article 26 may not constitute a safeguard for those foreigners with special visas. In cases when foreigners hold any of the other two types of visas, normal and temporary, the law did not specify the cases when they could be deported and the question was left up to the executive authority to decide whether to deport foreigners or not. However, the common practice in this concern shows that such decisions must be conducted within the spirit of the law and the interests of the state. Finally, deported foreigners may return to

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[67] ILR, Vol.26, 1958/II, P. 481.

[68] Oppenheim, P. 690.

Egypt after being admitted by the interior minister on new bases, even if they were holding a special visa before they were deported. Such opinion was adopted by the Egyptian Administrative Court of Appeal (Al-*Mhkama Al-Idaria Al-Olia*) where it considered that the privileges of deported foreigners who used to obtain special visa should expire as a result of the their deportation, and they may return to Egypt on a fresh basis".[70]

2.4.2. Departure, and Expulsion from Egypt

States enjoy territorial legislative supremacy over all commercial and employment activities. Oppenheim explained that as "every state can treat foreigners according to discretion, except in so far as its discretion is restricted through international treaties".[71] Similarly, other writers have defended a state's right to exclude foreigners from doing certain jobs in a way that preserves their economic, cultural, and social interests.[72] Foreigners who are engaged in unauthorized employment might be subject to deportation proceedings.[73]

Anyhow, the question of foreigners' rights to employment in foreign countries has always been treated in accordance with the above-mentioned standards, similarly to all other issues of the treatment of foreigners. Such standards may be drafted through the articles of an agreement or by the terms of national laws such as investment laws.

3. Treatment of Foreign Direct Investment

The term "treatment" refers to the legal regime that applies to investors once they are admitted by Host States. Such a question is another controversial subject of international law. The controversy is derived from the differences in opinion between developed states considering that there is "an international minimum standard" of treatment, while developing states insist on a "national treatment " approach. This means that foreigners should never ask for more than that which a state is giving to its

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[69] See article 26 of law No 89 of 1960, This Article mentions that foreigners who obtain special visas can not be deported unless their stay inside the country may threaten the state's security, national economy, public health, or its public manner.

[70] The court's decision of 24 Dec. of 1960.

[71] Oppenheim, P. 689.

[72] British Act of 1919 provides That "no foreigner is to be hold a pilotage certificate for any pilotage distract in the United Kingdom or act as master, chief officer or chief engineer of a British merchant-ship registered in the United Kingdom or as skipper or second hand of a British fishing boat, or receive an appointment to the Civil Service."

[73] Strauss, M. W., "Employment of Foreigners: a Guideline for Employers and Employees", UWLA Law Review, Vol. 20, (1988-89), P. 143.

own nationals. The gap between these two understandings "makes it difficult to determine many of the international law rules in this area".[74] In any case, both sides commonly agree that foreigners' activities are not covered by international law rules, since most of such activities are left to be determined at the discretion of the host states.[75]

Whenever foreign investors decide to send their money abroad they, usually, aim at making their best efforts to gain maximum possible financial profits. Accordingly, they consider many elements before taking the first step, such as the way foreigners are treated in the host state. This leads to many legal questions central to the success of their projects: their admission, position after reception, properties, and many others related issues. Therefore, those elements have a special importance because they suggest whether or not foreign investors are able to get into the host state and if their projects will be treated fairly under its legislation.

Treatment of FDI evolves round the concept of "Non-discrimination", based on the following three principles: Most-Favoured-Nation (MFN), Fair and Equitable Treatment, and National Treatment. This section is divided into two parts. The first looks at Non-contingent standards of treatment. The second deals with contingent standards of treatment.

3.1 Non-Contingent Standards of Treatment

Non-Contingent standards, as reflected by national investment laws, most BITs and MITs instruments, have no specific purpose other than dealing with foreign investment within the general meaning of the term "fair and equitable treatment" on a case to case basis.[76] For example, Article II of the Egypt-Kuwait Agreement of 1966 states that "each contracting party shall in its territory promote ... the investment of capital by nationals or companies of other contracting party, [and] it shall in any case accord such investment fair and equitable treatment".[77]

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[74] D.J. Harris, "Cases and Materials on International Law", Sweet and Maxwell, London, (1991) P. 494.

[75] Most states put restriction on many activities such as taking employment, owning property, voting in parliamentary elections. See Hood, Philips Constitutional and Administrative Law, 1987. P. 449.

[76] Kronfol, p. 46. See also UNCTAD, World Investment Report, (1996), P. 782.

[77] See also Article 2(2) of Egypt-Italy Treaty of (1975), Article 2 of the France-Morocco Treaty of (1977) at 1036 UNTS No. 1.15497.

In reality, the term "fair and equitable treatment" is open to a variety of interpretations.[78] In modern history, after witnessing a substantial socio-economic development and vast advance in methods of communication among nations, foreigners became more eligible to be treated in accordance with a minimum standard of treatment as human beings.[79] Such standards have been set by international agreements recognising the existence of international customary rules, which should be taken into account by states whenever they codify rules concerning the treatment of foreigners inside their territories.[80]

The above-mentioned trend was adopted by the PCIJ in its judgment in the German Settlers of Poland Case, where it considered that the treatment of Germans who live on Polish territories should be conducted in accordance with the rules of international law,[81] which maintain certain rights for them outside their own country. This may lead to a question about the criteria on which such rights should be determined and whether or not these rights must be equal to those of the nationals of the state, or if they may exceed them.

The answer to the above mentioned question is linked closely to the theory of state sovereignty. In this sense, states enjoy almost an absolute authority over their nationals and no state may claim sovereignty over them but their own state. Meanwhile, as states have a limited authority over foreigners living within its territories, rules governing foreigners should "form part of generally accepted international law"[82] into account whenever they deal with foreigners. On these grounds, foreigners' rights may exceed those of the nationals who are not treated as required by the rules of the civilized world.

Admitting foreigners does not imply that they have the right to settle down and move inside the admitting state in the way they wish. Usually, states have the right to limit the duration of the admission, which is supposed to be respected by foreigners who are required either to renew their visa when it expires or to leave the country. They are

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[78] Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", 24 International Lawyer (1990), P. 667.

[79] U.S.-Italy Treaty of Friendship, Commerce and Navigation of 1948 provides that nationals of the contraction parties should be treated as required by international law, UNTS, Vol.79, (1948), P. 178.

[80] Article 2, Lausanne Agreement of (1923); the Egyptian-Persian Treaty of Friendship and Establishment, of Nov. 28, (1928); and the League of Nations Treaty Series, No. 2127, (1929), P. 395.

[81] PCIJ, Series B, No. 6, P. 36.1923.

supposed to arrive and move inside the country in accordance with the law of the state, which may "compel them to register their names for the purpose of keeping them under control".[83] Furthermore, states rights to be " free ... to make [the] admission subject to condition limiting its duration, or the rights of foreigners to travel, sojourn, settle, chose their places of residency, and move from place to place"[84] were preserved by the articles of the International Convention on the Treatment of Foreigners of 1929.

Moreover, the UN International Convention on Civil and Political Rights of 1966, in Article 12 paragraph 1, mentioned " every one lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residency". [85] But, on the other hand, Paragraph 3 of the same Article limited such rights to be within the rules of the host state where it provided that the rights which were mentioned in Paragraph 1 "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or the rights and freedoms of others, and are consistent with the other rights recognised in the present covenant".[86]

It is clear, however, that many domestic courts supported such rights given to states. In this context, the Belgium Court of Cessation considered in June 27, 1960, that " as regard residency and domicile of foreigners in Belgium, the law of March 28, 1952, divides foreigners into two categories ... the minister of justice may oblige foreigners belonging to the first category whose presence is considered to be dangerous or harmful to public order or safety to the economy of the country, to leave certain places or regions, or to remain outside such places or regions, or to reside in specified places".[87] Whatever approach states decide to adopt, either to insist on their right to restrict the movement of foreigners inside their territory or to take the easier option which gives foreigners much more freedom, both position should be codified either through agreements or municipal legislation[88] or both, The general trend nowadays in

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[82] The German Interests in Polish Upper Silesia Case, PCIJ, Series A, No. 7, (1929), P. 42.

[83] Oppenheim, P. 689.

[84] L.N. Doc., 62, II, 5, (1930), P. 419.

[85] International Covenant on Civil and Political Rights, Dec. 16, 1966.ILM, Vol. 6, (1966), P. 372.

[86] Ibid.

[87] *Re Benakila Case*, ILR, Vol. 31, (1960), PP. 331-3.

[88] Article 2 of the Algerian Investment Law of 1963, the Official Gazette, August 2, 1963.

developing countries is to guarantee foreigners' right of residency and freedom of movement on their territory.

After admission, foreigners are directed by a group of rights and duties as follows; on the rights level, states must respect foreigners' basic rights as human beings, recognised and protected by the International Covenant on Civil and Political Rights of 1966[89], and by some other international[90] regional instrument such as the European Covenant on Human Rights.[91] This includes a foreigner's right of having a legal personality which enables them to enact all sorts of contracts, and to deal with their money in the way they wish, in addition to being able to get married and have a family. Moreover, they enjoy the right to own things, intellectual and physical, within the limits of the law of the land. Finally, they are to be treated equally concerning the use of the state's public utilities[92] and to have access to courts when needed.[93]

On the other hand, foreigners are bound by many duties while they are living within the territory of a foreign state which has territorial sovereignty over them, partially, similarly to its own nationals, who have the duty to be bound by the law of the land whether it is judicial or administrative. Furthermore, the state's taxation laws bind them, directly and indirectly. Finally, some states impose extra taxes on foreigners in return for enjoying the stay in their country and being protected by its authorities. In other words, states have a territorial sovereignty over foreigners who live within their territory, and they are supposed to treat them as equal to their own nationals except in the exercising of political rights and duties.

The minimum standard of treatment recognized and protected by international rules, should be taken into account by states when they deal with foreigners, as a safeguard for protecting basic rights as human beings and protecting their means of living. Meanwhile, some states tend to extend such standards when they feel that they are not enough to attract foreign investors. Accordingly, developing countries incline to

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[89] Human Rights Covenants, http://www.unhchr.ch/html/intlinst.htm

[90] The Geneva Convention on the Status of Refugees. Convention relating to the Status of Stateless Persons, UNTS, Vol. 360, P. 117. Protocol relating to the status of the Refugees of 1967, UNTS, Vol. 606, P. 267.

[91] The European Convention on Social and Medical Assistance of 1953, UNTS, Vol. 218, P. 255.

[92] ILR, Vol.23, 1956, P. 381, the Re Boileau Case, Dominican Republic Supreme Court, Feb. 3, (1956).

[93] ILR, Vol. 27, 1963, Re Mannira Case, Ontario Court of Appeal, March 5,1959, P. 248. Where the court's decision mentioned, "Once [foreigner is] on our land he is entitled to be protected by our laws".

widen the rights of foreign investors to exceed those of ordinary foreigners in order to create a much more attractive atmosphere which is able to attract more foreign investors, through giving them more than what is required by international law as a minimum standard of treatment. This is usually regulated by agreements between host states and foreign investors.

3.2 Contingent Standards of Treatment

This type of standard specifies the way foreign investments will be treated either by referring the matter to national investment legislation or by adopting either national treatment standards or most-favoured-nation treatment standards.

3.2.1 National Treatment

In most cases, host states commit themselves to many types of privileges given to foreign investors in a step towards promoting and encouraging foreign investment, for example principles of national treatment. This principle ensures at least an equal treatment between foreign and national investors in like conditions. However, policy makers use the term "no less favourable" to indicate that foreign investors will be treated at least the same as national investors.

In some cases, states offer foreigners national treatment giving them all the humanitarian and civil rights of the nationals. The practice of such principles could be based either on states municipal laws[94] or international treaties. According to the Franco-Spanish Consular Treaty,[95] the French court of Cessation in *Re Balseiro Case* considered that "it is contended that provided for complete equality between French and Spanish citizens" and that "as a matter of principle, treaties take precedence over municipal law".[96]

3.2.2 Principle of Reciprocal Treatment[97]

Under this principal, foreigners are entitled to the same standard of treatment as the nationals of the host state.[98] This principle prompts states to offer the best possible

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[94] The Swiss civil law, Article 11 mentions that every person may enjoy all civil rights guaranteed by the Constitution and other laws regardless of their nationalities.

[95] January 7, 1862, cited in ILR, Vol. 24, 1957, P. 600.

[96] ILR, Vol. 24, 1957, Re Balseiro Case, P. 600. ILR, Vol. 24, 1957, Eustathiou & Co. V. USA Case of Sep. 10, 1957. Where the court considered that [Such] treaties created a substantive rights" concerns the right to access courts.

[97] See, *Re sastella case*, France Court of Cessation, May 25,1956. ILR, Vol. 23, (1956), P. 376.

[98] Article 2, of the French Civil Code provides that "Foreigners should enjoy in France the same civil rights which are or shall be accorded to French men by the treaties of the nation to which that foreigner

treatment to foreigners in order to guarantee the same treatment for their nationals abroad.

The principle of reciprocal treatment can be derived either from municipal laws or from international treaties, which take precedence over national laws. Such a method of treatment may take one of the following forms: when state (A) recognises this principle but it does not activate it until state (B) recognises the principle and offers the same rights to the nationals of state (A). This, usually, happens either through giving them exactly the same rights,[99] or through giving them what is equivalent to such rights.[100]

In brief, reciprocal treatment could be offering a right in return for what could be identical or equivalent to it, but it is clear that the fairness of the practice of such treatment is based on the number and the qualification of the people moving between both countries. For example: if a reciprocal agreement has been signed between a rich industrial state and a poor underdeveloped country, nationals of the rich state will benefit most from such an agreement because of their experiences and capabilities.

3.2.3 Most Favoured Nation Clause

This principle was defined as "a treaty with a particular foreign state may operate to confer on, or extend to, the rights of nationals or official representatives of such a country rights and privileges, or immunities in the... state which are not expressly conferred by such treaty but which are conferred by treating the nationals or representatives of another foreign country".[101] This means that when states sign an agreement based on such a principle they should agree to offer the nationals of the other contracting party the best treatment, which may be offered to the nationals of any third party.

On the other side, such a clause may have serious consequences as it could immobilize a state's ability for any future negotiation about the treatment of its nationals in foreign countries. For example, if state (A) committed itself with state (B) to the most-favoured-nation clause, later on state (A) signed an agreement with state (C) on which

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belongs". Quoted by Kronfol, Z. in "Protection of Foreign Investment", A.W. Sijthoff, Leiden (1972), P.15.

[99] When two state or more allow each other national to have identical rights in each other's territories, such as practicing certain career

[100] When one state offers nationals of another state not identical rights but what is equivalent to them.

they rely on having a reciprocal treatment which offer each other's nationals some extra rights. In this case state (B) will get the benefit from the second agreement just like state (C) without giving any commitment to state (A).

To conclude, enjoying special treatment under a most-favoured-nation clause could be achieved in the following ways: unilaterally, bilaterally,[102] and multilaterally[103]. However, "the operation of such a clause is limited to those matters to which by its terms it applies and it does not confer greater rights, privileges, or immunities than those on nationals or representatives of the most favoured nations".[104] In all cases, this does not point out any sort of commitment by the host state to offer any rights to nationals of the other contracting party unless such rights have been given to a national of a third party. Moreover, the ICJ has agreed that no state may ask for the continuation of certain rights, which were gained by virtue of the "most favoured nation" clause in case such rights were amended or abolished in relation to the nationals of the third party.[105]

3.3. Foreigners' Post-Entry Position in Egypt

In principle, foreigners enjoy all rights and freedoms, which are internationally recognised, that are considered necessary for them as human beings such as: freedom of expression, right to worship and their personal privacy and security. Moreover, foreigners in Egypt enjoy a legal personality, which enable them to a right of ownership, right to use public utilities, and finally their right of employment and enacting economic activities.

Foreign firms in Egypt, under investment Law 8/1997, receive equal treatment with domestic firms in all aspects, including owning land, and unrestricted ownership of invested capital. That is the case except for some strategic industries, e.g. the arms industry, where foreign participation is prohibited. Another issue of importance with regards to the treatment of FDI is the repatriation of profits and capital, which is

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[101] See "Corpus Juris Secundum", Vol. 87, (1954), P. 936.

[102] Article 1 of the US and the Oriental Republic of Uruguay mentions that each state will "grant each other unconditional and unrestricted most favored nation treatment in all matters concerning custom duties and subsidiary charges of every kind and in the method of levying duties" UNTS, Vol.120, (1942), P. 211.

[103] Article 2 of the GATT Agreement of 1947, mentions that this principle "shell apply to custom duties, charges imposed in connection with importation and exportation of goods, and to methods, and formalities in connection with importation and exportation" UNTS, Vol. LX, P. 200, (1947).

[104] See "Corpus Juris Secundum", Vol. 87, (1954), PP. 936-37.

permitted under Egyptian law. However, any provisions guaranteeing the right of foreign firms to freely repatriate capital is precluded and is considered to be a drawback by some analysts.

On the other hand, if foreign investors choose to operate in the country under the jurisdiction of the Companies Law 159, there are certain requirements that discriminate against foreign investors. Examples of this are the articles and provisions in the Law that require that foreign companies established under this law should offer at least 49% of the companies' shares to Egyptians, within a one month period of establishment and the majority of the Board of Directors (BOD) have to be Egyptian. Also, if the ownership majority is for foreigners, the workers must be represented in the BOD. In addition, the law prohibits foreign firms, operating under its jurisdiction, from owning land and requires that 10% of the profits should be distributed to the companies' employees, with an upper limit equal to one-year's salary.

3.3.1. **Types of Residency in Egypt**

Under Egyptian laws, admitted foreigners should respect the duration of their visas, and they should either renew them or leave the country whenever it expires.[106] Moreover, foreigners are required to restrict their activities within the declared aims of their visit. Any violation of such conditions may expose them to specific punishments, which varies between imprisonment and paying a fine or both together.[107]

Types of residency, which could be offered in accordance with Egyptian laws, might be classified into the following four categories:[108]

- Special Residency;
- Ordinary Residency;
- Temporary Residency;
- Tripartite Residency.

Different types of residency vary in duration, their ability to be renewed, and the possibility of expelling the person who obtains them.

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[105] See "Corpus Juris Secundum", Vol. 87, (1954), P. 937.

[106] Article 16 of law No 89 of 1960 as amended by law no. 49 of 1968.

[107] Ibid. Article 42.

[108] Ibid. Article 17.

3.3.1.1. Special Residency

Its duration is ten years. In legal terms, special residency is given to all foreigners who have close links with the Egyptian community and they were enlisted in Article 18 of law No 89 of 1960 as follows:

1) First, foreigners who were born in Egypt before the implementation of law No 74 of 1952 (26/05/52),[109] and who did not leave the country before the implementation of law No 89 of 1960.
2) Second, foreigners who lived in Egypt for at least 20 years before the implementation of law No. 74 of 1952 and how did not leave the country before the implementation of law No 89 of 1960.
3) Third, foreigners who lived in Egypt for five frequent years before implementing law 89 of 1960 and kept renewing their visas regularly. This situation applies for those who intend to stay in the country for the next five years in case they get some sort of qualifications, which are important for the interests of the country. The interior minister should specify the above-mentioned qualification.
4) Fourth, well-known foreign scientists and authors may get an unconditional special visa; this should be given by a decision of the interior minister.

With regard to Article 18 of law No. 1960, foreigners who obtain special visas have the right to extend them automatically by law, and no authority is qualified to review such a matter unless the concerned foreigner fits any of the expulsion categories, which was mentioned by Article 26 of the same law. In this case, the matter should be designated to a special committee that is capable either to extend his visa or not.[110]

Finally, privileges gained on the grounds of a special visa may be jeopardised if the foreigner stays outside the country for more than two years,[111] unless there are some convincing reasons for their absence, such as studying or having a medical treatment.[112]

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[109] This law aimed at regulating foreigners' affairs in Egypt.

[110] Article 26 of law 89 of 1960.

[111] Ibid. Article 22.

[112] Ibid.

3.3.1.2. Ordinary Residency

These types of visas are usually given for five years and renewable. This group of foreigners is eligible to have their visas by law for at least ten years having lived for fifteen years prior to the implementation law No 74 of 1952 and which was not interrupted till the enactment of law No. 89 1960. The renewal of such a visa is at the discretion of the concerned authorities and must be within the limits of the law. Maintaining this type of residency requires the holder not to leave the country for more than two years unless there is an authentic reason for that, such as studying or medical treatment.

3.3.1.3. Temporary Residency.

All foreigners who do not fit within one of the previous two categories are considered as ordinary foreigners. Their admittance will be considered as a privilege given to them by virtue of the Egyptian authorities, so Egypt is under no legal duty to admit them. This type of visas may be given to foreigners who intend to visit Egypt for the purpose of tourism, studying or any other purpose, which does not require a permanent residency.[113]

3.3.1.4. Tripartite Residency

In 1980 law no. 124, which allowed a renewable tripartite residency, amended the above-mentioned rules.[114] The Ministerial Decision no. 10 of 1982 listed the cases who can obtain the three year visa: 1) foreign investors, 2) Wives and widows of Egyptian nationals and foreigners who used to hold any of the first two types of residency 3) sons and daughters of Egyptian ladies, 4) foreigners who hold Egyptian governmental or public positions, 5) children of fathers who obtained Egyptian citizenship, 6) those who deserve it by the virtue of international agreements and 7) Foreign husbands of Egyptian women, five years after marriage. Finally, the tripartite residency could be given to foreigners who had a special visa, which was jeopardised because they spent more than two years outside Egypt -for no legitimate reason.

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[113] Article 20

[114] This new law was enacted by a ministerial decision No. 280 of 1981

3.3.2. Foreigners' Rights of Property Ownership in Egypt

As a step to protect Egypt's national economy, the Egyptian legislators intended to put some legal limitations on a foreigners right to own certain types of properties.

3.3.2.1. Borderline areas

Article 1 of the military order No. 62 of 1940 provides that no foreigner is permitted to own any property, which is located along the borderline, and is under the custody of the borders authorities. Likewise, Article 874 of the 1949 Egyptian civil code excluded all foreigners from owning some types of lands[115]

3.3.2.2. Real Estate

The question of owning Real Estate by foreigners was subject to more legal limitations, which were handled by Article 1 of law No. 37 of 1951, which articulated the principle; Meanwhile Article 2 mentioned its exceptions. In addition, the subject was treated by, law No 124 of 1958 concerning the ownership of the Egyptian dessert lands.

Law No 56 of 1988 prohibited foreigners from owning any built real estate unless their case fits any of the exceptions listed by Article 56 of the same law.[116] In other words, Law 56 of 1988 mentions that a foreigner's right to own properties in Egypt should take place either through inheritance or by ministerial decision approved by the prime minister within the limits of the national laws.

3.3.2.3. Personal Estate

As to the rules, which regulate the question of owning real estate, the Egyptian legislator who laid down the rules of foreigner's ownership of a personal estate took into account some necessary considerations, such as the protection of the state's economic interests, which may affect the economic entity of the state. Therefore, foreigners are not allowed to own, fully or partially an Egyptian ship. Besides, the Egyptian Company law 159 of 1981 mentioned that "[At] least 49% of the shares of

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[115] Article 874 of the civil code of 1949 amended by law of 1986 mentions that " Uncultivated land which has no owner is the property of the state. If, however, an Egyptian cultivates or plants uncultivated land or builds on there on ... he becomes the owner of the part cultivated planted or build on, even without the authority of the state".

joint stock companies ... must be offered for one month to the [Egyptian] public ...unless said percentage had already been subscribed by the Egyptians".[117] It is clear that the content of this Article meant to support the trend of the abolished law No 26 of 1954.In some cases, [118] companies should be owned solely by Egyptians. [119]

In the case of industrial ownership, Foreigners as well as Egyptians, have the choice of either Egypt's national legislations or international agreements to govern their ownership of industrial and trademarks. In this context, Egypt has signed many international agreements such as; i) Paris Agreement of 1883 about the protection of industrial ownership, which was amended many times, lately that of Stockholm amendment of 1976. ii) Madrid Agreement of 1891 about the registration of trademarks, which was amended in France in 1957. iii) Madrid Agreement of 1891, which was amended in 1934 in London.

As expected, Egypt offered all foreigners who are living in Egypt the right to use all public utilities regardless of their nationality. Consequently, foreigners who are living in Egypt are eligible to use all education, health, transport, water and electricity facilities, in addition to their right to use the Egyptian judicial system and the privileges of social benefits in case their work contracts extends for more than a year or in case their countries offer Egyptians who are living within its territories the same benefits.

3.3.3. Foreigners' Rights of Employments in Egypt

The last thing to mention in Egypt is a foreigner's right to employment as such a question has always been a sensitive one for heavily populated countries like Egypt. Such states have always applied strict conditions to regulate the import of labour forces, unless they are specially qualified and their experiences are needed for the Egyptian national economy.

The Egyptian legislators took into account three main considerations concerning the above-mentioned question: first, the protection of Egyptian labour forces. Second, excluding foreigners from having any positions, which are closely linked to Egyptian

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[116] For example such properties should be used either for diplomatic or personal purposes.

[117] Nicola H. Karam, Business Laws of Egypt Vol. 1 p. 1.2 -18 the company law Graham and Trotman, London 1990.

[118] Such as banks and insurance companies

[119] Article 27 of law 10 of 1981 and Law No 120 of 1975.

national interests. Finally, the consideration of being flexible with what may be important for the accomplishment of development projects. In addition, Law 137 of 1981[120] adopted the principle of reciprocal treatment among states without specifying what sort of reciprocal treatment and what types of employments are included.

It is clear that the bases of rules governing foreigners' right to employment in Egypt were set by law 137 of 1981 and by the ministerial decision 25 of 1982, which require a prior permission from the competent minister in accordance with the conditions which were specified by Article 28 of law 137 of 1981. However, the same article lists the exceptions to the above-mentioned principle, which excludes some foreigners from taking some types of employment.[121] These exceptions, meant to prevent foreign domination over certain sectors of the Egyptian economy.[122] Accordingly, foreigners are not able to take certain positions either because they are listed by article 28[123] or because their employment is in excess of the 10% limitation allowed by law 137 of 1981[124]. In addition, article 174 of law No 159 of 1981 confirms, " the number of the Egyptian personnel employed by companies governed hereby shall not be less than 90% of the total of its personnel...".[125]

The other exception takes place in the case of foreigners who are either personnel of foreign diplomatic envoys or listed by Article 176 of the Law 159 of 1981 which says that "the minister concerned may allow the employment of foreign personnel, consultants or specialists where it is impossible to find Egyptians, for such a term as may be fixed by the minister...".[126]

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[120] Article 26 of Law No. 137 of 1981.

[121] Such as all foreigners who are supposed to work for projects, which are classified as foreign investment projects?

[122] On the bases of the decision of the minister of state for man power and training how is supposed to issue a decision "determining the conditions for obtaining the work permit" in accordance with Article 28 of the law 137 of 1981.

[123] For example, all members of the boards of directors of Egyptian bank and insurance companies and the majority of joint ventures should be Egyptians. This applies to some careers such as physicians[123], lawyers and some other nationally important careers.

[124] Article 4 of the ministerial decision No 25 of 1982.

[125] Nicola H. Karam, "Business Laws of Egypt", Vol. 1, the Company Law, Graham and Trotman, London (1990), PP. 1.2 -70

[126] Ibid., PP. 12 -71.

4. Conclusions

Rules administering the admission and establishment of FDI constitute an essential element in policies promoting their inflow into host states. In Egypt, similar to other developing countries, admission rules consist of two elements: substantive "policy" rules and procedural rules. On a policy level, Egypt tends to eliminate all unnecessary requirements and to pack the rest together in "one-stop shop" arrangements. However, a division of the administration and decision-making authorities undermines the effort. Unifying those two authorities enhances the work of the "one-stop shop" and creates a body with decision-making authority and the needed political power to achieve its targets.

This chapter has highlighted policies and technical rules concerning the question of admission and establishment of FDI in host states, with special reference to Egypt, in their pursuit to liberalise FDI policies.

On the "Admission" level, the term was presented as a Legal process through which FDI legally enter countries' sovereignty. After presenting the recognised international rule, Egyptian policies and practices were presented and analysed. However, it has been found that Egypt prolong the admission process, which can take up to 70-130 days as compared to 1-3 days in Tunisia, 2-4 weeks in Morocco and 28-40 days in Turkey.

To sum up, this chapter shows that Egypt deals with the question of foreign investment entry and establishment in line with its general policies for encouraging the flow of FDI. Such policies are based on the presumption that this will have a positive impact on the country's economic development program.

Chapter Six:

Tax Incentives of Foreign Direct Investments in Egypt

Chapter Six Contents

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1. Introduction

As part of its commitment to create a favourable investment climate, Egypt demonstrated a great awareness of the significance of minimising foreign investment deadlocks and providing foreign investors with additional incentives in order to attract more foreign capital. It is true that incentive measures are important for both parties: foreign investors who wish to make a good start and to settle down, and for host states, which aim at gaining more inflow of foreign capital. At the same time, such measures may have counter effects on host states income.

The increased demand for FDI has led to the worldwide competition for FDI. In a world where an increasing number of governments compete hard to attract foreign direct investment, tax incentives have become a global phenomenon. Poor developing countries rely on Tax Holidays and import duty exemptions while industrialised western countries accord financial subsidies and/or accelerated depreciation allowances to investors. As a result, tax incentive provisions form a large part of many recent tax reform programmes undertaken by developing countries.

The efficiency and effectiveness of tax incentives has always been argued about. Tax incentives are not an effective means of attracting FDI because tax considerations are only rarely a major determinant factor than investor's decision. While the question of tax incentives effectiveness is further complicated by the tax policies of the home country. In a situation where a home country does not recognise the incentives provided by the host country when taxing the profits of its multinationals, the incentives provided by the host country would not be useful in attracting investment from that country. In this case, the need for Double Taxation agreements to make a balance in tax rights between the host and home country. Despite the many criticisms against tax incentives, developing countries continue to use them in their competition against other countries.

Defining investment incentives is a difficult task since they vary according to the context in which they are used. However, they may be defined as "any government

measures designed to influence an investment decision, and increasing the profit accruing to the potential investment or altering the risks attaching to it".[1] In later occasion, they were defined as "... measures designed to influence the size, location or industry of a FDI investment project by affecting its relative cost or by altering the risks attached to it through inducements that are not available to comparable domestic investor".[2]

This chapter attempts to examine the tax incentives used by Egypt and evaluates their effectiveness and efficiency in attracting FDI to the country. Then, I will present and analyse various types of tax incentives, which are provided to investors, and the rationale for their continued use. The objective is to come up with some recommendations on ways of doing away with tax incentives and alternative means of attracting foreign direct investment. This chapter will only focus on tax incentives and the debate against the effectiveness and efficiency in attracting FDI, as other types of incentives, which are used to attract FDI, such as direct financial grants, subsidies loan guarantees, etc... are outside the scope of this study.

In other words, this chapter aims at studying the types of Tax Incentives provided by Egypt for attracting foreign Direct Investment through investment and tax legislations. Then, this chapter will evaluate the effectiveness of these incentives in making up the investor's decision to invest in one country or the other. The efficiency of tax incentives and whether their benefits outweigh the costs will be investigated. Finally, the question of double taxation will be studied.

2. Types of Foreign Investment Incentives

There are a wide variety of instruments used by host states to achieve their foreign investment measures. Those measures are not necessarily designed to attract foreign investors.[3] Most of them do not make a distinction between foreign and domestic investments, and they apply to all investment, which may fulfil the aims of investment incentive policies such as promotion of employment and developing some underdeveloped areas in a given country. Practically, more than one distinction can be made in order to classify such instruments.[4] However, it is relevant to classify foreign

[1] OECD, "International Investment, and Multinational Enterprises", (1983), P. 10.
[2] OECD (2003), P. 9
[3] Ibid., P. 19
[4] The following four distinctions were noted by OECD: 1) The distinction between automatic and discretionary measures, 2) The distinction between measures applying to all enterprises and those applying to certain categories among them.3) The distinction

investment incentives into the following three categories: Financial incentives, Non-financial Incentives and Fiscal Incentives.

2.1. Financial Incentives

Most of these incentives come in the shape of grants, Loans, and loan grants[5] for either "specific Sectors or specified activities".[6] These incentives are often designed "to facilitate transaction to more efficient structures or patterns of production and, in such instance, are of limited duration".[7] Grants, which are the most common type of the financial incentives, aim mainly at covering "the cost of investment, the cost of labour training or the relocation costs".[8] Meanwhile, other means like, loans at preferential rates and loans guarantee, to extend its taxation sovereignty to foreign investors is an accepted principle of international law.[9]

No financial subsidies are available as an incentive in Egypt, except in foreign investments related to the Egyptian privatization program; the government offers potential investors the transfer of outstanding debts to banks as well as other liabilities on the company's books under sale to its Holding Company.

2.2. Non Financial Incentives

Non-financial measures aim at increasing the profitability of investment projects by non-financial means. Such means vary from one host state to another. In some cases, regional or local governments provide investors with land, industrial sites, or industrial buildings at low cost, for practical reasons. In some other cases,[10] host states offer such non-financial measures in order to stimulate research and development.

2.3. Fiscal (Tax) Incentives

Most states operate a variety of fiscal incentives in order to stimulate foreign investment. The most common types of fiscal incentive come in the shape of tax reductions and tax exemptions, among which the more frequent, especially in OECD countries, are "The accelerated depreciation and preferential taxing".[11] However, tax exemption may be used as one of the following measures: tax credits, reduction

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between measures of immediate impact and those become effective only in the course of application. P 17. For more details see A. Aharoni, "The Foreign Investment Decision Process", Boston, (1966), P. 254.

[5] Ibid., P. 19

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Like Italy and Norway

[10] Egypt imposes stamp duties, social security taxes, sales tax, and entertainment tax.

(exemption) of investment tax rate, Payroll taxes, local taxes, property taxes, taxable income, or sales tax (tax rates on taxable profits). As a result, special attention will be given next, to the question of tax incentives.

2.3.1. The Host State's Right to Tax Foreign Investors.

Under The Egyptian Income Tax law No. 157 of 1981, as subsequently amended, companies resident in Egypt or branches of foreign corporations operating in Egypt are subject to tax. Then, all companies are liable to pay tax on total net profits of their Egyptian operations, derived from Egypt as well as on profits derived from abroad, unless the foreign activities are performed through a permanent establishment located abroad. Within this context, the term "company" means: joint stock companies, limited liability companies, and partnerships limited by shares that were established under Egyptian law, as well as equivalent foreign corporate entities. Apart from income tax, there are other direct taxes such as personal income tax, customs duties, and some miscellaneous taxes.[12]

Egypt's right, as a host state, to extend its taxation sovereignty to foreign investors is an accepted principle of international law.[13] This assumption is based on the principle that when a person leaves his own country he becomes liable to taxation by a foreign state. This means that living or owning a business and property in a foreign country makes a person liable to taxation by a foreign state.[14] Taxing foreign investors means a relation between a host state and a national of another state, which raises many questions of international law. However, this doctrine could be justified on any of the following theories: (1) Contractual, where tax is understood as a return of services received by taxpayers. (2) Ethical, where taxation of foreign investments was considered as a return of advantages received from the host state, and (3) sovereignty theory, which is based on the host state's right.[15]

While a state is, undoubtedly, entitled to levy taxes within it territory, there is no known case in which a court has condemned the extension of tax jurisdiction to include foreigners as a violation of international law.[16] Within this tendency, many

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[11] R. Albrecht, "The Taxation of Aliens Under International Law", 22 The British Yearbook of International Law, (1952), P. 145.
[12] Oppenheim, PP. 256-620.
[13] R. Albrecht, "The Taxation of Aliens Under International Law", 22 The British Yearbook of International Law, (1952), P. 146.
[14] M. Nour, "Jurisdiction to Tax and International Income", Tax Law Review, Vol. 17, (1962), P. 433.

[15] Gupta Anand, "Central Government Taxes: Have they Reduced Inequality", XII Economic and Political Weekly, (1992), P. 88.
[16] Ibid., P. 90.

international jurists like Oppenheim[17] and Hackworth,[18] have approved the host state's right to tax foreign investors. In addition, national courts of most states have acknowledged the host state's right to tax foreign investors; In the *Egyptian Government v. Nicolas Zintzos Case*,[19] the Egyptian mixed court stated that "there is no distinction between citizens and foreigners in the sense of being subject to tax and fiscal regulations". Similarly, the Supreme Court of California concluded in the *Ex Parte Heikichi Terui*[20] *Case* that foreigners are as equal as nationals before all tax legislation.

2.3.2. Types of Tax Incentives

It is beyond the scope of the study to discuss the structure of the Egyptian taxation system in detail. However, it is important to shed some light on the taxes, which concern foreign entities after the expiry of their tax incentives, which are:

- Corporate income tax,
- Capital gains tax,
- Other taxes.

2.3.2.1. Corporate Income Tax

Income taxes are levied in Egypt under the Income Tax Law, 157/1981,[21] as amended by the Unified Tax Law No. 187 of 1993. Under this Law all companies[22] are liable for the rules of this law if they operate in Egypt, unless they were established under the Investment Law No. 8.[23] In other words, companies are subject to taxation on income from movable capital as well as corporate income tax.[24]

As of January 1, 1994, companies are subject to corporate profit tax at a standard rate of 40 percent. However, special rates apply to companies engaging in certain activities.[25] Corporate income tax is based upon taxable profits calculated according to generally accepted accounting principles and certain modifications as provided by statute, the most important of which involve depreciation, inventory valuation, and inter-company transactions.

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[17] Oppenheim, P. 680.
[18] Hackworth, PP. 281 and 576.
[19] Egyptian Government v. Nicholas Zintzos, Egyptian Mixed Court of appeal, 3 May 1928, Annual Digest of International Law and Cases, Vol. 4, P. 335.
[20] This law was published in the Official Gazette on 10 Sept. 1981, Issue No. 37.
[21] Ibid.
[22] The term (company) refers mainly to joint stock companies, limited liability companies, and partnerships limited by shares that were established under Egyptian law, as well as equivalent foreign corporate entities.
[23] A. A. Lutfy, "Legislative Aspects of Tax on Commercial and Industrial Profits", Dar El-Nahda Al-Arabiah, Cairo, (1992).
[24] Ibid.
[25] Such as: (a) Petroleum companies - 40.55 percent; (b) Companies with export activities - 32 percent; and (c) Industrial (manufacturing) companies of 32 percent.

In addition to corporate income tax, projects of foreign investment may be liable for a tax on income from movable capital. This tax applies to most types of interest income and also to foreign source dividends, only if a foreign company is usually resident in Egypt[26].

2.3.2.2. Capital Gains Tax

Capital gains arising from the sale of fixed assets or of compensation on the destruction or confiscation of fixed assets are treated as ordinary business profits, and are not calculated separately. Trading and capital losses realized on sales of other assets that are deductible against taxable capital gains. If the sales proceeds of capital assets are used to purchase new capital assets, a tax credit is available. The proceeds must be used in the same year, or the following two years, and the new capital assets must contribute to increased and improved production. The tax credit, calculated on capital gains, is granted in the year of sale or the year following the sale, and proper bookkeeping records are provided for getting this relief.

2.3.2.3. Other Taxes

Personal Income Tax

In respect of individuals and partnerships, a new Unified Income Tax is applied according to the category of activity.[27] The tax is applied on net profits at rates ranging form 20% to 48%. Income from movable capital: the withholding tax is levied at 32% on gross income. Salaries are subject to withholding tax rates of 20% on the first L.E. 50,000 per year, and 32% on the excess. This tax is paid to the Tax Department on a monthly basis. The rate of tax on the salaries of foreign experts of 20% and 32% is levied on their gross salaries (i.e. without any allowances) if their working period in Egypt is less than 183 days per year.

Customs Duties

The standard rate of customs duty is 80%. However, reduced rates of duty apply to certain imports. The following are examples of items that are subject to reduced duty rates: Basic food products; machinery, equipment, raw materials imported by Egyptian

[26]Term usually resident is not defined, but it would mean that a foreign company is a company, which has its headquarters or, more likely, a branch in Egypt that receives the foreign-source income.

