



## SIGNIFICANT IMPACTS ON EGYPTIAN LEGAL SYSTEM CAUSED EGYPTIAN INVESTMENT LEGISLATION

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### ABSTRACT

*The Egyptian government and its legislators have been putting forth legislative amendments to its domestic laws that are controversial in relation to investment, tenders, bids, and investment guarantee as top priority. On one hand, they are doing this in order to encourage and reassure the foreign investors in Egypt, and on the other hand, they are likely facing psychological fears of international massive litigations. However, these legislative investment amendments could threaten and undermine the stability of inherited Egyptian jurisdiction systems and integrity. These amendments include providing avenues of escape of corruption and financial crimes through the reconciliations with the foreign investors who have been damaging the Egyptian economy and its citizens' livelihoods. As the role, size, and impact of foreign investment grow worldwide. The mechanisms holding such entities accountable are actively diminishing. Unfortunately, the legal framework of foreign investment is aggressively shrinking the state's role in regulating these foreign investment enterprises in Egypt, while challenging the very sovereignty and jurisdiction of the Egyptian court system to investigate allegations of violations committed by foreign investors. In effect, this results in absolute impunity by foreign investors in Egypt. Moreover, this trend of more legal privileges and the loose accountability to the foreign investors create a negative impact on Egyptian public interests and then on the Egyptian legal system as well as on the Egyptian Constitution. The aim of this paper, therefore, is to highlight the lawful deficiencies of the amended investment laws as well as its patterns trespass to the Egyptian Constitution. In addition, this paper brings out the implications of these violations on the inherited Egyptian legal system.*

**Keywords:** Jurisdiction, Arbitration, Bilateral treaty, Investor, Legislative favoritism, Constitution.

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### Contribution/ Originality

This paper contributes to existing literature in two ways; first, it critically analyzed the presidential decrees that amended some part of the Egyptian laws. Secondly, the study also evaluates the effects of these legislative amendments on the Egyptian legal system.

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## 1. INTRODUCTION

Without doubt, the globalization of enterprises boosts economic growth and development, but also dominates the global trade system. As a result of this, national legal protections are appropriately put in place for globalization. Therefore, legislations that are the main instruments of determination and control over any hybrid economic and legal issues regulate the economy and point it towards liberalism, economic nationalism, and Marxist economics (Peinhardt and Allee, 2012).

Although domestic legal norms and bilateral treaties play a vital role in the global legal norms and practices, Lehari (2014) argued that the conflicts between the norms and the treaties could change the formation of the legal structure of nations. Therefore, the compromises and settlements of the legal conflicts over international investment activities can be legitimately resolved within the binding countries (Stiglitz, 2007).

The following are the major profit and non-profit players that make organizations play divisive roles in economic globalization: A foreign direct investment (FDI) is the most prominent of forms of investment for this economic globalization. Conventionally, the obligations and constraints tied to international economic architecture are placed mainly by multinational corporations (MNCs) (Goldman, 2006) international financial institutions (IFIs), intergovernmental organizations (IGOs), and other global private sectors that associate closely with international trade and investment agreements.

These major players have noticeable effect on the legal framework in many countries regulating foreign investment (Paparinskis, 2012). Where, the legislation is aggressively shrinking the state's role in controlling these enterprises that challenge the sovereignty and jurisdiction of the national court system in order to investigate allegations of violations committed by foreign investors. In effect, this global investment system leads to absolute impunity to the foreign investors in developing countries (Stiglitz, 2007).

A fundamental purpose of investment treaties is to protect and promote investment. International investment treaties consist principally of three types : ( 1) bilateral investment treaties, commonly known as 'BITs', (2) bilateral economic agreements with an investment provision, and (3). BITs, as the name indicates, exclusively govern investment relations between two signatory states (Markusen and Maskus, 2001); (Teece, 1986). The role of these Treaties is important to facilitate the transfer of intangible assets, such as the knowledge or reputation of an MNC across borders. Despite this effort, the MNCs connive with the relevant government

institutions so that policies are made to favor MNCs interests at the risk of national and public interest<sup>1</sup>.

In the meantime, Egypt is one of the states facing the highest figure of cases requiring litigation in international investment courts and facing claims of more than USD 20 billion yearly from foreign investors<sup>2</sup>, because of the imbalanced bilateral investment treaties (BITs). Unfortunately, BITs between Egypt and developed countries seem to favor the interests of foreign investors at the expense of Egypt's state sovereignty and public interest. However, ironically, these BITs remain the pillar of Egypt's reform of the investment framework, especially the latest amendments that were passed by the current president of Egypt on the Eve of the Economic Conference in Egypt between 13 and 15 March 2015 (De Chazournes and Laurence, 2014).

Egypt's legislative framework is very indicative of its vision for investment that is influenced by reflective global investment trends rather than being responsive to economic and social needs on the domestic level. It can be argued that the Egyptian legal approach of investment includes the following features:

First, the Egyptian legal approach of investment is fully compliant with World Trade Organization (WTO) rules, and BIT provisions. Where, Egypt is eager to attract foreign investments by diminishing the sovereignty for turning favor to these foreign investments that are practically allowed to draw their own business environment. However, there is increased presence of foreign investment, operating in developing and third-world countries. Where, economies continue to struggle with very low growth rates. The foreign investments have become a major player on this issue at the domestic level and they often violate the legal norms as well as practices of the Constitutional Heritage. The Egyptian constitution has always given to the national jurisdiction pride place, and evidently exercising lawful protection of domestic interest<sup>3</sup>.

Second, Egypt has passed recent amendments of investment framework that align national laws with the remaining main provisions of bilateral investment treaties. The amendments have granted foreign investors large protections and incentives, with few regulations being allowed by the state, and they have denied the Egyptian judicial oversight over corruption and other economic crimes' cases.

