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Topic: State Liability in Euro Arab ISDS – the Arab Perspective

My topic of today is looking at State liability from an Arab perspective, when discussing Euro-Arab Investor-State Dispute Settlement (ISDS).

The legal basis of ISDS is complex and varied, and is spread across the dispute resolution provisions contained in some 3000 investment treaties, in other international conventions (notably the ICSID Convention and the New York Convention), and arbitration rules. A 2012 OECD survey of ISDS provisions shows that the overwhelming majority of bilateral investment treaties provide for ISDS, as do practically all recent treaties. [1]

To address this topic, I will divide my presentation as follows: 1) I will first discuss the notion of State, 2) then turn to the notion of liability, then 3) remedies; 4) enforcement; 5) look at a new Arab perspective, and 6) conclude briefly.

1. **The notion of State** / the rules of attribution

ICSID tribunals have frequently awarded damages as compensation by reference to the rules of State Responsibility under general international law, relying notably on the International Law Commission's (ILC's) Draft articles on State Responsibility. [2]

As an example, I will refer to a 2008 case, where an Arbitral Tribunal decided an ICSIC arbitration brought by two Belgian companies against the Government of Egypt, which the companies tried to hold liable for investment treaty breaches. The dispute arose over a dredging contract issued by Egypt's Suez Canal Authority. The Tribunal found that the acts of the Suez Canal Authority (SCA) were not attributable to the State, and ultimately rejected all the claims in favor of Egypt.[3]

In this case, which I will call the Jan de Nul case for ease of reference, the main question was to determine whether the Suez Canal Authority (SCA) is a State organ pursuant to article 4 of the ILC articles, or an entity that exercises governmental authority pursuant to article 5 of the ILC articles. Should the SCA be a State organ under article 4, any of its acts would be attributable to the State. On the other hand, should the SCA be an entity pursuant to article 5, Egypt's liability will depend on

[1] OECD Investor-State Dispute Settlement Public Consultation 16 May to 9 July 2012, p. 8
[2] OECD report, p. 26
[3] ICSID Case No. ARB/04/13 of 2008; Jan de Nul N.V. and Dredging International N.V. vs. Arab Republic of Egypt

whether the SCA did exercise elements of governmental authority towards the Claimants at the relevant time. [4]

The ILC articles on State responsibility mentioned above have been embodied in Resolution A/56/83 adopted by the General Assembly of the United Nations on 28 January 2002. This resolution is considered as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which the Tribunal held to be applicable by analogy to the responsibility of States towards private parties.[5]

In order for an act to be attributed to a State, it must have a close link to the State. Such a link can result from the fact that the person performing the act is part of the State's organic structure (art. 4), or exercises governmental powers specific to the State in relation with this act, even if it is a separate entity (art. 5), or if it acts under the direct control (meaning: on the instructions of, or under the direction or control) of the State, even if being a private party (art. 8).[6]

- *Analysis of art. 4*

Art. 4 of the ILC provisions addresses "Conduct of organs of a State". It reads as follows:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

To determine whether an entity is a State organ, one must first look to domestic law. In the Jan de Nul case, the SCA was created by Law No. 30/1975. It appears that the SCA is not classified as a State organ under Egyptian law. Indeed, Art. 2 of Law No. 30/1975, embodying the Suez Canal Authority Statutes, states that "Suez Canal Authority is a Public Authority" and that SCA "enjoys an independent juristic personality."[7]

In its analysis, The Tribunal acknowledged that the SCA was created to take over the management and utilization of a nationalized activity. From a functional point of view, it can be said to generally carry out public activities. However, structurally, the Tribunal held that it is clear that the SCA is not part of the Egyptian State, as results

[4] ICSID Case ARB/04/13, para. 155
[5] ICSID Case ARB/04/13, para. 156
[6] ICSID Case ARB/04/13, para. 157
[7] ICSID Case ARB/04/13, para. 160

from articles 4, 5 and 10 of the Law No. 30/1975. These provisions insist on the commercial nature of the SCA activities and its autonomous budget.[8]

The Tribunal concluded its analysis of art. 4, by holding that the SCA is not an organ of the State, and that, as a consequence, its acts cannot be attributable to Egypt.[9]

- *Analysis of art. 5*

Art. 5 of the ILC provisions addresses conduct of persons or entities exercising elements of governmental authority.

