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Omar Effendi vs. Union Fenosa: Corruption as a Transnational Public Policy Consideration

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CORRUPTION AS A TRANSNATIONAL PUBLIC POLICY CONSIDERATION

A Thesis Submitted by

Ahmed Badreldin

To the Department of Law

Fall 2021

in partial fulfillment of the requirements for

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DEDICATION

I proudly dedicate this thesis to my family members for their constant support and unconditional love. I am so lucky to have parents whose prayers and encouragement were the first incentive, and a wife whose love, support, and understanding were integrated parts of my success. I also dedicate this thesis to my lovely sons Badr Eldin and Bassel, wishing if this success would inspire them in their future.

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ABSTRACT

At the beginning of 2011, Egypt witnessed radical political developments that led to the emergence of a pressing tendency to adjudicate the collapsed regime's policies and practices. Shortly thereafter, the Egyptian State Council issued a number of judicial decisions that confirmed that the sale of the privatized governmental enterprises had been tainted by corruption. Crucially, the Court maintained that flagrant breach of law, regulations, and administrative orders that encompassed these transactions created serious suspicions about corruption committed by public officials and investors. It concluded that the existence of corruption, as a transnational public policy consideration, had deprived foreign investors of the opportunity to resort to international arbitration. Beyond that, it affirmed that its decisions aimed at protecting the state's wealth and economy, and encouraging serious investments. However, when Egypt, upon nearly identical circumstantial evidence invoked the issue of corruption as a public policy consideration before ICSID arbitration, it was discarded due to lack of evidence. This paper compares the position of both the national court and the international arbitral tribunal when allegations of corruption, as a transnational public policy consideration, are raised. The study believes that the Court reversed fundamental legal principles of the national law, and maneuvered the concept of transnational public policy to produce a plausible, yet not sound conclusion in the realm of both the national judicial system and international arbitration. Further, this paper suggests that the court's attempt to safeguarding the Country's public wealth actually jeopardized justice, the state's economy, and its investment credibility.

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I. Introduction

Transition to market economy was pursued by the pre-2011 regime starting from the 1990s, this aim was sought through a structural adjustment program that targeted the liberalization of the market, privatization of public-owned enterprises, and attracting direct foreign investments.[1] This radical reform required legislative and judicial structural reform as to substantiate the investment environment, and to mitigate investors' worries about the security of their ownership rights.[2]

Legislative restructure could be referred to by enacting new laws aimed at guaranteeing and protecting investments from expropriation and nationalization, and providing accessible different disputes settlement mechanisms. This attempt can be best represented by law no. 8/1997.[3] Furthermore, on the judicial level there was discernible autonomous granted to the Supreme Constitutional Court with regard to the power of judicial review as a way to provide credible commitment to investment protection.[4]

Applying the policy of privatization led to transferring of many industrial and commercial entities' ownership from governmental-affiliates to national and foreign investors. Meanwhile, this policy triggered strong criticism, especially with regard to criteria of evaluating the privatized assets financially. It usually have been stigmatized as corrupt.

However, these critiques were retained beyond the judicial purview. As per usual, contracts concluded in accordance with privatization included arbitration clauses which enabled the parties to avoid resorting to domestic courts. This

[1] Khalid Ikram. THE POLITICAL ECONOMY OF REFORMS IN EGYPT: ISSUES AND POLICYMAKING SINCE 1952. The American University in Cairo press. 202, (2018).

[2] Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 13, 285, (2014).

[3] Law no. 8/1997 on Guarantees and Incentives of Investment, been Published on 11 May 1997, and was cancelled recently by the Law no. 72/2017.

[4] Moustafa, *supra* note 2, at 285.

mechanism of settling disputes was also available through other instruments, including the investment law.[5]

It was until 2011 when Egypt witnessed radical political movements that caused a whole collapse of the regime. Suddenly, a common tendency was expressed to question and to adjudicate all the previous regime's practices that were exercised for 30 years. This tendency was manifested in media as well as in courts.

As a result, there were a number of lawsuits initiated by Egyptian activists, and welcomed by privatization opponents before the State Council's administrative Court,[6] requesting the annulment of the sale contracts of privatized entities.[7] Surprisingly, the Court issued a number of identical judgments which, *inter alia*, rendered these contracts of privatized enterprises null and void.

In fact, the Court reversed fundamental principles of civil procedural law, administrative law, criminal law, and arbitration law, in addition to the inherent rules of international arbitration. In addition, it intensely exaggerated the significance and the national value of the privatized enterprises, and expressed its dissatisfaction with the methods employed to dispose it. In effect, it affirmatively argued that there was strong suspicions of the existence of corruption in concluding the privatization contracts, so it charged senior public officials, as well as the investors who bought the privatized enterprises, of being corrupt.

Inferring that these decisions contradict intrinsic legal principles, the Court defensively warranted its conclusions, so it used emotional and patriotic statements to decide on uncontested subject matters in these cases. Indeed, one of the most crucial

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[5] Law no. 8/1997, *supra* note 3. Article 7 reads as follows: "Investment disputes in respect of the implementation of the provisions of this law shall be settled in a manner to be agreed upon with the investor or within the framework of the agreements in force between [Egypt] and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of law no. 90 of 1971, where such Convention applies, or according to the Arbitration law no. 27/ 1994, or by arbitration before the Cairo Regional Center for International Commercial Arbitration."

[6] The State Council is an independent judicial body. According to article 140 of the 2014 Constitution it is exclusively competent to adjudicate in administrative disputes, disciplinary cases and appeals, and disputes pertaining to its decisions. It is also solely competent to issue opinions on the legal issues of bodies to be determined by law, review and draft bills and resolutions of a legislative character, and review draft contracts to which the state or any public entity is a party. Other competencies are to be determined by law.

[7] Reference here is made to the investment circuit of the Administration Court to which all the decisions mentioned in this thesis are attributed. (*hereinafter* the Court)

areas in these decisions was the declaration that *all* the investors to whom the privatized entities have been sold have no right to resort to international arbitration. The Court contented that due to the blatant breach of law and regulations these contested contracts were *definitely* concluded in corrupt methods. It further purported that corruption is a severe consideration that does not entail protection under the auspice of International Arbitration.

This thesis analyzes case law in an area that is confused, and in conflict with the constituent principles of Egyptian law and international arbitration. It studies the legal basis of the Court's conclusion in a series of identical decisions, in which it found that sale contracts of privatized companies were null, void, and were concluded corruptly. Next, it investigates the Court's argument in respect of the inadmissibility of potential claims of the investors whose investments were expropriated as a result of its judgments before the ICSID arbitration due to the said corruption.

The thesis claims that the Court's conclusion contradicts the most constituent legal principles of the Egyptian criminal law, civil law, and arbitration law. Also, it criticizes the Court's exploiting of the concept of "transnational public policy" to reveal the fallacy of its understanding to what constitutes corruption in light of international arbitration practices.

This article believes that the Court was motivated by patriotic inspirations that synchronized with the political circumstances which preceded its judgments. Thus, it reacted in accordance with, and under the influence of the then historical and societal context to protect the nation's public wealth. It proposes that the Court intervened to tackle the flagrant breach of law that reigned over the sale contracts of privatized enterprises, and to encounter its odd results. Nevertheless, this paper explains that the Court's attempt led to delivering poor judgments that, in fact, were inconsistent with law to the same extent.

It eventually emphasizes that the Court's position did not achieve what it aspired, on the contrary, it demolished the purpose of the Egyptian legislative's aim to protect investment from expropriation, so it jeopardized Egypt's economy and investment credibility. In effect, it illustrates that the Court's activism was done at the expense of justice.

This thesis criticizes the Court's stance because its decisions are in conflict with domestic laws, so it does not suggest that the contested contracts were concluded in accordance with law. It also does not suggest that the judgments are wrong because the international arbitration's criteria are correct. It rather criticizes the Court's rationale because it argued that it applies these practical standards and criteria, but in fact, it maneuvered these concepts to fit in its conclusion.

In addition, the thesis does not target to analyze all the procedural and substantive matters of the Court's decisions. It focuses only on areas where the Court placed itself in the position of the national criminal and civil judges on the one hand, and of the international arbitrators on the other, to decide upon their competence and jurisdiction, and on behalf of them. However, as the Court's rationale was widely criticized for other legal irregularities it produced, yet, only certain issues will be addressed to the extent that serves to connecting the dots between the Court's legal rationale and its conclusion, but will not be exhaustively examined.

For this purpose, two main models will be demonstrated. The first model is the lawsuit no. 11492/ 65 which became publicly known as "Omar Effendi case".[8] The second model is the arbitral award in the ICSID case no. ARB/ 14/ 4 which was initiated by a foreign investor against Egypt for requesting damages due to Egypt's violation of its obligations under a Bilateral Investment Treaty.[9]

The relevance of these two models stems from two main facts. First, the *Omar Effendi* decision is the first paradigm that was imitated in a series of subsequent identical decisions rendered by the same Court. In fact, its rationale and perception of corruption was adopted and cited by Egypt's defense in *Union Fenosa* as to prove the alleged corruption in procuring the contested contract. Second, the Tribunal's process of analyzing the adduced evidence in *Union Fenosa* signifies how corruption in

[8] The case No. 11492/ 65 was initiated on 21-12-2010 before the investment circuit of Cairo Administrative Court at State Council by an Egyptian activist called Hamdi Al-Fakharani. (*hereinafter* Omar Effendi). Though it is beyond the purpose of this study to furnish an exhaustive detailed legal commentary on all the procedural and substantive issues raised in each model, yet, a brief overview of their facts and most crucial legal issues will be presented in chapter one.

[9] UNIÓN FENOSA GAS, S.A. ARAB REPUBLIC OF EGYPT ICSID Case No. ARB/14/4. Final Award on 31-8-2018. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10061.pdf. Last accessed 24-3-2021. (*hereinafter* Union Fenosa)

investment contracts is administered in international arbitration practice by refuting the Court's rationale in the *Omar Effendi* decision.[10]

This thesis is divided into four chapters. The first chapter demonstrates the two main models under examination, their key facts, allegation of corruption, and how the Court and the Tribunal dealt with such an allegation.

Chapter two studies the national legal basis of the *Omar Effendi* decision. This process aims at analyzing the legal and factual considerations through which the Court decided that the contested contract was concluded corruptly. This chapter serves to enumerate the legal faults that the Court made at the expense of the well-established legal principles of the Egyptian law. It then links this stance with employing a non-pure legal analysis to decide on other uncontested subject matters, which is the inadmissibility of contracts of corruption before the ICSID arbitration in light of the concept of transnational public policy.

Chapter three presents the concept of transnational public policy. This explanation serves to understand what constitutes corruption in the realm of international arbitration in public procurement contracts, and why it became widely perceived as transnational public policy. Next, this chapter shows how corruption is administered in international commercial arbitration and in ICSID arbitration. It further manifests the arbitrators' attitudes towards corruption, and their evidence gathering and evaluating process.

The last chapter is devoted to assessing the *Omar Effendi* decision. It comprehensively compares between the Court's and the Tribunal's rationale as with regard to the administration of corruption in investment contracts, this comparison also extends to include two other relevant ICISD cases. The assessment further continues to evaluate the Court's argument with regard to safeguarding the nation's

[10] It is critical to refer here that the major limitation with the award of *Union Fenosa* was the unavailability of some information and facts of the case due to confidentiality, the Tribunal recorded that "the Respondent requested that the Claimant withdraw from the record certain document filed with the Claimant's Rejoinder Memorial on Jurisdiction and Admissibility… The Respondent argued that these documents constituted confidential state secrets not subject to disclosure under Egyptian law." *Id*, at 8, part 1, para. 1.50

public wealth on the one hand, and the results of this decision on the State's economy and individuals' rights and interests on the other.

It eventually purports that the Court failed to achieve what it aspired. Its activism led to delivering a poor judgment that is inconsistent with law, affected the economy negatively, jeopardized the Country's investment credibility, and conflicted the legislature's aim. It proposes that the Court would have produced less-harmful outcomes if it has been applied the law properly.

II. *Omar Effendi* and *Union Fenosa*: Raising the Question of Corruption

This chapter presents two models of analysis to the issue of corruption as a transnational public policy consideration in international investment contracts. These models illustrate the different outcomes that both the Egyptian State Council and the ICSID arbitration reached with regard to the perception of obtaining contracts of corruption.

The first model concerns a lawsuit brought by an Egyptian activist against a Saudi investor and other public officials concerning the Omar Effendi Company for the annulment and cancellation of the Company's sale contract concluded between the investor and an Egyptian governmental affiliate.[11] The second model concerns an ICSID arbitration case initiated by a Spanish investor against Egypt concerning the Claimant's investment in Egypt (gas liquefaction plant) for requesting damages resulted from unlawful measurements that resulted in the plant's complete shut-down.[12]

A. *Omar Effendi* Lawsuit

The *Omar Effendi* lawsuit is one of several cases concerning the annulment of privatization contracts; yet, the Court's decision in *Omar Effendi* is the first one that affirmatively declaring that contracts of sold privatized corporations were concluded corruptly.

On December 21st, 2010, *Omar Effendi* lawsuit no. 11492/ 65 was filed by the claimant before the Court, petitioning for the cancellation and the annulment of the sale contract of the Omar Effendi Company.

The claimant argued that the government had approved the sale of the company to a foreign investor in flagrant violation of the bidding law, and for a much lower price than the real value. In addition, the buyer had breached fundamental contractual obligations, such as unfairly dismissing workers.

[11] *Omar Effendi*, *supra* note 8.

[12] *UNIÓN FENOSA, supra* note 9.

On May 5th, 2011 the Court delivered its verdict, *inter alia*. It annulled the contract, cancelled the related governmental orders and procedures, and set aside the arbitration clause included therein.

1. Factual Background

An understanding of the company's history and how it led to this outcome illustrates its historical and economic heritage value. The Omar Effendi Company is one of the oldest and largest Egyptian giant department stores. Its popularity amongst Egyptians is due to its long history as the first chain retail store with 82 branches all over the country.[13]

It was originally established under the name of "Orosdi Back" in the middle of the nineteenth century by a family with an Austrian-origin family. In 1921 it gained its current commercial name "Omar Effendi" after ownership was transferred to another Jewish-Egyptian merchant.

By 1957, the company was nationalized along with many other foreign and Egyptian-owned companies. In 1967, Omar Effendi became an Egyptian publicly company owned as a government affiliate.[14] Its ownership was later shifted to the Holding Company for Building and Construction, and finally to the National Company for Building and Construction (*hereinafter* NCBC).

By the 1990s, Omar Effendi's condition had changed again. The nationalization of the company, similar to other entities, did not lead to any accomplishment. Its iconic status in the first half of the last century dissipated under poor management becoming a burden on the State's economy.

As a result of the failure of managing and operating publicly-owned corporations, the government decided to change its economic policies with regard to the entities it owned, and the policy of *laissez faire* was adopted. Upon the implementation of this new paradigm, the succeeding Egyptian governments started to privatize various categories of companies that were owned by their affiliates. In the

[13] *Omar Effendi*, *supra* note 8. https://omareffendi.com.eg/?lang=en&module=page&param1=history. Last accessed 1 March 2021.

[14] Republican Decree no. 544/ 1967, been published on 18 February 1967.

case of *Omar Effendi*, the Ministerial Committee for Privatization announced on 1 January 2001 its decision to sell 90% of the company's shares.[15] The decision was approved by the Cabinet on 6 January 2004.

On 11 November 2005, the NCBC announced the terms of the sale and the procedures of the transaction, and on 4 April 2006, one sole offer was made by a foreign investor for 90% of the company. After the approval of the Committee and the Cabinet, on 2 November 2006, the sale contract of 90% of the Omar Effendi Company was concluded between the NCBC and the foreign investor.

Two incidents had been occurred before this lawsuit has been filed, and should be mentioned before stepping forward, as each of them has its impact on the propriety of the *Omar Effendi* decision. First, during the process of evaluating the company's assets before the sale, the Public Prosecution had investigated a complaint raised by one of the parties to the lawsuit, alleging potential criminal acts with regard to the evaluation process. The Public Prosecution ultimately decided that there was no dissipation of the public wealth, and the case was closed on 21 March 2006.[16] This decision was affirmative in negating the criminal activity in conducting the evaluation process of the company.

Second, after concluding the now-contested contract, the buyer filed case no. 583/ 2008 before the Cairo Regional Center for International Commercial Arbitration (CRCICA) to seek an annulment of the contract on the basis of the breach of the seller's contractual obligations. The arbitral tribunal delivered its award on 10 November 2010 and rejected the plaintiff's claims.

2. The Court's Rationale

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[15] On 20 August 2000, the then-prime minister issued decree no. 1765/ 2000, been published on 30 August 2000, that established the Ministerial Committee for Privatization (*hereinafter* the Committee). The *Committee* was constituted of 19 ministers in addition to the Central Bank chief. It was generally entitled to study all the related matters with regard to the process of privatization, including determining which assets and companies to be privatized, and the value of each transaction. The recommendations of the Committee were to be raised to the Cabinet monthly.

[16] *Omar Effendi*, *supra* note 8, the investigation of the Egyptian Public Prosecution no. 18/ 2006, filed on 5 March 2006.

On May 5th, 2011 the Court concluded that the contract under examination was null and void. This conclusion was reached according to the following findings:

First, the Court approved the plaintiffs' capacity to initiate the lawsuit as Egyptian citizens, as they were constitutionally entitled to resort to the state's judiciary to examine the legitimacy of the sale of the state's public properties.[17]

Second, the Court affirmed its competence to judicially review the contract's legitimacy. It referred to the administrative nature of the contract that was concluded upon the fulfillment of the governmental approvals.[18] It follows that the Court raised, *ex officio*, the annulment of the arbitration clause included therein on the basis of the prerequisite of article 1 (2) of the Egyptian Arbitration law.[19] Having regarded this prerequisite as a public policy consideration, the court rendered the arbitration clause null and void.

Third, and most importantly, the court enumerated severe violations to the law, regulations, and the requirements of the policies designated for the implementation of privatizing the company. The violations were based on three major grounds.

The first posited that the entire evaluation process of the company's assets had been intentionally manipulated. This involved the provision of misleading financial figures that drastically degraded the real value of the company.

