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PROTECTION OF U.S.  
NON-GOVERNMENTAL  
ORGANIZATIONS IN  
EGYPT UNDER THE  
EGYPT – U.S. BILATERAL  
INVESTMENT TREATY

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## EXECUTIVE SUMMARY

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In 2011, the Government of the Arab Republic of Egypt (“Egypt”) began investigations into whether non-governmental organizations (“NGOs”)<sup>1</sup> had breached the Egyptian law governing NGOs. As part of these investigations, armed personnel entered the offices of certain NGOs from the United States of America (“U.S.”), Egypt, and other countries, and temporarily detained employees while they seized documents and computers. The government subsequently charged particular staff with criminal offences and prevented them from leaving the country. Shortly after, the Government released the draft of a new law to govern the activities of NGOs in Egypt, which would, among other things, preserve the right of the government to dissolve NGOs and limit their access to funding in certain circumstances.

This paper considers the actions of the Egyptian government in light of the Egypt-U.S. bilateral investment treaty (“BIT”).<sup>2</sup> BITs provide protection to the investors of the parties to the treaty and their investments when they invest in the other party. Such treaties typically also provide the investor with the right to initiate arbitration to determine if a party has failed to provide the protections guaranteed in the treaty.

A U.S. organization who sought to initiate an arbitration under the Egypt-U.S. BIT would initially need to establish the jurisdiction of a tribunal to hear its claim. Thus, among other things, the organization would need to prove that it has an investment that is protected under the treaty.

The U.S. NGO would also need to establish that Egypt’s actions were inconsistent with obligations under the treaty. The organization could argue that Egypt failed to:

- provide an investment of the NGO with “national treatment” by treating an investment of a local organization in “like situation” more favorably;
- provide an investment of the NGO with “most favored nation treatment” by failing to provide treatment which Egypt has promised to provide investments from other countries under other BITs, such as “fair and equitable treatment” and “full protection and security;”
- provide treatment no less “than that required by international law” by breaching its obligations in other treaties, such as the International Covenant on Civil and Political Rights;
- pay compensation when expropriating part of the NGO’s investment; and
- allow the free transfer of funds to the NGO.

In response to such claims, Egypt could seek to rely on exceptions in the treaty, including the exception for “measures necessary for the maintenance of public order and morals.”

If a U.S. NGO could successfully establish the jurisdiction of a tribunal to hear its claim and that Egypt acted inconsistent with its obligations under the treaty, and if Egypt was unable to rely on an exception under the treaty, the organization may only be able to obtain remedies if it can demonstrate that Egypt’s actions caused it monetary damage.

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<sup>1</sup> This paper refers to NGOs as not-for-profit organizations pursuing civil society goals.

<sup>2</sup> Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, entered into force June 27, 1992, available at: [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_002813.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002813.asp).

## I. INTRODUCTION

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In 2011, Egypt began an investigation into whether hundreds of organizations, including U.S. NGOs, had breached the *Law on Associations and Foundations* (Law 84 of 2002). Specifically, Egypt investigated whether the organizations had breached Law 84 of 2002 by receiving funding without obtaining approval from the government and operating without licenses.<sup>3</sup>

As part of the government's investigation, on December 29, 2011, armed personnel entered the offices of several NGOs, including the U.S. organizations Freedom House, International Republican Institute and National Democratic Institute, and temporarily detained employees while they seized documents and computers.<sup>4</sup> The government subsequently criminally charged particular staff and prevented them from leaving the country.<sup>5</sup> The trials are ongoing.

On January 17, 2012, Egypt announced the completion of a draft *Law on Associations and Foundations* ("Draft Law") to replace Law 84 of 2002 as the law governing NGO activities in Egypt.<sup>6</sup> The Draft Law applies to "associations" and "foundations." An "association" is defined as "[a] group of continuous legal personality composed of natural or legal persons, or both, whose number in all cases is not less than 20, formed to pursue not-for-profit purposes."<sup>7</sup> A "foundation" is defined as "[a] legal person established by one or more natural or legal persons, or both, with an endowment of no less than one hundred thousand pounds, to pursue not-for profit purposes."<sup>8</sup> Among other things, the Draft Law:<sup>9</sup>

- allows the Ministry of Social Affairs ("Ministry") to refuse to register, or dissolve, an association or foundation if the Ministry decides that its purposes do not relate to "social welfare, development, and the enlightenment of society" or pursues purposes that include "threatening national unity, violating public order or morals, or calling for discrimination between citizens ....";<sup>10</sup>
- prohibits any government entity other than the Ministry from "licens[ing] the practice of any of the activities of associations or foundations" and voids existing licenses issued by other government entities to organizations practicing the activities of associations or foundations;<sup>11</sup>
- prevents associations and foundations from accepting foreign funds or sending funds abroad without Ministry approval;<sup>12</sup>
- gives the Ministry the right to suspend the activities or license of a foreign association or foundation;<sup>13</sup>

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<sup>3</sup> CNN Wire Staff, *Egypt Says It Will End NGO Raids, Return Seized Items*, 30 December 2011.

<sup>4</sup> Peter Beaumont, *Egypt Police Raid Offices of Human Rights Groups in Cairo*, *Guardian*, 29 December 2011.

<sup>5</sup> David Kirkpatrick and Mayy El Sheikh, *Politically Charged Trial of Pro-Democracy Groups Opens in Egypt*, *New York Times*, 27 February 2012.

<sup>6</sup> Kareem Elbayar, *ICNL Comments on the Draft Egyptian Law on Associations and Foundations*, 23 January 2012.

<sup>7</sup> Article 1.

<sup>8</sup> Article 1.

<sup>9</sup> The description of the draft *Law on Associations and Foundations* is based on the translation provided by the International Center for Not-for-Profit Law.

<sup>10</sup> Articles 6, 9 and 35.

<sup>11</sup> Preamble Article 3.

<sup>12</sup> Article 13.

<sup>13</sup> Article 56.

- gives the “Regional Federation” the right to send representatives to attend any general assembly meeting of an association (a “Regional Federation” is “a federation established by at least 10 associations or foundations or both located in one governorate, regardless of the activity, and having a legal personality”);<sup>14</sup> and
- gives the Ministry the right to “prevent the implementation of” any decision “considered by the [Ministry] as violating [the draft] law or the [association’s] Articles of Incorporation.”<sup>15</sup>

Some of these provisions in the Draft Law are similar to provisions in Law 84 of 2002.<sup>16</sup>

This paper examines the issues that would be faced by a U.S. NGO who claims that Egypt’s recent actions breach its obligations in the Egypt-U.S. bilateral investment treaty (“BIT”).<sup>17</sup> The following section provides an overview of BITs and Egypt’s BIT with the U.S. Section III examines the hurdles which an NGO would need to overcome to establish the jurisdiction of a tribunal to hear a claim against Egypt under the treaty. Sections IV and V describe the standards of protection under the Egypt – U.S. BIT and the issues which might arise from the application of those standards of protection to Egypt’s recent treatment of U.S. NGOs. Section VI addresses exceptions on which Egypt may rely before the final section reviews the remedies available to U.S. NGOs if Egypt has breached its obligations under the treaty and Egypt cannot rely on any exception.

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<sup>14</sup> Article 23.

<sup>15</sup> Article 19.

<sup>16</sup> Note also that on 8 May 2012, the Human Rights Committee and Religious and Social Affairs Committee of the Egyptian People’s Assembly published a draft *Law on Civil Work Organizations*.

<sup>17</sup> Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, entered into force June 27, 1992, available at: [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_002813.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002813.asp)

## II. THE EGYPT – U.S. BILATERAL INVESTMENT TREATY

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BITs provide protection to the investors of the parties to the treaty and their investments when they invest in the other party. Such treaties typically also provide the investor with the right to initiate arbitration to determine if a party has failed to provide the protections guaranteed in the treaty and what remedy is appropriate. The arbitrations are resolved by a tribunal, which generally has three members. One member is appointed by the claimant, another is appointed by the responding state, and a chairperson is agreed between the parties or appointed by the other two arbitrators or an appointing authority. Tribunal members are typically legal academics, partners in law firms or barristers. The arbitration is conducted independently of any domestic legal system, according to a set of procedural rules identified in the treaty.

The first BITs were entered by Germany with Pakistan and with the Dominican Republic in 1959.<sup>18</sup> There are now over 2500 BITs as well as several multilateral investment treaties, including the North American Free Trade Agreement and the Energy Charter Treaty.<sup>19</sup>

Investors have started arbitration under an investment treaty at least 390 times.<sup>20</sup> There may be more claims as not all decisions are publicized. Several claimants have successfully convinced tribunals that states breached their obligations under the treaty. For example, tribunals have found a breach of a bilateral investment treaty through:

- Mexico failing to fulfill representations to the investor that an investment permit would be renewed;<sup>21</sup>
- Chile issuing an investment permit for an urban renewal project that ultimately failed to satisfy local planning laws;<sup>22</sup>
- Poland reneging on a commitment to sell shares to an investor;<sup>23</sup>
- Spain permitting money to be transferred from an investor's bank account without consulting the investor on the terms of that transfer;<sup>24</sup>
- Sri Lanka destroying the investor's shrimp farm as part of a military operation against separatist rebels;<sup>25</sup>
- Zaire looting the investor's battery factory;<sup>26</sup>
- Egypt passing legislation that proscribed cement imports three years before the investor's license to import was due to expire;<sup>27</sup>
- Hungary passing legislation that extinguished the investor's right to manage an airport;<sup>28</sup> and

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<sup>18</sup> Kenneth Vandeveld, A Brief History of International Investment Agreements, 12 *UC Davis Journal of International Law and Policy* 157 (2005) at 170.

<sup>19</sup> C McLachlan, L Shore, M Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press, 2007) para 1.07.