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<sup>1</sup> UNCTAD, IIA ISSUES NOTE RECENT TRENDS IN IIAS ISDS, No. 1 February 2015 database. Note: Preliminary data for 2014. Retrieved 11 October 2015 from [unctad.org/en/./webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/./webdiaepcb2015d1_en.pdf) > accessed. See also, UNCTAD. World Investment Report (2012): Towards A New Generation of Investment Policies [REPORT]. UNITED NATIONS PUBLICATION Sales No.E.12. II.D.3 ISBN 978-92-1-112843-7 (Sales No.E.12. II.D.3 ISBN 978-92-1-112843-7), 204. Retrieved 9 October, 2015 from [http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012\\_WebFlyer.aspx](http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx)>accessed.

<sup>2</sup> UNCTAD. Recent Trends in IIAs and ISDS. (2015). [REPORT]. UNCTAD, 18

<sup>3</sup> The bids and tenders law is one of the most important texts used by Egyptian courts to annul privatization and land sale contracts, since it regulates sales provisions and operations. Thus, reducing the cover of the law is a first step to lifting regulations on the sales public resources and property, which promises even more corruption.

Finally, the second feature triggers impunity for the cases of systematic and widespread corruptions in Egypt that continue to cost Egypt billions of dollars annually. The money could have been better spent on infrastructure development and provision of quality health services.

Unfortunately, Egypt's current investment framework seems to help the interests of MNCs over the internal interests. The Egypt's legal approach to investment is reflective of the global trend, according to the World Trade Organization (WTO) that specified rules and accords. The Egyptian government's policies on these issues are influenced essentially by the legislative council. Therefore, one can only conclude that Egypt is allowing investors to breach domestic laws in order to attract foreign investments, without taking into account the public interest, the prestige of the national laws, and the domestic jurisdiction integrities. For example, Law No.4 of 2012, concerning the amendment of some provisions of the Investment Guarantees and Initiatives Law issued through Act No.8 of 1997, authorized the General Authority for Investment and Free Zones (GAFI) to settle cases of fraud, theft, and corruption in investment, from outside the criminal courts. This invalidated criminal proceeding against investors in all cases of fraud and took away the role of the judiciary in accountability for corruption, in an assault on the rule of law.

It is in line with these that the paper aims to analyze the presidential decrees that amended some Egyptian investment laws. In addition, it evaluates the impact of these legislative amendments on the Egypt's legal system.

### 1.1. Conceptual Clarification of Terms

The Arab Republic of Egypt "is a sovereign, united and indivisible State. Egypt is a country with a democratic Republican system based on citizenship and the rule of law. Egyptians are part of the Arabic-speaking nations who are seeking enhancement for integration and unity. Egypt is also part of the Islamic world. It not only belongs to the African continent and cherishes its Asian dimension, but it also contributes to build human civilization" (Abdel, 2008).

It is worth noting that the classical dichotomy of public and private law has resulted in the crystallization of a separate set of legal rules applicable to transactions involving the state (or any of its institutions, subsidiaries, or state-owned enterprises) acting as a sovereign power. This entailed the establishment of the Egyptian Council of State (Council of State) by virtue of Law No. 112 of 1946 as amended by Law No. 9 of 1949, which consists of administrative courts vested with the power to decide over managerial disputes pertaining to administrative contracts and governmental decrees issued by government officials. These courts apply administrative rules, which are not entirely codified; hence, because often no applicable legislative rules exist, the scope of judicial discretion is ample in light of the established precedents laid by the supreme courts (Fahmy, 2015).

The judicial authority acts as the third independent power of the state. The Egyptian Judiciary is comprised of secular and religious courts, administrative and non-administrative courts, the Supreme Constitutional Court, penal courts, civil and commercial courts, personal

status and family courts, national-security courts, labor courts, and military courts, as well as other specialized courts or circuits. The Egyptian court system is composed of a number of tiers: The Court of First Instance, the Court of Appeal, and the Court of Cassation are at the apex of the judiciary. The classical dichotomy of public and private law has resulted in the establishment of the Council of State, which consists of administrative courts vested with the power to decide over executive disputes pertaining to authoritative contracts and administrative decrees issued by government officials and ministries. The Supreme Constitutional Court has been established in 1970, replacing the Supreme Court that had been established in 1960, and has exclusive jurisdiction to decide issues regarding the constitutionality of laws and regulations, as well as negative and positive conflicts of jurisdiction.

Egypt's economy depends mainly on agriculture, media, petroleum imports, natural gas, and tourism; there are also more than three million Egyptians working abroad, chiefly in Saudi Arabia, the Persian Gulf, and Europe. Since 1991, Egypt has been implementing the policy of privatization, so the state is no longer the sole investor, and its role is based on the indicative planning and direct implementation of the necessary economic and social development, which is concentrated mainly in infrastructure projects of public investments. The current Egyptian economic strategy considers that the privatization policy of economy is a key component of economy's reform in Egypt. The Egypt's government depended on some mechanisms, which aimed at creating the Egyptian economy in the privatization. This economics conversion has been conducted through the restructuring of economic institutions, in order to restore the balance required in the basic economic variables. This economy's approach helped to open the door for the private sector to strengthen its involvement in the economy's activity and its policies.

The ruling investment legislations in Egypt have been completely changed, when the Egyptian state determined to embrace economic openness and liberalization, the economy began to be liberalized in piecemeal legislation. The 1989 investment law and the 1991 public enterprise law foreshadowed the phase of general economic legislation. In the mid-1990s, the focus turned to extensive legislation that liberalized the economic infrastructure in several important sectors such as investment, export, banking, insurance, ports, and the stock market.

**Egyptian business laws:**

Investment Law No. 8 of 1997, Law No. 159 of 1981, Amendment to the Investment Law and Corporate Law, the Commercial Agency Law, Tax Law, Labor Law, Intellectual Property Rights Law, Environmental Law, The Commercial Register Law, Special Economic Zones Law, Land and Real Estate Ownership Law, Investment Guarantees and Incentives Law.

**Egyptian financial laws cover:**

Mortgage Law, Money Laundering Law, Insurance Law, General Budget Law, Central Securities Depository Law, and Capital Market Law.