The second asserted that other assets, including real estate properties and entitlements, were excluded from this erroneous evaluation process, as they were simply not offered in the transaction as per the decision of the Committee. However,

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[17] Based upon article 6 of the then-Constitutional declaration, that mirrors article 33 of the 1971 Constitution, which authorized all citizens to support and protect the public wealth.

[18] The Court interpreted the plaintiffs' requests as to the cancellation of the Committee's decision dated September 25th, 2006 that approved the recommendation of the sale of 90% of the Company and all its related consequences which involve the sale Contract between NCBC –as a deputy to the ministry of investment- and the foreign buyer. The Court further explains that the sale occurred due to the delegation of the competent governmental body. Accordingly, all the approvals and the sale contracts are in fact administrative decisions subject to the Court's competency.

[19] This sub-article reads as follows: "With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached with the approval of the competent minister or the official assuming his powers with respect to public law entities. No delegation of powers shall be authorized therefrom."

the contract of sale included all these assets and entitlements. In other words, it was given to the buyer for free.

Finally, in order to accomplish the transaction at any cost, the Committee accepted the sole and remarkably low offer by the buyer. Accepting an offer that was presented had no competitors,[20] and strikingly less than that "falsely" determined was a flagrant violation to law, regulations, and the stipulated criteria to privatize the company.

3. Raising the Question of Corruption

The findings in *Omar Effendi* were a judicial review not only of the legitimacy of a contested contract, but also the legitimacy of all other contracts concluded in accordance with privatization policy.

More specifically, the decision in *Omar Effendi* was not one-of-a-kind. Indeed, this judgment was one of a series of similar decisions that targeted the annulment of numerous similar contracts.

For instance, a few days after the decision of *Omar Effendi* had been rendered, another lawsuit was filed before the same Court which related to the sales contract of the Tanta Linen Company.[21] On September 21st, 2011 the Court delivered its verdict. It, *inter alia*, annulled the sale contract, and set aside the arbitration clause included therein. On the same day, the same Court gave the exact same conclusion on a third lawsuit annulling the sale contract of the Misr Shibin El Kom Textile Company.[22]

These lawsuits are only a sample of similar cases which share common characteristics.[23] First, the claimant is an Egyptian citizen who is not a party to the

[20] Article 15 of law no. 89/ 1998 that governs bids sets out that the bid may be cancelled if a sole offer is presented even if fulfilled the transactions' requirements. Also, article 127 of the executive memorandum exceptionally grants the authority to accept the sole presented offer if only it is in conformity with the transaction's conditions.

[21] lawsuit no. 34248 of the judicial year 65, (*hereinafter* Tanta linen). It had been filed on 21 May 2011 and brought before the same circuit.

[22] lawsuit No. 34517 of the Judicial year 65, (*hereinafter* Misr Shibin Textile). It was initiated before the first instant of the administrative court at Monufia Governorate on September 26th, 2010, which decided to submit it to the Investment Circuit at the Administrative Court at Cairo.

[23] This list extends to include lawsuit no. 37542 of the judicial year 65 concerning the Nile for Cotton paring Company, the Court delivered its decision on 17 December 2011, and the lawsuit no. 40510 of the judicial year 65

contract under question and may not even have a legal relationship with the sold entity. Second, the respondents are ex-public officials whose approvals were the basis of the contested contract, in addition to the buyer, who is in most cases a foreign investor. Finally, all of the cases involved a formerly government-approved contract.

Just as the case is in the *Omar Effendi* decision, the Court highlighted the corruption that encompassed the entire transaction. Thus, it broadly explained how corrupt the practices were, how flagrantly the law had been breached, and how the state's wealth had been dissipated.

For example, the Court affirmed that the process by which the company's value had been estimated was tremendously deceptive, based on no legal or factual grounds, and led to an assault on the public wealth. It also criticized the complacency shown in the transaction's terms and conditions as well as the provisions of the contract. It further explained that the government conducted the privatization of the enterprise as if it was an abomination that had to be purified.

4. Consequences of suspicions

Based on these assumptions and suspicions, the Court charged the investor of being an integral part of this corruption. Surprisingly, it went even further by declaring *ex officio* that this investor was not entitled to resort to international arbitration under the realm of the Convention on the Settlement of Investment Disputes between States and National of other States (*hereinafter* Convention).

This conclusion is constituted on two bases. First, the Court argued that the contested contract did not refer to submitting its parties' disputes to the arbitration before the International Centre for Settlement of Investment Disputes (*hereinafter* ICSID).[24] Second, the Court asserted that this corrupt investor has no right to resort to the ICSID arbitration. It cites the principle in *World Duty Free Limited vs. The Republic of Kenya* (*hereinafter* WDF vs. Kenya) whereby "claims based on contracts

concerning Elnasr for steam Boilers Manufacturing Company, the Court delivered its decision on 21 September 2011.

[24] ICSID Convention, Regulations and Rules. Washington, D.C.: International Centre for Settlement of Investment Disputes, 2003. Available at: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf. Last accessed on 25 March 2021.

of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[25]

B. Union Fenosa Gas vs. Arab Republic of Egypt

The Tribunal's award in *Union Fenosa* mirrors how the allegation of corruption in obtaining contracts of investment is analyzed and administered in the ICSID arbitration. This award highlights the process of analyzing the adduced evidence and its relevance to prove the allegation of corruption.

This ICSID case no. ARB/14/4 was filed by a Spanish investor (*hereinafter* Claimant) against the host state (*hereinafter* Egypt) for requesting damages due to Egypt's failure to afford the protections granted to the Claimant's investment by the Bilateral Investment Treaty (*hereinafter* BIT).[26]

This dispute arose under the Bilateral Investment Treaty between Spain and Egypt, in which the Claimant's investments allegedly had been influenced due to the host state's acts and omissions that breached its substantive obligations under the Treaty. The investor initiated the claim before the ICSID arbitration. The arbitral Tribunal held that Egypt has violated its obligations under the Fair and Equitable Treatment standard according to the Treaty, rendering it liable to the Claimant, and imposing a sum of US$ 2.013.071.000 as compensation.

1. Factual Background.

A brief introductory to the context through which the dispute arose helps to understand the relationship between the parties. On November 3rd, 1992 the Kingdom of Spain and the Arab Republic of Egypt signed the agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and Egypt (*hereinafter* the Treaty), and it entered into force on April 26th, 1994.

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[25] *World Duty Free Company Limited* v. *The Republic of Kenya,* ICSID Case no. ARB/00/7. 4 October 2006. Final Award. (*hereinafter* WDF vs. Kenya).

[26] *UNIÓN FENOSA, supra* note 9.

Under its realm, the Sale and Purchase agreement (*hereinafter* SPA) dated August 1st, 2000 between a Spanish enterprise, later assigned to the Claimant as a buyer, and an Egyptian corporation as a seller. The Claimant's investment in Egypt related to the Damietta natural gas liquefaction plant, concerning the liquefaction, shipping, regasification, and commercialization of natural gas.

The dispute arose as a result of Egypt's failure to afford the protections granted by the Treaty. The Claimant's main ground was that its investments had suffered and had continued to suffer significant harm as a result of decisions attributable to Egypt to curtail and cut the supply of natural gas to the plant, which eventually resulted in a complete shut-down for lack of a gas supply. According to the Treaty, Egypt's obligations generally include the protection of the Claimant's investments against unjustified or discriminatory measures. The Treaty also grants the Claimant the right to resort to one of several means of dispute settlement mechanisms, including the ICSID.

2. The Question of Corruption

In an attempt to challenge the arbitral Tribunal's jurisdiction, Egypt contended that the Claimant's investment was not protected under the Treaty and the ICSID Convention due to the existence of corruption. An investment made corruptly does not qualify for protection under the laws of Egypt, and under the Treaty as a matter of international law.

Stressing the wording of the treaty with regard to conducting investments in compliance with Egyptian law, Egypt argued that the Claimant's investments were procured through corrupt and illegal practices to which the Claimant was a party. Egypt constituted its claim upon three separate acts of corrupt conduct, all of which were attributed to the Claimant and its associated companies.

First, the selection of the subcontractor to build the plant was a process that was riddled with corruption. The Engineering, Procurement, and Construction contract (EPC contract) was awarded to a joint venture consortium led by a company whose bid was 50,000,000 USD higher than its nearest competitor. The winning company's CEO later pleaded guilty in the USA to violations of the US Foreign

Corrupt Practices Act for bribing Egyptian Government officials in connection with an "unnamed Egypt liquefied natural gas project."[27]

The second act of corruption involved the Claimant's engaging of a friend of then-President of Egypt Hosny Mubarak who publicly stated that he had used his personal connections in the government for the Claimant's benefit.

The third, and most important act, concerning the Claimant's engaging an Egyptian businessman who had genuine connections with the then-Minister of Petroleum. The Claimant hired him as an "agent" or "intermediary" to use his illicit influence on the then-Minister to steer the Damietta project towards the Claimant. Egypt contended that the project was awarded to the Claimant upon the intermediary's influence without a tender process. According to Egyptian law, obtaining such a project has to be done through an open and competitive bid process, however, it was unilaterally approved by the then-Minister. Egypt, on this particular point, cited the *Omar Effendi* decision.

Furthermore, Egypt argued that the Claimant's association with this intermediary was not a true business partnership. The latter's contribution to the project was a total of 6.88 million USD which was later sold to the Claimant's associated company, a contribution that was nothing more than money funneled to him in exchange for his personal connections and back-channel influence. All three of these acts reflected corruption on the part of the Claimant whose business and contract was obtained corruptly, therefore, does not qualify protection according to international public policy.

3. The Arbitral Tribunal's Rationale

The Tribunal's rationale is characterized by closely scrutinizing the adduced evidence individually and collectively. Its starting-point emphasized the general principle that investment made corruptly by the investor does not qualify for protection as a matter of international public policy, of Egypt's law, and of the Treaty.

[27] *Id.* At time, there was only another project in Egypt, to which that company had no involvement.

In addition, the Tribunal asserted that Egypt bears the legal burden and standard of proof for its allegations of corruption. Beyond that, as corruption is rarely proven by direct convincing evidence, the Tribunal believed that the standard of proof remains "the balance of probabilities" that depends upon an accumulation of circumstantial evidence.

The Tribunal first addressed the allegation of corruption related to the awarding of the EPC contract. The Tribunal, assuming that the CEO's conviction in the US did indeed relate to the Damietta Project, found no "evidential materials" that linked the Claimant *per se* with such acts of corruption attributed to the CEO.

The Tribunal, next, adopted the same attitude as it had concerning the allegation of the intervention of the close 'confidant' of the then-President of Egypt in the project. It found that Egypt presented no proof that the Claimant was involved in the negotiations of the SPA through him.

Finally, the Tribunal examined the most crucial allegation of corruption raised by Egypt. It related to the role of the Egyptian businessman, as allegedly being an intermediary, and whose influence on the corrupted public officials led to the granting of the project to the Claimants' associations

The Tribunal acknowledged at the outset that this businessman, along with the then-Minister of Petroleum, at the time of the proceedings, was under investigation by the Egyptian public prosecution in connection with the corruption surrounding the Damietta project.[28]

In addition, it also realized that he, as well as his family-owned company which was also connected to the preliminary business of the project, had very limited experience in the field of this complex project. This limited experience cannot plausibly explain the Claimant's choice of him as a local partner for the project. Moreover, the Tribunal noted that several payments received by this Egyptian

[28] On 27 October 2016, the Court of Cassation found the ex-Minister, and other public officials involved in the case, not guilty. Case No. 2487 of judicial year 86. Available at https://manshurat.org/node/30848. Last accessed 26 March 2021. The said businessman was not involved in this case, yet, he was convicted of credit fraud and sentenced to three years' imprisonment. https://www.masrawy.com/news/news_egypt/details/2012/4/28/121284 Last accessed 26 March 2021.

partner's company seemed overly generous. Above all, the Tribunal believed that this partner was not a net source of capital for the project, nor did he provide any funding.

Acknowledging all these facts, the Tribunal viewed this businessman's role in the project visibly from the outset. His involvement with the Claimant in the project was publicly identified for the Egyptian decision-makers. In the Tribunal's view, this partner was chosen to act as a lobbyist with access to Egypt's decision-makers:

> Access to government power can be a valuable asset to bring to a project involving the purchase of natural resources from the State or State entity, particularly when such natural resources comprise highly regulated sectors of the economy controlled by the State. Different States have a variety of standards governing the propriety of taking advantage of such access; lobbying can take many forms; and a paid lobbyist is not necessarily committing a crime or other impropriety.[29]

Hence, the determinant question is whether this partner was only acting as a lobbyist with access to the Egyptian decision-makers. The Tribunal found, upon the evidence adduced, that he did not act as a covert peddler of influence; it found no evidence of any back-channel influence. In other words, corruption is not established since there was no proof of any monies received by a senior decision-maker through this partner nor bribe paid or promises made. In light of the fact that neither this partner, nor any of the public officials had been prosecuted by the Egyptian judiciary for criminal conduct in regard to the project, the allegation of corruption could not be accepted.

Moreover, the Tribunal points out that concluding the contract in contradiction of the national procedures as regards a public bid cannot be taken as proof of corruption. In fact, the contract had been ratified and even amended several times after its first conclusion and approved by the Egyptian Cabinet without raising the issue of incompatibility with Egypt's law.

The Tribunal finally argued that the allegation of corruption on the part of the Egyptian partner was not frivolous, but, the evidential

[29] *Union Fenosa*, *supra* note 9, Para 7.101.

circumstances made by Egypt did not suffice without proof. The Tribunal asserted that:

> Suspicion is not equivalent to proof. Unanswered queries may have innocent explanations, not amounting (in the absence of explanations) to proof of corruption. With hindsight, what business people agree not infrequently defies logic or common-sense to non-business people, again without amounting to proof of corruption. The legal burden of proving corruption rests upon the party alleging corruption; and it is not discharged by placing the burden on the adverse party to prove the absence of corruption.[30]

Thus, the Tribunal found that upon the insufficient evidence of corruption against the Claimant, the Respondent's allegation of corruption was dismissed.

C. Concluding Remarks

The demonstration of the abovementioned two models reveals a number of facts. While a comprehensive comparison between the Court and the Tribunal's position with regard to the administration of the issue of corruption in investment contracts will be held in the fourth chapter, yet, enumerating these facts serves to point out areas of examination.

First, On the one hand, the Court believed that privatization of publicly-owned entities led to the dissipation of the State's wealth, so it invoked *ex officio* issues of corruption and inadmissibility before the ICSID to substantiate its position that targeted retaining the sold assets. On the other hand, the Tribunal in *Union Fenosa* only dealt with the challenges invoked before it and in light of the case presented.

Second, The Court viewed that violation of national laws and regulations encompassed the sale contract as evidence of collusive corruption committed by the public officials and the foreign investor. On the contrary, the Tribunal in *Union Fenosa* rejected the allegation of corruption after many local official approvals had been obtained for the contested contract over more than ten years.

[30] *Id*. Para 7.113.

Likewise, The Court insisted on accusing public officials of being corrupt due to its own belief in their criminal liability. This standpoint ignored the results of previous criminal investigations which ended without charges. But the Tribunal found the allegation of corruption as not legally plausible since the Egyptian authorities did not charge the alleged intermediary or any other public official of being corrupt in relation to a matter that was directly related to the project.

Chapter two will address the domestic legal basis through which the Court in *Omar Effendi* reached its conclusion with regard to the nullity of the contested sale contract due to flagrant breach of law, public officials' criminal liability, and the inapplicability of the arbitration clause.

III. The Legal Basis of *Omar Effendi*

The Court in *Omar Effendi* found the sale contract of the enterprise to be corrupt, and accordingly rendered it null and void. In order to reach this conclusion the Court had to address several procedural and substantive matters.

In its efforts to deal with the legal irregularities that led to that contract, the Court made several legal faults in its analysis.

I argue that the Court reversed numerous well-established principles of the Egyptian legal system and its domestic public policy considerations, as well as longstanding Egyptian judicial precedents. I further connect this methodology with the mechanism that the Court adopted to defend its stance and to decide upon unchallenged subject matters in the case.

The first part of this chapter begins with questioning the capacity of the claimant to file this case before State Council. Second, it discusses the competency of the Court to review the sale contract of Omar Effendi including the legal rationale it leveraged in treating it as an administrative contract. Third, it addresses the severe public policy violation of an administrative court assuming criminal activity on behalf of the competent criminal court, and in contradiction with a previous order issued from the public prosecution. Fourth, this part investigates another public policy consideration concerning the issue of *res judicata*, as this decision contradicts a previous arbitral award rendered in accordance with the arbitration clause included in the contested sale contract.

The second part links the Court's legal analysis of the contested issues to its normative non legal analysis to uncontested issues that it invoked ex officio.

A. The Court's Legal Analysis

The Court in *Omar Effendi*, as well as in identical subsequent decisions, had to overcome procedural and substantive legal obstacles in order to decide on the subject matter. Accordingly, in order to render the sale contract null and void it first had to justify the capacity of the claimants to file this lawsuit, even though they were not parties to the contract in question.

Next, it had to approve its jurisdiction and competency to judicially review the contested contract. The Court then had to deal with the principle of Separability of arbitration clause, as the sale contract included an arbitration clause. Indeed, this arbitration clause was employed in a previous conflict which arose between parties to the sale contract where the competent arbitral tribunal rendered its award; thus, the Court had to deal with the issue of *res judicata*.

1. The Legal Capacity of the Plaintiff.

One of the most fundamental rules of civil and administrative lawsuits is that plaintiffs must have a legal capacity to initiate their claims before courts. This rule is found in article 3 of the Egyptian Civil and Commercial Procedural Law which limits the right to initiate a lawsuit before the judiciary to plaintiffs who have a personal, direct, and existing interest according to the law.[31] The rule gives courts absolute discretion to dismiss claims initiated by individuals who lack this capacity as a public policy consideration.[32]

[31] Article 3 (1) of the Egyptian Civil and Commercial Procedural Law no. 13/ 1968.

[32] *Id.* article 3 (3).

