EGYPT'S BAN ON PUBLIC INTEREST LITIGATION IN GOVERNMENT CONTRACTS: A CASE STUDY OF "JUDICIAL CHILL"

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Since 2010, a series of Egyptian court decisions, which effectively expropriated foreign investments on a variety of public interest grounds, has made foreign investors wary of investing in Egypt. Those directly affected by the court-led expropriations have lodged multiple bilateral investment treaty claims against Egypt, exposing it to potentially large damages awards. Consequently, the Egyptian government came under considerable pressure to restrict such public interest litigation. In 2014, it proposed a sweeping ban on third party litigation. Law 32/2014 spells the end of public interest litigation in Egypt by limiting the right to challenge the validity of government contracts to the parties and creditors only.

In this Paper, we argue that (1) public interest litigation proliferated in Egypt because of the lack of good governance, particularly the absence of an independent anticorruption body during the privatization program; (2) the promulgation of Law 32/2014 is an example of "judicial chill," where the government forecloses the courts' review power in the name of foreign investment; (3) Law 32/2014 curtails the fundamental "right to petition the courts" as laid down in the Egyptian Constitution; (4) instead of limiting public interest litigation, Egypt should address the widespread and institutionalized corruption in government contracting as the root cause of the disputes, by establishing an independent anti-corruption body and streamlining government contracting; and (5) Egypt should consider explicitly allowing for citizen suits in the area of human, labor, and environmental rights to overcome government inertia and corruption.

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I. EXECUTIVE SUMMARY

Since 2010, a series of Egyptian court decisions, which effectively expropriated or re-nationalized foreign investments on a variety of public interest grounds (including illegality, squandering public funds, and corruption), has made many foreign investors wary of investing in Egypt. Those foreign investors directly affected by the court-led expropriations and re-nationalizations have lodged multiple international treaty arbitration claims against Egypt under some of its bilateral investment treaties, potentially making Egypt liable to pay large damages awards it can hardly afford. As a result, the Egyptian government has been under considerable pressure to restrict those public interest lawsuits, given their potentially negative impact on foreign investment.

Accordingly, in 2014 the Egyptian government proposed Law 32/2014, a sweeping ban on third-party litigation, to stop the influx of cases exacerbating an already difficult economic situation. In support of Law 32/2014, the government cited the negative impact on investments and the high probability of losing inves-

tor-state arbitration claims, as well as exposure to large damage awards resulting from the domestic court decisions.

In this Paper, we argue that the promulgation of Law 32/2014 is an example of "judicial chill," in which the government forecloses the courts' review power in the name of foreign investment. We argue that public interest litigation, in itself, is not antagonistic to foreign investment. Public interest litigation proliferated in Egypt because of the lack of good governance, particularly the absence of independent anti-corruption agencies during the privatization program. Egyptian courts were left with the duty to review and reverse impropriety in government contracting. From the government's perspective, Law 32/2014 cuts the head off the snake in an effective and clean manner. From a civic perspective, however, the law forecloses peaceful means of change in government policies by blocking one of the venues the public used to respond to widespread institutionalized corruption and rights violations.

II. INTRODUCTION

Three years after the Egyptian Uprising that led to the toppling of Hosni Mubarak and ushered in one of the most politically volatile and economically precarious periods in Egypt's modern history, Egypt is trying to win back foreign investors, particularly those from the Gulf Cooperation Council. However, a series of Egyptian court decisions since 2011,[1] which effectively expropriated or renationalized investors' investments on a variety of public interest grounds, has made many foreign investors wary of investing in Egypt.

Furthermore, these domestic court decisions have caused Egypt to become the respondent in a series of international arbitration proceedings under some of its many bilateral investment treaties.[2] As of June 1, 2013, Egypt was party to more bilateral investment treaties than any other State in the Middle East and North Africa region.[3] These international arbitration proceedings expose Egypt to billions of dollars in potential damages and legal costs. Between the January 2011 uprising and August 10, 2014, twelve arbitration proceedings against Egypt were registered

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[1] *See infra* section III(B).

[2] *See* Jano Charbel, *Qandil Acquitted in Privatization Case*, EGYPTIAN INDEP. (Apr. 10, 2014), http://www.egyptindependent.com/news/qandil-acquitted-privatization-case; Michael Termini, *Another Corrupt Privatization Deal in Egypt Annulled: Court Orders Assuit Cement Renationalized* (Sept. 20, 2012), http://www.whistleblower.org/blog/120020-another-corrupt-privatization-deal-egypt-annulled-court-orders-assuit-cement; Tawfik Hamid, *Egypt: Judgment Invalidating the Sale of Omar Effendi to Saudi Company Anwal*, BBC ARABIC (May 7, 2011), http://www.bbc.co.uk/arabic/middleeast/2011/05/110507_egypt_omar_afandi.shtml; *see also* Annulment of: (1) AICT Concession Contract by Alexandria Administrative Court (Dec. 29, 2012), (2) CEMEX Assiut Cement Company Privatization Contract (Sep. 13, 2012), (3) Al Sokray/Centamin Gold-mining Contract (Oct. 10, 2012, under Appeal), (4) Indorama Textile Sale Contract (Sep. 27, 2011), (5) Al Nasr Company for Steam Boilers Sale Contract (Sep. 21, 2011), (6) Nile Cotton Ginning Company (Dec. 17, 2011).

[3] *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *Full List of Bilateral Investment Agreements Concluded* (June 1, 2013), http://unctad.org/Sections/dite_pcbb/docs/bits_egypt.pdf (indicating that Egypt signed ninety-eight BITs, of which seventy-one are listed as having entered into force); *see also* GENERAL AUTHORITY OF INVESTMENT, *Bilateral Investment Treaties Signed and Into Force by Egypt*, *available at* http://www.gafi.gov.eg/EN/InvestEgypt/docs/Bilateral_Investment_Treaties.pdf (last visited Jan. 20, 2015).

with the International Centre for the Settlement of Investment Disputes alone.[4] Five of these arose out of an Egyptian court's decision negatively affecting the relevant foreign investment. One investor, Al Jazeera Broadcasting, announced its intention to file an investor-state arbitration following a court decision in a public interest litigation banning Al Jazeera from carrying out its Egyptian operations.[5] There are fourteen more cases pending in Egyptian courts that could potentially increase the number of investor-state arbitration cases based on judicial breach of the relevant bilateral investment treaty.

One could argue that there is nothing unusual about the occurrence of expropriations and nationalization programs following major political upheavals and change, particularly as the 2011 uprising was fueled by popular demand for bread, freedom, and social justice. What is unusual is the fact that in the case of Egypt, the expropriations are court-led. By annulling and voiding the affected investment contracts, the Egyptian courts effectively reversed the transaction—i.e., the previously privatized asset fell back to the state. But neither the Egyptian government under Mohamed Morsy nor the military-backed interim administrations supported or initiated the proceedings, nor did they have any interest in taking over the administration of large companies.[6] Public interest suits were brought by concerned citizens and/or Egyptian civic and labor organizations,[7] who sought—and in some instances succeeded—to annul the relevant investment contracts.

While the annulments left the investment companies in limbo, the investors sued the Egyptian government through the International Centre for Settlement of Investment Disputes under the applicable bilateral investment treaties. These court actions sent shockwaves through investor circles and prompted lobbying efforts by investors to amend the Egyptian Investment Guarantees and Incentives Law.[8] It has been widely reported in the Egyptian press that Saudi Arabian investors were actively lobbying for amendments to the Investment Guarantees and Incentives Law to ensure that rights and privileges enjoyed by investors under previous contracts could not be changed. The amendments proposed by the Saudis placed restrictions

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[4] WORLD BANK INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, *List of Pending Cases,* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited Jan. 20, 2015) (Bawabet Al Kuwait Holding Co. v. Arab Rep. of Egypt, ICSID Case No. ARB/11/6 (registered Oct. 24, 2011); Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E. & Damac Gamsha Bay for Development S.A.E. v. Arab Rep. of Egypt, ICSID Case No. ARB/11/16 (registered Jan. 9, 2012); Indorama Int'l Fin. Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/11/32 (registered Dec 2, 2011); Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11 (registered May 23, 2012); Veolia Propreté v. Arab Rep. of Egypt, ICSID Case No. ARB/12/15 (registered Feb. 4, 2013); Ossama Al Sharif v. Arab Rep. of Egypt, ICSID Case No. ARB/13/3 (registered Mar. 13, 2013); Ossama Al Sharif v. Arab Rep. of Egypt, ICSID Case No. ARB/13/4 (registered Mar. 13, 2013); Ossama Al Sharif v. Arab Rep. of Egypt, ICSID Case No. ARB/13/5 (registered Mar. 13, 2013); ASA Int'l S.p.A. v. Arab Rep. of Egypt, ICSID Case No. ARB/13/23 (registered Sep. 13, 2013); Cementos La Union S.A. & Aridos Jativa S.L.U v. Arab Rep. of Egypt, ICSID Case No. ARB/13/29 (registered Nov. 22, 2013); Utsch M.O.V.E.R.S. Int'l GmbH et al. v. Arab Rep. of Egypt, ICSID Case No. ARB/13/37 (registered Dec. 24, 2013); Unión Fenosa Gas, S.A. v. Arab Rep. of Egypt, ICSID Case No. ARB/14/4 (registered Feb. 27, 2014)).