**Egyptian trade laws encompass:**

Export Promotion Law, Customs Law, Anti-Dumping Law, Import and Export Regulation Law and Competition, and finally, Antitrust Law.

## 2. EGYPTIAN LEGISLATION AND THE PRIORITY

As usual, the Egypt's legal approach is based on the main concepts of sustainable development to attract more local and foreign capital to the Egyptian economy (Nagarajan, 2013). Moreover, the best and most effective manner to encourage investment is to offer tremendous privileges for foreign investors. All these require legislative amendments in order to demonstrate the State's keenness for investment and investors. The successive post-2011 governments, including the current interim cabinet, still clutch for those failed attracting-investment policies. The Egyptian government continues to look into attracting foreign investments as the solution to all of the country's financial and economic problems, thus mechanisms to attract foreign investments have been given a top priority, and the Egyptian government with its economic policies is continuing to ignore available resources in Egypt and national solutions to complex economic and social problems, such as wages, housing, health, and education<sup>4</sup>.

Factually, the government of Egypt has declared investment, including foreign investment, a top priority. It has supported this policy through a series of recent pro-business amendments, including a third-party-contract appeal law prohibiting third-party interference in state-investor contracts; a competition law; and a presidential decree reforming Egypt's 1997 Investment Law by trimming customs duties, expanding corporate veil protection, establishing additional forums for investor-state disputes, and setting the foundation for a true one-stop business registration shop. Additional upcoming reforms promised by the government include a value-added tax (VAT), simplified bankruptcy proceedings, a company's law, and amendments to the capital markets law, a new insurance law, and a land management framework.

Moreover, the country has demonstrated a willingness to make difficult economic decisions, including cutting fuel subsidies by 30 percent and devaluing the Egyptian pound. In addition, in March 2015, the country organized the Egypt Economic Development Conference (EEDC), bringing together heads of state and multinational chief executives to showcase Egypt's reform agenda, spotlight USD 36 billion in foreign investments, and offer speeches by ministers who affirmed the government's commitment to economic reform.

Egypt's government claims that it has several programs intended to attract foreign direct investment into special economic and trade zones. The General Authority for Investment and Free Zone (GAFI) implements Egypt's policies and procedures to facilitate doing business, including maintaining Egypt's "one-stop shop" for investors<sup>5</sup>. The Egyptian tax code taxes, personal income and corporate profits for both foreigners and nationals at a maximum marginal rate of 25 percent. The Minister of Finance recently declared that this rate will be reduced to 22.5 percent. In 2015, the World Bank's Ease of Doing Business Index ranked Egypt 112 out of 185 economies (Sherif, 2015). The laws that reflect the Egyptian legal approach towards investment and their development are described in the next section.

### 2.1. The Review of Legislators' Incentive Releases

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<sup>4</sup> Al-Jarida and Al-Rasmiyya, 1948. Law No. 131 of 1948 Civil Code, 108.

<sup>5</sup> World Bank's doing Business Report "Ease of Doing Business", [doingbusiness.org/rankings](http://doingbusiness.org/rankings).

The Investment Incentives Law (Law No. 8 of 1997) was intended to motivate domestic and foreign investment in stressed economic sectors and to promote decentralization of industry away from the Nile Valley. The law permits 100 percent alien ownership of investment projects and warrants the right to remit revenue earned in the Egyptian state and to repatriate capital. Other basic provisions embrace guarantees against confiscation, sequestration, and expropriation; the right to acquire land; the right to preserve foreign-currency bank accounts; liberty from administrative accessory; the right to repatriate money and profits; and equal treatment irrespective of nationality<sup>6</sup>.

Law No. 94 of 2005 amended the law No.8 of 1997 and made corporations combined under its subject to quit simple procedures for the combination<sup>7</sup>. It also granted companies established under the Businesses Law or the Commercial Law sure incentives, including a shield from expropriation, the imposition of compulsory pricing, and termination or suspension of authorizations to use immovable possession such as the real estate, buildings and lands. It also granted firms the right to own real estate wanted for their business and the right to import raw materials, equipment, spare parts, and transportation means without being required to record them on the Importers List.

The Companies Law No. 159 of 1981(Riad, 2000) applies to domestic and foreign investment in sectors not covered by the Investment Incentives Law, whether shareholder, joint stock, or limited liability companies, representative offices, or branch offices. The law allows automatic firm recording upon a submission to GAFI, with some exclusions. The law also removed a preceding legal condition that at least 49 percent of shareholders be Egyptian, allows 100 percent foreign representations on the board of directors, and supports accounting norms<sup>8</sup>.

Law No. 89 of 1998 (Tenders Law) requires the government to consider both price and best value in giving contracts and to release a clarification for rejection of a tender. But, the law includes favoritism for Egyptian national contractors, who are given priority if their bids do not exceed the lowest foreign bid by more than 15 percent.

Law No. 95 of 1992 (Capital Markets Law) and its amendments and regulations rule Egyptian capital markets. Foreign investment entities and investors can buy shares on Egypt's Stock Exchange on a similar basis as domestic investors<sup>9</sup>. Brokerage companies have capital requirements of LE 5 million (USD 656,200), and same-day trading on Egypt's Stock Exchange is allowed. As of January 2011, 47 brokerage companies had authorizations for same-day or intra-

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<sup>6</sup> World Bank Group, Doing Business, Measuring Business Regulations. Retrieved 19 October, 2015 from <http://www.doingbusiness.org/law-library/egypt>.

<sup>7</sup> U.S. Department of State, 2015. Egypt investment climate statement. Available from <http://www.state.gov/documents/organization/227163.pdf>

<sup>8</sup> Law No. 95 of 1992 (Law of Capital Market), Al-Jarida Al-Rasmiyya, 22 June 1992 (Egypt). See also Shahira Abel Shahid, Corporate Governance Is Becoming a Global Pursuit: What Can Be Done in Egypt? 42 (Sept. 2001) (unpublished manuscript) <http://papers.ssrn.com/abstract=286875>.