<sup>20</sup> UNCTAD, Latest Developments in Investor-State Dispute Settlement, *IIA Issues Note*, No. 1, March 2011, page 1.

<sup>21</sup> *Técnicas Medioambientales, TECMED SA v. Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, paras 154 and 174.

<sup>22</sup> *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 188.

<sup>23</sup> *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005, para 233.

<sup>24</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 83.

<sup>25</sup> *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award, June 27, 1990.

<sup>26</sup> *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997.

<sup>27</sup> *Middle East Cement Shipping and Handling Co SA v. The Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002, para 107.

- Argentina failing to fulfill a specific legislative commitment to maintain gas distribution tariffs in U.S. dollars.<sup>29</sup>

Not only have investors successfully claimed that States breached their obligations under investment treaties, but some of the compensation awarded by the tribunals has been substantial. For example, a Dutch investor received over U.S. \$300 million after convincing a tribunal that the Czech Republic breached the Czech Republic–Netherlands treaty by interfering with the investor’s license to operate a local television station.<sup>30</sup>

The Egypt – U.S. BIT was signed in 1982, although it was subsequently amended before finally entering into force in 1992. It was the first BIT signed by the U.S.<sup>31</sup> and contains some language that is different to language contained in the majority of U.S. BITs, which were signed later.<sup>32</sup> Thus, the language in the Egypt – U.S. BIT has not been reviewed as extensively as the language in later U.S. BITs.

There is only one dispute under the Egypt – U.S. BIT which is public (although there have been several decisions under Egypt’s BITs with other countries).<sup>33</sup> Members of the Wahba family and the U.S. companies which they owned, Champion Trading Company and Ameritrade International, complained that Egypt breached its obligations in the Egypt – U.S. treaty by not paying them compensation which was paid to local cotton companies following the privatization of the Egyptian cotton industry in 1994. The tribunal decided it did not have jurisdiction over the claims brought by the Wahba family, since they were nationals of Egypt as well as the U.S., and rejected the claims brought by the companies.<sup>34</sup>

As the only decisions under the Egypt – U.S. BIT that are public, the decision on jurisdiction in *Champion Trading, Ameritrade International, James Wahba, John Wahba and Timothy Wahba v. Egypt* and the award in *Champion Trading and Ameritrade International v. Egypt*, are particularly important to the interpretation of that treaty. While there is no rule of precedent under investment treaty law - international tribunals established under investment treaties are not obliged to follow the interpretation of the treaty by previous tribunals – tribunals do tend to follow those previous interpretations.<sup>35</sup> Consequently, any tribunal which hears a claim brought by an NGO under the

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<sup>28</sup> *ADC Affiliate Limited and ADC & ADC Management Limited v. Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, para 476.

<sup>29</sup> *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 175.

<sup>30</sup> *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, Partial Award, September 13, 2001; *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, Final Award, March 14, 2003.

<sup>31</sup> Letter from the Department of State to the President, May 20, 1986: "The Bilateral Investment Treaty (BIT) with Egypt was the first treaty signed under the BIT program which you initiated in 1981."

<sup>32</sup> See, generally, Kenneth Vandeveld, *U.S. International Investment Agreements* (Oxford University Press, 2009), pages 273 – 276.

<sup>33</sup> *Wena Hotels Ltd v. Egypt*, ICSID Case No ARB/98/4 (Egypt-UK BIT); *Helnan International Hotels v. Egypt*, ICSID Case No ARB/05/19 (Egypt-Denmark BIT); *Siag and Vecchi v. Egypt*, ICSID Case No ARB/05/15 (Egypt-Italy BIT); *Jan de Nul and Dredging International v. Egypt*, ICSID Case No ARB/04/13 (Egypt-Belgium/Luxembourg BIT); *Middle East Cement Shipping and Handling v. Egypt*, ICSID Case No ARB/99/6 (Egypt-UK BIT); *Joy Mining Machinery v. Egypt*, ICSID Case No ARB/03/11 (Egypt-UK BIT)

<sup>34</sup> *Champion Trading, Ameritrade International, James Wahba, John Wahba and Timothy Wahba v. Egypt*, ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003 and *Champion Trading Company and Ameritrade International v. Egypt* Award, 27 October 2006.

<sup>35</sup> See, for example, C McLachlan, L Shore, M Weiniger, *International Investment Arbitration – Substantive Principles*, (Oxford University Press, 2007) para 1.48: ‘... while no *de jure* doctrine of precedent exists in investment arbitration, a *de*



Egypt – U.S. BIT will pay careful attention to the *Champion Trading* decisions. However, as explained further below, the decisions are short and do not extensively clarify the scope of the treaty.

A tribunal which hears a claim brought by an NGO under the Egypt – U.S. BIT will also pay attention to decisions under other investment treaties. Tribunals have tended to follow the decisions of previous tribunals on the interpretation of similar obligations, even if they are not in the same treaty. However, decisions are certainly not always consistent and a decision on the interpretation of a provision is far from a guarantee that a similar provision, or even the same provision, will be interpreted the same way by another tribunal.<sup>36</sup>

The Egypt – U.S. BIT, like all other BITs, was not created expressly to protect not-for-profit organizations. Nonetheless, some commentators have stated that, in certain circumstances, their protections could be relied on by such organizations.<sup>37</sup> The next sections examine the issues which would arise for a U.S. NGO which sought to rely on the Egypt – U.S. BIT to challenge Egypt's recent actions.

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*facto* doctrine has in fact been building for some time'; Jeffery Commission, 'Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence' 24(2) *J Intl Arbitration* 129 (2007); *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction, 21 March 2007, para 67: "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."

<sup>36</sup> For example, see Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *Fordham Law Review* (2005) 1521.

<sup>37</sup> Nick Gallus and Luke Eric Peterson, "International Investment Treaty Protection of NGOs" 22(4) *Arbitration International* 527 (2006) and Luke Eric Peterson and Nick Gallus, "International Investment Treaty Protection of Not-for-Profit Organizations," *The International Journal of Not-for-Profit Law* 10(1), December 2007.

### III. THE JURISDICTION OF A TRIBUNAL TO HEAR A CLAIM UNDER THE EGYPT – U.S. BIT CONCERNING EGYPT’S RECENT TREATMENT OF U.S. NGOS

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An NGO challenging Egypt’s recent actions under the Egypt – U.S. BIT will first need to establish that the tribunal has jurisdiction to hear the claim. Specifically, the NGO will need to establish that the tribunal has personal, subject matter and temporal jurisdiction.

#### A. PERSONAL JURISDICTION

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An NGO must establish that a tribunal convened to hear a claim for a breach of the Egypt – U.S. treaty has personal jurisdiction, that is, that the tribunal has jurisdiction over the parties before it.

A tribunal convened under the Egypt – U.S. BIT has personal jurisdiction over the Government of Egypt, since Egypt consented in the treaty to the jurisdiction of tribunals to hear claims against it.

With regard to the claimant, the treaty gives standing to claim to "nationals" and "companies."<sup>38</sup> The treaty defines "national" as a "natural person who is a national of a Party under its applicable law."<sup>39</sup> Thus, U.S. citizens have standing to claim under the treaty (as long as they are also not citizens of Egypt)<sup>40</sup>. So, too, do U.S. companies. The treaty states that "company":

means any kind of juridical entity, including any corporation, company association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.<sup>41</sup>

An NGO claiming under the Egypt – U.S. BIT would need to establish that it satisfied this definition. The organization may draw from comments of the Government of the U.S. that similar definitions in other U.S. treaties encompass “charitable and non-profit entities.”<sup>42</sup>

In addition to giving standing to “nationals” and “companies,” the Egypt – U.S. BIT, like many investment treaties, gives standing to the parties to the treaty.<sup>43</sup> Thus, the U.S. government has

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<sup>38</sup> Article VII: "(2) In the event of a legal investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company – in the territory of such Party, the parties shall initially seek to resolve the dispute by consultation and negotiation. ... If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute settlement procedures upon which a Party and national or company of the other Party have previously agreed. ... (3)(a) In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to ..."

<sup>39</sup> Article I(1)(e).

<sup>40</sup> *Champion Trading, Ameritrade International, James Wahba, John Wahba and Timothy Wahba v. Egypt*, ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003.

<sup>41</sup> Article 1(1)(a).

<sup>42</sup> For example, see Treaty Between the United States of America and the Republic of Kyrgyzstan concerning the Encouragement and Reciprocal Protection of Investment, Article I(1)(b): "'company' of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled" and Letter of Transmittal available on-line at the U.S. State Department website: <http://www.state.gov/documents/organization/43567.pdf>.

standing to challenge Egypt's recent actions. However, no state has publicly exercised its right under a BIT to challenge the actions of another state.

## B. SUBJECT MATTER JURISDICTION

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In addition to establishing the tribunal's personal jurisdiction, an NGO challenging Egypt's recent actions under the Egypt – U.S. BIT would also need to establish that the tribunal has subject matter jurisdiction over the claim. The subject matter jurisdiction of such a tribunal is confined in two important ways.

First, the treaty gives tribunals subject matter jurisdiction over a “legal investment dispute,” which is defined as including “an alleged breach of any right conferred or created by this Treaty with respect to an investment.”<sup>44</sup> Thus, an NGO would need to establish that it has in Egypt an investment, as defined by the treaty.

The investment of a U.S. NGO claiming against Egypt under the Egypt – U.S. BIT is particularly important because the treaty offers protections to those “investments,” rather than the investors,<sup>45</sup> as explained further in section IV below. Thus, the NGO will need to identify an asset in Egypt which is a protected investment but which is also subject to the treatment of which the NGO is complaining.