This rule is reiterated in article 12 of the law no. 47/ 1972 which expressly requires the personal interest of the plaintiff as a condition for the acceptance of their claims.[33] Accordingly, plaintiffs to an administrative lawsuit may be entitled to exercise their right of litigation with respect to a given matter only when they have direct and personal legal interest in that matter.[34] In addition, being personal means that the claimant's personal interest must be seriously affected by the administrative decision that they seek to challenge,[35] so it is a vital requirement that the Court is entitled to monitor its existence at the outset of the hearings until it renders its decision.[36]

But the Court reversed this inherent rule and approved the claimant's capacity to initiate lawsuits that targeted the annulment of administrative decisions that led to the sale of privatized enterprises. It emphasized that the joinder of parties has the legal capacity to initiate these lawsuits even if none of them was a party to the sale contract.

The Court explained that the plaintiff exercised a constitutional right to protect public wealth. More specifically, it argued that each and every Egyptian citizen is constitutionally obliged to defend public ownership, thus, requesting to investigate the legality and legitimacy of sale contracts of these publicly-owned enterprises is an obligation that makes those individuals entitled to initiate claims for requesting nullity of such a contract.[37]

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[33] Law no. 47/ 1972 concerning the State Council was published on 5 October 1972. Article 12 (a) states that the following claims must be denied: a) if the claimants have no personal interest."

[34] The Higher Administrative Court, Appeal no. 6637/ 50 was rendered on 28 April 2007.

[35] The Higher Administrative Court, Appeal no. 9393/ 47 was rendered on 2 December 2006.

[36] The Higher Administrative Court, Appeals no. 8133/ 51 was rendered on 2 April 2005 and no. 12915/ 52 was rendered on 11 November 2006.

[37] *Omar Effendi*, *supra* note 8.

Furthermore, the Court illustrates that legal capacity in administrative claims should not be strictly interpreted in light of the general rule of article 3 of the Civil and Commercial Procedural law, because the former extends to encompass other forms of interests that aim at guaranteeing the principle of legitimacy, which in turn the cornerstone of civilized nations.[38]

In fact, the Court's rationale in deciding on the Claimant's legal capacity in this series of lawsuits was not one-of-a-kind, as it cited an earlier ruling rendered by the Higher Administrative Court that admits each Egyptian citizen's right to question the legitimacy of contracts related to the disposition of public wealth.[39] However, this precedent was widely criticized, and cannot be followed blindly, in fact, it does not relate preciously to the claims.

As a case in point, admitting the initiation of these lawsuits from individuals in their capacity as Egyptian citizens and with no time frame limitation must lead to severe legal irregularities that will be explained in chapter four, such as abusing the right of litigation, jeopardizing both investment environment and the national economy. However, the precedent that the Court cited is irrelevant, as it relates to the nature of the government's decision to export one of the Country's natural resources, and whether it is an act of sovereignty that cannot be challenged by citizens or not. This is not the case in *Omar Effendi* where the challenge relates to a commercial transaction made in accordance with civil law.

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[38] *Misr Shibin Textile*, *supra* note 20.

[39] The Higher Administrative Court, Appeal no. 5546, 6013/ 55 on 27/ 2/ 2010: "Both Legal capacity and interest merge in claims that requesting nullity. The legal characteristic of this kind of legitimacy-related lawsuit requires broadening the definition of interest necessitated in other kinds of claims, so they are not strictly limited to a claimant's own personal legal right. Therefore, article 3 of the Egyptian Civil and Commercial Procedural Law is inapplicable when contradicts the nature of claims requesting nullity. Accordingly, each Egyptian citizen has the interest to initiate claims concerning the development and exploiting revenues of the country's natural resources."

2. The Competency of the Court

The Court's rationale with regard to its competency to decide on the subject matter of *Omar Effendi* triggered even more critiques.

Certainly, any court has initially to examine whether the lawsuit in question is able to be settled according to its legal jurisdiction. Because classifying Courts according to their jurisdictions is constitutionally determined. Violation of this classification must result in violating a domestic public policy consideration.

However, the Court violated this rule although it was quite clear that the contract in question was subjected to the jurisdiction of civil courts according to the constitution and concerned laws. Indeed, the Court presented poor legal reasoning in order to affirm its jurisdiction.

The Court used a well-established legal rule which gives discretionary power to courts to determine the proper legal basis of a case in question according to its facts, so that it is not restricted by the parties' determination,[40] and that the administrative judge controls administrative lawsuits positively through principles of legitimacy and rule of law to extract the proper legal orientation.[41]

In *Omar Effendi,* as well as the following decisions, the claimants' requests were the cancellation of the decision that led to concluding the sale contract, and the annulment of the contract. As previously mentioned, the decision was issued by the

[40] The Court of Cassation, appeal no. 8583/ 66 on 15/ 4/ 1998.

[41] The Higher Administrative Court, Appeal no. 4011/ 50 on 5/ 12/ 2006.

Committee and approved by the Cabinet, then the NCBC concluded the sale contract with the investor.[42]

The Court considered the decision of the Committee as an administrative decree that is subjected to its judicial review, so it used its discretionary power to reformulate the lawsuit's subject matter as to suspend and then to cancel the decision of the Committee dated 1/ 1/ 2001 to sell the shares of the Omar Effendi Company and all the sequences resulted thereafter, especially the concluding of the sale contract.

The Court distinguished between the procedures that precede the contract and the concluding of the contract *per se*. It explained that these procedures were a pure administrative order that was taken by the competent administrative authority, as these procedures characterized the administration's obligatory will that based upon its public authority according to laws and regulations. Besides, it aimed at bringing about a legal situation that targets public interests. Therefore, while these decisions are preparatory steps for the contract, yet, they have separate characteristics and are subject to an administrative judicial review.[43]

Next, the Court turned to the real legal dilemma which is the legal nature of the contested contract. The sale contract was concluded between the NCBC and the foreign investor purely in accordance with law no. 159/ 1981.[44] Disputes arising out of implementing this law are a sole jurisdiction of the competent civil courts.

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[42] The Committee, *supra* note 15.

[43] *Omar Effendi*, *supra* note 8. The Court followed the same rationale in both Tanta Lined and Misr Shibin Textile, and it cited the Higher Administrative Court, Appeal no. 666/ 24 on 14/ 4/ 1979.

[44] Law no. 159/ 1981 concerning the issuance of Shareholder, share limited, limited liability, and one-person companies, published on 1 October 1981.

Hence, in order to extend its jurisdiction over this contract, the Court went through a complex legal analysis of the procedural process of privatization policy as administered in Egypt. It enumerates the features that distinguish administrative contracts, as it must be concluded by an entity that represents the State, acts on its behalf, and appears to use its authority for implementing its role in achieving public interest. Moreover, this contracting body must declare that it applies the public law's contractual methods that are not familiar nor practical in private law contracts.[45]

Next, the Court went to analyze the provisions of the sale contract in a really unreliable manner to extract what indicates that it is an administrative, not civil contract. Eventually, it concludes that because selling a publicly-owned enterprise could only be done by following these governmental procedures that define its criteria and approvals, so the sale contract of any privatized enterprise must be characterized as being an administrative contract, which in turn is also subjected to its administrative judicial review.

In particular, it alleges that the concluding of the sale contract was a result of designated governmental approvals issued from the Committee. And, because the NCBC, though a private law entity according to law no. 203/ 1991,[46] has no power to enter into such a legal contractual relationship upon its own initiation so that NCBC's legal acts should not be viewed as a contractual relationship of a private law entity. Rather, being a tool to implement the government's economic plans with regard to privatization made the NCBC a representative of the government, acted on its behalf,

[45] *Omar Effendi*, *supra* note 8.

[46] Law no. 203/ 1991 concerning the issuance of Public Business Sector, published on 19 July 1991. The preliminary article states that: "Public business sector shall be governed by this law, this sector composites of holding companies and its affiliates subjected to the provisions of this law, it shall all take the scheme of shareholder companies, and shall be governed by the provisions of the law of companies no. 159/ 1981".

and upon its delegation to sell the company. Therefore, the contract itself is considered to be an administrative contract that can be challenged before administrative courts.

Apparently, the Court's rationale violated the explicit provisions of law no. 203/ 1991 which classifies the holding companies as shareholder companies that have their own legal identity, are considered as private law bodies, and are governed by law no. 159/ 1981.[47] Being a tool that implements governmental policies does not legally change its nature or turns its contractual relationships into administrative contracts that can be challenged before State Council, it remains a private law entity that is governed by the law of companies and under the legal jurisdiction of the civil courts.

The Court apparently muddled up the functions of the holding companies in implementing privatization policy and its legal characteristics as designated by law. So it turned it from a contractual relationship accomplished between two parties who belong to private law into an administrative one that can be challenged before administrative courts.

Furthermore, the Court had to follow the same manner in relation to the legal nature of the State's private ownership and its public ownership. It wrongly kept referring to the properties of the holding companies as public ownership. Such a standpoint was contrary to article 12 of law no. 203/ 1991,[48] and conflicted many judicial precedents..[49] Besides, the distinction between the State's private and public

[47] The Court of Cassation, Appeal no. 13598/ 78, on 28 December 2009.

[48] Article 12 of law no. 203/ 1991 states that: "…. The company's funds are considered as the State's private ownership."

[49] The Administrative Court, Appeal no. 25661/ 61, on 28 April 2015. This rule affirmed that an entity that is owned by the State and serves for public interests will be considered a private law entity as long as it is a shareholder company that is governed by the law no. 203/ 1991

ownership is well defined in judiciary and jurisprudence, as the latter must be appointed to public services according to law. Accordingly, it cannot be subject to any kind of legal transaction that may lead to the disposition of its ownership.[50]

In short, The Omar Effendi Company was owned by a holding company which properties are private according to the applicable law. However, the Court disregarded the distinction between the State's public and private ownership in order to overstretch the jurisdiction to decide upon the contested sale contracts, so it falsely considered it as administrative contracts, not a civil contractual legal bond.

3. Deciding on Criminal Liability

The Court's quest to stigmatize the contested contract as corrupt extended to seeking more plausible ground for rendering these contracts null and void after many years of its execution.

The Court enumerated the legal faults that severely affected the validity of the designated process through which the deal was concluded. In fact, many violations of the applicable law and administrative regulations have occurred. As a case in point, these violations included the manipulation of the real value of the Company's assets that led to drastically degraded its returns, the turning over of non-offered assets to the buyer freely, and accepting the remarkably low offer that was even strikingly less than the already degraded value.

Yet, the Court knew that even these severe violations will not affect the legal position of the transaction, it admitted that:

[50] The State Council's legal opinion no. 537/ 2013, on 27 August 2013.

> Decisions that produce individual rights or personal legal status cannot be withdrawn as long as it was validly issued in order to achieve public interests which require the stability of these decisions. On the contrary, invalid decisions must be withdrawn by the competent authority in accordance with law and to correct its irregularities. Even though, public interest also necessitates maintaining the existence of invalid decisions when they resulted in legal rights if a certain period of time has elapsed. Then, it should be viewed as if it was validly issued. It is well established that this period of time would be sixty days starting from the date of issuance of the decision… so if this period of time elapsed the invalid decision becomes immune.[51]

Hence, the Court was forced to address this obstacle that restricted its determination to annul the contract, surprisingly, it criminalized these severe violations:

> There are exceptional circumstances according to which the sixty-day rule will not be applied, first: if the decision was issued as a result of severe violation of law that turns it from a legal act into just a material one with no legal effect; second, if obtaining such a decision was due to the beneficiary's fraud… whereas the decision in question has been issued in a severe violation of the applicable laws and the designated procedures for selling public ownership, and whereas these violations were too severe to the extent that it led to the dissipation of public wealth in turn of unrealistic price…. Therefore, this decision became merely a material act, not a legal one. Accordingly, it does not enjoy any immunity, no matter the elapsed time.[52]

Therefore, the Court pointed out that this decision which led to concluding the contract was completely void and enjoyed no immunity. It argued that the act of concluding this contract was a result of a series of crimes, on top of which is the felony of dissipation of public wealth. It asserted that this crime was committed in conspiracy conduct between the public officials in charge and the investor.

[51] *Omar Effendi*, *supra* note 8.

[52] *Id.*

Dissipation of public wealth is a serious felony that is criminalized according to the Egyptian Panel Code,[53] being described as "serious" in the Egyptian criminal judicial system means that the process through which this convection is done through a complex process. It started with the public prosecution investigations that usually include several procedural aspects, requesting technical expertise, and the suspect's interrogation. If the investigations point out the weighting of the suspect's criminal liability, the criminal court starts to hold hearing sessions, demonstrates the adduced evidence, and evaluates the suspect's defense. Eventually, it renders its judgment.

Therefore, The Court reversed another fundamental constitutional principle and violated another public policy consideration. It acted on behalf of the competent criminal court to decide that severe violations encompassed the contract in question constituted the felony of dissipation of public wealth. Therefore, the Court used this understanding to decide that the sale contract, as an administrative decision, cannot be considered as a legal act, it rather a completely void order that does not produce any legal effect, and is not immune, no matter what time has elapsed.

What more is, the Court ignored a previous decision issued from the public prosecution in which it decided, after excluding this potentiality, that there was no dissipation of public wealth.[54] Even though, the Court impliedly rendered a criminal judgment against public officials in light of its own discretionary criteria.

4. The Issue of *Res Judicata*

[53] Article 116 repetitive of the Panel Code punish public officials who deliberately commit acts that lead to the loss of money possessed by the entity they work for or are responsible for.

[54] *Omar Effendi*, *supra* note 8, reference is made to the conclusion of the Public Prosecution investigations mentioned earlier in footnote no. 16.

The Court's analysis to characterize the contested contract as administrative served its strategy in multi-levels. It overcame another considerable obstacle which is the arbitration clauses embodied therein. The existence of an arbitration clause should prevent that Court, as well as any other judicial body from reviewing it according to the inherent principle of Separability.

Separability of the arbitration clause is a well-founded principle that makes this clause, whether embodied in the main agreement or concluded in a separate one, fully independent from the original contract. This means that the arbitration clause represents a single agreement *per se*, so it does not be affected by the nullity of the original agreement.[55] This rule is acknowledged both on the national and international level, so that it can be found in nearly identical wording in the Egyptian Arbitration law,[56] UNCITRAL rules,[57] and ICC rules.[58]

Accordingly, deciding that the sale contract is null and void does not affect the validity of its arbitration clause. To that end, having decided that the sale contract is purely an administrative contract, the Court managed to exploit the requirement of article (1) of the Egyptian Arbitration law which necessitates the competent minister's approval.[59] The Court further warranted that this approval is a public policy

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[55] Fathi Wali, ARBITRATION IN CIVIL AND INTERNATIONAL DISPUTES- SCHOLARLY AND PRACTICALLY, 104 (2014).

[56] The Egyptian Arbitration law on Civil and Commercial Matters no. 27/ 1994, been published on 21 April 1994. Article 23 therein states that: "The arbitration clause shall be treated as an independent agreement separate from the other terms of the contract. The nullity, rescission, or termination of the contract shall not affect the arbitration clause, provided that such clause is valid *per se*."

[57] Article 23/1 of the UNCITRAL rules, effective as of 15 August 2010.

[58] Article 6/9 of the ICC rules, effective as of 1 January 2012.

[59] Law no. 27/ 1994, *supra* note 56. Paragraph two of article (1) was added to the Arbitration law no. 27/ 1994 by virtue of law no. 9/1997 dated 13 May 1997, which was published on 15 May 1997 and came into force one day following its publication. It reads as follows: "With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect".

consideration that cannot be overcome, the absence of which leads the arbitration clause embodied in the contested sale contract to be null and void, no matter what legal considerations it previously produced.[60]

Amongst all the contradictions that this series of judgments invoked, still this conclusion comes on top of them. In fact, the parties to the contested contract did not conclude it as an administrative contract, not the CNBC, not the government, and surely not the investor. For them, it was a commercial contract concluded between two companies that acted on their capacities as private law bodies and is governed by the concerned civil law, not the administrative law. The requirement of the competent minister's approval is not required on that basis.

Furthermore, article 1 (2) of the Arbitration law did not strictly require the explicit approval of the competent minister, in other words, this approval might be expressed impliedly.[61]

Assuming that the contested contract was an administrative one, one should question the significance of the NCBC's initiation to file case no. 583/ 2008 before the CRCICA seeking the annulment of that contract. Does not that give an indication that this holding company, which the Court argued that it was a representative of the Minister of Investment, got the required ministerial approval impliedly? Not mentioning the sophisticated process of preparing the transaction, the approvals of the minister of investment and of the Cabinet, and all the procedural steps that the Court was keen to trace.

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[60] *Omar Effendi, supra* note 8.

[61] Wali, *supra* note 55, at 137.

Article 55 of the Arbitration Law gives arbitral awards the power of the *res judicata* and obliges all the relevant authorities to enforce it as long as it was rendered in accordance with its provisions.[62]

There are numerous judicial precedents that profoundly prohibit re-examining the subject matter before the judiciary when it was settled before the arbitration in accordance with the law requirements on the basis of the principle of *res judicata*.[63] The phrase "in accordance with law" refers to the validity of the arbitration clause itself,[64] as well as the existence of other fundamental conditions, such as the unity of the parties, the basis of their dispute, and subject matter in question,[65] otherwise, this authority will not exist.[66]

Certainly, the Court chose to depend on the literal requirement of article 1 (2) to escape the issue of *res judicata*. Thus, it used this escaping valve to get rid of the arbitration clause and the previous arbitral award that had the authority of *res judicata*. Hence, it insisted that the arbitration clause of the sale contract is null and void in the absence of the approval of the competent minister's approval.

B. **The Court's additional justifications**

Critical reading to the Court's legal analysis does not suffice to answer that pressing question: why did the Court do that?

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[62] Law no. 27/ 1994, *supra* note 56. Article 55 reads as follows: "Arbitral awards rendered in accordance with the provisions of the present Law have the authority of the res judicata and shall be enforceable in conformity with the provisions of this Law".

[63] The Higher Administrative Court, Appeal no. 25596/ 52, on 27 December 2016. The Court of Cassation, Appeal no. 5147/ 78, on 3 December 2015.

[64] Wali, *supra* note 55, at 591.

[65] *Id*, at 592.

[66] The Court of Cassation, Appeal no. 1202/ 80, on 10 August 2016.