<sup>9</sup> Ibid.

day trading. In addition, Law No. 123 of 2008 amended Law No. 95 of 1992 to allow local and foreign entities to issue bonds at a par value of LE 0.10 (USD 0.0131)<sup>10</sup>.

Decree No. 719 of 2007 by the Ministry of Industry and Foreign Trade and the Ministry of Finance affords privileges for industrial ventures in the governorates of Upper Egypt (Upper Egypt refers to the governors in southern Egypt). The decree provides a privilege of LE 15,000 (USD 1,968) for each work opportunity created by the venture, on the clause that the investment costs of the venture overtake LE 15 million (USD 1.97 million)<sup>11</sup>. The decree can be processed on both new and current ventures.

Law No.1 of 1998 (Maritime Law) allows private businesses, including foreign investors, to conduct most maritime conveyance activities, including loading, supplying, and vessel repair. Law 17 of 1999 (Commercial Law) has more than 700 articles covering overall business, commercial agreements, banking contacts, commercial paper, and bankruptcy. Law No. 93 of 2000 (Central Depository Law) decreases risks related to trading safety, promotes market liquidity, and attempts to streamline the securities exchange process through systematized recording, clearance, and settlement procedures<sup>12</sup>.

As for bankruptcy<sup>13</sup>, Egypt does not have a bankruptcy law per se; however, Law No. 17 of 1999 (Commercial Law) enacts a chapter of bankruptcy. The terms of the bankruptcy chapter are worthless or vague on different key cases that are decisive to the decrease of settlement risks. Egypt's government has distinguished the absence of a functioning bankruptcy code as an important weakness for investment. In trying to help accelerate the bankruptcy process in 2015, the government amended Law No. 8 of 1997 (Investment Law), stipulating that if a firm under liquidation has not received a report of liquidation from the relevant administrative authorities within 120 days of the liquidating presenting the application, the firm will be liberated from its responsibilities. While this has accelerated bankruptcy proceedings to some extent, the government continues to show in public statements that efforts are underway to initiate new bankruptcy legislation to more permanently address continuing concerns over the cost and paperwork involved in the bankruptcy (Youssry and Partners, 2014).

Lastly, in 2015, Egypt issued Presidential Decree No. 17 of 2015, amending much of the Egyptian investment-related legislation, including the General Sales Tax Law, the Companies Law, the Income Tax Law, and as the Investment Guarantees and Incentives Law. Egypt's one-stop shop system has been refined by the decree, which states that the Ministry of Investment's

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<sup>10</sup> Santander Trade Portal, Egypt: Foreign Investment. Retrieved 19 October, 2015 from <https://en.santandertrade.com/establish-overseas/egypt/foreign-investment>

<sup>11</sup> Egypt, Law No. 17 of 1999 on Commerce. Retrieved 20 October, 2015 from [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=312040](http://www.wipo.int/wipolex/en/text.jsp?file_id=312040)

<sup>12</sup> Ibid.

<sup>13</sup> CDL was amended by laws 143/2004, 10/2009 and 127/2009. See also, Executive Regulations were amended by Decrees No. 227/2002, 267/2002, 554/ 2002 and 193/2005. See also Listing Rules were amended by CMA Decision No. 94/2008 and EFSA Decisions No. 50/2009, 64/2009, 67/2009 and 132/2010.



GAFI will serve as a liaison between investors and government agencies when applying for business licenses. The one-stop shop remains to be implemented. The decree offered non-tax incentives to investors in certain sectors or regions. The decree also offered new mechanisms for investment dispute settlement and improved corporate veil protection shielding senior executives from prosecution. Finally, the decree limits the expansion of free zones and gives the cabinet the exclusive right to choose fields of investment in the free zones, contingent on the state's economic strategy<sup>14</sup>

### 3. EGYPTIAN FRAMEWORK IN INTERNATIONAL INVESTMENT

The structure of international trade and investment is one of the main frameworks that determine Egyptian policies. Current trade and investment agreements do not merely liberate pricing policies and abolish custom duties; they also become central cores of local economic policies that shift unfair terms and conditions of public policies, particularly concerning subsidies, investments, taxes, and industry. The following is one such case. The European Union, at the beginning of the so-called Arab Spring, began negotiating with Egypt, Tunisia, Morocco, and Jordan on Deep and Comprehensive Free Trade Agreements (DCFTAs) (Hoekman and Djankov, 1997) mainly focused on supporting foreign investors in the countries of the Arab Spring.

The supporting of foreign investors will be through the amendments of policies and laws that govern over and control monopoly, competition, public procurement and investment guarantees in Egypt. Where, The Egyptian law does not apply to foreign investors in Egypt, overruling jurisdiction's powers of Egypt and passing the state of Egypt to address the dispute issues at the international investment courts Guzman (1998); Vandavelde (2000); Ginsburg (2005); Franck (2007).

#### 3.1. The Rule of Bilateral Investment Treaties

BITs are accords that specify rules, terms, and conditions for organizing and controlling investment arrangements between two states<sup>15</sup>. It is significant to note that Egypt is constrained by many agreements with international investors and by safeguards, terms, and conditions set by international financial institutions (IFIs). All these can be regarded as a driving force behind Egypt's legislative amendments. Egypt is a binding party with over 100 states with bilateral investment treaties<sup>16</sup>. Most of these agreements contain clauses of legal technicality loopholes,

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<sup>14</sup> United Nations Conference on Trade and Development World Investment, Report (2013), Global Value Chains: Investment and Trade for Development. P., 104. (2013).

<sup>15</sup> Full list of Bilateral Investment Agreements concluded. (2013). Retrieved 12 October, 2015 from [http://unctad.org/Sections/dite/pccb/docs/bits\\_egypt.pdf](http://unctad.org/Sections/dite/pccb/docs/bits_egypt.pdf).

<sup>16</sup> The International Centre for Settlement of Investment Disputes \_ICSID\_ was the outcome of a multilateral treaty established by the Executive Directors of the International Bank for Reconstruction and Development \_IBRD\_ of the World Bank\_ The treaty was introduced for signature on 18 March 1965 and entered into force on 14 October 1966. Retrieved from <https://icsid.worldbank.org/ICSID/>.

triggering disputes that are settled through international arbitration panels such as the International Centre for Settlement of Investment Disputes (ICSID) (Minas, 2008).