[27]These categories may be summarized as follows: Commercial, industrial, and non-commercial income, and income derived form immovable property (i.e. land and buildings).

industrial companies and companies with a foreign capital investment License, hospital supplies and electrical supplies for regional electricity companies; medicine; books; military equipment; and gold, silver and platinum. To protect certain national industries, a 20% duty is levied on steel products, cement, etc. Customs duty is calculated on the CIF (cost insurance freight) value of imports.

Miscellaneous Taxes

Foreign projects may be liable to the following taxes; stamp duties, social security tax, sales tax, and entertainment tax.

Despite the legality of the principle of states' right to tax foreign investors, most host states intend to create a more satisfactory investment climate through removing certain impediments, which drive away foreign investors, and by providing additional incentives. Such incentives are usually embodied in national legislation, treaties, economic development agreement and other means, and they come in the form of fiscal concessions in order to attract foreign investors and to give them the chance to settle down and make a quiet start.

These incentives could be fiscal inducements, financial subsidies or regulatory exemptions. Fiscal inducements include tax holidays, customs/tariffs exemptions or drawback, and operation in free zones. The financial subsidies can take the form of direct government loans or loan guarantees to foreign investors, export financing, and debt/equity conversion possibilities, while regulatory exemptions mean derogations from regulation offered to foreign-owned enterprises with the purpose of making them willing to invest.

3. Tax Incentives of FDI in Egypt Under Law 8/1998

Under Investment Incentives Law 8/1997, Fiscal inducements are the basic incentives offered by Egypt.

The Investment Law provides certain incentives for foreign investors who carry out projects in Egypt in accordance with its provisions. To qualify for these incentives there are two requirements to be met: First, the company must be established under the terms of Law 8/1998 and the procedures pointed out by the executive regulations. Second, the competent authority must approve the project; if the project is one of the

listed 16 activities in Article 1 of the Law[28] GAFI may approve it, otherwise Egyptian cabinet approval is needed.

The terms of this law shall apply to "all companies and establishments, whatever the legal systems they are subject to".[29] However, within the scope of the Investment Law, There are two ways for investing in Egypt: 1) Inland investment, 2) Free zones investment.[30]

4.1. Inland Projects Incentives

Once a project of a foreign company has been approved, it will be qualified for the following tax incentives, which are clearly based on geographic bases. In case of inland investments[31] a five year period is given for most industrial projects with a possibility of another five-year tax holiday extension on distributed profits, plus two additional years if over 60% of the machinery used is locally-made. In addition, distributed profits are exempt from taxation, and projects are exempt from the stamp tax and national fees. However, an important limitation to these incentives is the condition that income tax holidays are not operative if the non-taxed income will be taxed in the foreign companies' home country, or any other country to which such income will be transferred.[32]

4.1.1. General Incentives (Protections)

Law No. 8 provides foreign direct investments with general incentives. Approved projects cannot be expropriated, confiscated, or nationalized[33] unless it is in the public interest and should be compensated for at the market value. Moreover, no governmental agencies should be able to cancel any approved project[34] except GAFI

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[28]Reclamation and cultivation of barren and/or desert lands, Animal, poultry and fish production; Industry and mining; Hotels, motels, boarding houses, tourist villages, tourist travel and transport; Transport of goods in cooling vans, cold stores for preservation of agricultural products, industrial products, food, containers stations, and grain silos; Aviation, transportation and their directly associated services; Overseas maritime transport; Oil services for digging and exploration operations, and transport and delivery of gas. Housing projects of which its units all leased for non-administrative housing purposes. Infrastructure of drinking and drainage water, electricity, roads and communications. Hospitals and medical treatment centres which offer 10% of their capacity free of charge. Financial leasing. Production of computer software and systems. Guaranteeing subscription to securities. Risk capital. Projects funded by the social fund for development. Besides, the cabinet may add other fields according to the needs of the country. Furthermore, the executive regulation of this law shall determine the conditions and limitations of the above-mentioned field.

[29]Article 1 of law 8/1997.

[30]This law provides three types of free zones investment areas: 1) Public, which is established by GAFI with the approval of the Council of Ministers, 2) Private, created by GAFI for a single project, 3) Free zone city.

[31] Inland Investments are essentially industrial investments in the domestic economy.

[32] Egypt signed and ratified treaties for the avoidance of double taxation with Austria, Canada, Cyprus, Denmark, Finland, France, Germany, India, Indonesia, Iraq, Japan, Libya, Malaysia, Norway, Oman, Pakistan, Romania, Sudan, Sweden, Switzerland, South Korea, Syria, Tunisia, UK, and the USA.

[33]Article 8 of Law No. 8 of 1997.

[34]Ibid., Article 11.

(the Investment Authority), which has the power to do so if the project does not comply with the conditions of its approval.

4.1.2. Income and Profits Tax Incentives

Profits of companies and establishments and the partners' shares of these profits shall be exempted from tax on the revenues of commercial and industrial activities, or corporation tax, as the case may be. The exemption shall be applied for a period of five years, commencing from the first financial year subsequent to beginning the production or exercising the activity. Such exemption shall be extended to a period of ten years for the companies and establishments founded in the new industrial zones and urban communities, as well as remote areas determined by the Prime Minister. The same exemption applies to the new projects financed by the social fund for development.

Moreover, the extension of this exemption reaches the period of twenty years if the company or the establishment is operating outside the old valley. The cabinet determining the areas to which this provision shall apply shall issue a decree. An amount equivalent to a percentage of the paid-in capital, determined according to the Central Bank of Egypt discount and lending rates for the year of fiscal treatment, shall be exempted from corporation tax; provided the company is a joint stock and its shares are registered in one of the stock exchanges.

The result of evaluating the assets used in forming or increasing the capital of joint stock companies, partnership limited companies by shares, or limited liability companies shall be exempted from tax on revenues of commercial and industrial activities or corporation tax as the case may be.

4.1.3. Customs and Import Incentives

Imported capital assets, construction materials, and components required to establish an approved project are subject to import duty at a low flat rate of 5% of the cost, insurance, and freight value.[35] Approved projects are eligible for deferred payment of the duty or payment by instalment.[36]

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[35] Article 23 in accordance with article 4 of law No. 186 of 1986,
[36] Ibid.,

4.2. Free Zones Incentives

Free zone areas are considered as an international market, this means that goods imported from there are subject to the general rules of import and calculation of custom duties.[37] As for the imports, which are composed of local and foreign components, the custom duties of the foreign component are calculated at the market's price.[38] The assigned amount of custom duties should not exceed that of the final imported product from outside the country. All the tools, machines, and transportation - except cars for personal use - required for the project are exempted from custom duties, sales tax, and other taxes and fees.

In the free zones foreign companies pay no income taxes[39]. However, these projects are subject to a one percent fee on goods entering or leaving the free zone, unless they do that on a transit-basis.[40] Exporting companies enjoy an additional incentive of the availability of the tax rebate and drawback schemes, whether foreign or domestic. It is important to mention that several studies[41] find that the pattern of financing from the parent company to the affiliate company depends on the tax rate in the host country.[42] In the case of high rates of corporate taxes, the parent company uses debt to finance its affiliate to increase the interest payment, and thus reduce the taxable income, while in the case of a low corporate tax rate, parent companies inject new capital into their affiliate. Many countries that give tax exemption incentives for a period of time have put limits on the interest payments that local affiliates pay to the parent company to prevent tax evasion after the end of the exemption period. In Egypt, however, no such measure is taken. Fiscal inducement incentives offered by Egypt are not related to any goal other than for investing in the free zones and in exports other than this no developmental goals or goals related to employment, or transfer of know-how, for example are realized as benefits from FDI.[43]

As for the warehousing projects, they are assigned a 1% annual fee of the value of the imported products. While production and assembling projects are assigned to 1% of the value of the exported product. Concerning the projects depending on local goods, are assigned a 1% annual fee of the total income. Performing any permanent private

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[37] Article 33 (a)
[38] Article 33 (b)
[39] Article 32
[40] Article 35 (b)
[41] See James R. Hines, and Roger Gordon, "International Taxation", NBER Working Paper no. 8854, National Bureau of Economic Research, Cambridge, (2000).
[42] Article 35 (a).
[43] Article 35 (c).

business in the free zone requires a license issued by the chairman of the board, and the fee is defined by the policy of the area: in which it does not exceed L.E. 500 per year.

4. Further Incentives

In addition to the above mention incentives under law 8/1997, Egypt offers FDI many other incentives, which can be listed as follows.

a) Under law 59 of 1979, which is concerned with the development of specified geographic regions in Egypt,[44] all companies whose activities are confined to those locations are to be granted various incentives which are similar to that offered by the Investment Law. Moreover, it is possible to combine the benefits of both laws, if the concerned project is established under the investment law and being located in that area, then the period of tax holiday will be 20 years. In addition, the import of necessary machinery and equipment is subject to a low flat rate of 5% of the value of their cost and shipment.

b) Law No. 186 of 1986[45] for regulating custom's exemption. This law aims at grouping all the customs exemptions stipulated in other laws and degrees according to a clear and definite criteria, without prejudice to the customs exemptions previously granted by international agreements, by a decision of the competent authorities in the Port Said free zone area, or by Article 4 of the Petroleum and Mining Agreement.

c) Law No. 11 of 1991, Sales Tax Law. This Law[46] has replaced the Consumption law No. 133 of 1981 and it was supposed to be enforced in three stages. The first stage of this law has already been implemented; the remaining two stages were discontinued because of their bad effects on existing and potential projects of foreign direct investment.

5. The Question of Double-Taxation

Developing countries recognise double taxation treaties as a form of incentive and consider them as part of their efforts to reform the tax systems, which include tax incentives, to attract foreign capital particularly. Thus, even in the absence of tax incentives, DTTs continue to be central in the effort to liberalise the operation of FDI.

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[44] Eighteen new cities were newly established such as: *New Ameiya City, Sadat City, 10th of Ramadan City, 6th of October City, El Obour, Borg el Arab, New Noubarey, Al Amal, Badr City and the new Valley.*

[45] This law was published in the Official Gazette on 21 August 1986, Issue No. 34.

[46] This law was published in the Official Gazette on 21 August 1991, Issue No. 18(a)

Double taxation treaties play an important role in allocating revenue, in case tax jurisdictions overlap.[47] The number of DTTs between developed and developing countries[48] is not as desired as a larger percent of them are between developing countries, still negotiating and concluding double taxation agreements this could be one of the best methods used to avoid such an overlap.[49]

The question of double taxation is of central importance for foreign investors. A normative regime provides tax relief "to alleviate the burden of double taxation" [50] and it also provides "a broad understanding of general international tax regime",[51] which is not confined to the issue of double taxation in the strict sense. For instance, there is no reference in the title of the OECD model convention to the issue of eliminating double taxation.

Any time the question of foreign investment taxation arises, it is important to make a distinction between economic double taxation and international double taxation.[52] The term "economic double taxation" is used to describe the burden, which takes place under the rules of a national law of a given country. While, international double taxation means that a taxpayer; an individual or a corporation, may be taxed under the system of two or more countries[53]. It is not necessary that the items subject to double taxation are identical.[54] However, international double taxation may be defined as "the imposition of comparable taxes in two (or more) states on the same taxpayer with respect to the same subject matter and for identical periods".[55]

Projects of foreign investment conducted in Egypt may be taxed in two locations. Such a matter arises from the conflict of the tax laws of more than one state, Egypt as a host state and the other country as the foreign investment's home state, which assert jurisdiction over the same capital or the same income.

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[47] Kibuta Ongwamuhan, "Perspectives on the proposed double taxation agreement between Papua New Guinea and Australia", 1 Revenue Law Journal, (1990), P. 48.
[48] Ibid., P. 90
[49] See UNCTAD, (1998), P. 3.
[50] A. Qurashi, "The Public International Law of Taxation: Text, Cases, and Material" (1994), P. 396.
[51] Ibid., P. 397.
[52] See A. H. Afifi, "The Principles of Taxation: General Theories", Dar Al -Nahda, Cairo, (1953), P. 45. (*Arabic*).
[53] In this study, term double taxation means international double taxation, unless it is indicated otherwise.
[54] Qurashi, P. 398.
[55] Both the United Nations Model Double Taxation Convention between Developed and Developing Countries (1980), UN Doc. ST/ESA/102. And the OECD Model Double Taxation Convention on Income and Capital (1977) agreed on a similar definition of double taxation. See Ibid., P. 1098.

4.3. Causes of International Double Taxation

As was mentioned earlier, the main reason for double taxation is the assertion of jurisdiction to tax the same item of income or capital in more than one country. The justification for such a criteria must be derived either from the residence of the recipient of the income or capital (residence taxation), or based on the source of the income or the capital (source taxation).

Income from foreign stocks is paid from the legal entity of one country to a resident of another country. This poses a conflict of jurisdiction between them. To avoid such conflict, many attempts have been made such as the attempt of the International Conference on Income Tax, which aimed at making it certain that tax is paid by the investors in at least one country. Since many investors are also taxed on income received in their countries of residence, the problem of double taxation may arise but it could be avoided through a network of international tax treaties.

The possibility of tax being imposed more than once on the same taxpayer depends on the criteria states use to specify their fiscal jurisdiction. Most states apply what is known as the "unlimited tax liability" which allows them to extend their jurisdiction to tax residents on their worldwide income.[56] However, some other countries, like the USA, apply the criteria of nationality, where citizens or nationals will be taxed on their worldwide income, even if they are residents or domiciled outside the USA.

4.4. Avoidance and Elimination of Double Taxation

Double taxation relief is available either as a unilateral act by the source states as ordinary credit methods[57] or as a multilateral agreement,[58] and more commonly as bilateral agreements on double taxation. Most of such bilateral agreements are based on the UN convention or OECD model convention.

What distinguishes the above mentioned two models from each other is the fact that the first one was founded to reflect the interest of the developed countries, which try hard to reflect the Convention provisions, in their double taxation agreements among

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[56] Resident statues are commonly understood to be for 6 months or more residencies, Article 4 of the Model Convention of the OECD.

[57] Credit for tax paid in the source country equal to the value it would charge if the profit were made within its territory. The USA and UK follow this trend. See Qurashi, P. 370.

[58] Multinational agreements of double taxation are few and mainly of regional nature i.e., the Andean Group Convention of Double Taxation of 1971, the OCAM General Fiscal Agreement Regarding Fiscal Cooperation of 1971 and the Nordic Tax Convention of 1983.

themselves and with developing countries. Meanwhile, the UN model convention is more in favour of the developing countries. This model influences developing countries' double taxation agreements with other countries, especially when it comes to standards, which determine the states' fiscal jurisdiction. Moreover, it is important to mention that such models are of a consultative role and have no obligatory nature. Moreover, these Model conventions are useful in the sense of setting an example on how to draft a double taxation agreement and in resolving the interpretation problems of the provisions, which is accompanied by a commentary.

Egypt has entered into a number of double taxation treaties[59] and has been in compliance with them. In addition, it has adopted a unilateral tax system and policies, which are mainly consistent with the general principles of international law and the practice of other states. It is important to make a distinction among contracts under concession agreements; contracts of projects located in new urban communities, and projects which were established under law 8/1997.

Under Egyptian Investment law, this issue may take two forms: first, double taxation relief where Foreign and Egyptian companies may receive credit for tax paid on an overseas income. There are two examples where this may arise: first, when a UK company operating abroad has to pay tax to the foreign government in respect of profits arising in that country. Second, when a UK Company is paying "withholding tax" to foreign government for dividends received from holdings in foreign companies. Third, through what is known as a tax credit system. Under this system, foreign investors are able to credit any taxes they paid for the host states against their home state.

Egypt has been following an internationally recognized pattern of standards aiming at eliminating the question of double taxation. Article 7 of the Egyptian- UK Agreement eliminates double taxation of UK nationals who are investing in Egypt. Similarly, the US-Pakistan Treaty of 1957[60] provided that any tax paid on income made in Pakistan was to be credited against USA tax. In the same way, Article XI (3)(h) of the Japan-India treaty of 1960[61] provided that "the scope of the benefits [designed to promote

[59] Such as: Austria, Finland, France, Germany, India, Iraq, Italy, Japan, Norway, Romania, Sudan, Sweden, the UK, and the USA. All signed treaties are in force.
[60] UNTS, 344, P. 3.
[61] UNTE, 384, P. 3.

economic development in India] accorded to the taxpayer by the measures effective on the date of signature of the present agreement is mot increased".

Double taxation treaties operate in two ways: First, tax exemption "in the capital exporting countries" of foreign income (Dividends, interests, and royalties) is granted. This means that foreign investment projects will be taxed at source-in the host state. In other words, the investor's home state grants him complete tax exemption. This has been accorded to many investors of different nationalities under the following conventions. Such agreements, clearly, approve the principle, which implies that income from foreign investment should only be taxed at source.

Most of Egypt's treaties are based on the criteria of "Practical Management" to determine its taxation jurisdiction, by which a company based in one country to be taxed in the other country must have "Permanent establishment" in that other country, as defined by the signed agreement. For example, the Egypt-UK treaty defines the term "Permanent Establishment" as "a fixed place of business in which the business of the enterprise is wholly or partly carried out".[62] A similar clause was included in many other treaties such as the Egyptian-French treaty,[63] and the Egyptian Canadian Treaty.[64]

Before concluding this section it is worth mentioning that the developing countries' weak position during the negotiation of DTTs made them doubtful of the fact that the benefits of the treaty will end on the side of the developed country.[65] This fear is understandable, if one considers some of the agreements already signed following the OECD model.[66] The issue of the "residence of a taxpayer" is a very important and sensitive issue for any double taxation agreement. Defining the residence of a tax determines the party who will have the right to in case double taxation takes place.[67] Most of the treaties between developed and developing countries give a primary right of taxation to the country in which the recipient of the foreign source income is a resident. This means that the power of taxation is the source country.[68]

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[62] Article one of the Treaty, was published in the official Gazette, No. 10, (1981).
[63] Article four of the treaty, was published in the official Gazette, No. 43, (1982).
[64] Was published in the official Gazette, No 48, (1984).
[65] Kibuta, PP. 55-58.
[66] The United Kingdom concluded Double Taxation Treaties with Zambia and Zimbabwe that are very restrictive on the tax scope of the source country. They adopt the narrow OECD definition on what constitute a permanent establishment and tax on interest and royalties is fixed to the maximum of 10% for the source country. See Ibid, P. 57.
[67] See Kibuta, P. 49.

The OECD model is not a good model for developing countries, keeping in mind that most investors will keep their permanent establishment and thus residence in the source countries. The OECD model definition of the residence of a taxpayer is narrow in favour of developed countries.[69] The treaties concluded between the United Kingdom and Zambia and Zimbabwe where the term "permanent establishment" was given a narrow description in favour of the UK, sets a good example. This treaty put both countries in an unfavourable position, as for benefiting from the income of the activities regulated by the treaty.[70]

Such practices made developing countries more violently opposed to DTTs based on the OECD Model. This is why the number of concluded double taxation agreements between developing and developed countries is small.[71] Accordingly, many developed countries began to realise that DTTs with developing countries constitute a problem, which require a different approach. The best evidence on this is the number of departures from the OECD Model as being unfavourable to developing countries. Logically, this should raise concerns within the OECD in some way.[72]

This discussion proves that DTTs are important for developing countries' efforts to attract FDI as they activate tax incentives offered to foreign investors. Without them, investors will pay tax, even if the host state exempts them. However, The problem is in negotiating and concluding such treaties, which will keep a balance between the interests of both parties.[73] Unless proper negotiating skills are mastered, which preserve the interests of both host states and foreign investors, many investors will continue to avoid these countries and the tax incentives offered will never achieve the desired role.

6. The Efficiency and Effectiveness of Tax Incentives

It is clear that Egyptian Investment law provide a single type of tax exemption, which is known as a tax holiday. Accordingly eligible companies do not pay tax during a

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[68] Ibid.

[69] Article 5(2) of the OECD Model of Double Taxation Agreements a permanent establishment refers to a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well other place for extraction of natural resources. It also includes a building site and construction or installation project where the activity lasts for more than 12 months. It is this definition, which has been used by some developed countries to get more benefits in DTT agreements with developing countries.

[70] Kibuta, P. 57.

[71] The negotiations for double taxation Treaty between Tanzania and U.K started in February 1977 and are still not completed. See Kibuta, (1991), P. 56.

[72] Canada and Australia expressed reservations on various articles of the OECD Model, Articles 5, 8, 10, 11 and 12. See Kibuta, P. 56.

[73] See DTTs concluded between Zimbabwe and Zambia. See Kibuta, P. 57

period of time specified by the investment law. Such a type of tax incentives, which is well known in the developing countries, embodies the following defects:

- The duration of this type of tax holiday is based on geographical structure and on the investment activities, regardless of the size of the capital involved.
- Limiting the duration of such a tax holiday within a number of years represents a clear weakness of the incentive structure, especially when some productive and important foreign projects expect little profit during their early years.
- A tax holiday within this structure may lavish some of the host state's income, especially when it is offered to projects of a consumption nature, which are able to gain a high rate of profit as soon as they start working.
- This tax holiday structure may have damaging effects on the economic development program of the host state as a whole since it will direct foreign investors towards projects which enable them to make quick profits early as they start their projects.

As a result, such a structure of tax incentives may succeed only in attracting foreign projects aiming at fast and quick profits with minimal risks, and clearly willing to terminate such projects at the end of the tax holiday period. In other words, such tax incentives systems will deprive the Host State from a proportional part of its income and will have a major influence in creating a consuming society in a way, which does not help in achieving the economic development of their country. Therefore, it is important for developing countries, such as Egypt, to review their tax incentives system in order to ensure the possibility of using them within the desired aims of introducing them.

When it comes to the question of foreign investment incentives, it is important that host states bring their incentives measures to an internationally recognised level in a way that does not confront their national interests. It is important that host states are aware that only introducing incentives is not enough to bridge the gap between the potentials of such incentives and their actual achievements. The prospective host state's structure of taxation is a major concern of any enterprise considering a foreign investment.

7. Conclusions

It appears that Egypt, like many other countries, has put much emphasis on investment incentives programs.

The host state's investment incentives are a major concern of any foreign investor considering coming to them. Such incentives aim at providing investors with additional motives in particular areas or directions. Considering the level of attention given, especially by developing countries, to the issue of investment incentives raises the question about their effectiveness and whether they are achieving their intended aims or not?

Chapter Seven:

The Settlement of Foreign Direct Investments Disputes

Chapter Sven Contents:

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The Settlement of Foreign Direct Investments Disputes

1. Introduction

Foreign investors have to deal with a number of different legislation and agreements during their transitional business, which are regulated by associated rules of municipal laws, investment contracts, international agreements, and other similar means. In spite of the parties' mutual intentions to negotiate every aspect of the proposed investment project and to draw up agreeable terms of their investment contract, the possibility of dispute arises from the practical application of the contracts or from the interpretation of their rights and duties, this can never be eliminated. Consequently, any regulating rules of foreign investments are not complete unless they observe a proper mechanism for dispute settlement.

In this context, states usually take the initiative to provide foreign investors with some constitutional guarantees, as they are more stable than ordinary laws and they needs much more complicate processes to be modified. This means that it is a more preferred guarantee for the investors. In addition, most states offer additional means of dispute settlement that are more favorable by foreign investors. Such means can be described as either national or international methods of dispute settlement.

The states' attitude towards the question of dispute settlement is reflected through their regulatory instruments, which control foreign investment within their territories and have been varied from one case to another. In this respect, these attitudes may be classified into three main categories: Firstly; where investment disputes are referred to either local courts[1] or to a special board.[2] Secondly, which the majority of the investment codes adopt, provides one or more types of Arbitration without touching the right of the parties to refer their dispute to national courts.[3] Thirdly, leaving the

[1]See, as example, the Philippines' Foreign Investment Act of 1991, Law on Foreign Investment in the Lao People's Democratic Republic, of 1989, and many of Latin American States that adopted the Calvo Clause that recognizes only the jurisdiction of their national courts.

[2]See, as example, the Russian Special Authority for the Settlement of Commercial Disputes with Foreign Parties, and the American Committee for the Settlement of Foreign Disputes; A. M. P. Al Far, "Legal Aspects of Arab and Foreign Investment Law in Egypt", (1974), P.186. [Arabic].

[3]See, as example, the Cameroon's Investment Code of 8 November 1990, Angola's Foreign Investment Act of 16 June 1988, and Egypt's Investment Law No. 7 of 1997.

parties' choices open to make special arrangements according to their own terms in case they desire to recourse to arbitration.[4]

Generally, the developed country posture concerning this matter has been more orthodox than that of the developing countries, as most of them have included in their investment laws and contract a penal provision.[5] However, most of them share with the developing countries the possibility of submitting their disputes with private foreign investors to national courts as well as sustaining the choice of arbitration,[6] emphasizing that in some industrial states, referring an investment dispute to arbitration would require much more complicated procedures than that of the developing countries.[7] In any the case, analyzing the majority of the world investment codes may prove that in case of "Disputes between the government and foreign investors [it] will be settled by local courts. [But] The parties may however agree to have recourse instead to international or domestic conciliation or arbitration".[8]

Concerning Egyptian laws, Article 7 Of Law No 8 of 1997, refers investment disputes between the Egyptian government and foreign investors to a "menu" of different types of national and international arbitration, alongside preserving the parties' right to agree with each other on whatever means of settlement they desire to use. Then, in case of dispute, parties should rely on what has been mentioned in their agreement, which should specific to whom the dispute should go. Without such a thing, the disputes will be resolved according to the general rules and principle of Egyptian national law. Furthermore, Egypt is a contracting party to many multilateral international agreements that are concerned with the settlement of foreign investment disputes, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958, the New York convention, the Washington Convention and some other treaties and conventions related to this matter.

The Egyptian Investment Law No. 8 of 1997 was promulgated on May 11, 1997, and published in the Official Gazette No. 19 of May 1997. Its Executive Regulations were issued on 9 August 1997 by a Prime Ministerial Decree No. 2108 /1997. According to

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[4]See the investment codes of the following countries: Sudan, Bangladesh, Korea, Argentina, and Chile.

[5] Antonio R. Parra, "Principles Governing Foreign Investment, as Reflected in National Investment Codes", 7 *ICSID Review FILJ*, (1992), P. 447.

[6]Ibid. such as investment laws of Australia, Canada, Japan and the U. K.

[7]See the French, American and Spanish investment laws.

[8]Parra, footnote 5, P. 447.

Article 8 of this Law, the implementations of the Investment Law prescribe two requirements to be fulfilled: Firstly, the Dispute must arise out of an investment act which obtains what distinguishes it from other ordinary commercial disputes. More over, investment act should be within the meaning of Articles 1 & 2 of the Investment Law.

Secondly, such an investment dispute must be "related to the implementation of the provisions of this law". This means that any disputes concerning the interpretation, amendment, and termination of provisions of the Investment law are out of the jurisdiction of bodies to be established under Article 55 of this Law. Here it is worth mentioning that it is difficult to draw a line between "implementing" the Law and "interpreting" it since they both are closely related to each other. Moreover, the Investment Law excludes the jurisdiction of bodies to be established pursuant to Article 55 from all investment disputes which are not related to the implementation of "This Law", in other words, all foreign investment disputes related to other laws are excluded. Finally, the Investment Law did not mention any requirements concerning the parties' nationality or their legal status.

Article seven of law Number 8 on Investment Guarantees and Incentives mentions:

> *"Settling the investment disputes in connection with the implementation of the provisions of this law may be carried out in the manner to be agreed upon with the investor".*
> *Agreement may be reached between the concerned parties on settling their disputes within the context of the conventions in force between the Arab Republic of Egypt and the country of the investor, or within the context of the Convention on the Settlement of Disputes Between States and Nationals of other States, which was joined by the Arab Republic of Egypt by virtue of Law No. 90 of the year 1971, according to the conditions and terms of, and in the cases to which these agreements apply, or according to the provisions of the Law on arbitration in Civil and Mercantile Matters as promulgated by Law No. 27 of the year 1994, Agreement may also be reached on settling the aforementioned disputes and litigation by means of arbitration at Cairo Regional Centre for International Commercial Arbitration".*

Under this Article, the new Investment Law recognises five possible means of dispute settlement:

- According to the preference of the parties; or
- According to an agreement between Egypt and the investor's home state; or
- According to the framework of the ICSID Convention; or

- According to the Egyptian Arbitration Law No 27 of 1994; or
- According to arbitration rules before the Regional Centre for International Commercial Arbitration in Cairo.

Even though Article 7 of the new law does not reconfirm the parties' right to resort to Egyptian national courts as Article 55 of the Law No 230/1989 did,[9] jurisdiction of the Egyptian national courts over the investment dispute is out of question. As a result, settlement of investment disputes should fall within the jurisdiction of the national courts, at least as a first step, and resorting to the other mentioned methods should be understood as additional options.[10]

This chapter seeks to examine the legislative and practical aspects of Egyptian conduct concerning the settlement of their disputes with foreign investors and the compatibility of such practices with international rules and standards. This will be done within two scopes: firstly, the litigation scope which deals with the rule of local remedies. Secondly, this chapter will look at the dispute settlement under the auspices of Article 7 of Law No 8 of 1997.

2. Adjudication - The Rule of Local Remedies

In case it is a question of sovereignty, most legal systems come to the conclusion that "the king, while imposing his peace on the community, is above suit himself".[11] Until recently, it was, somehow, logical to say that it is not favourable to judge the sovereign by his minion. In principle, it is a matter of grace for the state not to be subject to courts. Undoubtedly, this understanding will have no positive implication on the efforts to attract foreign investors. In many instances, the gap between states' sovereignty and subjection to courts has been narrowed through tailoring a separate court-like hierarchy body called the "Conseil d' e'tat" in France or "Court of Claims" in the USA.

Foreign investments disputes occur, especially, in the case of "act of state" against properties owned by a national of other state either in breach of contract, which was signed by either of them or as a result of misbehaviour by the foreign investor. In the

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[9]Investment Law No 230/1989, art. 55 provide: "Without prejudice to the right to resort to Egyptian courts". Law No. 230 of 1989 was promulgated on 20 July 1989, and published in the Official Gazette No. 29 of July 1989. Its Executive Regulations were issued on December 5, 1989 by a prime ministerial Decree No. 1531.

[10]Bernard Marchais, "The New Investment Law of the Arab Republic of Egypt", *4 ICSID Review* (1989), P. 279.

case of Egypt, many questions may arise such as: What instrument has the Egyptian legislator provided for foreign investors to settle their disputes? Where do they start to settle such a dispute? How compatible are such instruments with the rules of international law? Finally, are they in harmony with Egyptian national laws and demands?

2.1. Egyptian Municipal Facilities

First, it is worth mentioning that the judicial and dispute settlement mechanism in Egypt is guaranteed by a group of constitutional rules, as mentioned in a number of Articles[12] of the Egyptian Constitution. For example, Article 165 mentions that *"Judicial Authority shall be independent...[and] the court shall issue their judgment in accordance with the law"*. Article 166 adds that, *"Judges shall be independent, subject to no other authority but the law. No authority may intervene in court cases or in the affairs of justice"*.

Prior to law No. 43 of 1974, the Egyptian Government used to make a distinction between investment's disputes with the government, which were supposed to be settled by competent Egyptian courts of law and investment disputes with state owned co-operations that were supposed to be settled by means of arbitration. In an Agreement between the United Arab Republic and Pan America a distinction was drawn between disputes occurring with the government and others occurring with the Egyptian General Petroleum Corporation. Such a distinction has affected the legal method of dispute settlement.[13]

The Kingdom of Saudi Arabia adopted the above-mentioned tendency in 1963 when the Council of Ministers restricted arbitration in any future disputes with foreign investors except in exceptional cases.[14] Later on, the decision of the Saudi Council of Ministers found ground in an agreement with Auxirap on the 4th of April 1965. This agreement was concluded in two stages: the first was completed with the Saudi Government and the second with the General Petroleum and Minimal Organisation

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[11] Detlev F. Vagts, "Dispute Resolution Mechanisms", *203 Recuil De Cours*, (1987), P. 58.

[12] Under the amendment of the Egyptian Constitution of 11 September 1971, Article 173 replaced Article 165.

[13] See, as example, the agreement between the United Arab Republic and Pan American, in 1963-1964, by which the distinction was made and affected the legal methods to settle any foreseen problems. See H. Cattan, "Law of Oil Concessions in the Middle East and North Africa", (1967), P. 187.

[14] Petroleum Legislation, Middle East, Supplement No. V, E-1.

(Petromine) to give effect to the first agreement. Examining the Articles of both Agreements that dealt with dispute settlement of any problems between the parties of the agreements shows that according to the first agreement the dispute was referred to a national forum.[15] Further more, the same Article provided for the exceptional cases in the following terms *"If and when an international court is created for the settlement of disputes, then the parties shall examine together the possibility of substituting that court for the Board of Concession Appeals"*. Meanwhile the second agreement with Petromine proposed arbitration for the settlement of disputes between the parties to the Agreement.[16] On the other hand, disputes of foreign investment used to be referred to national tribunals or courts.[17]

It is true that article 7 of law No 8 provided a number of alternative dispute mechanisms, but Egypt's national courts may still have a jurisdiction in any of the following cases:

- In case foreign investors agreed to refer their dispute to national courts, which is unlikely; or
- In case the dispute is not related to the implementation of the investment law but it is linked to some other obligations that are regulated by another legislation; or
- In case it is impossible to refer the dispute to any of the exceptions listed by Article 7, for reasons such as an agreement to wave the possibility of arbitration, or if the investor's national state is not a contracting party to the Washington Agreement, or if the investor does not recognise the jurisdiction of the ICSID Centre for any reason.

As already mentioned, the Egyptian Judicial System is subdivided into two main types of courts: Administrative courts[18] and judicial courts, the distinction originally arose out of the principle of the separation of powers. Thus, the administrative courts are competent to hear cases relating to administrative public activities, such as contractual disputes involving public contracts or disputes involving taxes. Meanwhile, the

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15 Article 63 of Auxirap Agreement of 1965 said: "If any doubt, difference or dispute shall arise at any time between the parties concerning the agreement or their rights and liabilities there under, it shall, failing any agreement to settle it by any other method, be referred to a committee of two experts, one chosen by the government and the other chosen the concessionaire. If no agreement is reached by the committee of experts, the matter shall be referred to the Board of Concession Appeals envisaged by Article 50 of the Saudi Arabian Mining Code", quoted by Cattan, footnote 13, P. 188.

16 In case of dispute, the Agreement says "[I]t shall, failing any agreement to settle it by any other method and failing particularly an agreement to refer it to a court of law, be referred to three arbitrators."

17 Before The Evian Agreement of March 19, 1962. Article 41 of the Sahara Petroleum Code had referred the settlement of concessionaire disputes by decision of the French Conseil d' e'tat. See, Cattan, P. 189.

18 Article 172 of the Constitution states that "The Council of State shall be independent judicial organization competent to take decisions in administrative disputes and disciplinary cases".

judicial courts deal with cases against private person or entities. In addition, a number of judicial courts are competent to hear commercial and civil cases, according to the CCCP and in certain instances, by additional rules specific to certain types of courts. Accordingly, disputes should be, mainly, settled by civil courts with exception of administrative disputes to be brought before the Council of State.

If the dispute in question is related to a constitutional right it should be the "subject matter of constitutional suit" and be brought before the Supreme Court,[19] "*whose function is to undertake judicial control concerning the constitutionality of the laws and regulations*",[20] including Presidential Decrees and ratified international agreements. However, this judicial control faces some restrictions such as: the inability of the Court to review all Presidential Decrees, which were issued under a state of emergency. Law No.48 of 1979 governs the Supreme Court. On the other hand, if the dispute is not about measures or actions that violate a constitutional right, it will be brought before the *Shoura Council.*[21] Finally, if the dispute does not fit any of the first two categories it will be considered as an ordinary commercial dispute and must be brought before the ordinary court system.

2.1.1. International Status

It is acknowledged that rules of local remedies are "relevant to the settlement of certain international disputes involving states".[22] Such a rule " is accepted as a customary rule of international law and needs no proof today".[23] The rule of local remedies has been "affirmed in diplomatic practice, international litigation both before the ICJ and other Arbitral tribunals".[24] For example, in the *Interhandel Case*[25] the court mentioned categorically "the rule of local remedies must be exhausted before international proceedings may be instituted and is a well-established rule of customary international law". Moreover, in the *Finnish Ships Arbitration*[26] the rule of local remedies was clearly recognised and accepted.

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[19] Article 58 of the Constitutions.

[20] Article 175 of the Egyptian Constitution established this court.

[21] Articles 194-205 of the Constitution.

[22] C.F. Amerasinghe, "Local Remedies in International Law", (1990), P. 1.

[23] Ibid.

[24] Ibid.

[25] 1959, ICJ Reports, P. 27.

[26] See the *Finnish Ships Arbitration case*, 1934, 3 UNRIAA, P. 1479.

In principle, municipal law may regulate state contracts. Such a principle has been recognised by the United Nations General Assembly, international jurisprudence, and judicial authorities. On the 14th of December 1962, the General Assembly of the United Nations promulgated decision No. 1803[27] concerning permanent sovereignty over natural resources. Later on, another decision was adopted treating the same subject and emphasising the fact that the laws of the lands should regulate this matter.[28] The above-mentioned tendency has been approved by many other instruments, such as some decisions of the PCIJ,[29] the opinions of international judges,[30] state contracts[31] and finally by arbitration.[32]

Nonetheless, Local remedies are still regarded as a very applicable to the settlement of international disputes involving foreigners and *"can only be eluded by a deliberate act of state involved in a dispute"*.[33] but this does not detract from the quality of rule as a customary rule of law, especially in the field of diplomatic protection. Accordingly, it is important to make the rule well defined and reasonably developed even for the purpose of the law relating to diplomatic intervention.

2.1.2. Waiver of the Rule of Local Remedies

The need for the exclusion of the rule of local remedies can be argued on the basis that the parties do not enjoy an equal status before national courts.[34] In one case of a dispute with a foreign investor, in principle, the later is supposed to exhaust local remedies. This produces many anxieties for foreign investors such as: Firstly, the consideration of the host state as a sovereign entity, while foreign investors are considered as non-sovereign persons or corporations. Furthermore, in cases like the Egyptian case, the state enjoys immunities not only before foreign courts but also even

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27 G. A. Res. 1803 (XY 11), 14 Dec. 1962.

28 G. A. Res. 2158 (XX. 1), 25 Nov. 1966.

29 *The lighthouse case*, PCIJ, ser A/B No. 62 p. 20 (1934); and the *Serbian loans case*, PCIJ, ser. a, No. 20/21, (1929), PP. 3-41.

30 The opinion of judges Badawi and Lauterpacht, *the Norwegian loans*, ICJ, Report, No. 8 P. 28.

31 Auricle 33 of the agreement between the Kingdom of Saudi Arabia and Getti Corporation said ": the Saudi municipal laws should govern all activities of the corporation under this Agreement".

32 *In Aramco case* the arbitration award referred the dispute to be settled according the rues of Saudi laws, for the arbitration agreement see, ICJ, Pleadings, PP. 90-91 and for the award see International La w Reports, 27, (1973), P. 162.

33 Amerasinghe, footnote 22, P 1.

34 E.I. Nwogugu, "The Legal Problems of Foreign Investment in Development Countries", (1965), P. 232.

before their own national courts.[35] Secondly, the influence of the nationalistic political atmosphere on national judges pushes them to be biased.[36] Finally, the national law of the host state on dispute resolution may not be able to provide the minimum standards required internationally, if they exist at all.[37]

As a result of these factors which might affect the investor's location decision, developing countries tend to provide foreign investors with suitable international instruments to settle any dispute that may arise, along side local remedies, but not in a way which implies that the host state, as a sovereign entity, is not able or qualified to provide them with a just solutions.[38]

Accordingly, it could be said that the application of the rule of local remedies is based largely on the principles of good faith and the consent of the parties involved. This may, however, result in the exclusion of the rule.[39] Internationally, there has been a growing tendency to exclude this rule by agreement between the concerned parties, as is demonstrated by the ICSID Convention,[40] and by the Claims Settlement Declaration by Algeria of 1981 between Iran and the USA.[41]

The rule of local remedies may be waived expressly when a state agrees not to apply its local remedies to a particular dispute.[42] Such waivers may be included in *"both multilateral treaties and bilateral treaties and do not raise any legal problems"*.[43] On the other hand, in case a dispute between a state and individual is submitted to

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35 Nwogugu, footnote 34, P. 230.