The treaty states that:

"Investment" means every kind of asset owned or controlled and includes but is not limited to:

- (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
- (ii) a company or shares, stock, or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) valid intellectual and industrial rights property, including, but not limited to rights with respect to copyrights and related patents, trademarks and trade names, industrial designs, trade secrets and know-how, and goodwill;
- (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;
- (vi) any right conferred by law or contract, but not limited to rights within the confines of law to search for or utilize natural resources, and rights to manufacture, use and sell products;
- (vii) returns which are reinvested.

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<sup>43</sup> Article VII: “(1) Any dispute between the Parties concerning the interpretation or application of this Treaty should, if possible, be resolved through diplomatic channels. (2) If the dispute cannot be resolved through diplomatic channels, it shall, upon the agreement of the Parties, be submitted to the International Court of Justice. (3)(a) In the absence of such agreement, the dispute shall, upon the written request of either Party, be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules and principles of international law.”

<sup>44</sup> Article VII(1).

<sup>45</sup> For example, Article II(4) states that “[t]he treatment, protection and security of investments shall never be less than that required by international law and national legislation” (emphasis added).

This definition is not exclusive. Thus, an "asset owned or controlled" by the NGO in Egypt falls within the definition, even if the asset does not fall within one of the listed examples.

Even if an NGO owns or controls an asset in Egypt, it may still not have an investment protected by the treaty. Some arbitrators have held that, regardless of the definition of investment in an investment treaty, investments will only be protected by the treaty if the asset displays certain inherent or objective characteristics of "investments."<sup>46</sup> One tribunal listed these objective characteristics as "a contribution that extends over a certain period of time and that involves some risk."<sup>47</sup> Commentators have suggested that, in certain circumstances, NGO investments may display these characteristics.<sup>48</sup>

At least twice, arbitrators have held that an investment must be commercially oriented or intended to generate an economic return or profit.<sup>49</sup> Thus, depending on the tribunal convened to hear the dispute, an NGO seeking to establish the subject matter jurisdiction of a tribunal under the Egypt – U.S. BIT may need to demonstrate that it expected a profit or return from its investment in Egypt. This does not necessarily mean that the organization must establish that its overall goal was to profit; it may be sufficient to establish that was the goal of the particular investment which was effected.

The subject matter jurisdiction of a tribunal convened to hear a dispute under the Egypt – U.S. BIT is not only confined by that treaty. It is also confined by the Convention of the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID"). This is a treaty which was negotiated in the 1960s to create a center to resolve disputes between foreign investors and their host states. The Egypt-U.S. BIT requires claimants to submit their dispute to the ICSID.<sup>50</sup> This means that the jurisdiction of a tribunal convened under the treaty is confined by the ICSID Convention.

Some arbitrators have held that there is an implicit or objective definition of investment under the ICSID Convention which must be satisfied before a tribunal at the ICSID has jurisdiction over the dispute.<sup>51</sup> These characteristics are similar to the objective characteristics of investment discussed

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<sup>46</sup> Nick Gallus and Luke Eric Peterson, "International Investment Treaty Protection of NGOs," 22(4) *Arbitration International* 527 (2006) at pages 537-8.

<sup>47</sup> *Romak S.A. v. Republic of Uzbekistan*, 26 November 2009 at para. 180: "The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT;" and para. 207: "The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning ... entailing a contribution that extends over a certain period of time and that involves some risk."

<sup>48</sup> Luke Eric Peterson and Nick Gallus, "International Investment Treaty Protection of Not-for-Profit Organizations," *The International Journal of Not-for-Profit Law* 10(1), December 2007.

<sup>49</sup> *CME Czech Republic BV (The Netherlands) v. Czech Republic*, Ian Brownlie's separate opinion, Final Award, 14 March 2003 at para. 34; *Franz Sedelmeyer v. Russian Federation*, Award, July 7, 1998 at page 65.

<sup>50</sup> Article VII(3)(a): "In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration ..."

<sup>51</sup> Several tribunals have disagreed and held that parties to the ICSID Convention enjoy broad discretion to determine what constitutes a foreign investment – for example through the definition in a given investment treaty – and that arbitration at the ICSID should be open to all such investments: *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004 at para. 73; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997 at para. 31; *M.E. Cement Shipping & Handling Co., SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 at para 136; *MCI Power Group LC and New Turbine, Inc v. Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 at para. 165; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 at paras. 249-255.

above, but also include contribution to the economic development of the host state.<sup>52</sup> A small number of tribunals have also required the expectation of profit or return.<sup>53</sup> Thus, even if a tribunal convened to hear a claim by a U.S. NGO under the Egypt – U.S. BIT does not interpret the BIT as requiring the NGO's investment to display characteristics inherent in an investment, the tribunal may require the investment to display those features to satisfy the requirements of the ICSID Convention.

### C. TEMPORAL JURISDICTION

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The third limit on the jurisdiction of a BIT tribunal is on the tribunal's temporal jurisdiction. That jurisdiction is confined in three ways. First, it is confined to acts which occurred after the treaty entered into force.<sup>54</sup> The actions of Egypt against U.S. NGOs highlighted in section I above appear to satisfy this requirement; all occurred after the treaty entered into force in 1992.

A tribunal's temporal jurisdiction is also confined to acts which occurred after the beginning of the tribunal's personal and subject matter jurisdiction.<sup>55</sup> That is, the tribunal has no jurisdiction over acts which occurred before the claimant satisfied the definition of "national" or "company" under the Egypt – U.S. BIT and before the claimant owned or controlled an investment protected under the treaty and the ICSID Convention.

A tribunal would also likely be limited in its ability to hear claims which challenge acts that occurred too long ago. While the Egypt – U.S. BIT does not contain an express time limit within which a claim must be brought, international tribunals that were not bound by express time limits have still held that they could not hear claims which challenged acts that occurred too long ago.<sup>56</sup> The precise time at which a claim expires is unclear; tribunals have tended to be guided by the claimant's negligence in delaying the claim and the prejudice to the respondent state from the delay. Thus, an NGO which waited several years before claiming could face an argument that the claim is time barred.

## IV. PROTECTIONS PROVIDED TO U.S. NGOS UNDER THE EGYPT – U.S. BIT

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If an NGO who claims under the Egypt – U.S. BIT can demonstrate that an arbitration tribunal convened has jurisdiction to hear the claim, it must then demonstrate that the treatment of that organization or its investment was inconsistent with a treaty obligation. There are likely five

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<sup>52</sup> See, for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 at para. 52; *AES v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 at para. 88; *Jan de Nul and Dredging International v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 at para. 91.

<sup>53</sup> See, for example, *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997 at para. 43; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction at para. 53.

<sup>54</sup> See, generally, Nick Gallus, *The Temporal Scope of Investment Protection Treaties* (British Institute of International and Comparative Law, 2008) from page 14.

<sup>55</sup> Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) para. 631.

<sup>56</sup> Nick Gallus, *The Temporal Scope of Investment Protection Treaties* (British Institute of International and Comparative Law, 2008), pages 93 – 98.

obligations under the Egypt – U.S. BIT which might be invoked by an NGO, namely, the obligations to provide:

- national treatment;
- most favored nation treatment;
- treatment required by international law and national legislation;
- compensation on expropriation; and
- free transfers.

These obligations are examined, in turn.

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## A. NATIONAL TREATMENT

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Articles II(1) and II(2)(a) of the Egypt – U.S. BIT require the parties to provide national treatment to foreign investments. Specifically, the parties must "permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords to investments of its own nationals and companies ..." The parties must also "accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments and associated activities of its own nationals and companies ..." <sup>57</sup>

The national treatment obligation in the Egypt – U.S. BIT was addressed in *Champion Trading and Ameritrade International v. Egypt*. In that case, the claimants alleged that Egypt had failed to provide national treatment by not giving them compensation which was given to Egyptian owned cotton-trading companies. However, the tribunal dismissed the claim because the claimants were not in "like situations" with those companies who received compensation. Specifically, the companies were awarded compensation for trading in years when the claimants did not. <sup>58</sup>

The national treatment obligation in the Egypt – U.S. BIT is worded similarly to articles in many BITs, which prevent states from treating foreign investments "less favorably" than local

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<sup>57</sup> Article II(1) of the Egypt – U.S. BIT states: "Each Party undertakes to provide and maintain a favorable environment for investments in its territory by nationals and companies of the other Party and shall, in applying its laws, regulations, administrative practices and procedures, permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treaty it accords to investments of its own nationals and companies ..." Article II(2)(a) of the Egypt – U.S. BIT states: "Each Party shall accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments and associated activities of its own nationals and companies ... Associated activities in connection with an investment include, but are not limited to: (i) The establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business; (ii) The organization of companies under applicable laws and regulations; the acquisition of companies or interests in companies or in the property; and the management, control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution or other disposition, of companies organized or acquired; (iii) The making, performance and enforcement of contracts related to investment; (iv) The acquisition (whether by purchase, lease or any other legal means), ownership and disposition (whether by sale, testament or any other legal means) of personal property of all kinds, both tangible and intangible; (v) The leasing of real property appropriate for the conduct of business; (vi) Acquisition, maintenance and protection of copyrights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights; and (vii) The borrowing of funds at market terms and conditions from local financial institutions, as well as the purchase and issuance of equity shares in the local financial markets, and, in accordance with national regulations and practices, the purchase of foreign exchange for the operation of the enterprise."

<sup>58</sup> *Champion Trading Company and Ameritrade International v. Egypt Award*, 27 October 2006 paras 134 – 156.

investments in “like situations” or “like circumstances.”<sup>59</sup> Nonetheless, the precise scope of the two key phrases, “less favorably” and “like situations (or circumstances),” is unclear

A state clearly treats a foreign investment “less favorably” than local investments when the state *intentionally* discriminates against a foreign investment because of the investment's nationality.<sup>60</sup> The circumstances in which other treatment is “less favorable” are unclear. The issue has not been extensively addressed by tribunals, who have tended to focus instead on whether the investments are in “like situations” or “like circumstances.”