[5] *Al-Jazeera Sues over Broadcast Ban in Egypt,* NATIONAL (Sept. 12, 2014; updated on Dec. 21, 2014), http://www.thenational.ae/world/middle-east/al-jazeera-sues-over-broadcast-ban-in-egypt.

[6] Maggie Fick, *Egypt Drags its Feet in Privatization Tussle,* REUTERS (May 29, 2013), http://in.reuters.com/article/2013/05/29/egypt-renationalisation-idINL6N0DX07420130529.

[7] *See infra* Section III(B).

[8] Law No. 8 of 1997 (Investment Guarantees and Incentives Law), *Official Gazette,* 11 May 1997, vol. 19 (Egypt).

on the right to sue investors in criminal courts and barred public interest litigation challenges against investment contract.[9] The suggested amendments were met with outrage by Egyptian labor and human rights organizations and were thereafter scrapped.[10] On April 22, 2014, the Egyptian government passed Law 32/2014, a procedural law titled "Regulating Some Procedural Aspects of Challenging Government Contracts" ("Law 32").[11] This well-drafted law is succinct: It consists of two main articles that deny third parties the right to file claims relating to contracts between investors and the government.[12] The law extends to all government contracts and administrative decisions leading up to the award of such contracts.[13]

This Paper discusses the effect of Law 32 on public interest litigation in Egypt and its interplay with investor-state arbitration claims against Egypt. First, we provide a comparative overview of public interest litigation in two jurisdictions: public interest litigation in the United States and its success in bringing about social change (subsection III.a.i) and public interest litigation in India regarding the fight against corruption in government (subsection III.a.ii). In Section III.b, we then discuss the emergence of public interest litigation in Egypt as developed by the administrative courts. In Part IV, we analyze the Egyptian government's reasons behind Law 32, judicial expropriation as a cause for investment treaty arbitration claims against Egypt, the viability of corruption as a defense thereto and the possible effects of corruption on the fairness of quantum valuations. In Part V, we look at Law 32 as a case of "judicial chill," both from an international investment perspective and under the Egyptian Constitution. Finally, we conclude by marking the impact of Law 32 on the broader issue of transition to good governance and fighting corruption in post-revolutionary Egypt.

III. THE ROLE OF PUBLIC INTEREST ADJUDICATION IN INVESTMENT-RELATED MATTERS

A. Public Interest Litigation Is a Motor of Social Change

1. Public Interest Litigation in the USA

The term "public interest litigation" was coined by Professor Abram Chayes of Harvard Law School in 1976. Chayes referred to the practice by U.S. lawyers of "precipitat[ing] social change through court-ordered decrees that reform

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[9] *Saudi Businessmen Propose Bill to Amend Egyptian Investment Law*, DAILY NEWS EGYPT (Jan. 13, 2014), http://www.dailynewsegypt.com/2014/01/13/saudi-businessmen-propose-bill-to-amend-egyptian-investment-law/.

[10] Sara El Aisawy, *Officials Say the New Third Party Law Supports Investment Climate and Facilitates Negotiated Settlements*, AL AHRAM, (Apr. 24, 2014), http://gate.ahram.org.eg/News/482942.aspx.

[11] Law No. 32 of 2014 (Law Regulating Some Procedural Aspects for Challenging Government Contracts), *Official Gazette*, 22 Apr. 2014, vol. 16 (Egypt).

[12] Law No. 32 at art. 1; *see also infra* section III(B).

[13] Law No. 32 at art. 1.

legal rules, enforce existing laws, and articulate public norms."[14] This practice originated in the public interest litigation movement formed in the 1960s and 1970s, which found support in the United States in a liberal federal judiciary sympathetic to claims by civil society and human rights groups and centralized government agencies open to reform.[15] *Scenic Hudson Preservation Conference v. Federal Power*, 407 U.S. 926 (1972), is often considered the first public interest litigation case in the United States that gave citizens standing to sue in the name of the public interest.[16] In *Hudson*, the U.S. Supreme Court ruled that an environmental group had legal standing to bring an action against the government regarding the approval of plans for Consolidated Edison to build a power plant.[17] Today, public interest litigation in the United States reflects societal concerns and accordingly covers a wide spectrum of subject matters, including the struggle for civil and economic rights (e.g., workers' rights and the eradication of poverty), as well as the protection of the environment.[18]

Public interest litigation has developed in the United States despite the explicit prohibition of third-party standing in U.S. jurisprudence,[19] which is subject to a few clear exceptions. Calls for Congress to legislate in the area of standing have gone unheard.[20] Based on the U.S. Constitution, which grants federal courts the right to hear "cases" and "controversies,"[21] petitioners must generally prove (1) injury, (2) causation, and (3) redressability.[22] The injury must be "concrete and particularized" and "actual or imminent."[23] Causation requires that the party being sued has directly caused the injury, and redressability requires that a favorable decision can remedy the claimant's injury.[24] The U.S. Supreme Court has created further exceptions to the traditional standing requirements to advance right-based litigations, such as so-called over-breadth challenges, which allow third parties to bring claims on behalf of particularly vulnerable sections of the population.[25] Additionally, so-called "citizen suits" allow citizens to sue citizens, corporations, or the

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[14] Helen Hershkoff, *Public Interest Litigation: Selected Issues and Examples*, WORLD BANK LAW AND JUSTICE INSTITUTION (2005), *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation[1].pdf.

[15] Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 606 (2009).

[16] Cao Mingde & Wang Fengyuan, *Environmental Public Litigation in China*, 19 ASIA PAC. L. REV. 217, 218 (2011).

[17] Scenic Hudson Pres. Conference v. Fed. Power, 407 U.S. 926, 927 (1972).

[18] Gregg Lawson, *Will Lawsuits Related to Shale Gas Drilling Be "The Next Big Thing?"*, LEXIS (Sept. 14, 2011), *available at* http://www.lexisnexis.com/legalnewsroom/energy/b/oil-gas-energy/archive/2011/09/14/will-lawsuits-related-to-shale-gas-drilling-be-the-next-big-thing.aspx; *see* Katie Valentine, *Court Strikes down Nebraska Law That Allowed Keystone XL Pipeline Through the State*, THINK PROGRESS (Feb. 19, 2014), http://thinkprogress.org/climate/2014/02/19/3309791/nebraska-keystone-pipeline-ruling/.

[19] Gwendolyn McKee, *Standing on a Spectrum: Third Party Standing in the United States, Canada and Australia*, 16 BARRY L. REV. 115, 118 (2011) (citing Gladstone Realtors v. Bellwood, 441 U.S. 91, 99–100 (1979)).

[20] Dru Stevenson & Sonny Eckhart, *Standing as Channelling in the Administrative Age*, 53 B.C. L. REV. 1357, 1384–1386 (2012).

[21] U.S. CONST. art. III, § 2, cl. 1.

[22] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[23] *Id.* at 560.

[24] McKee, *supra* note 19, at 118.

[25] *Id.* at 116, 12–25.

government for the enforcement of statutes, such as the Environmental Protection Act of 1997.

Some argue that this piecemeal approach has allowed public interest litigation to bring about positive social change in the United States, but has failed to create a coherent public interest standing doctrine and subjects the success of public interest litigation in the United States to the alternating tides of the zeitgeist of politics.[26] Following the political liberalism of the 1960s and 1970s, a right-wing federal judiciary became less welcoming to liberal public interest claims in the 1980s and 1990s. Procedural constraints passed by Congress, which went hand in hand with welfare cuts, severely restricted the ability of public interest lawyers to rely on federal funding when bringing their claims.[27] The unfavorable climate for public interest litigation coincided with a growing belief that public interest litigation had its limits, regularly triggered legislative backlashes, and inadequately precipitated social change. More recently, however—and again in line with the judiciary shifting to the left—there is once more a growing recognition that public interest litigation constitutes one prong, and an important one, in the struggle for social change.[28]

2. *Public Interest Litigation in India*

Whereas the United States is considered the cradle of public interest litigation, India is widely believed to be the country where public interest litigation has enjoyed the greatest success. The issues in India's public interest litigation differ as much as societal concerns and India's economic standing differ from those in the United States.[29] Although the focus on fighting for the rights of the disadvantaged is on the agenda of public interest litigation in both the United States and India, corruption-related concerns have been at the fore in India, where institutionalized corruption is a major issue.[30] Because corruption is also a serious problem in Egypt, India's public interest litigation practice may be considered more relevant to Egypt than the United States' practice.[31]

Public interest litigation ("PIL") arose in India from the suspension of civil liberties under the rule of Indira Gandhi between 1975–1977 (known as the "Emergency Period"), which the Supreme Court did nothing to prevent.[32] By the end of the Emergency Period, the Supreme Court arguably had lost much of its credibility in the eyes of the public. To counter this unpopularity, the Supreme Court assertively expanded its jurisdiction to serve civil liberties, and has continued to do so

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[26] *Id.* at 116.

[27] Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2037 (2007–08).

[28] Cummings & Rhode, *supra* note 15, at 609–10.

[29] Zachary Holladay, *Public Interest Litigation in India as a Paradigm for Developing Nations*, 19 IND. J. GLOBAL LEGAL STUD. 555, 558 (2012).