36 Oppenheim, "International Law", 8th edition, Vol. 1, P. 271.

37 Oppenheim, footnote 35, P. 682.

38 Young, P. 362.

39 G. A. RES. 1803 14 DEC. 1962, " It is possible to settle down a dispute by an agreement between the concerned parties through international arbitration or international courts". Nwogugu, footnote 34, P. 232.

40 Article 26 of the Convention.

41 Article II.1: 1 IRAN-US CTR, P.9

42 See G. Bushnell, "The Development of Foreign Investment Law in Egypt and Its Effect on Private Foreign Investment", *10 Georgia Journal of International and Comparative Law*, (1980), P. 313. There he discuses the tend of industrial states to go for other methods than the local remedies and he mentioned that according to the General Counsel of an American corporation "it is preferred to include an arbitration clause in the joint venture agreement and try to keep clear of the Egypt's courts"

43 See, Feller, "the Mexican Claims Commissions 1923-1934", (1935), P. 34. As quoted by Amerasinghe, "local Remedies", P. 251

international arbitration, *"There is no presumption ... that the rule of local remedies does not apply, unless it is expressly invoked or preserved".*[44]

2.2. Foreign Municipal Courts

It is understandable that foreign investors try to take their disputes to a venue outside the territory of the host state. In principle, foreign investors always have the possibility, if the law permits, to sue the host state before foreign courts, including their own.[45] However, this matter depends on the theory of "sovereign immunity", which is based on a territorial conception of state sovereignty and jurisdiction and has been used in the context of expropriation of foreign owned properties, allegedly, in violation of international law. This implies that "municipal courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories"[46]

Concerning the theory of sovereign immunity, it is considered as a complicated question since it is located on the borderline between law and politics, between national law and international law, and between private and public international law. However, the legitimacy of this principle is based on the principle of *Jus Gentium*, which categorises it alongside with other principles such as the principles of sovereignty and independence, and based on the rule of *"par in parem protestatem non habet jurisdictionem"* which implies that sovereign state cannot be subject to the jurisdiction of foreign courts.[47]

In the USA, the "Tate Letter" of 1952[48] may be considered as an initial step, which was followed by many procedures for handling sovereign immunity claims of foreign states. The supreme Court of Pennsylvanian recognised the principle of sovereign immunity in the *Chemical Natural Resources V. the Republic of Venezuela Case* of 1966, and mentioned that "A foreign sovereign is immune to suit, without its consent, in the courts of the United States".[49] Furthermore, many bilateral treaties of friendship,

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44 Ibid., P. 255. See Freemann for views supporting this trend, "The International Responsibility of States for Denial of Justice", (1938) P. 414, and for views objecting this view see, Schwebel and Wetter, "Arbitration and the exhaustion of Local Remedies", 60 AJIL, (1966) P. 484.

45 Nwogugu, footnote 34, P. 232; Cattan, footnote 13, P. 11; Oppenheim, note 35. P. 35.

46 I. Brownlie, "Principles of Public International Law", Fourth Ed., (1990), P. 507.

47 Ibid.

48 Department of State Bulletin, Vol. 26, (1952), P. 984.

49 Atlantic Reporter, Vol. 215, (1966), P. 873.

Commerce, and navigation treaties have supported this trend.[50] In the *Underhill V. Hernandez* Case (1897) the Supreme Court mentioned, "*The courts in one country will not sit in judgment on the acts of another done within its territory*".[51]

In the *Sabbatino Case*,[52] which was brought in the US as a result of the expropriation of American owned property by the Cuban government in the early 1960's, the District Court granted a judgment against the plaintiff, saying that an "*act of state doctrine did not apply as the expropriation violated international law in that it had not been motivated by public purpose, and had failed to provide for adequate compensation*". This decision was upheld on appeal.

The supreme Court of Appeal reversed the Judgment and considered that "both the national interest and progress towards the goal of establishing the rule of law among nations are best served by maintaining the "act of state doctrine" in this realm of its application"[53] and added that the taking of property by a foreign sovereign government within its own territory will not be questioned judicially, even "if such an act violates customary international law".[54] This decision was widely questioned by many academics and politicians in the U.S. and resulted in congressional intervention to overrule the Supreme Court decision, through what is known as the Hickenlooper Amendment to the United States Foreign Assistance Act of 1965. [55]

The implications of *the Sabbatino Case* have affected the duty of the American courts to apply the rules of international law, since they feel that they are not free to judge a foreign state's acts within its territories according to the principles of international law unless they have been given the consent of state Department. Moreover, the application of the theory cannot be "predicted in precision" and is based on more than one rudiment such as the nature of the act in question, the right sought to be protected

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50 See the Treaty between the USA and Italy of 1948 in Treaties and Other International Acts Series, No. 1965, Par. 6.

51 *Underhill V. Hernandez*, U. S. Supreme Court Reports 168, (1897), P. 250.

52 *Banco National de Cuba V. Sabbatino*, U. S. Supreme Court Reports 376, (1964), P. 398.

53 P. 437.

54 P.428.

55 22 U.S.C., 2370 (e) (2) (Supp. 1966). This amendment forbids all American courts to determine any case on the grounds of the federal 'act of state' when the act of state violates international law, unless the president determines that the country's foreign interests require the application of the theory.

and may be the nationality of the claimant.[56] However, "the general tendency in recent years is towards restricting the scope of the doctrine".[57]

Although there is an agreement, in principle, about the existence of the theory, states' practices vary from one state to another about its extent. On one hand, trends have emerged in the direction of absolute immunity; this classical theory dictates that foreign states cannot be subject to national courts of another country even when "it engages in commercial activities".[58] On the other hand, the idea of restricted immunity has emerged, where a distinction has been made between the public acts (*jure impreii*) and commercial acts (*jure gestionis*) of states.

The theory of an absolute immunity found ground in English and American case law as early as 1920 when an English court considered that the public property of a foreign state must be destined for public use[59]. Later, in the *Port Alexandria Case*, the same court of Appeal granted immunity to a state-owned ship used in a trading operation.[60] In the United States, the leading case that established absolute immunity was the award of the Supreme Court in the *Pesaro Case* of 1926 about an Italian state - owned ship, which was used, in trading activities.[61] In France, the Court de Cassation has followed the same trend through settling many cases, which are related to the question of sovereign immunity, such as the *Moroccan Loans*,[62] in favour of absolute immunity.

To the contrary many other states have denied a foreign state's immunity in commercial activities. This was clear in the practice of the Court of Commerce at Ostend. In 1878, the court rejected foreign states' immunity on the ground that states contracts with foreign individuals should be considered as a commercial transaction.[63] Meanwhile, in the Belgium, the Court of Appeal of Brussels rejected any jurisdiction over foreign states' acts in practice of their Emporium.[64]

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56 James N. Hyde, "The Act of State Doctrine", *53 AJIL*, (1959), P. 635.

57 El Sheik, "The Legal Regime of Foreign Investment in the Sudan and Saudi Arabia", P. 293.

58 Nwogugu, footnote 34, P. 232

59 The Parliament Belge cited by G.M. Badr, "State Immunity", The Hague, (1984) P. 34.

60 Ibid.

61 Among many reasons for denying immunity in this case, judge Julian Mack says that not doing so might drive shippers to hesitate "to trade with government ships" [1926] 271 US. 562.

62 1934, Sirey, 1935 I 103.

63 Pasicrisie 1889 III 62.

The first step in the direction of restricting state sovereign immunity started, practically, with the Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State Owned Vessels of 1926.[65] The main aim of the Convention was "to assimilate the position of state-owned or operated merchant ships to that of privately owned or operated merchant ships as regards immunities"[66]. More recently, practices of courts in many countries[67] has been directed towards restricting the theory of state immunity on the grounds of making a distinction between the sovereign and commercial acts of states.

Characterization

In Europe, there is an agreement about the Characterisation of activities carried out by agencies of sovereign entity, where "the commercial Characterisation should prevail"[68] in a way, which "denies immunity to entities other than a foreign sovereign".[69] In *Sapphire International Petroleum LTD v. National Iranian Oil Co.* (NIOC) case, the Iranian Company pleaded immunity from both suit and execution against an award in favour of the Sapphire Company. The plea was successful in the first instance, but not on appeal. Similarly, the Germany Federal Constitutional Court in *Cabolent V. NIOC Case*[70] ordered the restraint of the NIOC's property in response to petitions by a group of British and American companies that resulted in seizing its money from accounts maintained in German banks under the company name.

Later, the company protested against the court's decision on the basis that the money seized was an "object attached to serving sovereign purposes and thus was not subject to action by German courts". And they added that "Under Iranian law, the proceeds from the sale of oil and oil products are to transferred to the main state treasury with the central bank of Iran". On 25th of June 1980, the court rejected NIOC claims as being "irrelevant" and concluded that "NIOC could not plead immunity" on the basis that the company is not part of the Iranian state [it enjoys a separate Judicial

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[64]Ibid., 1891 II 419.

[65] For the text, see Nagendra Singh, "International Convention of the Merchant Shipping", London, Steven's and Sons, (1973), PP. 1433-1438.

[66] Badr, P.42.

[67] See, United State: Foreign Sovereign Immunities Act of 1976, ILM (1976), P. 1388, Australia: Foreign Sovereign Immunities Act 1985, ILM (1986), P. 715, United Kingdom: State immunity Act 1978, ILM (1978), P. 1123.

[68]G.R. Delaume, "Economic Development and Sovereign Immunity", *79 AJIL*, (1985), P. 321.

[69] Delaume, footnote 68.

[70] ILM 152, (1970).

existence]" and " it is structured according to private law and it conducts its business affairs according to commercial principles", so both parties enjoyed "equal Footing". Here it is worth mentioning that the German court acted in accordance with the principle of La lex fori that provides that a proper Characterisation should be made according to German law, regardless of the Iranian classification.

In American courts, the concept of sovereign immunity has been understood in a wider sense, as was expressed in the International Association of Machinist and Aerospace Workers (IAM) v. Organisation of Petroleum Exporting Countries (OPEC).[71] In this case the IAM brought an action against OPEC seeking financial compensation and injunctive relief because OPEC's "price-setting activities violated the US anti-trust law and were the cause of [a] burden on the American public".[72]

The District Court dismissed the case on the basis of lack of jurisdiction. The Court of Appeal affirmed the decision and considered that OPEC's activities as "the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resources- to wit, crude oil- from its territory", and that "IAM had no valid anti-trust claim". Therefore, it was concluded that national courts should not enter into a delicate area of foreign policies, and what OPEC had done should be considered as an act of state and closely linked to the issue of permanent sovereignty over natural resources, as it was meant by the resolutions of the UN General Assembly Resolutions.[73]

In the field of foreign investment, the question of Characterisation takes another dimension, especially when the sovereign does not do the activity itself. In *Gibbons V. Udaras Na Gaeltachta*,[74] New York district Court considered that the activities of the Industrial Development Authority of Ireland, served a purpose integral to the Irish government's plan, "*are by nature no different at all from the promotional activities engaged by a private public relation firm*". In other words, according to the meaning of the US Foreign Sovereign Immunities Act 2[75] the court considered the defendant's activities as commercial activities and that judicial immunity should not be taken into account.[76]

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[71]477 Federal Reporter Supplements 553 (C. D. Cal. 1979).

[72]1355 federal report vol. 649 F 2nd, (1981).

[73] GA. Res. 1803, 3821. 3201, 3171 and 3016. 1361 federal report vol. 649 F 2nd 1981.

[74]549 F. Supp. 1094 (S.D.N.Y. 1980).

[75]28, USA 1603 (e), 1605 (a) (2,3), P. 1097.

[76]Federal Supplement, vol. 549, 1983, the United State District Court, S.D. New York

To conclude, it is agreed that absolute immunity is not workable in contemporary times, and it is accepted by most states that sovereign immunity should be restricted. While this Characterisation is based on a distinction between two types as "sovereign or public acts (*Jure Imperii*) of a state, and "Private acts (Jure Gestionis),[77] a court may take into account other standards to reject or accept jurisdiction over an act which was done by a foreign state as "the enjoyment of independent legal existence".[78]

Accordingly, it is important to mention that only acts of a public nature can be accepted as an immune plea against the jurisdiction of a foreign court. Though, the remaining question that is central to this issue will be on what grounds should this Characterisation be drawn.[79] It is clear that this question faces two barriers. The first obvious one is that there is no one standard to make such a Characterisation. The second bar is that many jurisdiction characterizations are done according to *Lex Fori* in the absence of unified international rules. Concerning this matter, Dr. Badr notes that the methods of Characterisation must use elements inherent in the act it self.[80] Furthermore, he proposed that a public act of state "is always a unilateral exercise of authority over parties within the state's own territorial jurisdiction", and a private act of state involves a "bilateral relationship on a footing of equality between the state and a party or parties not within the state's own jurisdiction".[81]

Finally, contemporary attitudes towards the question of state immunity may differ, theoretically, from one state to another, but in practice all states are bound, at least, with the issue of reciprocal treatment among states, and by the fact that private acts of state can no longer be given the status of public acts, and that the public acts of states can be within the jurisdiction of foreign courts. As a result, many countries have issued special legislation to handle the question of state immunity before their own national courts,[82] in addition to their efforts to create an international mechanism to regulate the standard of a state's immunities and to unify their rules.[83]

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[77]Marchais, P. 103.

[78]See *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* (NIOC) case, ILM 152 (1970)

[79]Bishop, 47 AJIL, (1953), P. 103.

[80] Marchais, P. 65.

[81] Ibid.

[82]Such as the American Foreign Sovereignty Immunities Act of 1976, ILM (1976), P. 1388. The Australian Foreign Sovereignty Immunities Act of 1985. ILM (1986), P. 715.

[83]The European Convention on State Immunity of 1972, AJIL, 1972, P. 925. and UN Doc. A/41/10 that approved Article 19 of the European Convention.

3. Settlement Under Law Number 8 of 1997

Article 7 of law 8/1997 referred the settlement of investment disputes related to the implementation of this law to any of the following five choices[84]: i) an agreement with the investor; or ii) an agreement between Egypt and the investor's home state; or iii) in the context of the ICSID agreement; or iv) according the rules of the Arbitration Law No 27 of 1994; or v) at the Cairo Regional Centre for International Commercial Arbitration.

Therefore, there are two requirements to be met: a) the disputes must be an investment dispute as it is listed by Article 1 of the same law and explained by article 1 of the Executive Regulation No. 2108/1997[85] in order to distinguish them from ordinary commercial activities. b) The dispute must be related to the implementation of the Investment law. However, it is difficult to make a clear distinction between disputes related to the implementation of this law from those that are related to its interpretation. Then, disputes that are not related to the provisions of this law, such as those, which are of a political nature, or those which are concerned with other laws regulating foreign investment, are not within the domain of Article 7 and are not within the jurisdiction of bodies to be established pursuant to this law.

Facilities of Investment Dispute Settlement

Outside the sphere of local remedies, article 7 provides foreign investors with many facilities to specify a venue to settle their disputes with the Egyptian Government, such as: First, an agreement with the investor, which may specify one or more peaceful means of dispute settlement from any available domestic and international methods. Second, is an agreement between Egypt and the investor's state? This provides foreign investors with another method to settle their disputes with Egypt. For this purpose many agreements have been concluded between Egypt and other states all of which included a clause for dispute settlement. Some of them refer disputes to be settled under the auspices of the ICSID. According to the provisions of the Egyptian Constitution, once such agreements are concluded and entered into force, they will have the force of law with a binding power like any domestic laws with the ability to change and amend previous laws and regulations.

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[84] Article 7 of law 8/1997 says, "Related to the implementation of the provisions of this law".

Due to the political atmosphere that prevailed in the sixties and early seventies, Egypt did not sign many bilateral agreements about the protection and encouragement of foreign investment, apart from the one with the USA in 29/6/1963 and another one with Kuwait in 2/2/1966. After the adoption of the economic openness policies and the promulgation of the investment law No. 65 of 1974, Egypt concluded as many as fifteen agreements by the beginning of 1977.[86]

Generally, such agreements made a distinction between disputes related to the implementation of the agreements themselves and disputes related to the implementation of investment contracts. Concerning the first type of disputes, most of Egypt's agreements refer them to arbitration, after exhausting other means like Negotiation[87], Diplomatic Protection, or conciliation.[88] Most of such agreements agree that the Arbitral tribunal must consist of three arbitrators; to represent each party and the third to be appointed by both of them or by the General Secretary of the UN or the General Secretary of the Arab League in case of dispute between the parties about it.

Concerning the second Type, Most of Egypt Agreements mention that a dispute between a national of one party and the other party of the agreement should be settled in accordance with the terms of the Washington Agreement. [89] However, the adoption of this method means a waiver of all other methods of settlement and some of Egypt's bilateral agreements may ask for the exhaustion of local remedies as a condition. The tone of such a condition may vary from one agreement to another in the following sense:

Some agreements require the exhaustion of local remedies in the first instance,[90] before approaching any international means of settlement. Some other agreements ask for the exhaustion of only a part of local laws that is compatible with the rules international law.

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[85] Prime Minister's Decree No. 2108 of 1997, Published in *El- Waqai El Misriyya*, No. 176, 9th August 1997.

[86] For example: with Sudan in 3/6/1977, Morocco in 6/6/1977; Switzerland in 25/7/1973, Iran in 5/5/19977, Germany /7/1974, Japan in 28/1/1977, and some other more countries as it is mentioned by in a book published by the Egyptian General Authority of Investment and Free zone areas. Cairo, 1979.

[87] Agreements with Italy, Greece, Switzerland and Kuwait.

[88] Agreement with Iran. France, Morocco, UK, and The Netherlands

[89] http://icsid.worldbank.org/ICSID/FrontServlet

[90] Rumania, Germany and Switzerland

Some agreements imply that in the case of a dispute between the rules of local remedies and the terms of the agreement, the latter must prevail. For example, some agreements have legalised nationalisation of foreign properties if it's done in terms with international law even though Egypt's foreign investment law mentions that nationalisation of foreign properties is not allowed under any circumstances. It is obvious that the existence of such agreements improves the foreign investment climate in many ways:

- They encourage the flow of foreign capital
- They provide foreign investors with what protects them from non-commercial risks, such as unilateral decisions and legislation of the host states.
- They create mutual legal commitments on both parties, in a way that they prevail over national laws and shift the contractual relations to an international level.

Within the context of multilateral agreements, namely, the Convention on the Settlement of Disputes Between States and Nationals of Another State, at international level, and Arab Agreement of the Movement of the Arab capital of 1953, the Unified Agreement for the Investment of Arab Capital in the Arab Countries[91] and the Agreement of the Arab Board for the investment Guarantees,[92] on a regional level. And according to the Egyptian constitution, once an agreement has been duly concluded and entered into force it will have the force of law, in a sense it will become binding internally as domestic laws and it will change or amend any existing national laws and regulations.

Anyhow, this section discuses two methods of dispute settlement mentioned by Article 7: Diplomatic protection by an investor's home state and arbitration at international, regional and national levels.

3.1. Diplomatic Protection (International courts)

Under Article 7 investment disputes May be resolved "*in a manner to be agreed upon with the investor*". This text verifies the possibility of referring any disputes to international courts if the parties agree so. Then, parties may agree, if the law permits,

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[91]The Unified Agreement for the Investment of Arab Capital in the Arab Countries

[92]This Agreement was included a provision for the settlement of investment disputes that distinguishes between disputes related to the implement ion of the Agreement itself which is supposed to be settled by the administrative body of the Board, and between other disputes that can be resolved either through negotiation, mediation or arbitration in accordance with the terms and conditions were specified by annex No. 1 of the Agreement.

on choosing any international courts to settle their disputes in accordance with the court rules. In case there is no possibility of a foreign investor approaching any international courts, his only option is to depend on his home state's right of diplomatic protection.

The notion of Diplomatic Protection

It is a settled principle of international law that a state as a subject of international law may intervene diplomatically to protect their natural and/or legal individuals against an act, or failure to act, law by another subject of international law in violation of international law. This right of diplomatic protection against another state is based on on the account that the injury of its nationals is the cause of suffering of the claimant state, and on the basis that it has the right to complain about the defendant state's violation of international law. Such an opinion was confirmed by the PCIJ in the *Panevezys-Saldutiskis Railway Case*[93] and in the *Serbian Loans Case*.[94]

In principle diplomatic protection aims at remedies for damages caused by a subject of international law, and sometimes at preventing such damages from taking place. Its practical importance depends first on the law of international wrongful acts and for reparation for internationally wrongful acts.[95]

Because the right of diplomatic protection belongs to the state itself, the insured individual cannot withdraw the claim before it has been concluded by the international venue. This explanation would question the validity of the Calvo doctrine, since foreign investors are not qualified to disclaim the right of diplomatic protection that does not belong to them.[96] There are, however, some conditions for diplomatic protection to be applicable: citizenship, exhaustion of local remedies, and the clean hands theory.

3.1.1. Citizenship.

Only individuals who have a special relationship are entitled to be protected by subjects of international law. In the *Panerzys-saldatiskis Railway case* the PCIJ stated

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[93] *Panevezys-Saldutiskis Railway Case*, PCIJ, Ser. A/B, No. 76, P. P.16.

[94] *Serbian Loans Case*, 12 July 1929, PCIJ Ser. A, No. 20/21.P. 77.118.

[95] Wilhelm Karl Geck, "Diplomatic protection", Encyclopedia of Public International Law, Volume 1 (1992), P.1048.

[96] H. Sadik, "The International Protection of Foreign Capital", (1978), P. 104, [Arabic].

that " it is the bond of nationality between the state and the individual which alone confers upon the state right of diplomatic protection", and many decisions of international commissions and tribunals confirmed this right within this context.[97] However, there are some exceptions where the state can treat other individuals as its own nationals.[98]

3.1.2. Natural Persons

Under international law, states have the right to intervene diplomatically whenever their nationals are threatened by a foreign state in violation of international law. States enjoy a comprehensive right concerning this matter, so it can determine where and when it may intervene and the extent of such intervention.[99] In the *Panerzys-saldatiskis Railway case* the court ruled, " It is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection".[100]

It is also agreed that obtaining and losing nationality is left to each state to regulate and implement, as it was concluded in *the Nationality decrees of Tunis and Morocco Case*, which said that, "The question of nationality must be within the jurisdiction of the state".[101] Still, the discretion of states is limited by the rules of customary international law and international treaties. For example, a state cannot impose its nationality upon foreigners who lives temporarily within its territory; this implies that the jurisdiction of the state is not absolute. The limitation on the state's authority over the question of nationality was confirmed by Article 2 of the Harvard Research Draft Convention on Nationality,[102] and by the Convention on Certain Questions relating to the conflict of Nationality Law,[103] which stated "the right of each state to determine by municipal law who are its nationals".[104] Both these conventions admit states' jurisdiction over this question as far as this is compatible with the rules of international law and recognised by other states.

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[97] *Mavrommatis Concession Cases*, PCIJ, Series A, No. 2, 1924, P. 6. *Nottebohm Case* ICJ Reports, (1955), P. 4.

[98] H. Sadik, P. 114.

[99] Borchard, "The Diplomatic Protection of Citizens Abroad", AJIL, (1915), PP. 313-331. See also Nwogugu, P. 115.

[100] *Panerzys-saldatiskis Railway case*. PCIJ. S. A/B No. 76, (1939) P. 16.

[101] Nationality Decree in Tunis and Morocco case, PCIJ, Ser. B, No. 4, 7 Feb. 1933, P. 24.

[102] Harvard Research Draft Convention on Nationality, 23 AJIL (Supp.) (1929), P. 13.

[103] UN Doc. ST/Leg/Ser. D/3. Dec. 1969.

[104] Hudson, "International Legislation". Vol. 5, P. 359.

However, there are two main problems of diplomatic protection in the case of individuals of dual or multiple nationalities. First, when each state wishes to grant its protection against a third party, the state that has the stronger social bond with the concerned person should have priority.[105] Second, when a state uses its right of diplomatic protection against another state of which the person in question is also a national.[106] In this case, states' practice follows the Hague Convention, which says "a state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses".[107]

However, the only exception to such a principle would be under certain conditions that are recognised by international law. A state can protect diplomatically other individuals as well as its own nationals. This matter was approved by article 3 (1) of the 1965 Warsaw Agreement of the Institute De Droit International on the national character of an international claim espoused by a state for damages suffered by an individual.[108]

3.1.3. Legal Persons

The nationality of a legal person is a much more complicated question than that of a natural person. However, states' diplomatic protection to a legal person is an established principle of customary international law. In the *Barcelona Traction* case, the ICJ stated: "In allocating corporate entities to state for purposes of diplomatic protection, international law is based, but to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the state under the law of which it is incorporated and in whose territory it has its registered office".[109] This decision reflects the uncertainty about the attitude towards the protection of legal persons, especially in the case of Multinational Corporation or transitional enterprises.

States enjoy an exclusive right to specify what standards determine the nationality of legal persons and corporations;[110] usually they adapt what serves their interests best.

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[105] See Article 4/b of the 1965 Warsaw Agreement.

[106] Such as the *Nottebohm Case*, ICJ Rep. 1955. P. 4. For more details see Nwogugu, P. 104.

[107] Iran-us Claims Tribunals, ILM, Vol. 23, (1984), P. 489.

[108] AnnIDI, Vol. 51 II (1965).

[109] *Barcelona Traction Case*, ICJ Reports 1970, P. 4 At P. 42.

[110] See the decision of the League of Nation Committee of Experts on the Nationality of Commercial Corporation and their Diplomatic Protection, AJIL Special Supplement (928) 205.

There is more than one theory to specify such nationality which is the only legal and political foundation to gain such protection: First, the state of the registered office, according to this a corporation gains the nationality of the state where it is registered. States like USA, UK and Brazil rely on this standard.[111] Secondly, the place of exploitation, according to this theory the corporation gains the nationality of the state where it conducts its activities, This standard has been criticised for being unrealistic since modern day corporations and multinationals perform their activities either in more than one state or they change the place of performance frequently in a way that contradicts the condition of stable nationality.[112]

Thirdly, Place of incorporation (Siege Social): the place where main offices are located and where the decision-making meetings take place. In this case, the corporation will have a genuine legal and political link with the state of the nationality since it was established according to its laws and it is located within its jurisdiction. Like most European States, Egypt grants diplomatic protection only to companies that were established and have their registered office in Egypt and are regulated by Egyptian Laws.[113] However, some exceptions were accepted such as the case of the Suez Canal Company, which was considered by Egypt as an Egyptian company despite the fact that it took Paris as a place for its offices and headquarters.[114] Fourth; the control theory, where the nationality of the corporation is based on the nationality of the majority of the shareholders.

Shareholders

The issue of protecting corporations diplomatically raises the question as to whether states are entitled to protect their nationals in their capacity as owners or shareholders. Or just the company itself as a legal person? *In Barcelona Traction Case,*[115] the court did not find any grounds for Belgium to protect its nationals as shareholders diplomatically against Spain. However, some Judges considered the

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[111]Heinrich Kronstien, "The Nationality of International Enterprises" 52 Colombia Law Review, (1952), P. 986.

[112]This theory was the base for classifying the Suez Canal as being of Egyptian Nationality since the company performs its activities on Egyptian territories.

[113]Article 41 of the Egyptian Commercial Law States that" all Companies which were establish in Egypt must be Egyptian and there headquarters must be located on the Egyptian territories".

[114]The decision of the Egyptian Court of Appeal of 20 May 1888, the Official Journal 5/263. 9 February (1922), PP 34-161.

[115]ICJ Reports (1970), P. 4, at P.49

courts' decision as rigid and confirmed the shareholders right to diplomatic protection by their home state if they were economically in violation of international law.[116]

Still, under exceptional circumstances diplomatic protection could be granted by the shareholders' home state.[117] Such circumstances may take place either according to treaty provisions[118] as in the *Orinoco Steam Delagoa Bay Railway Company Case*, and *Orinoco Steamship Company Case*, or according to a circumstantial practice, where states may claim diplomatic protection on behalf of their nationals in their capacity as shareholders, especially if they suffer in violation of international law. The expropriation of foreign properties by host states without due compensation and the failure of the company's home state to intervene are a good example of these exceptional cases.

In other words, it is convincing to say that the only legal grounds of allowing a state to protect its nationals in their capacity as shareholders is the absence of another state to protect the company itself, as it was stated in *Barcelona Traction Case*. This absence might be either for practical reasons, to wit the company was insured by the same state that was supposed to protect it, or for legal reasons, as is the case when the state of nationality fails to fulfil the requirements of nationality.

As a result, we may conclude that the ICJ does not object to the protection of the shareholders by their home state when circumstances permit. Then, the question remains as to whether a given state may intervene to protect its nationals in their capacity as shareholders if the concerned company is stateless.

3.1.4. Exhaustion of Local Remedies

It is a settled principle of customary international law that diplomatic protection cannot be offered to any individuals unless they have exhausted national remedies of the host state. A huge number of international courts, tribunals, and agreements have confirmed this principle.[119] Moreover, exhaustion of local remedies "implies the

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[116] P. 1054.

[117] P. 1053.

[118] *Delagoa Bay Railway Company Case* (GB & USA V. Portugal), Award of 30 May 1900 (Unpublished), mentioned in State Contracts Arbitration, University of Cambridge Research Centre for International Law. And *Orinoco Steamship Company Case*, Permanent Court of Arbitration, Award of 25 October 1910, 11 RIAA 227.

[119] Oppenheim, "International Law", P. 361. See also McNair, "International law Opinion", PP. 197-8.

exhaustion of all appeals, including appeals of the court of Cassation" as it was stressed in the *Electricity Company of Sofia and Bulgaria Case.*[120]

In the *Interhandel Case* (Switzerland V. USA),[121] the court stated that Switzerland could not raise the problem to international level because the case was still before the American courts. Obviously, this case tackled two main areas. First, these were the necessity to exhaust the local remedies of the host state.[122] Second, it is the international court that decides the extent of local remedies.[123]

Under customary international law, it is not adequate to say that the question of local remedies exhaustion is absolute, since such remedies must be appropriate, just, and practical. There are, however, some exceptions to this principle. International courts may accept jurisdiction over disputes without exhausting host states' national means of dispute settlement. This will be either on agreeable grounds or because of the impossibility of referring the dispute to local courts.

In the first case, the concerned parties may include their agreements on excluding the condition of exhausting local remedies, similar to what has been included in the arbitration agreement of 1923 between USA and Mexico.[124] Meanwhile, the best example of excluding the principle of exhausting local remedies is the irrelevancy of local courts and their inability to constitute an alternative to international means of dispute settlement.[125] This assumption may take place in the following cases:

- If the case is out of the ordinary judicial system's jurisdiction of the Host State according to the national law or as it was paraphrased by Oppenheim "when the injury to the alien is the result of an act of the government as such".[126]
- If the case is out of the jurisdiction of the ordinary judicial system of the host state according to international law.[127]
- In the case where the defendant was well notified about the procedures he should follow. In his opinion in the Barcelona Traction Case, Judge Tanaka

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[120] *Electricity Company of Sofia and Bulgaria Case*, PCIJ Ser. A/B No.77 P. 64.
[121] *The Interhandel Case*, ICJ Report (1959), P. 6.
[122] Ibid., P. 27.
[123] Ibid., P.19.
[124] The Mexican Claims Commissions (1923-34), P. 315.
[125] Bagge, 28 AJIL, (1934), P. 729.
[126] Oppenheim, "International Law", Vol. I, 7th Ed., P. 362.
[127] W. Jenks, "Liability for Ultra-Hazardous Activities in International Law", 117 RCADI, (1966), PP. 101-98.

stated that since the defendant "was never properly notified of the original bankruptcy declaration... the correct conclusion might well be that no obligation to exhaust local remedies could ever have been generated".[128]

- In the case where the damages affect directly the rights or the properties of another state, because no sovereign should subject to the jurisdiction of another sovereign. Such an attitude was reflected clearly in the *Anglo-Iranian Oil Company Case*,[129] as the British Government had a direct interest in the nationalised Oil Company.

Egyptian Practice in the Area of Diplomatic Protection

Egypt has always insisted on the condition of "real and effective" nationality as a standard to establish the right of diplomatic protection. This attitude was reflected clearly in two cases: the *George Salem case*[130] (USA v. Egypt) and *the Suez Canal case*,[131] In the first case, the USA claimed the right of Diplomatic Protection over property owned by an American citizen called G. Salem who was born in Egypt in 1883. Egypt rejected the American claim on the basis that Mr. Salem was effectively an Egyptian national". The court dismissed the Egyptian claim on the bases that " there was no need for Egypt to rebut the American claim on the basis of "effective" nationality if they were able to provide a proof that Mr. Salem in an Egyptian national. The case ended with the Egyptian failure to prove that.

In the second case, again, Egypt maintained the same attitude concerning the nationalisation of the Suez Canal, and considered this act as an act of sovereignty, recognised by international law. Furthermore, Egypt claimed that the Canal Company enjoy an Egyptian nationality according to article 16 of the Concession Agreement of 22nd of 1866 and articles 10,12, and 13 of the Costantinah Agreement of 1888.[132]

In other words, diplomatic protection may be considered as one of the available political channels to settle investment disputes, especially in case of the nationalization of foreign owned properties. Taking into account that diplomatic negotiation, which precedes the procedures of diplomatic protection, may result in finding a settlement of

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[128] *Barcelona Traction, Light and Power Company case*, PP. 73-74.
[129] *Anglo-Iranian Oil Company Case*, ICJ. Rep. (1952), P. 93
[130] *Salem Case* (US V Egypt) Vol. II, U.N.R.I.A. A. PP., 1165-1187.
[131] *The Suez Canal Case*, US. Department of State Publications, No. 6392, (1956).
[132] The Suez Canal, Society of Comparative Legislation and International Law, London, (1956).

the concerned dispute, similar to what happened in the case of the properties of some American nationals, which were nationalised by communist regimes.

Diplomatic protection offers protection against potential non-commercial risks. However, foreign investors still think that what is available is not enough since there are many factors, which may influence the effectiveness of this method of dispute settlement such as the political dimension, especially if the protecting state is not the original state of the foreign investor. For this reason among other reasons, foreign investors always tend to search for more effective means of dispute settlement such as arbitration.

3.2. Arbitration

3.2.1. Submission to International Judicial Organs

It is agreed that foreign investors' confidence in a host state's national judicial system has always been doubtful. This is due to many elements such as an undeveloped legal system, an untrained administrative mechanism and finally, disreputable political powers. These elements together have created an atmosphere of mistrust between both parties and led to an attempt to find an international independent body to settle any disputes which may arise between them in a way that minimise the worries of foreign investors.

Almost all efforts to find an international instrument concerning foreign investment dispute settlement have concentrated on avoiding the *Jus Standi* condition, through either developing the existing institutions or through creating a new alternative that may enable foreign investors to represent their cases, without the need to obtain the consent of their home states.

Reading carefully the grounds of a new system which may satisfy the needs for change can be summarised as follows: i) It should guarantee the right of both parties to appear before a tribunal court on equal basis. ii) The arbitral tribunal must be an independent, professional and out of the influence of both, host state and foreign investors' home state, i.e. diplomatic protection. ii) The arbitral tribunal must be able to conclude an award, which is enforceable. Such grounds can be accomplished through international

bilateral agreements[133] and multilateral agreements[134] which is preferable of foreign investors for being able to be left open to be signed by other states and for the opportunity to settle foreign investment disputes without touching the rest of the rules regulating the relationship between host state and foreign investors. On the other hand, arbitration can be recognised either by national investment laws[135] or by EDAs.[136]

3.2.2. Attempts to develop the exiting instruments

According to Article 7, Egypt considered an international means to settle investment disputes related to the implementation of the law No 8 of 1997. However, in the sense of accessibility, international institutions are divided into two categories: First, Institutes do not require the parties of the dispute to have a status of *Jus Standi.* Second, institutes require a status of *jus Standi* for any party who wishes to bring an action before them. This condition was required by the "Conciliation Commission", which was established after the Second World War to settle disputes arising out of the peace treaty of 1947. Similarly, the International Court of Justice, under the Articles of its Statute, will accept jurisdiction only over disputes among states[137]. Further more, the Court's jurisdiction is an optional and based upon the consent of the parties to submit their conflicts before the Court,[138] such a jurisdiction will become compulsory in the cases, which were listed in paragraph 2 of Article 36.[139]

In the event, Private investors have no access to many international judicial institutions, which are accessible only by states, which have *jus* Standi status. Therefore, their suits before the ICJ will not be accepted unless they were adopted by

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133 Such as the Friendship, Commerce and Navigation treaty between Japan and Pakistan, 18th Dec. 1960, article two, UNTS 197, No. 1/6030. And the Agreement of 1966 between United Arab Republic and Kuwait, 47 the Official Gazette, 27 Feb. 1967.

134 Abs-Schawcross draft convention on investment abroad, 1959. IBRD Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) 1966.

135 Article 55 of the Egyptian Law No. 230 of 1989

136 Oil Concession Agreement between UAR and Pan-Am of 23rd Oct. 1963. 258 the Official Gazette, 11 Nov. 1963.

137 Article 34(1) mentions that only states may be parties in cases before the Court.

138 Article 36(1), the jurisdiction of the Court comprises all cases, which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

139 The state parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a) The interpretation of treaty,

b) Any question of international law,

c) The existence of any fact, which, if established, would constitute a breach of an international obligation.

d) The nature or extent of the reparation to be made for the breach of an international obligation.

their home states,[140] and had an agreement with the Host State before the dispute takes place.[141] Alternatively, foreign investors approach accessible institutions such as the ICC, the ICSID, and the *ad hoc* Arbitral tribunals.

Article 7 lists few examples of the available means of dispute settlement. This never was a restrictive list. As a result, there is no legal reason for Egypt to reject the jurisdiction of the ICJ, although Egypt has never signed any agreement that recognised such jurisdiction in the field of foreign investment. The two main international institutions, which require a status of jus Standi, are the ICJ and the Permanent Court of Arbitration.

Concerning the ICJ, As the Courts' Statute emphasizes on the principle of *Jus Standi*,[142] it was proposed to create a special committee specialise in cases of commercial arbitration and in cases related to foreign investment disputes, this means to extend the court's jurisdiction that requires the amendment of the United Nation's Charter. In any event, this suggestion, still, does not provide foreign investors with the right to appear before the ICJ unless they obtain the consent of their home state, which is required to have an agreement with the host state about this matter.[143]

On the other hand, some other opinions supported the idea of allowing individuals to appear before the ICJ either on the basis of Article 26 of the Statute which says "The Court may from time to time form one or more chambers, for dealing with particular categories of cases"[144] or on the basis of Article 29 which mentions "With a view to the speedy dispatch of business, the court shall form annually a chamber composed of five judges which, at the request of the parties may hear and determine cases by summary procedures".[145] And they considered that the Statute provides a complete mechanism for these two chambers since it specified many sides of their functions and structures

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140 Before the Iran-USA Claims Tribunal small claims were presented by the home state of the clients, meanwhile the claimants presented large claims (more than $ 250,000) themselves.

141 Sirhan, Abdul Aziz, "The Principles of International Order", Dar El-Nashir, Cairo, (1975), P. 314 (Arabic).

142 Article 34 Para. 1 of the courts' Statute says" Only States may be parties in cases before the court"

143 Ketcham, "Arbitration Between a State and a Foreign Private Party", Southwestern Legal Foundation, (1965), P. 409.

144 Such chamber was never formed.

145 This chamber, usually, gets formed every year, but was rarely given cases such as Bulgaria-Greece case of 1934. 28 AJIL, (1934), P. 787.

such as the strength of the chambers judgments,[146] the place where the judgment takes place[147] and the Nationality of the chambers' judge.[148]

In addition, the supporters of this option proposed a way to avoid the obstructions of Article 34 through working on a multilateral agreement which provide the pre-improvement of all signature states to authorise all cases related to foreign investment to appear before the ICJ.[149]

In other words, due to the existence of textual and practical obstacles facing the freedom of foreign investors to bring their disputes before the ICJ, it is worth saying that the above-mentioned proposal did not provide a successful alternative to settle foreign investment disputes. On the contrary, the proposal left foreign investors under the predominance of outsider -sometimes political- powers in a way that has affected the practicality of such procedures.