The answer cannot be that the Court's legal knowledge fell short of the proper, inherent, and well-founded legal solutions to the issues of this case. In fact, the Court exhaustively tried to orientate its rationale in a lengthy sophisticated manner by employing national legal rules and international arbitration principles.

However, the answer to this question will start to come to the surface once the link between the timing of this judicial decision and the contemporary political and societal context is drawn. This decision was delivered shortly after the 25 January 2011 revolution which led to the collapse of the then political regime,[67] an unprecedented environment existed for many opponents to exploit the Egyptian judiciary as one arena for manifesting their disagreement with the previous regime's policies. Of course, accusations of corruption were the most repetitive allegations.[68]

Granted that, the Court in *Omar Effendi* appeared respondent to this tendency, it reacted in accordance with, and under the influence of the contemporary circumstances. This standpoint can be seen in the Court's utilizing of two strategies. First, it adopted a non-pure legal analysis,[69] Second, it provoked the potential of resorting to the international arbitration before ICSID where it was a non-contested matter.

These two strategies disclosed that the Court believed that the process of concluding the contested contract was riddled with corruption, and it led to the loss of

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[67] The *Omar Effendi* decision was delivered on 5 May 2011, the *Tanta Linen, Misr Shibin Textile,* and Elnasr for steam Boilers manufacturing Company decisions on 21 September 2011, and the Nile for Cotton paring Company decision on 17 December 2011.

[68] SHAWKI ALSAYED, CONFRONTING NULLITY: CONTRACTS OF SALE, ALLOTMENT, AND PRIVATIZATION- CRITICAL LEGAL ANALYSIS AND COMMENTS ON THE STATE COUNCIL JUDGMENTS, 53, (2014).

[69] Adel Mahmoud Farghali, *The Role of Administrative Judiciary in Protecting Public Wealth- Analytical Study*, EGYPT IN STATE COUNCIL- A CONFERENCE ON THE ROLE OF THE STATE COUNCIL IN PROTECTING RIGHTS AND FREEDOMS 182 (2017).

principal economic resources. So that, it sought to rectify the odd results of privatizing this publicly-owned Company by delivering a decision that can be used to regain its sold assets to the Country's ownership. Besides, it was aware of the claims that may be initiated by the investor against Egypt due to its judgment.

1. Employing Non-Pure Legal Logic

One of the main traditional functions of judiciary in civilized societies is to settle the individuals' disputes in accordance with the law, and in light of that society's legal rules which must be characterized by generality and abstraction.[70] Hence, courts employ applicable legal rules that govern issues in question, in light of the given relevant facts, in order to deliver a judicial decision that should be compatible with the law.

However, the Court did not follow that logic, it rather built a considerable part of its decision on non-pure legal orientation. The wording of its decision was radically unfamiliar with the traditional form of judicial judgments.[71]

The non-legal content of the Court's decision is characterized by enumerating the tangible evidence of the ex-public officials' responsibility towards the failure of administering the publicly-owned projects which led to the disposal of it. In addition to the glorification of publicly-owned enterprises, and the necessity to keep the State's control over means of production.

First, the Court believed that the previous governments deliberately "mismanaged the public sector by yielding its responsibilities to inefficient

[70] *Id*. at 185.

[71] *Id.*

administration". Thus, "it let corruption prevails in order to degrade its value and to sell it to national and foreign investors".

Moreover, it disapproved the public officials' corrupt manner "as they get rid of the Omar Effendi Company as if it is an abomination they must purify, or an expired product that should be disposed at any cost". In addition, it condemned those politicians' management with respect to the sale transaction and "the strong suspicious indulgence" they offered to the investor to pass the deal.[72]

Consequently, the Court charged all the public figures of the State of being tools to facilitate the foreign intervention in the nation's domestic policies. It affirmed their liability "for dissipating public wealth and devastating the national economy."

It interpreted their manner as "they were bribed to work on implementing the policy of privatization", and that they were submitted to foreign prejudiced conditions which "enabled the representatives of the governments of the USA and other international financial institutions who conspired to devastate Egypt's public sector and to encroach its sovereignty and independence."[73]

The Court next turned to glorify the State's ownership of means of production. It signified that the State previously managed to "guide the public sector to significant successes that led to establishing great projects like the High Dam". And, that the public sector's projects "led the nation to build and develop industrial civilization", so

[72] *Omar Effendi*, *supra* note 8.

[73] Farghali, *supra* note 69, at 184.

that the State should have maintained and worked on supporting and developing its public ownership instead of dissipating it.[74]

The Court continued to enumerate what it viewed as "privileges" of the State's control of public sector enterprises. And, it kept giving advice on how the government should make the best use of it on both the management and the economic levels. It even went farther by explaining how the privatization policy should have been adopted and implemented.[75]

2. Citing the Concept of Transnational Public Policy

To continue on defending its rationale, the Court was keen on invoking the possibility of the investor's claiming for damages before the ICSID arbitration. It was aware that the investor will view its decision as an expropriation of his property, which gives legitimate reason to resort to international arbitration claiming damages.[76]

Indeed, the sequence of legal faults committed by the Court served to substantiate its argument with regard to this part. Confirming that the contested contract was concluded corruptly led the Court to argue that contracts of corruption are not protected under the umbrella of international arbitration according to the concept of "transnational public policy".

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[74] ALSAYED, *supra* note 68, at 52.

[75] Farghali, *supra* note 69, at 185.

[76] Justice Mohamed Attyia, the then Senior deputy of the State Council has made an interview with the press published on 21 June 2011, in which he was asked about the foreseen and potential claims of foreign investors before the international arbitration due to other judicial decisions related to previous investment contract in which the competent court intervened to modify its provisions, he replied that it is not a big deal: "Let them resort to the international arbitration, whatever the compensation will be, it will be much cheaper than the value of the nation's dissipated natural resources." Available at: https://www.shorouknews.com/pdf/. Last accessed on 18 October 2021.

Hence, the Court wanted to mirror this view through the lens of international arbitration to sustain Egypt's defense in future claims by giving reliable legal ground for expropriating the investor's ownership. Hence, it cited the concept of transnational public policy to prove that it imitated the ICSID arbitration principles with regard to contracts of corruption.

I believe that the Court should not have adopted this kind of reasoning. Its function is to give legal answers to the issues in question, these answers should be built on the relevant facts and the applicable law. But the Court used to justify its legal answers and sought to substantiate its rationale by building on irrelevant facts, assumptions, and the analysis of uncontested matters.

To sum up, this chapter demonstrated the Court's rationale with regard to particular procedural and substantive matters in *Omar Effendi*. It enumerates the legal faults that the Court made to render the sale contract null and void, particularly as it extended its jurisdiction to place itself in the position of civil and criminal courts, and arbitral tribunals to achieve this goal.

The Court's aim to safeguard public wealth led it to relinquish its presumed neutrality and integrity. It produced a judicial decision that mixed legal analysis with irrelevant considerations, stressed the significance of the State's public ownership, and clearly encouraged its control over means of production. It generally accused ex-public officials and investors of being corrupt, therefore, it argued that the latter cannot claim compensation before the ICSID arbitration because contracts of corruption are not protected in light of the concept of transnational public policy.

Chapter three explains the notion of transnational public policy, and what the relation between corruption and transnational public policy is. It addresses the issue of deciding on corruption in commercial and investment contracts, and what the evidence of corruption is, and how arbitral tribunals deal with it.

IV. Corruption as a Transnational Public Policy Consideration

The Court in *Omar Effendi* cited an inherent principle in International Arbitration to affirm that contracts of corruption are inadmissible before the ICSID arbitration as a transnational public policy consideration. Hence, business procured through corruption cannot be protected under domestic laws, international law, and the Convention.

However, concluding that business was procured through corruption in international arbitration is dependent on the process of analysis pursued and the standard of proof accepted. The respective outcomes also are dependent on how the concerned arbitral tribunal perceives the allegation of corruption, what standards of proof it relies upon, and what evidence it accepts.

This chapter addresses these aspects successively. The first section of this chapter is dedicated to the concept of public policy. It begins with an attempt to define the concept, describe its nature, characteristics, and forms. It next lists its levels. Further, this section traces the concept of public policy as utilized in the field of international arbitration.

The second section of the chapter focuses on corruption as a specific consideration of transnational public policy under the realm of international arbitration. And, it points out the two main approaches in evaluating corruption. Next, evidence of corruption will be discussed with regard to its burden of proof, standards, and extent.

This analysis will be linked to case law from domestic jurisdictions and international arbitral tribunals to manifest how corruption is perceived and administered from their lens. This demonstration serves the process of analyzing the outcomes that the Court in *Omar Effendi* came up with to show the fallacy of its conclusion.

A. Public Policy: an Overview

Finding an exhaustive definition of the content of 'public policy' is almost impossible;[77] consequently, it is argued that all devoted efforts to do so fall short of reaching a proper delineation,[78] or precise definition.[79]

In fact, there is sound logic in this ambiguity. Flexibility is one distinguishing characteristic of public policy, because each nation has its own cultural, moral, and ethical heritage, and these values keep evolving over time.[80] As a consequence, public policy has always been viewed as a vague concept that is constantly changing to the extent that it may lead to uncertainty and unpredictability.[81]

This vagueness is graphically described by Justice Burrough as he portrays public policy as "a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail."[82] This oft-quoted observation expresses the risks that employing the concept of public policy in the international commercial arbitration field may result in, as it can undermine the concerned parties' legal agreements or lead to the setting aside of the arbitral awards they obtain.[83]

This apparent contradiction between the nature of nations' public policy with its unpredictability along with the objectives of international trade, which counts heavily on visibility and foreseeability, has led to certain developments in differentiating among levels of public policy that national courts and arbitrators operate in. Accordingly, the award may be invalidated at the national arbitration level due to violating domestic public policy, while it could be enforced if it is rendered in

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[77] Wali, *supra* note 55, at 146.

[78] Fouad Riad, Conflict of Laws, International Judicial Jurisdiction, and the Consequences of foreign Judgments, 143 (1998).

[79] Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARBITR INT 249–263 (2003) at 252.

[80] Abd El-Razzak Al-Sanhuri, *Part One: The General Theory of Obligations- Sources of Obligations*, *in* AL-WASEET IN CIVIL LAW EXPLANATION 3–1114, 133 (ed. 2008)

[81] Hisham Ismaeil, the international protection to foreign arbitral awards- a comparative study, 817 (first ed. 2012).

[82] Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303; 2 Bing 229, 252 Quoted in Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685–736 (2015) at 693.

[83] Riad, *supra* note 78, at 136.

international arbitration,[84] a conclusion that coincides with the necessity of employing a narrower perspective of public policy at the international level.[85]

1. Characterizing the Concept of Public Policy

Almost all legal systems encounter the question of what the concept of public policy is, as it is pleaded before various courts and arbitral tribunals on a daily basis.[86] The vagueness of its nature maximized the discretionary power of national courts as to delineating its boundaries.[87] Similarly, legal scholars have always engaged in the debate in order to reach a clear articulation of the concept.

Judiciaries have examined this concept of public policy by giving various explanations that share common elements. In England, it is seen as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good."[88] Similarly, the Egyptian courts have repeatedly upheld that public policy is considered to be those rules "aiming to achieve a public interest, whether political, social, or economic, pertaining to the society's high order and which prevails over the individual's interest."[89] In the United States, the Supreme Court of Pennsylvania likens it to the public good:

> Anything that tends clearly to injure the public health, the public morals, the public confidence, in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy.[90]

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[84] Wali, *supra* note 55, at 146.

[85] Riad, *supra* note 78, at 137.

[86] Ghodoosi, *supra* note 82, at 688.

[87] In Egypt, No legislation defines public policy nor does indicate a proper explanation to what constitutes its basics, alternatively, the Explanatory Memorandum of the Civil Code explicitly discloses that it is deliberately left to the judiciary to decide. See Explanatory Memorandum of the Egyptian Civil Code in the Collection of Preparatory Notes, Vol. 2, at 223

[88] Egerton v. Brownlow [1853] 10 Eng. Rep. 359, 437 (H.L).

[89] Court of Cassation, Appeal no. 16/ 48 (17 January 1979), Appeal no. 385/ 44 (24 April 1980), Appeal no. 12790/ 75 (22 March 2011).

[90] Goodyear v. Brown, 155 Pa. 514, 518, 26 A. 665, 20 L.R.A. 838, 35 Am.St.Rep. 903. Magee v. McNany, 10 F.R.D. 5 (1950)

To that end, it is quite clear that attempts to crystalize the concept of public policy produce common substantive and procedural characteristics that most jurisdictions and legal scholars have agreed upon. It consists of a group of rules that govern and organize the most fundamental social, economic, and political interests of a given society;[91] it usually manifests a state's "basic notions of morality and justice",[92] so that it encompasses the "least rudiments of natural justice" that guarantee due process."[93] A state's public policy does not reflect a certain regime's political perspective, because it is not related to the state's political stance or its international policies,[94] as it may be altered from one generation to another.[95]

Moreover, rules of public policy intervene when the public sphere should trump individuals' private legal acts,[96] so that it profoundly limits their freedom to contract by imposing certain standards that are not subject to derogation.[97] For instance, the prohibition of monopoly to protect certain economic policies, or to invalidate an arbitral agreement with regard to real estate disputes in order to protect the rights of the state and of third parties are cases in point.[98]

Hence, public policy represents "the final parameter of the law that, while it is reflected in and often expressed by statutory and constitutional statements of law, also dictates either consent or constraint, permission or prohibition, when statutes and constitutions are silent on a given matter."[99] Accordingly, rules of public policy may

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[91] Wali, *supra* note 55, at 147.

[92] Mayer and Sheppard, *supra* note 79, at 252.

[93] Methanex Motonui Ltd, Methanex Waitara Valley Ltd v. Joseph Spellman, Attorney General for New Zealand, High Court, CL3/03, 18 August 2003, available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn80391?q, Last accessed 19 October 2021.

[94] Subway Franchise Systems of Canada Ltd. & others v. Cora Laich, Queen's Bench for Saskatchewan, Case No. Q.B.G. No. 482, 24 June 2011, available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/kli-ka-1201003, Last accessed 19 October 2021.

[95] India no. 2020-3, Vijay Karia et al. v. Prysmian Cavi e Sistemi SRL et al., Supreme Court of India, Civil Appellate Jurisdiction, Civil Appeal No. 1544 of 2020 and Civil Appeal No. 1545 of 2020, 13 February 2020, available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/kli-ka-icca-yb-xlv-303-n?q, Last accessed 19 October 2021.

[96] Ghodoosi, *supra* note 82, at 678.

[97] Mark A. Buchanan, Public Policy and International Commercial Arbitration, 26 Am. Bus. L.J. 511–532, 513 (1988).

[98] The Egyptian Court of Cassation, Appeal no. 9882/ 80 (8 October 2013)

[99] Buchanan, *supra* note 97, at 513.

be enshrined explicitly in a state's constitution,[100] or in a private law that sets "the legal basis on which rests the society's economic or moral order."[101]

2. Levels of Public Policy

Given public policy is characterized as a group of rules that aim to protect a certain society's values suggests that these rules address and organize the relationships of a specific state's individuals. However, this assumption does not function in the world of international trade. In other words, only one understanding of what constitutes public policy cannot be perceived in domestic and international level of interactions in the same manner.

As a result, generating more flexible rules whereby different states can manage and comprehend international commercial practice is required. In international commercial arbitration, national judiciaries have to differentiate between those rules that must prevail on the domestic level, and those tested in the international sphere.

a. Domestic Public Policy

When dealing with national arbitration in which concerned parties, applicable law, and the entire process are administered under the state's legal system, a national court only considers its own domestic public policy.[102]

On this level, local standards of public policy, as viewed through the lens of the judiciary, prevail -either when the award is contested or its enforcement is sought.[103]

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[100] Argentina no. 2020-1, Milantic Trans S.A. v. Ministerio de la Producción de la Provincia de Buenos Aires, (Astilleros Río Santiago et al.), Suprema Corte de Justicia, Province of Buenos Aires, A-69572, 30 March 2016 available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/kli-ka-icca-yb-xlv-601-n?q, Last accessed 19 October 2021.

[101] Belgium Supreme Court, Cass., 9 December 1948, Pas., I, p. 699 ; 15 March 1968, Pas., I, p. 894 ; 10 November 1978

[102] Kenneth-Michael Curtin, Redefining Public Policy in International Arbitration of Mandatory National Laws, 64 Def. Counsel J. 271–284, 281 (1997).

[103] Buchanan, *supra* note 97, at 513.

In this case, national courts apply their domestic public policy rules that do not permit derogation, as they pursue fundamental national interests and protect morals.[104] Accordingly, an entire contract could be struck down if found against a governmental economic policy,[105] or violating municipal mandatory regulations.[106] Likewise, a national court may justify its refusal to enforce a domestic arbitral award if it breaches a mandatory rule.[107]

b. International Public Policy

When a legal question before a national court is related to more than one country's legal system, it has to deal with its international dimension.[108] In this case, a domestic court applies less restrictive rules of its own public policy, a policy "viewed through the lens of the state's own laws or standards for dealing with a foreign arbitral award," so it is a narrower perspective of a state's public policy inspired by international purposes.[109]

Thus, the application of the concept of a state's public policy in private international law may bar the application of a foreign law or, the recognition of a foreign arbitral award by its national judiciary.[110] However, this is only the case when the national court applies a narrower perspective of its public policy.

Through this narrower version of a state's international public policy, national courts examine whether enforcement of the foreign arbitral award violates the

[104] Ismaeil, *supra* note 81, at 826.

[105] Buchanan, *supra* note 97, at 513.

[106] Wali, *supra* note 55, at 770.

[107] Court of Cassation, Appeal no. 810/ 71 (25 January 2007). The court upheld the decision of the Cairo Court of appeal that the contested award violates the Egyptian public policy as it awarded an interest rate that exceeds the fixed maximum limit.

[108] Margaret Moses, Public Policy Under the New York Convention: National, International, and Transnational, in Katia Fach Gomez and Ana M. Lopez-Rodrigues (eds), 60 years of the New York Convention: Key Issues and Future CHALLENGES. 169–184, 173 (2019).