Purportedly, Egypt has ratified to sign such agreements on the ground of serving the best strategies to encourage direct foreign investments (Cosmas, 2014). In fact, Egypt is not the only country to go for the investment policies; the African states had joined<sup>17</sup> what is dubbed “the race to the bottom” where they compete to ease their investment climate to compete with other countries in attracting investors. They end up in a race to the bottom, without attracting the prospective investment. Therefore, it is not viable or realistic that most African countries such as Egypt automatically provide investors with all sorts of privileges<sup>18</sup>, without even looking into the added value of their investments.

Therefore, neglecting calculations of potential risks rather than pursuing implementation of policies of attracting foreign investments by entering into BITs is no longer the case. Several developing countries, especially in Latin America and South Africa are beginning to revise BITs to seal off the legal loopholes, such as by removing unfair binding terms and conditions that are contrary to the public policy.

The number of dispute cases of BITs rose up in the past few years’ entails and indicates the failure of the WTO in negotiations in multilateral agreements on investment protections. To a great extent, the fiasco that was caused by the efforts of developing countries led to putting an end to such unfair treaties during WTO rounds of negotiations. These countries had felt the brunt of the negative impacts of implementing legally binding terms of investment protections in their economies<sup>19</sup>.

The annual United Nations Conference on Trade and Development (UNCTAD) report showed that litigations in international investment courts witnessed an unprecedented surge in 2012, indicating that the huge rise was a result of BIT failures. The report disclosed that 68% of the countries affected by the arbitration were developing countries (Sanya, 2010). In response to the findings, UNCTAD also pointed out that investment rules linked to Free Trade Agreements (FTAs) “can hamper ‘the ability of governments to act for their people’” (Subedi, 2012). This was the reality when protecting investments, no longer existed, instead of applying a means to attain economic development as part of a strategic plan freely drafted and scheduled by the state to boost its own resources and reach sustainable development<sup>20</sup>.

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<sup>17</sup> “Investment Minister: Amendment of investment initiative legislation is under review,” 26 July 2013. Retrieved 2014, from <http://www.youm7.com/News.asp?NewsID=1178885#.Um5gIVynpAg>.

<sup>18</sup> The Department of Trade and Industry Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review, June 2009. Retrieved 7 February, 2014 from [http://www.thedti.gov.za/ads/bi-lateral\\_policy.pdf](http://www.thedti.gov.za/ads/bi-lateral_policy.pdf).

<sup>19</sup> UNCTAD IIA Issue Note, “Latest Development in Investor-State Dispute Settlement,” April 2012. Retrieved 14 October, 2015 from [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf).

<sup>20</sup> Full list of Bilateral Investment Agreements concluded, 1 June 2013, Egypt. Retrieved 11 October, 2015 from [http://unctad.org/Sections/dite\\_pcb/docs/bits\\_egypt.pdf](http://unctad.org/Sections/dite_pcb/docs/bits_egypt.pdf).

### 3.2. The Unwarranted Restriction of International Framework

Worth noting, Egypt is ranked as the first among Arab countries and as the fifth globally as the binding signatory state of total accords numbers of BITs with different countries. Updated data as given currently *amount to 100 accords of BITs* (Alcacer and Ingram, 2013). While these treaties are regarded as a tool for promoting economic growth and attracting investments, experience from different countries shows that these treaties pose a great threat to the democratic process and to the nation's economic and social policies (Hafner-Burton and Montgomery, 2006). To the foreign investors, the treaty is actually a *de facto* legal blanket for unconditional protection (Dolzer and Stevens, 1995).

Noticeably, there are not clear provisions or legal definitions of corruption in the most of BITs. In addition, most, BITs do not include the rules of the states' rights to safeguard its public money and maintain its sovereignty. Therefore, without these provisions and rules, it is impossible to overrule the judgments of international arbitration courts that settle the disputes related to the corruption and public interest protection in BITs (Tony and Vaksha, 2011). An issue which is often raised in the objections of states and economists to BITs has been the broad and pliable definition of investors and investment. The majority of bilateral agreements does not entail a definition of these terms and therefore could be applied to a wide range of situations and cases. This means that arbitration courts looking into investment disputes, which only follow the rules of the BITs, are governed by the elastic definition<sup>21</sup>

Remarkably, upon signing a treaty, the investors (of a signing party) already present in a country (with whom they state signed a BIT) and those who are yet to come, become protected under the terms of the treaty. In order to extend the blanket of protection, companies from countries without BITs with Egypt can seek the same protection by buying shares in a company in one of the BIT signatory countries or by opening a letter-box (ECES, 2013). Moreover, while the Egyptian investor has to abide by the Egyptian judicial laws, the foreign investor can simply choose to bypass the domestic courts of developing countries and even use the last resort of investor-state dispute settlement (ISDS) mechanisms, which rule based on the terms of the BIT. Let us refer to the case of Siag, the Egyptian business man who sued Egypt through international arbitration on the ground of his Italian citizenship; he received over LE 400 million as compensation from the Egyptian government. According to the Head of State Litigation Authority, the total value of compensation requested by investors who are suing Egypt in international court cases amounts to almost LE 100 billion<sup>22</sup>. From the foregoing, it has been illustrated that Egypt has committed to an international investment framework and that these obligations have been translated in the national legislative framework.

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<sup>21</sup> Corporate Europe Observatory, February, "The Story of Dutch Letterbox which Could Cost Bolivia a Fortune" (2008). Retrieved 25 November, 2015 [from http://archive.corporateeurope.org/bolivia\\_eti.html](http://archive.corporateeurope.org/bolivia_eti.html).