The development of the Permanent Arbitration Court of 3 March 1960 is a result of two Conventions for the Pacific Settlement of International Disputes.[150] This Court aimed at "Facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy".[151] In 1939 the Permanent Administrative Council of the Court expressed its intention to develop the fact that only states can settle their disputes through the framework of the court, but the beginning of the Second World War has blocked such tendencies.[152] In March 1962 the Court's Permanent Administrative Council agreed on a group of rules of conciliation and arbitration to deal with disputes between states and private parties.[153] Such developments ought to be considered as an important proficiency in the international intent to settle disputes between states and nationals of other states, despite the criticisms that were directed against this international institution such as:

- The facts that the jurisdiction of the court was not compulsory, especially aftermath the attempts at the second Conference to make recourse to the Court compulsory were unsuccessful.

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146 "Considered as rendered by the Court" Article 27 of the Statute.

147 "...[S] it and excuses their function elsewhere than at Hague" Article 28 of the statute.

148 Article 31 of the Statute.

149 Young, PP. 369-371.

150 Of July 29, 1988 and October 18, 1907.

151 Article 20 of the 1899 Convention for the Pacific Settlement of International Disputes.

152 Ketcham, PP. 407-408.

153 Ibid., P. 409.

- The Courts jurisdiction is limited to contracting parties of the Hague Conventions.[154]
- The European Nature of the two conventions has made other countries refrain from signing them.

3.2.2.1. Attempts to Create New Instruments

Creating a new international body to deal with investment disputes has been always dominated by the concepts of conciliation and arbitration between states and nationals of other states. Arbitration has been defined as "the process of resolving disputes between two states [Parties] by means of an Arbitral appointed by the parties".[155] Similarly, the Hague Peace Conference of 1899 defined arbitration as "International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect of law. Recourse to arbitration implies an engagement to submit in good faith to the award".[156]

According to the aims and legal nature of arbitration, it might be either national or international; the latter is preferable to foreign investors since both parties are equals before the court and outside the influence of the host states.

Historically, there has been more than one attempt to create an international body to take care of investment disputes on fair grounds, which grants foreign investors the right to represent their cases before an international independent body. Here, it is worth mentioning the three most important attempts to create such body:

- Firstly, the Abs-Schawcross Agreement of 1959[157] that could be considered as a pioneer attempt to regulate the relationship between foreign investors and host states. Article 7 of this Agreement, proposed the existence of an "Arbitral Tribunal" under terms compatible with "*the provisions of the Annex to this Agreement*". Observing the contents of Article 7 and the annexes of this Agreement show that the jurisdiction of the proposed tribunal concerning the enforcement and explanation of the Agreement is not obligatory since Article 7 asks for the "consent of the concerned parties", and "*in case the of the absence of such consent or of agreement by other specific means, the dispute may be submitted by either party to the International Court of Justice*". Paragraph two of the same

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154 Article 45 Para 1 and Article 47 Para 1 of the Convention for the Pacific Settlement of International Disputes of 1899.

155 Hans-Jurgen Schlochauer, "Arbitration", Encyclopedia of Public International Law, Vol. 1, (1981), P. 14.

156 Article 37 of the Convention.

1579 Journal of Public Law, (1960), P. 116.

Article granted foreign investors the right to "institute proceedings ... before the Arbitral Tribunal", and such a right should be accompanied by the consent of the host state.

Although this Agreement has given foreign investors the best chance to represent their cases as individuals, it failed to gain the approval of the required number of states. Moreover, the provisions of its articles have never been enforced because most of the states felt that such a multilateral agreement may limit their freedom in regulating their relationship with foreign investors and they would rather rely on bilateral agreements and on their national laws of investment to achieve such an aim, in a way that is compatible with their nation's demands.

- Secondly, The OECD draft convention of 1967[158] was presented by the Organisation for Economic Co-operation and Development and sponsored by its Council and "had tried Hard to evade: the substantive rules of international law governing the protection of foreign property".[159] It was observed by the council that the Draft Convention embodied "recognised principles relating to the protection of foreign property" and rules designed to "render more effective the application of these principles".[160] Article 7 of this Convention included a group of proposed rules by which a dispute between one contracting party and another contracting party may be solved. Furthermore, the same Article indicates that such a dispute must be referred to an Arbitral Tribunal, which has been organised by Article 1 of the annexes to the Draft Convention or to any other international body within a 60 days period; otherwise the jurisdiction of the Arbitral Tribunal will be obligatory. In addition, the same Article provides that nationals of a contracting state, who are affected by violations of the agreement by a contracting party, may raise their case before the Arbitral Tribunal, which was established by the Draft Convention, after exhausting other national and international means.

Analysing Article 7 shows that the Convention allows the concerned parties to refer their disputes to diplomatic means. Then, in the case of no agreement the matter would be handled by an arbitral tribunal, which should be organised by the annex of the Draft Convention of 1976, unless the parties to the dispute did not succeed in

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158 OECD Publication No. 15637, (1962).

159 Schwarzenberger, P. 153.

160 Ibid., P. 154.

submitting it to any other international body within the period of 60 days. This means that the jurisdiction of the above mentioned tribunal enjoys some rather obligatory nature.

To sum up, it is no surprise to consider the attempt of the OCED to create an international body to settle foreign investment disputes as a step on the right path, since it granted foreign investors the right of equality with host states. Despite that, the Draft Convention did not gain the required support from the world states. This might be due to the fact that most states prefer not to be bound by any such multilateral agreement, which may limit their freedom to regulate their relationship with foreign investors. And they would prefer to get involved with a legal mechanism, which deals only with the question of solving foreign investment disputes without touching any other aspects of the relationship between foreign investors and host states.

The above-mentioned tendency has been adopted by the drafters of the Agreement of the World Bank on the way to settle foreign investment disputes. This question will be discussed in the following part of this chapter.

3.2.2.2. Arbitration

Inequality of legal power between states and foreign investors produce differences in choosing a forum for settling investment disputes. Due to the pre-discussed attitude towards national litigation of host states, in most cases foreign investors tend to choose international venues to settle their disputes with host states, especially in the form of arbitration. However, arbitration is not a new means of dispute resolution[161]. It was known before the existence of judicial courts in case of disputes between individuals, while in the case of a dispute between a state and individuals it was not known until recently.[162] In *LETCO case*, the ICSID Tribunal states a "Right to arbitration is a guarantee that it will not have [foreign investor's] long term and costly investment arbitrarily rendered useless by the government of [host state], such a provision is considered fundamental to the foreign investors".[163]

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161 Oppenheim, "International Law", Vol. 2, 7th Ed., P. 33.

162 The earliest of this kind of arbitration took place in 1864 between the Compagnie Du Canal de Suez and the Egyptian Government. Noted by H. Cattan, P. 140.

163 *Liberian Eastern Timber Corporation (LETCO) V. The Republic of Liberia*, 26 ILM (1987), P. 662.

Arbitration as opposed to litigation has proved an attractive method of settling investment disputes and has gained a special importance in this concern. There are many reasons behind this: conventional consideration such as its efficacy, its confidentiality, and the expertise involved. Secondly, considerations which are related to the development of treaty relations among states and the improvement of arbitration effectiveness. However, there is no doubt that relying on the national laws of host states to settle foreign investment disputes, and the impossibility of presenting such a dispute before international courts, has created a situation which has affected the movement of foreign capital, and which may either discourage needed foreign capital or make it more expensive. Consequently, this has convinced a large number of the states to welcome arbitration as a method to settle investment disputes without the intervention of the investors' home states.

Reviewing most of the world's investment laws and most of the EDAs proves that arbitration continues to be the preferred method to settle commercial disputes through either international institutions on local centres which exist around the world. Within this understanding, Nathan mentions that "under the provisions of their [host states] national laws of arbitration and international conventions and multilateral and bilateral treaties, [they] assure a degree of immunity from national courts and extend a promise of recognition and enforcement of their award's world wide".[164]

The principle of arbitration embodies a recognition by the state that it shall not sit in judgment of disputes involving its own acts but shall rather join with the corporation in the establishment of an independent judicial body, to wit, an Arbitral tribunal, to which such a dispute shall be referred for final and binding decision. Herein the implicitly waives any requirement of the exhaustion of local remedies. This waiver is ... consistent with the number of international arbitral awards recognising the principle that the state should not sit in judgment on its own acts in a matter involving contracts with aliens". In addition, many international organisations have recommended Arbitral tribunals to be adopted as a method to settle investment disputes, such as the recommendation of the secretary general of OPEC who said:

> *"In general, there is considerable international support for the opinion that for the settlement of trade disputes arbitration is preferable to judicial procedure even where domestic differences are concerned, for reasons which*

164 Nathan, P. 20.

seem to be universally recognised, arbitration is less rigid, less costly and less dilatory than the normal judicial procedure. Furthermore, persons who invest capital on a large scale in a foreign country feel more secure".

The above-mentioned opinion has been adopted by many other international organisations,[165] which showed interest in advocating the principle of arbitration to solve problem with foreign investors.

3.2.2.2.1. Types and Nature

Traditional legal literature distinguishes between two major types of arbitration: Firstly, arbitration of public international law that settles disputes between subjects of international law. Secondly, arbitration that takes place between subjects of private law[166]. In the case of investment disputes the question will be whether they fit any of the above-mentioned types.

Some writers say that arbitration of investment disputes must be considered as an international arbitration. For instance, Dr Broches notes that international arbitration would be "Any arbitration that has an international element, that is, any arbitration other than one in which all elements, including the parties, the applicable law, the place of proceedings, the remedies against the award, and the enforcement of the award are localised within one national system of law".[167] It is clear, however, that Dr Broches' opinion contradicts the text of Article 37 of the Agreement of Pacific Settlement of International Disputes, which mentions that international arbitration must be limited among international entities (states). In the same way, it cannot be considered as national because some of its elements are national.

In this context, it could be said that arbitration of investment disputes enjoys a special nature *sui generis*, since it is part of a contract between a state and a private party that is not possible to be classified within any of the above mentioned categories. Such a

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165 The Secretary General of the United Nations stated in his report of 7 April 1983 that: "Arbitration is the prevalent mode for the settlement of the disputes that inevitable arise. Its function is to motivate the parties to reach an agreement among them in order to avoid the intervention of third parties and, eventually, to provide a neutral forum for settling and deciding disputes. Arbitration, either under the auspice of the ICC or the World Bank's ICSID Center, is the rule" E/C, 7/1983/5. P. 16.

166 In Egypt, there are two types of national arbitration; the Administrative Law governs the first while law No 27 of 1994 governs the second.

167 Aron Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", 2 Recueil Des Cours, (1972), P.381.

special nature would make arbitration of foreign investment disputes different from that of private parties in many ways:

- The applicable law and procedures
- Jurisdictional immunity of the state as a party (*Par in parem non-habit jurisdiction*). In the *Aramco case* it was concluded that state immunity "excludes the possibility for the judicial authorities of the country of the seat of exercising their right of supervision and interference in the Arbitral proceedings which they have in certain cases".[168]
- The question of the execution of the Arbitral award.

Arbitration of investment disputes derives some of its nature from that of investment contracts in terms of special characteristics such as being long term contracts, being between a sovereign entity and a private person or company and most of the time being related to the natural resources' sector in the host state. Arbitration clauses and agreements should enjoy the same special nature *sui generis* since they are a part of the investment contract.

The above mentioned special natures lead the drafters of the Washington Agreement of 1965 to avoid mentioning anything about the nature of investment dispute arbitration, whether it is international or not. This has stimulated the tendency to internationalise such contracts through applying the rules of international law, or at least the rules, which are recognised by civilised nations as similar to what has been concluded in the *Sapphire v. NIOC Arbitration Case.*[169] Here, it is worth noting, the tendency to internationalise such contract is, usually, based on the desire to liberalise these contracts from the domination of national laws, especially those of developing countries,[170] and to keep them away from any potential legislative changes of host countries. Even in cases where EDA's were governed by public international law, this does not mean that this should happen on the grounds that they are considered as absolute international contract, but this is based on a group of rules, which enable the parties to the contract to choose the applicable law. Then the problem will be closely linked to the rules of private international law.[171]

In the *Petroleum Development v. the Ruler of Abu Dhabi Case*, Lord Esquish disallowed the law of *Abu Dhabi* to be applied on the basis that " *[I] t was fanciful to suggest that in this very primitive region, there was any settled body of legal principles applicable to the*

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[168] Saudi Arabia V. Arabian American Oil Company (ARAMCO), Award of 23 August 1958, 27 ILR 117.

[169] International and Comparative Law Quarterly, Vol. XIII (July, 1964)

[170] This tendency was reflected clearly in many arbitration cases.

construction of modern commercial instrument".[172] Again in the *Qatar Arbitration Case*,[173] the referee, Sir Bucknill, despite his opinion that the national Law of Qatar was normally applicable to the dispute, concluded that it is not applicable and the dispute must be settled in accordance with "the principles of justice, equity and good conscience".[174]

On a practical level, there are two traditional forms of arbitration: ad-hoc arbitration and institutional arbitration.[175] The Ad-hoc arbitration takes place to settle a particular dispute, the agreement on this type of arbitration, usually, determines the arbitrators, the procedures, and the applicable law. There is no doubt that the development of the concept of international arbitration has affected the world attitude towards ad hoc arbitration in the sense that resorting to it is an exception to institutional arbitration.[176] Moreover, the development of international commerce has urged the need for reliable facilities to settle any emerging problems. This lead to the creation of more stable facilities and centers on both national and international levels: such as the American Arbitration Association, the London Court of International Arbitration on a national level, the ICC and ICSID on an international level, and the Cairo and Koala Lumpur on a regional level.[177]

3.2.2.2.2. Advantages and disadvantages

The development of Arbitration reflects the growth of transitional business, for which arbitration is often the preferred means of settlement for disputes. However, the importance of arbitration is based on the fact that it constitutes an alternative for litigation, in the sense that it provides foreign investors with a neutral venue, which is able to offer them a final enforceable award, away from the influence of local courts. Discussing arbitration as an alternative to litigation shows that most concerned parties favour arbitration to a court of law as a method to settle their disputes for many reasons,[178] especially in international cases. On the other hand, some other parties reject such generalization and consider that in this issue, "Much depends on the

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171 See the Arbitral award in the TOPCO/Cal Asiatic Case of 1977.

172 *Petroleum Development (Trucial Coast) v. the Ruler of Abu Dhabi Case* (1951), International and Comparative Law Quarterly, Vol. I (April, 1952)

173 *Ruler of Qatar V. International Marine Oil Company case*, Int'l L R (1953) P. 534.

174 Ibid.

175 This classification was adopted by the 1899 Hague Convention for the Pacific Settlement of International Disputes.

176 See Wolfgang, P. 185. See also Kronfol, P.139.

177 Kronfol, P. 139.

co-operation, in the conduct of the arbitration proceedings of the parties in dispute".[179] However, in recent years, most international contracts include some provision, which provide for some other means of resolving disputes, mainly by arbitration.

At this level, it is important to clear up the advantages and disadvantages of arbitration, but what concerns us most in this debate is how this method of settling investment disputes has been carried on, and to evaluate how it works in practice. Foreign investors instinctively prefer arbitration because they believe it is a friendlier mean of resolving disputes than litigation,[180] and it is cheaper, quicker, flexible[181], and more convenient. Law and legal procedures vary from one country to another. For example, in the USA, adjuration is based on English common law, whereas Latin American countries use the Napoleonic civil law. In these circumstances arbitration can be used as a sort of "Legal Esperanto" to bridge the gap between different legal systems.[182] However, the most powerful attraction to arbitration, generally, may well be that it leads to an award that is claimed to be binding and final and enforceable in the country of arbitration and other countries, particularly those which have acceded to international conventions such as the New York Convention of 10 June 1958.[183]

Arbitration is especially useful in the case of a dispute between a sovereign state and a national of another state. A number of reasons contribute to this: First, arbitration may limit or eliminate the question of local remedies, since it has been considered that "The principle of arbitration embodies a recognition by the state that it shall not sit in judgment of disputes involving its own acts but shall rather join with the corporation in the establishment of an independent judicial body, to wit, an Arbitral tribunal".[184] Secondly, the usefulness of arbitration has been reflected in many cases such as the Lena Gold field case,[185] where the Russian Government has agreed to compensate the Claimant Company without raising the question of sovereign immunity.[186] Similarly, in the Aramco case it was concluded that arbitration "excludes the possibility for the

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178 Kerr, P. 164.
179 Nathan, P. 14.
180 Kerr, P. 55 and P. 164.
181 Nwogugu, P. 240.
182 Kronfol, P. 138.
183 Nathan, P. 19.
184 K. Carlston, "International Role of Concession Agreements", 52 Northwestern University Law Review, (1957), P. 640.
185 *Lena Gold fields Case* (1930), Annual Reports of Public International Cases, Years 1929-1930.
186 Lena Gold field Limited Arbitration, 36 Cornell Law Quarterly (1950), P. 42,

judicial authorities of the country of the seat of exercising their right of supervision and interference in the Arbitral proceedings, which they have in certain cases".[187]

On the one hand, it is obvious that the flexible nature of arbitration allows parties to the dispute to have a say concerning many things like: the location, proceedings, applicable law and the arbitrators once agreed upon. However, it is true that such flexibility has been affected by an institutionalised arbitral process in the sense that the "Arbitral institution exerts considerable influence in the selection and appointment of arbitrators".[188] On the other hand, many parties are sceptical about the apparent advantages of arbitration and they consider that "Arbitration can take a long time, and be more expensive",[189] and generally, privacy of arbitration is not completely guaranteed, because most of the arbitral awards are published either with the consent of the parties or without it.[190] Arbitration considers the remedies, not the legality of the act taken by the state. This study will deal with the question of arbitration only in relation with investment disputes through investment laws, bilateral agreements, and economic development agreements.

3.2.3. The ICSID

3.2.3.1. The Role and Aims of the Centre

The ICSID was a creation of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States[191] by virtue of a proposal by the World Bank. Its creation was inspired by the duties of the World Bank to provide developing countries with any possible facilities to encourage the flow of foreign capital and to help them in improving administrative techniques and manpower capabilities. For this purpose the World Bank worked for four years to draft an international convention, which is accepted by most concerned states and able to create an international arbitral institution, to resolve disputes between governments and nationals of other states. As till 20 August 1997, this Convention has been signed by 142 and ratified it by 129 states.[192] Egypt adopted the Convention by law No. 90 of

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187 Aramco V. the Government of Saudi Arabia, 27 ILM, (1951), P. 155.

188 Nathan, P. 19.

189 Nathan, P 16. For an example about the SPP case.

190 The Int'l. L. Rep. published the outcome of the BP v. the government of Libya Case despite the objections of the Libyan Government. See 53 Int'l L. Rep. 297 (1974).

191 This Convention was opened for signature on March 18, 1965 and came into force on October 14, 1966 after being ratified by twenty states.

192 News from ICSID, Vol. 14, No. 2, (1997), P.10.

1971 through signing the Convention in 11 February 1972 and ratified on 3 May 1972.The latest state to sign the Convention was Serbia on June 8, 2007.[193]

Thinking about such an international institution, which was initiated in 1961 by the then president of the World Bank, Mr. Eugene Black, and motivated by the need to mediate between member states or their nationals and another member states? The *Anglo-Iranian Oil Corporation Case*[194], the *Egyptian High Dam Case*[195] and the dispute between India and Pakistan over the waters of the Indus River,[196] proved that the World Bank mediation efforts were "essentially political in character, although in each case the Bank intended to act strictly on an economic and financial basis".[197]

For this purpose, the general secretary of the Bank, Mr. Broches, proposed to the board of directors, the need to establish an effective instrument to settle disputes, which may arise between host states and foreign investors[198] through conciliation and arbitration. On 5 June 1962, a draft convention was prepared by the General Counsel and Transmitted to the Executive Directors,[199] who were asked to discus it with their governments and to prepare a report on this matter. Consequently, after an extensive process that included four meetings in four different countries,[200] with the contribution of 86 delegations, the Bank succeeded in collecting enough views and national legislations on the treatment of foreign investment. All this resulted on 18 March 1965, in laying down a draft convention, which was called the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The Main object of the Convention is to Facilitate a set of conciliation and arbitration rules and procedures, with a stand-by panel of arbitrators, to settle investment disputes in accordance with the terms of the Convention,[201] that includes "default choice-of-law and provisions on the enforcement of its judgments. It was, however,

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193 Ibid., P.11.

194 See Edward S. Mason and Robert E. Asher, "The World Bank Since Britons Wood", the Brooking Institute, Washington, (1973), P. 595.

195 Ibid. P. 627.

196 Ibid., P. 610.

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198 Broches, "Development of International Law by IBRD", 59 Proceeding of the American Society of International Law, (1959), P. 35

199 "History of the ICSID Convention", Vol. 2, Part 1, Doc. No. 6, Washington, (1969), P. 19.

200 The first meeting took place in Addis Ababa between 16-20 February 1963. The second meeting took place in Santiago between 3-7 February 1964. The third meeting took place in Geneva between 17-22 February 1964. The fourth meeting took place in Bangkok between 27 April- 1 May 1964.

201 Article 1 (2) of the Convention.

intentional,[202] not to define a term "investment" in order to give the concerned parties the ability to "decide on the classes of disputes they wished to submit to the Centre".[203] According to Article 67 of the Convention, membership to the Centre is limited only to contracting states. Other states will be eligible to the Center's facilities if they are parties to the statute of the ICJ, by the invitation of a two-third majority of the members of the Administrative Council.[204] ICSID has been considered as "the first truly international institution, which administers tribunals with judicial powers to allow a private party to bring the equivalent of an action against a state",[205] and then the ECCJ and the ECHR have extended Locus *Standi* to private parties.[206]

The Administrative Council, which is considered as the policy-making power of the Centre, is composed of one agent for every contracting state[207] and headed by the president of the World Bank[208]. According to Article 6 of the Convention, the main functions of the Council are as follow:

- It shall "adopt the administrative and financial regulations of the Centre".
- It shall "adopt the rules of procedure for conciliation and arbitration proceedings".
- It shall "adopt the rules of procedure for the institution of conciliation and arbitration proceedings".
- It shall "adopt the Annual budget of revenues and expenditures of the Centre".

3.2.3.2. The Jurisdiction of the Center

According to the provisions of the Convention, it is clear that the drafts men did not intend to challenge the sovereignty of the contracting parties and not to force them to "*be under any obligation to submit any particular dispute to conciliation or arbitration*" under the auspice of the Centre.[209] Considering the general significance of Article 25 (1) of the Convention, it is realised that there are three condition to be met in order to establish the jurisdiction of the Centre:

3.2.3.2.1. Consent of the Parties

The consent of the parties is the "*cornerstone of the jurisdiction of the Centre*".[210] In other words, "no procedures can take place under the Center's auspice unless both parties to

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202 Schwarzenberger, P. 139
203 Ibid.
204 Article 67 of the Convention.
205 Nathan, P. 80.
206 Ibid. , Footnote 17.
207 Article 4(1).
208 Article 5.
209 "The Preamble of the ICSID Convention", ICSID Basic Documents, January (1985), P. 11.
210 E.D. Report, Para 23.

the dispute have given their consent"[211] in a written form[212]. The Convention does not specify the manner in which the consent may be expressed. The parties might express consent in one of the following forms:

- In an international bilateral agreement; or
- In an investment agreement / contract with foreign investors; or
- In their national legislation.[213]

The Report describes this provision as an "offer" and mentions that the investors "*might give their consent by accepting the offer in writing*". If the investor does so, there is mutuality of consent just as in the case of a *clause compromissoir* or in that of a compromise.[214] The Host State may express its consent in its internal legislation. This can be an explicit consent of ICSID jurisdiction either as the only option "which may acquire the force of an agreement once the investors have given their consent",[215] or as one of a menu of dispute settlement mechanisms. This type does not commit the host state to the jurisdiction of the Centre without further expression of consent, as was held by the ICSID Tribunal in the *Amco v. Indonesia Case.*[216]

The same question was raised in a dispute between Southern Pacific Properties (Middle East Limited "SPP (ME)" and the government of the Arab Republic of Egypt. This case arose in 1974 out of a contract to build a tourist resort near the Pyramids of Giza. The dispute began in 1978 when the Egyptian Government cancelled the authorisation to use the land for this purpose, and it finished in 1992 when the parties to the dispute agreed on a settlement. In the beginning, the matter was arbitrated at the ICC in 1983 and resulted in favour of the investors. In 1984, the award was challenged before the Court of Appeal of Paris, and the outcome was in favour of Egypt. At this level, in 1987, the dispute was brought before the France's highest court, the Court of Cassation that also supported the Egyptian point of view. Later, the investors brought the dispute before the ICSID Centre; this resulted in an award in favour of the SPP Case. In December 1992, the parties reached a negotiated settlement of their conflict while annulment proceedings were still pending.

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[211]Broches, P. 352.

[212]Article 25/1.

[213]This method will be discussed later in this section.

[214]A. Broches, "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction". P.269.

[215]Hirsch, P. 52.

[216]*Amco Asia Corporation v. The Republic Indonesia Case*, Award of 21 November 1984, 24 ILM, (1985), P. 1022.

In the *SPP Case*, the Centre's jurisdiction was based on the Egyptian national legislation, namely article 8 of law No. 43 of 1974. Concerning the investment of Arab and Foreign Funds and the Free Zones as amended by law No. 32 of 1977 this lists a menu of possible methods of settlement such as:

> "In a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of the Investment Disputes between the States and the National of other Countries to which Egypt has adhered by virtue of law No. 90 of 1971, where such a law applies."[217]

The question in this case, *inter alia*, is whether it can be suggested that the text of article 8 of law 43 as interpreted by Article 45 of the Executive Regulations constitute consent of the Egyptian Government within the meaning of Article 25 (1) of the ICSID Convention.

According to Egypt, Article 8 provides just a list of possible alternatives to be negotiated with foreign investors and was insufficient to constitute consent to ICSID arbitration. In addition, Article 8 didn't specify whether conciliation or arbitration should settle the dispute. This does not suggest that Egypt meant both options and either of them. According to the Convention, Egypt was supposed to specify one of them, otherwise the consent of Egypt to the jurisdiction of the ICSID does not fit the requirements of consent as were lay down by the ICSID Convention. It is, however, agreed that the Egyptian government had to specify one of the two methods, and without this, Egypt's consent to the jurisdiction of the Center will not be within the meaning of the Convention.

Meanwhile, the tribunal did not consider that Article 8 provided only a list of alternatives but indicates a group of mandatory methods with a hierarchy relationship. Then, the tribunal ruled out that since there were no other methods applicable, Article 8 constitutes a written consent to the Center's jurisdiction within the meaning of Article 25(1) of the Convention.

Such an additional action can be achieved either by an agreement with the foreign investor or with his own country or by the amendment of Article 8. The later

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[217]Article 7 of law No.8 of 1997 confirmed the possibility of settling investment disputes "within the context of the Convention on the Settlement of Disputes Between States and Nationals of other States".

suggestion took place when Egypt enacted new investment laws in 1989 and in 1997, which made it clear that the ICSID jurisdiction is not automatic but only take place if the parties were specifically to enter into an agreement to that effect.[218] The new provisions "make it abundantly clear that the choice of one of the alternative methods of disputes resolution listed therein requires the agreement of the parties involved. It dispels the ambiguities that might be attributable to the earlier language of Article 8 of law No. 43".[219]

To sum up, regardless of whether it was right or not, it would have been much better for Egypt not to raise the jurisdictional issue. Instead, it should have welcomed the jurisdiction of the Centre since this would be more compatible with its efforts in attracting more foreign investors, or as Dr El- Kosheiri put it "more consistent with the declared governmental public policy of providing foreign investors with effective legal guarantees that should normally prevent any type of denial of justice including any delay in rendering justice".[220]

Once the Consent of the parties has been submitted to the ICSID Centre, it would have far-reaching implications. On the one hand, it means the *"exclusion of any other remedy", however,* host states *"may require the exhaustion of local remedies as a condition of its consent to arbitration under this Convention".*[221] This matter may be considered as a positive modification of some international rules concerning the exhaustion of local remedies. On the other hand, such provisions assure a host state that it will not be exposed to an international claim put forward in exercise of diplomatic protection by the investor's national state.

Under the Convention, once it is given properly *"no party may withdraw its consent unilaterally".*[222] And it will be irrevocable. This provision is probably the most important one in the Convention.[223] The importance of such a provision is derived from the fact that referring a dispute to the ICSID arbitration will bring the parties commitments towards each other to international level, and it will help to avoid a

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[218]Article 7 of law No.8 of 1997.

[219] G. R. Delaume, "The Pyramids Stand-the Pharaohs Can Rest in Peace", 8 FILJ P No. 2, (1993), P. 258.

[220]El-Kosheiri, "ICSID Arbitration and Developing Countries", 8 ICSID Rev.-FILJ 104, (1993), P. 111.

[221]Article, 26.

[222]Article 25/1.

[223]A. Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Another States", P.352.

unilateral action by the host state that may frustrate arbitration clauses. The *Anglo-Iranian Oil Co. Case*[224] constitutes a good example on how a host state may claim that an arbitration clause will be equally cancelled when the original contract is cancelled. Similarly, the importance of this provision was well illustrated in the *Aloca v. Jamaica Case* where the tribunal quoted Article 25(1) and considered that a state *"may not unilaterally revoke its consent once it has been given in an investment contract"*.[225]

However, it might be concluded from Article 25(1) that prohibition on withdrawing parties consent is valid only when both parties have submitted their consent, otherwise the first party to give his consent can withdraw it if the second party has not submitted its consent yet.[226]

3.2.3.2.2. Jurisdiction *"Ratione Materiae"*

The history of the World Bank as a mediator proved, in many instances, that cases of a political nature have lead the institution to fail in finding a proper settlement. For example, in the *Anglo-Iranian Oil Case* and the *Egyptian High Dam case* the bank failed when the disputes were between developing and developed countries and in the *Indian-Pakistani dispute* over the Idus River water, it succeeded when the dispute was between two developing countries.[227]

As a result, the draft men of the Convention tried to avoid handling any disputes, which are based on political or economic interests and limited the jurisdiction of the Centre just to "legal disputes arising directly of an investment".[228] The content of Article 25(1) shows that there are two requirements for the dispute to be included in the jurisdiction of the Centre; firstly, it should have a link with an act of investment. Secondly, the dispute must be of a legal nature. Such a term was defined as "any dispute concerning a legal right or obligation, or concerning a fact relevant to the determination of a legal right or obligation".[229] This "would presumably exclude disputes which are political in nature or those arising from differences in interests".[230]

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[224] *Anglo-Iranian Oil Co. Case*, (1951) ICJ. Report.89.

[225] Alcoa Minerals v. Jamaica, Award of (1975) (ICSID Case No. ARB/74/2), 17 Harv. Int'l. J. 90 (1976).

[226] As it was indicated by Article 25(1) that says "When the parties have given their consent..."

[227] See E.S. Mason and Robert Asher, "The World Bank Since Briton Woods", The Brooking Institute, (1973), P. 643

[228] Article 25 (1).

[229] This was mentioned in a draft submitted to the Legal Committee and was noted by Broches, RCADI, Note 8, P.363

[230] El sheik, P. 310

Under the provisions of the Convention none of the following terms "Legal disputes", "directly" and "foreign investment" have been defined. Actually, "all of them are sufficiently controversial to call for definition in an interpretative section",[231] and this omission was intentional in order to open the door for wider understanding of the terms in a way which suites all parties at the same time, and this should be recognised "*in the final analysis, [as] the best solution*".[232]

3.2.3.2.3. Jurisdiction "*Ratione Personae*"

The ICSID Convention provides that the Centre has jurisdiction only over disputes between a contracting state and the nationals of other contracting states.[233] This means that the services of the Centre are not available in connection with disputes between private individuals, between states (including subdivisions or agencies) or between a state and its own nationals.[234] Dr. C. F. Amerasinghe, in his article on the Jurisdiction *ratione personae* under the convention on the settlement of investment disputes between states and nationals of other states, noted that:

> "There is good reason for disputes which come within the jurisdiction of the Centre to be restricted ratione personae in the way they are under Article 25 (1)." He added, " A dispute between private individuals can be settled through the municipal system of law. Disputes between states and their own nationals fall outside the scope of an international convention intended to deal with foreign investment. Disputes between states may be settled under traditional international law".[235]

According to Article 68, a state becomes a contracting state after 30 days of the date it "deposits its instruments of ratification, acceptance or approval". Then, a request can be made only after the Convention has come into force in both states, however. The jurisdiction of the Center is not affected by the question as to whether the dispute occurred any time before or after the Convention came into force. The jurisdiction of the Centre can be extended to cases where the Host State is represented by a "constituent subdivision or agency".

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231 Schwarzenberger, "Foreign investment", P. 142.

232 Delaume, P. 70.

233 Art. 1(2)

234 Article 25.

235 C. F. Amerasinghe, "Jurisdiction *Ratione Personae* Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", the BYBIL, Vol.47, (1974-1975), P. 227.

Two comments are worth making, concerning this matter: First, the contracting party must either approve the consent of the subdivision or agency, or the state must notify the Centre that such an approval is not required[236]. Second, the subdivision must have been designated to the Centre, and this must be enough to enjoy *Locus Standi* in ICSID arbitration and to invoke the jurisdiction of the Centre. Practically, *The Klockner Case*[237] proves how easy it is for a company to be designated as an agency or subdivision of a contracting state.

Another thing to be mentioned about the parties to the dispute is the distinction between "natural people" and a "juridical person" which was made by Article 25 (2).[238] This Article differentiates between them in the sense of ability to submit their disputes to the Centre.

With respect to "natural persons", they must have the nationality of a contracting party in order to stand in ICSID arbitration.[239] This condition must exist on the date on which the parties to the dispute gave their consent to ICSID arbitration, and on the date on which this request was registered. However, the continuity of such a condition is not required. In general, the question of nationality concerning natural persons "has not been a contested issue in the practice of the Centre".[240] So, it would be more practical to understand such a condition within a functional approach. When it comes to the definition of nationality, the criterion that was adopted in the *Nottebohm Case* "Should not be adopted slavishly with respect to the jurisdiction of the ICSID Centre"[241] because this case was more concerned with the question of diplomatic protection.

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[236]Article 25 (3).

[237]Klockner Industries Anlagen Gmbh v. the United Republic of Cameroon, Award of 12 October 1983, summarized by J. Paulsson in J. int'l Arbitration. (1984) P. 145.

[238] Article 25 (2) mentions that " Nationals of another contracting state" means:

(a) Any natural person who had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consent to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who no either date also had the nationality of the contracting state party to the dispute; and

b) Any juridical person which had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consent to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the contracting state party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as national of another Contracting State for the purposes of this Convention.

[239]Article 25(1).

[240]Broches, FILJ, P.173.

It is not practical to compare the nationality of a corporation to the nationality of a natural person because "there is no such a thing as a company nationality".[242] However, there are many criteria to assert the nationality of a company such as: Firstly, the criteria of incorporation.[243] Secondly, the criterion of the place of business or *siege social*, for one reason or another, will has the nationality of the majority of its members.[244] The ICSID Convention added the criterion of "Control" to the above two mentioned criteria, where it treats a corporation that have the nationality of the host state "as national of another contracting state" because of Foreign control. In the MINE v. Guinea Case[245] where the criterion of "control" was the base in asserting the nationality of the company, the tribunal ignored the question of jurisdiction, which was not challenged by Guinea.

Article 25 (2)(b) left the question determining the nationality of a company in the hands of the states where it is operating and in agreement with the other concerned party. This decision must be made at the date on which the parties have consented to submit to the Center's arbitration, and any subsequent changes are irrelevant. Nevertheless, it was left after all to the tribunal to "to look into all factual and juridical circumstances, in order to determine who really control a corporation". This tendency was reflected clearly in *LETCO v. Liberia Case.* In other words, the criterion of "foreign control" must be with the meaning of the Convention. In the *AMCO v. Indonesia Case* the tribunal rejected the claim and reconfirmed that "except as provided in Article 25 (2)(b), nationality would be determined by the "classical" criteria of incorporation or Siege social. Meanwhile in the SOABI Case, "where a foreign company incorporated in a contracting is a party to a dispute with another contracting state, and the company is controlled by nationals of the state party to the dispute or nationals of non-contracting state, it would be in line with the convention".[246]

3.2.3.3. Evaluation and Future of the Center

As mentioned before, the creation of the Convention was considered by most states as a welcome development in the area of dispute settlement between states and nationals of other states. Such a reaction is due to the fact that industrial states felt that this

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[241]Hirsch, P. 77.

[242]Nathan, P. 128.

[243]For example, to be an UK corporation it is necessary to be registered under the UK Companies Act regardless of the nationality of the shareholders.

[244]Under French law a company must have its real seat in France.

[245]505 F. Supp. 141 (1981).

mechanism would preserve the interests of their nationals outside their countries. On the other hand, developing countries considered that signing the Convention would be a good way to express their good intentions towards foreign investors.

The opposite extreme position was adopted by Latin American States, which rejected the Convention, not only on the basis of what was included in the Convention, but based on their previous experience with the concept of arbitration as a whole. In addition, they objected to the Convention because it gives foreign investors, "the right to sue a foreign State outside its national courts. This, they advocate, is contrary to their accepted legal principle.[247] Unlike other judicial institutions,[248] ICSID does not have a permanent court, since it works virtually as an administering body, and it is considered as " the first truly international institution, which administers tribunals with judicial powers to allow a private party to bring the equivalent of an action against a state".[249]

Many aspects of the Center's exclusivity were reflected in the Convention and they may be summarised as follows: first of all, the Center's facilities are based on a voluntary basis and the ratification of the agreement means only the willingness to use the machinery of the Centre. Secondly, the flexible nature of the system, especially when it concerns the venue of arbitration,[250] or when a party fails to participate in the proceedings of the case, ensures that the proceedings will continue despite his absence.[251] Thirdly, the fact that a party's consent to the Center's jurisdiction means a protection against any form of judicial intervention or control, and the binding character of the Center's award, eliminates the problem of recognition and enforcing foreign arbitral awards?

It is noteworthy is that the Convention has given private investors the right to initiate their claims, as *domini litis*, without the need to be adopted by their home state. Moreover, comparing Article 25 of this Convention with Article 7 of the Convention of OECD[252] shows that the ICSID Convention was unique in three ways: Firstly,

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[246]Nathan, PP. 138-139.

[247] El-sheik, P. 314.

[248] Such as the International Court of Justice and the Permanent Court of International Arbitration

[249] Nathan, P. 80.

[250]In the Holiday Inns Case proceeding of the case took place in Morocco.

[251]Art. 45(2) of the Convention.

[252] This Article dose not allow the nationals of a contracting state to initiate their claims unless they prove the intention of their own countries not to adapt their claim, and even in case he referred his case

preventing a foreign investor's home state from either compelling or resisting him from submitting his claim against another contracting state. Any how, since the consent of both parties to recourse to arbitration can be understood as excluding any other means of settlement, this should result in prohibiting[253] the state of the foreign investor from forming any diplomatic of judicial intervention concerning the same case.[254] Secondly, the 'Convention does not modify the rules of international law concerning the exhausting of local remedies".[255] Thirdly, the character of the agreement between the two concerned parties to submit to the jurisdiction of the Centre is binding, and once this consent has been given; it cannot be withdrawn unilaterally.[256]

Alternatively, the Convention has been subject to many criticisms, such as being expressed "in broad terms which left certain basic issues unresolved".[257] The restrictions upon the usage of the Centre facilities, among the contracting parties and the nationals of other contracting parties, has been considered as an obstacle in the way of making the best of such an institute.