[30] TRANSPARENCY INT'L, CORRUPTION PERCEPTION INDEX 2013, http://cpi.transparency.org/cpi2013/results/ (last visited June 11, 2015) (India ranks at 94 out of 177 countries, while Egypt ranks even lower at 114). It has been suggested that "corruption affects India at all levels of decision-making and in the distribution of the state's largesse." C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31, 34 (2003).

[31] *Id.*

[32] Holladay, *supra* note 29, at 559.

ever since.[33] With the majority of Indians then unaware of their legal rights or lacking in the skill, education, and financial means required to enforce them in courts, the Supreme Court's role in furthering PIL has been vital to further social change and has compensated for the relative inaction of the other branches of government.

The Indian Supreme Court achieved this position by relaxing what is often the most demanding bar to PIL: the Court's standing rules. By virtue of Article 32 of the Indian Constitution, which confers on citizens "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred,"[34] anyone asserting a violation of a fundamental right can file a claim in one of the appellate courts.[35] Nowadays, the normal practice is for petitioners to be asked to submit an affidavit professing their concern and purpose in filing the case.[36] The relaxed standing rights are based on the widely held conviction that "law is an instrument for social change and social engineering, and that it is important that the principles of justice should ensure that judicial procedure does not come in the way of constitutional empowerment."[37] This in effect gives standing to third parties, such as NGOs and concerned citizens, to provide a voice to victims, whose economic and educational status inhibits them from independently vindicating their rights in court. The practice has enabled intensive collaboration between NGOs seeking to bring cases, no longer with an emphasis on trying to enforce rights of the individual but rather on enforcing rights in the collective to "empower the individual," so to speak.[38] In fact, PIL cases in India do not even strictly require formalized legal pleadings: A letter or even a hand-scribbled note has been sufficient for the Supreme Court to initiate a PIL in the past.[39]

The Supreme Court's willingness to service PIL efforts, while heavily criticized by some, has not been diminished, and the necessity of the Court's ongoing efforts has been attributed to the existence of severe parliamentary inertia and incapacitation caused by a "severely fractured Parliament, bureaucratic hurdles . . . and corruption of a tremendous order."[40] It is therefore not surprising that citizens enthusiastically seized the opportunity to move the third branch of government—the courts—to fight societal and governmental ills, most notably corruption, which has been a staple of PIL in India ever since its inception. Commentators have argued that in India, it is PIL that ensures that courts watch over the corruption and bribery of public officials.[41] PIL cases have been credited with promoting "a certain degree of governmental accountability, as well as ensuring that the constitutional rights of

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[33] *Id.*

[34] INDIA CONST. art. 32, § 1.

[35] *See* S.P. Gupta v. Union of India, (1982) 2 S.C.R. 365, 530–31, (quoted in Holladay, *supra* note 29, at 561). The Supreme Court stated in its ruling:

> [A]ny member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective.

[36] Kumar, *supra* note 30, at 49.

[37] *Id.*

[38] Holladay, *supra* note 29, at 565.

[39] S.P. Gupta, (1982) 2 S.C.R. at 520–21.

[40] Holladay, *supra* note 29, at 560 (citing Avani Mehta Sood, *Gender Justice through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833, 845 (2008)).

[41] Kumar, *supra* note 30, at 50.

Indian citizens are duly protected, regardless of their social, economic and political status."[42]

B. PIL in Egypt

In contrast to the situation in the United States and India, PIL is still in its infancy in Egypt.[43] Despite a strong track record in a relatively short time period, PIL has stirred serious controversy and regulatory backlash, culminating in the recent issuance of Law 32.

In Egypt, PIL is used by concerned citizens and aggrieved workers of former publicly owned projects to bring government contracts and privatization deals under judicial scrutiny. The common denominator in all past and pending PIL cases—the claim that a government transaction was corrupt and illegal, and that it infringed upon public interest and labor rights—thus closely resembles the subject matter of Indian PIL actions. However, the forum is different: In Egypt, the forum for PIL cases is not the Supreme Constitutional Court but rather the administrative courts of the Egyptian State Council.[44]

The State Council was established in 1946 to preserve legitimacy and the rule of law and to safeguard individual rights against government transgressions.[45] The body of law created by administrative courts has never been fully codified. In this respect, administrative courts are different than regular courts: an administrative judge is intended to "make the law" on a case by case basis, in contrast to the traditional role of judges in civil law systems. Administrative law is often described as "dynamic and ever changing" in its flexible responses to developments in government activities.[46]

Most Egyptian PIL cases concern a claim of nullity of a government contract, which may be classified as either an administrative contract or a private law contract entered into by the government. Administrative courts can exercise jurisdiction only over administrative contracts.[47]

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[42] *Id.* at 49.

[43] *See* East Gas, *infra* note 51, on the first case of public interest litigation in civil matters.

[44] Egypt is a civil law country with a dual judiciary. The Egyptian State Council is modeled after its French counterpart.

[45] The State Council has three divisions: The judicial division reviews the legitimacy of the government decisions and contractual disputes, the consultative division advises the administrative branch on matters designated by law, and the legislative division comments on proposed laws.

[46] *See generally* THARWAT BADAWI, ADMINISTRATIVE LAW (2d ed. 2006).

[47] Courts have developed a three-pronged test, influenced heavily by the French theory of *Les Contrats Administratifs*, to distinguish administrative and private contracts.

Administrative courts may exercise jurisdiction over contracts that meet three criteria: (1) the government is represented in the contract by a juridical public entity; (2) the contract relates to a public service/utility; and (3) the contract contains "exorbitant clauses" putting the government in an elevated position. Exorbitant clauses are classically defined as clauses that put the government entity in an elevated position vis-à-vis the private party contractor through powers given to the contracting authority uncommon in private party contracts.

Despite the long line of cases affirming these criteria for administrative contracts, an administrative judge is free to adapt the law to the changing platform of government contracting. For example, the right to supervise and intervene in managing public services was considered by early decisions as a classic example of exorbitant clauses. Nowadays, duties to supervise and monitor operations are very common in B.O.T.s and EPC contracts, and thus may no longer meet the mark of exorbitant clauses.

Since 2009, administrative courts faced with questions of subject-matter jurisdiction and standing in PIL cases challenging foreign investments have become increasingly lenient, widening their jurisdiction to hear these cases. Critics of PIL decisions and the State Council's noticeably progressive trend toward hearing these cases highlight the court's departure from established legal doctrine and definitions.[48] Proponents of PIL, on the other hand, have applauded the court's responsiveness to the social and economic aspirations of Egyptian citizens. Legal ingenuity to some is legal activism to others. Nonetheless, much to the delight of foreign investors, the interim government issued Law 32 in 2014, spelling an apparent end to third-party challenges to government contracts.

In the following subsection, we offer an overview of the sociopolitical situation leading to the Egyptian Uprising of 2011. In subsection 2, we survey the ensuing PIL cases challenging the government's transactions with foreign investors and the resulting investor-state arbitrations arising out of those PIL decisions. Finally, in subsection 3, we discuss in detail the pivotal questions raised by those cases under Egyptian law and international arbitration jurisprudence.

1. Economic and Social Effects of the Privatization Program Helped Trigger the Egyptian Uprising in 2011

In the 1990s, the Egyptian government under Hosny Mubarak transitioned from a planned socialist to a liberalized capitalist economy. Several government-owned projects were privatized. Some were privatized through outright sale, while other projects were privatized through government partnerships with private investors. This change in economic policy was spearheaded by the top ranks of a non-elected government and as such was not accompanied by broader steps toward good governance, such as anti-corruption measures and transparency.[49] Political mal-

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[48] *See* Ahmed El Hadidi, Privatization and Revolution: a Critical Reading of the Omar Effendi Case 46 (2013) (unpublished M.A. thesis, American University in Cairo) (on file with author). El Hadidi analyzed the effects of the case:

> [The Egyptian government's] failure to manage and privatize Omar Effendi properly was exacerbated by the issuance of a procedurally and substantively faulty judgment from the Egyptian State Council, against a foreign investor who had invested its money in cooperation with legitimate Egyptian authorities following proper procedures and all. This has certainly augmented foreign investment fears that the application of the law in post-Revolution Egypt is affected by political circumstances.