[109] Christopher B Kuner, *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention*, 7 JOURNAL OF INTERNATIONAL ARBITRATION, KLUWER LAW INTERNATIONAL, 79 (1990).

[110] Pierre Mayer, *Effect of International Public Policy in International Arbitration*, 15 PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 61–69, 61 (2006).

fundamental principles and values of its legal system.[111] This is because not every domestic legal rule necessarily forms a part of the state's international public policy.[112] Accordingly, for challenging a foreign arbitral award, it has to invoke something more than the violation of the law of the enforcement state. For this reason, public policy in the context of international arbitration should be construed as being applied in the field of private international law.[113]

A dichotomy between domestic and international public policy is thus justifiable given the different objectives each peruses.[114] The latter is derived from the conventions or international declarations that the state has ratified, so it constitutes universal principles shared by nations of a similar level of civilization, in order to protect fundamental values.[115]

c. Transnational Public Policy

While both domestic and international levels represent two different perceptions of public policy, they both stem from one source which is the concerned state's perception. On the contrary, transnational public policy norms neither belong to a single state nor reflect a certain nation's viewpoint. They are rather, as the term suggests, those considerations that transcend states' boundaries.[116]

The emergence of the concept "transnational public policy" for the first time is attributed to Professor Pierre Lalive in his 1986 article *Transnational (or Truly International) Public Policy and International Arbitration*.[117] Although, as Professor

[111] Italy no. 181, C.G. Impianti SpA (Italy) v. B.M.A.A.B. and Sons International Contracting Company WLL (Kuwait), Corte di Appello [Court of Appeal], Milan, Not Indicated, 29 April 2009 Available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/kli-ka-1052033-n?q, last accessed 15 March 2021.

[112] ISMAEIL, *supra* note 81, at 827.

[113] India no. 22, Renusagar Power Co. Ltd v. General Electric Co., Supreme Court of India, Not Indicated, 7 October 1993, available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn5505?q, last accessed 15 March 2021.

[114] RIAD, *supra* note 78, at 136.

[115] Italy no. 143, Allsop Automatic Inc. v. Tecnoski snc, Corte di Appello [Court of Appeal], Milan, Not Indicated, 4 December 1992, available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn6413?q, last accessed 15 March 2021.

[116] Michael Pryles, *Reflections on transnational public policy*, 24 KLUWER LAW ARBITRATION 1–7, 3 (2007).

[117] Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration, XI Revista Brasileira de Arbitragem, (© Comitê Brasileiro de Arbitragem CBAr & IOB; Comitê Brasileiro de Arbitragem 173–230 (2014).

Alan Redfern commented, the term "transnational" arose as coined by Judge Jessup in the 1950s,[118] the novelty of explicitly bringing the concept into the world of international commercial arbitration is attributed to the former.

Professor Lalive may have found it more convenient to characterize the concept of "transnational" public policy as "truly international" public policy. In fact, some commentators consider this as an attempt to distinguish it from the classic or the more "traditional" international public policy of states.[119] Others criticize the confusion that it entails, either for overlapping the two concepts as "international" suggests, or for ascribing untested qualifications as "truly" implies.[120]

While transnational public policy also has no precise definition, it can be characterized by its nature, sources, and functions.

It is said that practices of the operators of international trade in their own realm, which exhibits coherence and solidarity, led to regrouping their community as a distinct social order. This *societas mercatorum* enjoys an overriding normativity in it and is governed by the *lex mercatoria* where distinctive, essential, and widely shared values are acknowledged.[121]

It follows that public policy to that order has been posited in terms of mandatory norms. These norms, created, interpreted, and modified by those operators, and as well accepted by other civil societies around the world, have a universal character and have become the "sign of the maturity of the international communities."[122]

Thus, transnational public policy can best be characterized as basic legal rules and principles that are commonly recognized among different nations. It does not

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[118] In his lectures at Yale, Judge Jessup describes "transnational law" as a term that includes "all law which regulates actions or events that transcend national frontiers both public and private international law are included, as are other rules which fit into such standard categories." Redfern: Comments on commercial arbitration and transnational public policy at 871.

[119] Ismaeil, *supra* note 81, at 835.

[120] Catherine Kessedjian, Transnational Public Policy, 13 in Albert Jan Den Berg (ed), International Arbitration 2006: Back to Basics? 857–870, 860 (2007).

[121] Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration, (Kluwer Law International) 276 (2004).

[122] Kessedjian, *supra* note 120, at 862.

relate to a certain state, rather it does involve a public policy that transcends state boundaries.[123] These rules and principles are derived from abstract ideas of morality, ethics, and justice. They function as a sensor that discards offensive choices and renders unenforceable the law chosen or the contract agreed upon by the parties to an international contract.[124]

The notion that there are shared rules that manifest the abstract ideas of morality and justice is well-rooted in most, if not all, legal systems, and resides in the heart of international arbitration as well. As the arbitral tribunal noted in *WDF vs. Kenya* when it distinguished the three levels of public policy, it pointed out a sort of violation that does not relate to a single jurisdiction, including international. Rather, it pointed to a universal value in stating that "[t]he term 'international public policy' is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora."[125] In that sense, the Tribunal in *WDF vs. Kenya* signified that although national courts are applying their own international public policy as per usual, however, perceiving this universal concept of public policy started to be reflected in their decisions.

This tendency is seen in *W v. F and V* in which the Swiss Federal Tribunal took into account a "universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognized in all civilised countries."[126]

B. Corruption in International Contracts Through the Lens of Transnational Public Policy

The concept of corruption is one of the norms that distinguish transnational public policy from other levels of public policy. It is a norm that was generated by private actors in international business and became binding even before it was enshrined in

[123] Moses, *supra* note 108, at 179.

[124] SAYED, *supra* note 121, at 282.

[125] *WDF v. Kenya*, *supra* note 25.

[126] Pryles, *supra* note 116, at 3.

international conventions by states.[127] This specific issue has been prioritized by merchants as well as by states due to the catastrophic consequences it causes both on business and on states' economies.

1. Corruption is a Public Enemy

Twenty-five years ago, James D. Wofensohn, a former President of the World Bank described corruption as cancer which "diverts resources from the poor to rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors, and … we all know that it is a major barrier to sound and equitable development."[128] Seventeen years later, the same fact was ascertained by another President, as he described corruption in the developing world as "public enemy number one."[129]

Identifying corruption as "a public enemy" reflects the seriousness of this phenomenon and mirrors its destructive consequences on the national economies as well as on international trade. The cost of corruption in the field of international trade is alarming; World Bank estimations indicate that 1 trillion in USD in bribes is paid on a yearly basis throughout the world.[130]

Corruption in the field of international investment contracts as viewed from investors' perspective is defined as "actions of transfer of money or anything of value to foreign public officials, either directly or indirectly, to obtain favorable public decisions in the course of international trade."[131] From the host states' perspective, it is commonly defined as the "abuse or misuse of a position of trust or responsibility

[127] Kessedjian, *supra* note 120, at 861.

[128] Quoted by Kristalina Georgieva, IMF Managing Director in the Opening Statement of the 19th International Anti-Corruption Conference, 1 December 2020. Available at: https://www.imf.org/en/News/Articles/2020/12/01, last accessed 15 March 2021.

[129] A statement dated 19 December 2013, of the then-President Jim Yong Kim, available at: https://www.worldbank.org/en/news/press-release/2013/12/19, last accessed 15 March 2021.

[130] CleanGovBiz, The Rationale for Fighting Corruption, available at https://maritimecyprus.files.wordpress.com/2017/09/oecd.pdf, last accessed 16 March 2021.

[131] SAYED, *supra* note 121, at xxiii.

for private gain rather than the purpose for which that trust or responsibility is conferred."[132]

These definitions suggest two main actors: the public official and the investor. Yet, it tolerates, as is often the case, a third party who facilitates the indirect channeling of corrupt forms of advantage. According to this thinking, it follows that a transfer of benefits across national borders occurs, from the seeker of a favorable public decision, typically by bribery, through the intermediary to the decision-maker in order to obtain this decision in the context of international trade.[133]

Acts of corruption through which those actors operate result in benefitting a limited number of individuals at the expense of entire states' economies and of the international business environment.

On the one hand, corrupt practices hinder the flow of fair business; 'fairness' requires that it be competitive which, in turn, triggers creativity, incites the production of good quality goods and services, and motivates the offering of lower prices. But when bribery becomes the channel through which a public procurement is obtained, attention is redirected to reimbursing the cost of obtaining the contract.

On the other hand, quality becomes less important along with the higher prices paid by the taxpayer who pays for the cost of corrupt practices by receiving goods and services of inferior quality at high prices. Corruption also brings other destructive factors like alienating fair-minded investors, stopping foreign aid, dissipating public resources, and drowning the economy in overburdening debt.

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[132] Philip M. Nichols, The *Business Case for Complying with Bribery Laws: The Business Case for Complying with Bribery Laws*, 49 AM BUS LAW J 325–368 (2012) at 329- 330- quoting Joseph S. Nye, Corruption and Political Development: A Cost-Benefit Analysis, in American Political Science Review, vol. 61, issue 2, 417- 427, 417 (1967).

[133] Benefits in this sense may take any form, such as cash payment, gifts, or securing scholarships for relatives, or putting them on the payroll as consultants. As well, favorable decisions may extend to concern any official action, either in accordance with or against the prescribed criteria, such as buying of governmental benefits, contacts, or reducing the outcomes of a regulatory process, such as avoiding taxes. *See* SAYED, *supra* note 121, at xxiv, xxv.

In brief, "corruption creates, and accentuates poverty within a country,"[134] for these reasons, it is public enemy number one for both developing countries and fair international business operators.

2. Corruption is a Pure Manifestation of Transnational Public Policy

Corruption is an issue that straightforwardly curtails debate about the content of transnational public policy,[135] as it unanimously condemned by almost all societies, the major religious and moral schools of thought, and municipal legislatures.[136] It is seen as a value that is essential, is supported by a large consensus, and requires immediate attention regardless of any contrary agreement.[137]

Corruption as a transnational public policy principle was expressed by Judge Lagregren in the landmark decision in ICC case no.1110 of 1963.[138] He explained that a contract is invalid when it violates not only relevant domestic legislations, but also international public policy.

Also, he emphasized that "it cannot be contested that there exists a general principle of law recongised by civilised nations that contracts which seriously violate *bonos mores* international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators."[139] This statement illustrates that being a transnational public policy consideration, corruption contracts cannot be upheld either before national courts or in international arbitration.

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[134] SAYED, *supra* note 121, at xxv.

[135] Some commentators suggest that transnational public policy can find its contents outside the scope of laws enacted by municipal legislatures. *See* generally Kessedjian, *supra* note 120, at 868. Others criticize this suggestion as it could produce hazardous results to undermine the contractual certainty. See Pryles, *supra* note 116, at 5.

[136] Kessedjian, *supra* note 132, at 861.

[137] Pryles, *supra* note 116, at 3.

[138] SAMIA RASHED, ARBITRATION IN PRIVATE INTERNATIONAL RELATIONS: ARBITRATION AGREEMENT, 141 (1984). The case relates to an agreement between an Argentinian intermediary and an English Company on commissions to be paid by the latter to the former, whose mission it was to use his influence on Argentinian officials to grant the company a project.

[139] ICC case no. 1110, 1963, in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1996 – Volume XXI, Yearbook Commercial Arbitration, Volume 21 (© Kluwer Law International; ICCA & Kluwer Law International (1996) pp. 47 – 53. Also available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/kli-ka-aim-awards2019-068-n?q . Last accessed 17 March 2021.

This widely shared view is reflected in international conventions concluded under the auspices of the United Nations,[140] and the Organization for Economic Cooperation and Development (OECD),[141] to commit states criminalizing various forms of corruption. It is also seen in the works of International Financial Institutions, such as the World Bank, and the World Trade Organization.

Therefore, being against transnational public policy, the existence of corruption in a contested contract authorizes the arbitrator to raise the issue *ex officio* regardless of the applicable law, or even the parties' agreement from which the arbitrator derives his or her authority.

This was the case in *WDF vs. Kenya* whereby the Tribunal found that the applicable law's perspective towards bribery was irrelevant, as was the case for any local custom in the host state. This is because under no circumstances would the Tribunal validate "bribery committed by the Claimant in violation of international public policy."[142] Judge Lagregren adopted the same stance as to invoke *ex officio* the illegality of the contract:

> Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.[143]

As these standpoints are well established, there is no difficulty in inferring that international arbitrators have legal and moral obligations to not 'close their eyes' to corrupt practices. They should discard any agreement that is, if proven, riddled with corruption, and refrain from upholding a contract that the tribunal, upon

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[140] The work of the United Nations led to a convention against Transnational Organized Crime that requires the State Parties to consider enacting legislations to explicitly criminalize corruption. See SAYED, *supra* note 72 at 297.

[141] Carolyn Lamm & Andrea Menaker, *The Consequences of Corruption in Investor-State Arbitration*, BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 433–446, 434 (2015).

[142] *WDF v. Kenya*, *supra* note *26.*

[143] ICC case no. 1110, *supra* note 139.

sufficient evidence, was procured corruptly. This is the case whether upon a party's challenge or *ex officio*.

Hence, it becomes a necessity to identify the process through which the evaluation of evidence of corruption is done, and to point out which criterion or standard of proof is employed by international arbitrators to decide whether the allegation or suspicion of corruption is approved or refuted.

C. Evaluating the Evidence of Corruption

Generally speaking, it is well established in the field of international arbitration that upon the requirements of due process, arbitrators have wide discretionary power to determine the procedure of the claim. They can next determine the admissibility and the relevance of adduced evidence.[144] In addition, this authority extends to empower the arbitrators to adopt any set of rules prepared by any specialized institution they see fit and appropriate for their case.[145] In other words, the process of gathering evidence in international arbitration is not restricted by any rigid national procedures.[146] This is a merit that has escaped the traditional common law/civil law debate about the presentation of evidence and standard of proof.[147]

Another general rule with regard to the burden of proof is that the parties are obliged to prove the facts that sustain their cases,[148] such a fundamental principle that exists in all domestic legislations and judiciaries, and is unanimously recognized in the scholarship and the arbitration practice.[149]

The process of evaluating evidence of corruption seems to be influenced by three principal factors. The first is the existing attitudes of international arbitrators in

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[144] WALI, *supra* note 559, at 467. The requirement of the due process assumes that both parties to be equally treated, be noticed in advance of what rules of evidence should the Tribunal apply, and which standards of proof will be used to present and weigh the evidence. Article 27 (4) of the UNCITRAL Arbitration Rules as adopted in 2013 states that: "The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered."

[145] AHMED SHARAF ALDIN, ARBITRATION RULES: A GUIDANCE TO ARBITRATORS AND PRACTITIONERS, 171 (2017).

[146] AHMED ABDUL-KARIM SALAMA, LAW OF DOMESTIC AND INTERNATIONAL COMMERCIAL ARBITRATION, 910 (2004).

[147] SAYED, *supra* note 121, at 91.

[148] ABDUL-KARIM SALAMA, *supra* note 146, at 912.

[149] SAYED, *supra* note 121, at 92. This principle was reiterated in Article 27 (1) of the UNCITRAL Arbitration Rules as adopted in 2013.

evaluating corruption, and the second is the standard of proof they employ. The third is the extent to which the adduced evidence may influence the cogency of the parties' arguments.

1. International Arbitrators' Attitudes in Evaluating Evidence

In response to the case of corruption, where the arbitrators' subjectivity is presumed, two opposing models of attitudes can be found: the repressive attitude and the indifferent attitude.

a. The Repressive Tendency

The proponents of the repressive model believe that arbitrators must become suppressers whenever the parties' choices run against moral rules, especially when these rules call for condemnation of a certain breach. They understand the role of international arbitrators is like that of national judges in that they are each obligated not to close their eyes to corruption. Although arbitrators are appointed by the parties, they still have the authority to eschew complicity in corruption which could contravene public policy objectives and undermine any arbitrated resolution.[150]

This model upholds the foundational values of transnational public policy, taking into account the destructive effects of corruption on international trade, on the running of businesses, and on the state's economic prosperity. The repressive tendency is best represented by the-well known principle set forth by Judge Lagregren.[151]

b. The Indifferent Tendency

The second model's advocates do not consider corruption in international trade as an absolute universal moral value. Thus, they do not believe that arbitrators should condemn corrupt practices. This model's starting point is to question the reality of objective immutable values. In particular, it doubts the viability and necessity of applying the same moral rules to different societies, especially in light of

[150] *Id.* at 11.

[151] ICC case No. 1110, *Supra* note 139.

the cultural and societal differences between modern Western rational governments and the governments of more traditional values.[152]

This model's supporters further argue that traditional societies may adopt the modern state model, however, their traditional practices with regard to governmental decision-making remain subject to the authoritarian scheme. As a matter of fact, in such a society the process of obtaining a favorable public decision from a public figure in terms of a paid bribery is not an act that is heavily condemned.[153]

When it comes to judging corruption before international arbitration, this tendency justifies the arbitrator's not condemning the contested corrupt practice as his or her mission should not imitate a state judge's function. This is because the latter's mindset pushes him or her to apply the obligatory norms and rules of law of his or her country. Alternatively, an international arbitrator functions within a social space in which the conceptions of moral values may intersect or be noticeably inconsistent. This is typically the case with regard to different perceptions of corruption in modern and traditional societies.[154]

In addition, it is also argued by those advocates that, being independent from national regulations, arbitrators should position themselves as upholding fundamental principles on which the mechanism of arbitration is built like parties' autonomy. They also have to consider the peculiarity of the immediate purpose of trade which is profit-making.[155]

c. Analysis

One can easily find many examples that represent the repressive tendency in condemning corruption in international trade. The well-known statement of Judge Lagregren and the award in *WDF vs. Kenya* serves this purpose. On the contrary, this research did not find such an award that explicitly adopted the indifferent tendency's attitude.

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[152] SAYED, *supra* note 121, at 20.

[153] *Id.* at 21.

[154] *Id.*

[155] *Id.* at 22.

It is my contention that it is already well-established that corruption has become a transnational public policy consideration and its condemnation is inescapable. This fact is the result of the experienced consequences of corrupt practices on international business and societies, and is propounded by the efforts of the United Nations, Non-Governmental Organizations, and the International Financial Institutions. Hence, the large consensus on the condemnation of corruption is characterized in its prohibition in most, if not all, domestic legislations. Accordingly, the indifferent tendency seems to exist more in theory than actual arbitral practices.