For an act to be attributed to a State under art 5, two cumulative conditions have to be fulfilled:[10]

1. the act must be performed by an entity empowered to exercise elements of governmental authority;

2. the act itself must be performed in the exercise of governmental authority.

The tribunal held that there is no doubt that the SCA was and still is empowered to exercise elements of governmental authority. (..) It is common ground that for an act of an independent entity exercising elements of governmental authority, to be attributed to the State it must be shown that the act in question was an exercise of such governmental authority.[11]

The tribunal held that it must look to the actual acts complained of. In its dealing with Claimants during both the tender process and the performance of the contract, the SCA acted like any contractor trying to achieve the best price for the services it was seeking. It did not act as a State entity.[12]

Even though the Contract was awarded through a bidding process governed by the laws on public procurement, the tribunal held that what matters is not the "service public" element, but the use of "prerogatives de puissance publique" or government authority.[13]

The tribunal held that, although the SCA is a public entity empowered to exercise elements of governmental authority, the acts of the SCA toward the claimants are not attributable to the Egyptian State in this arbitration on the basis of article 5 of the ILC Articles, as they were <u>not</u> performed pursuant to the exercise of governmental authority. [14]

[8] ICSID Case ARB/04/13, para. 161
[9] ICSID Case ARB/04/13, para. 162
[10] ICSID Case ARB/04/13, para. 163
[11] ICSID Case ARB/04/13, para. 166 & 167
[12] ICSID Case ARB/04/13, para. 169
[13] ICSID Case ARB/04/13, para. 170
[14] ICSID Case ARB/04/13, para. 171

- *Analysis of art. 8*

Art. 8 of the ILC provisions addresses the conduct directed or controlled by a State.[15]

It reads: "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the effective control test. There being no evidence on record of any instructions that the State would have given to the SCA in relation to the acts complained of – the tribunal concluded in the Jan de Nul case that there can be no attribution of the acts of SCA to the State of Egypt under Article 8 of the ILC provisions.[16]

Concluding on the attribution of the acts of the SCA, the Tribunal held that the acts of the SCA towards the Claimants are not attributable to the State of Egypt.[17]

Conversely, in another ICSID case, ATA Construction Industrial and Trading Company v. Hashemite Kingdom of Jordan, the Tribunal upheld ATA's claim against Jordan. It is said to be one of the very few modern investment treaty cases that have found a violation by a State of its international obligations by the actions of its courts. – It would be interesting to hear more about this case from Dr. El Kosheri, who was ATA's nominee arbitrator in this case.[18]

2. **The notion of Liability**

A claimant seeking to claim under a BIT must not only demonstrate that an arbitration tribunal has jurisdiction to hear the claim, but must also demonstrate that the treatment is inconsistent with a treaty obligation.[19]

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[15] ICSID Case ARB/04/13, para. 172
[16] ICSID Case ARB/04/13, para. 173
[17] ICSID Case ARB/04/13, para. 174
[18] ICSID Case ARB/08/2 of 18 May 2010; see: "Jordan: ICSID Tribunal finds Jordan in Violation of its Investment Treaty Obligations", by J. Dingwall & H. Haeri, in International Arbitration Law Review, Issue 4, 2010.
[19] International Investment Treaty Protection of Not-for-Profit Organizations; Working Paper, Regional NGO Law Rapid-Response Mechanism, Supported by USAID; May 2008 update, (hereinafter: WP Regional NGO Report).

- *A description of the protections*

Most BITs contain eight provisions representing the core investment protections. Those are the provisions on:

a) Fair and equitable treatment or FET

This standard was discussed earlier today.