[49] *See* Mohammad Fadel, *Public Corruption and the Egyptian Revolution of January 25: Can Emerging International Anti-Corruption Norms Assist Egypt Recover Misappropriated Public Funds?* 52 HARV. INT'L L. J. ONLINE 292, 294 (2011), *available at* http://www.harvardilj.org/wp-content/uploads/2011/04/HILJ-Online_52_Fadel1.pdf. Fadel described the effects of the change in policy:

> [T]he rate of Egyptians living on less than $2 per day stubbornly remained at a high 20%, and real wages for the working class stagnated. Benefits of growth during the Mubarak era generally went almost exclusively to those sectors of Egypt that were already relatively well-off, and the class of crony capitalists close to the regime especially benefitted. Consequently, both the working classes and the upwardly mobile but politically disconnected professional middle classes could easily unite behind a revolution committed to the elimination of public corruption. The working class blamed the public sector's failures on the corruption of Mubarak cronies who were appointed as managers of state-owned firms. On the other hand, the upwardly mobile professional classes could identify corruption as a primary cause holding back Egypt's international competitiveness and an immediate threat to the value of their greatest asset—their human capital.

function and lack of accountability increased the pressure on the courts to intervene in the wake of the 2011 uprising. The absence of a functioning democratic process in general, and especially in government contracting, fueled public anger and resentment towards privatization deals and foreign investment. The crumbling social safety nets for low-income Egyptians, and particularly for those who were laid off as a result of privatization, played an important role in creating a launch pad for legal actions against the government.[50]

2. *PIL Cases and the Resulting Investor-State Arbitrations Against Egypt*

Administrative courts were first faced with a petition to annul the decision to enter into a government contract in the much-publicized East Mediterranean Gas Case in 2009.[51] The Supreme Administrative court ruled that the decision by the Petroleum Minister and the Nazif Cabinet to sell natural gas to the East Mediterranean Company, which exported it to Israel, was invalid because, among other things, the long-term contract was fixed at below market prices and lacked any price and quantity adjustment formula.[52]

Since the East Gas decision in February 2010, administrative courts have decided on the validity of ten other government transactions. Of the eleven total cases, eight decisions directly or indirectly impact foreign investors: East Gas, Indorama Shebin Textiles,[53] Centamin Gold Mine,[54] AICT concession,[55] Omar Effendi sale,[56] Tanta Flax,[57] Nile Cotton and Ginning Company (NCGC),[58] and Al Jazeera Broadcasting.[5960] There are fourteen actions to annul government contracts

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[50] Ahmed Eldakak, *Approaching Rule of Law in Post Revolution Egypt: Where We Were, Where We Are and Where We Should Be*, 18(2) U.C. DAVIS J. INT'L L. & POL'Y 261, 276-92 (2012) (discussing deficiencies in the rule of law and related grievances in pre-revolution Egypt).

[51] Case No. 5546/6013/55/2010/Supreme Administrative Court, (Head of Council of Ministers, Minister of Petroleum & Natural Resources v. Yousry) (Egypt) [hereinafter "East Gas"].

[52] *Id.*

[53] Case No. 34517/65/ 2011/Cairo Administrative Court (Al Fakharany et al v. Head of Council of Ministers, et al.) (Egypt) [hereinafter "Indorama"].

[54] Case No. 57579/65/2012/Cairo Administrative Court (Al Fakharany et al. v. Head of Council of Ministers, Centamin Egypt, Al Sukary Gold Mine S.A.E et al.) (Egypt) [hereinafter "Centamin"].

[55] Case No. 12646/65 Alexandria Administrative Court (Ahmed v. Alexandria Port Authority and Alexandria International Containers Terminal) (Egypt) [hereinafter "AICT"].

[56] Case No. 11492/65/2011/Egyptian State Council (Al Fakharany v. Anwal Trading Union Co.) [hereinafter "Omar Effendi"].

[57] Case No. 34248/65/ 2013/Supreme Administrative Court (Sharaf v. Head of Council of Ministers) (Egypt) [hereinafter "Tanta Flax"].

[58] Case No. 37542/65/2013/Supreme Administrative Court (Al Fakharany v. Head of Council of Ministers) (Egypt) [hereinafter "NCGC"].

[59] Case No. 50297/65/ 2013/Cairo Administrative Court (Omran v. Minister of Investment) [hereinafter "Al Jazeera Misr"].

[60] There are three other cases that bear resemblance to the eight PIL cases identified above from the point of view of investor-state disputes. The three ICSID cases are not a direct result of a third party challenge to the transaction's validity, but rather an indirect result of judicial decisions by the Egyptian courts that constitute breaches of the respective BITs. The first is the case of German investor Eric Utsch, who was indicted in absentia in a criminal corruption procedure, along with the three former ministers for "squandering public funds" in a government procurement contract with the Egyptian Ministry for Internal Affairs. An ICSID claim is pending under the Egypt-Germany BIT. *See* Utsch M.O.V.E.R.S. International GmbH et al. v. Arab Rep. of Egypt, ICSID Case No. ARB/13/37 (2013).

A similar criminal procedure was the subject matter of the ICSID claim filed by a UAE investor,

with investors (both foreign and domestic) pending before administrative courts, which could be struck out *ipso jure* under Law 32 for lack of personal jurisdiction, regardless of the status of the proceedings.[61]

As of September 2014, the government of Egypt is the respondent in twelve ongoing ICSID cases. Five of those cases arise directly from Egyptian judicial decisions, which the investors claim breached the relevant BIT. Those five cases are *Ampal American*, *Indorama*, *Damac-Gamsha Bay*, *Utsch*, and *Veolia*. In *East Gas* and *Indorama*, the administrative court's decision to annul the foreign investment was a result of a PIL. Veolia instituted arbitration under the France-Egypt BIT, claiming that enforcing the administrative court decision on minimum wage would violate the BIT. In *Damac*, *Gamsha Bay*, and *Utsch*, the judicial decision prompting the ICSID cases is not a result of PIL per se, but rather arises out of a criminal investigation and the indictment of the foreign investors over criminal charges. Those criminal cases are directly linked to accusations of government corruption.

Moreover, in April 2014, Al Jazeera Misr announced its intention to bring an investment treaty claim after an administrative court decision cancelled Al Jazeera's license to broadcast and banned a subsidiary of the Qatari enterprise from broadcasting in Egypt for "violating the Code on Journalism and Media Honor."[62] The State Council's September 2014 decision to ban Al Jazeera from broadcasting on Egypt's state-owned satellite NileSat soon followed.[63]

Some PIL decisions from Egyptian courts will not appear on the investment treaty arbitration/ICSID radar, be it for lack of "foreign" investor (Al Nasr Steam Boilers and Arabian External Trade); the investors' decision to pursue local courts (Centamin); the existence of negotiated settlements; or the apparent lack of recourse to ISA in the applicable BIT (such is the case of Saudi investors in Omar Effendi, Tanta Flax and AICT).

3. *Recent Trends Set by the Administrative Courts in Reviewing the Validity of Government Contracts in PIL*

In each of the PIL cases, the administrative courts were faced with four pivotal questions:

Hussain Sajwani, alleging that the criminal court decision in the corruption charges related to the Gamsha Bay project in Hurgada breaches the Egypt-UAE BIT. *See* Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E. & Damac Gamsha Bay for Development S.A.E. v. Arab Rep. of Egypt, ICSID Case No. ARB/11/16 (2011).

The third case relates to a decision by the administrative court in 2010 to force the government to set a mandatory minimum wage for all public and private sector employees. The French investor Veolia Properties initiated ICSID arbitration under the France-Egypt BIT, claiming that enforcing a minimum wage as mandated by an Administrative court constituted a breach of the BIT. *See* Veolia Propreté v. Arab Rep. of Egypt, ICSID Case No. ARB/12/15 (2012).

[61] *See* Press Release, Egyptian Center for Economic and Social Rights (ECESR), ECESR Challenges Constitutionality of Corrupt Contracts Law (Jul. 8, 2014), http://ecesr.org/en/?p=421976.

[62] Shawn Donnan, *Al Jazeera Sues Egypt for $150m After Crackdown on Journalists*, FIN. TIMES (Apr. 28, 2014), http://www.ft.com/cms/s/0/7ff2210c-ccc0-11e3-ac8d-00144feabdc0.html.

[63] *Egypt State Council Bans Al Jazeera, Rabaa on NileSat*, AHRAM ONLINE (Sept. 3, 2014), http://english.ahram.org.eg/NewsContent/1/64/109878/Egypt/Politics-/Egypt-State-Council-bans-Al-Jazeera,-Rabaa-on-Nile.aspx.

i. Do third parties to government contracts have legal standing to file a claim to annul the contract? Does the constitutional text alone create *locus standi* for third parties?
ii. What is the standard of review?
iii. Does the arbitration clause in the contract, if any, prevent the court from examining the conformity of the contract with the law?
iv. What is the standard of proof applicable to corruption and illegality?

As we will explain below, the courts' answers to those questions in all the PIL cases decided thus far demonstrated the courts' willingness to depart from established dogmas in favor of a wider scope of review and a lower evidentiary bar for corruption in government contracts.

i. Locus standi

In the same way as courts in the United States have tried and as courts in India have succeeded in overcoming inchoate or explicit rules against third party standing, Egyptian administrative courts have had to grapple with standing rules designed to restrict PIL. Under Article 3 of the Code of Civil and Commercial Procedure ("CCCP") and Article 12 of the State Council Law (Law 47/1972), a claimant has to prove a personal and direct interest in the outcome of any legal claim.[64] Article 3 of the CCCP was amended in 1996 by Law 3/1996 to put an end to a number of cases that were filed by "concerned citizens" in civil courts to protect public ethics and morals using the Islamic law concept of *Hisba*.[65] Administrative courts had to listen to arguments on third-party standing beginning with the first PIL case, *East Gas*, in 2009.

In all Egyptian PIL cases, claimants have been aggrieved workers, represented by legal NGOs[66] and in some cases joined by certain public figures[67] in their personal capacity as "concerned citizens."[68] Yet, similar to Indian Supreme Courts resorting to broad constitutional rights, Egyptian administrative courts have voiced that the constitutional mandate on all citizens to protect public funds[69] is sufficient

[64] A claimant challenging an administrative decision has to prove his "personal and direct interest" in the outcome of the dispute: "annulling an administrative decision requires that the claimant be in a special legal status viz-a-viz the challenged administrative decision which in turn affects the personal interests of the claimant in a direct way" Case No. 18868/51/2007/Supreme Administrative Court (Egypt).