Nevertheless, which local investments are in “like situations” or “like circumstances” with foreign investments is also unclear. One tribunal compared the treatment of the foreign investment with the treatment of the local investment producing the same product.<sup>61</sup> Another tribunal supported a broader interpretation, examining the treatment of all local investments operating in the same economic sector.<sup>62</sup> Another tribunal went even further, comparing the treatment of the foreign investment with that of all local investments that exported other types of products. That tribunal found that Ecuador failed to provide national treatment by refunding value-added tax to a local flower exporting company and not to the foreign investor exporting oil.<sup>63</sup>

Some tribunals have examined the policy goals of the challenged measure when examining if the local and foreign investments are in “like situations” or “like circumstances.” One tribunal said that a difference in treatment can “be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments.”<sup>64</sup> The tribunal applied this principle to find that Canada had not denied national treatment to a U.S. owned company who exported lumber from Canada by giving it a lower export quota than Canadian owned exporters. The tribunal found that, since the lower quota was reasonably related to rational policies, the U.S. owned company who received that quota was not in “like circumstances” with Canadian companies who received a higher quota.<sup>65</sup>

Another tribunal also accepted the principle that the “assessment of ‘like circumstances’ must also take into account circumstances that would justify governmental regulations that treat [foreign investors] differently in order to protect the public interest.”<sup>66</sup> However, that tribunal held that the differential treatment of a U.S. investor in Canada was not justified because, while the goal behind the treatment was legitimate, the means chosen by the government to pursue that goal was not.<sup>67</sup>

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## B. MOST FAVORED NATION TREATMENT

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<sup>59</sup> Article II(1) of the Kazakhstan-U.S. BIT, for example, reads: “Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies. ...”

<sup>60</sup> See, for example, Mexico’s submission to the *Methanex* Tribunal: *Methanex Corporation v. United States of America*, Final Award, 3 August 2005 at para. 32 of Chapter C of Part II.

<sup>61</sup> *Methanex Corporation v. United States of America*, Final Award, 3 August 2005 at para 19 of Chapter B of Part IV.

<sup>62</sup> *S.D. Myers, Inc. v. Canada*, Partial Award, November 13, 2000 at para. 250.

<sup>63</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, Award, 1 July 2004 at para. 179.

<sup>64</sup> *Pope & Talbot*, Award on Merits Phase 2 at para. 79.

<sup>65</sup> *Pope & Talbot*, Award on Merits Phase 2 at para. 87, 93, 102, 103.

<sup>66</sup> *S.D. Myers, Inc. v. Canada*, Partial Award, November 13, 2000 at para. 250.

<sup>67</sup> *S.D. Myers, Inc. v. Canada*, Partial Award, November 13, 2000 at para. 255.

In addition to requiring treatment of investments of the other Party no less favorable than treatment of local investments, the Egypt – U.S. BIT also requires treatment no less favorable than that provided to investments of any third country.<sup>68</sup> This obligation is commonly known as the obligation to provide most favored nation (“MFN”) treatment and is also common to investment treaties. Generally, it prevents a party to the treaty from discriminating against investments from the other party in favor of investments from a third country.

This provision imposes an obligation on the parties regarding their specific treatment of investments. For example, Egypt might breach the Article if it granted a permit to an English investment rather than a U.S. investment solely on the basis of the nationalities of the investment.

The MFN provision may also require Egypt to give U.S. investments treatment which it is obliged to provide in Egypt’s investment treaties with other countries, such as its BIT with the United Kingdom. Some states and tribunals have accepted that the promise of MFN “treatment” includes a promise to provide treatment required by other investment treaties, which is more favorable.<sup>69</sup> However, some states have criticized this approach as inconsistent with the words of the provision.<sup>70</sup>

Thus, an NGO may seek to rely on the MFN provision to obtain treatment offered by Egypt in its other investment treaties, such as its BIT with the United Kingdom. There are four obligations, in particular, which are likely to be attractive:

- i. the obligations observance obligation;
- ii. the obligation to provide fair and equitable treatment;
- iii. the obligation to provide full protection and security; and
- iv. the obligation not to impair by unreasonable measures.

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## I. THE OBLIGATIONS OBSERVANCE OBLIGATION

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The “obligations observance” or “umbrella” obligation is contained in Egypt’s BIT with the United Kingdom, which states:

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.<sup>71</sup>

Tribunals have disagreed over the scope of this provision. In particular, tribunals disagree over the precise obligations a state must observe. One tribunal found Argentina breached the provision

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<sup>68</sup> Article II(1) of the Egypt – U.S. BIT states: “Each Party ... shall, in applying its laws, regulations, administrative practices and procedures, permit such investments to be established and acquired on terms and conditions that accord treatment no less than that accorded in like situations to investments of nationals or companies of any third country, whichever is more favorable.” Article II(2)(a) states: “Each Party shall accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments of its own nationals and companies or to investments of nationals and companies of any third country, whichever is most favorable. ...”

<sup>69</sup> For example, *Rumeli Telekom and Telsim Mobil Telekomikasyon Hizmetleri v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 at para. 568; *White Industries Australia Limited v. India*, Final Award, 30 November 2011, paras. 11.2.1 – 11.2.9.

<sup>70</sup> For example, *Chemtura Corporation v. Canada*, Canada Counter Memorial, October 20, 2008, para. 882.

<sup>71</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, Article 2(2).



when it failed to fulfill a specific legislative commitment to maintain gas distribution tariffs in U.S. dollars.<sup>72</sup> However, other tribunals expressed doubt whether the provisions elevate breaches of domestic legislation to a breach of the treaty.<sup>73</sup>

Some tribunals have held that the obligations observance provision protects all contractual obligations.<sup>74</sup> Other tribunals view such provisions as protecting only those obligations that a state undertakes in its sovereign capacity.<sup>75</sup> For example, one tribunal said that this provision “will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State ... but will cover additional investment protections contractually agreed by the State as a sovereign inserted in an investment agreement.”<sup>76</sup> An agreement to refrain from changing certain regulations or laws affecting a particular foreign investor is an example of such a protection.

The *obligations* protected are not the only aspect of the provision that is unclear. Which *breaches* of contract breach the provision is also unclear. Some tribunals say the provision protects all breaches.<sup>77</sup> Other tribunals arguably say only breaches through sovereign act breach the provision.<sup>78</sup> A state implementing legislation extinguishing a contractual obligation is an example of a breach through such a sovereign act.

Further aspects of the application of the provision to contractual disputes are also unclear. It is still unclear whether investors can rely on the provision where the investor’s contract contains a clause choosing domestic courts to resolve the dispute.<sup>79</sup> The parties entitled to the protection of the provision also remain unsettled. Some tribunals have suggested that the provision only protects contracts to which the foreign investor and the state, themselves, are parties.<sup>80</sup> Other tribunals have arguably extended the provision’s protection to contracts to which the foreign investor’s local subsidiary and sub-state entities are parties.<sup>81</sup> On this approach, a foreign investor might claim that the state breached the BIT by failing to fulfill a contractual obligation – notwithstanding that the foreign investor is not personally a party to the contract in question.

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<sup>72</sup> *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 at para. 175.

<sup>73</sup> *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at paras. 71-88. See also *SGS Société Générale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction, at paras. 166-168.

<sup>74</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004 at para. 128. See also *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award, 9 March 1998, at para. 29, holding that the provision protected the contractual obligation to pay the debt on a promissory note and *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 at para. 260, holding that the provision protected the contractual obligation to issue shares.

<sup>75</sup> *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at para. 81.

<sup>76</sup> *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, at para 109. See also the discussion in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at paras 71-88.

<sup>77</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004 at para. 128.

<sup>78</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction at para. 72 and 81.

<sup>79</sup> Compare *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004 at para. 155 with, for example, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 at para. 112.

<sup>80</sup> *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para. 384; *Impregilio S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 at para. 223.

<sup>81</sup> *SGS Société Générale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction at para. 166; *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of October 12, 2005 at para. 86.

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## II. THE OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT

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An NGO may also argue that Egypt has breached the MFN provision in the Egypt – U.S. BIT by failing to provide the “fair and equitable treatment” which Egypt has promised to investments of other countries. For example, Egypt’s BIT with the UK also requires that:

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment ...<sup>82</sup>

Many BITs require the host state to provide “fair and equitable treatment.”<sup>83</sup> The precise scope of this standard of treatment is unclear. At least two tribunals have interpreted the standard literally, simply deciding whether the state’s conduct was “fair and equitable.”<sup>84</sup> Some countries have rejected this standard as too high.<sup>85</sup> Furthermore, it is unclear whether the standard is uniform across countries or depends on the country’s level of development.<sup>86</sup>

While the precise scope of the standard is unclear, it is possible to identify elements of the standard on which many tribunals have agreed. All tribunals agree that the fair and equitable treatment standard protects against “denial of justice.” A state denying a foreign investor access to the justice system or administering that justice system unfairly can commit a denial of justice.<sup>87</sup>

Some tribunals agree that the fair and equitable treatment obligation protects the investor’s legitimate expectations.<sup>88</sup> Tribunals have found that states failed to protect the investor’s legitimate expectations and, therefore, failed to provide fair and equitable treatment by:

- failing to fulfill representations to the investor that an investment permit would be renewed;<sup>89</sup>
- issuing an investment permit for an urban renewal project that was inconsistent with local planning laws;<sup>90</sup>
- reneging on a commitment to sell shares to an investor;<sup>91</sup> and

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<sup>82</sup> Article 2(2).

<sup>83</sup> Article II(2)(a) of the Kazakhstan-U.S. BIT, for example, provides: “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”

<sup>84</sup> *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para 360; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 at para. 290.