3.2.4. Egyptian National Arbitration Law No. 27 of 1994

Egypt like most Arab countries has participated actively in the development of the role of arbitration as a method to resolve investment and commercial disputes. If an investment dispute is related to the implementation of Investment Law No. 8 of 1997, it should be resolved according to Article 7 of this Law. This means through any of the following methods; an agreement "with the investor",[258] an agreement with the "investor's home country",[259] within the framework of "the ICSID Convention",[260]

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to Arbitral tribunal his country has the right to adapt the case and bring an action against the other contracting country in a way with freezes his case until a solution has been reached between the two contracting counties.

253 Article 26 which reads that "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy*"

254, "History of the ICSID Convention, Primary Draft Convention: Working Paper" ICSID Doc. No. 24, P. 221. For the consultative meeting of Legal Experts, Com/AF/EN/AS/1,15 Oct. 1963.

255 According to Article 26 of the Convention, party's consent may be based on the exhaustion of local remedies. See G.R. Delaume, "Convention on the Settlement of Disputes Between States and Nationals of Other States", The International Lawyer, Vol. 1, No 1 Oct. (1966), P. 71.

256 Article 25 (1),

257Al-Sheik, P. 316.

258 Article 55

259 Ibid. For this purpose many agreements have been concluded between Egypt and other states BIT With the Belgo- Luxembourg Economic Union, Finland, Germany, Italy, Sweden, Switzerland, USA, France, Japan, Nether lands, Rumania and the United Kingdom. See M. Khalil, "Treatment of Foreign Investment in Bilateral Agreements", ICSID Review, 7 FILJ (1992), PP.341-345

according to law No. 27 of 1994 On Arbitration in civil and mercantile matters, or through "arbitration"[261] before the Regional Centre for International Commercial Arbitration in Cairo.

On the other hand, if the dispute is not related to the implementation of the Investment Law of 1989, the arbitration framework in Egypt will be among the other available methods to settle the dispute. In Egypt there is no legal restriction on submitting foreign investment disputes to arbitration, and this has been always the preferred means of the settlement of such disputes.[262] This started with the Convention of 1974 concerning the Settlement of Investment Disputes between Arab States and the Nationals of other Arab States.[263] Later, the arbitration framework in Egypt has clearly been improved by law No. 27 of 1994[264] (hereinafter referred to as the "Arbitration Law" or as the "Law"). This law replaced Articles 501-513 of the Law No. 13 of 1968[265] (hereinafter referred to as the "Procedural Law"). Prior to the Arbitration Law there were three types of arbitration in Egypt:

- Private arbitration:[266] this voluntary type deals with commercial and civil matters and is based on an agreement between the parties. The national courts have no right to intervene to name the arbitrators or to eliminate an arbitral award.
- Public arbitration:[267] it is compulsory and covers disputes among public establishments, corporation and between state enterprises. In addition to disputes between public corporations and physical or legal persons of private law, national or international. In this case, arbitration would be voluntary and the person of the private law may choose private arbitration methods. Also, in this case arbitration agreement is required.
- Arbitration of foreign investment disputes.[268] This type of arbitration is voluntary and arbitrators must be named.

Attempts to promulgate a new arbitration law in Egypt started as early as 1986, after the creation of a committee charged with the duty of drafting a new Egyptian arbitration law, derived from the rules of the UNCITRAL model law.

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[260] Ibid.

[261] Ibid.

[262] On 18 May 1981, Egypt recommended to all states' institution to include an arbitration clause in their contacts with foreign partners referring to the Cairo International Commercial Arbitration Centre. See, K. H. Bockstiegel, "Arbitration and State Enterprises", Kluwer, Netherlands, (1984), P. 19.

[263] This convention was ratified on 23/11/ 1974

[264] Law No 72 of 1994 was published on 21 April 1994 in the Official Gazette No 16, and came into force on 21 may 1994. Law No. 9 of 1997 amended this law; this amendment was published in the Official Gazette on 13 May 1997.

[265] The Egyptian Code of Civil and Commercial Procedures.

[266] Articles 501-513 of the Law No. 13.

[267] Law No 60 of 1971.

[268] Law No. 43 of 1974 & Law No. 280 of 1989.

The Arbitration Law is evidently based on the UNCITRAL Model law on International Arbitration.[269] This law "Introduces greater flexibility and more efficient judicial procedures relating to the enforcement and challenge of arbitration awards, significantly enhancing arbitration as a means of dispute resolution in Egypt".[270]

The Arbitration Law shares many common provisions with the UNCITRAL Model Law. For example, the similar grounds[271] of annulment, which are limited to two cases: First, if the arbitration fails to apply the law agreed upon by the parties[272]. Second, in the case of a legal violation that causes nullity. [273]

However, many article of the Arbitration Law distinguish it from the UNCITRAL rules, such as, Article 15(2), which require an odd number of arbitrators. Article 19(4) mentions that parties must follow the challenge procedures (Art. 19), namely a decision on the challenge by the arbitral tribunal, which if unsuccessful, may be appealed to the court. If the challenge has been successful all previous hearings and awards shall be null and void. Article 22(3) says that the decision of arbitral tribunal may only be challenged in an action to annul the award[274]. Finally, Article 24(1) says that the arbitral tribunal may make orders for interim measures only if the parties expressly confer this power upon them.

3.2.4.1. Arbitration Domain

The provisions of the Arbitration Law are applicable, almost to all types of arbitration. Article 1 provides that " the Arbitration Law applies "to all arbitration cases between public or private persons whatever the nature of the legal relationship around which the dispute revolves" in a way that this Law puts an end to the controversy of whether disputes of administrative contracts are arbitrable or not.[275]

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[269]UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 302 (1985). Egyptian Arbitration law consisted of 21 extra articles than that of the UNCITRAL model law

[270] Janette Hassan, and John Bentley, "New Law Vastly Improves Arbitration Framework", MEER, (September 1994), P. 8.

[271]Art. 53 of the Arbitration Law & Art. 34(2) of the Model Law.

[272]Art. 53(1)(b).

[273]Art. 53(1)(g).

[274]Article 16(3) of the Model Law gave chance to recourse to competent court within thirty days to challenge the arbitral decision.

[275]See the decision of the Egyptian *Conseil d'Etat* of 20 February 1990, which concluded that such disputes are not arbitrable.

Unlike some other arbitration laws, the Egyptian law is applicable to both national and international arbitration.[276] The Arbitration Law sets a group of standards on which a distinction may be made between national and international arbitration. Such standards adopt the same criterion of the Model Law that determines the cases in which the arbitration can be considered of "International nature"[277]. What is new concerning this matter is that Article 3(2) says, whenever the parties "agree to resort to a permanent arbitral organisation or to an arbitral Center having its headquarters in Egypt or abroad", arbitration will be considered as an international, which is not usual.[278] However, the only result of such a distinction is the determination of the court, which is competent to nominate the arbitrators if the concerned parties refrained from doing that.[279]

The Arbitration Law is applicable only in cases where arbitration either takes place in Egypt or outside Egypt but when Egyptian law is applied. Then, the enforcement of an arbitral award, which was concluded outside Egypt and did not apply an Egyptian law, should be done according to Articles 296-301 of the Procedural Law. However, the New York Convention prevails over any domestic laws, including this Law.

3.2.4.2. Changes Achieved

After explaining the circumstances which accompanied the creation of the Arbitration law and discussing the rules which formed its basis, this section will be summed up by noting what has been achieved by this Law and also noting the major differences between the Arbitration Law and Articles 501-513 of the Law No. 13 of 1968, which used to govern the issue of Arbitration in Egypt.

Dr Mohsen Shafiq summarised the intention behind the new Arbitration Law as the need to create a new arbitration mechanism, which is compatible with the modernisation of other legislation concerning foreign investment, tax treatment and other important legislation, designed to attract foreign investors.[280] Many things have been achieved through the promulgation of the new Law. Such as:

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[276] Article one of the arbitration law No 27 of 1994
[277] Article 1(3) of the Model Law.
[278] Ahdab, P. 27.
[279] Ibid., P. 28.
[280] The Official Gazette, a report about the meeting No 58 concerning the new Arbitration Law, P.150.

Firstly, the Arbitration Law succeeded in putting an end to the problematic nature of Article 205 of the Procedural Law, which recommended the nomination of the arbitrators in the arbitration agreement. This means that institutionalised arbitration will be excluded if their rules dictate their competence to nominate the third arbitrator. Here, the main question was whether to consider the content of Article 205 as an element of public order or not. This matter created a chaotic situation where many foreign arbitral awards were nullified on the basis of violating Egyptian public order. Accordingly, Egyptian courts intervened to minimize the link between the content of Article 205 and the question of public order.[281] As a result of the new Law, arbitrators are no longer required to be named, this choice can be done in accordance with the parties opinion or according to rules adopted such as that of the ICC, LCA, UNCITRAL.

Secondly, the new Law equalized between persons in public law and persons in private law, in the sense of being subject to arbitration However, the Egyptian legal system makes a distinction between private law, governed by the mainstream judicial system, and administrative law, governed by the Egyptian "Council of state". The new Law did not succeed in resolving the confusion of the arbitrability of disputes arising from public administrative contracts.

The Council of State rejected the arbitrability of such disputes on the basis that Article 10 of the Council State Law NO. 47 of 1972 indicates that the Council has exclusive competence over disputes of administrative contract. In contrast, the other side argue that the content of Art. 10 gave the council such an authority facing only the jurisdiction of the normal civil courts.[282] This confusion urged the Egyptian Government to amend the Arbitration Law through adding a new paragraph to article 1 providing that: "Concerning administrative contracts disputes, agreement on arbitration shall be by approval of the concerned minister or by the person exercising his competence in the case of public jurists persons and no delegation of authority is allowed in this matter.[283]

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[281] See the decision of Cairo Court of Appeal of 23 Dec. 1991 that considered that the nomination of the arbitrators in the arbitration agreement is related to the question of public order.

[282] Tarik Riad. "Disputes Relating to Public Administrative Contracts", International Arbitration Law Review, (1997), P. 25.

[283] Article 1 of Law No. 9 of 1997, amending certain provisions of the Arbitration Law of 1994, The Official Gazette, No.20 supplement, 15 May 1997.

Finally, The parties to the dispute are free to make a decision concerning the applicable law, the language, and the place of arbitration. Moreover, they have the right to decide what procedural rules should govern the arbitration,[284] other wise the tribunal will determine such things.[285]

3.2.5. The Cairo Arbitration Centre

The Centre was established as a result of the meeting of the Asian-African Legal Conciliate Committee in Doha on 23rd of January 1978. It was authorised on the 10th December 1979, by the Presidential Decree No. 515,[286] for a preliminary period. Later, another Presidential Decree was issued on 15th November 1983, to authorise it permanently. The main objectives of the Centre are:

- Promoting international commercial arbitration in the region;
- Co-coordinating and assisting the activities of existing arbitral institutions;
- Rendering assistance in the conduct of ad hoc arbitration, particularly those held under UNCITRAL Arbitration Rules.
- Assisting in the enforcement of arbitral awards
- Providing for arbitration under the auspices of and the Rules of the Centre;
- Rendering of advice and assistance to parties who may approach the Center.[287]

3.2.5.1. Status and Administration

The Center was established in co-operation with the Egyptian government, which ensured that it " will be an International Institution having its own international statutes" and it enjoys the privileges and immunities of such independent international institutions.[288] The Centre maintains an international panel of arbitrators, which contains the names of jurists and judges from the Asian-African region, and from other countries, which have economic links with the region.[289]

3.2.5.2. Applicable law

The rules of the United Nations Committee on International Trade Law (UNCITRAL)[290] of 1976, as amended, are to be applied to Arbitration by the Centre.

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[284] Article 25.

[285] Article 26.

[286] It was published in 26th February 1981 after being ratified by the People's Assembly, in accordance with Article 105 of the Constitution.

[287] M. Abu El Enein, "Arbitration Under the Auspices of the Cairo Regional Center for Commercial Arbitration", 2 Journal of International Arbitration, No. 4, (1985), P. 30.

[288]. See letter No. 1043 of May 6th 1984, issued by the Egyptian Foreign Minister. Quoted by Abu El Enein, Ibid. P. 31.

[289] Ibid.

[290] Article 10 of the Rules of the Cairo Centre for Arbitration.

In case the Center's arbitration procedures take place in Egypt, the question will be to what extent arbitration under the auspices of the Centre is subject to arbitration rules of the Egyptian Law. The answer to the above mentioned question would be based on the legal status of the rules of the UNCITRAL against Egyptian national laws, and on the degree to which the procedures under Arbitration law[291] are compatible with arbitration procedures adopted by the Centre.

Concerning the first point, it is worth mentioning that the procedural rules of the UNCITRAL do not acquire any particular legal status, since they are not incorporated into Egyptian legislation as an international agreement which has been signed and ratified by the competent authorities. The only legal basis for such rules is the fact that the parties to the dispute have selected them. Therefore, such rules have no supremacy over the national procedural law On the contrary; they are supposed to be influenced by national laws where it is necessary.[292]

Article 1 (2) of The UNCITRAL Arbitration Rules provides that in a case where any of its rules " is in conflict with the provisions of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail", this means that there is no contradiction between these rules and the provisions of Egyptian national laws.

Decisions of the Egyptian courts[293] show that their legal practice has agreed " on procedures different from those prescribed by law", even in cases which are contrary to "mandatory legal rule" unless they violate the public order in the sense of the moral, social and economic basis of the Egyptian society.[294]

Finally, Dr. Rashid notes that

> " The conduct of Arbitration in accordance with the UNCITRAL rules would not be constrained by the Egyptian legal procedures on arbitration, should Egyptian law be applied to the arbitration. While the two procedural systems are fundamentally in accord, the few differences

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[291] Law No. 27 of 1994 which replaced Articles 501-513 of the Code of Civil and Commercial Procedures (Law No. 13 of 1968)

[292] Samia Rashid, "Arbitration Under the Auspice of the Regional Centre in Cairo", Dar El-Manar El-Arabi, Cairo, (1985), P. 57, (Arabi).

[293] Concerning the recognition of arbitration agreements and refusal of the Egyptian court's jurisdiction, see the decision of the court of first instance in Cairo, on 16th of February 1953, in 35 El-Muhamat p.546. And the decision of the court of appeal (*Al Istinaafia*) concerning the same case, decision No. 60 of 25 February 1965. Mentioned by S. Rashid, P. 84.

[294] Ibid., P.147.

> may be claimed to fall within the areas where, under the Egyptian law, arbitration may be governed by the procedures agreed upon by the parties".[295]

4. The Enforcement of Foreign Arbitral Awards in Egypt.

Reviewing the question of foreign arbitral awards will never be complete without mentioning the issue of their recognition and enforcement, which has always been given too little attention. The structure of international law implies that the process of enforcement of international / foreign arbitral awards relies ultimately on the exercise of territorial sovereignty of states, which is basically regulated by domestic laws and achieved by national enforcement mechanisms. However, such awards constitute international validity, and the failure to recognise and enforce them is considered as a breach of international law.[296]

Host states tend to adhere to international and regional conventions, aiming to minimise investors' worries, and to avoid hardships created by differences between national laws.

First, it is worth mentioning that the enforcement of the ICJ decisions were regulated by Article 94 of the UN Charter which says that "*each party shall comply with the decisions of the Court anyhow whereto the member is a party.*" In case any of the parties did not comply, the other party may have recourse to the UN Security Council that may take measures and recommendations to give effects to the decision.[297] Such measures proved to be ineffective because of their political nature. Iran's refusal to comply with the Council's Resolution concerning the release of the American hostages constitutes a good example. From a practical point of view Egypt, usually, abides by all decisions of the ICJ.

However, the enforcement of a judicial decision is considered to be more difficult than an arbitral award because it is more challenging in relation to the issue of states' sovereign immunity. In the *Daff Development v. Kelantan Case*, the court made a clear distinction between a submission to the jurisdiction of a foreign court and the execution against the property of a sovereign state. On the contrary, in the *Republic of*

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[295] S. Rashid, P. 84.
[296] O. Schachter, "The Enforcement of Judicial and Arbitral Decisions", 54 AJIL, (1960), P.1.
[297] Kronfol, P. 132.

Yugoslavia v. Kafr El-Zayat Cotton Co. Ltd. (Egypt),[298] the court refused to apply the principle of restrictive immunity.

Arbitration awards rendered in Egypt fall into two categories: 'international' and 'domestic'. International awards are defined as those awards, which involve a foreign element. A foreign element will be found to exist where one of the parties is a foreign company or when the object of the dispute is located abroad. A domestic award is an award where a foreign element is involved. In Egypt, there are no domestic statutes which define what a foreign arbitration award is and which authorise enforcement without a retrial of the dispute.

Recognition and enforcement of foreign arbitral awards in Egypt is governed by two main sources of legal rules, which will be discussed in the following section: First, the rules of international and regional conventions. Second the rules of Egyptian national laws.

4.1. International and Regional Conventions

In addition to many bilateral conventions, Egypt is a party to many multilateral international and inter-Arab conventions on recognition and enforcement of foreign arbitral awards. In this context, two international and one regional convention should be mentioned: The New York Convention, The ICSID Convention, and Arab Convention of 1974 on the Settlement of Investment Disputes between Arab States and the Nationals of other Arab States.

4.1.1. The New York Convention of 1958[299]

Obviously, examining the New York Convention, closely, is not feasible since the subject has been well covered by many distinguished scholars. However, Article One provides the scope of the Convention as follows:

> "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 rising 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."

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[298]ILR, (1951), P.54.

[299]UN Treaty Series, Vol. 330, P. 38.

This means that a contracting state must recognise and enforce foreign arbitral awards even in cases where arbitration took place in a non-contracting country, unless such a state declares that it will apply the convention to awards made only in the territory of another contracting state.[300] Thus, the Convention does not require "leave for enforcement" to be obtained from the state where the award was given, to be able to obtain it in the country where enforcement is sought.[301]

Articles IV&V say that the arbitral award shall be recognised and informed, unless the Defendant State provides one or more of the following circumstances:

- Absence of a valid agreement
- Lack of a fair opportunity to be heard.
- The award is in excess of the submission.
- Improper arbitral procedure
- Lack of finality of the award in the rendering state.

In the Parsons & Whittemore Overseas v. Rackta Company (Egyptian) Case, Judge Smith rejected the claims of the defendant, which was based on Article 5 of the New York Convention and ordered the enforcement of the arbitral award.[302]

Article V (2) provides that national courts may refuse to enforce foreign awards only if the following two conditions are met: i) If the dispute is not arbitral under local law, ii) If the enforcement of the award violates the public order of the concerned state.[303]

The extent of this Convention depends on the interpretation of Article 1 that provides that this Convention shall apply to awards "arising out of differences between persons, whether physical or legal". The argument, hereof, is about the meaning of term "Legal Person" and whether it includes government departments or not.[304] Most states tend to recognise all arbitral awards as binding and enforceable, according to their national laws and procedures. However, State practice and generalization of the concept prove that the tendency to include states and government departments to the meaning of term "legal persons" are a fact.[305] This means that the New York Convention is said to

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[300]Art. 1(3)

[301]Abdul Hamid El-Ahdab, "Enforcing Foreign Awards in the Middle East" Commercial Law in the Middle East, Ed. Hillary Lewis Ruttley and Chibli Mallat, (1994), P. 330.

[302]US. Court of appeal. 2nd Circ. 32 December 1974, Yearbook, 1976.V1. P.205.

[303]Giorgio Gaga, "International Commercial Arbitration: New York Convention", Oceana Publications, (1973), P. 2.

[304]P. Contini, "International Commercial Arbitration: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards". 8 AJIL, (1959), PP. 289 and 294.

[305]See P. Sandra, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 6 Neth. Int'l L. R., (1959), P. 46.

be a step towards the development of the issue of recognising and enforcing foreign arbitral awards. This step is characterized by three main aspects; the foreign arbitral award must be enforced, despite where it is granted, the chosen law of the parties prevails once the law of the state where it took place, this constitutes a precedent in respecting the will of the parties.

In addition, Article 7(1) of the Convention lays down an important rule to protect the parties of the arbitral award through stating that:

> "The provisions of the present convention shall not affect the validity of multilateral or bilateral agreements ... entered by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the treaties of the countries where such award is sought to be relied upon."

This means that the provisions of this Convention must not prevail over the parties' agreements, and it operates in parallel with states' national statutes and regional and international agreements.

According to Article 1(3), contracting parties may put certain reservations on the application of the Convention. As for Egypt,[306] it did not avail itself of the reservations mentioned in Art. 1(3) of the Convention especially concerning the reservation of reciprocity. Then, Egypt will recognize and enforce arbitral awards within the meaning of Art. 1(3) of the Convention despite whether the state where the award was made is a contracting country or not.

To sum up, The New York Convention, which operates in parallel with states' national laws, has produced three new principles concerning the question of recognising and enforcing foreign arbitral awards; first, the awards must be enforced regardless of where the award was granted. Second those two laws can be applied to the same arbitral proceedings. Third, that both the reversal of the burden of proof and the rule that the award is valid until proven otherwise.[307]

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[306]Egypt ratified this Convention on 9 March 1959. By a Presidential Decree No. 191 of 1959.
[307]A. El-Ahdab, "Commercial Law In the Middle East", (1997), P. 331

4.1.2. The Washington Convention of 1965 (ICSID Convention)[308]

Articles 50-55 of this Convention provide a clear indication of the binding character of ICSID awards. The article 53(1) states *"The award shall be binding on the parties and shall not be a subject to any appeal ... Each party shall abide by and comply with the terms of the award."* The article 54(1) adds that *"Each contracting state shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it was a final judgment of a court in that state...."*

Articles 53(1) and 54(1) of the Convention show that the ICSID awards are final and binding. This means that "prompt and effective recognition of the awards is assured in all contracting states"[309] without any procedure of *exequatur* and no national court has jurisdiction to review the award on any grounds including public policy.[310]

The ICSID Convention was drafted in a way that observed the interests of parties, investors, and host states. On the one hand, the Convention gave the investors "almost all the assurances [they] could wish for, and realistically expect", and the host state would be "under a treaty obligation to comply with the award". On the other hand, the Convention included a provision for the domestic enforcement of the award to assure host states.

The B&B v. Congo Case[311] proved to be a good test of the effectiveness of the Centre. This case resulted from the execution of an agreement between S.A.R.L. Benvenuti & Bonfant and the Governments of the People's Republic of the Congo of April 1973. The parties included an arbitration clause in agreement, which says that any dispute between them shall be submitted to arbitration within the framework of convention.

After an arbitral award was rendered in its favour, B&B petitioned the French *Tribunal de Grande Instance* to recognise the award.[312] On 13 January 1981, the award was declared enforceable, but this would be subject to the following reservation: Execution on any assets located in France need the court's prior authorisation". This means that although the award was recognised, in reality it was emptied of any practical

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[308]Egypt ratified this Convention on 3 May 1972.
[309]G.R. Delaume, "ICSID Arbitration: Practical Considerations", P. 103.
[310]A. Broches, "The Convention on the Settlement of Foreign Investment Dispute", P. 403.
[311] ICSID Case No. ARB/77/2. 21 ILM (1982) P. 740.
[312]For the English translation of French original see, 65 ILR 91 (1984); 1 ICSID Report 369 (1993).

significance.[313] B&B appealed against the decision of the Tribunal as it violated the content of Article 54 of the ICSID Convention. The French Court of Appeal supported B&B's point of view and concluded, "Courts have to recognise ICSID awards without any reservations".[314]

The ICSID Convention has succeeded, through the text of article 54, to give the awards of the Centre. Article 55 gave a great trust despite all the credibility to municipal law and to the question of sovereign immunity whenever it comes to the question of executing the Center's awards.[315] However, Art. 55 rarely hinder the enforcement of ICSID awards for more than one reason: First, the international tendency to apply a restrictive form of the doctrine of state immunity.[316] Secondly, a set of remedies against the misuse of Article 55, similar to what has been mentioned in Articles 27 and 64 of the convention, raises the possibility of bringing the dispute before the International Court of Justice. Finally, and essentially, the moral side of the issue may discourage foreign investors from coming to a state, which did not comply with the ICSID awards.

It is of such reasons and many others, that it would be in the interest of both parties to the dispute to work on preventing such disagreements from taking place through including in their contracts an ICSID arbitration clause,[317] with an explicit waver of state immunity from execution.[318]

4.1.3. The Arab Convention of 1974[319]

The Arab Convention on the Settlement of Investment Disputes between Arab States and the National of another Arab States of 1974. This Convention was signed by eight Arab states, including Egypt. While it shares some common ground with the New

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[313]G.R. Delaume, "ICSID Arbitration: Practical Consideration", P. 107.

[314]English translation of the French original was published in 20 ILM 878 (1984); 1 ICSID Report 369 (1993).

[315]C. L. West, "Award Enforcement Provisions of the World Bank Convention", P. 50.

[316]G. Delaume, " ICSID Arbitration and the Courts", P. 800.

[317]P. Wolfgang, "Arbitration and Re-negotiation of International Investment Agreements" (1986), P. 212.

[318]A good example in this instance is the Diminco Agreement between Sierra Leone and Sierra Leone Selection Trust Ltd. of 1970 which states that: The State and Diminco hereby expressly waive the right to avail themselves of any privilege or immunity of jurisdiction in respect of any arbitration pursuant to this Agreement of the exception or enforcement of any award or judgment as a result thereof." This was quoted by G. R. Delaume, "ICSID Arbitration: practical Consideration", P.117.

[319]Egypt ratified this Convention on 23 November 1974.

York Convention, they differ in concern with the authority of National courts to review the case before enforcing an award.[320]

The importance of this convention is not the backdated provisions,[321] but the importance of the states, which ratified it. However, provisions of the Arab Convention may be summarised as follows:

- The Convention is applicable to both civil and commercial cases;
- Article 3 of the Convention prevents the courts, which shall enforce the award, from reviewing the case as a matter of substance.
- The concerned courts may reject the petition to enforce the award if any of the following cases exist.
    - If the subject of the dispute is not arbitrable according the place of enforcement.
    - If the award is not final in the place of arbitration.
    - If the parties were not properly summoned to appear.
    - If the award did not result from a valid arbitration clause.
    - If the award contradicts the public policies of the state where it shall be enforced.

The Arab Convention was replaced by the Convention on the Judicial Co-operation between the States of the Arab League in 1983. 13 Arab states signed this Convention.[322] Egypt did not sign the new Convention. The only possible reason for Egypt's absence is of a practical consideration, and because of the more favorable treatment of other multinational Conventions such as the New York Convention. The new Convention recognizes the principal of enforcement of arbitral awards, without reviewing the merits of the case. In addition, it emphasises the validity of the arbitration clause, arbitration agreement, and the proper summoning and the non-violation of the public policy and moral rules of the state where the enforcement is to take place.[323]

4.2 Egyptian National Legislation

The most recent development concerning the question of enforcement of arbitral awards in Egypt is the promulgation of Arbitration Law No. 27 of 1994 on arbitration

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[320]Article 4 and 2; prevent the competent authority, which is to enforce the award from reviewing the case.

[321]Most of the provisions of this Convention were derived from the Geneva Convention of 1927.

[322]Syria, Lebanon, Jordan, Iraq, Kuwait, Libya, Bahrain, Saudi Arabia, Qatar, Oman, North Yemen, and South Yamane.

[323]Article 37.

and alternative dispute resolution. The influence of the new Law was substantial in its recognition and enforcement of foreign arbitral awards, and in the sense of narrowing the grounds of nullifying arbitration awards after they had been concluded: as listed in Article 58 of the new law as follows:

- If it is not contrary to a judgment previously issued by the Egyptian courts on the subject matter of the dispute.
- If it does not run contrary to public policy (*ordre public*) of Egypt.
- If it were properly notified to the party against whom it was rendered.

This means that an arbitral award has the authority of a court decision and will be enforced if it satisfies the above conditions.

Egyptian law recognises the validity of arbitration clauses in international contracts. The Egyptian courts will give an effect to contracts specifying arbitration as the forum for the solution of any disputes arising under it. The Arbitral award will be enforceable as if an Egyptian court had rendered the judgment. However, Arbitration may be resorted to according to the rules and provisions laid down through the Arbitration law of 1944, and in such case arbitration would be considered a domestic issue and does not qualify as international arbitration by all means.[324]

4.1.4. Awards of National Arbitration

Under the Arbitration Law, Arbitral awards have "the authority of *res judicata* and shall be forcibly executed"[325] Applications to execute national arbitral awards should be submitted to courts having the original jurisdiction over the dispute.[326] These applications should be accompanied with the following:

- The original award or a signed copy hereof.
- A copy of the arbitral agreement.
- An Arabic translation of the Award.
- A copy of the minutes evidencing the disposition of the award pursuant to Art. Forty-seven hereof.[327]

Comparing enforcement procedures of the Egyptian Arbitration Law with those of the UNCITRAL rules proves how the first law intended to narrow the grounds on which an arbitral award can be nullified.[328]

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[324] See the new code or Articles 501-512 of the CCCP.
[325] Article 55.
[326] Article 9.

4.1.5. Awards of International Arbitration

The Arbitration Law is only applicable to awards, which were concluded in Egypt, and Articles 296-301 of the CCCP law, which were not amended or cancelled by the new law, will govern any other awards. Accordingly, applications to enforce foreign awards should be submitted to the courts of appeal.[329] In such cases, the enforcement of foreign awards will be subject to the same rules, applicable to the enforcement of foreign judgments. Such rules are based mainly on the principle of reciprocity. This means that foreign awards are enforced in Egypt only if the concerned foreign state enforces arbitral awards made in Egypt.

However, in Egypt the enforcement of such awards requires an exequatur "leave for enforcement", even in cases where the other concerned country does not require such a condition. The court of first instance, in the area where the award is sought to be enforced, is the competent authority to authorise such enforcement. Obtaining "Leave for enforcement" depends on meeting the following, conditions: The award should not be in violation of Egyptian public policies, the award has acquired the force of "*res judicata*" in the country where it was concluded, and the parties of the case should have been properly summoned.

The subject of the disputes does not fall exclusively within the jurisdiction of the Egyptian courts. In 1956, the Supreme Court of Appeal considered that referring a dispute to international arbitration outside Egypt is not related to the issue of Egyptian public order, because the question of arbitrability of a dispute should be the same in any case, nationally or internationally.[330] In a dispute between a French construction company and an Egyptian investment company, which was referred to the ICC in Paris[331]. The latter company claimed that disputes of construction contracts fall solely within the jurisdiction of the Egyptian courts, so the ICC had no jurisdiction over this dispute. The ICC tribunal rejected the Egyptian plea and considered that since the

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[327]Article 56.

[328]Article 36 of the UNCITRAL Model Law provides a wider ground for the unification of arbitral award.

[329]Article 297 of the CCCP Law.

[330]Case of 12/4/1956, *Majmouat Ahkam Al-daiira Al-Madaniah*, No 7, P. 522.

[331]Case No 4589/RP of 7/1 1983, the date of the award is 13/4/1984.

dispute is not related either to the personality law or to the issue of public order, it does not fall within the exclusive jurisdiction of the Egyptian courts.

To sum up, it is clear that international and national legal development has reduced the grounds on which Egypt can refuse the recognition and enforcement of foreign arbitral awards. Such a development will have a wide impact on the role of arbitration between Egypt and nationals of another country.

5. Conclusions

Conflicting opinions about the practicality of local remedies as a means of investment dispute settlement is not a new issue. It is clear that foreign investors tend to refer their disputes to tribunal panels, even if host states have one of the most advanced judicial systems. Meanwhile, host states think about the supremacy of their legal systems as an aspect of their national sovereignty, as expressed in the public international law principle, "act of state" doctrine. In this context, Egypt is not an exception. Without prejudice to Egyptian courts, Egypt recognized the right to refer investment disputes to a more acceptable mechanism, this to satisfy foreign investors on whom the countries economic future depends.

International arbitration constitutes a constructive and secure base for developing countries to deal with foreign investors, which are neither states to be bound by international law, nor nationals of the host states to be bound by national law. The existence of institutional arbitration secures a healthier investment climate and provides a prestigious platform for settling investment disputes.

Egyptian experience, on legislative and practical levels, proves that Egypt is in favour of settling investment disputes by arbitration. For this reason Egypt has included an arbitration clause in most of its development agreements and bilateral treaties in order to simplify and clarify the settlement procedures. The Egyptian court of cassation has confirmed, on a number of occasions, the validity of such arbitration clauses. With this atmosphere, Egypt has acceded to many multinational agreements, which provide framework arbitration for investment disputes (ICSID) and convention on enforcement of arbitral awards (New York Convention and intern-Arab convention). Furthermore, Egypt has introduced a new arbitration law (27/1994) and this law consolidates and

streamlines various confusing and conflicting rules that left the enforcement of international and national awards in doubt.

Finally, there is no doubt that Egypt's effort to provide foreign investors with a better means of dispute settlement are fruitful and promising. However, many steps still need to be taken on an administrative level.

Chapter Eight:

Estimation of Egypt's Investment Climate: A Questionnaire

CHAPTER EIGHT CONTENTS:

Chapter Eight:

Estimation of Egypt's Investment Climate: A Questionnaire

1. Introduction

Assessing investment climate in host states starts with diagnostics such as surveys and indicators. This would diagnose problems of foreign investment climate in a way, which promotes reform where it is needed most. In recent years, institutes such as the World Bank and others have introduced many cross-countries and firm surveys, and indicators, to assess the investment climate in developing countries, including Egypt. Despite this I preferred to conduct a special firm survey in order to obtain an original assessment of the weaknesses of the investment climate in Egypt from a foreign investors' perspective.

Accordingly, the answer to the question of why the inflow of FDI into Egypt is still far less than anticipated is closely linked to the question of why someone would invest in a foreign state. Reasons behind location decisions can be either internal or external. The latter type of reasons has been called the "location advantages"[1] or the attractiveness of a foreign location the concern of this chapter. These advantages are a group of elements that determines the level of investment climate attractiveness.

This chapter will attempt to identify the main elements of investment climate in Egypt and to examine the way they are implemented in the Egyptian case, and lastly to determine their quality as perceived by foreign investors.

As discussed in chapter three of this study, elements of investment climate vary according to the objective of the study and to the researcher's aims. This has resulted in designing a questionnaire, with broad inspiration, in order to include all components that make up the investment climate in Egypt, and it accurately reflects foreign investors' opinions. Accordingly, it was reasonable to divide the questionnaire into the following three sections: first, firm characterization. Second, factors influencing the investment climate in Egypt. Third and last is a section, which deals with future prospects.

[1] See, John H. Dunning, 1981.

2. Description and Design of the Questionnaire

Based on the introduction of this chapter and on the literature review conducted in chapter three of this study, the following elements were found important enough to reflect accurately the conditions of investment climate in Egypt. This questionnaire[2] will be divided into three sections.[3]

2.1. Section One of the Questionnaire: Firms Characterisation

The first section aims at collecting information about the characteristics of foreign firms, in order to draw an accurate picture of the firms involved in the questionnaire, and it consists of the following four questions:

The first question deals with the types and basic information of foreign firms.

Table 1: Question One

Types and Basic Information of Foreign Firms

a) Industry/ activity:[4]		b) Number of employees:	
c) Date of starting operations:		d) Nationality of parent company:	

The second question detects the percentage of foreign participation in foreign firms.

Table 2: Question Two

FDI Participation in Equity (Foreign Owned Percentage)

a) 24% or less	( )	b) 49% to 25%	( )
c) 50% or more	( )	d) 100%	( )

The third question determines the type of FDI or non-equity involvement in this company.

Table 3: Question Three

Type of FDI or Non-equity Involvement in this Company

a) New establishment	( )	b) Joint Venture	( )
c) Acquisition	( )	d) Supplier/Subcontractors	( )
e) Distributors	( )	f) Others3	( )

[2] See Appendix C of this study for a list of the variable values of this questionnaire

[3] See Appendix B. of this thesis for a full copy of the questionnaire.

[4] Industry and type of activity will be limited to the areas mentioned by the Egyptian investment law 8 of 1997 and as fellows: 1) Manufacturing this includes Textiles, food, chemicals, wood, engineering, building materials, metals,

The fourth question verifies the location of foreign firms' operation.

Table 4: Question Four

Where is the Location of Your Operation?

a) Inland	( )	b) Free Zone	( )
c) New Communities	( )	d) Other4	( )

2.2. Section Two of the Questionnaire: Factors Influencing Investment Climate.

The second section of this questionnaire is the heart of this chapter as it reflects foreign investors' opinion about the investment climate in Egypt. This section includes five major questions, which cover the opinion of foreign investors about three main issues: The investment law in Egypt, the political climate, and the economic-business climate. Then, question eight investigates opinion about the most disturbing impediments of the investment climate. The last question in this section with deals with the most attractive factors of the investment climate in Egypt.

Table 6: Question Five on the Egyptian Investment Law

To what extent do you think these items are satisfactory under the Egyptian Investment Law?

		1	2	3	4	5	
1) Admission and settlement	Not Satisfactory						Very Satisfactory
2) Incentives	Not Satisfactory						Very Satisfactory
3) Guarantee of transfer of profits	Not Satisfactory						*Very Satisfactory*
4) Guarantee of capital reparation	Not Satisfactory						*Very Satisfactory*
5) Dispute settlement mechanism	Not Satisfactory						*Very Satisfactory*

Table7: Question Six-Political Climate

How do you evaluate the following non-commercial factors?

		1	2	3	4	5	
1) Attitude of opposition groups towards FDI	Unfavourable						Favourable
2) Egypt's regional and international relations	Poor						Excellent
3) Probability of nationalisation	Low						*High*
4) Probability of unilateral Legal act effects all FDI	Low						*High*
5) Probability of unilateral legal act effects only you	Low						*High*

Table 8: Question Seven-Economic Climate

pharmaceuticals, and mining, ...etc. 2) Agriculture. 3) Tourism. 4) Construction. 5) Services, this includes Transport, health, consultancy, and others. 6) Finance, this includes Commercial banks, Investment banks. 7) Non financial projects.

How would you describe the Following Factors?

		1	2	3	4	5	
1) Infrastructure (Availability & Condition)	Poor						*Excellent*
2) Development plans and policies	*Unclear*						*Very Clear*
3) The status of the stock market	*Not Active*						*Very Active*
4) Availability and cost of skilled labour	*Not Available*						*Available*
5) Cost of labour	*Low*						*High*
6) Corporate tax level	*Low*						*High*
7) Size and growth rate of the Egyptian market	*Small*						*Large*

Table 9: Question Eight

How important is each of the following factors as impediments to business establishment and operation in Egypt? *(1 for least important to 5 for the most important)*

Factors	1	2	3	4	5	Comments
1) Political stability						
2) Predictability of macroeconomic conditions						
3) Tariff levels						
4) Tax regime						
5) Privatisation						
6) Business establishment procedures						
7) Adequacy of investment incentives						
8) Availability of business information						
9) Access to credit						
10) Land tenure policy						
11) Customs procedures						
12) Labour law						
13) Labour skill						
14) Distribution channels						
15) Unofficial payments						
16) Dispute settlements						

Figure 10: Question Nine

What were the overriding factors that caused your company to invest in Egypt?

1	
2	
3	
4	
5	

2.3. Section Three of the Questionnaire: Future Prospects.

Section three of this questionnaire inspects the future plans of foreign investors already having business in Egypt. The first question in this section explores investors' opinion about some steps the Egyptian government should take to improve the country's competitiveness to attract more FDI. Meanwhile, question eleven explores foreign

investors' priorities for any government improvements in the country's investment climate. The last question in this section detects investors' plans in relation to the future of their companies.

Figure 11: Question Ten

Over the next five years, what factors will give Egypt a competitive advantage in attracting FDI?
(1 for least important to 5 for the most important)

Factors	1	2	3	4	5	Comments
1) Trade agreement with the European Union						
2) Trade agreement with the USA						
3) Arab World integration						
4) Higher growth rate of domestic market						
5) Credit worthiness						
6) Political stability						
7) Competitive wages						
8) Skilled labour force						
9) Other						

Figure 12: Question Eleven

What are your company's plans over the next five years under the present investment climate?

		Yes	*No*
1	Significant increase in your investment		
2	Moderate increase in your investment		
3	Standstill		
4	Decrees in your investment		
5	Sell out your investment		

Figure 13: Question Twelve

What measures should the Egyptian government work on in support of investment climate?