[65] *Hisba*, an Islamic law concept, is the duty to petition the courts on behalf of the public to protect a right of God from violation. *See* Nadia Abou El-Magd, *When the Professor Can't Teach,* AL-AHRAM WEEKLY (Jun. 15-21, 2000), http://weekly.ahram.org.eg/2000/486/eg6.htm.

[66] Most prominently, the Egyptian Center for Economic and Social Rights ("ECESR").

[67] Former Ambassador Ibrahim Yousry, ex-parliamentarian Hamdy Al Fakharany, and Hamdy Hussian Abdel Hady emerged as prominent figures for their role in bringing successful PIL cases.

[68] In a press conference, Khaled Ali the head of the ECESR lashed out against the government alleged motivations for banning PIL in government contracts. Mr. Ali, a lawyer and former presidential candidate in 2012, stressed that the workers are the real claimants, not political opposition figures as the media paints them. *See Against 32*, EGYPTIAN CTR. FOR ECON. & SOC. RIGHTS (May 10, 2014), http://ecesr.org/?p=768384.

[69] Article 34 of the 1971 Constitution (and its rendition in Article 6 of the 2011 Constitutional Declaration) stipulates that "[P]ublic funds and national resources are collectively owned by the public. The protection and defense thereof is an obligation on every citizen in accordance with the law." Whereas Article 22 of the 2012 Constitution used a different language by stating that "[p]ublic funds are sacred

to provide third parties with *locus standi.* In several cases, the courts ruled[70] that Article 33 of the 1971 Constitution creates the "personal and direct interest in the outcome of the dispute"[71] required by law in cases challenging the validity of government contracting on grounds of corruption and illegality. Article 33 of the 1971 Constitution and its rendition in Article 6 of the Constitutional Declaration of 2011, under which all the PIL cases were decided,[72] imposed a "duty on every citizen" to protect public funds in accordance with the law. Article 22 of the 2012 Constitution, passed under former President Morsy, shifted the duty to protect public funds from the individual citizen and placed it on "the society and the State." The strength of this constitutional mandate was not tested in courts, as the whole Constitution was scrapped in July 2013. The new Constitution passed in 2014 by the military-backed interim government[73] refrained, perhaps purposefully, from the strong mandate included in its predecessors. Instead, Article 34 of the new Constitution reads, "Public ownership is sacred and shall not be infringed upon. The protection thereof is a duty exercised in accordance with the law."[74] As a result, even without Law 32, it is questionable whether the 2014 constitutional mandate continues to convey *locus standi* on concerned citizens in their individual and personal capacity to enable PIL before the administrative courts.

ii. Standard of review

Having decided that the claimants have standing to bring the claim, it is for the court to decide on the appropriate standard of review. To do so, the court has to answer two preliminary questions of subject matter jurisdiction. Is the challenged act an administrative decision or an administrative contract? As we explained earlier, the administrative court does not exercise jurisdiction over private law matters. A contract or an act has to satisfy certain criteria to be deemed administrative.[75] After deciding the prima facie matter of the type of the act under review (private or public), the court has to decide if the act under review is an administrative contract or a contract-related administrative decision. Answering this question determines the scope of review; since administrative courts review government decisions under

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and the protection thereof is the duty of the society and the State." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as promulgated*, Dec. 25, 2012, art. 22.

[70] Centamin, *supra* note 54; East Gas, *supra* note 51; Adel Madkour v. Head of Council of Ministers, Case No. 40510/65/2012/Administrative Court in Cairo, (7th Circuit for Economic and Investment Disputes) [hereinafter "Al Nasr"]; AICT, *supra* note 55.

[71] *See supra* note 64.

[72] Article 33 of the 1971 constitution stipulated, "Public ownership shall have its sanctity, and its protection and reinforcement are the duty of every citizen in accordance with the law." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, art. 33. The same language was included *verbatim* in the Constitutional Declaration passed under the Supreme Counsel of Armed Forces (SCAF). EGYPT. CONST. DECL., Mar. 2011, art. 6.

[73] The current Constitution passed in 2014 succeeded the 2012 Constitution, which was scrapped in July 2013 by the military when it took over power following three days of anti-government demonstrations.

[74] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, Jan. 18, 2014, art. 34.

[75] *See supra* note **Error! Bookmark not defined.** (outlining the three-pronged test for an administrative contract). Similarly, an administrative decision, subject to review by the courts, is distinguished from a parliamentary act, an act of Sovereignty and a private law matter using the following characteristics: an administrative decision is the "final resolution by an executive body in a certain matter."

the "limited review" standard, while administrative contracts are reviewed under the "full review" standard. The limited standard of review requires the court to find illegitimacy on one of four specific statutory grounds: (1) ultra vires, i.e., the issuing entity is not authorized to issue the decision, (2) defective form, (3) illegality, or (4) ulterior motive.[76] Full review, on the other hand, means that formation, terms, and performance of the government contract are tested not only against the specific laws regulating government contracting (such as Law No. 89/1998 on government bids and tenders, sector-specific B.O.T. laws, and Law No 67/2010 regulating PPP contracts), but also against general principles of legitimacy, achieving public interest, and protecting public funds.

Remedies under the limited review standard are very specific: If the court finds illegitimacy on one of the four enumerated grounds, the court annuls the decision and compensates the aggrieved party. In contrast, a wider range of remedies are available under the full review standard: (1) annul the contract in its entirety or find partial nullity, (2) order the modification of the terms to "restore the contract's equilibrium" in cases of hardship, or (3) order the government to take certain actions to rectify the contract to conform to legitimacy as found by the court. All three remedies require that courts adhere to the "separation of powers" principle: A judge should not "replace" the administrative discretion with that of his own, and cases that require the court to overstep and act as legislator are not to be entertained. That said, and in the wake of the social justice movement following the January 2011 uprising, administrative courts have been visibly more ingenious in finding new ways to carve policy and decision-making power into judicial review boundaries. Particularly, in the cases that invoke corruption in public procurement and privatization contracts, the classic demarcation between administrative decisions and administrative contracts has been blurred in favor of expanding full review to all administrative acts.[77] Also, in the case of *Centamin*, the court examined the validity of the gold mining contract, which was promulgated as a law,[78] pushing the boundaries of the court's adherence to the "separation of powers" doctrine.

iii. Arbitrability and Separability: Does the Inclusion of an Arbitration Clause in the Challenged Contract Preclude the Court from Hearing the PIL case?

Respondents have regularly argued the inadmissibility of the claim being heard by the administrative court when the relevant investment contract mandates arbitration. The administrative court in the *East Gas*, *Omar Effendi*, and *AICT* cas-

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[76] *Id.* Also, the government's inaction could, in certain cases, be an administrative decision. In case of administrative decisions (both positive and passive) the statutory time limit is 60 days from the date the administration "expresses its final decision on the matter." Therefore, if the act is an administrative decision reviewed under the limited review standard, the court has to ascertain that the claimant is within the statutory limitation period or throw the case out of court. Therefore, in *AICT* the Alexandria Administrative Court reformulated the claimants' request, which was filed as a limited review case of an administrative passive decision for failure to act, into one of full judicial review which allowed the court to examine the legality of administrative contracts and any claims for damages relating to the performance of the contract.

[77] AICT, *supra* note 55.

[78] In Egypt, oil, gas, and mining contracts are enacted as laws. Over the last sixty years, while various constitutional documents changed, one thing endured: natural resources contracts must be approved by the parliament.

es dismissed objections to its jurisdiction, although the investment contracts in all three cases included arbitration clauses. In *AICT*, the court based its decision on the principle of "privity of contract." Because the PIL claimants were not parties to the contract, the court reasoned, its arbitration clause neither bound nor precluded the court from hearing the dispute. In *Omar Effendi*, the court invalidated the contract and the arbitration clause by invoking incapacity of the government entity that signed the contract and the arbitration clause in an administrative contract.[79] In sum, Kompetenz Kompetenz and the principles of separability of the arbitration clause were bypassed by the courts' analyses of absolute nullity of the government act.

iv. Standard of Proof Applicable to Corruption and Illegality

Putting aside the two criminal cases, in which the foreign investors were tried and sentenced in absentia for corruption-related crimes, PIL cases show that the administrative courts significantly lowered the evidentiary bar for the claimants. In *AICT*, *Centamin*, *Omar Effendi*, and *Indorama*, the court inferred corruption and the intent to jeopardize public funds from the fact that the contracts in question were underpriced or that the terms were tilted in favor of the investor.

The administrative courts used the term "corruption" very liberally. In Egyptian administrative law, and in contrast to its criminal law equivalent, corruption is not a defined legal term. Accordingly, the administrative courts do not concern themselves much with criminal connotations of corruption, especially because review procedures differ greatly from criminal law procedure. That said, in every decision of PIL, the administrative court found illegality and violations of a certain mandatory rule. In *AICT*, the court found that awarding the B.O.T. contract to the investor by direct order, as opposed to a public and transparent tender, was in violation of the Public Tenders law.[80]

In *NCGC*, the court found that the decision of the privatization committee to sell the company through an IPO in contravention of the law in force at the time of sale constituted a case of flagrant illegality.[81] In *East Gas*, the court found that the contract was a long-term contract with a fixed price that was below market prices. The court also found that absence of a price adjustment formula in the East Gas contract "jeopardized public interest" by giving priority to exporting natural gas when there was still local demand.[82] In *Indorama* and *Tanta Flax*, the court found that the government sold the companies for below market prices.[83] In *Omar Effendi*, the court considered the sale to be in violation of the Public Tenders law. The court inferred corruption from a downward variation in the valuation in favor of the buyer.[84]

Al Nasr Steam Boilers may be distinguished from the cases above, since the court was presented with a criminal investigation involving a high-ranking

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[79] Law No. 27 of 1994 (Concerning Arbitration in Civil and Commercial Matters), *Official Gazette*, 21 Apr. 1994, No. 16, art. 1(2) (Egypt).