This analysis does not suggest that there is a uniform approach in adjudicating corruption in arbitration practices, though it does propose the omnipresence of the repressive tendency. Where there is an established institution that makes it clear that corruption is not tolerated, however, there is no great coherence in determining what evidence is sufficient to constitute or to test the allegation of corruption.

Granted that, incoherent practices are partly warranted by the very nature of the composition of arbitral tribunal. This process brings together members from different cultures whose beliefs and attitudes remain subject to, and inspired by, their social and cultural background. This results in variations of their approaches to the question of corruption.

Therefore, the process of analyzing adduced evidence of corruption may produce other solutions to embody their individual beliefs towards corruption. These beliefs may stem from the arbitrators' preferences as to whether his or her moral values should or should not outweigh any other consideration, such as the flow of business or legitimate expectations of the investment.

2. Standard of Proof in Corruption Matters

The previous analysis suggests that there is no known arbitral tribunal that is likely to acknowledge the existence of corruption and let questionable contracts escape sanction.

However, an arbitrator who advocates the repressive tendency will be in favor of setting the bar of proof low, while another arbitrator who is a proponent of the indifferent tendency will be keen to apply a high level of proof. Accordingly,

adopting a certain standard of proof would be probably an indication of the attitude through which the arbitrator would administer the adduced facts.[156]

a. High Level of Proof

A high level of proof takes the position that corruption is a strong accusation - an evil that must be combated well beyond a party simply escaping from its contractual obligations. This position requires heightened levels of proof that stems from superior direct evidence. Thus, evidence resulting from a clear and convincing presentation of facts can suffice to affirm the allegation of corruption.[157]

A clear-cut example of this position can be identified in one ICC award where the claimant raised the allegation of forgery which, like the case of corruption, falls under fraudulent actions. The tribunal noted that "[t]here are no international rules on the burden of proof, but it is commonly accepted by ICC arbitral tribunals that allegations of fraud call for a high standard of evidence." [158] The tribunal questioned the "number of potentially troubling circumstances in support of this proposition" argued by the claimant, and believed that these evidential circumstances were insufficient to establish the alleged fraud.

b. The Normal Weighing of Probabilities: ICC Case no. 6497

Contrary to a high level of proof, the opposite position – the normal weighing of probabilities – does not require the same level of evidence. This approach advocates assessing the normal weighing of probabilities, thus setting the bar of proof low if the process of evidence gathering is problematic.[159] This is seen in ICC case no. 6497 whereby the tribunal relied on a low standard of proof on the extent to which the counter-evidence was sufficient to refute the allegation of corruption based on some relevant, but not conclusive, evidence. However, it stated that this position, which is based on the procedural rules of the applicable Swiss law, could only be resorted to in

[156] *Id.* at *106.*

[157] *Id.* at 104.

[158] ICC case, Award 09 October 2008', ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2011, Volume 29 Issue 4) pp. 860 - 883. Available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/kli-ka-asab290406?q-. Last accessed 19 March 2021.

[159] SAYED, *supra* note 121, at 105.

exceptional circumstances and for a good reason where such change in the burden of proof is accessible and not too burdensome.[160]

Although the tribunal, in this case, made it clear that its position –in cases lack conclusive evidence of allegation of corruption– was exceptional and only resorted to in limited situations. However, this position strengthens the suggestion that when the tribunal set the low standard of proof, it may usually indicate that "the arbitrators seek to facilitate the task of concluding that there is indeed an intent or an act of corruption in the facts at their disposal."[161]

3. Extraction of Proof in Corruption Matters

The adoption of a certain standard of proof by the tribunal leads to the determination of nature and relevance of evidence of whether corruption exists. This step is usually governed by the significance of adduced evidence, so that the tribunal may find a single clear and direct testimony attributed to one of the parties suffice to proving corruption, contrarily, numerous indirect incidents would be seemed insufficient.

When an arbitral tribunal faces the issue of potential corruption, either as to invoke the matter *ex officio*, or upon the defense of the alleging party, it usually investigates numerous elements. These elements may extend to the extraction of relevant facts from the clauses of the contract, its surrounding circumstances, related documentation, testimony, relevant facts, or any other method that may serve the required standard of proof set by the tribunal.[162] Next, upon the criteria that arbitral tribunal deploys to examine the allegation of corruption, the number of facts and weight of evidence is then determined.

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[160] The ICC case no. 6497 of 1994, parties are not identified, Final Award, in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1999 - Volume XXIVa, Yearbook Commercial Arbitration, Volume 24 (© Kluwer Law International; ICCA & Kluwer Law International 1999) pp. 71– 79. Available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn18066?q=6497&type. Last accessed 19 March 2021. The tribunal asserts this position by stating that: "The alleging Party may bring some relevant evidence for its allegations, without these elements being really conclusive. In such a case, the arbitral tribunal may exceptionally request the other party to bring some counter-evidence, if such a task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven… However, such change in the burden of the proof is only to be made in special circumstances and for very good reasons."

[161] SAYED, *supra* note 121, at 106.

[162] *Id.* at 107.

a. Abundance of Evidence

Setting a high level of proof usually result in failing of proving corruption. This is because the nature of corrupt agreements is characterized by secrecy and is covered by numerous misleading agreements.

Certainly, when the tribunal choses to heighten the level of proof, it decides to depend on a combination of relevant facts and evidence to analyze the question of corruption. Such a choice was shown in the abovementioned ICC case where the arbitrators found that the allegation of fraud had not been proven upon the failure of the alleging party to furnish sufficient evidence.[163] Although the tribunal assumed that the surrounding circumstances indicated the possibility of its occurrence, along with the tribunal's acknowledgment of the difficulties facing the alleging parties to gather more evidence, it favored the establishment of more clear and convincing evidence.

b. Common Intention vs. Single Intention

Furthermore, in searching for the intention of corruption as a motive to conclude the contract, particularly in consultancy contracts between the investor and the intermediary, the tribunal may set the bar of proof high. Hence, it may require that the corrupt intention exist amongst all of the involved parties. Upon applying the Swiss law, the arbitral tribunal in ICC case no. 9333 required that the purpose of corruption must be pursued by the two parties' common and shared intention, so that suspicions about the knowledge of one of them of the other's corrupt intention did not qualify the contract to be found illegal due to corruption.[164]

On the contrary, when the tribunal set the bar low in consultancy contracts, it may find that the proof of one corrupt intention is sufficient. This would meet the expectations of the repressive tendency's advocates. Thus, the tribunal in this case would render the agreement null and void.

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[163] ICC case, *supra* note 158.

[164] Sayed, *supra* note 121, at 110, quoting Monsieur G. v Société L., Order, ICC Case no. 9333, 12 March 1998', ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2004, Volume 22 Issue 3) pp. 520 - 530. Available at: https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn25816?q=9333. Last accessed 20 March 2021.

The tribunal in ICC case no. 6248 declared that claims raised upon an offensive secret commission agreement ought to be rejected.[165] The claimant concluded a consultancy contract with the defendant according to which the former was to assist the latter in securing saving on costs of a project. This project was initiated by the defendant as a contractor and on behalf of a joint venture. The defendant's work was supervised by an architectural firm. A dispute arose when the defendant refused to pay the consultant's contractual compensation that was fixed at a certain sum. The defendant argued before the tribunal that this agreement covered an illegal relationship between the defendant and the supervisor's firm appointed by the joint venture to monitor his performance. Thus, the defendant contended that this supervisor abused its position to extort payments from the defendant through collusion.[166]

Although the tribunal asserted that the common intent of the parties by concluding the contested agreement was to harm the joint venture's privilege, it explicitly declared that "the freedom to shape the contents of a contract at the discretion of the parties ends where either the contents itself or the connection between contents and intentions or substantial motives of at least one party to the contract are contra *bonos mores*."[167] The tribunal affirmed that parties' freedom to conclude legal agreements is not uncontrolled, when this freedom contradicts transnational public policy it must be hindered. In this case, the tribunal found the parties' common intention to act corruptly makes their agreement unenforced. Beyond that, it further declared that the same conclusion would be reached if the intention to act corruptly is attributed to one of the parties.

The last standpoint would be favorable to the proponents of the repressive tendency, however, relying upon the sole corruption intent of a party regardless of the

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[165] ICC Case no. 6248, 1990, Final Award, in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1994 - Volume XIX, Yearbook Commercial Arbitration, Volume 19 (© Kluwer Law International; ICCA & Kluwer Law International 1994) pp. 124 – 140. Available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn4813?q=6248. Last accessed 20 March 2021.

[166] *Id.* The tribunal explained that, upon the relevant facts adduced, "[a]ll … elements of an offensive secret commission agreement are assembled in the … agreement: Claimant and defendant intended to secretly exercise influence on the decisions of the Group (joint venture) for defendant's benefit by inducing the architectural firm to disregard the (joint venture's) privileged fiduciary rights under the supervision contract."

[167] *Id.*

other party's knowledge may result in a hazardous effect. It would be an easy way for the party that was indebted or failed to meet its contractual obligation to escape its sanction. Accepting such an allegation, especially with the normal weighing of probabilities would facilitate that party's ability to undermine and manipulate the process of evidence gathering.[168]

Furthermore, arbitral practice suggests that examining the evidence of the intermediary's corrupt intention would suffice to establish the existence of corruption.[169] Developing the intermediary's intent to resort to corruption after concluding the contested agreement with the investor assumes that the latter does not share this intent. This incident may occur when the bribed public officials intervened to extort the intermediary after that agreement is done.

However, the tribunal may depend on some relevant facts to determine whether there is a common intention shared by the investor and the intermediary, such as the reasons for choosing that intermediary in particular, the investor's previous knowledge for the connections between the public official and the selected intermediary, and whether the terms of their agreement are in compliance with the applicable laws.[170]

To sum up, corruption is a sound manifestation of the concept of transnational public policy, and is characterized as a moral value that has a large worldwide consensus. Its destructive consequences impact businesses and states' public wealth led almost all states to criminalize corrupt practices, and this universal tendency is encouraged by the international conventions and the condemnation by other international organizations.

In the realm of international arbitration, while arbitrators have a moral and a legal duty to combat corruption in international trade, however, their attitudes towards corrupt practices are influenced by how the corruption is proved. Accordingly, arbitration practices vary as to how evidence is evaluated.

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[168] SAYED, *supra* note 121, at 111.

[169] *Id.* at 114.

[170] *Id.* at 115.

The next chapter is dedicated to evaluating the *Omar Effendi* decision, this analysis aims at emphasizing that the Court failed to achieve what it aspired to both on the national level and on the international level, on the contrary, it led to catastrophic results.

V. Judging the *Omar Effendi* Decision

In *Omar Effendi,* the Court affirmed that the sale contract of the Company is a contract of corruption and is inadmissible before the ICSID arbitration. It also alleged that it aimed at safeguarding the public ownership and protecting serious investment.

This chapter assesses the *Omar Effendi* decision from two perspectives: (1) the Court's rationale for the issue of contracts of corruption and its significance on the admissibility of the claims initiated before the ICSID arbitration. And, (2) the impact of the Court's decision on the Country's public wealth, economy, and on investment credibility.

The first segment of this chapter hypothesizes that the investor in *Omar Effendi* resorts to the ICSID arbitration claiming damages resulting from the Court's decision. It envisages the conclusion that will be reached in light of the approaches and practices as presented in chapter three.

For this purpose, a comprehensive comparison will be held between the Court's rationale and three ICSID arbitral awards with regard to the issue of inadmissibility of contracts of corruption before the ICSID arbitration; the first award is *Union Fenosa* in terms of its relevance as a main model of this study, the second is *WDF vs. Kenya* which was cited by the Court, and the third is *Metal Tech vs. Uzbekistan* due to its relevant facts.

The analysis exhibits successively the process of perceiving and analyzing adduced evidence and serves to identify each tribunal's approach to issues of burden of proof, standard of proof, and evaluation of evidence.

The second segment of this chapter evaluates the outcomes of the Court's decision on the national level in light of this assessment. It explains the major negative results it caused and demonstrates the odds it produced.

Through this demonstration, I claim that the Court failed to achieve what it aspired, and that its attempt to rectify the odds which resulted in concluding the Omar Effendi sale contract led to even worse results. I eventually suggest that the negative results of the sale contract could have been mitigated if it applied the law properly.

A. Evidentiary Matters Before ICSID Arbitration: Selected Awards

The process of analyzing, evaluating, and deciding upon allegation of corruption raised by one of the parties before an arbitral tribunal necessitates investigating the seriousness of this allegation, to determine which standard of proof is to be employed and whether the party's burden of proof is met.

Perceiving the adduced evidence is a critical process through which an international arbitrator may decide to depend upon the existence of as many as indirect circumstantial evidence, or to count on a single clear and direct evidence. In other cases, an arbitrator may have the chance to avoid the debate over the party's burden of proof entirely; this happens when a party against whom the allegation of corruption is invoked, voluntarily brings a clear evidence of their own corruption.

1. Presumptions and Circumstantial Evidence: *Union Fenosa*

In *Union Fenosa*, the Tribunal found that Egypt's allegation of corruption does not stand for a clear and direct evidence. Instead, it brought some separate incidents as circumstantial evidence. As a result, it joined up these incidents to decide whether it produced a plausible conclusion. However, the Tribunal eventually affirmed that these incidents were not enough to substantiate Egypt's allegation.

As previously mentioned, Egypt's allegation of existing corruption on the part of the Claimant in *Union Fenosa* was built on three separate bases: (1) the Claimant choice of a corrupt subcontractor, (2) the Claimant's engagement with a confident of the then-President Mubarak, and (3) the engagement with an Egyptian business partner who cultivated his connections with senior public officials to steer the project to the Claimant's favor.

However, the tribunal rejected two of these bases based on its weakness and lack of evidence, and even asserted that "[t]hese two pleas should not have been made by the Respondent based on the materials presented by it to the Tribunal."[171] On the contrary, it found the issue of the involvement of the Claimant with the 'alleged' intermediary deserves to be considered due to the relevance of the adduced evidence.

[171] *UNIÓN FENOSA, supra* note 9, para. 7.112.

In the absence of any direct evidence of corruption, as per usual, the Tribunal depended on an accumulation of circumstantial evidence, which it viewed as "as good as direct evidence in proving corruption."[172]

Circumstantial evidence is a technique employed by arbitrators to ascertain facts that cannot be proven by direct evidence. This technique helps in deducting facts "at which the evidence is directed from another connected fact",[173] because it is often critical to arrive at decisions in corruption cases. This method leads to the inference of a particular fact only when it is substantiated by a reasonable amount of other circumstantial evidence. Hence, the availability of circumstantial evidence serves to support the occurrence of the alleged fact.[174] Beyond that, the Tribunal retains the balance of probabilities as the prospective standard of proof.

With this standard of proof established, three principal factors were examined in *Union Fenosa* to assess the allegation of corruption through circumstantial evidence: the nature and the effectiveness of the intermediary's participation in the project, the nature and proportionality of the remuneration the intermediary received from the Claimant, and his identity and status.

The adduced evidence was drawn from the disclosed documentation which was composed of agreements, publicly reported interviews, minutes of the Claimant's internal meetings and a fax message.[175]

a. The Effectiveness of the Partner's Participation to the Project

The Tribunal accepted the Claimant's argument that this partner, along with his family-owned company, was from the outset viewed as necessary to the project.[176]

[172] *Id*. para 7.52.

[173] SAYED, *supra* note 121, at 94.

[174] *Id.*

[175] *Union Fenosa*, supra note 9, part VII para 7.74.

[176] *Id*. para 7.108.

The Claimant explained that this partner was chosen because he was the first mover of the project, [177] and due to his personal expertise and experience in the industry. [178]

However, the Tribunal declined to recognize these justifications. In fact, it inferred from the adduced evidence that the project was conceived by, and been subject to previous developments on the Claimant's behalf by others before this partner's involvement.[179] Beyond that, it disputed the possibility that this partner provided any significant capital to the project, as it materialized that the Claimant would completely fund the project and "expects that [the latter] provide financing and markets."[180] Moreover, all the evidential materials presented before the Tribunal were affirmative that the partner's professional limited expertise in the field of the project did not warrant the choice made by the Claimant.[181]

Consequently, the Tribunal believed that the only plausible basis for the choice was the partner's tangible effectiveness to benefit the Claimant in his ability to access senior decision-makers, with whom he had cultivated connections, and exercised influence. [182] It further explained that having access to government power is a valuable asset to bring to such a project controlled by the State's senior figures. Accordingly, being a paid lobbyist does not *necessarily* stigmatize his influential role as corrupt. [183] It is not corruption in the absence of either direct or circumstantial evidence that this influence included any back-channel influence.[184]

Although this conclusion is reiterated in international arbitration practice,[185] it deserves to be criticized. The Tribunal's rationale ignored a clear significance on a

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[177] *Id*. para 7.103.

[178] *Id*. para 7.95.

[179] *Id*. para 7.107.

[180] *Id*. para 7.92.

[181] *Id*. Para 7.100.

[182] *Id*. Para 7.101.

[183] *Id*. Para 7.102.

[184] *Id*. Para 7.109.

[185] SAYED, *supra* note 121, at 130. Quoting *Lunik v. Soliman, Bulletin de L'Association suisse de l'arbitrage,* 1998, p. 210, at p. 218, par. 44. *See* also *Id.* at 110, quoting Monsieur G. v Société L., Order, ICC Case no. 9333, Award of 1998, *Bulletin de L'Association suisse de l'arbitrage*, 2001, no. 4, p. 757, p. 770. Available at: https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn25816?q. Last accessed on 26 March 2021. The arbitrator investigated the relation between a consultant and a public official and concluded that such a relation did not inevitably suggest engaging in corruption, because the obtained benefit could be possibly achieved

possible corrupt role of this intermediary in the project. And, it was actually biased against Egypt as to bring *ex officio* a plausible explanation on behalf of the Claimant who, in light of this circumstantial evidence, ought to give more credible explanation.

b. The Proportionality Between Services and Remuneration

Following an established principle in arbitral practice, the Tribunal in *Union Fenosa* avoided evaluating the proportionality between payments made by the Claimant for the services rendered by the partner's company due to the commercial nature of these transactions.