Factors	1	2	3	4	5
1) Tax treatment					
2) Dispute settlement					
3) Privatisation					
4) Skilled labour force					
5) Other					

3. Data Collection

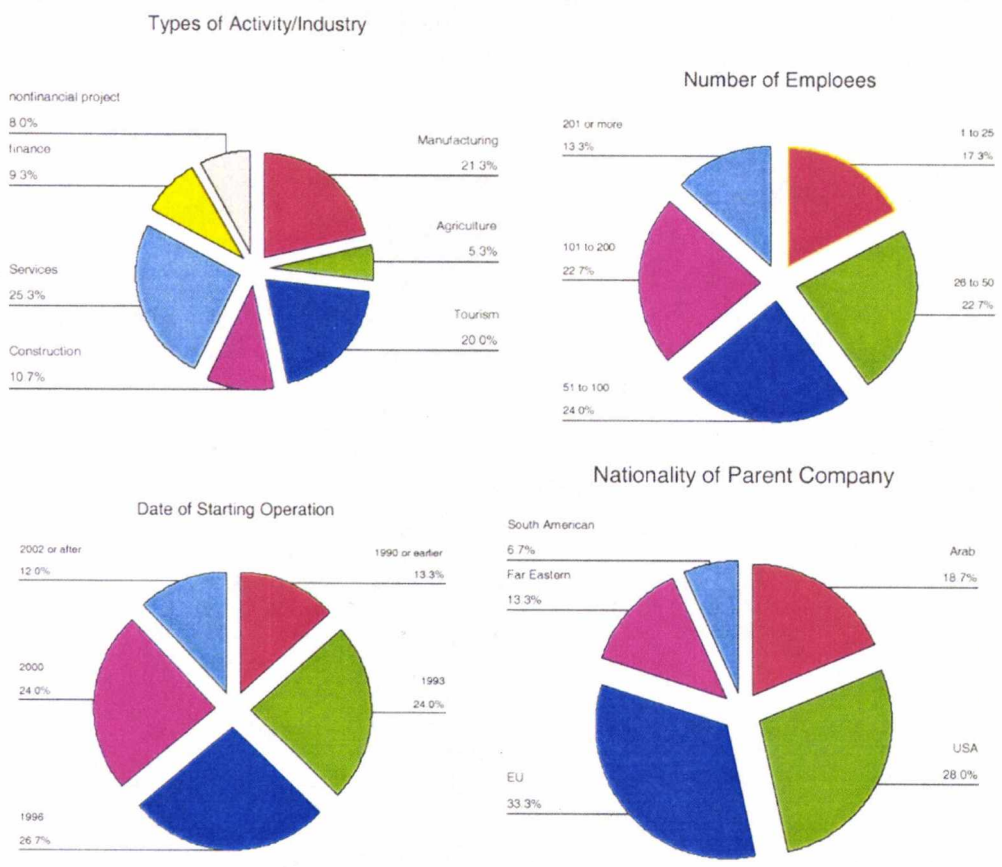
Data collection for this interview questionnaire was conducted in March-April 2006 with the authorized person of a hundred foreign firms doing business in Egypt. These firms were chosen randomly from different areas of activities.

4. Data Analysis

This section reflects the results of the questionnaire and will be presented in a way that reflects foreign investors' opinion about the major components of the investment climate in Egypt.

4.1. Results for Questions 1,2,3, and 4

Table 14: Answers On Question One



The outcome of the first question indicates that the majority of foreign investors interviewed were Europeans 33.3% while 28.0% USA, 18.7% Arabs, 13.3% Far Eastern, and 6.7% South American. It indicates as well that the average number of employees employed by these foreign firms is (26 to 50) 22.7%, (101-200) 22.7%. While (1-25) 17.3% and (201 or more) represented only 13.3% of the cases.

Concerning the starting date of their business, table 14 shows that 26.7% started in 1996, 24% in 1993, 24.0%2000, 13.3% in 1990, and 12.0% in 2000 or later.

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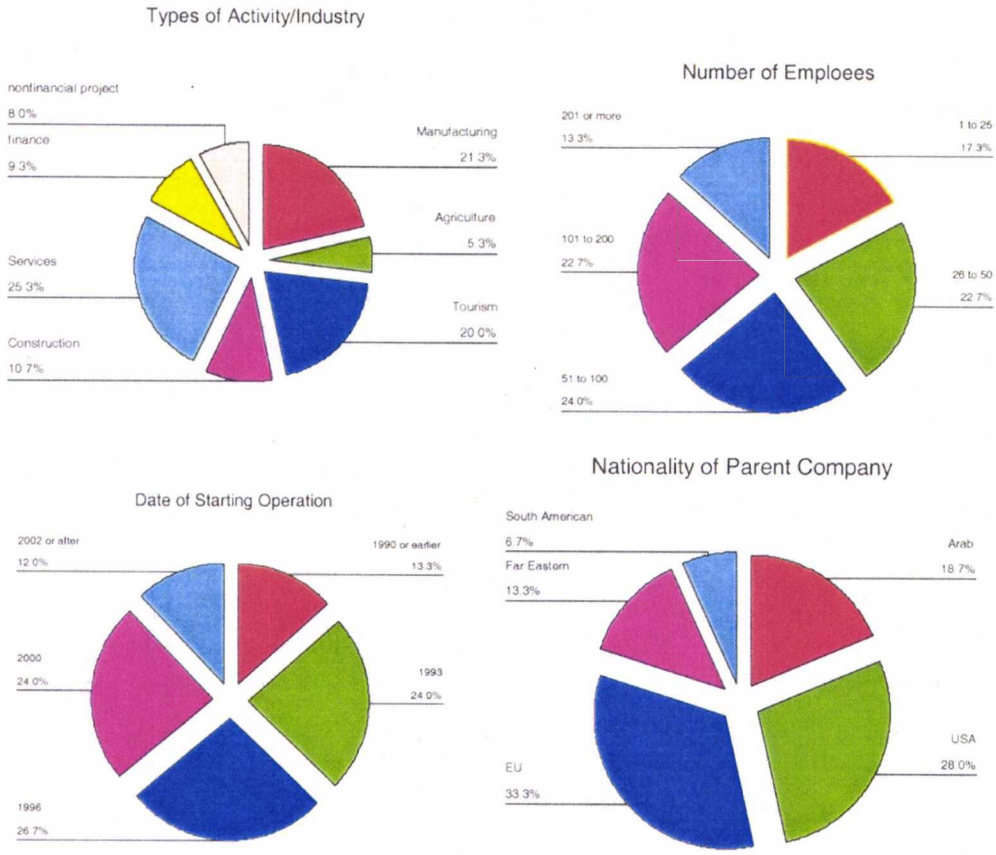

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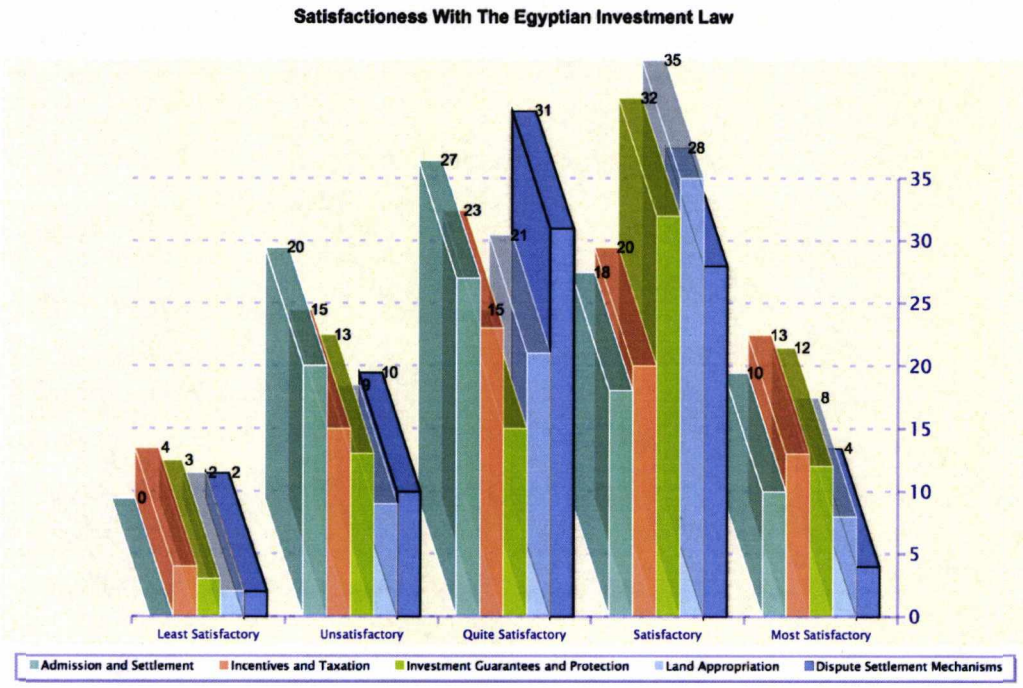

Figure 16: Answers on question five

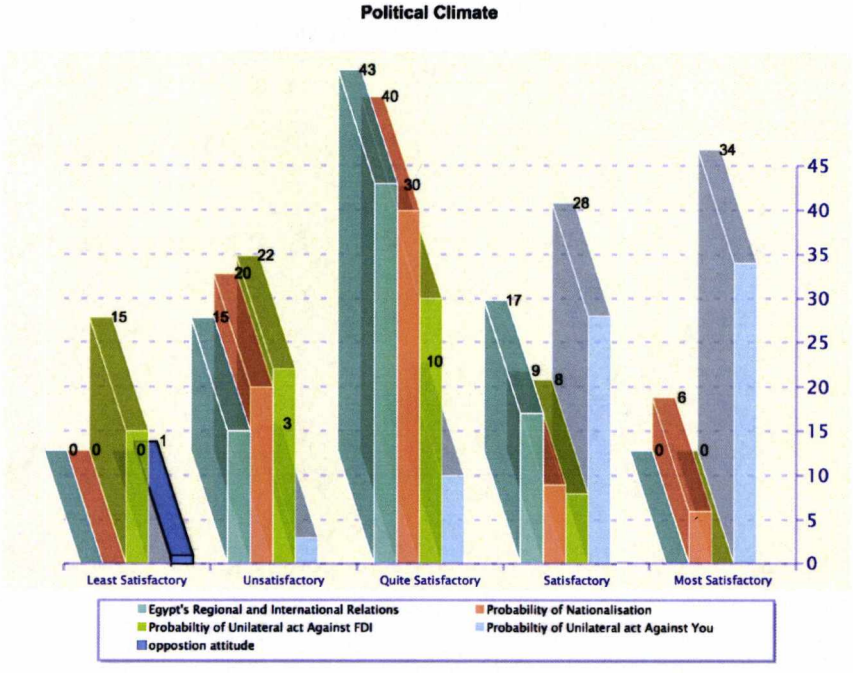

Figure 17: Answers on question six

Figure 17 on page 244 reflects the interviewed firms' evaluation of the stability in Egypt. The outcome shows that they were most worried about the probability of unilateral legal act affecting their firms only (34%). At the time they were most satisfied with Egypt's regional and international element of stability (20%).

Concerning the economic and business climate in Egypt, the following chart (figure 18) proves that foreign firms think the availability and cost of skilled labor is the least favourable feature of the economic and business climate in Egypt. The size and growth of the Egyptian market is the most favoured aspect of this climate.

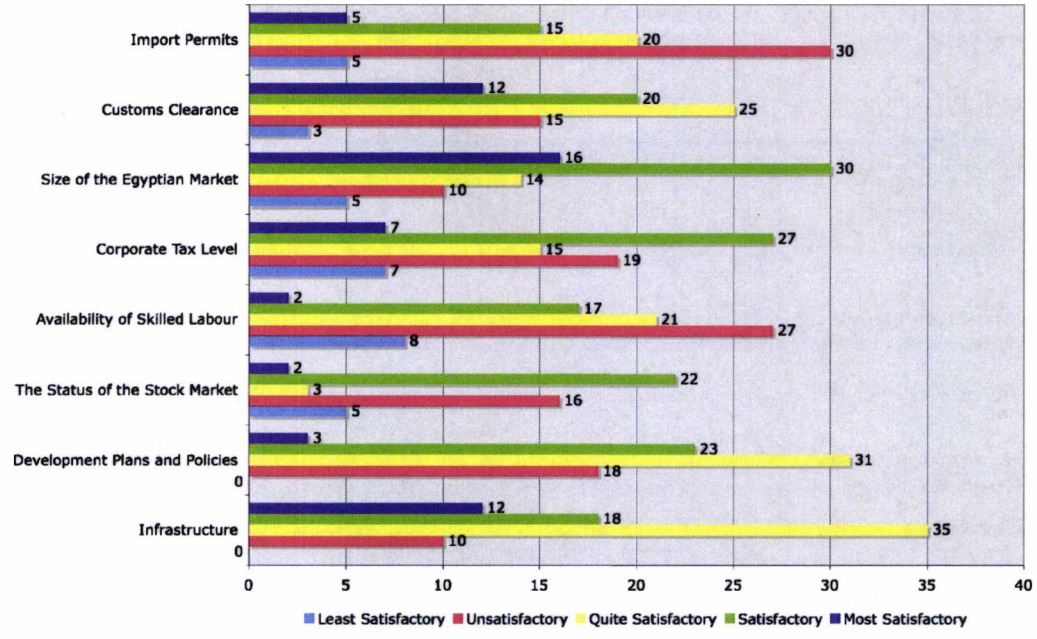

Figure 18: Answers on question seven

The following (figure 19) reflects the answers of the interviewed foreign firms about the impediments to the investment climate in Egypt. As shown in the above chart, it is clear that the opinion is that the unavailability of skilled labor and education (29%) is the most worrying impediment to the investment climate, then came the unpredictability of macroeconomic conditions (19%) and High tariff level (19%) in the second place.

Concerning the least disturbing impediments, the lack of a privatization element is considered as the least important impediment (30%) while the inadequacy of investment incentives (19%) is considered next in comparison.

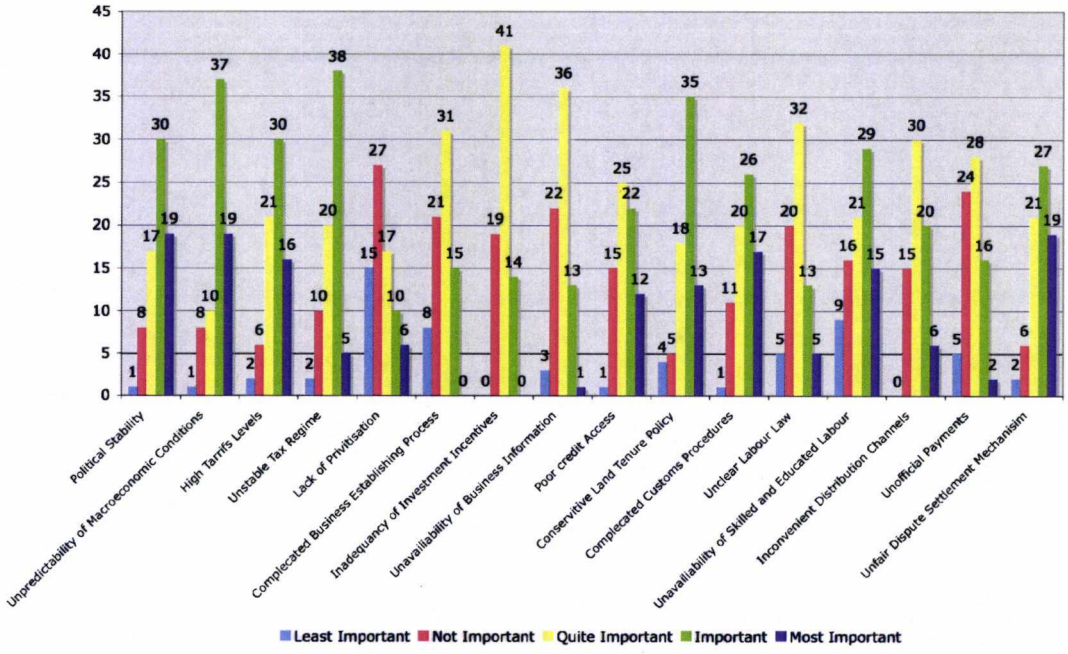

Figure 19: Answers on question eight

On the overriding factors that brought foreign firms to Egypt, the following chart (Figure 20) shows that Egyptian cheap labor (35%) has the priority, then the market size comes next (32%). the other factors came as follows investment incentives (20%), Natural resources (12%), skilled labor (3%).

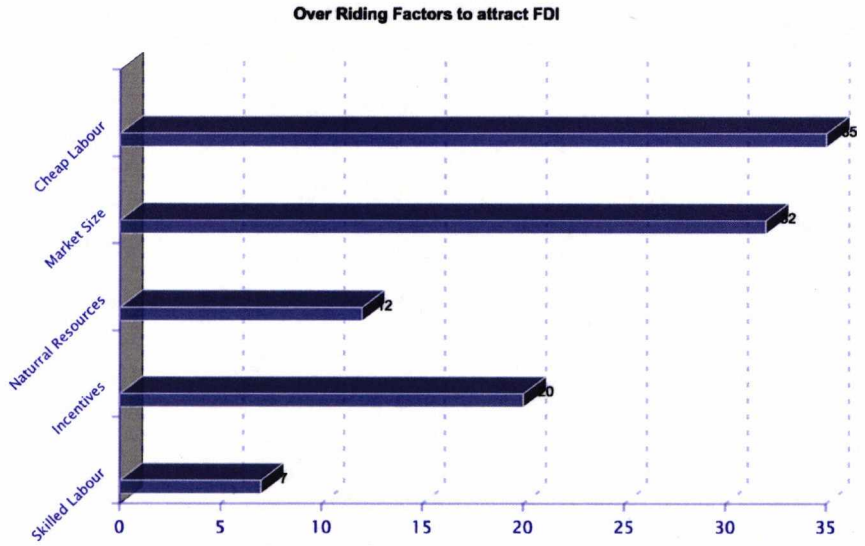

Figure 20: Answers on question nine

4.3. Results of Questions 10,11, and 12

This section examines the interviewed foreign firms about the future prospects of investing in Egypt.

Concerning question ten, about the necessary steps needed to be taken by the Egyptian government in order to improve the competitiveness of the country as host state, the chart in figure 21 shows that integrating more with the Arab world is the most important step for the future, as this means an access to a wider market (30%). The results of other factors came as follows: trade agreement with the EU (25%), trade agreement with the USA (5%), achieving a better growth rate (15%), improving credit worthiness (10%), political stability (15%).

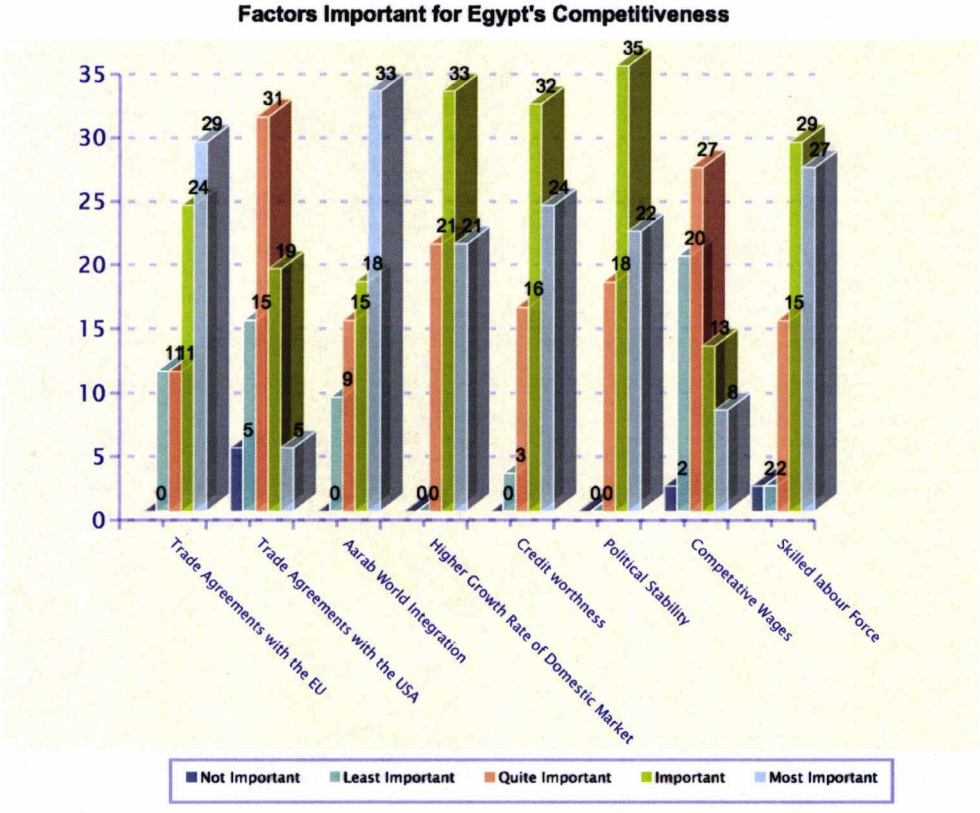

Figure 21: Answer on question ten

The following chart (figure 22) reflects the opinion of the interviewed foreign firms about the areas that need more improvement to enhance the investment climate in Egypt: Human resources (20%), tax incentives (16%), Privatization (15%), Dispute settlement mechanism (13%), and admission and establishment regulations (11%).

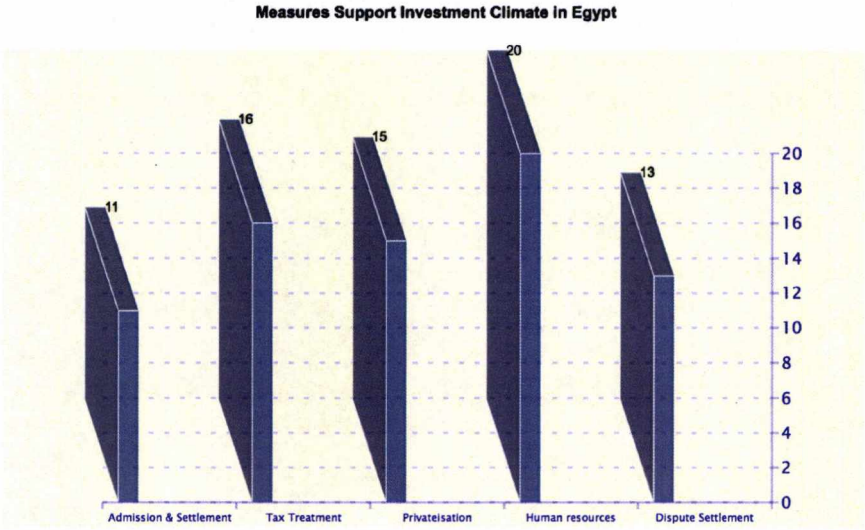

Figure 22: Answers on question eleven

Chart 23 reflects the plans of foreign firms for the next five years. 40% plan for a moderate increase for their firms, 28% plan to stand still, 13% plan for a significant increase in the size of their business, 13% plan to decrease the activities, and last around 5% plan to sell out and terminate their business in Egypt.

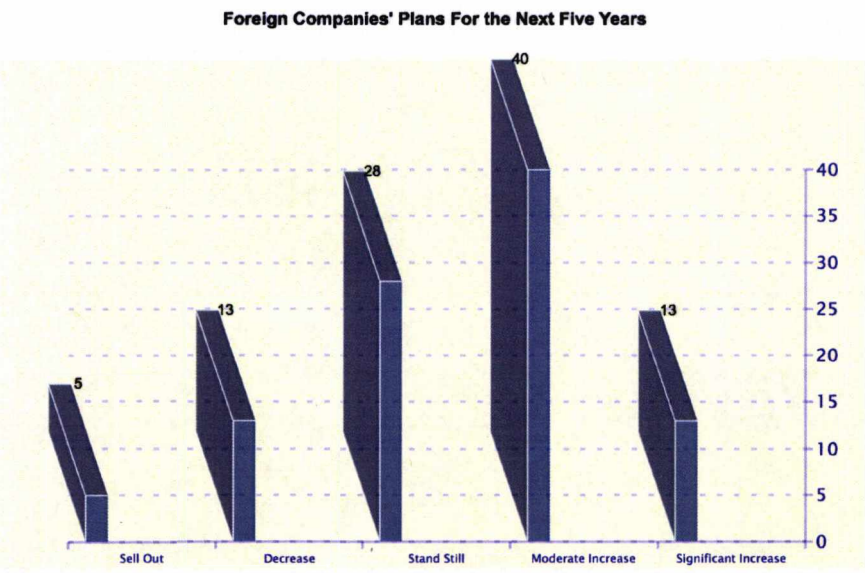

Figure 23: Answers on question Twelve

5. Analysis and Conclusions

A balanced, sequenced, and specially tailored diagnostic dictated the need for this survey. The importance of this survey is due to the engagement of foreign firms not only in expressing their opinion about the different aspects of investment climate in Egypt, but in designing this survey in some cases.

This section summarises and presents the outcome of this survey questionnaire. Generally, the degree of variation in responses was very low. This indicates the reliability of the response to the questionnaire and allows the identification of factors of high significance. Responses to the Surveys are also consistent, although there are some variations in opinion. The responses give some clear guidelines to the steps that the government needs to take in order to make the investment climate in Egypt even more business friendly. The following gives a summary of the responses.

In response to the question on major aspects that enhance the investment climate, the answers can be grouped and ranked by importance as:

- The stability and openness of the economy including a stable monetary policy, a stable exchange rate, liberal foreign exchange regulations, free repatriation of profits, favourable tax treatment for new ventures, a rapid program of privatization, and reduced general bureaucracy.
- The size, growth and location of the domestic market, including around 70 million population, reasonable purchasing power, expected GDP growth and growth of GDP per capita, good returns. In addition to that, Egypt enjoys a central location at the crossroads of the Middle East, Africa and Europe, and may be a "gate" to the Arab World.
- A large quantity of low cost labour, including the availability of relevantly skilled employees, skilled management, a competitive and trainable local labour force, and cheap labour.
- An adequacy of infrastructure, including the development of the infrastructure, and quality of available services.

- The relevant stability of a social and political system, which includes a presidential and parliamentary system and press freedom.
- Transparent legislation, including effective and consistently applied legal/fiscal legislation, clear and stable laws and regulations, clear and well-defined government policy, proper protection by arbitration of commercial disputes.
- Responses to the question on major problems that face the investment climate can be subsumed into five categories:
- The level of liberalization and government intervention. Whereas stability and openness are perceived as a major strength of the Egyptian economy, problem areas relate to the level of liberalization. Specific mention is made of the high tariff rates on imports, protection of some industries, and high cost of interest on medium to long-term debt, and high transaction costs. The complexity of the tax system is also mentioned a number of times. The most prevalent problem mentioned is the quality of government intervention, including bureaucratic and complicated procedures, and lack of sufficient transparency in regulations.
- The judiciary and legislation. Although the judicial system is considered generally fair and consistent, problems are perceived in the speed of judicial function, the application or interpretation of laws, the introduction of sudden changes in the law relating to the business environment, and the confusion between some investment laws.
- Labor market problems. The problem posed by the rigidity of the labour law is mentioned a number of times, confirming the difficulty perceived by employers reducing their labor force. Other problems that are mentioned are the availability of trained middle management and senior management in manufacturing and marketing.
- Insufficient support for exports including lack of regional trade agreements, of direct support for exports and of advanced infrastructural and other support facilities.
- Political security and political risk, including the need for sustained social stability, and more transparency in the democratic process.

The final set of responses is on what are the most important changes required of the government and legislation so as to improve the investment climate (Questions 10 and 11 of the questionnaire). Foremost among the suggestions made are:

- Further liberalization and deregulation, including a speedy move towards decentralization, a speedier approval process, the removal of red tape, the reduction of government sector, the acceleration of privatization, an increase in transparency at all levels, removal of monopolies in infrastructure and export services, and the creation of a more competitive environment. The need are also perceived to simplify tax regulations and improve tax inspection regulations, reduce income tax rates, reduce VAT on plant and equipment, and lower customs duties.
- Further improvements on the legislative front, especially the Labour Law, introduction of the Unified Company Law, improving the efficiency of the judicial process, and better enforcement of intellectual property rights. (Egypt has enforced new labour laws and a Unified Company Law after this questionnaire has been done).
- Promotion of export trade, with suggestions for concluding trade agreements with Arab and European countries and with the US, revising tax and other incentives so as to focus these on export performance and use of advanced technology, addressing quality issues and upgrading Egyptian standards and specifications to international norms.
- Improvement of the education and training system, by upgrading training programs, and education policy.

As mentioned earlier in this study, reform in developing countries takes place only in cases of urgency and hardship. Even so, the outcome of such surveys is useful and convincing in many cases. However, the most important role can such surveys fulfill, is to highlight areas for improvement, which need government attention if the political desire exists.

Chapter Nine:

Conclusions

Chapter Nine:
Conclusions

The political system of any country dictates the way it deals with the inflow of FDI. In this instance, Egypt sets a good example in the way a developing country may shift from being a socialist system into a market oriented economy for the sake of attracting more FDI. Since the adoption of the "Open Door Policy", Egypt has started encouraging the inflow of foreign capital from all sources, regardless of whether they are friendly or not.

Foreign investment in Egypt is regulated by a wide group of legislations, BITs, and MITs. All such tools aim at creating a sound investment climate, providing foreign investors with a broad combination of guarantees, especially against illegal expropriation, incentives, and concessions. However, the outcome of all that still depends on the country's political stability. In addition, FDI in most developing countries, including Egypt, still faces many unnecessary procedural obstacles, which may neutralise all efforts to attract more FDI and prevent the concerned administrative bodies from implementing investment legislations under the pressure of overriding bureaucracy.

There is no doubt that investment legislation in Egypt, at all levels, has paved the way for eliminating of investment impediments and this could be considered as a constructive step forward, to create a favourable investment climate. However, the remaining impediments, in addition to a state of chronic infrastructure crises, would definitely deter foreign investors and prevent Egypt from making use of FDI, which is already available. This is because the Egyptian government has been focusing only on some aspects of investment climate and ignoring other aspects, which are necessary for overall national reform.

Egypt realised very early the importance and impact of opening up with regional countries to improve its investment climate. The signing of an economic partnership agreement with the European Union is an important step forward. Similarly, Egypt is planning to sign the proposed Arab League's Free Trade Zone agreement. Egypt believes that regional grouping would facilitate the way for coordination of inter-regional trade and investment policy and custom harmonisation. More over, intra-

regional coordination helps in adopting common trade and investment policies and leads to the creation of regional investment promotion events.

Because the investment climate is all about the way foreign investment is treated by host states, from an international law point of view, BITs are the most effective way to reaffirm the rules of international law on protecting FDI, especially in the areas where a host state enjoys sovereign supremacy. These BITs usually contain provisions on the standards of treatment to be given to foreign investors. As applying these provisions improves the investment climate of host states, Egypt has already signed more than 112 BITs.

Chapter eight of this study investigated the performance of major factors affecting the investment climate in Egypt from the perspective of foreign firms operating in Egypt.

Government regulations. On the positive side, it has been agreed that the costs of setting up a company are reasonable, and that the government does not interfere badly with pricing, with the exchange rate. However, incentives are considered highest for locating in new industrial zones. On the negative side, the judicial system is not sufficiently fast and efficient and the bureaucracy is still considered as a serious impediment.

- Taxation issues. With respect to taxation, tax rates are considered as acceptable for the three main types of taxes: sales, corporate taxes and personal income taxes. Meanwhile, dealing with the tax authorities was considered slow and tax disputes are not settled appropriately.

- Infrastructure. Foreign firms considered the adequacy of the infrastructure in meeting business needs as acceptable. Utilities (water, electricity, natural gas, fuel and telephones) are available at competitive charges and their quality is also considered better than average, except for roads and telephones.

- Labour and salaries. Foreign firms give an exceptionally positive opinion of the Egyptian labour market, both in terms of recruitment and of wage and salary scale. Foreign firms' opinion varied between unskilled-semi-skilled labour (engineers and accountants) and the availability of skilled labour, middle managers, and computer specialists, who are more difficult to recruit. The level of wages and salaries are

considered highly competitive for all eleven jobs descriptions, with the three most competitive categories being skilled and semi skilled labour, and engineers.

- The outcome of the questionnaire reflects foreign firms expectations and growth and investment plans are highly encouraging over the coming five years. As to their own plans for the next five years, the opinion of foreign firms operating in Egypt is extremely positive. They are planning to expand their investment in Egypt.

This study dealt with many major aspects related to the foreign investment climate in Egypt and proved that the Egyptian government is making great efforts to increase the attractiveness of its investment climate. However, such legal and institutional efforts have to continue, especially in the following areas, which constitute a serious impediment to the desired sound investment climate:

- The judicial system in Egypt is still time consuming and expensive, especially concerning commercial judicial procedures. The entire judicial system in Egypt is still suffering from many problems, such as the low technical capacity of staff, poor facilities, and limited financial resources. In general, the litigation system in Egypt is not updated and not qualified to deal with contemporary issues, like privatisation and project finance.
- Bureaucracy is one important impediment facing foreign investors in Egypt. Efforts should be made to abolish the bureaucratic procedures and to create, or to upgrade GAFI to be, one-stop-shop. The absence of the technical and procedural efficiencies, and the non-coordination between the government bodies dealing with foreign investment, undermines efforts to create a favourable investment climate.
- Apart from the tax holiday offered to foreign investment, it could be said that the tax system in Egypt is still applying an inefficient process in the way it deals with foreign investment. Tax rates are very high, the process is time consuming, and the process for filing tax returns is very inefficient.
- On human resources development level, chapter eight of this study shows that foreign investors consider the lack of a qualified workforce in Egypt to be one of the most serious obstacles for them. In addition, laws governing employment in Egypt enforce some rigidity, which reduce opportunities for change and career improvements.

Thus, we can conclude that the policy on FDI in Egypt was focused on the wrong question. The challenge should not be only the creation of a sound investment climate or attracting more foreign investments, but rather to derive macroeconomic benefits from FDI. That is done not only by offering incentives, especially tax incentives, but by making Egypt's location characteristics more favourable to potential investors, by improving the availability of other factors such as qualified labour, the creation of sound institutions, and by opening up to international trade.

The extent of Egypt's continued development depends largely on the inflow of foreign direct investment as this has proved to be of considerable importance in the process of the country's development. But, it is of vital importance that efficient utilisation of such foreign capital take place.

Treatment of foreign investment in host states cannot be evaluated theoretically, or in the abstract, because this matter depends on the subjective assessment of foreign investors. Finally, it is worth saying that host states' unilateral guarantees, offered by national legislation, constitute only an act of good faith. But, it is clear that such guarantees will be more secure if national legislation is supported by contracts with foreign investors and treaties on regional and international levels. The legal effects of this tendency will link keeping the promises of the host state to their credit-worthiness. This means a favourable and more stable investment climate.

APPENDIX ONE

The Arab Republic Of Egypt
LAW NO, 8 OF 1997
ON
INVESTMENT GUARANTEES AND INCENTIVES
THE GENERAL AUTHORITY FOR INVESTMENT & FREE ZONES[1]

THE PROMULGATION ARTICLES
In the name of the people,
The President of the Republic
The People's Assembly Passed The Following Law And It Has Been Promulgated:

Article one
The provisions of the attached Law shall govern investment guarantees and incentives.

Article two
With due regard to the provision of Article 18 of the attached Law, which provisions shall not affect the tax privileges and exemptions, and other guarantees and incentives established for the companies and the existing establishments at the time of its enforcement. Such companies and establishments shall continue to maintain such privileges, exemptions, guarantees, and incentives, until expiry of their specified terms, and in accordance with the legislations and agreements wherefrom they emanate.

Article three[2]
The General Authority for Investment and Free Zones is the competent Authority, which shall exclusively apply the provisions of this Law, and the Laws of Joint Stock Companies, Partnerships, and Limited Liability Companies promulgated by Law No.159 of 1981, and Law No. 95 of 1995 concerning Financial Lease, and its Executive Regulations. The aforesaid shall be without prejudice to the provisions of the Capital Market Law promulgated by Law No. 95 of 1992, and Law No. 148 of 2001 regarding Real Estate Financing. The Authority shall not be restricted to the governmental rules and regulations concerning the financial and administrative matters, which shall be regulated by a decree issued by the President of the Republic.

The Authority's Board of Directors shall issue the Internal Regulations and Executive Resolutions pertaining to the Authority's financial, administrative and technical matters, and shall set up its organizational structure, and shall take all necessary procedures to manage the Authority and organize its work. The Authority's Board of Directors may establish offices for the Authority, in the country or abroad.

To such end, the Authority may seek the assistance of the best national and international professionals and expertise with no restrictions to the limitation provided in any legislation concerning the remuneration of employees, directors, and expert advisors.

The Authority shall have a private account in which its proceeds shall be deposited, and the balance of such account shall be carried forward from one year to another.

The Authority's Board of Directors shall approve its draft budget and final accounts prior the approval of the Prime Minister and submittal before the People's Assembly.1

Article four
Without prejudice to the provisions of the preceding Article, the Investment Law promulgated by Law No. 230 of 1989 shall hereby be repealed, except for paragraph (3) of Article 20 of the aforementioned

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[1] www.gafinet.net

[2] Article Three (3) has been amended by Law No. 13 of 2004 issued on April 22, 2004. Any other provision in breach of the provisions of the attached Law shall, likewise; be repealed.

Law, and Articles 5 and (5 bis) of Law No.1 of 1973 concerning hotel and tourist facilities, and Articles 21, 24 and 25 of Law No. 59 of 1979 concerning New Urban Communities, and Article 30 of Law No. 95 of 1995 concerning Financial Lease.

Article five
The Prime Minister shall issue the Executive Regulations of the attached Law within three (3) months from date of its enforcement. Pending the issuance of such Regulation, the prevalent regulations and decrees on the date of the enforcement of this Law shall continue to apply where they do not conflict with its provisions.

Article Six
This Law shall be published in the Official Gazette, and shall come into force the day following the date of its publication. This law shall bear the State Seal and shall be enforced as one of its Laws.

Issued by the Presidency on 11th of May 1997

Hosny Mubarak Issued

By The Presidency On 4 *Muharram* 1418 A.H.
Corresponding To 11th of May 1997 A. D.

THE INVESTMENT GUARANTEES AND INCENTIVES LAW
PART ONE
GENERAL PROVISIONS

Article 1
The provisions of this law shall apply to all companies and establishments to be incorporated after the date of its enforcement regardless of the legal form governing them, for exercising their activities in any of the following fields:

1. Reclamation and cultivation of barren and desert land, or either of them.
2. Animal, poultry, and fish production.
3. Industry and mining.
4. Hotel, motels, hotel apartments, tourist villages, and tourist transport.
5. Goods' reefers; refrigerators for the preservation of agricultural crops, manufactured products, foodstuffs, container's depots and grain silos.
6. Air-transport and services directly related thereto.
7.] High-seas maritime transport.
8. Petroleum services supporting drilling and exploration operations, and the transport and supply of natural gas.
9. Housing of which all units are leased unfurnished for
10. Other than administrative housing purposes.
11. Infrastructure including drinking water, sewage, electricity, roads, and communications.
12. Hospitals, medical and therapeutic centres, which offer 10% of their service free of, charge.
13. Financing lease.
14. Guarantee subscription of securities.
15. Risk capital.
16. Production of computer software and systems.
17. Projects financed by the Social Fund for Development.

The Council of Ministers may add other fields as deemed needed for the country.

The Executive Regulations of this Law shall determine the conditions and limits of the fields referred to herein.

Article 2
The investment guarantees and incentives, including tax exemptions, enjoyed by the Companies and establishments with multi-purposes and activities, its activity shall be Limited to the fields defined in the preceding Article and those which the Council of Ministers may add.

Article 3
The provisions of this Law shall not prejudice any tax privileges or exemptions or other favourable guarantees and incentives

established by other legislations or agreements.

Article 41[3]

Corporations established according to the provisions of this Law shall be subject to the provisions of Articles 17, 18 and 19 of the Law on Joint Stock Companies, Partnerships Limited by Shares, and Limited Liability Companies promulgated by Law No.159 of 1981 and the statutes of said corporations hall be published according to the rules and procedures determined by the Executive Regulation of this Law.