[80] AICT, *supra* note 55.

[81] NCGC, *supra* note 58.

[82] East Gas, *supra* note 51.

[83] Indorama, *supra* note 53; Tanta Flax, *supra* note 57.

[84] Omar Effendi, *supra* note 56.

member of the Board of Directors of the selling entity who participated in the evaluating committee of the investment. That person improperly used his position to sell the company, at a depreciated value, to a private investor owned by his two sons.[85] In *Al Nasr*, the evidence of corruption was overwhelming.

Centamin may also be distinguished, because government employees involved in re-zoning the concession area for El Sokary Gold Mine were fired and disciplined by the competent authorities for violating the law on re-zoning.

To summarize, in the courts' analyses, illegality itself is sufficient to prove ultra vires an intent to jeopardize public funds on the part of government employees. The courts, however, do not move to investigate the culpability of the foreign investor unless submitted with evidence implicating the investor in wrongdoing.

The verdicts leave the government in charge of deciding what, when, and to whom payment should be made in return for the renationalized companies.[86]

IV. PIL BAN IN EGYPT: AN ATTEMPT TO AVOID DAMAGES IN INVESTOR-STATE ARBITRATIONS

A. Law 32/2014: PIL in Egypt Triggered a Regulatory Backlash

The success of PIL in undoing Mubarak-era deals sent shockwaves through the investment community in Egypt. In a public memorandum, the interim government (appointed by the military following the July 2013 removal of Mohamed Morsy) deemed the high probability of losing those arbitrations and incurring large amounts of damages devastating to the much-needed economic recovery.[87] Saudi investors were among those most wary of PIL, since their investments were not covered by conventional investor treaty arbitration under the Saudi-Egyptian BIT. Therefore, the interim government proposed a ban on third-party standing to stop the influx of PIL cases from exacerbating an already difficult economic situation. The original draft of the law would have allowed the government to reach comprehensive post-judgment settlements in non-criminal cases notwithstanding the final court decision.[88] But this article was dropped from the final version of the law.

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[85] Al Nasr, *supra* note 70.

[86] Maggie Fick, *Egypt Drags its Feet in Privatisation Tussle*, REUTERS (May 29, 2013), http://in.reuters.com/article/2013/05/29/egypt-renationalisation-idINL6N0DX07420130529.

[87] Minister of Investment Osama Saleh writes in the explanatory memorandum accompanying the draft law that a law banning third party challenges to government contracts will give the Egyptian economy a real boost and reassure foreign investors that the Egyptian State respects its undertakings. The Minister explains, "the government notes that the annulment decisions issued in third party challenges to government transactions were issued despite lack of conclusive evidence on corruption. The resulting arbitrations entail claims to large amounts of damages which are most likely to be awarded to the investors will unbearably burden the treasury." For this reason the Minister proposed that "the right to challenge government contracts for corruption will be vested in the Public Prosecutor's office (Article 8 of the draft law)." Finally, the Minister states that the high probability of incurring large damages in international arbitration as a direct result to impracticability of court decisions is the reason behind the proposed Article 66(a), which gives the government the right to reach a comprehensive post-decision settlement with an investor regardless of the final court decision. EXPLANATORY MEMORANDUM OF THE PROPOSED AMENDMENTS TO IGI LAW, YOUM7 (Mar. 16, 2014), *available at* http://www.masress.com/youm7/1559730 (last visited Jan. 20, 2015).

[88] Draft Article 66 bis (a) of the Egyptian Investment Guarantees and Incentives Law (Law 8/1997) as

Proponents see the promulgation of Law 32 as a last-resort effort to limit budgetary exposure to large sums of damages that may contribute to sovereign insolvency. Egyptian business organizations also hailed the law as a reassuring message to local and international investors alike. Foreign investors, especially those who did not have recourse to international arbitration, felt reassured.

Law 32 is comprised of two articles. Article 1 limits the right to challenge the validity of government decisions and the contracts that were concluded pursuant to those decisions to (1) the private investor, (2) the government entity party to the contract in question, and (3) creditors and holders of personal rights (e.g., a lessee) and in rem rights to the property in dispute. Article 1 allows third parties to challenge a government contract only if both parties to the contract have been convicted in accordance with a final decision in a criminal proceeding under Volume 2, Sections 3 and 4 of the Egyptian penal code.[89] Even in this case, the petitioner still has to prove that the contract in question was concluded as a direct result of the same criminal act. Article 2 provides for retroactive effect of the law—i.e., the courts will have to strike down all pending PIL cases that were brought by third parties.

Law 32 was met by strong opposition from legal NGOs and labor rights activists. On May 3, 2014, the Egyptian Centre for Economic Social Rights successfully petitioned the administrative court for leave to present a constitutional challenge against Law 32.[90]

B. Judicial Decisions May Amount to Judicial Expropriation

As discussed in Section III(b)(2), of the twelve ongoing ICSID cases in which the government of Egypt is named as a respondent, five cases are directly attributed to judicial decisions in which the investor claimed breach of the relevant BITs. They are thus not ordinary expropriations, but judicial "expropriations." The term "judicial expropriation" refers to the effect that a judicial decision has on the protected investment. Judicial expropriation could be direct—i.e., taking the investment away from the investor is the decision's explicit goal—or it could be indirect. As long as the investor can show total deprivation as a result of the judicial decision, it will generally be awarded the compensation standard specified for expropriation in the relevant BIT, which is most often the fair market value (FMV) immediately before the relevant expropriation became known.[91] If a judicial decision adversely affects the investment without totally depriving the investor of the

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proposed by the Investment Minister in the unofficial explanatory memorandum to the proposed legislative amendments allowed the government to reach comprehensive post judgement addendums to the contract under review by the court. *See supra* note 87.

[89] Law No. 32 of 2014 (Law Regulating Some Procedural Aspects for Challenging Government Contracts), *Official Gazette,* 22 Apr. 2014, vol. 16 (Egypt).

[90] Brief for Case No. 120/36/2014/Supreme Constitutional Court, (Petitioners in AlShabasi v. Head of Council of Ministers) (Egypt).

[91] *See, e.g.*, Treaty for the Promotion and Protection of Investments Austria-Egypt, art. 4, Apr. 29, 2002, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/183 ("(1) Investments of investors of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for a public purpose by due process of law and against compensation. (2) Such compensation shall be equivalent to the fair market-value of the investment, as determined in accordance with recognized principles of valuation taking into account such as, inter alia the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors, immediately prior to or at the time when the decision.").

day-to-day management of his investment, the judicial decision may often still constitute a breach of the BIT; however, it will usually no longer be considered an expropriation not subject to a rigid treaty-determined compensation standard.[92]

Whereas expropriations are common after major political upheavals, the judicial element is unusual. It is frustrating for the government of Egypt to see those cases that it vehemently opposed advance to international arbitration as expropriation claims, attributed to the Egyptian government under international attribution law rules, and without providing Egypt with an opportunity to absolve itself from its liability under the BIT.[93]

C. Egypt May Have a Corruption and/or Illegality Defense

In all aforementioned claims against Egypt, the corruption element is salient and raises the question as to (1) whether an investment demonstrably tainted by corruption is entitled to protection under BITs and (2) if it is not, what evidentiary standards apply. The aforementioned approach of the Egyptian administrative courts greatly contrasts with the high evidentiary standards set by international tribunals in investor-treaty arbitration cases in their consideration of corruption and fraud defenses of Respondent states.[94]

Although the number of cases in which Respondents have pleaded corruption-related defenses has increased at accelerating speed, successful defenses have been few and far between.[95] One examples is *World Duty Free Co. v. Republic of Kenya*,[96] an investment contract claim, in which the tribunal dismissed the claim on the maxim *ex turpi causa non oritur action*,[97] since the contract had been procured in violation of the principle of good faith "as a matter of ordre public international and public policy."[98] They also include *Plama Consortium Ltd. v. Republic of Bulgaria*, an Energy Charter Treaty case,[99] where the tribunal denied the investor protection from expropriation because it found that Bulgaria would not have authorized the investment but for "deliberate concealment amounting to fraud."[100] In *Inceysa v. Salvador,* Salvador's successful defense turned on the exact wording of the trea-

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[92] *See generally* Andrea Saldarriaga & Mark Kantor, *Calculating Damages: Arbitrators, Counsel, and Experts Can Do Better Than They Have in the Past, in* INVESTING WITH CONFIDENCE: UNDERSTANDING POLITICAL RISK MANAGEMENT IN THE 21ST CENTURY, 196 (Kevin W. Lu et al. eds., 2009).

[93] The rules of attribution, devised by the International Law Committee ("ILC"), adopt an organic definition of the State, which does not distinguish between the different organs of the State.