The Tribunal recognized the *exaggeration generosity* of the remuneration paid by the Claimant to the partner's company in return for the services rendered to the project. This occurred even though the Tribunal refused to second-guess the underlying conditions according to which the Claimant should have paid.[186] The Tribunal enumerated some of these services as perceived from the adduced evidence and it concluded that the reward should be viewed as "a commercial matter for negotiation and agreement between the parties at the time."[187] Declining to question the legitimacy of the *generous* payments, the Tribunal took into account the parties' originally-envisaged plans to develop a longer relationship and concluded that these payments did not constitute part of a corrupt scheme relating to the project.[188]

No doubt, this conclusion is reiterated in arbitration practice. In *Lunik v. Soliman*, the arbitrator emphasizes the hardship of measuring the services provided by a consultant in concluding that:

> [t]he very nature of the agent's or the sponsor's activity, and especially his insider influence with the [public purchasing entity], … is at odds with the idea that it would be possible to

on an amicable and for free basis. The Tribunal specifically declared that "[t]he privileged and uncontested relations between the family of the claimant and the [public official] would rather have been of such a nature as to facilitate the efforts of the claimant and the obtaining of useful information, on an amicable and free basis, without any corruption being necessary or envisaged." Moreover, the possibility of employing such a relation did not raise great concern for the arbitrators in another ICC case when the tribunal acknowledged the excellent connections between a consultant and a senior public figure which enabled the former to obtain "important information and to exert a certain influence on the decision to be taken." ICC Case no. 4145, collection of ICC Arbitral Awards, Vol II, p. 53, at p. 62, par. 62.

[186] *Union Fenosa, Supra note 9,* Para 7.88.

[187] *Id.*

[188] *Id*.

> control or measure the services or the diligences accomplished by [the consultant], which remuneration, according to the contract, does not depend on working hours effectively spent, or on the number of personnel used or the number of letters or documents drafted.[189]

Indeed, this view reflects the arbitrators' wide discretionary power to assess the proportionality between services rendered by consultants and remuneration they receive. However, this power was misused by the tribunal that disregarded another clear evidence of corruption on the part of the investor and the role of the Egyptian intermediary.

c. The Partner's Identity and Status

The Tribunal emphasized that this partner's identity and status was obvious. He and his company's participations in the project were not passive from the outset. This fact defies the possibility of being such a covert peddler of influence.[190]

This inference reflects the approach of the tribunal in ICC case No. 6497. In this case, the defendant was a contractor who resisted commission payments to an allegedly corrupt consultant and argued that the consultant's identity was not transparent. However, the tribunal did not draw from the ambiguities about the consultant's internal organization any adverse conclusion. It found that "[t]his argument is not conclusive for deciding which was the real object of the agreements between the parties and if bribes were paid in fact."[191]

For the purpose of analyzing the adduced evidence, the Tribunal decided to scrutinize the documents that Egypt relied upon to substantiate the case of corruption. It studied each document individually in the context of other related evidence presented through the proceedings. Next, it examined the allegation more broadly through the accumulation of evidence. In all cases, it reached a conclusion that Egypt

[189] Remarkably, the arbitrator added that: "and we know that sometimes one single telephone call can be enough to secure a big procurement contract, whereas the sending of an important team of engineers and the spending of working hours may not suffice." SAYED, *supra* note 133, at 128 quoting *Lunik v. Soiman, Bulletin de L'Association suisse de l'arbitrage,* 1998, p. 210, at p. 228, par. 96.

[190] *Union Fenosa, supra* note 9, Para 7.109.

[191] ICC Case no. 6497, 1994, *supra* note, 160.

did not meet the set standard of proof to establish the case of corruption on the part of the investor and the influential Egyptian partner.

This explanation should be viewed in light of two main facts. First, the Tribunal opted to find a convincing explanation to serious incidents about the Egyptian partner's role, especially in light of the Claimant's weakness. Given that, the Tribunal's explanation, as pointed out by the dissenting opinion, "indeed flies in the face of Claimant's own denials that [the Egyptian partner] exerted any influence on government officials at all."[192]

However, it is my contention that the Tribunal found it more convenient to reach more affirmative answers to the questions of corruption instead of taking the position of the tribunal in ICC case No. 6497 in which it resorted to the counter-evidence to refute the allegation of corruption based on some relevant evidence.[193] In effect, the Tribunal explicitly stated that "The legal burden of proving corruption rests upon the party alleging corruption; and it is not discharged by placing the burden on the adverse party to prove the absence of corruption."[194]

Second, employing circumstantial evidence led the Tribunal to discard allegation of corruption, particularly while knowing that there was no proof of any fund passed from the consultant or his company to senior officials. Accordingly, the case of bribery was dismissed. What more is, the Tribunal stressed on the fact that neither the businessman nor the concerned decision-makers were prosecuted in relation to the contested contract. In passing, it criticized Egypt's argument that the contract was conducted in violation to its domestic laws, as it was invoked after more than ten years during which several amendments had been made to it.

2. Non-Addressing of Evidentiary Matters: *WDF vs. Kenya*

[192] *Union Fenosa, supra* note 9, at. 5. Para. 17: Dissenting Opinion of Mark Clodfelter

[193] ICC Case no. 6497, *supra* note 160.

[194] *Union Fenosa, supra* note 9, par. 7.113. Being Conservative to accept this view, the dissenting opinion of Mark Clodfelter contend that there was a clear red flag "sufficient, not to shift to Claimant a burden of proving that there was no corruption, as worries the majority, but to require Claimant to *go forward* with, at very least, a plausible and credible explanation." Supra note 136 at 4 para. 16.

The particular significance of *WDF vs. Kenya* stems from the reference made in the *Omar Effendi* decision to its principle with regard to the inadmissibility of contract of corruption claims before international arbitration. The Court particularly cited the Tribunal's statement that "claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[195] Therefore, finding the basis on which the tribunal in *WDF vs. Kenya* deducted the proof of corruption is a prerequisite to manifest the fallacy of the Court's imitation.

a. Key Facts of *WDF vs. Kenya*

The contested contract in this case was concluded between a foreign investor and the Kenya Airports Authority for the purpose of construction, maintenance, and operation of duty-free complexes at international airports in Kenya.[196] The project began in 1988 when the investor began to consider diversifying his investments in specific African countries, and he decided to begin in Kenya.[197]

Therefore, upon the assistance and the advice of a Kenyan businessman who had close connections to the President of the state, a meeting was arranged with the latter at his residence. The purpose of this meeting was to obtain necessary licenses and authorizations for the establishment of the project, and the Kenyan intermediary's advice included the investor making a personal donation to the President during the meeting in accordance with a Kenyan cultural practice.[198]

Following the investor's approval, the intermediary arranged for a meeting in which the former brought two million USD, exchanged by the intermediary into the domestic currency, to the President's residence.[199] The President approved the proposed investment and suggested that the investor meet other public officials. After a series of meetings, the concerned governmental affiliate concluded a ten-year

[195] *WDF v. Kenya*, *supra* note 25, at 21.

[196] *Id*. at. 9.

[197] *Id*. at 16.

[198] *Id*. at 18.

[199] *Id*.

renewable lease with the investor's company on 27th of April 1989.[200] The contract was governed by the law of the host state, and the clause of arbitration stipulated the English law to be applied to resolve any dispute arising thereof.[201]

A few years later, a dispute arose between the investor and the Kenyan government due to the refusal of the investor to allow his company's name to be used in allegedly illegal activities, including fraud, conducted by the President and one of his deputies.[202] The Kenyan courts issued judicial orders which resulted in the expropriation of investment as the project ownership was transferred to a Kenyan politician.[203]

The investor initiated ICSID arbitration. The Chief Executive Officer and shareholder of World Duty Free provided a full written statement included a detailed testimony regarding the meeting with the President of the state and the two million USD payment.[204] Immediately, Kenya raised the issue of corruption and requested the dismissal of the claim. The respondent's basis was that the contract under examination was procured by bribery; therefore, it is unenforceable under the applicable law and international public policy.[205]

b. Deduction with No Burden of Proof Required

The determinant factor that the tribunal had to administer is whether the two million USD payment constituted a bribe, and whether obtaining the contract was the legal consequence of bribery.[206] The investor contended that since Kenyan law is the applicable law to the contract, this payment was not unlawful, but rather was

[200] *Id*. at 17. According to the written statement submitted by the company's chief executive officer, he received several requests for gifts to bring for officials in the Kenyan Government, but he was not given any money in return for these gifts.

[201] *Id*. at 13.

[202] *Id*. at 11.

[203] *Id*.

[204] *Id*. at 16.

[205] *Id*. at 15.

[206] Lamm and Menaker, *supra* note 141, at 437.

considered as a "gift of protocol or a personal donation… to be used for public purposes within the framework of the Kenyan [cultural tradition]."[207]

However, the Tribunal declined to perceive this payment as a lawful gift. It believed that this payment was a bribe paid in exchange for procuring business with the host state's government. It traced the sequence of events from the beginning in order to dispute the investor's argument that the concealed payments were a personal donation for public purposes.

The Tribunal followed the chronicle of the events. The starting point was when the investor requested the advice of his Kenyan peer (knowing his close ties to the state's President) to obtaining the necessary authorizations for the former prospective investment in Kenya. The next point existed when he showed his approval of the payment of two million USD. Finally, the examine reached the concluding of the agreement with the Kenyan government. It insisted that "those payments were made not only in order to obtain an audience with [the President], but above all to obtain during that audience the agreement of the President on the contemplated investment."[208]

Giving a particular scrutiny to the consequences of bribery under the applicable law and transnational public policy,[209] the Tribunal concluded that agreement based on corruption or was obtained by bribery must be dismissed.[210]

The peculiarity in *WDF v. Kenya* is that the Tribunal needed not to address evidentiary matters,[211] because the claim itself did not turn on legal presumptions, statutory deeming provisions, or different standards of proof under the applicable law.[212] The main evidence that the Tribunal relied on was driven from the claimant's own testimony submitted in a written statement. Certainly, with this direct

[207] *WDF v. Kenya*, *supra* note 25, at 18.

[208] *Id*. at 18.

[209] Lamm and Menaker, *supra* note 141, at 438.

[210] *WDF v. Kenya*, *supra* note 25, at 21.

[211] Lamm and Menaker, *supra* note 141, at 440.

[212] *WDF v. Kenya*, *supra* note 25, at 24

uncontested evidence, the Tribunal needed not to search for answers to the questions of proof as frequently opted to in most cases of corruption.[213]

3. Deducting Proof *Ex Officio*: Metal Tech vs. Uzbekistan[214]

The Metal Tech vs. Uzbekistan case involved an Investor-State dispute initiated under the 1994 Israel-Uzbekistan Bilateral Investment Treaty.[215] According to the first article of this treaty,[216] the protection is limited to investment implemented in accordance with the laws and regulations of the host state.

a. Key Facts of *Metal Tech vs. Uzbekistan*

The Claimant was a foreign company that had formed with two other State-owned entities a joint venture by concluding the constituent contract on 28 January 2000,[217] to build and operate a plant for the production of molybdenum products (Uzmetal) in Uzbekistan.[218] Six years later, criminal proceedings were initiated by the host state's public prosecution against Uzmetal's officials alleging abuse of authority.[219] Subsequent developments had led to judicial orders resulting in the liquidation of the plant assets.[220]

On January 26, 2010 Metal-Tech commenced arbitration proceedings on the ground that the host state violated its obligations under its law, the BIT, and customary international law.[221] During the proceedings, Uzbekistan objected to the jurisdiction of the Tribunal on the basis that the Claimant obtained its investment by

[213] Lamm and Menaker, *supra* note 141, at 441.

[214] Metal-Tech Ltd. V. The Republic of Uzbekistan (Award), ICSID Case No. ARB/10/3, 4 October 2013. (hereinafter *Metal-Tech vs. Uzbekistan*) Available at https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf Last accessed 28 March 2021.

[215] Lamm and Menaker, *supra* note 141, at 442.

[216] Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Reciprocal Promotion and Protection of Investments. Available at https://www.italaw.com/sites/default/files/laws/italaw6153.pdf. Last accessed 29 March 2021.

[217] *Metal-Tech vs. Uzbekistan, supra* note 214, at 12 par. 19.

[218] Id. par 20.

[219] *Id*. at 15 par 37.

[220] *Id*. at 18 par 50.

[221] *Id*. at 18 par 55.

bribing public officials.[222] The host state's criminal investigations disclosed that this investment included kickback payments to government senior officials[223]. On the hearing, the Claimant's Chairman and Chief Executive officer disclosed that, during the negotiations of the main contract of the project, the Chairman has concluded consultancy agreements with three Uzbek citizens, knowing that one of them was the brother of the then-Prime Minister, and the second was working in the office of the President of the State.[224]

The Tribunal has deduced main facts which it considered determinative of the outcome of the proceedings. It lists that the consultants were paid a total of roughly four million USD. This sum of money exceeded the Metal-Tech's initial cash contribution to the project, and amounted to nearly 20% of the entire project cost.[225] And, it was paid through offshore companies to foreign bank accounts;[226] received the last payment in the same month when the President officially dismissed the Prime Minister (one of the consultants' brothers),[227] and disproportionally remunerated, irrespective of any services provided (in light of the claimant's repeated failure to provide evidence justifying the legitimate services in return) or possessing any particular qualifications of consultancy.[228]

b. The Tribunal's Power to Call *Ex Officio* for Evidence

The Tribunal at the outset maintained that since the establishment of the State's responsibility was sought upon the breach of its international obligations, it was appropriate to apply the principle of international law as to the burden of proof, i.e. each party has the burden of proving the facts on which it relies.[229] However, taking into consideration the divergence in the parties' positions on burden and standard of

[222] *Id*. at 34 par 110 (i).

[223] *Id*. at 22 par 76.

[224] *Id*. at 69 par 211.

[225] *Id*. at 63 par 197.

[226] *Id*. at 65 par 202.

[227] *Id*. at 75 par 227.

[228] *Id*. at 64- 65 par 201, 204.

[229] *Id*. at 78 par 237.

proof,[230] the Tribunal questioned the viability of this debate to resolve their dispute while the relative facts did not require the application of the rules on burden of proof or presumptions.[231]

In effect, the Tribunal exercised its power *ex officio* to inquire about the reasons of the payment of those substantial sums according to the claimant's acknowledgment.[232] The Tribunal found that these facts were not alleged by the respondent, rather it emerged during the course of arbitration; therefore, it invited the parties *ex officio* to provide additional testimony and evidence.[233]

This inquiry resulted in finding that corruption was established to an extent sufficient to violate Uzbekistan law with regard to the establishment of the claimant's investment. Accordingly, the Tribunal came to the conclusion that it lacked Jurisdiction over the claim.[234]

Following the Tribunal's explanation in *WDF vs. Kenya*,[235] but without resorting to the concept of transnational public policy, the Tribunal in *Metal-Tech* declared that findings on corruption often come down on claimants while, as may be seen at first sight, it exonerated the other party who itself may have been involved in corruption. However, the Tribunal continued, the issue is not to punish one of the parties, rather it must be seen to promote the rule of law, which gives no room for a tribunal to assist a party that has engaged in a corrupt act.[236]

B. Judging the Decision of *Omar Effendi* Before International Arbitration

The previously demonstrated scholarly writings and international arbitral awards lead to several alarming questions about the Court's findings and conclusion in *Omar Effendi*. The Court's legal analysis has triggered a sequence of legal missteps,

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[230] *Id*. at 77 par 236.

[231] *Id*. at 78 par 239.

[232] *Id*. par 240, 241.

[233] *Id*. at 79 par 241.

[234] This particular outcome reflected that the tribunal emphasized that the claim itself was not grounded on an investment that was made in accordance with the applicable law. *Id*. at 128 par 372.

[235] *WDF v. Kenya*, *supra* note 25, at 26.

[236] *Metal-Tech vs. Uzbekistan, supra* note 214, at 131 par 372.

particularly with regard to issues of jurisdiction, admissibility, and evidentiary matters and burden of proof.

1. Jurisdiction

The first legal blunder appears when the Court *ex officio* argued that its decision should not be viewed as a prejudice against the investor. It claimed that it had full jurisdiction over the relevant dispute, as a result of the absence of any settlement mechanism included in the *Agreement on Economic, Commercial, investment, and technical Cooperation* between Egypt and the Kingdom of Saudi Arabia (the investor's State of nationality, *hereinafter* KSA).[237] However, both Egypt and KSA have ratified the *Agreement for Promotion, Protection, and Guarantee of Investment among the Member States of the Organization of Islamic Conference*.[238] According to article 17 of this Agreement, parties are entitled to resort to arbitration if their dispute is not to be settled through conciliation,[239] besides, arbitral awards are final and cannot be contested.[240]

The Court depended only on the provisions of the bilateral agreement between Egypt and KSA and considered that the *domestic judiciary* must have the jurisdiction of the dispute. Although there was a functioning mechanism set by another multilateral convention, both the countries have ratified it. Thus, the investor has the

[237] The Agreement on Economic, Commercial, investment, and technical Cooperation between Egypt and the Kingdom of Saudi Arabia, signed on 13 March 1990, and effective by law no. 208/ 1990 as of 8 November 1990. Available at http://almanzuma.laa-eg.com/ETash/DocViewer?isDet. Last accessed 29 March 2021.

[238] AGREEMENT ON PROMOTION, PROTECTION, AND GUARANTEE OF INVESTMENTS AMONG MEMBER STATES OF THE ORGANISATION OF THE ISLAMIC CONFERENCE, 10. The Agreement was entered into force on 23 September 1986. Available at https://iccia.com/sites/default/files/investment/agreements/2399_41.pdf. Last accessed 29 March 2021.

[239] *Id*. Article 17 (1)(2)(a) reads as follows: "[u]ntil an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures: If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute."

[240] *Id*. Article 17 (1)(2)(d) reads as follows: "[t]he decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."

right to resort to international arbitration under the auspice of this convention irrespective of the Court's decision.