<sup>22</sup> Ibrahim Al Azzab, "Foreign Investors are asking for EGP 100 bn in compensation in front of international arbitration" \_ Al Ahram\_ 22 April 2014\_ [http://www.ahram.org.eg/NewsPrint\\_278879.aspx](http://www.ahram.org.eg/NewsPrint_278879.aspx)

#### 4. THE EGYPTIAN LEGISLATIVE AMENDMENTS AND BYPASSING THE INHERITED JURISPRUDENCE

Since this paper is on the impacts of the Egyptian legal system caused by the Egyptian investment, there is the need to analyze the application of the principles of rule of law in Egypt from the perspective of the existing Egyptian constitution. This concerns the relationship between the arms of the Egyptian government. That is, the judiciary, the legislature and the executive arms respectively.

##### 4.1. The Rule of Law

The framework of the rule of law is derived from the United Nations<sup>23</sup>, a renowned international governing body that demonstrates the rule of law as a system in which the following four universal principles are upheld:

- (1) The government and its officials and agents as well as individuals and private entities are accountable under the law.
- (2) The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
- (3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
- (4) Justice is delivered timely by competent, ethical, and independent representatives and neutrals that are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

In 2014, Egyptian legislators clearly addressed the rule of law in the Constitution, as follows:

##### **Judicial independence, Article 94: Rule of law**

“The rule of law is the foundation of governance in the state that is subject to the law. Nevertheless, the independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms”<sup>24</sup>.

##### **Ultra vires administrative actions, Article 97: Right to litigate**

“Litigation is a safeguarded right and guaranteed to all. The state shall bring together the litigating parties, and work towards speedy judgment in cases. It is forbidden to grant any act or administrative decision immunity from judicial oversight. Individuals may only be tried before their natural judge. Extraordinary courts are forbidden”<sup>25</sup>.

##### 4.2. The Judiciary in Egypt

Principally, the Egyptian judicial authority is as the third independent power of the State. The Egyptian Judiciary is included tow sorts of courts religious and secular, administrative and non-administrative courts, civil and commercial courts, a Supreme Constitutional Court, penal

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<sup>23</sup> United-Nation. (2015). Retrieved 25 October, 2015 from Rule of law. [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3).

<sup>24</sup> Egyptian Constitution, 2014. 3. Available from [www.sis.gov.eg/Newvr/Dustor-en001.pdf](http://www.sis.gov.eg/Newvr/Dustor-en001.pdf) [Accessed 9 September, 2015].

<sup>25</sup> Ibid, Article 97

courts, personal status and family courts, labor courts, military courts, national security courts, also other kinds of courts or circuits. The system of Egyptian Courts is composed of three of tiers: The Courts of First Instance, Court of Appeal, and the Court of Cassation that is the top of the judiciary hierarchy.

**Judicial independence, Article 184: The judiciary**

“The judiciary is independent. It is vested in the courts of justice of different types and degrees in verdicts by issuing their judgments in accordance with the law. Its powers are defined by law. Interference in judicial affairs or in proceedings is a crime to trespassers on the authority of the judiciary no statute of limitations”<sup>26</sup>.

**Protection of judges' salaries, Article 185: Judicial bodies**

“All judicial bodies administer their own daily duties. Each of them has an independent budget, whose expenses items are all discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure, and their opinion is consulted closely based on the draft laws governing their affairs”<sup>27</sup>.

**The judiciary and public prosecution, Article 188: Mandate**

“The judiciary adjudicates all cases of disputes and crimes except for matters in which another judicial body is competent. Only the judiciary settles any dispute cases relating to the affairs of its members, and its affairs are administered by a higher council whose structure and mandate are appointed by law”<sup>28</sup>.

**Attorney general, Article 189: Public prosecution**

"Judicial Council is appointed members from among the Deputies to the President of the Court of Cassation, and the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential public prosecution as an integral part of the judiciary. The attorney general is responsible for investigating, pressing charges and prosecuting all criminal cases except what is exempted by the law that establishes for the public prosecution other competencies. Public prosecution is carried out by a Prosecutor General who is appointed by the Supreme Decree for a period of four years, or for the remaining period until retirement age, whichever period comes first, and only once occurs during a judge's career”<sup>29</sup>.

**The State Council, Article 190: Mandate**

"The State Council is an independent judicial body that is exclusively competent to adjudicate in cases of administrative disputes, disciplinary and appeals as well as disputes pertaining to its decisions. It is also solely competent to publish opinions on the legal issues of judicial bodies to be determined by law. The mandate duties of the State Council are reviewing and drafting bills as

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<sup>26</sup> Ibid, Article 184

<sup>27</sup> Ibid, Article 185

<sup>28</sup> Ibid, Article 188

Ibid, Article 189

<sup>29</sup> Ibid, Article 189

well as finding resolutions of a legislative character, and reviewing of draft contracts to which the state or any public entity is a stakeholder. Other competencies are to be determined by law”<sup>30</sup>.

#### 4.3. Public Funds in Egyptian Law

Public funds are dedicated and allocated to public interest. Therefore, these funds ought to be protected by special rules. The lawful protection of public funds from any abuse is compulsory to prevent any disruption to the public funds purpose<sup>31</sup>. In fact, the legislation of anti-abuse public funds is popular in various countries worldwide, especially the protection of public funds being permeated for the sake of society. After all, the protection and maintenance of the sustainable operation of public utilities were covered by the civil law, the Penal Code and even those legal clauses in the central core of the Constitution.

#### A- Constitutional Protection

The consecutive Egyptian constitutions have frequently established legal protection of public funds. The chronicled findings are listed below:

1. The 1956 Constitution stipulated in Article 27, “Public ownership shall have its sanctity, and its protection and consolidation is the duty of every citizen.”
2. The 1962 Constitution stipulated in Article 15, "Public ownership shall have its sanctity; and that its protection and consolidation are the duty of every citizen in accordance with the law, because the Article 15 is considered as the groundwork of the strength of the homeland, a basis for the socialist system and a source of prosperity for the people."
3. In addition to this context, the 1971 Constitution developed Article 29, which stipulates, "Ownership shall be under the supervision of the people and the protection of the State. There are three kinds of ownership: public ownership, cooperative ownership and private ownership”<sup>32</sup>.
4. The constitutional amendments of 2007 tried to reverse to the new capitalist trend of the state. Article 33 of the constitutional amendments of 2007 nullified Article 15 of the 1962 constitutional amendments.
5. The last constitutional amendments in 2014 emphasized protection of the public funds in "Article 32: Natural resources, “which stated, “Natural resources belong to the people. The state commits to preserving such resources, to their sound exploitation, to preventing their depletion, and to take into consideration the rights of future generations to execute sustainable development”<sup>33</sup>.