[94] *See* Cecily Rose, *Questioning the Role of International Arbitration in the Fight Against Corruption*, 31 J. INT'L ARB. 183 (2014). Rose argues that arbitral tribunals have made "unsatisfactory" contributions in combating corruption. Rose suggests five potential solutions to evidentiary problems faced by arbitral tribunals: "drawing adverse inferences, playing greater reliance on circumstantial evidence, lowering the standard of proof, shifting the burden of proof and finally drawing on factual findings in domestic proceedings."

[95] *See id.*

[96] World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, 179 (Oct. 4, 2006).

[97] English translation: "from a dishonorable cause, an action does not arise."

[98] World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, 188 (Oct. 4, 2006); GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 433 (2012).

[99] It was also brought under the Bulgaria-Cyprus BIT but proceeded to the merit phase under the ECT only.

[100] Plama Consortium Ltd. v. Rep. of Bulg., ICSID Case No. ARB/03/24, Award, 38 (Aug. 27 2008), *available at* http://italaw.com/documents/PlamaBulgariaAward.pdf.

ty, particularly the term investment, as well as the *travaux preparatoires* prompting the tribunal to hold that Inceysa's investment was "not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT," and that consequently, "the disputes arising from it [we]re not subject to the jurisdiction of the Centre."[101] Inceysa's claim was thus thrown out at the jurisdictional stage.

An empirical review of cases in which the Respondent argued corruption indicates that the reason so few cases succeed is the fact that the evidentiary standard for proving fraud or corruption is high.[102] This is in direct contrast with the standards applied by the Egyptian State Council in the aforementioned decisions giving rise to the judicial expropriation claims. Furthermore, the ICSID tribunals are inconsistent when it comes to the evidentiary standard for proving corruption. Some tribunals require "irrefutable evidence" or proof "beyond reasonable doubt,"[103] but other tribunals are satisfied with a much less stringent standard that is "greater than the balance of probabilities but less than beyond reasonable doubt" or "clear and convincing evidence" [104]

ICSID tribunals place the burden of proof on the State advancing such allegation. The evidentiary standard is set high, and the burden is not shifted easily. Mere allegations or allusions to irregularities in acquiring the investment are not enough to prove corruption. In *SPP v. Egypt*,[105] for example, the majority decision refused the Egyptian government's allegations that the contract procurement was tainted by corruption and lamented Egypt's failure to meet their expected standard. In *Wena Hotels v. Egypt*, the ICSID tribunal also refused to accept the government's allegations of corruption. In this case, the government argued that a prominent employee of the Egyptian General Company for Tourism and Hotels ("EGOTH") had a consultancy agreement with Wena without material evidence other than what the tribunal described as a "mere coincidence in the timing of the payments."[106]

More recently, in *Malicorp v. Egypt*, the tribunal was not convinced that the investors, two of whom had already been tried and sentenced in absentia for fraud and forgery in criminal procedures,[107] committed "forgery." The *Malicorp* tribunal required the respondent to submit "clear evidence" on a matter of "such capital importance."[108]

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[101] Inceysa Vallisoletana, S.L. v. Rep. of El Sal., ICSID Case No. ARB/03/26, at 257 (Aug. 2, 2006).

[102] *See supra* note 94, at 183–264.

[103] For more on the issue of corruption in arbitration, see Michael Hwang S.C. & Kevin Lim, *Corruption in Arbitration—Law and Reality*, ARBITRATION-ICCA.ORG (Aug. 4, 2011) (expanded version of Herbert Smith-SMU Asian Arbitration Lecture), *available at* http://www.arbitration-icca.org/media/0/13261720320840/corruption_in_arbitration_paper_draft_248.pdf.

[104] Elic v. Arab Rep. of Egypt, ICSID Case No. ARB/05/15, Award, §§ 326, 85 (June 1, 2009).

[105] Southern Pacific Properties, Ltd. (Middle East) v. Egypt, ICSID Case No. ARB/84/3, Award, 364 (May 20, 1992), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC671_En&caseId=C135.

[106] Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Award, §§ 77, 117 (Dec. 8, 2000), *available at* http://italaw.com/documents/Wena-2000-Final.pdf.

[107] There are other annulment cases (e.g., *Natural Gas Export* and *Centamin)* where the court was presented with criminal investigations, criminal sentences, and in the later case disciplinary actions against the government employees involved in rezoning the concession area.

[108] Malicorp Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/08/18, Award, 73, 135 (Feb. 7, 2011), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=

Despite the findings of "corruption" and illegality by domestic courts, the review of cases intimates that a successful corruption defense by Egypt will be an uphill battle, and may heavily depend on other factors, such as the constitution of the tribunal.

By issuing Law 32, the Egyptian government raised the evidentiary bar for corruption and irregularity in government contracts by requiring a final verdict incriminating both parties to the contract, in certain enumerated crimes, proving beyond a reasonable doubt criminal intent for the government employee issuing the decision and/or both parties to the contract, before an administrative court can deem the contract, or the administrative decision related to it, null.

D. Traditional Quantum Valuation Methods May Appear Unfair Where Investments Were Acquired at Undervalue

Subject to potential successful defenses, it appears that in *Damac*, *Utsch*, and *Indorama* the effect of the court decision amounted to a total deprivation of the investment in question—i.e., a likely judicial expropriation.[109]

Bilateral investment treaties do prohibit expropriation. But most BITs provide that expropriation is prohibited unless it is undertaken (1) for a public purpose, (2) with due process of law, and (3) for payment of compensation that is "prompt, adequate and effective."[110] Accordingly, a contracting party is free to expropriate an investor, as long as it follows the criteria stipulated in the BIT. Comparable expropriation provisions are found in the Egyptian BITs that apply to the discussed cases.[111] As is the case in the United Kingdom-Egypt BIT, under which *Indorama* was brought, compensation is often further specified as "market value of the investment expropriated immediately before the expropriation itself," or immediately before the expropriation is made public.[112]

In contrast, in the majority of the PIL cases, the court orders the "return" of the investment to the government, even though it is an established principle of Egyptian law[113] that annulment returns the parties to their pre-contractual status and if that is impractical, the court orders appropriate compensation.[114] However, the

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DC1911_En&caseId=C461.

[109] However, in the Ampal American ICSID case, the apparent effect of the court's decision is to "enjoin the government from selling natural gas to East Gas Co.," so long as the contract is not modified to conform to the conditions set out in the Supreme Court decision. The court decision in East Gas is not one of total deprivation of Ampal's investment in East Gas Company, but the East Gas decision significantly impacts the "investment backed expectations" of Ampal American and other investors. Similarly, in Veolia the judicial decision in question is not directly aimed at taking the investment away. The court-ordered mandatory minimum wage could constitute a breach of FET through changing the investment's legal environment.

[110] SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 78 (2008).

[111] Agreement for the Promotion and Protection of Investments, United Kingdom-Egypt, art. 5(1), Feb. 24, 1976 (U.K.), *available at* http://arbitrationlaw.com/files/free_pdfs/egypt-uk_bit.pdf ("Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated . . . except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation.").

[112] *Id.*

[113] Law No. 131 of 1948 (Civil Code), 29 July 1948, art. 142 (Egypt).

[114] Case No. 2976/61/1999/Egyptian Court of Cassation.

PIL decisions deny investors the right to receive compensation in the majority of cases and are silent on the issue of compensation in the remainder.[115]

In the *Damac*, *Utsch*, and *Indorama* cases, Egypt failed to provide any compensation and accordingly appears to have breached the relevant BITs subject to the availability of defenses. A resultant ICSID award would likely grant compensation. But where the expropriated investments were acquired at below market prices, the BIT compensation standard of market value could lead to awards, which may appear unfair. The assessment methods most regularly used in valuations would not take account of the undervalued investment an investor paid for.[116] This is because the methods are commonly understood to calculate market value as objective and abstract: the price that an informed buyer would pay for the property in an arm's length transaction.[117] In contrast, the concept of clean hands would potentially indicate adjusting compensation for the lower investment acquisition prices.

Given the questionable chance of success of Egypt's corruption defenses, the likelihood that a tribunal will find that the decisions constitute expropriation (or other breaches under the BITs) is not to be underestimated. It is therefore understandable that the Egyptian government felt—as clearly expressed in an explanatory memorandum[118]—that there is a high risk to lose investor-state arbitration cases that arise out of Egyptian judicial decisions. The Egyptian government, therefore, had an interest in closing Pandora's Box—i.e., to stop the administrative courts from annulling the investment contracts by banning PIL in all pending and future cases.

The existence of political risk insurance that gives investors strong incentives to move forward with arbitration rather than agree a settlement may nevertheless limit the effectiveness of Law 32 as an incentive for settling disputes with foreign investors.[119]

V. EGYPT IS A CASE OF "JUDICIAL CHILL"

A. Law 32/2014 Is an Example of Judicial Chill

In recent years, commentators critical of investment treaty arbitration and BITs have argued that the current structure of the international investment dispute settlement regime causes a "regulatory chill" swaying developing states against amending their regulatory frameworks out of fear that disgruntled foreign investors may sue them in expensive international arbitration proceedings in turn exposing

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[115] For example, in AICT, Al Nasr, East Gas, and Omar Effendi, the court discussed the culpability of the investor in violating the law and therefore there was no award of any compensation for returning the investment. In NCGC, on the other hand, the court did not accuse the investors of any wrongdoing; it formed a committee to oversee the valuation of the company and the sale of the shares back to the government.