<sup>85</sup> NAFTA Free Trade Commission Note of Interpretation, July 31, 2001.

<sup>86</sup> Nick Gallus, “The influence of the host state’s level of development on international investment treaty standards of protection,” 6(5) *Journal of World Investment and Trade* 711 (October, 2005); Nick Gallus, “The fair and equitable treatment standard and the circumstances of the host state,” in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011).

<sup>87</sup> The leading text on the issue says “denial of justice occurs when the instrumentalities of a state purport to administer justice to aliens in a fundamentally unfair manner:” Jan Paulsson, *Denial of Justice* (Cambridge University Press, 2005) at page 62. Note that an investor must give local courts an opportunity to remedy their unfair treatment before the investor can successfully claim for a denial of justice (Jan Paulsson, *Denial of Justice* at pages 100-130). This is known as “exhausting local remedies”.

<sup>88</sup> *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para 372, *Técnicas Medioambientales, TECMED S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 at para .154; *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 at para. 207.

<sup>89</sup> *Técnicas Medioambientales, TECMED S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 at para. 154 and 174.

<sup>90</sup> *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 at para. 188.

- drafting a law to minimize an investor's sugar production quota.<sup>92</sup>

Among those tribunals that agree the fair and equitable treatment standard requires the state to protect the investor's legitimate expectations, there is little consensus on what, precisely, investors ought to legitimately expect. Some tribunals have said that foreign investors expect a stable legal and business environment.<sup>93</sup> These same tribunals have found that by failing to provide that environment, the state failed to provide fair and equitable treatment. For example, one tribunal found that Argentina breached the standard by reneging on a commitment to allow U.S. investors to charge local Argentine customers in U.S. dollars for the transport and distribution of gas.<sup>94</sup>

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### III. THE OBLIGATION TO PROVIDE FULL PROTECTION AND SECURITY

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A further obligation which a U.S. NGO might seek to import through the MFN article is the obligation to provide full protection and security. For example, the Egypt – UK BIT states:

Investments of nationals or companies of either Contracting Party ... shall enjoy full protection and security in the territory of the other Contracting Party.

At a minimum, the obligation to provide "full protection and security" requires the state to protect the investment's *physical* security. For example, a tribunal found Sri Lanka failed to provide full protection and security when its army destroyed the investor's shrimp farm as part of a military operation against Tamil Tiger rebels.<sup>95</sup> The tribunal held that the obligation required the state to take "reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."<sup>96</sup>

Some tribunals have endorsed an even broader interpretation of the full protection and security provision by applying the provision to protect the investment's *legal* security, as well as its physical security.<sup>97</sup> One tribunal, for example, found that Argentina failed to provide full protection and security by failing to provide a secure investment framework.<sup>98</sup>

Not all investors have succeeded in their claims that states breached their obligation to provide full protection and security. The International Court of Justice, for example, found that failing to prevent

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<sup>91</sup> *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 at para. 233.

<sup>92</sup> *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 at para. 335.

<sup>93</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at para. 274; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at para. 124; *Occidental Exploration and Production Company v. The Republic of Ecuador*, Award, 1 July 2004 at para. 183; *Metalclad Corporation v. Mexico*, Award, 30 August 2000 at para. 99.

<sup>94</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at paras. 275-281.

<sup>95</sup> *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990.

<sup>96</sup> Para. 77. Another tribunal found Zaire failed to provide full protection and security when its army looted the investor's battery factory: *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997. A third tribunal found Egypt failed to provide full protection and security when it failed to prevent private parties taking over the investor's hotel and failed to subsequently prosecute those parties: *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 at paras 84-95.

<sup>97</sup> See, for example, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award, September 13, 2001 at para. 613: "The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."

<sup>98</sup> *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para. 408.

local workers from occupying a factory was not sufficient to amount to a failure to provide full protection and security, where there was no evidence the workers damaged the plant and some level of production was maintained.<sup>99</sup> A BIT tribunal later partly relied on the International Court of Justice's decision in rejecting a claim that Romania's reaction to labor unrest breached the State's obligation to provide full protection and security.<sup>100</sup>

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#### IV. UNREASONABLE IMPAIRMENT

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A final obligation which a U.S. NGO might seek to import through the MFN article is the obligation not to unreasonably impair the management of its investment. For example Article 2(2) of the Egypt – UK BIT states:

Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable ... measures.

This obligation has not been reviewed by tribunals as often as the obligations described above. However, two tribunals have interpreted this obligation as requiring that the State's conduct "bears a reasonable relationship to some rational policy ..."<sup>101</sup>

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#### C. TREATMENT REQUIRED BY INTERNATIONAL LAW AND NATIONAL LEGISLATION

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Article II(4) of the Egypt – U.S. BIT provides that "[t]he treatment, protection and security of investments shall never be less than that required by international law and national legislation." The U.S. State Department explained "[t]his clause is intended to place a floor under and reinforce the national/MFN treatment standard."<sup>102</sup> Thus, Article II(4) requires a minimum standard of treatment of investments from the other Party, regardless of how the government treats its own investments or those of third parties. In this sense, Article II(4) is similar to the obligations in the Egypt – UK BIT to provide fair and equitable treatment, full protection and security and not unreasonably impair the operation of investments, which were discussed above in section IV(B).

Article II(4) contains two sub-obligations. The first is that "[t]he treatment, protection and security of investments shall never be less than that required by ... national legislation." This seems to oblige the parties to the treaty to treat foreign investments consistent with national legislation. Thus, an investor could claim under the treaty that the treatment of its investment was inconsistent with national legislation.

The second obligation in Article II(4) is that "[t]he treatment, protection and security of investments shall never be less than that required by international law." This obligation was invoked by the claimants in *Champion Trading and Ameritrade v. Egypt*. They alleged that Egypt breached the obligation by failing to act transparently. The tribunal held that, on the facts before it,

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<sup>99</sup> *Case concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 20 July 1989, ICJ Reports [1989] 15 at para. 108.

<sup>100</sup> *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of October 12, 2005, at paras 164-166.

<sup>101</sup> *Saluka v. Czech Republic*, Partial Award, March 17, 2006, para. 460, approved in *Rumeli Telekom and Telsim Mobil Telekomikasyon Hizmetleri v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 at para. 679.

<sup>102</sup> Letter from the Department of State to the President, May 20, 1986.

there was no evidence that the government failed to act transparently.<sup>103</sup> Consequently, there was no need for the tribunal to decide if Article II(4) required Egypt to act transparently.

Aside from *Champion Trading and Ameritrade v. Egypt*, no award that is public has addressed the meaning of Article II(4) of the Egypt – U.S. BIT or the obligation to provide treatment no “less than that required by international law.” Thus, the scope of the obligation is not clear. Nevertheless, it may require Egypt to provide the customary international law minimum standard of treatment.

Generally, “international law” is determined by four sources listed in Article 38(1) of the Statute of the International Court of Justice.<sup>104</sup> One of those sources is customary international law, which is the “the general and consistent practice of States that they follow from a sense of legal obligation.”<sup>105</sup> The customary international law minimum standard of treatment is, therefore, the general and consistent treatment of aliens performed from a sense of legal obligation. The 1910 description of the standard given by the former U.S. Secretary of State, Elihu Root, is often repeated:

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the world. .... If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of aliens.<sup>106</sup>

The customary international law minimum standard of treatment is unclear. However, one tribunal recently described it as follows:

... to violate the customary international law minimum standard of treatment ... an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards ...<sup>107</sup>

According to this description, the customary international law minimum standard of treatment is not as high as the standards described above, such as that required by the obligation not to unreasonably impair the management of an investment or the obligation to provide fair and equitable treatment. Thus, an NGO claiming against Egypt under the Egypt – U.S. BIT will likely focus on claiming that Egypt has failed to provide MFN treatment, in breach of Article II(1), by unreasonably impairing the management of its investment or failing to provide fair and equitable treatment, rather than focusing on claiming that Egypt has breached Article II(4) through a failure to provide the customary international law standard of treatment.

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<sup>103</sup> *Champion Trading Company and Ameritrade International v. Egypt* Award, 27 October 2006 at para. 164.

<sup>104</sup> C Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) 36–7.

<sup>105</sup> Annex A, 2004 U.S. Model BIT.

<sup>106</sup> Elihu Root, “The Basis of Protection to Citizens Residing Abroad,” 4(3) *The American Journal of International Law* (1910) 517 at pages 521-522.

<sup>107</sup> *Glamis Gold v. U.S.*, Award, 8 June 2009, para. 22. See also *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, 18 September 2009, para. 296: “To determine whether an action fails to meet the requirement ..., a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.”

Customary international law is not the only source of international law under Article 38 of the Statute of the International Court of Justice. Another source is treaties. Thus, a U.S. NGO could argue that the obligation in Article II(4) that “[t]he treatment, protection and security of investments shall never be less than that required by international law” also requires Egypt to treat the organization consistent with Egypt’s obligations in treaties other than its BIT with the U.S.

#### D. EXPROPRIATION

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Article III(1) of the Egypt – U.S. BIT provides protection against certain kinds of expropriation. It states:

No investment or any part of an investment of a national or company of either Party shall be expropriated or nationalized by the other Party or by a subdivision thereof – or subjected to any other measure, direct or indirect, if the effect of such other measure, or a series of such other measures, would be tantamount to expropriation or nationalization (all expropriations, all nationalizations and all such other measures hereinafter referred to as "expropriation") – unless the expropriation

- (a) is done for a public purpose;
- (b) is accomplished under due process of law;
- (c) is not discriminatory;
- (d) is accompanied by prompt and adequate compensation, freely realizable; and
- (e) does not violate any specific contractual engagement.