It should be noted that FET remains the most relied upon and successful basis for a treaty claim. An UNCTAD survey of 2009 gives a picture of the year 2008: a claim based on FET was addressed by the Tribunal in all 13 decisions on the merits rendered in 2008.[20]

Claims based on FET were rejected in 6 instances out of these 13 decisions, 3 of which involved an Arab state: LESI v Algeria[21]; Helnan International Hotels v Egypt[22]; and the Jan de Nul v. Egypt [23] where the Tribunal held that Egypt did not breach the standard of fair and equitable treatment, nor did it accept claimant's claim of denial of justice.

Tribunals accepted the FET claims in seven other cases, one of which was the Desert Line Production vs. Yemen[24], where the Tribunal found that the State had breached its obligation, by forcing the investor to accept an unfair settlement of its dispute with the State.

b) Full protection and security

In many cases, BIT provisions requiring fair and equitable treatment also make reference to the obligation to provide "full protection and security". This obligation potentially provides broader protection than provided by the non-binding standards found in international human rights agreements, such as the UN Declaration on Human rights Defenders.

At a minimum, the obligation to provide "full protection and security" requires the state to protect the investment's physical security. Tribunals have held that the State had an obligation both where they had injured an investment through its own actions, as well as against injury by private parties. An ICSID tribunal for example found that Egypt failed to provide full protection and security when it failed to prevent private parties

[20] UNCTAD report « Latest Developments in Investor-State Dispute Settlement », in IIA Monitor No. 1 (2009), p. 8.
[21] LESI v Algeria in ICSID Case ARB/05/3 - Italy Algeria BIT, Award 12 November 2008
[22] Helnan International Hotels A/S v. Egypt, ICSID case No. ARB/05/09, Denmark Egypt BIT, Award 7 June 2008
[23] Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt, ICSID Case ARB/04/13, Belgium Luxembourg Egypt BIT, Award 6 Nov. 2008.
[24] Desert Line Projects LLC v. Yemen, ICSID Case ARB/05/17, Oman Yemen BIT, Award of 6 Feb. 2008

taking over the investor's hotel. I refer of course to the ICSID case of 2000, Wena Hotels Limited v. Arab Republic of Egypt.[25]

Other Tribunals have given a 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.

c) Arbitrary impairment

A State's obligation to provide fair and equitable treatment may also oblige the State not to treat the investor in an arbitrary fashion. Several BITs even include a separate explicit provision protecting investors against arbitrary impairment of their operations. Tribunals have said a measure is arbitrary if it is "founded on prejudice or preference rather than on reason or fact"[26] or is a "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.[27]

d) National treatment

The national treatment obligation prevents States from treating foreign investors "less favorably" than local investors in "like situations" or "like circumstances".

A State clearly treats a foreign investor "less favorably" than local investors when the State intentionally discriminates against a foreign investor because of the investor's nationality.[28] It is less clear whether a State breaches the provision by effectively treating a foreign investor less favorably while pursuing a legitimate policy objective. This ties in with the recent concerns of States reflected in latest trends in BIT negotiations.

e) Expropriation

Almost every BIT requires States to pay compensation when they expropriate foreign investments. The precise protection provided by such provisions depends on the meaning of the two key words "investment" and "expropriation".

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[25] ICSID case ARB/98/4, Award of 8 December 2000 at § 84-95; see also WP Regional NGO Report, p. 14.
[26] Lauder v. Czech Republic, Final Award, 3 September 2001.
[27] WP Regional NGO Report, p. 15.
[28] Mexico's submission to the Methanex Tribunal: Methanex Corporation v USA, final award 3 Aug. 2005, at § 32; see also WP Regional NGO Report, p. 15.

Every BIT includes a definition of investment. This definition will invariably include tangible property, such as land and buildings thus protecting such property against expropriation.

In addition, almost every BIT also defines investment to include intangible property, such as contractual rights and intellectual property. BIT tribunals have found States breached BITs by failing to pay compensation for expropriating intangible property rights. In the case Middle East Cement Shipping and Handling Co SA v. The Arab Republic of Egypt, for example, Egypt was held to have breached the Greece-Egypt BIT by expropriating the investor's license right to import cement; Egypt had passed legislation proscribing cement imports three years before the investor's license was due to expire.[29]

The protection provided by expropriation provisions is also largely determined by the meaning of the term expropriation, which typically covers both direct and indirect expropriation. This issue will be discussed by another panel.

f) Observance of obligations

Most BITs contain a provision requiring the State to "observe" its obligations. Tribunals have disagreed at times over the scope of this provision. In particular, Tribunals disagree over the precise obligations a State must observe.