[116] Discounted Cash Flow (DCF) valuations or market based approaches.

[117] Irmgard Marboe, *Compensation and Damages in International Law—The Limits of "Fair Market Value*, 7 J. WORLD INV. & TRADE 723, 729 (2006).

[118] *Supra* note 87.

[119] Mark Kantor, *International Project Finance & Arbitration with Public Sector Entities: When is Arbitrability a Fiction?*, 24 FORDHAM INT'L L. J. 1122, 1140 (2009).

them to costly damages awards.[120] Although the term has been used ad nauseam in academic debate, there has only been scant and often inconclusive evidence.[121] Egypt's latest moves, however, provide empirical data for the impact that existing obligations under bilateral investment treaties and the international investment dispute settlement regime may have on states' lawmaking choices.

In Egypt, PIL has served as a venue for aggrieved workers and concerned citizens to directly petition the courts for oversight. PIL cases have allowed Egyptian administrative courts to exhibit ingenuity in dealing with pervasive institutionalized corruption. Law 32 takes away that right, and judicial ingenuity is curbed. The impact of Law 32 is compounded by the absence of independent government watchdogs capable of conducting efficient impartial investigations into allegations of corruption and illegality. Even if such entities existed, they would have no right under Law 32 to ask the court to review the validity of a government contract or the decision to enter into such contract, even if the petition was based on improprieties revealed by an independent investigation.

The law curtails citizens' rights at the altar of foreign investment, and this squarely falls into the category of concerns commentators associate with "regulatory chill." Yet calling the impact of Law 32 "regulatory chill" misrepresents its very nature. In fact, it is not the regulatory and lawmaking capacity of Egypt that is curtailed by the government for fear of looming investor claims. Instead, it is regulation that curtails the ability of citizens to bring claims and, in turn, the capacity of the Egyptian State Council to adjudicate claims pertaining to government contracts. In the case of Egypt, therefore, the impact is a "judicial chill."

B. The Egyptian Supreme Constitutional Court Hears a Challenge Against Law 32/2014 on the Basis of Judicial Chill

The Supreme Constitutional Court of Egypt ("SCC") will hear a challenge to the constitutionality of the judicial chill effect of Law 32 in the upcoming

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[120] *See* Jonathan Bonnitcha, *The Real Costs and Benefits of Investment Treaties*, EASTASIAFORUM (Mar. 16, 2010), http://www.eastasiaforum.org/2010/03/16/the-real-costs-and-benefits-of-investment-treaties/; KARL SAUVANT & LISA SACHS, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (2009); *see also* Gus Van Harten, *The Public Statement* (Aug. 31, 2010), *available at* http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/.

[121] Audley Sheppard & Antony Crockett, *Chapter 14: Are Stabilization Clauses a Threat to Sustainable Development?*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, 30 GLOBAL TRADE LAW SERIES 334 (Marie-Claire Cordinier Segger et al. eds., 2011); Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, INT'L INST. FOR SUSTAINABLE DEV. (Feb. 2008), *available at* http://www.iisd.org/publications/international-investment-agreements-business-and-human-rights-key-issues-and (last visited Jan. 20, 2015); Gus van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern*, INVESTMENT TREATY NEWS (Apr. 12, 2012), *available at* http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/ ((last visited Jan 20, 2015)); Gus van Harten, *Submission to the Productivity Commission, Bilateral and Regional Trade Agreements Study* (Sep. 23, 2010), *available at* http://www.pc.gov.au/__data/assets/pdf_file/0017/102842/subdr099.pdf (last visited May 14, 2014); Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, 3 W. J. LEGAL STUD. 1 (2013; Lyuba Zarsky, *From Regulatory Chill to Deepfreeze? In response to the Paper by Kyla Tienhaara, "Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana,"* 6 INT'L ENVTL. AGREEMENTS 395–99 (2006).

months. The challenge,[122] filed on May 3, 2014, is based on the law's alleged violation of Article 97 of the Constitution. Article 97 guarantees the people's right to petition the courts and prohibits immunizing government decisions from judicial review.

Although Law 32 purports to "regulate" judicial review for government contracts and related decisions, Law 32 gives immunity to a government action that runs afoul the law. Law 32 requires the government action to fall within the strict definitions of certain enumerated crimes before allowing administrative courts to exercise their review powers, in that case rubberstamping the criminal court decision. Law 32 and the crimes incorporated by reference in Article 1 fail to cover the wide range of PIL cases in which administrative review is pivotal to assure the protection of the public interest beyond strict criminal offences.

Pending a decision by the SCC, the government could use the time to enter into negotiated settlements of the pending PIL cases and related arbitrations.[123] As for those cases already decided by Egyptian courts, the government cannot offer the investor to keep its expropriated investment in violation of the court's decisions.[124] Therefore, the government's offer to settle ICSID cases where investments have already been expropriated or adversely affected by PIL decisions will be less attractive. This is particularly the case if the investor considers that (1) it has good chances of winning the ICSID claim, (2) it does not see a prospect for investing in Egypt again, and (3) it has the benefit of a political risk insurance, which may pay better than a negotiated settlement with Egypt. On the other hand, investors who have no recourse to investor-state arbitration in their respective conventional BITs (such as the Saudis) are more likely to accept a settlement of some sort.

If, however, the SCC deems Law 32 unconstitutional, or if the newly elected parliament decides to strike the law down, we could see another round of PIL possibly even extending to litigating the legality of any negotiated settlements.

VI. CONCLUSION

Law 32 did in fact close Pandora's Box, effectively banning administrative courts from annulling investment contracts or investment related decisions, by banning PIL in all pending and future cases and limiting budgetary exposure to future arbitral awards as a result of those PIL cases. The pending constitutional challenge to Law 32 may crack the box wide open once again. The problems created by years of political and economic dysfunction cannot be resolved with formalistic measures such as the procedural bans Law 32 proposes. Regulating litigation in government contracts should come as part and parcel to structural and institutional reforms. PIL in Egypt was a tool to hold the government accountable when representative de-

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[122] Brief of Petitioners in AlShabasi v. The Head of Council of Ministers, Supreme Constitutional Court, Case No. 120/36 (2014), *available at* http://ecesr.com/ (last visited Jan 20, 2015).

[123] It appears that the Egyptian government has been successful in reaching agreements with the Claimants Hussain Sijwani, Damac Park, Damac Gamsha Bay (ICSID Case No. ARB/11/16) to suspend the ongoing ICSID proceedings. *See* ICSID, *List of Pending Cases as of August 9, 2014*, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending.

[124] Law 32 does not, unlike the earlier Saudi proposed amendments, allow the government to reach a post judgment settlement that would allow the investor to keep its expropriated investment.

mocracy failed. Taking away this tool without restoring representative democracy and accountability serves only to complicate Egypt's transition to good governance.

PIL in Egypt was born out of institutionalized and widespread corruption and, as a result, has focused on the same to prevent the "endangerment of public funds." Instead of prohibiting PIL in its entirety, Egypt should address the root cause of the PIL proceedings and address the problem of corruption head-on to resolve its economic ills. To this end, serious efforts should be made to establish and solidify an independent and powerful anti-corruption body, while reforming its government contracting process to allow for transparency and accountability from the very outset. The latter would entail mandating an independent tender process, conducting social and environmental impact studies for certain investments, and establishing a "review and comments period" where such studies are made public and comments from the public received should be considered. If given the chance to develop, PIL could also serve as an important tool to hold the government and investors accountable. While institutional solutions (intra-government accountability mechanisms and corruption watchdogs) would eventually offer a consistent and uniform approach to government/investor accountability, in the interim PIL should be allowed to function. PIL brings attention to cases where both the government and the investor prefer to keep at bay—e.g., in cases of corruption, environmental violations, and human rights infringements. For workers in privatized companies, PIL could function, in the absence of a collective labor contract or a unionized agreement, as a tool to enforce certain statutory labor rights or protect workers' benefits under the privatization contract.

While Egypt may not be ready to adopt an Indian-like standing doctrine, where all citizens have a right to move the courts, risking overburdening the court system, a more limited standing doctrine akin to the U.S. model may be appropriate to address areas of most concern: corruption, environment and labor rights. Giving citizens a right to sue for enforcement of the law, such as is the case in the United States under the Environmental Protection Act of 1997, may serve Egypt well, where laws often lay unenforced and dormant on the books with no value whatsoever. Explicitly allowing citizens to sue under the laws reforming a transparent government contracting and procurement process may strengthen accountability and reduce corruption from the outset while at the same time increasing investor confidence in the long term.

Overall, therefore, we see the solution in (1) allowing PIL to proceed directly in cases of human, labor and environmental rights and (2) creating a robust, independent anti-corruption agency tasked with oversight of government contracting.

While we recognize the limitations of PIL in bringing about social change, its success is not only measured by winning cases, but also by raising public awareness and keeping the government in check. Law 32 limits such opportunities for public awareness and participatory governance by Egyptian citizens.

As for investment treaty arbitration, the pending ICSID cases against Egypt represent an opportunity to clarify the position of international investment law regarding corruption in all stages of the proceedings—jurisdictional, merits, and quantum.