License for the establishment of personal companies according to the provisions of this Law, shall be issued by a decree from the competent Administrative body after reviewing the principal data of the incorporation contracts of these companies. These companies shall acquire their legal entity, from the date of registration in the Commercial Register. The Articles of Incorporation shall be published according to the rules and procedures determined by the Executive Regulations of this Law.

Irrespective of the legal form, the signatures of the partners or their representatives on the Articles of Incorporation must be notarized against payment of a notarization fee equal to one-quarter percent of the value of the paid-in capital with a maximum limit of L.E. 500 (Five Hundred Egyptian Pounds), or its equivalent in foreign currency, as the case may be, whether notarization is effected in Egypt or before the Egyptian Authorities abroad.

The foregoing provisions shall apply to every amendment made to the company statutes.

Article 5

The Competent Authorities shall assume the appropriation of lands owned by the State to investors according to the governing legislations through the offices established at the Authority and its branches. Such offices shall establish a database on the lands available for appropriation, its areas, location, prices, and the conditions of its disposal. Such information shall be periodically updated and whenever so required. Such offices shall also maintain maps issued by the National Centre for planning the use of State owned lands.

The Authority shall take all measures to have such information available to investors.

Lands for investment may not be offered before ascertaining non-existence of any dispute thereon. Also the offered areas and prices may not be modified after an announcement thereof has been made. Neither amendment of prices nor addition of improvement fees may be to these prices after disposal; unless expressly provided in the agreement.

Moreover, execution or announcement concerning the disposal contracts of State owned lands concluded with its organizations, public authorities, public sector companies or public business sector companies may not be terminated based on to the existence of a dispute between such bodies concerning these lands.

Article 6

Application for the filing of criminal claim for the crimes provided in Article 124 of the Customs Law No. 66 of 1963, Article 191 of the Income Tax Law No. 157 of 1981-Article 45 of the General Sales Tax Law No. 11 of 1991 and Article 9 of Law No.38 of 1994 regulating transactions of Foreign Currencies, shall be submitted after seeking the opinion of the Competent Administrative Authority in case the accused of committing the crime is affiliated to one of the companies or establishments subject to the provisions of this Law.

The Competent Administrative Authority shall express its opinion in this regard within fifteen (15) days from date of receiving the letter seeking such opinion, otherwise; application for filing the claim may be processed.

Article 7

The investment disputes regarding the implementation of the provisions of this Law may be settled in the manner agreed upon with the investor. The parties concerned may also agree to settle such disputes within the framework of the agreements in force between the Arab Republic of Egypt and the country of the investor, or within the framework of the Convention for the Settlement of Disputes arising from investments between the States and nationals of other countries, which the Arab Republic of Egypt has adhered to by Law No. 90 of 1971, and pursuant to the conditions,

[3] Article (4) has been amended by virtue of Law No. 94 for 2005. Official Gazette - edition No 24 (bis) on 21/6/2005.

terms, and cases where such agreements do apply, or according to the provisions of Law No. 27 of 1994 concerning Arbitration of Civil and Commercial Issues. It may also be agreed to settle said disputes through arbitration before the Cairo Regional Centre for International Commercial Arbitration.

PART TWO
INVESTMENT GUARANTEES

Article 8
Companies and establishments may not be nationalized or confiscated.

Article 9
Companies and establishments may neither be sequestrated nor may their assets be subject to administrative attachment, seized, restrained, frozen, or expropriated.

Article 10
No administrative authority may intervene in pricing the products of companies and establishments or in determining their profits.

Article 11
No Administrative Authority may cancel or suspend, in whole or in part, a license for usufruct of real estate, which the company or establishment is licensed to utilize, except in case of breach of the conditions of the license.

The Prime Minister upon a proposal of the Administrative Authority shall issue a decree terminating or cancelling a license. The involved party may challenge such decree before the Administrative Courts within thirty (30) days from date of notification or acknowledgement thereof.

Article 12[4]
Without prejudice to the disposals that occurred prior to the effective date of this Law, companies and establishments shall have the right to own land and realty which are necessary for the performance of expansion of their activities regardless of the nationality of the partners and shareholders, their domicile or the percentage of their partnership or shareholding in the capital. This is with the exception of land and realty located in areas, which are determined pursuant to the issuance of a decree by the Council of Ministers, wherein the conditions and rules for disposal are determined

Article 13
Without prejudice to the laws, regulations and decrees governing importation, and without need for their recordable on the Importers' Register, the companies and establishments shall have the right to import, by themselves or through third parties, all production requirements, materials, machinery, equipment, spare parts and means of transport suited to the nature of their activity, as may be required for their construction, expansion or operation.

Companies and establishments may also export their products, by themselves or through intermediary, without neither license nor the need for recordable on the Exporter's Register.

Article 14
Joint Stock Companies, partnerships limited by shares or limited liability companies whose activities are limited to the fields mentioned in Article 1 of this Law shall not be subject to the provisions of Articles 17,18. 19 and 41, and the first and fourth paragraphs of Article 77 and Articles 83. 92 and 93 of Law No. 159 of 1981 concerning Joint Stock Companies, Partnerships Limited By Shares and Limited Liability Companies.

Equity portions and shares may be negotiated during the first two fiscal years of the company upon the approval of the Prime Minister or his authorized designee.

The Competent Authority shall replace the Companies' Department in applying the provisions of Law No. 159 of 1981, referred to herein, and it's Executive Regulations with regard to the aforementioned companies.

Joint Stock Companies shall not be subject to Law No. 73 of 1973 determining the Conditions and Procedures for Election of the Workers' Representatives on the Boards of Public Sector Units, Joint Stock Companies, Private Societies and Establishments. The Statutes of the Company shall specify the method of the workers' participation in its management and in the manner determined by the Executive Regulation of this Law.

[4] Article (12) has been amended by virtue of Law No. 94 for 2005. Official Gazette - edition No 24 (bis) on 21/6/2005.

Article I5
Joint stock companies shall be accepted from the application of Law No. 113 of 1958 concerning employment in the Joint Stock Companies and Public Organizations, and Article 24 of the Labour Code issued by Law No. 137 of 1981.

PART THREE
INVESTMENT INCENTIVES
CHAPTER O N E : TAX EXEMPTIONS

Article 16
Profits of companies, establishments, and participants' shares therein shall be exempt from the tax on revenues of commercial and industrial activities, or the tax on corporate profits, as the case may be, for a period of five (5) years starting from the first fiscal year following the beginning of production or of practicing the activity. Such exemption period shall be for a period of ten (10) years in respect of companies and establishments set up in the new industrial zones, new urban communities and remote areas to be determined by a decree from the Prime Minister, as well as the new projects financed by the Social Fund for Development.

Article 17
Profits of the companies and establishments exercising its activity outside this old valley, and participant's shares therein shall be exempt from the tax on revenues of commercial and industrial activity or the tax on corporate profits, as the case may be, whether they be established outside this valley or transferred therefore, for a period of twenty (20) years, starting from the first fiscal year following the beginning of production or of exercising activity.

The Council of Ministers shall issue a decree designating the areas to which this provision shall apply.

Article 18
Companies, establishments and projects financed by the Social Fund for Development existing on the date this Law comes into force, and which exercise their activity within the fields referred to in Article 1 hereof shall complete the periods of exemption provide in the two preceding Articles if the periods of exemption determined for them had not expired on that date.

Article 19
In application of the provisions of the preceding Articles, the first year of exemption shall include the period from date of start up of production or of practicing activity, as the case may be, till the end of the following fiscal year. The company or establishment shall notify the Competent Administrative Authority of the date of start up of production or of practicing activity within one (1) month from such date.

Article 20
Contracts of incorporation of companies and establishments and loan and mortgage contracts related to their business shall be exempt from the stamp tax as well as notarization and publication fees for a period of five (5) years from the date of record on the Commercial Register.

Contracts of registration of lands necessary for the establishment of companies and establishments shall also be exempt from the above mentioned tax fees.

Article 21
A tax exemption on corporate profits shall apply to an amount equivalent to a percent of the paid-in capital determined by the loan and discount rate of the Central Bank of Egypt for the accounting year; provided the company is a joint stock company and its shares are recorded at one of the stock exchanges.

Article 22
Returns on bonds, financial debentures, and other similar securities issued by Joint Stock Companies shall be exempt from the tax on movable capital revenues; provided that such are offered for public subscription and are recorded at one of the stock exchanges.

Article 23
The provisions of Article 4 of Law No. 186 of 1986 regulating Customs' Exemptions, concerning the collection of customs duty at a fixed rate of 5% of the value shall apply to the companies and establishments to all of their imports of machinery, equipment, and appliances necessary for their establishment.

Article 23 Bis:
Expansions approved by the Administrative Authority shall be exempt for five (5) years from the tax provided in Article 16 of this Law, and exemptions stipulated in Articles 20 and 23 shall also apply to such expansions. Expansion shall mean increase in the capital

used in the addition of new assets for the purpose of increasing the production capacity of the project.

The Executive Regulations shall determine the kinds of assets, rules, and controls used as basis in calculating such increase. [5]

Article 24
Profits resulting from merger, division or change of the legal form of companies shall be exempt from taxes and duties owing by reason of merger, division, or change of the legal form.

Article 25
The merging and merged companies and establishments, and those which are divided or whose legal form is changed, shall enjoy the exemptions prescribed for them before such merger, division or change of legal form until the period of such exemption has expired. The merger, division, or change of the legal form shall not ensue any new tax exemptions.

Article 26
The resultant evaluation of in-kind participations contributed to the incorporation of joint stock
Companies, partnerships limited by shares and limited liabilities companies or to their capital increase, shall be exempted from the tax on commercial and industrial activity revenues, or the tax on corporate profits as the case may be.

Article 27
The Executive Regulations of this Law shall define the conditions, rules and procedures related to enjoying tax exemptions automatically and without dependence on any administrative approval, provided the exemption shall be cancelled in case of breach to any of such conditions and rules.

The Prime Minister shall issue a decree cancelling the exemption upon a presentation from the Competent Administrative Authority. The party concerned may challenge such decree before the Administrative Courts, within thirty (30) days from the date of notification or acknowledgement thereof.

CHAPTER TWO
ALLOCATION OF LAND

Article 28
The Council of Ministers may, upon the proposal of the Competent Minister, issue a decree allocating the lands owned by the State or by public legal bodies to companies and establishments to be constructed in certain areas in the fields specified in Article 1 hereof, and free of charge pursuant to the procedures provided in the Executive Regulation of this Law.

CHAPTER THREE
FREE ZONES

Article 29
A Law shall establish the establishment of the free zone covering an entire city.

Public free zones shall be established by a decree from the Council of Ministers upon the proposal of the Competent Administrative Authority for the purpose of setting up duly licensed projects, whatever their legal form.

The Competent Administrative Authority may issue a decree for the establishment of private free zones, each of which shall be confined to one project, if the nature thereof shall so require. In light of the controls set forth in the Executive Regulations of this Law, the Competent Administrative Authority may also approve the transformation of inland projects into a private free zone. The decree issued for the establishment of a free zone shall indicate its location and boundaries.

Public free zone shall be managed by a board of directors formed and its Chairman appointed by a decree issued by the Competent Administrative Authority.

The board of directors shall be have competence over the implementation of the provisions of this Law, its Executive Regulations, and the decrees issued by the said

Authority.

Article 29 (Bis)[6]
An authorization may be issued for the transfer of companies and establishments located inside the Public and Private Free Zones to conduct activities under the Internal Investment System. Companies and establishments that have been transferred shall be exempted from the payment of any taxes or

[5] Article 23 (bis) added by Law No. 162 of 2000 issued on June 18, 2000.

[6] The whole Article (29) bis has been added by virtue of Law No. 94 for 2005. Official Gazette edition No 24 (bis) on 21/6/2005.

custom duties on imported equipment, machinery, devices, production lines, components thereof and spare parts, that are required for the activity, at the depreciation rates thereof and provided that twelve months have lapsed from the date of commencement of the activity or of production inside the Free Zone.

The authorization and exemption referred to in the preceding paragraph, shall take place in accordance with the conditions, controls and procedures determined in the Executive Regulations of this Law.

Article 30
The Competent Administrative Authority shall lay down the policy to be pursued by the free zones, and may adopt such resolution as it deems necessary to achieve the purpose for which such zones have been established, particularly:

a) Laying down the systems and regulations necessary for management of free zones.
b) Laying down the conditions for granting licenses, and occupancy of lands and buildings, the rules governing ingress and egress of goods and their recordation, the fee for the warehousing of such goods, the examination of documents and auditing, the system of controlling and guarding these zones and collecting dues owing to the State.

Article 31[7]
The Board of Directors of the Free Zones shall issue a preliminary approval for the establishments of companies and establishments inside said Zones. The competent administrative body shall issue a decree for the incorporation of such companies and establishments. The chairman of the Board of Directors is authorized to issue licenses for these companies and establishments to practice their activities.

The license shall indicate the purposes for which it is granted, its term and the amount of financial guarantee to be paid by the licensee. This license may not be assigned, in whole or in part, except upon the approval of the authority issuing the same. Denial of license or of assignment thereof shall be by a causative resolution. The party concerned may lodge a complaint there-against with the Administrative Authority Concerned in accordance with the rules and procedures set forth in the Executive Regulation.

The licensee shall not enjoy the exemptions or privileges provided for in this Law except to the extent of the purposes indicated in the license.

Article 32
With due regard to the provisions set in the laws and regulations banning dealings in certain goods or materials, goods exported abroad by the free zone projects or imported for the pursue of their activity, shall not be subject to the rules governing import and export, nor to the customs procedures related to exports and imports. Such goods shall also not be subject to customs taxes, the general sales tax and other taxes and duties.

With the exception of passengers' cars, all types of tools, supplies, machinery and all different means of transportation, necessary for pursuing the activity licensed for all kinds of projects existing inside the free zones, and if the nature and necessity for pursuing such activity requires its temporary exist from the free zone inside the country and return thereto.

The aforesaid shall apply to the tools, supplies and machinery, according to the cases, guarantees, conditions and procedures as specified by a decree issued by the Prime Minister based on the proposal of the Minister of Finance and Head of the Authority.[8]

The Executive Regulation of this Law shall determine the procedures of moving and securing the goods from the point of unloading until its arrival at the free zone and vice versa.

The Competent Administrative Authority may, in the manner specified by the Executive Regulation of this law, allow the temporary ingress of local and foreign goods, materials, parts, and raw materials, owned by the project or by third parties, from inside the country into the free zone, on a temporary basis, for repair, or for conducting Manufacturing processes thereon and thereafter return inside the

[7] The first paragraph of Article (31) has been amended by virtue of Law No. 94 for 2005. Official Gazette edition No 24 (bis) on 21/6/2005.

[8] Law No. 13 of 2004 issued on April 22, 2004 has amended Paragraph two (2) of Article 32.

country, without being subject to the applicable import rules. Customs duties shall be collected in respect of the repair cost pursuant to the provisions of the Customs Laws

The provisions of Article 33 of this Law shall apply to manufacturing processes.

Article 33
Import from the free zones into the country shall be subject to the general rules applicable to imports from abroad. Customs taxes on goods imported from the free zone into the local market shall be paid as if they were imported from abroad.

As for the products imported from free zone projects, and which comprise local and foreign components, the customs tax base therefore shall be on the value of the foreign components at the prevalent prices at the time of their egress from the free zone into the country; provided the customs tax due on the foreign components shall not exceed the tax due on the final product imported from abroad.

The foreign components shall consist of the imported foreign parts and materials as per its condition upon ingress into the free zone, exclusive of the operating costs in that zone. In determining freight costs, the free zone shall be deemed the country of origin for the products manufactured therein.

Article 34
The director of the free zone customs shall notify the zone Chairman of any unjustified cases of shortage or overage, as compared with the bill of lading to the number of packages, or their contents, or to the packed or loose (bulk) goods, if they were consigned to the free zone.

The Competent Administrative Authority shall issue a decision regulating liability for the cases provided for in the preceding paragraph and the ratio of tolerance therein.

Article 35
Projects established in the free zones, and dividends to be distributed, shall not be subject to the provisions of the tax and duty laws valid in Egypt.

Such projects, however, shall be subject to an annual fee of 1 % (one percent) of commodity value upon ingress with respect to the storage projects and of commodity value upon egress concerning the manufacturing and assembly projects. Transit trade goods with fixed destination shall be exempt from this duty.

Projects, whose main activity does not necessitate the ingress or egress of commodities, shall be subject to an annual fee of 1% (one percent) of the aggregate revenues thereby realized based on accounts accredited by one of the chartered accountants.

In all cases, projects shall pay a services charge determined by the Executive Regulation of this Law.

Article 36[9]
Companies conducting their activities under the Free Zones Systems shall not be subject to the provisions of Law No. 73/1973 determining the conditions and procedures of electing labour representatives to the board of directors of public sector units, joint stock companies and non-governmental organizations and private societies and organizations.

Article 37
Maritime transport projects established in free zones shall be exempt from the conditions related to the nationality of the vessel owner and its crew as are provided for in the Merchant Marine Law, and in Law No. 84 of 1949 concerning Registration of Merchant Vessels.

Vessels owned by such projects shall also be accepted from the provisions of Law No.12 of 1964 Incorporating the Egyptian General Organization for Maritime Transport.

Article 38
The licensee shall insure all buildings, machinery and equipment against all accidents, and shall remove the same, at his own expense within the period to be determined by the zone board of directors in accordance with the rules laid down by The Competent Administrative Authority.

Article 39
Entry or residence in the free zones shall be in accordance with the terms and conditions set forth in the Executive Regulation of this law.

[9] The reference to the companies Law No.159 for 1981 made in Article (36) has been cancelled by virtue of Law No. 94 for 2005. Official Gazette - edition No 24 (bis) on 21/6/2005.

Article 40
The provisions of Law No. 173 of 1958 requiring obtainment of a work permit prior working with foreign bodies and Law No. 231 of 1996 concerning certain provisions regulating the work of Egyptians with foreign organisms, shall not apply to Egyptians working in projects established in the free zones.

Article 41
No person may pursue on permanent basis, in a profession or craft in the public free zone for his own account, except after obtaining a license therefore from the chairman of its board of directors in accordance with the terms and conditions determined by the Executive Regulation of this Law, and after payment of the fees determined by such Regulation provided it shall not exceed L.E. 500 (Five Hundred Egyptian Pounds) per year.

Article 42
Employment contracts concluded with employees in the free zones shall be drawn up in four copies; one copy for each of the parties, a copy to be deposited to the free zone management, and another copy with the area labour office. If a contract is drawn up in a foreign language, the latter two (2) copies shall be accompanied by a translation into Arabic.

Article 43
Projects established in public free zones shall not be subject to the provisions of Law No. 113 of 1958, and Article 24 and Chapter 5 of Part III of the Labour Code.

The Board of Directors of the Competent Administrative Authority shall establish the rules regulating the personnel affairs in these projects.

Article 44
The provisions of the Social Security Law No.79 of 1975 shall apply to Egyptians employed in projects exercising their activity in the free-zones.

Article 45
A fine of not less than L.E shall punish any infringer of the provisions of Article 41 of this Law. 2000 (Two Thousand Egyptian Pounds) and shall not exceed L.E. 5000 (Five Thousand Egyptian Pounds).

Criminal suit related to such crimes shall not be filed, except upon a written request from the Competent Administrative Authority. The said Authority may effect conciliation with the

Infringer in the course of proceedings in return for an amount equivalent to the minimum required fine. Such conciliation shall result in the lapse of the criminal suit.

Article 46
The provisions of Articles 8, 9,10,11, and 20 of this Law shall apply to investment in the free zones.

CHAPTER FOUR
FACILITATION OF INVESTMENT PROCEDURES

Article 47[10]
The capital of companies that are governed by this Law may be determined in any convertible currency, and their financial statements prepared and published in same currency, provided that subscription to its capital must be in that same currency, and the entire amount of the issued capital shall be paid, and shall be deposited at any one of the recognized banks in foreign currency accounts.

The designated capital, in Egyptian pounds, of these companies may also be transferred into any convertible currency, according to the prevailing exchange rates at date of transfer, provided the controls specified by the Executive Regulations of this Law are adhered to.

Article 48
The government shall submit to the Authority's Board of Directors, the drafts of laws, regulations, and decisions related to investment issues for consideration thereon.

Article 49
Decisions regulating the establishment and operation of projects may not be issued, and charges and fees may not be imposed in return for services thereon or amendment thereof, except after obtaining the opinion of the Authority's Board of Directors and approval of the Council of Ministers.

Article 50[11]
The Authority shall be the competent body to collect, provide and update investment data and information and to regularly disseminate it through various means of dissemination via its

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[10] Article (47) has been amended and a second paragraph has been added by virtue of Law No. 94 for

[11] 2005. Official Gazette - edition No 24 (bis) on 21/6/2005

local branches, Internet websites, and offices abroad.

All State agencies shall adhere to providing the Authority with such data and information, and any updates made in respect thereof, and shall also provide the Authority with charts related to the available investment programs, plans, and potentialities.

Each year, on July first, the Authority shall issue a guiding bulletin of all projects, to which it invites all investors to establish in light of the preliminary studies, which verify their feasibility. The Authority shall take all measures to ensure that such bulletins and studies are available to interested investors.

The Authority, moreover, shall issue quarterly bulletins regarding investment flows, guarantees, incentives, and services provided to investors.

Article 51
All Government bodies, economic and service authorities dealing with investors, determined by a decree from the Prime Minister, shall establish offices at the Authority and at every one of its branches and it is only these offices that shall receive applications, conclude transactions, draw up contracts and grant the necessary licenses for establishing projects and conducting activity.

The Investment Services' Units affiliated to the Authority and its branches, shall be equipped to receive investors, and to provide them with all required services through offices set up at one specific location. Such offices shall maintain all data pertaining to each service, including its type, cost, the required documents, and procedures, and time schedule for accomplishment thereof, together with adherence to fully perform such services within the time determined.

The Chairman of the Authority shall issue a decision establishing work rules and procedures at such offices, and determining the functions of the Authority branches to achieve coordination between such branches and the Central Investment Services Unit.

The branches of the Authority shall submit semi-annual reports concerning their activities and issues that disrupt their functions, and recommendations to rectifying recommendations to the Chairman of the Authority and the Competent Governor.

Article 52
The Authority shall prepare standard forms for the investment applications according to the nature of each activity; and shall incorporate all data necessary for the activity, and the required documents, in particular, the list of the type of activity, project investment cost and requirements thereof concerning services, energy sources, and all licenses, approvals and documents required from various bodies to establish the project, conduct activity and liquidation thereof.

An original of the document shall be sufficient to submit to the Authority or its branch, as the case may be, and the Authority or its branches shall assume responsibility to provide the body requesting the document with a certified copy.

The Authority, moreover, shall prepare a booklet comprising the legislation regulating the investor's activities, and in light of any amendments shall update and publish it on its Internet website.

The Authority and its branches, on behalf of the investor, shall complete of all procedures, and furnish all competent bodies with data and copies of the documents required from the investor.

Article 53
The investors shall submit to the Authority or its branches, on the forms approved by the Chairman, applications for incorporation and registration of companies and establishments, and obtainment of all licenses and approvals from all the competent governmental bodies, as well as applications for allocation of lands and extension of utilities thereto.

Article 54
The investor shall submit to the Authority or its branch an application on the form prepared for such purpose accompanied with the documents determined by the Authority. Following immediate submission of his application and at his own responsibility, the investor shall be given a temporary license to establish the project, and the body that received the application, shall be responsible for providing the investor with the documents bearing the approvals and licenses of the competent bodies. The temporary license shall remain valid until a final license is issued.

The rights of the investor may not be encroached on or his activities stopped nor may the investor be prevented from obtaining

the necessary facilities and approvals by reason of delay in issuing the final license.

Article 55
The Authority shall be in charge of issuing the final license within a period not to exceed (15) days from date of issuance of all licenses and approvals required by the competent bodies through its employees at its offices and branches, who are authorized to issue such licenses; on condition that the documents stated in the application and stipulated in Article 54 of this Law are completed. If said period has lapsed, without the issuance of the final license, the Chairman of the Authority, within one (1) week, shall submit the matter to the committee mentioned in Article 65 of this Law, to take the proper decision within a maximum of fifteen (15) days, in accordance with the rules and procedures specified in the Executive Regulation.

Companies, which are incorporated for the purpose of integrated development shall be granted a single approval for establishing and operating all of their projects, and each of the company's projects shall enjoy the investment guarantees and incentives established from date of start up of the activity, which shall be determined in accordance with the provisions of this Law.

Article 56
Bodies entrusted with granting licenses for establishment of projects and conducting activities, in accordance to the provisions of this Law, shall have the right to inspect the licensed projects in compliance with its provisions, in order to ensure adherence to the licensing conditions as well as the provisions of the law that govern the conduct of their activities and take the necessary procedures upon breach of such conditions and provisions as stipulated in the law.

Inspection shall take place in accordance with programs duly prepared and implemented in a manner that does not affect the smooth operation of the projects

The inspection shall follow the rules, parameters, and procedures set by the Executive Regulations of this Law.

Article 57
In accordance with the rules drafted by its Board of Directors, the Authority, pursuant to the rules set by its Board of Directors, may issue licenses to foreign companies to establish their representative's offices and branches in the free zones. These offices and branches shall receive the same status as projects licensed by the Authority to be established in such zones.

Article 58
The investor shall, pay in one instalment all fees and other payable amounts due to any bodies that provide investment services. The Authority shall collect these fees for the account of such bodies.

The Authority shall be entitled to a fee for the actual services it renders to the investors. A resolution by the Authority's Board of Directors shall define the rates, and the rules and conditions and procedures regulating the collection of such fees. The proceeds of such fees shall revert to the Authority's resources.

Article 59
Contracting for the necessary utilities for implementation of the projects shall be made through the Authority's offices and branches, authorized by the competent bodies to affect it.

The Authority shall establish a database to comprise information pertaining to the utilities and services necessary for the projects or to be provided to investors. The database shall indicate the requirements for contracting for these utilities or the costs and procedures and documents for obtaining services. Such information shall be periodically updated as required. The Authority shall take measures to ensure that such data is available to investors.

Contracting shall be concluded pursuant to the published rates, and the price list may not be applied to investors till after publication. Furthermore, no amendment may/shall be made to the conditions of the contract, or to the rates throughout its validity of, unless the contract includes an express condition permitting such amendment.

Article 60
The Chairman of the Authority or his representative shall be authorized to issue the necessary certificates to the companies and establishments, which enjoy tax and customs exemptions, and any other exemptions applicable to companies subject to this law, in light of the Laws governing such exemptions.

Such certificates shall be final and shall be effective without the need for any approvals from other bodies. All bodies shall act in

accordance with said certificates and shall comply with the data mentioned therein.

Article 61
Owners of industrial establishments, which are governed by the provisions of this Law shall import, without any customs duties, the casts and moulds for temporary use in manufacturing products, and, thereafter reshipped abroad.

Such customs release and reshipment abroad shall be effected by virtue of the bill of lading; provided that ingression and reshipment documents are registered on the register prepared for such purpose at the Authority.

Article 62
The Council of Ministers upon a proposal by the Chairman of the Authority shall decide additional incentives to the internationally renowned companies, which aim to establish their main domicile in Egypt to produce and cover the neighbouring markets as well as the companies working in one of the fields of the developed high technology, and to the international companies specialized in developing international trade.

The Council of Ministers upon a proposal by the Chairman of the Authority, shall grant investors the facilities it deems appropriate to encourage them to invest and reside in Egypt.

The Council of Ministers shall decide on the validity of the incentives provided in this Investment Law to upgrade one of the public sector companies, public business sector, or companies the ownership of which reverts to banks.

The Council of Ministers shall conduct their functions provided in the preceding paragraphs in accordance with the rules and procedures issued by a Presidential Decree.

Article 63
The administrative bodies, in case the project is in breach of any provision of the laws, regulations and decrees, shall notify the investor together with a copy of such notice to the Authority, to rectify the causes of the breach within a period to be defined in the notice in light of the extent and nature of such breach In case such period lapses without rectification of the breach, the Authority shall issue a causative decision to terminate the activity of the project.

The investor may file a grievance before one of the committees to be formed at the Authority and branches thereof, against the termination order within ten (10) days from receipt of the termination notice, submission of the grievance shall result in the suspension of the enforcement of the decision except for enforcement as regards violation that threaten citizens security.

The committee, within seven (7) days from the grievance date, shall issue a decision to enforce the decision subject of the grievance or continue to temporarily suspend its enforcement until grievance is adjudicated.

The Prime Minister shall issue a decree to form the committees and work procedures; provided that a counsellor from the State Council chairs such committees. The party that submitted the grievance or that part's representative shall participate in the committee The committee's decision shall be valid and binding to all governmental bodies without prejudice to the right to resort to the Courts.

Article 64
The investor shall notify the Authority of the starting date of the activity at the new establishments, and expansion of the existing ones. The Executive Regulation shall define the rules and requirements that govern the start of the activity.

The Authority shall be, exclusively, competent for determining the starting, suspension and termination dates for enjoyment of incentives and privileges as well as the settlement of any disputes among Ministries, their Authorities and Agencies concerning said dates or the starting date of the activity.

Article 65
By way of exception to the provisions of Law No. 7 of 2000 concerning the conciliation committee of certain disputes, a committee formed at the Authority shall manage the dispute settlement efforts between the investor and any of the administrative bodies. Said committee shall be chaired by a member of the judiciary with at least the grade of counsellor, who shall be selected in accordance with the provisions of the Judicial Authority Law. Members of such committees shall include a representative of the union of the activity subject of the investment and a representative of the Authority. The committee shall pursue the settlement efforts as per the investor's request, and shall issue their recommendations

concerning the dispute after inviting their parties to a hearing to listen to their statements. Should one of the parties disagrees with the committee's recommendations, the dispute shall be submitted to the ministerial committee provided in Article 66 of this Law.

The Chairman of the Authority shall issue a resolution on the rules, procedures and of the conciliation committee.

Article 66
The Prime Minister shall issue a decree to form a ministerial committee to review the complaints and disputes brought and submitted by the investor against the administrative bodies, and the committee's decrees shall be valid and binding on the administrative bodies; after such decrees are approved by the Council of Ministers. The above shall be without prejudice with the right to resort to Courts. The Executive Regulation shall define the work procedure of said committee.

Article 67
The Authority shall have a Board of Trustees to include representatives of investors, experts, and bodies that provide services to investors. This Board shall examine investment issues and solutions thereto and shall render advice and opinion to the Authority's Chairman and Board of Directors, as to what it deems necessary to attract additional investments. A decree by the Prime Minister shall form the Board of Trustees, define their authority, Shall hereby be repealed.

determine their work procedures, and specify their required expertise and their remuneration.

Article 68
Every land, sea and airport shall have a Board of Sponsors, which shall monitor the implementation of the development program of the ports' administration and customs department, This board of sponsors shall examine problems related to such ports and propose the necessary solutions, and means of upgrading the services provided by such ports. The Competent Minister shall issue a decree to form the Board of Sponsors, which shall include a representative of the port's Authority, experts in the field of land, maritime or air transport, as the case may be, a representative of the General Authority for Investment and Free Zones, representatives of the companies and establishments operating at the port.

Article 69
The regulations governing public sector companies, public business sector and their employees shall not apply to companies established in accordance with the provisions of this Law, irrespective of the nature of the capital contributed or the capacity of the Shareholders contributing thereto

Article 70
Any provision contrary to the provisions of this chapter.

APPENDIX TWO:

Interview QUESTIONNAIRE: INVESTMENT CLIMATE IN EGYPT

Dear Sir/Madam
My name is Salim Hammoud. I am a Ph.D. candidate at the University of Kent (Canterbury-UK) under the supervision of Professor Wade Mansell. As a part of my research, I am conducting a survey about the investment climate in Egypt. I am aware that answering this questionnaire means additional work for you. Nevertheless, I would be grateful if you could give me your answers as best as you can, because this is still the easiest way for both of us to collect valuable information for an important research. Otherwise your own expertise and views would not be included in the research, and my evaluation of the contemporary investment climate in Egypt will not be as accurate.

Section 1: Firm characteristics

1. Basic information about the foreign firm.

a) Industry/ activity:	**b) Number of employees:**
c) Date of starting operations:	**d) Nationality of parent company:**

Optional					
Name of company:					
Name & position of respondent:					
Tel:		**Fax:**		**Email:**	

2. Foreign Direct Investment (FDI) participation in equity (foreign owned percentage)

(Please Tick (√) where appropriate)

a) 24% or less	( )	b) 49% to 25%	( )
c) 50% or more	( )	d) 100%	( )

3. Type of foreign direct investment or non-equity involvement in this company:

(Please mark (√) where appropriate)

a) New establishment	( )	b) Joint Venture	( )
c) Acquisition	( )	d) Supplier/Subcontractors	( )
e) Distributors	( )	f) Others	( )

Please continue on the next page

4. Where is the location of your operation?

(Please mark (√) where appropriate)

a) Inland	( )	b) Free Zone	( )
c) New Communities	( )	d) Other	( )

Section 2: Factors Influencing Investment climate

5. Investment law

To what extent do you think these items are satisfactory under the Egyptian Investment Law?

		1	2	3	4	5	
a) Admission and settlement	*Least satisfactory*						*Most satisfactory*
b) Investment incentives	*Least satisfactory*						*Most satisfactory*
c) Investment guarantees and protection	*Least satisfactory*						*Most satisfactory*
d) Land appropriation	*Least satisfactory*						*Most satisfactory*
e) Dispute settlement mechanism	*Least satisfactory*						*Most satisfactory*

	1	2	3	4	5
f) Rank the above items according to their sufficiency under the Egyptian investment law					

6. Political Climate

How do you evaluate the following non-commercial factors?

		1	2	3	4	5	
a) Attitude of opposition groups towards FDI	*Least favourable*						*Most favourable*
b) Egypt's regional and international relations	*Very Poor*						*Excellent*
c) Probability of nationalisation	*Very Low*						*Very High*
d) Probability of unilateral Legal act effects all FDI	*Very Low*						*Very High*
e) Probability of unilateral legal act effects only you	*Very Low*						*Very High*

	1	2	3	4	5
f) How would you rank the above items according to their importance to your company?					

7. Economic and Business Climate

How would you describe the Following Factors?

		1	2	3	4	5	
a) Infrastructure (Availability & Condition)	*Very Poor*						*Excellent*
b) Development plans and policies	*Least clear*						*Most Clear*
c) The status of the stock market	*Least Active*						*Most Active*
d) Availability and cost of skilled labour	*least Available*						*Most available*
e) Corporate tax level	*Very Low*						*Very High*
f) Size and growth rate of the Egyptian market	*Very Small*						*Very Large*
g) How would you describe customs clearance	*Very Difficult*						*Very Easy*
h) How would you describe import permits	*Very Difficult*						*Very Easy*

		1	2	3	4	5	6	7	8	
i) How would you rank the above items according to their importance to you?										

Please continue on the next page

8. How important is each of the following factors as an obstacle to business establishment and operation in Egypt? *(1 for least important to 5 for the most important)*

Factors	1	2	3	4	5	Comments
a) Political instability						
b) Unpredictability of macroeconomic conditions						
c) High tariff levels						
d) Unstable Tax regime						
e) Lack of privatisation						
f) Complicated Business establishment procedures						
g) Inadequacy of investment incentives						
h) Unavailability of business information						
i) Poor access to credit						
j) Conservative Land tenure policies						
k) Complicated customs procedures						
l) Unclear Labour law						
m) Unavailability of skilled Labour skill and education						
n) Inconvenient distribution channels						
o) Unofficial payments						
p) Unfair Dispute settlements mechanism						

9. What were the overriding factors that made your company to invest in Egypt?
(Please mark (√) where appropriate)

a) The size of the market/domestic and regional	( )	b) Skilled labour force	( )
c) Cheap labour force	( )	d) Natural resources	( )
e) Incentives given to FDI	( )		

Section 3: Future Prospects

10. Over the next five years, how important are the following factors on Egypt's competitiveness in attracting FDI?
(1 for least important to 5 for the most important)

Factors	1	2	3	4	5	Comments
a) Trade agreement with the European Union						
b) Trade agreement with the USA						
c) Arab World economic integration						
d) Higher growth rate of domestic market						
e) Credit worthiness						
f) Political stability						
g) Competitive wages						
h) Skilled labour force						

11. What measures should the Egyptian government work on in support of its investment climate?
(Please mark (√) where appropriate)

a) Admission and Settlement	( )	b) Tax Treatment	( )
c) Privatisation	( )	d) Human resources	( )
e) Dispute settlement	( )	f) Unified Legal Framework	( )
g) Other	( )		

Please continue on the next page

12. What are your company's plans over the next five years under the present investment climate?
(Please mark (√) where appropriate)

a) Sell out your investment	( )	b) Decrease in investment	( )	c) Standstill	( )
d) Moderate increase	( )	e) Significant increase	( )		

13. Any further comments would you like to make regarding:

13a- investment climate in Egypt.

.....

.....

13b- this questionnaire.

.....

.....

The end

Many thanks for your effort and time

APPENDIX THREE:

Variables of the Survey Questionnaire Values

Question	Answer	Code
1a	Manufacturing [1]	100
	Agriculture	200
	Tourism	300
	Construction	400
	Services[2]	500
	Finance[3]	600
	Non financial projects	700
1b	1 to 25	100
	26 to50	200
	51 to 100	300
	101 to 200	400
	201 or more	500
1c	1990	100
	1993	200
	1996	300
	2000	400
	2002	500
1d	Arab	100
	USA	200
	EU	300
	Far East	400
	South American	500
2	24% or less	100
	25% to 49%	200
	50% or more	300
	100%	400
3	New establishment	100
	Joint venture	200
	Acquisition	300
	Supplier/Subcontractor /Distributors	400
	Others3	500
4	Inland	100
	Free Zone	200
	New Communities	300
	Others4	400
5a	Least satisfactory	100
	Unsatisfactory	200
	Quit satisfactory	300
	Satisfactory	400
	Most satisfactory	500
5b	Least satisfactory	100
	Unsatisfactory	200
	Quit satisfactory	300
	Satisfactory	400
	Most satisfactory	500
5c	Least satisfactory	100
	Unsatisfactory	200
	Quit satisfactory	300
	Satisfactory	400
	Most satisfactory	500
5d	Least satisfactory	100
	Unsatisfactory	200
	Quit satisfactory	300
	Satisfactory	400
	Most satisfactory	500
5e	Least satisfactory	100
	Unsatisfactory	200
	Quit satisfactory	300
	Satisfactory	400
5f	Admission and settlement	100
	Investment incentives	200
	Investment guarantees	300
	Land appropriation	400
	Dispute settlement mechanism	500
6a	Least favourable	100
	Unfavourable	200
	Quit favourable	300
	Favourable	400
	Most favourable	500
6b	Very poor	100
	Poor	200
	Good	300
	Very good	400
	Excellent	500
6c	Very low	100
	Quit low	200
	Low	300
	High	400
	Very high	500
6d	Very low	100
	Quit low	200
	Low	300
	High	400
	Very high	500
6e	Very low	100
	Quit low	200
	Low	300
	High	400
	Very high	500
6f	Attitude of the opposition towards FDI	100
	Egypt's regional and international relations	200
	Probability of nationalisation	300
	Probability of unilateral act effects all FDI	400
	Probability of unilateral act effects only you	500
7a	Very poor	100
	Poor	200
	Good	300
	Very good	400
	Excellent	500
7b	Least clear	100
	Unclear	200
	Quit clear	300
	Clear	400
	Most clear	500
7c	Least active	100
	Not active	200
	Quit active	300
	Active	400
	Most active	500
7d	Least Available	100

[1] Textiles, food, chemicals, wood, engineering, building materials, metals, pharmaceuticals, and mining, …etc.
[2] Transport, health, consultancy, and others.
[3] Commercial banks, Investment banks, … etc.