The obligations in sub-Articles (a) to (e) are cumulative. Thus, a party breaches its obligation in the Article if an expropriation is not “accompanied by prompt and adequate compensation” that is “freely realizable,” even if the expropriation satisfies the other listed obligations.

Article III(1) protect against both direct and indirect expropriation. A direct expropriation is where the state directly takes the investment, often by transferring the investment to itself. For example, one tribunal found that Russia expropriated a German investor’s property through a Presidential Decree confiscating the property.<sup>108</sup> Similarly, in a 2006 case, another tribunal found Hungary had directly taken the investor’s contractual right to manage an airport by passing legislation extinguishing the right.<sup>109</sup>

Article III(1) also protects against certain “indirect” expropriations or measures “tantamount to expropriation.”<sup>110</sup> These are measures which do not overtly expropriate property but have the same effect. There is no test for what amounts to an indirect expropriation. There is not even consensus as to whether tribunals hearing a claim for an indirect expropriation should only focus on the *effect* of the measures on the investment or whether they should also look at the *legitimacy* of the purpose behind the measures (for example, a legitimate public health purpose). While some tribunals focus on the effect of the measures on the investment,<sup>111</sup> one tribunal found that a

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<sup>108</sup> *Franz Sedelmeyer v. Russian Federation*, Award, July 7, 1998 at page 73.

<sup>109</sup> *ADC Affiliate Limited and ADC & ADC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 at para. 476.

<sup>110</sup> On indirect expropriation generally, see Andrew Newcombe, “The Boundaries of Regulatory Expropriation,” 20 *ICSID Review-Foreign Investment Law Journal* 1 (2005).

<sup>111</sup> See, for example, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para 310.

Californian law proscribing the use of an ingredient in gasoline was not an indirect expropriation because the law pursued a legitimate purpose.<sup>112</sup>

While there is no agreement on a test, some tribunals have identified what types of measures might be an indirect expropriation. A tribunal said that a measure is more likely to be an indirect expropriation if the measure is inconsistent with specific commitments given to the foreign investor.<sup>113</sup> Another tribunal found a measure is more likely to be an indirect expropriation if the measure is disproportionate to the purpose the state hopes to achieve.<sup>114</sup>

Thus, the line between legitimate non-compensable exercises of government regulation and those actions which amount to an expropriation for which compensation must be paid is unclear.<sup>115</sup> Some governments have provided more detailed written guidance. For example, the U.S. now provides that “[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation.”<sup>116</sup>

## E. FREE TRANSFERS

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Article V of the Egypt – U.S. BIT provides:

1. Either Party shall in respect of investments by nationals or companies of the other Party grant to those nationals or companies the free transfer of:
  - a. returns;
  - b. royalties and other payments deriving from licenses, franchises and other similar grants or rights;
  - c. installments in repayments of loans;
  - d. amounts spent for the management of the investment in the territory of the other Party or a third country;
  - e. additional funds necessary for the maintenance of the investment;
  - f. the proceeds of partial or total sale or liquidation of the investment, including a liquidation effected as a result of any event mentioned in Article IV; and
  - g. compensation payments pursuant to Article III.
2. ...
3. Notwithstanding the preceding paragraphs, either Party may maintain laws and regulations: (a) requiring reports of currency transfer ...

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<sup>112</sup> *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part IV, Chapter D, Page 4, para. 15. See also *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006 at paras 254-5; and *Fireman’s Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006 at para. 176(j).

<sup>113</sup> *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part IV, Chapter D, Page 4, para. 7. See also *Fireman’s Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006 at para. 176(k).

<sup>114</sup> *Técnicas Medioambientales, TECMED SA v. Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003 at para. 122.

<sup>115</sup> See, for example, the discussion in Andrew Newcombe, “The Boundaries of Regulatory Expropriation,” 20 *ICSID Review-Foreign Investment Law Journal* 1 (2005).

<sup>116</sup> U.S.-Chile FTA, Chapter 10, Annex 10-D, Article 4 (b).

The precise scope of this provision is unclear. It has not been interpreted by an award that is public. While similarly worded provisions are included in many BITs, they have not been extensively reviewed by tribunals and tribunals which have addressed the provisions have not clarified their scope. Commentary on the provision does not clarify its application to measures similar to those envisaged in the Draft Law.<sup>117</sup>

## V. THE APPLICATION OF THE EGYPT – U.S. BIT TO THE ACTIONS OF EGYPT AGAINST U.S. NGOS

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Having reviewed the scope of the obligations under the Egypt – U.S. BIT, this paper now applies those obligations to specific aspects of the recent Egyptian conduct, identified in section I above.

### A. ARMED PERSONNEL ENTERING NGO OFFICES AND TEMPORARILY DETAINING EMPLOYEES

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An NGO could claim that Egypt failed to provide full protection and security to its investment in Egypt by entering its offices and temporarily detaining employees while documents and computers were seized. As explained above, such an NGO may need to demonstrate that Egypt failed to take such "reasonable measures ... which a well-administered government could be expected to exercise under similar circumstances."<sup>118</sup> Thus, such a claim might need to address whether it was unreasonable for the Egyptian military to enter the offices and temporarily detain employees to gather evidence to support the claim for breach of Law 84 of 2002.

An NGO could also argue that Egypt's actions impaired the management of its investment. Such a claim would initially need to establish that Egypt owed the NGO the obligation not to impair the management of its investment, through the treaty MFN provision. The NGO would also likely need to establish that entering the offices and detaining employees did not "bear a reasonable relationship to some rational policy."<sup>119</sup>

An NGO might also claim that entering its offices and temporarily detaining employees was a breach of Egypt's obligation to provide fair and equitable treatment. Again, the NGO would need to first establish that Egypt owed the organization that treatment, through the treaty MFN provision, before demonstrating that Egypt's conduct fell below the fair and equitable treatment standard. Thus, the organization may need to establish that it did not legitimately expect that the military would enter its offices and detain its personnel to gather evidence to support a charge that the organization breached Law 84 of 2002.<sup>120</sup>

Finally, an NGO could claim that Egypt's actions fell below the customary international law minimum standard of treatment. An organization bringing such a claim would likely need to

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<sup>117</sup> For commentary on BIT provisions that require the free transfer of funds, see United Nations Conference on Trade and Development, *Transfer of Funds*, 2000. For commentary on the provision in the Egypt – U.S. BIT, see Kenneth Vandeveld, *United States Investment Treaties – Policy and Practice* (Kluwer, 1992) at pages 144 – 146.

<sup>118</sup> See section IV(B)(iii) above.

<sup>119</sup> See section IV(B)(iv) above.

<sup>120</sup> See section IV(B)(ii) above.



establish that Egypt's actions were "manifestly arbitrary," "blatantly unfair," involved "a complete lack of due process," involved "evident discrimination" or "a manifest lack of reasons."<sup>121</sup>

## B. ARMED PERSONNEL SEIZING ASSETS

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An NGO could challenge that the seizure of its documents and computers was an expropriation, in breach of Article III(1) of the treaty. Such a claim would face the obstacle of establishing that the documents and computers, themselves, are investments or parts of an investment protected under the treaty and possibly also the ICSID Convention. The claim would also need to establish that the documents and computers have not been returned since, generally, *temporary* taking of property is not regarded as an expropriation.<sup>122</sup>

Seizing the assets also may raise issues of full protection and security, unreasonable impairment of the management of the investment, fair and equitable treatment and the customary international law minimum standard of treatment.

## C. CHARGING NGO EMPLOYEES AND PREVENTING THEM FROM LEAVING THE COUNTRY

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Charging someone with a crime, of itself, is unlikely to engage any obligations under the treaty. Nor is preventing the employees from leaving the country. One tribunal recently held that "interdiction orders ... are commonplace in many countries and promote the rational public policy of preventing the accused from fleeing the country in avoidance of criminal prosecution."<sup>123</sup>

Nevertheless, the subsequent trial of those charged with operating without a license and receiving foreign funds in violation of Egyptian law may provide a basis for a claim that Egypt has failed to provide fair and equitable treatment, or the customary international law standard of treatment by committing a denial of justice. Such a claim would need to establish that the administration of justice to the employees was "fundamentally unfair."<sup>124</sup>

## D. DRAFT LAW

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The application of the Draft Law, if enacted, could be challenged by an NGO as inconsistent with Egypt's obligations in its BIT with the U.S. However, many of the provisions of the Draft Law, highlighted in section I above, are similar to provisions in Law 84 of 2002.<sup>125</sup> A claim which

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<sup>121</sup> See section IV(C) above.

<sup>122</sup> Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration, Substantive Principles* (Oxford University Press, 2007) para. 8.95.

<sup>123</sup> *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, para. 606.

<sup>124</sup> See section IV(B)(ii) above.

<sup>125</sup> For example, see Law 84 of 2002, Preamble Article 4: "All group whose purpose includes or that carries out any of the activities of the aforementioned associations and institutions, even if it assumes a legal form other than that of the associations and institutions, shall adopt the form of an association or non-governmental institution, and amend its articles of incorporation accordingly and submit the application for its registration according to the provisions of the attached law, within the period prescribed in the first clause of this article, otherwise it shall be considered dissolved by the rule of law;" Article 17: "In all cases no association shall collect funds from abroad ...;" Article 42: "The Association shall be dissolved with a substantiated decision of the Minister of Social Affairs ... in the following cases ...;" Article 63: "The non-governmental institution may be dissolved by virtue of a substantiated decree of the Minister of Social Affairs..."

challenges the application of provisions of the Draft Law which are similar to provisions in Law 84 of 2002 will face several obstacles. First, Egypt could challenge whether a tribunal has temporal jurisdiction to hear a challenge to the application of a law which has existed since 2002. Egypt could argue that the claim effectively challenges a measure that was enacted before the claimant acquired its investment in Egypt. The government could also argue that the claim has expired because it is effectively challenging a measure which occurred too long ago.<sup>126</sup> Egypt has previously challenged the validity of a claim on similar grounds, albeit unsuccessfully.<sup>127</sup> Second, it would be difficult for an NGO to successfully argue that the application of a law which existed when the claimant began working in Egypt is inconsistent with the claimant's legitimate expectations, and, therefore, inconsistent with any obligation to provide fair and equitable treatment. Moreover, it would be difficult to successfully argue that the application of a law which existed when the claimant began working in Egypt is not "fair" or "reasonable."<sup>128</sup>

Nevertheless, an NGO might challenge the application of provisions of the Draft Law, if enacted, as inconsistent with Egypt's BIT obligations. Specifically, an NGO might challenge the application of the provision which voids existing licenses issued by other government entities to organizations practicing the activities of associations or foundations.<sup>129</sup> An NGO whose license was voided under this law, and was not reissued, could argue that this was inconsistent with its legitimate expectations and, therefore, a failure to provide fair and equitable treatment.