The obligations protected is 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[30], whereas others say only breaches through sovereign act breach the provision, as in the case Joy Mining Machinery Ltd v. Arab Republic of Egypt.

g & h) For lack of time, I will skip Free transfers and establishing investments, and review remedies.

3. **Remedies**

A tribunal finding a State breached its BIT obligations can, generally, order the State to:[31]

[29] Middle East Cement Shipping and Handling Co SA vs The Arab Republic of Egypt); see also WP Regional NGO Report, p. 17

[30] SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case ARB/02/6, 29 January 2004.

[31] WP Regional NGO Report, p. 25.

a) stop breaching its obligations;
b) perform a certain act in order to fulfill its BIT obligations;
c) compensate the foreign investor for any monetary damages suffered by the investor as a result of the breach.

The tribunal in the Desert Line Projects v. Yemen case awarded so-called "moral damages" of USD 1 million to a company whose executives "suffered the stress and anxiety of being harassed, threatened and detained by Yemen security forces, as well as by armed tribes".[32]

4. Enforcement

The State may refuse to provide the remedies ordered by the tribunal, it may also refuse to cease its act breaching the treaty or may refuse to undertake the actions necessary to comply with its BIT obligations. A State may also refuse to pay the compensation ordered by the tribunal. Then the claimant can seek to enforce the award. ICSID awards are easier to enforce than others. 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" – according to art 54.1 of the ICSID convention. By contrast, investors seeking to enforce non-ICSID awards, or 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.[33]

5. A new Arab perspective [34]

The remarkable and unprecedented political and social upheavals witnessed in several Arab countries in 2011, have had a tangible impact on treaty based claims against States, arising from the actions of governments and State entities both during and after the political events in the region.

Each of the States involved in the Arab Spring, with the exception of Lybia, has entered into dozens of these treaties; Egypt for example is signatory to one hundred BITs. 4 requests for arbitration against the Egyptian State were registered at ICSID in the 9 months period from March 2011. In comparison, there were only 2 cases against Egypt in the course of the previous 5 years. It is common knowledge that there are a number of other cases in preparation. Since march 2011, cases have been brought (or are about to be brought) under the Egypt-UAE, Egypt-UK, Egypt-Kuwait and Egypt-USA BITs, among others, - and in relation to investments in property development, textile manufacturing and the Egyptian energy industry.

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[32] Desert Line Projects v. Yemen, ICSID Case ARB/05/17, Award of 6 Feb. 2008, at § 286.

[33] WP Regional NGO Report, p. 27

[34] See « Commercial disputes after the Arab Spring », by C. Tevendale, 8 March 2012, treaty claims section.

The mentioned cases can be summed up as follows: the government has sought to revise the sale price reached with investors by the previous regime for the sale of land (Damac v. Arab Republic of Egypt); effectively renationalized an industrial asset privatized by the previous regime (Indrama Finance v. Arab Republic of Egypt); and withdrawn investment free zone status (Bawabet Al Kuwait v. Arab Republic of Egypt).

6. **Conclusion**

I would conclude as follows:

First, it seems that Arab countries in general and Egypt in particular are fighting claims with more success than in the past, having prevailed in a string of 5 ICSID claims up-to the Jan de Nul case.

Second, there is a growing awareness in the importance of properly negotiating BITs - these are no longer instruments prepared in haste to be signed at the occasion of a State visit, but are carefully negotiated texts, drafted by professionals of the field, who carefully weigh the implications of words used.

As mentioned in an earlier presentation, some examples given of policy options include

a) carefully crafting the scope and definition clause to promote and protect investments contributing to the host country's economic development;

b) including exceptions to protect human rights, health, labor standards, and the environment.

Looking outside the Euro Arab Box, I understand those are directions adopted by the USA and Australia. There is definitely food for thought.