Appendix Three: Variables of the Survey Questionnaire Values

Question	Answer	Code
	Not Available	200
	Quit Available	300
	Available	400
	Most available	500
7e	Very low	100
	Quit low	200
	Low	300
	High	400
	Very high	500
7f	Very small	100
	Quit small	200
	Small	300
	Large	400
	Very large	500
7g	Infrastructure (Availability and Conditions)	100
	Development plans and policies	200
	The status of stock market	300
	Availability and cost of skilled labour	400
	Corporate tax level	500
	Size and growth of the Egyptian market	600
8a	Least significant	100
	Not significant	200
	Quit significant	300
	Significant	400
	Most significant	500
8b	Least significant	100
	Not significant	200
	Quit significant	300
	Significant	400
	Most significant	500
8c	Most difficult	100
	Very difficult	200
	Difficult	300
	Easy	400
	Very easy	500
8d	Very difficult	100
	Not very difficult	200
	Difficult	300
	Easy	400
	Very easy	500
8e	Significant of price control in you business	100
	Level of competence with public companies	200
	How would you describe customs clearance	300
	How would you describe import permits	400
9a	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9b	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9c	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9d	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9e	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9f	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9g	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9h	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9i	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9j	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9k	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9l	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9m	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9n	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9o	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
9p	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
10	Size of the market/ Domestic and regional	100
	Skilled labour force	200
	Cheap labour force	300
	Natural resources	400
	Incentives offered to FDI	500
11a	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
11b	Least important	100
	Not important	200

	Quit important	300
	Important	400
	Most important	500
11c	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
11d	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
11e	Least important	100
	Not important	200
	Quit important	300
	Important	400
Question	Answer	Code
	Most important	500
11f	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
11g	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
11h	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
11i	Least important	100
	Not important	200
	Quit important	300
	Important	400
	Most important	500
12	Admission and settlement	100
	Tax treatment	200
	Privatisation	300
	Human resources	400
	Dispute settlement	500
	Unified legal framework	600
	Others	700
13	Sell out your investment	100
	Decrease in investment	200
	Standstill	300
	Moderate increase	400
	Significant increase	500
14a		100
		200
		300
		400
14b		100
		200
		300
		400
		500

Bibliography

1. BOOKS:

- Afifi, A. H., The Principles of Taxation: General Theories, (Cairo: Dar Al –Nahda, 1953). [Arabic]
- Aharoni, A., Foreign Investment Decision Process, (Beirut: Dar Al-Kutub, 1966). [Arabic]
- Ahdab, El- Abdul Hamid, Arbitration With Arab World, (The Hague: Kluwer Law International. 1999).
- Ahdab, El- Abdul Hamid, Commercial Law In the Middle East, (1997).
- Ahdab, El- Abdul Hamid, Enforcing Foreign Awards in the Middle East, Commercial Law in the Middle East, Hillary Lewis Ruttley and Chibli Mallat, Ed. (Graham and Trotman, 1995).
- Albert, P., Economic Development, (London: 1963).
- Amerasinghe, C. F., Local Remedies in International Law, (Cambridge: Cambridge University Press, 1990).
- Amerasinghe, C. F., State Responsibility for Injuring Aliens, (Oxford: Clarendon Press, 1967).
- Baldwin, Robert E., Economic Development, and growth, Second Edition, (Canada: John Willy & Sons Inc, 1972).
- Bennouna, M., Droit International de Development, (Paris: Berger Leverault, 1983).
- Bernard-Maugiron, N. and B. Dupret, Egypt and Its Laws, (London: Kluwer Law International, 2002).
- Borchard, Edwin M., The Diplomatic Protection of Citizens Abroad or the Law of International Claims, (London: William S. Hein & Company, 2003)
- Brownlie, I., Principles of Public International Law, Fourth Ed., (Oxford: Oxford University Press, 1990).
- Brownlie, I., Treatment of Aliens: Assumption of Risk and International Law, in W. Flume, Haln, H.J. and K.R. Simmonds (eds.), International Law and the New International Economic Order: Essays in Honour of F.A. Mann, (Cambridge: Cambridge University Press, 1982).
- Cambridge Encyclopaedia, (Cambridge, Cambridge University Press, 1993),
- Caron, D. and M. Pellompa, The UNICTRAL Arbitration Rules as Interrupted and Applied: Problems in the Light of the Practice of the Iran-USA Claims Tribunal, (London: 1994).
- Carr, David W., Foreign Investment, and Development in Egypt, (UK: Praeger Publishers, 1979)
- Cattan, H., Law of Oil Concessions in the Middle East and North Africa, (Dobbs Ferry, NY: Oceana Publications, 1967).
- Comeaux, Paul E. and Kinsella, N. Stephen, Protecting Foreign Investment Under International Law-Legal Aspects of Political Risk, (NY: Oceana Publications, 1997).
- Davis, M., Business Law in Egypt, Sixth edition, Vol.1, (London: Graham and Trotman, 1990).
- Delaume, G., La Convention Portant Reglement des Differen Des Entre Etats et Ressortissent D'autre Etats Clunet, Report of the Administration of the World Bank, (Paris: the World Bank, 1966).

- Delupis, Ingrid, Finance and Protection of Investment in Developing Countries, (London: Wiley Publishers, 1973).
- Doing business (World Bank Group) 2001-2003 145 countries reports & 60 Firm surveys, World Competitiveness Reports/ annual by (World Economic forum), Index of Economic Freedom by (the Heritage Foundation). http://www.doingbusiness.org
- Dolzer, Rudolf, and Margaret Stevens, Bilateral Investment Treaties, (The Hague: Kluwer Law International, 1995).
- Dunning, J. H., Multinational Enterprises and the Global Economy, (Wokingham: Addison Wesley, 1992).
- Fahmy, Khaled and Agnieszka Dobrowolska, Muhammad Ali Pasha, (Cairo: American University in Cairo Press, May 2005).
- Fahmy, Khaled , A History of Modern Egypt, (Cambridge: Cambridge University Press 2008).
- Fatouros, A. A., Government Guarantees to Foreign Investors, (New York: Columbia University Press, 1962).
- Feller, A. H., The Mexican Claims Commissions 1923-1934: A Study in the Law and Procedure of International Tribunals, (New York: Macmillan, 1935).
- Freemann, Vernon, The International Responsibility of States for Denial of Justice, (New York: Longmans, Green and Co., 1938).
- Friedman, Samy, Expropriation in International Law, (London: Stevens, 1953).
- Gaga, Giorgio, International Commercial Arbitration: New York Convention, (New York: Oceana Publications, 1973).
- Gill, Richard T., Economic Development: Past and Present, (New Jersey: Prentice, 1960).
- Hadden, Tom, Company Law and Capitalism, (London: Weidenfeld & Nicolson, 1972).
- Harris, D.J., Cases and Materials on International Law, (London: Sweet and Maxwell, 1991).
- Herzfeld, E., Joint Venture, (London: Jordans, 3rd edition 1996).
- Hill, Enid, Laws of Foreign Investment, Privatisation, and Labour in Egypt, Conference Paper, (London: 1993).
- Hood, N. and S. Young, Multinational Enterprises, (London: Longman, 1979).
- Hudson, Manley, O., International Legislation, Vol. 4, (Washington: Carnegie Endowment for International Peace, 1931).
- ICSID, History of the ICSID Convention, (Washington: 1969)
- ICSID, Investment Laws of the World-Loose-leaf collection. (Washington: ICSID, 1973-2006).
- ICSID, Investment Treaties-Loose-leaf collection, (Dobbs Ferry, NY: Oceana Publications, 1984-2006).
- ICSID, The Preamble of the ICSID Convention-ICSID Basic Documents, (Dobbs Ferry, NY: Oceana Publications, 1985).
- Jennings and A. Watts, Oppenheim's International Law, 9th Ed, Eds. (Avon: Longman, 1992)
- Kahn, Philippe, Les Problems Juridiques des Investments Etrangers Dane Les Pays en Voie De Development. Report Preliminary, (Helsinki: 1966).
- Karam, Nicola H., Business Laws of Egypt, (London: Graham and Trotman, 1990).

- Kaufman, D., A. Kraay, and Ziodo-Lobaton, Governance Matters II: Updated Indicators for 2000/01, Policy Research Working Paper 2772, (Washington, D.C.: The World Bank, 2002).
- Kaufman, D., A. Kraay, and Ziodo-Lobaton, Governance Matters, Policy Research Working Paper 2196, (Washington, D.C.: The World Bank, 1999).
- Kronfol, Z., Protection of Foreign Investment: A Study in International Law, (Leiden, USA: A.W. Sijthoff, 1972).
- Lalive, A., The Doctrine of Acquired Rights' in Rights and Duties of Private Investors Abroad, (Washington: South-western Legal Foundation, 1994).
- Lanjouw, and Stern. Eds., Economic Development in Palangur Over Five Decades, (Oxford: Oxford University Press, 1988).
- Lutfy, A., Legislative Aspects of Tax on Commercial and Industrial Profits, (Cairo: Dar El-Nahda Al-Arabiyah, 1992).
- MacDonald, Fiona , The Ancient Egyptians, (London: QED Publishing, 2007).
- Mason, Edward S. and Robert E. Asher, The World Bank Since Britons Wood, (Washington: The Brooking Institute, 1973).
- Marsot, Afaf Lutfi al-Sayyid , Egypt in the Reign of Muhammad Ali, (Edinburgh: Cambridge University Press, 1984).
- Marsot, Afaf Lutfi al-Sayyid , A History of Egypt: From the Arab Conquest to the Present, (Cambridge: Cambridge University Press, Second edition, 2007)
- Mawla, Sayed Abdul, Taxation of Foreign Investment Under Arab Investment Law, (Cairo: Institute of Arab Research and Studies, 1978). (Arabic)
- McNair, Arnold D., International law Opinions, (New York: Cambridge University Press, 1956)
- Meier, M. and Baldwin Robert, Economic Development, (New York: Huntington, 1976).
- Moughraby, M., Permanent Sovereignty Over Oil Resources, (Beirut, Majd Publishers, 1966).
- Muchlinski, P.T., Global Burkowina Examined: Viewing the Multinational Enterprises as a Transitional Law-Making Community, in Teubner, ed., "Global Law Without a State", (Brookfield: Dartmouth Publishing Company, 1997).
- Muchlinski, P.T., Multinational Enterprises and the Law, (London: Blackwell Publishers, 1999).
- Nehrt, lee Charles, The Political Climate for Foreign Investment, (New York: Praeger Publishers, 1970).
- Nwogugu, E.I., The Legal Problems of Foreign Investment in Development Countries, (Manchester: Manchester University Press, 1965).
- OECD, Capital Movement Code for the Statues of OECD Member Countries,
- OECD, International Investment, and Multinational Enterprises, (1983).
- Okita and Miki, Treatment of Foreign Capital: A Case Study for Japan, in Adler, ed., Capital Movement and Economics Proceedings of a Conference Held by the International Economic Association (London: Macmillan, (1967).
- Pepelasis, A. and Leon Mears, Economic Development, Analysis and Case Studies, (New York: Harper & Brothers, 1961).
- Philips, O. Hood and Paul Jackson, Constitutional and Administrative Law, Eighth ed., (London: Sweet & Maxwell, 2001),
- Qurashi, A., The Public International Law of Taxation: Text, Cases, and Material, (London: Graham & Trotman, 1994).

- Rashid, Samia, Arbitration Under the Auspice of the Regional Centre in Cairo, (Cairo: Dar El-Manar El-Arabi, 1985). [Arabic]
- Sadik, H., The International Protection of Foreign Capital, (Alexandria: Dar Sadik, 1978). [Arabic]
- Saleh, Samir, S., Commercial Arbitration in the Arab Middle East: A Study in Sharia and Statute Law, (London: Graham and Trotman, 1984).
- Sanjay, Lall and Paul Sreeten, Foreign Investment Translational and Developing Countries, (London: Macmillan, 1977).
- Sarhan, M., FDI and Economic Development, (Cairo, Dar Al Nahda, 1994).
- Schumpeter, J.A., The Theory of Economic Development, (New York: Oxford University Press, 1961).
- Schwarzenberger, G. and E. Brown, A Manual of International Law, 6th edition, (London: Steven and Sons, 1976).
- Schwarzenberger, G., Foreign Investment and International Law, (London: Steven and Sons, 1969).
- Schwarzenberger, G., Foreign investment,
- Shafer, M., Economic Development, (Beirut: Dar El-Tadamon, 1971). [Arabic]
- Sheik, Fath El-Rahman Abdallah El -, The Legal Regime of Foreign Investment in the Sudan and Saudi Arabia, 2nd Edition, (Cambridge: Cambridge University Press, 2003).
- Shihata, I., International Economic Joint Venture, (Cairo: Ain Shams University Press, 1969). [Arabic]
- Shihata, I., Legal Treatment of Foreign Investment: the World Bank Guidelines, (The Hague: Martinus Nijhoff Publishers, 1993).
- Shihata, I., Multilateral Investment Guarantee Agency and Foreign Investment, (The Hague: Martinus Nijhoff Publishers, 1988).
- Shihata, I., The World Bank in a Changing World, (The Hague: Martinus Nijhoff Publishers, 1991).
- Shihata, I., Towards a Greater Depoliticisation of Investment Disputes: The Role of ICSID and MIGA, (Washington: ICSID, 1992).
- Simpson, Ebow Bondzi, The law and the economic development in the third world, (Ed), (London: Praeger Publishers, 1992).
- Singh, Nagendra, International Convention of the Merchant Shipping, (London: Steven's and Sons, 1973).
- Sirhan, Abdul Aziz, The Principles of International Order, (Cairo: Dar El-Nashir, 1975). (Arabic)
- Society of Comparative Legislation and International Law, The Suez Canal, (London: SCLIL, 1956).
- Sornarajah, M., International Commercial Arbitration: The Problem of State Contracts, (Singapore: Longman, 1990).
- Sornarajah, M., The International Law On Foreign Investment, (Cambridge: Cambridge University Press, 1994).
- Sornarajah, M., The Settlement of Foreign Investment Disputes, (The Hague: Kluwer Law International, 2000).
- Sultan, H., Public international law in peacetime, (Cairo: Dar El-Nahda El-Arabia, 1962). [Arabic]
- Thrilwall, A. P., Growth And Development, (London: Macmillan, 1st edition 1972).

- UNDP, Human Development Report 2000- Human rights and human development, (Washington: UNDP, 2000)
- Vernon, I., And Sovereignty At Bay: the Multinational Spread of U.S. Enterprise, (London: Longman, 1971).
- Wolfgang, P., Arbitration and Re-negotiation of International Investment Agreements, (The Hague, Boston: Kluwer Law International, 1995).
- Wood, Philip R., International Loans, Bonds, Guarantees, Legal Opinions, (London: Sweet and Maxwell, 2001)
- Zaki, Ramzi, Problem of Foreign Debts, (Cairo: Dar Al-Nahda, 1992).

2. ARTICLES:

- Akehurst, S., "Jurisdiction in International Law", (1972-1973) 46 the British Yearbook of International Law.
- Akinsanya, Adeoye, "International Protection of Direct Foreign Investment in the Third World", (1987) 36 Int'l & Comp. Law Quarterly.
- Albrecht, R., "The Taxation of Aliens Under International Law", (1952) 22 The British Yearbook of International Law.
- Amerasinghe, C. F., "Jurisdiction *Ratione Personae* Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", (1974-1975) The BYBIL, Vol.47.
- Anand, Gupta, "Central Government Taxes: Have they Reduced Inequality", (1992) XII Economic and Political Weekly.
- Annan, Kofi, "Help Third World-Third World Help it Self", (1999) The Wall Street Journal.
- Asante, S. K. B., "International Law and Foreign Investments: A Reappraisal", (1988) 37 ICIQ.
- Asante, S. K. B., "The Concept of a Good Corporate Citizen in International Business", (1989) 1 ICSID Review FILJ.
- Atike, J., "Fairness and Managed Foreign Direct Investment", (1994) 32 Columbia. J. of Transnational Law.
- Baile, S. and H. Breier, "A Turning point for Southern Africa", (1994) 187 OCED Observer.
- Borchard, Edwin M., "The Diplomatic Protection of Citizens Abroad", (1915) AJIL.
- Bowett, D. W., "Estoppels Before International Tribunal and its Relation to Acquiescence", (1957) 33 B.Y.B.I.L.
- Brandon, M., "The World Bank Convention on the Settlement of Investment Disputes", (1967) 6 Il Diritto Negli Scambi Internazionali.
- Branson, D. J. & Tupman, W. M., "Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration", (1984) 24 Virginia Journal of International Law.
- Branson, D. J. & Wallace, R. E., "Choosing the Substantive Law to Apply in International Commercial Arbitration", (1986) 27 Virginia Journal of International Law.
- Branson, D. J. and R. Wallace, "Choosing the Substantive Law to Apply in International Commercial Arbitration", (1987) 27 Virginia Journal of International Law.

- Branson, D. J. and W. Tupman, "Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration", (1984) 24 Virginia Journal of International Law.
- Branson, D. J., "Annulments of 'Final' ICSID Awards Raise Questions about the Process", (1986) 25 The National Law Journal.
- Broches A., "MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency", [Book Review] (1990) 84 American Journal of International Law.
- Broches A., "Settlement of Disputes Arising Out of Investment in Developing Countries'', (1983) 11 International Business Lawyer.
- Broches, A., "A Guide for Users of the ICSID Convention", (1991) Vol. 8/1 News from ICSID
- Broches, A., "Avoidance and Settlement of International Investment Disputes", (1984) 78 American Society of International Law Proceedings.
- Broches, A., "Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution", (1987) 2 ICSID Review—Foreign Investment Law Journal.
- Broches, A., "Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application", (1993) 18 Yearbook Commercial Arbitration.
- Broches, A., "Denying ICSID's Jurisdiction The ICSID Award in Vacuum Salt Products Limited", (1996) 13 Journal of International Arbitration.
- Broches, A., "Observations on the Finality of ICSID Awards", (1991) 6 ICSID Review—Foreign Investment Law Journal.
- Broches, A., "On the Finality of Awards: A Reply to Michael Reisman", (1993) 8 ICSID Review—Foreign Investment Law Journal.
- Broches, A., "Promotion of the Improvement of Conventions on Arbitration'', (1970) 5 ICA Arbitration Quarterly.
- Broches, A., "Settling International Investment Disputes'', (1969) 119 The Banker.
- Broches, A., "The Convention on the Settlement of Investment Disputes", (1965) 9 International and Comparative Law Bulletin.
- Broches, A., "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States'', (1972-II) 136 Recueil des Cours.
- Broches, A., "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", (1966) 5 Columbia Journal of Translational Law.
- Broches, A., "The Experience of the International Centre for Settlement of Investment Disputes, in: International Investment Disputes: Avoidance and Settlement", (1985) (Rubin, S. & Nelson, R. eds.).
- Brodley, "Joint Ventures and Anti Trust Policy", (1982) 95 Harvard Law Review,
- Bushnell, G., "The Development of Foreign Investment Law in Egypt and Its Effect on Private Foreign Investment", (1980) 10 Georgia Journal of International and Comparative Law.
- Carlston, K., "International Role of Concession Agreements", (1957) 52 Northwestern University Law Review.
- Catrains, A., "Transfer of Technology to Developing Countries: A Study on the Draft International Code of Conduct", (1979) 38 RHDI.
- Claessens, S., "Alternative Forms of External Finance", (1991) 1 World Bank Working Paper, No. 812 (Washington, DC: The World Bank.

- Contini, P., "International Commercial Arbitration: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", (1959) 8 AJIL.
- Cremades, B. M., "Commercial Arbitration", Encyclopedia of Public International Law, V.8.
- Criik, J. R., Applicable Law in International Arbitration: the Iran-USA Claims Tribunal Experience", (1989) 83 AJIL.
- Delaume, G. R., "The Pyramids Stand-the Pharaohs Can Rest in Peace", (1993) 8 FILJ P No. 2.
- Delaume, G.R., " ICSID and Bilateral Investment Treaties", (1985) V. 2 No.1. News from ICSID.
- Delaume, G.R., " ICSID and the Courts", (1983) 77 AJIL.
- Delaume, G.R., " ICSID Clauses: Some Drafting Problems", (1984) V.1 No. 2 News From ICSID.
- Delaume, G.R., "Convention on the Settlement of Disputes Between States and Nationals of Other States", (1966) The International Lawyer, Vol. 1.
- Delaume, G.R., "Economic Development and Sovereign Immunity", (1985) *79 AJIL.*
- El-Kosheiri, "ICSID Arbitration and Developing Countries", (1993) 8 ICSID Rev.-FILJ 104.
- Enein, Abu El-M., "Arbitration Under the Auspices of the Cairo Regional Center for Commercial Arbitration", (1985) 2 Journal of International Arbitration, No. 4.
- Fatouros, A. A., "Legal Persons In International Law", V. 10 Encyclopedia of Public International Law.
- Fatouros, A. A., "Towards an International Agreement on Foreign Investment", (1996) in Towards Multilateral Investment Rules, OECD.
- Feliciano, F.P., "Legal Problems of Private International Business Enterprises", (1966-II) 118, R.C.A.D.I.
- Geist, "Toward a General Agreement on the Regulation of Foreign Direct Investment", (1995) 26 Law and Policy in International Business.
- Hanson, Gordon H., "Should Countries Promote Foreign Direct Investment", (2001) UNCTAD G-4 Discussion Paper Series, No. 9.
- Harrison, F., "Entrepreneurial Organization as a Factor in Economic Development", (1956) Q. J. E.
- Hashem, Hala Z., "Legal Treatment of Foreign Investment in Egypt: A Comparative Study of International Law and Bilateral Investment Treaties", (1984) 40 Revue Egyptienne de Droit International 133.
- Heinrich Kronstien, "The Nationality of International Enterprises", (1952) 52 Colombia Law Review.
- ICSID "History of the ICSID Convention, Primary Draft Convention: Working Paper" ICSID Doc. No. 24, P. 221. For the consultative meeting of Legal Experts, Com/AF/EN/AS/1,15 Oct. (1963).
- ICSID "Operational Regulations of the Multilateral Investment Agency", June 22nd, 1988, clause 3.16, reprinted in 3 ICSID Rev.-FILJ 364, 390 (1988).
- James N. Hyde, "The Act of State Doctrine", (1959) *53 AJIL.*
- Janette Hassan, and John Bentley, "New Law Vastly Improves Arbitration Framework", (September 1994) MEER.
- Julius, "Direct Investment Among Developed Countries: Lessons for the Developing World", (1991-92) 22 IDS Bulletin Institute of development Studies.

- Ketcham, "Arbitration Between a State and a Foreign Private Party", Southwestern Legal Foundation, (1965).
- Khalil, M., "Treatment of Foreign Investment in Bilateral Agreements", (1992) 8 ICSID Review- FILJ.
- Kofele-Kale, N., " The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations In Developing Countries:", (1992) 23 Law & P in Int'l Business.
- Kofele-Kale, N., "Host Nation Regulation and Incentives for Foreign Private Investment: Analysis and Commentary", (1990) 15 N. C. J. Int'l and Com. Reg.
- Mann, F. A., "British Treaties for the Promotion and Protection of Investment", (1981) 52 BYBIL.
- Marchais, B., "Composition of ICSID Tribunals", (1987) 4 News From ICSID.
- Marchais, B., "ICSID and the Courts", (1986) 3 News From ICSID.
- Marchais, Bernard, "The New Investment Law of the Arab Republic of Egypt" (1989), 4 ICSID Review.
- McClure, William B., "Mining the Resources of the Third World, Concessions Agreements to Services Contracts", (1973) 67 AJIL.
- Muller, J. and A. Cotler, "Estoppel", V.7 Encyclopedia of Public International Law.
- Mutharika, P., "the role of the UN Security Council in Africa. Peace management: Some proposal", (1996) 17 Mich. J. Int'l. Law, 537, 541.
- Nafzigar, James A. R., "The General Admission of Aliens under International Law", (1983) 77 American Journal of International Law, No. 4.
- Nour, M., "Jurisdiction to Tax and International Income", (1962) Tax Law Review, Vol. 17.
- OECD "OECD Declaration on International Investment and Multinational Enterprises", (1976) 15 ILM.
- Ongwamuhan, Kibuta, "Perspectives on the Proposed Double Taxation Agreement Between Papua New Guinea and Australia", (1990) 1 Revenue Law Journal.
- Parra, Antonio R. "Principles Governing Foreign Investment, as Reflected in National Investment Codes", (1992) 7 ICSID Rev. FILJ.
- Parra, Antonio R. "Principles Governing Foreign Investment, as Reflected in National Investment Codes", (1992) 7 *ICSID Review FILJ.*
- Parra, Antonio R., "The Screening Power of the ICSID Secretary", (1985) 2 News From ICSID.
- Peters, Paul, "Dispute Settlement Arrangements in Investment Treaties", (1991) 22 Netherlands Y.B. Int'l L.
- Riad, Tarik, "Disputes Relating to Public Administrative Contracts", (1997) International Arbitration Law Review.
- Riesenfeld, S. A., "Foreign Investment", V.8 Encyclopedia of Public International Law.
- Salacuse, Jeswald W. and Panall, "Foreign Investment and Economic Openness in Egypt", (1986) 20 International Lawyer.
- Salacuse, Jeswald W., "BIT-by-BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", (1990) 24 International Lawyer.
- Salacuse, Jeswald W., "Towards a New Treaty Framework for Direct Foreign Investment", (1985), 50 J. Air L. & Com.

- Sandra, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards", (1959) 6 Neth. Int'l L. R.
- Schachter, O., "The Enforcement of Judicial and Arbitral Decisions", (1960) 54 AJIL.
- Schlochauer, Hans-Jurgen, "Arbitration", (1981) Encyclopedia of Public International Law, Vol. 1.
- Schwebel and Wetter, "Arbitration and the Exhaustion of Local Remedies", (1966) 60 AJIL.
- Shihata, I. and Antonio Parra "Applicable Substantive Law in Disputes between States and Private Foreign Parties: the Case of Arbitration Under the ICSID Convention", (1994) 9 ICSID Review-Foreign Investment Law Journal.
- Shihata, I. and Antonio Parra, "The Experience of the International Centre for Settlement of Investment Disputes", (1999) 14 ICSID Review-Foreign Investment Law Journal.
- Shihata, I., "Joint Ventures in the Shadow of the Arab Co-operation", (1975) *Majalat Al-Siyasah Al-dawliyah*, issue 40. (Arabic).
- Shihata, I., "MIGA and the Legal Treatment of Foreign Investment", (1987) 203 Recueil des Cours.
- Shihata, I., "Obstacles Facing ICSID's Proceeding and International Arbitration in General", (1986) 3/1 News from ICSID.
- Shihata, I., "Promotion of Foreign Investment: A General Account with Particular Reference to the Role of the World ~Bank Group" (1990) 6 ICSID Review FILJ.
- Shihata, I., "Recent Development in ICSID" (1998) 13 ICSID Review FILJ.
- Shihata, I., "Recent Trends Relating to Entry of Foreign Investment" (1994) 9 ICSID Rev.-FILJ.
- Shihata, I., "The Role of ICSID and the Projected Multilateral Investment Guarantee Agency (MIGA)", (1986) 41 Aubenwirtschaft.
- Shihata, I., "Towards a Greater De-politicisation of Investment Disputes: the Roles of ICSID and MIGA" (1992) ICSID Publication.
- Shihata, I., The Settlement of Disputes Regarding Foreign Investments: The Role of the World Bank with Particular Reference to ICSID and MIGA" (1986) 1 Arab Law Quarterly.
- Smith, Arcaya, "Treatment of Investment in the Andean Group", in OECD proceedings.
- Sornarajah, M., "Investment Disputes, Convention and ICSID" The Encyclopedia of Public International Law, V. 5.
- Sornarajah, M., "Jurisdiction Ratione Personae Under the Convention of the Settlement of Investment Disputes", (1974) 47 British Year Book of International Law.
- Sornarajah, M., "State Responsibility and Bilateral Investment Treaties", (1986) 20 Journal of World Trade Law.
- Sornarajah, M., "The New International Economic Order, Investment Treaties and Foreign Investment Laws in ASEAN", (1985) 27 Malaya Law Review.
- Strauss, M. W., "Employment of foreigners: a guideline for employers and employees", (1988-89) 20UWLA Law Review.
- Vagets, D., " the United States of America and the Multinational Enterprises", in Hahlo, ed., Nationalism and Multinational Enterprises: Legal Economic and Managerial Aspects, (1973) Dobbs Ferry, N.Y.: Oceana.

- Vagets, D., "Coercion and Foreign Investment Rearrangements", (1978) 72 AJIL.
- Vagets, D., "Dispute Resolution Mechanisms", (1987) *203 Recuil de Cours.*
- Vagets, D., "The Host Country Races the International Enterprise", (1973) 53 Boston University Law Review.
- Voss, Jurgen, "The Protection and Promotion of Foreign Direct Investment in Development Countries: Interests, Interdependencies, Intricacies", (1982) 31 International and Comparative Law Quarterly.
- W. Jenks, "Liability for Ultra-Hazardous Activities in International Law", (1966) 117 RCADI.
- Wells, L. Jr and A. Wint, "Facilitating Foreign Investment: Government Institutions to Screen, Monitor, and Service Investment from Abroad", (1992) FIAS Occasional Paper, N. 2.
- West, L. C., "Award Enforcement Provisions of the World Bank Convention", (1968) 23 Arbitration Journal.
- Wiesner, Eduardo, "Ancom: A New Attitude Toward Foreign Investment", (1993) 24 Inter-American Law Review.
- Wilhelm Karl Geck, "Diplomatic Protection", (1992) Encyclopedia of Public International Law, Volume 1.
- Ziade, N. G., "References on the UNCITRAL Arbitration and Conciliation Rules", (1990) 5 ICSID Rev.-FILJ.
- Ziade, N. G., "Selective Bibliography on the ICC's Dispute Settlement Mechanisms", (1991) 5 ICSID Rev.-FILJ.

3. Egypt FDI Laws and Legislations[1]

- Anti Money Laundering Law no. 80 of 2002.
- Capital Markets Law no. 95 of 1992.
- Companies Law no. 159 of 1981.
- Customs Law no. 14 of 2004. (Arabic)
- E-Signature Law no. 15 of 2004. (Arabic)
- Executive Regulations of Capital Market Law no. 95 of 1992.
- Executive Regulations of Companies Law 159 of 1981. (Arabic)
- Executive Regulations of insurance law 10 of 1981. (Arabic)
- Executive Regulations of Mortgage Finance Law 148 of 2001
- Executive Regulations of Special Economic Zones Law 83 of 2002.
- Executive Statutes of the Law 95 of 1995 on Financial Lease.
- Export Development Law 155 of 2002.
- Financial Leasing Law 95 of 1995.
- Income Tax Law 91 of 2005 (Arabic)
- Insurance Law10 of 1981.
- Intellectual Property Rights Law no. 82 of 2002. (Arabic)
- Investment law 8 of 1997 Amending & capital markets law 95 of 1992 - Law no. 13 of 2004.
- Investment Law no. 8 of 1997.
- Law 3/ 2005 promulgating the law on protection of competition and prohibition.
- Minister of Economy and Foreign Trade decree no. 135 of 1993 on the regulations of the capital market law. (Arabic)
- Minister of Economy and Foreign Trade decree no. 478 of 1994 setting the brokerage commissions. (Arabic)
- Minister of Economy and Foreign Trade decree no. 697 of 2001 adding the activity of securitization. (Arabic)
- Minister of Economy and Foreign Trade decree no. 891 of 1995 adding the activity of holding securities records.
- Minister of Economy and International Cooperation no. 935 of 1996 adding the activity of direct investment funds.
- Minister of Economy decree no. 188 of 1999 establishing a branch of the Capital Market Authority in Alexandria. (Arabic)
- Minister of Economy decree no. 478 of 1997 forming the standing committee of accounting and auditing standards. (Arabic)
- Minister of Foreign Trade decree no. 383 of 2004 amending the executive regulations of the law. (Arabic)
- Minister of Foreign Trade decree no. 906 of 2001 issuing the regulations of the law of central custody and registration of securities. (Arabic)
- Minister of Investment decree no. 138 of 2004 on the rules of selecting insurance funds' boards. (Arabic)
- Mortgage Law no. 148 of 2001.
- PM's Decree 1316/2005 of the Regulations of the Competition law.

[1] http://www.investment.gov.eg/MOI_portal/Templates/DocList.aspx?NRMODE=Published&NRORIGINALURL=%2fMOI_Portal%2fInformation%2bCenter%2fLaws%2f&NRNODEGUID=%7b91FBB25F-10E2-4AD5-963A-F838890F65C0%7d&NRCACHEHINT=Guest

- PM's Decree 465 of 2005 amending Executive Regulations of Mortgage Finance Law.
- PM's decree no. 1764/2004 establishing insurance funds. (Arabic)
- PM's decree no. 2602 of 1994 adding the activity of organizing security portfolios.
- Presidential decree 277 for 2001 on Public Authority for Mortgage Financing Affairs.
- Presidential Decree 4 of 2003 for Mortgage Guarantee and Subsidy Fund.
- Special Economic Zones Law no. 83 of 2002.
- The capital market law no. 95 of 1992.
- The law no. 91 of 2000 on the central custody and registration of securities.
- The Minister of Finance decree no 325, of 1994 on the rules of gathering taxes. (Arabic)
- The Minister of Investment decree no. 40 of 2004 establishing the Institute of Directors.

4. International Reports and Documents

- Algerian Investment Law of (1963), the Official Gazette, August 2, (1963).
- American Foreign Sovereignty Immunities Act of 1976, ILM (1976).
- Atlantic Reporter, Vol. 215, (1966).
- Australia: Foreign Sovereign Immunities Act 1985, ILM (1986).
- Australian Foreign Sovereignty Immunities Act of 1985. ILM (1986).
- Britain and Soviet Republics Agreement of 1981, 29 ILM 371(1990).
- Charter of Economic Rights and Duties of States, G. A. Res. 3281(XXIX) of 12 Dec. 1974 (UN Doc. A/Res. 3281 (XXIX))
- Charter of Economic Rights and Duties of States, UNGA Res. 3281. (1975)
- Colonia and Buenos Aires Investment Protocols of Mercosur, 30 ILM 1041. (1990)
- Convention on the Law of the Sea (1982), 21 ILM 1261. (1982)
- Convention on the Settlement of Investment Disputes Between States and Nationals of another states (UNTS 159). (1965)
- Egyptian Court of Appeal of 20 May 1888, the Official Journal 5/263. 9 February. (1922)
- Egypt-Italy Treaty of (1975), at 986 UNTS No. 18368.
- Egypt–United States, "Treaty Concerning the Reciprocal Encouragement and Protection of Investment", 21 ILM 933. (1982)
- France-Morocco Treaty of (1977), (1977) at 1036 UNTS No. 1.15497.
- G. A. RES. 1803 14 DEC. (1962)
- G. A. Res. 2158 (XX. 1), 25 Nov. 1966.
- G.A Resolution on Permanent Sovereignty Over Natural Resources, G.A.Res. 1803 (XVII) of 14 Dec. 1962 (UN Doc. A/Res, 1803 (XVII)).
- G.A. Decision No 124 (13) of 1958.
- G.A. Decision No 1827 (45) of 1973.
- G.A. Decision No 198 (3) of 1948.
- G.A. Decision No 200 (3) of 1948.
- G.A. Decision No 2029 (20) of 1965.
- G.A. Decision No 2218 (21) of 1966.
- G.A. Decision No 2626 (25) of 1970.
- G.A. Decision No 304 (4) of 1949.

- G.A. Decision No 52 (1) of 1946.
- G.A. Res. 3281, 29 UN GOAP, Sup p. (No 31) UN Doc. A/9631. (1974)
- GA. Res. 1803, 3821. 3201, 3171, and 3016. 1361 federal report vol. 649 F second. (1981)
- General Assembly Resolution 1803 (XVII) of 1962, "Declaration on Permanent Sovereignty over Natural Resources".
- General Assembly Resolution 3201 (S-VI) adopted on 9th of May 1974, para1.
- Geneva Convention on the Status of Refugees, UNTS, Vol. 360.
- Great Britain - India agreement, of 1994, 34 ILM 940 (1995).
- Harvard Research Draft Convention on Nationality, 23 AJIL (Supp.) (1929).
- Human Rights Covenants, http://www.unhchr.ch/html/intlinst.htm.
- IBRD, Agreement of the International Investment Insurance Agency, Doc. M68-156, August 19, (1986)
- International Covenant on Civil and Political Rights, Dec. 16, 1966.ILM, Vol. 6, (1966).
- Japan and Pakistan Friendship, Commerce and Navigation Treaty, 18th Dec. 1960, UNTS 197, No. 1/6030.
- OECD Press Release A (76) 20 of (June 21, 1976), 15 ILM, (1976).
- OECD Publication No. 15637, (1962).
- OECD, "Economic Globalisation and the Environment", (1997).
- Protocol on the Status of the Refugees of 1967, UNTS, Vol. 606.
- Tanzania investment Code of (1978, the Official Gazette, Feb 23, (1979).
- The Energy Charter Treaty, 34 ILM 360 (1995)
- The European Convention on State Immunity of 1972, AJIL, 1972.
- TREATIES
- Treaty of Rome (15 UKTS 1979, UNTS 298).
- U.S.-Italy, "Treaty of Friendship, Commerce and Navigation", UNTS, Vol.79, (1948).
- UN Charter of Economic Rights and Duties of States, UNGA Res. 3281 (1975).
- UN Department of Economic and Social Affairs, "The External Financing of Economic Development", E.68 II. D, Section 84, (1968).
- UN Doc. E/550/Add 1 (Part 1) 24 May 1974 / 13 ILM 800 (1974) P. 25.
- UN Doc. E/CN4/Sub.2/404/Rev.1, 1981.
- UN Doc. ST/Leg/Ser. D/3. Dec. 1969.
- UN ECOSOC, "The Impact of Multinational Corporations on Development and on International Relations", E/5500, Rev., 1, (1974).
- UN Friendly Relation Declaration, UNGA Res. 2625 (1970)
- UN Statistical Year Book (1971-2005).
- UN Treaty Series, Vol. 330.
- UN, "The External Financing of Economic Development, International Flow of Long Term Capital and Donation", (1936-1967), (1969)
- UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 302 (1985).
- UNCTAD- "Bilateral Investment Treaties-BITs". St/ctc/165, (1988).
- UNCTAD Secretariat: "Estimated FDI Flows in 2001 and the Impact of the Events in the United States", UNCTAD/ITE/Misc.49, (2 October 2001).
- UNCTAD, the Competitiveness Challenge: Transitional Corporations and Industrial Restructuring in Developing Countries, United Nations. (2000)

- UNCTAD, World Investment Report, (1996). http://www.oecd.org/dataoecd/3/20/37579220.pdf
- UNCTAD, World Investment Report, (1999).
- UNCTAD, World Investment Report, (2000).
- UNCTAD, World Investment Report, (2001).
- UNCTAD, World Investment Report, (2002).
- UNCTAD, World Investment Report, (2003).
- UNCTAD, World Investment Report, (2004).
- UNCTAD, World Investment Report, (2005).
- UNCTAD, World Investment Report, (2006).
- UNCTC Draft United Nations Code of Conduct on Transitional Corporation (1986) (http://unctc.unctad.org/html/docmaster90.htm)
- UNDP, Human Development Report 2001.
- UNDP, Human Development Report 2002.
- UNDP, Human Development Report 2003.
- UNDP, Human Development Report 2004.
- UNDP, Human Development Report 2005.
- UNDP, Human Development Report 2006.
- UNGA Decision No. 3203 of (1/5/1974).
- United Arab Republic and Kuwait Agreement (1966), 47 The Official Gazette, (1967).
- United Kingdom: State immunity Act 1978, ILM (1978).
- United State: Foreign Sovereign Immunities Act of 1976, ILM (1976).
- US. Court of appeal. 2nd Circ. 32 December 1974, Yearbook, 1976.V1. P.205.
- USA and Italy of 1948, Treaties and Other International Acts Series, No. 1965.
- World Bank indicators, the World Bank, Washington D.C. , (2002).
- World Investment Report, the World Bank, Washington D.C. , (2000).
- World Investment Report, the World Bank, Washington D.C. , (2002).
- World Investment Report, the World Bank, Washington D.C. , (2004).
- World Investment Report, the World Bank, Washington D.C. , (2005).