The Draft Law gives the Ministry of Social Affairs the power to suspend the license of an NGO.<sup>130</sup> If the NGO could convince a tribunal that its license was an investment or part of an investment protected under the treaty and the suspension was sufficiently long, then the organization could argue that the suspension was an indirect expropriation of that license. The suspension of a license also might give rise to claim for unreasonable impairment of the management of the investment, failure to provide full protection and security or provide the customary international law minimum standard of treatment. Depending on the circumstances of the suspension, the NGO might rely on the comments of one tribunal that a "deliberate campaign" to "punish" an investor for supporting an opposition party or to "expose [the investor] as an example to others who might be tempted to do the same ... must surely be the clearest infringement one could find of the provisions ... of the Treaty."<sup>131</sup>

An NGO might challenge the application of the provision of the Draft Law which gives the Ministry of Social Affairs the ability to dissolve NGOs in Egypt.<sup>132</sup> Dissolving an NGO without reason could breach the obligation to provide fair and equitable treatment or the obligation not to arbitrarily impair the management of investments. Even if Egypt dissolved an NGO with reason, Egypt could, arguably, breach BIT obligations if the organization has a license allowing it to operate for a certain period of time. A tribunal could view the dissolution as inconsistent with the organization's legitimate expectations and, therefore, a breach of the obligation to provide fair and equitable

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<sup>126</sup> See section III(C) above.

<sup>127</sup> *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 104.

<sup>128</sup> See also *GAMI Investments, Inc v. Mexico*, Final Award, 15 November 2004 at para. 93: "NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest."

<sup>129</sup> Preamble Article 3.

<sup>130</sup> Article 56.

<sup>131</sup> *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 at para. 123. Note that at para. 137 the tribunal ultimately found that there was insufficient evidence of such a deliberate campaign.

<sup>132</sup> Articles 6, 9 and 35.

treatment or even as an expropriation of the intangible rights inherent within the license.<sup>133</sup> However, a tribunal might consider the legitimacy of the policy objectives being pursued by Egypt in weighing a potential treaty breach.

The Draft Law empowers the “Regional Federation” to send representatives to attend NGO meetings.<sup>134</sup> An NGO could argue that such interference goes beyond its legitimate expectations and, therefore, breaches an obligation to provide fair and equitable treatment. Such a claim would need to confront the authority of an International Court of Justice decision finding that the state did not breach its obligation to provide full protection and security by failing to prevent workers from occupying the investor’s factory.<sup>135</sup> However, if representatives caused some physical damage or impeded the meeting, then an NGO would have a stronger argument that the conduct rises to the level of a BIT breach.

The Draft Law also prevents NGOs from accepting foreign funds without the approval of the Ministry of Social Affairs.<sup>136</sup> This may implicate Article V(1)(e), which requires Egypt to grant to U.S. companies “the free transfer of ... additional funds necessary for the maintenance of the investment.”

The Draft Law also prevents NGOs from sending funds abroad without the approval of the Ministry of Social Affairs. This may implicate Article V(1)(d) or (e), which require Egypt to grant to U.S. companies with investments in Egypt “the free transfer of ... amounts spent for the management of the investment in the territory of the other Party or a third country.”

These restrictions may also implicate an obligation to not arbitrarily impair management of an investment. If the NGO is dependent upon foreign funding to survive, an NGO might argue that the denial amounts to an indirect expropriation.

An NGO could also argue that a denial of foreign funding breaches the obligation to provide national treatment if other local organizations remain able to draw upon foreign funding or if the denial of foreign funding effectively disadvantaged foreign owned NGOs compared to their local counterparts.<sup>137</sup>

Finally, a U.S. NGO might argue that the application of the provisions identified above is inconsistent with Egypt’s obligations as a party to the International Covenant on Civil and Political Rights and, therefore, breaches Egypt’s obligation in Article II(4) of the BIT to ensure that “[t]he treatment, protection and security of investments shall never be less than that required by international law.” Article 22 of that Covenant guarantees the “the right to freedom of association.”<sup>138</sup>

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<sup>133</sup> See section IV(D) above.

<sup>134</sup> Article 23.

<sup>135</sup> *Case concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 20 July 1989, ICJ Reports [1989] 15.

<sup>136</sup> Article 13. On the circumstances in which, generally, common restrictions on foreign funding of NGOs may breach common BIT provisions requiring free transfer of funds, see the appendix to this paper.

<sup>137</sup> See section IV(A) above.

<sup>138</sup> Article 22 of the International Covenant on Civil and Political Rights states: “(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3)

## E. COMPOSITE ACTS

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Even if one of the isolated acts, examined above, does not breach the Egypt – U.S. BIT, a U.S. NGO could claim that the combined effect of several of the acts does. Several tribunals have held that a state breached its obligations in a BIT through a composite act.<sup>139</sup>

## VI. EXCEPTIONS UNDER THE EGYPT – U.S. BIT

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Even if an action of Egypt is inconsistent with an obligation of the Egypt – U.S. BIT, Egypt will not breach the treaty if the action falls under an exception. There are three exceptions on which Egypt may seek to rely.

### A. MEASURES NECESSARY FOR PUBLIC ORDER AND MORALS

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Article X(1) of the Egypt – U.S. BIT provides:

This Treaty shall not preclude the application by either Party or any subdivision thereof of any and all measures necessary for the maintenance of public order and morals ... [and] the protection of its own security interests.

Thus, Article X(1) effectively contains two exceptions. The first is that the "Treaty shall not preclude the application by either Party ... of any and all measures necessary for the maintenance of public order and morals ..."

When interpreting a similar exception, a tribunal held that measures necessary for the maintenance of "public order" included "actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society ... to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order ...".<sup>140</sup> The tribunal held that a measure will not be "necessary" if another "treaty consistent, or less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ is available."<sup>141</sup>

A panel addressing a similarly worded provision in the World Trade Organization's General Agreement on Trade in Services<sup>142</sup> held that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation"<sup>143</sup> and "'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and

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Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

<sup>139</sup> For example, see *El Paso Energy International Company v. Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, para 519: "The Tribunal, taking an all-encompassing view of consequences of the measures complained of by El Paso ... concludes that, by their cumulative effect, they amount to a breach of the fair and equitable treatment standard."

<sup>140</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, para. 174.

<sup>141</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, para. 195.

<sup>142</sup> Article XIV of the GATS states: "... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Members of measures: (a) necessary to protect public morals or to maintain public order ..."

<sup>143</sup> *U.S. – Gambling*, Panel Report, para. 6.487.

law.”<sup>144</sup> The Appellate Body of the World Trade Organization confirmed that a measure will not be “necessary” if there is an alternative measure “that would preserve for the responding Member its right to achieve its desired level of protection,”<sup>145</sup> which is consistent with the state’s obligations, and which is “reasonably available.”<sup>146</sup> The Appellate Body applied this definition to hold that the U.S.’ prohibition on the remote supply of gambling and betting services, including internet gambling, is necessary for the maintenance of public order and protection of public morals.<sup>147</sup>

Thus, Egypt could attempt to defend its actions as necessary for the maintenance of public order and morals by arguing that they preserve the standards and the fundamental interests of Egyptian society. To succeed in such an argument, Egypt may need to establish that the actions of U.S. NGOs threatened the standards and fundamental interests of Egyptian society and there were no alternative measures available to the government which would have preserved those standards and interests.

## B. MEASURES NECESSARY FOR THE PROTECTION OF SECURITY INTERESTS

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The second exception within Article X(1) is that the "Treaty shall not preclude the application by either Party ... of any and all measures necessary for the ... protection of its own security interests." Similar provisions have been interpreted by several BIT tribunals<sup>148</sup> as well as the International Court of Justice.<sup>149</sup>

These tribunals have uniformly held that the application of this exception is not “self-judging;” it is for the tribunal to ultimately decide whether the measure was necessary for the protection of the state’s security interests.<sup>150</sup>

One tribunal held that a state can only rely on this exception in response to “serious public disorders.”<sup>151</sup> Another held that a measure will not be “necessary” if another “treaty consistent, or less inconsistent alternative measure, which the member State concerned could reasonably be expected to employ is available.”<sup>152</sup>

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<sup>144</sup> U.S. – *Gambling*, Panel Report, para. 6.467.

<sup>145</sup> U.S. – *Gambling*, Appellate Body Report, para. 308.

<sup>146</sup> U.S. – *Gambling*, Appellate Body Report, para. 307.

<sup>147</sup> U.S. – *Gambling*, Appellate Body Report, para. 326.

<sup>148</sup> Most recently, see *El Paso Energy International Company v. Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011 at paras. 561 – 670.

<sup>149</sup> In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986 at para. 282 the International Court of Justice rejected the U.S.’ argument that its support of paramilitaries against the government of Nicaragua in the 1980s was “necessary” for the protection of the U.S.’ “essential security interests” because “the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be ‘necessary’ for that purpose.” In *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p 161 at para. 78 the court also rejected the U.S.’ reliance on the provision to justify its attack on Iranian oil platforms in 1987 and 1988 because the attacks were not in self-defence.

