

INVESTOR-STATE DISPUTES: EGYPT

Part II: Investor-Side Dispute Avoidance and Mitigation

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KEY TAKEAWAYS FOR INVESTORS

- Legal savvy alone is not sufficient to secure favorable investment conditions, at investment inception or post-hoc.
- Successful investment/market-entry strategies require practical action customized for jurisdiction, industry, and asset class, at the due diligence, investment operation, and exit phases.
- Investors should familiarize themselves with broader legal, political and social environments, particularly where investments involve high visibility assets or public relevance (*e.g.*, providing goods or services to the public).

KEY TAKEAWAYS FOR INVESTORS

Practical Action Includes:

- **Understanding prior investor-state disputes, particularly those involving same or similar assets, industries, or issues (such as under labor laws or vis-à-vis labor groups).**
- **Take legal, political, and public relations risk management steps to avoid or mitigate the kind of scrutiny that can frustrate or raise the total cost of investment as a result of legal challenge.**
- **Ensure that all legal and administrative steps are satisfied and well-documented at inception and during operation.**

**See discussion of Omar Effendi and agricultural land investments.*

Investor-State Disputes

Egypt Snapshot

Egypt Investment Disputes (ICSID):

***Partial* snapshot**

Past and current disputes (before and per ICSID only):

- 18 total (1984-present)
- 7 pending cases
- 6 pending cases registered since March 2011

Post-Jan. 25th, spike in disputes and potential disputes

- Involving Arab investors (*e.g.*, Damac, Toshka)
- Claims and counter-claims involving Egyptian investors
- Present and prior interim gov't (PM Sharaf) negotiations to settle amicably pre-arbitration

Disputes Landscape: Characteristics and Potential Lessons

- INVESTMENT/ASSET TYPES

- “Champion” assets having broad real economy, social, historical significance, *e.g.*, Omar Effendi, land (agricultural and other development, key industries (gas, cement, cotton/textiles) .
- Associated with privatization of state assets lacking public support and magnified by, *e.g.*, post-sale labor violations/disputes, sales below market value, questionable legality/procedural integrity.

- INVESTOR TYPES (NATIONALITY)

- Egyptian (single and dual nationals)
- Arab (primarily GCC) (uptick post-February 2011)
- Other

Investor Interests

Dispute Avoidance and Risk Mitigation

Investor-State Disputes: Parties and Interests

AUDIENCES / PLAYERS

- Non transaction parties, including activists (domestic and foreign; *e.g.*, labor unions, NGOs, activist lawyers)
- Domestic media
- Government officials

STATE INTERESTS

- Preserve economic benefits
- Attract future investment
- Avoid reputational damage
- Avoid damages liability

INVESTOR INTERESTS

- Preserve economic value, minimize litigation costs, and avoid reputational damage in country or abroad.
- Avoid litigation/legal proceedings.
- Document and conduct transactions to prevail in legal proceedings or mitigate financial and qualitative cost.

DISPUTE AVOIDANCE & RISK MITIGATION

STEPS FOR INVESTORS

Negotiate, Structure, and Document investments, ancillary or subsequent transactions to obtain legally optimal investment treatment.

- Through comprehensive due diligence customized for context, at investment inception and after.
- Engagement with, or consideration of, constituencies other than government actors that can or have in the past influenced public perceptions of investments, leading to legal challenges.
- Satisfaction of all legal and procedural pre- and post-investment steps.
- Documentation of compliance with legal and procedural processes for internal purposes, government submissions, and future litigation (for admissibility and to withstand impeachment or other attack).

Manage investments to avoid disputes and mitigate the costs of disputes after they arise.

DISPUTE AVOIDANCE & COST-MITIGATION STEPS FOR INVESTORS

Understand the new landscape, post-2011:

- Transactions no longer are private matters between investors and high-level official actors. Dealings are discoverable at inception and post-hoc and subject to challenge.
- Investors must understand the broader landscape, beyond the letter of the law, and implement legal, business, and (where higher profile or larger investments are concerned) public relations strategies.
- Investors must take steps to engage with, or consider, perceptions of relevant constituencies— the public, advocacy groups, labor groups, business associations, indirectly related public entities.

DISPUTE AVOIDANCE & COST-MITIGATION STEPS FOR INVESTORS

- Procedural Integrity. Ensure that all procedural steps are satisfied, based on verified research/due diligence as to legal and regulatory requirements applicable to a specific investment type— *e.g.*, in a specific free zone, industry, under special law.
- Due Diligence. In addition to transactional due diligence, conduct adequate due diligence on intermediaries and service providers to ensure that, among other things, that association with parties (owing, *e.g.*, to prior involvement in controversial investment or perception as “insiders”) does not raise the risk of later challenge.

DISPUTE AVOIDANCE & COST-MITIGATION STEPS FOR INVESTORS

- **Review all applicable investment protections or preferences available under domestic law, bilateral treaty, or regional treaties.**
- **Build in contractual guarantees, covenants, and indemnification provisions that protect investor and investment where commercially viable and legally enforceable.**

DISPUTE AVOIDANCE & COST-MITIGATION STEPS FOR INVESTORS

- **Assess the costs and benefits of political risk insurance (private and government-backed), where appropriate for value, kind, and duration of investment.**
- **Be mindful that recourse for foreign investors will vary by country and the nature and history of the investment. Arab investors might have dispute resolution avenues not available to western investors, and vice versa.**

Thank You

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