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<sup>30</sup>Ibid, Article 190

<sup>31</sup>Ibid Article 34

<sup>32</sup>This article has not been matched by any other article in the successive constitutions except in the Constitution of 1964 in Article (13).

<sup>33</sup> Constitution, Op cit., Article 32.

Ibid, Article 33.

6. The following additional amended clauses were added to "Article 33: Ownership" by ceding, "The state protects ownership, which encompasses three types: Public ownership, private ownership, and cooperative ownership,"<sup>34</sup> and to "Article 34: Public Property" by quoting "Public property is inviolable and may not be infringed upon. It is the duty of every citizen to protect it in accordance with the law"<sup>35</sup>.

## **B- Legal Texts of Public Funds**

The Egyptian legislation includes several legal texts that incriminate the assault, seizure or abuse of public funds, whether in the Egyptian constitution or in executive laws and regulations. Egypt had joined the United Nations Convention against Corruption in 2004, a year after it was developed; and it went into force; was ratified and published in the official journal on 08/2/2007<sup>36</sup>.

The Egyptian legislature devoted sections three and four of the Egyptian Penal Code to public funds abuse crimes. The third section tackled bribery and the crimes associated with it, while the fourth section tackled public funds embezzlement. The Egyptian legislature considers any public official who asks for or accepts gifts or promises in order to perform or to not perform his job or as a reward for what he has done is a bribe taker, even if he did not mean to perform or not to perform this task and if there wasn't a prior agreement. The legislature enacted penalties of up to life sentence for both the briber and the bribe taker.

Furthermore, the Egyptian legislature incriminated the seizure and unjust enrichment off public funds or facilitating it for others, as well as the deliberate or non-deliberate actions that might abuse public funds as long as they harmed public funds. Regarding the right to file reports of incidents of public fund's abuse, the Criminal Procedures Law allowed citizens and obliged public officials who acknowledge a crime to report it to the competent authorities. Article (25) of the Criminal Procedures Law stipulates that for anyone who acknowledges a crime, the Public Prosecution can file a lawsuit about it without a complaint or request, provided that he informs the Public Prosecution or one of the law enforcement officers. Article (26) stipulates that any public (services) official who acknowledges a crime, which the Public Prosecution can file a lawsuit about without a complaint or request, while or because of performing his/her job, has to report it to the nearest prosecutor or law enforcement officer.

In addition to the abovementioned penal codes and procedural legislations, the below relevant laws apply to public servants who dare to breach public servant and administration codes for managing, disposing of, or illegally using public funds, even if their commitments do not intend to waste the public funds:

- Auctions and Tenders Law No. 89/1998 and its executive bylaw

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<sup>34</sup> Ibid, Article 33.

<sup>35</sup> Ibid, Article 34.

<sup>36</sup>According to Article No. 151 of the Egyptian Constitution: "International agreements have the force of law after their conclusion, ratification and publication"

Constitution, 2014, Op cit., articles 188, 189 and 190.

- Public Budgeting Law No. 53/1973
- Civil State Employees Law No. 47/1978

#### 4.4. Amendments of Decrees and Abuse

Consecutive Egyptian governments amended the investment code several times after the outbreak of the Revolution in 2011. Probably the strong debates and adoption of the new “Legislative Package to Stimulate Investment” on the eve of the economic conference on 12/3/2015 were the most popular legal issues in the reform of the investment regime. Regardless, the “Package” consists of two presidential decrees:

The first is the Decree of Law No. 16 of 2015, which amended some provisions of the Criminal Procedures Law, issued by Law No. 150 of 1950. The second is the Decree of Law No. 17 of 2015, which amended some provisions of the Law No. 159 of 1981, regulating joint stock companies, private equity firms and limited liability companies; the General Sales Tax Law No. 11 of 1991; the Investment Guarantees and Incentives Law No. 8 of 1997; and the Income Tax Law No. 91 of 2005.

The “Legislative Package to Stimulate Investment” and several amendments were considered necessary to reassure the foreign investors in Egypt. Most notably, the amendments set a standard for the settlement of investment disputes, keeping away from the court system in Egypt. Article 7 of Presidential Decree No. 17 for the year 2015 stipulated that investment disputes could be settled as the contract specified and according to the provision of this law. In particular, Articles 101, 104, and 108 of paragraph Sections Seven of the latter legislative reform provided for the creation of three committees: first, the Committee for Investment Complaints; second, the Ministerial Committee for the Settlement of Investment Disputes, and third, the Ministerial Committee for the Settlement of Investment Contracts’ Disputes. The decisions of these committees would be taken into effect by executing the decrees once they were ratified by the cabinet (article 110).

The setup of the ministerial committees was carried out within the cabinet that laid down qualified conditions for the membership of one of the representatives of the State Council president; the rest of the members were ministers or representatives of ministers. However, the “Ministerial Committee for the Settlement of Investment Contracts’ Disputes” laid down resolution conditions for the acceptance of the settlement that was provided by the committee and all binding parties of the contract. It was subsequently ratified by the cabinet (Article 110), and then it became enforceable.

Legal experts may be aware that Article 110 came to threaten the inability to enforce the final provisions of the Administrative High Court, such as the invalidity of the privatization of a number of public sector companies as the reference case. This occurrence was due to changing the status of these firms and their properties, but also that they faced to acquire a new reality. On the other hand, the usual practices were that this written document turned out to be a way of circumventing the final judgments. Thus, article 110 would rather apply to re-allocating the



investment projects and land for the same investors, according to the rules of Usufruct, and not according to the Egyptian law of Bids and Tenders. Noticeably, under the usufruct system, land is offered to investors for periods ranging from 40 to 100 years in exchange for annual fees, while ownership of the land remains with the state. Furthermore, the courts were representative of the people dealing with administration of litigation for handling disputes, but were also given verdicts to the violators. This was mentioned in the last Egyptian Constitution in articles (188, 189, and 190)<sup>37</sup>. The settlements were regarded as the most constitutional amendments in the world.