<sup>150</sup> For example, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, para. 222; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, para. 187.

<sup>151</sup> *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para. 228.

<sup>152</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, para. 195.

Egypt could attempt to defend its actions as necessary for the protection of its security interests by arguing that they address the serious public disorder caused by the U.S. NGOs' actions. Egypt may need to establish that the actions of U.S. NGOs threatened serious public disorder. Egypt may also need to establish that there were no alternative measures available to the government which would have prevented the serious public disorder.

### C. EXCEPTION TO THE OBLIGATION OF NATIONAL TREATMENT

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The national treatment obligation in the Egypt – U.S. BIT contains a limited exception in Article II(3)(a).<sup>153</sup> This Article gives Egypt the right to adopt a measure that is inconsistent with its obligation to provide national treatment if the measure satisfies three criteria. First, the measure must have existed at the time the treaty entered into force in 1992 or existed before the time of the investment. Second, Egypt must have notified the U.S. of the measure. The required time of this notification is unclear. Finally, the measure must fall within one of the following sectors:

Air and sea transportation; maritime agencies; land transportation other than that of tourism; mail, telecommunication, telegraph services and other public services which are state monopolies; banking and insurance; commercial activity such as distribution, wholesaling, retailing, import and export activities; commercial agency and broker activities; ownership of real estate; use of land; natural resources; national loans; radio, television, and the issuance of newspapers and magazines.

The actions of the Egyptian government described in section I do not appear to fall within one of these sectors.

## VII. REMEDIES FOR NGOS UNDER THE EGYPT-U.S. BIT

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The Egypt – U.S. BIT does not identify the remedies which are available to a successful claimant. Moreover, there is no jurisprudence under the treaty to help identify these remedies, since the one decision that is public held that there was no breach.

Nevertheless, decisions under other BITs shed some light on the remedies which may be available to a U.S. NGO which successfully established that Egypt breached its obligations in the Egypt – U.S. BIT. A tribunal finding a state breached its BIT obligations can order the state to compensate the foreign investor for any monetary damages suffered by the investor as a result of the breach. It is unclear whether a tribunal can order a state to perform a certain act in order to fulfill its BIT obligations.<sup>154</sup>

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<sup>153</sup> Article II(3)(a) provides: “Notwithstanding the preceding provisions of this Article, each Party reserves the right to maintain limited exceptions to the standard of national treatment otherwise required concerning investments or associated activities if exceptions fall within one of the sectors listed in the Annex to this Treaty.”

<sup>154</sup> Compare *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 at para 79: “An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available;” *Antoine Goetz v. Burundi*, Award, 10 February 1999, (2000) 15 ICSID Rev-FILJ 457 at page 516 and *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 at para. 387 with *LG&E Energy Corp and others v. Argentina*, ICSID Case No. ARB/02/1, Damages Award, 25 July 2007 at para. 87: “The judicial restitution required in this case would imply modification of the current legal

Claimants overwhelmingly claim only monetary damages. Damages awards vary. One tribunal, for example, awarded the claimant U.S.\$450,000, a small fraction of its original claim.<sup>155</sup> Conversely, another tribunal awarded the claimant almost U.S.\$300 million in a case where the state interfered with the control of a large broadcasting enterprise.<sup>156</sup>

NGOs claiming monetary compensation through the Egypt – U.S. BIT will need to demonstrate they have suffered quantifiable damages. In some instances, this will be straightforward. For example, if Egypt breaches the treaty through the seizure of assets which have not been returned, then the NGO has suffered damages amounting at least to the value of the assets. Similarly, if Egypt physically harmed the assets then it has caused damages to the extent of the harm.

Identifying the damages of an NGO arising simply from the inability to continue to operate is not so straight forward. The organization could claim for the amount it has invested in Egypt minus the proceeds from the sale of any assets. While BIT tribunals sometimes award future profits to foreign investors crippled by state interference, most NGOs will, by definition, not earn any future profits. However, an organization could claim the loss of future profits of an arm earning profits to fund the organization's other activities. Such a claim would need to demonstrate that future profits are not speculative.<sup>157</sup>

Some decisions indicate that not-for-profits may be able to claim for damage that is not financial. For example, the tribunal in the *Desert Line Projects v. Yemen* case awarded “moral damages” of U.S.\$1 million to a company because its executives “suffered the stress and anxiety of being harassed, threatened and detained by (Yemen security forces) as well as by armed tribes.”<sup>158</sup>

Any claimant under the Egypt – U.S. BIT will need to be well funded. Simply registering a claim at the ICSID will cost a claimant U.S.\$25,000<sup>159</sup> and each of the three arbitration tribunal members will charge hundreds of dollars an hour for their time.<sup>160</sup> BIT disputes often last several years, in which time lawyer, arbitrator and institution fees can amount to several million dollars<sup>161</sup> (although one recent award illustrates how BIT arbitration can be cheaper and only cost several hundred thousand dollars)<sup>162</sup>. Losing claimants are sometimes ordered to pay the entire fees of the winning

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situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty.”

<sup>155</sup> *Pope & Talbot v. Canada*, Damages Award, 31 May 2002 at para. 91.

<sup>156</sup> *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, Final Award, March 14, 2003.

<sup>157</sup> See, for example, *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Serketi v. Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, at paras. 310-315.

<sup>158</sup> *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 at para. 286. See also *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, at para. 333, holding that moral damages can be awarded “provided that the State’s actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and both cause and effect are grave or substantial.”

<sup>159</sup> ICSID Schedule of Fees, 1 January 2012, paragraph 1.

<sup>160</sup> See, for example, paragraph 3 of the ICSID Schedule of Fees, 1 January 2012, which provides that arbitrators can charge U.S.\$3000 per day.

<sup>161</sup> For example, the lawyer, arbitrator and ICSID fees in the *PSEG v. Turkey* dispute were U.S.\$20,851,636.62 (*PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Serketi v. Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007 at para. 352), although this amount is extraordinary.

<sup>162</sup> *Pantechniki SA Contractors and Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 at para. 103: “This case shows that competent lawyers on both sides of an investor-state dispute are able to represent their clients ably and efficiently without incurring vast expense. The Claimant seeks reimbursement of EUR 154,523; Albania’s corresponding claim is EUR 269,657. These amounts are but fractions of cost claims submitted in other ICSID cases.”

respondent state.<sup>163</sup> For example, one losing claimant was recently ordered to pay over \$15 million to Turkey,<sup>164</sup> although this was extraordinary. Even “victorious” claimants are not always awarded their legal costs,<sup>165</sup> which may diminish the attraction of arbitration over smaller claims.<sup>166</sup>

Even if a U.S. NGO successfully established that Egypt breached its obligations in the treaty, Egypt may refuse to provide the remedies ordered by the tribunal. Egypt may refuse to cease its act breaching the treaty or may refuse to undertake the actions necessary to comply with its BIT obligations. It is difficult to identify the recourse of a NGO in those circumstances. However, there is a debate as to whether the ICSID’s status as a World Bank agency might give added weight to political and diplomatic pressure on a recalcitrant state.<sup>167</sup>

Egypt could refuse to pay the compensation ordered by the tribunal. Other states have refused to pay compensation ordered in a BIT award. For example, Russia refused to pay the compensation to the German investor, Franz Sedelmeyer, for breaches of the Germany-Russia BIT.<sup>168</sup>

If the state does refuse to pay then the claimant can seek to enforce the award. The ICSID Convention requires states party to the Convention to enforce ICSID awards as if they were “a final judgment of a court in that State.”<sup>169</sup> By contrast, NGOs seeking to enforce ICSID awards in states not party to the ICSID Convention, must rely on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,<sup>170</sup> which allows courts in that state to refuse to enforce arbitral awards on a number of grounds.<sup>171</sup>

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<sup>163</sup> See, for example, *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part VI.

<sup>164</sup> *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 570.

<sup>165</sup> See, for example, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at para. 472; *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004 at para. 252.

<sup>166</sup> On costs generally, see Stephan Schill, “Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration,” 7 *Journal of World Investment and Trade* 653 (2006).

<sup>167</sup> Edward Baldwin, Michael Nolan, and Mark Kantor, “Limits to Enforcement of ICSID Awards,” 23(1) *Journal of International Arbitration* 22 (2006).

<sup>168</sup> See *Franz Sedelmeyer v. Russian Federation*, Award, July 7, 1998; Luke Eric Peterson, Contrary to Initial Reports, Russian Federation Deposits at Stockholm Arbitration Institute have not been Frozen, But Decision Expected Soon, *Investment Treaty Arbitration*, 12 October 2011.

<sup>169</sup> ICSID Convention, Article 54(1).

<sup>170</sup> Article III provides that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon ... .” A leading text explains that “[e]nforcement is normally a judicial process which ... gives effect to the mandate of the award. Enforcement may function as a sword in that the successful party requests the legal assistance of the court to enforce the award by exercising its power and applying legal sanctions should the other party fail or refuse to comply voluntarily. The type of sanctions available will vary from country to country and may include seizure of the award debtor’s property, freezing of bank accounts or even custodial sentences in extreme cases:” Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003), para. 26-12.

<sup>171</sup> New York Convention, Article V. The grounds for refusal to enforce include where a party was “unable to present his case,” the tribunal exceeded its powers conferred by the treaty and “enforcement of the award would be contrary to the public policy of that country.” NGOs may face the additional obstacle of the “commercial” reservation in Article I(3), under which states can declare they will only apply the Convention to disputes arising from relationships which are “commercial.” It is unclear whether a dispute under a BIT between an NGO and the host state satisfies this requirement.