In 2015, the articles providing for dispute settlement through ministerial committees were accompanied by legislative amendments to the Criminal Procedures Act through the Decree of Law No. 16. In particular, (Article 18, bis, B) of the subsequent legislative reform stipulated the permissibility of reconciliation in the crimes that were listed in chapter four of Book tow of the Criminal Procedures Act, titled “Defalcation of, Encroachment on and Embezzlement of Public Funds,” and further provision for “the consequent expiry of the criminal case” once the enforceable reconciliation was ratified by the cabinet. This significant change in dispute settlement was put through in Egypt: Despite that, the previous existence of dispute settlement in committees, keeping away from the court system, was limited to administrative breaches and offenses penalized by fines only (Article 18 of the Criminal Procedures Act).

The official permission for reconciliation and dispute settlement for more serious corruption crimes ended up with previously punishment by prison terms (including life in prison terms for several crimes that are listed in chapter four of Book tow of the Criminal Procedures Act) was a transgression in Egypt’s criminal justice system and articulated a new perception – mainly propagated by the government of Egypt in the past few years almost 10 years – that corruption and embezzlement of public funds were minor offenses but not crimes.

It is noteworthy to mention that the government of Egypt propagated the new law as an anti-corruption legislation. In particular, (Article 10, bis,1) of Decree of Law No. 17 in 2015 pointed out that investments built on deceit and corruption would not enjoy the protections, incentives, or guarantees given by the reform package, provided that the corruption and deceit were proven by a court order from the specialized courts. This article was enigmatic in multiply ways. Firstly, it was not clear how court orders would be issued to deal with investments and contracts if courts almost entirely lost jurisdiction’s power over the business conduct of the state with investors. Secondly, behind the background of Law No. 32 in 2014, it was not clear how corruption would be exposed if third parties were not allowed to challenge state-investor contracts and investment deals. Thirdly, there was a possibility that the Minister of Investment, who became the sole authority for challenging corruption, would litigate and investigate corrupt investments, resulting in court orders. Indeed, this in turn transferred into the futility of this so-called anti-corruption clause. Finally, the Reform Package annulled the tender and bid system for the disposition of state-owned land and property for the purposes of investment. Such legal

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<sup>37</sup> Constitution, 2014, Op cit., articles 188, 189 and 190.

measurement marked a turning point of reversing the state policy on land/property, sale, rent, and disposition of public property (Section 5, Articles 71 and 72). The state (after the approval of the cabinet) was also allowed to disperse lands and property to investors in specific geographical areas (complying fully with presidential decree) free of charge, for a period of five years (taking effect on April 2015). Additionally, the articles in the same paragraph section left a wide discretion to the committees that were formed by the Investment Authority in the selling, renting, or temporary disposition of lands and property for investment purposes, including vague provisions for the price setting of these properties (see Article 80) and generous exemptions from the land and property prices, especially when the state initiated an idea for an investment project to be carried out by private investors (see Article 79).

Previously, the investment package was accompanied by guaranteed tax breaks to investors in Egypt, when the tax rate was sliced from 30% on corporate income and personal income above 1 million EGP to a flat rate of 22.5%<sup>38</sup>. Taxation imposed on the Central Bank of Egypt, the Suez Canal Company, and the General Petroleum Corporation remained at a rate of 40.5%, whereas petroleum excavation companies continued to undergo the same tax rate of 40% on profits. A new 10% tax on profits was incurred from selling the company's shares exceeding 33% of the company's total shares [86] by offering unprecedented terms of taxing capital gains.

As per the tax exemptions under Egyptian law, Article No. 50 of Law No. 91 in 2005 dealing with income tax law exempted taxes on profits for companies reclaiming and farming lands for a period of 10 years. The same exemption was applied to profits of companies in poultry production, beekeeping, fisheries, fish farms, and livestock barns. Article 20 in Investment Law No. 8 in 1997 exempted contracts needed for the establishment of companies and facilities including the loan and mortgage contracts related to the establishment of companies, as well as the land-registering contracts necessary for establishing the companies and facilities are free from the tax of the stamp duty for a period of five years from the date of registration in the Commercial Register Bureau, as well as based on the date of documentation and notarization fees.

While Egypt enjoyed exercising territorial jurisdiction's power over any activity occurring within its borders, this sovereignty and jurisdiction did not extend to violations that were committed by international organizations or foreign investors. This was a result of two main variables. Firstly, as previously mentioned, Egypt had a weak legislative framework in dealing with such violations – particularly after the amendments of the laws referred to in earlier periods. Secondly, the policy and ideology of Egyptian economic strategy depended totally on the income from FDI inflow.

## 5. CONCLUSION

It is evident from the foregoing that this paper has analyzed the significant impact of the Egyptian legal system caused by the Egyptian investment legislation. The Egyptian investment legislation provided favorable conditions for foreign investors at the expense of the public interest

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<sup>38</sup> Article 56 from Law 101 for the year 2012 on amending income tax law.

which is protected by the Egyptian constitution. The paper has also revealed that there is usurpation of the Egyptian courts to hear and determine investment related disputes through the instrumentality of BITs. All these seem to violate the extant laws of Egypt as a sovereign country. The paper therefore recommends the amendment of the Constitution to prevent giving free hand to foreign investors at the expense of the public interest. Secondly, it also recommends training of the judicial officers in the area high technology and the current trend in the international investment laws. Thirdly, the paper recommends establishment of special courts to handle the foreign investor's disputes and related matters. Finally the paper recommends the introduction of new economic policies to attract foreign investment that would not comprise the interest of the Egyptian government and its populace.

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