The second fault with regard to the issue of jurisdiction existed as the Court assumed its competency to decide upon the admissibility of the investor's potential resorting to arbitration. It ignored a fundamental principle of arbitration, which is *competence-competence*, according to which, the arbitral tribunal has the power to decide upon its own jurisdiction, including "any objections with respect to the existence or validity of the arbitration agreement."[241] Accordingly, national courts do not have the authorization to decide in advance whether a party is entitled to initiate a claim before arbitration. Its decision in such a matter is unproductive and does not affect the competence power of arbitration.

Next, the Court superficially read article 25 of the Convention concerning the ICSID jurisdiction over investor-State disputes. It declared that since both Egypt and KSA have ratified the Convention, therefore, the jurisdiction to submit their dispute to the Centre must be in writing.[242]

It is true that consent in writing is the only formal requirement in this convention according to article 25, and must be obtained from all concerned parties, yet, this consent is not limited to a single form.[243] Accordingly, it may be recorded in a direct agreement between the parties,[244] such as a separate agreement or an investment application.[245] Alternatively, it can be found in a host state legislation, therefore, it expresses its unilateral acceptance in advance to submit prospective investment disputes to the ICSID jurisdiction, accordingly, this offer could be accepted by foreign investors to become binding.

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[241] Nigel Blackaby, J. Martin Hunter & Alan Redfern, *An Overview of International Arbitration*, *in* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 305–352, 340 (Sixth Edition ed. 2015).

[242] ICSID Convention, *supra* note 24, Article 25 reads as follow: (1) "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

[243] Christoph H. Schreuer, Loretta Malintoppi & August Reinisch, *Jurisdiction of the Centre*, *in* THE ICSID CONVENTION: A COMMENTARY, Cambridge University Press, 191 (2009).

[244] *Id.* at 192.

[245] *Id.* at 194.

In ICSID case no. ARB/84/3,[246] Egypt enshrined its consent to the jurisdiction of the Center in a piece of domestic legislation,[247] so the foreign investor directly initiated the case without prior 'written agreement', however, Egypt challenged the jurisdiction on the ground that its legislation set other alternatives that made the article too ambiguous to establish consent. The Tribunal rejected this stance because it found that the legislation set a "mandatory and hierarchic sequence of dispute settlement procedures, and constituted an express consent in writing within the meaning of article 25 (1)"[248]

In *Omar Effendi*, the contested contract was governed by law no. 8/ 1997. According to article 8 therein, Egypt expressed its consent to submitting investment disputes to the ICSID arbitration.[249] Therefore, there was explicit consent in accordance with the requirements of the Convention and as applied in SSP vs. Egypt.

2. Admissibility

The Court in *Omar Effendi* cited the *WDF vs. Kenya*'s principle that established that "bribery is contrary to … transnational public policy. Thus, claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this arbitral tribunal."[250] However, in *WDF vs. Kenya*, the tribunal faced an unequivocal case of bribery.

The Tribunal's conclusion was established on the sequence of incidents, not on assumptions. It pointed out that the payment was made and handed over by the investor to the President in order to obtain the necessary authorizations of his project. This incident came after the intermediary's advice and his effective role in facilitating

[246] Southern Pacific Properties (Middle East) Limited, Southern Pacific Properties Limited v The Arab Republic of Egypt, ICSID Case no. ARB/84/3, 27 November 1985, Decision on Jurisdiction, (hereinafter SPP vs. Egypt). Available at https://www-kluwerarbitration-com.libproxy.aucegypt.edu/document/ipn3585?type. Last accessed 30 March 2021.

[247] At time, Article 8 (para 1) of the existing law of investment no. 43/ 1974 read as follows: "Investment disputes in respect of the implementation of the provisions of this law shall be settled in a manner to be agreed upon with the investor or within the framework of the agreements in force between [Egypt] and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of law no. 90 of 1971, where such Convention applies."

[248] SPP vs. Egypt, *supra* note 246, at 38 para 69.

[249] Law no. 8/ 1997, *supra* note 5.

[250] *WDF vs. Kenya*, *supra* note 25.

the meeting between the investor and the President and resulted in approving the investor's plans and led to concluding the agreement. Thus, it concluded that, chronically, the payment was a bribe paid in exchange for procuring investment.

On the contrary, nothing in *Omar Effendi's* facts referred to the issue of bribery as a criminal activity. The Court repeatedly invoked the issue of dissipation of public wealth, it then equated this issue to corruption. However, dissipation of public wealth is not equivalent to corruption from the lens of international arbitration, because bribery, as one form of corruption must be intentional and deliberately committed, but the dissipation of a country's wealth can be unintentionally committed.

Indeed, the transaction of selling the Omar Effendi Company witnessed a catastrophic violation of the national law, however, this is not a sound ground that can be heard before international arbitration. The Tribunal rejected Egypt's allegation that was built on the breach of its domestic bidding law. The Tribunal asserted that "even if correct, this breach can support no inference of corruption by the [investor]in circumstances where the [contract] was approved in draft by the Egyptian Council of Ministers and, after its execution, endorsed by the Minister of Petroleum."[251]

In effect, the Court reached a wrong conclusion when it considered the serious violation encompassed the transaction as amounting to acts of corruption as established in international arbitration. I believe that the Court misused the term "corruption" to stigmatize these severe violations and in order to equate it to "corruption" that is condemned in international arbitration.

3. Evidentiary Matters and Burden of Proof

Analyzing the adduced evidence with regard to the allegation of corruption varies from one tribunal to another, especially when there is no direct and cogent evidence. Accordingly, when a tribunal depends on the accumulation of circumstantial evidence, along with its wide discretionary power, the result is always unpredictable.

[251] *Union Fenosa*, *supra* note 9, part VII at 25 par 7.90

In *Omar Effendi*, the Court assumed that the encompassed circumstantial evidence produced serious suspicion of corruption, and later it affirmed that there is actually corruption existed. Contrarily, the Tribunal in *Union Fenosa* was amenable to view all the raised suspicions in favor of denial of corruption although it admitted that there was a tremendous and unexplained discrepancy between the intermediary's participation and the compensation he was awarded. The Tribunal further commented that "[s]uspicion is not equivalent to proof."[252]

While in *Metal-Tech*, the Tribunal had clear evidence that there were payments made by the investor for services of consultancy, having found that these payments have roughly amounted to 20% of the entire project triggered further questions. Similarly, in *WDF vs. Kenya*, the Tribunal faced unequivocal proof of paying two million USD to the State's President before obtaining the investment.

As for the standard and burden of proof, the recognition of the hardship of proving corruption by direct cogent evidence led the Tribunal in *Union Fenosa* to set a low standard of proof. This standard of proof apparently was dependent on the accumulation of circumstantial evidence. As a result, it retained the balance of probabilities, and expected Egypt to bear the burden of proof as per the general rules.[253]

However, the Tribunal found that Egypt has failed to produce sufficient evidence to the allegation of corruption, and it considered that all the presented circumstantial evidence was not reasonably connected to produce a convincing result of bribery. On the contrary, both the Tribunals in *Metal-Tech* and *WDF vs. Uzbekistan* needed not to engage in evidentiary matters, only because they were convinced by the direct clear evidence admitted by the investors themselves.

To that end, the Court's conclusion with regard to the inadmissibility of the investor's potential claims before the ICSID arbitration was clearly rife with unreasonableness. Certainly, even the most extremist proponent to the repressive tendency in evaluating corruption would dispute that rationale, either with relation to

[252] *Id,* at 30 part VII par 7.113

[253] *Id*, part VII p 15 para 7.52

the elements that constituted corruption, or concerning the standard and the extent of proof.

This conclusion is proven by what the arbitral tribunal affirmed in *Misr-Shibin Textile* when the Court adopted the same rationale. The investor, upon the loss of his investment due to the Court's stance, resorted to the ICSID arbitration regardless of the Court's decision, and the available information indicates that the case was concluded.[254]

C. Consequences of *Omar Effendi*

As presented in chapter two, the Court in *Omar Effendi* was motivated by its responsibility towards the dissipated publicly-owned assets and its duty to retain Egyptians' properties.

The decision was synchronized with the political instability that took place then, which gave room for delivering an untraditional form of judicial decisions. The Court linked between the transaction in question and the State's submission to foreign governments and international institutions' unfair policy to devastate Egypt's economy and to dissipate its public wealth.

In his article *Law and Courts in Authoritarian Regimes*, Moustafa explains that authoritarian regimes generally use law and courts as instruments of political control.[255] However, regimes' interests have never been advanced through judicial institutions straightforwardly. On the contrary, litigation before these courts enables activists to initiate high-profile cases challenging the regime's radical policies.[256] He emphasizes the strategic position judges occupy in the interpretation, application, and reviewing of regime legislations. This position entitles them to produce, through their identities and aspirations, their own perception of the rule of law that ought to contain substantive conceptions of fundamental rights.[257]

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[254] Indorama International Finance Limited vs. Arab Republic of Egypt, ICSID case no. ARB/11/32, 2 July 2015, concluded. Available at https://icsid.worldbank.org/cases/concluded. Last accessed 30 March 2021.

[255] Moustafa, *supra* note 2, 287.

[256] *Id.* at 288.

[257] *Id.*

This explanation can best describe the Court's activism shown in *Omar Effendi*, *Misr-Shibin Textile*, *Tanta linen*, and other identical decisions. As Moustafa illustrates, reform-minded judges in authoritarian regimes may test their limits and give radical solutions to influence the direction of political reform.[258]

Granted that, the historical context of *Omar Effendi* and the subsequent decisions encouraged the Court to produce its own perception with regard to retaining the privatized assets. Unfortunately, this attempt was at the expense of justice, the rule of law, and the State's economic interests.[259]

1. Legal Consequences

The Court's attempt to rectify the government's faults in privatizing publicly-owned enterprises led to legal peculiar outcomes. For instance, it demolished the legislator's aim that targeted protecting investments,[260] brought an unprecedented language to the field of judicial decisions, and it appeared biased against individuals' rights and interests which resulted in jeopardizing the credibility of the judiciary.

First, attracting direct foreign investment was one of the strategies that the Egyptian governments pursued starting the 1990s. Therefore, law no. 8/ 1997 equivocally prohibited nationalization or expropriation of the investors' properties.[261] However, the *Omar Effendi* decision clearly confiscated the investor's investment.

The Court rendered the sale contract null and void. Accordingly, the sold enterprise's ownership was transmitted again to the NCBC and the investor was entitled to receive what he paid, but what had been paid for the assets was not equivalent to its value after many years. Not to mention, the loss that the investor faced due to what was spent on promoting and developing the Company during these years. Hence, the Court reversed the legislator's policy with regard to the prohibition of expropriating investments.

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[258] *Id.*

[259] Farghali, *supra* note 69, at 196.

[260] *Id.* at 193.

[261] Law no. 8/ 1997, *supra* note 3.

Second, the Court presented unfamiliar language. It used aggressive language in which it randomly charged an undefined number of politicians of being corrupt and for receiving bribes.[262] Furthermore, it accused them of conspiring with, and being subjected to the influence of foreign governments and international financial institutions to devastate the national economy.[263] The accusations extended to include *all* the investors as being corrupt and an integrated part of the conspiracy targeted the Country's economy.

This unconventional language gave an indication that the Court did not examine the case on a purely legal basis. Rather, it built its belief on assumptions and suspicions. This manner, along with expropriating the investors' properties, definitely leads to worsening Egypt's case before the ICSID arbitration in potential claims in light of the fair and equitable principle.

Third, the decision's main negative legal effect exists in disregarding vital rights, interests, and considerations. In particular, the Court disregarded the well-known destructive consequences that must follow deciding the nullity of a sale contract that was concluded and executed for a long time.[264]

As a case in point, the decision disregarded the investor's rights who concluded the contract with the competent governmental authorities and in accordance with its conditions.[265] This investor, in turn, made subsequent legal transactions, including real estate mortgage with other financial institutions. One should ask if the Court decided to disregard the investor's interests on account of their assumed corruption, why the Court did disregard the other parties' interests where they made separate transactions in good-faith.

Nullifying the sale contract led to considering such a contract as if it was not ever concluded, this outcome led to odds that cannot be rectified, especially when this contract has been concluded and executed for many years. This particular result

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[262] Alsyed, *supra* note 68, at 197.

[263] Farghali, *supra* note 69, at 194.

[264] Alsyed, *supra* note 68, at 194.

[265] Farghali, *supra* note 69, at 199.

forced the government to address the State Council seeking its legal opinion to explain how this decision should be forced in light of the elapsed time.[266]

Finally, this activism was made at the expense of justice and the considerations of public policy. Accusing the parties and other undefined numbers of public figures of being corrupts led to unacceptable intervention from that administrative Court in the jurisdiction of the competent criminal courts. No doubt, this stance must lead to a conflict between two judicial bodies and probably opposing outcomes that eventually lead to questioning their integrity and credibility.

2. Tangible Consequences

The Court attempted to defend the nation's interest, but that was through a series of legal faults. For instance, considering "citizenship" suffices to challenge contracts concluded between others encouraged some individuals to exploit the judiciary to blackmail investors.[267]

The Court expressed its strong motivation as to protect public wealth and to retain the assets of sold publicly-owned entities to the State, but its judgment did not empower the State's economy. On the contrary, it led to a number of arbitration claims before the international arbitration,[268] such as the case of Indorama,[269] and the case of Tanta Linen.[270] The outcomes of resorting to arbitration can be easily anticipated in light of the ICSID's previously mentioned position in this kind of claims, which in turn would cost the Egyptian government more financial burdens to compensate the investors for expropriation.

Furthermore, the decision conflicted with the economic plans that the government followed to dispose of these entities due to the losses it faced, and that is

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[266] ALSAYED, *supra* note 68, at 264.

[267] The Claimant in *Omar Effendi*, *Tanta Linen*, *Misr-Shibin Textile,* and other similar lawsuits is an ex-parliament during the pre-2011 regime. In 2015 he was convicted of blackmailing businessmen. He was caught red-handed receiving bribes in order not to initiate other lawsuits against similar businesses. He was sentenced to two years' imprisonment in case no. 6229/ 2016 misdemeanors October. More details concerning this incident is available at: https://www.youtube.com/watch?v=Wi3VHSS4vx8, last accessed 26/ 8/ 2021, and at: https://www.almasryalyoum.com/news/details/914320, last accessed 26/ 8/ 2021.

[268] *Id.* at 195.

[269] Indorama International Finance Limited vs. Arab Republic of Egypt, *supra* note 254.

[270] Farghali, *supra* note 69, at 202.

definitely added other burdens on the government. As a case in point, the government did not wish or plan to retrieve these sold enterprises and did not expect to be obliged to pay the investors the price which was already employed in its budget years ago.

The Court claimed that it empowered the investment environment. However, the result of its decision cannot be seen as an incentive for investment. Certainly, no investor may risk their investments that were made in accordance with the host state's laws and governmental approvals, especially when these investments could be expropriated at an indefinite period of time due to a similar judicial review.[271]

The Court's rationale jeopardized the investment ambiance and weakened the Country's investment credibility, which did not give the post-2011 governments much breathing space in negotiations with investors to conclude conciliations in order to avoid the expected results of resorting to international arbitration.

3. The Other Way not Taken

Now I hypothesize that the Court did not yield to the temptation of the then political and societal context. And, that it did not extremely exercise that judicial activism lest being liable for participating in the disposition of publicly-owned wealth, so it simply applied the law correctly and followed the profoundly legal principles and judicial precedents.

For this reason, first, the Court should have built its reasoning on purely legal consideration. Inserting irrelevant facts and considerations affected the Court's integrity and impartiality, and made the assumption that it was biased against the case's parties more convincing and most probable.

This particular point would lead to worsening Egypt's case before the ICSID arbitration that, as witnessed from the previous demonstration, would easily favor the investor's interests and would be keen to refute allegations of corruption even when the adduced circumstantial evidence is sufficient.

Second, it should not have contravened domestic public policy considerations. Its jurisdiction should not have been extended to judicially review the case subject

[271] *Id.* at 203.

matter, because the contested contract was neither an administrative contract nor was the sold enterprise publicly-owned one.

In fact, this stance was manifested in a subsequent decision delivered from the same Court with a different panel's composition. In lawsuit no. 43213 of the judicial year 65,[272] the Court rejected to render another privatization contract null and void. The Court affirmed that the sale contract was concluded in accordance with the Companies Law no. 159/ 1981,[273] and Public Sector Companies no. 203/ 1991.[274]

The Court explained that this sale contract should not be viewed as a result of an administrative decision. Rather, a sale transaction conducted by a public sector company that is legally entitled to sell its affiliate's assets or shares according to Law no. 203/ 1191. The Court added that the latter law aimed at achieving societal and economic development, and it is the main source that governs all legal transactions of the public sector companies.[275]

As a result, the claimant in *Omar Effendi* had no legal capacity to challenge a contract that he was not one of its parties on the basis of his citizenship. Citizenship cannot be considered a legitimate basis for challenging investment contracts.

Moreover, the arbitration clause included therein did not require the prerequisite of the competent ministerial approval which was impliedly obtained already. Accordingly, it should not disregarded a previous arbitral award issued in accordance with that arbitral clause according to the *res judicata* rule.

Third, it should not have given another significant bias against the parties by assuming their criminal liability according to panel law. It should not have placed itself in the position of the public prosecution and the competent criminal court to give that affirmative conclusion and to incent them to follow its rationale.

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[272] The lawsuit no. 43213 of the judicial year 65, been delivered on 15 February 2014.

[273] Law no. 159/ 1981, *supra* note 44.

[274] Law no. 203/ 1991, *supra* note 46.

[275] ALSAYED, *supra* note 68, at 211. Although this decision did not correct all the faults that had been made in Omar Effendi, Tanta Lined, and similar decisions with regard to jurisdiction, it at least rectified one of the main issues that related to the legal nature of the sale contract and the applicable law.

Fourth, it should not have decided on the competence of the international arbitration by citing the principle of transnational public policy, as it misused the concept and gave false interpretation to its content. This stance had no impact on the ICSID jurisdiction due to the *competence-competence* principle and surely is to be neglected by arbitrators to potential claims.

However, this position added more suspicions that the Court's biased attitude most probably exists and give another reason for a tribunal to outweigh the investor's interests.[276]

The Court had the choice to discharge its judicial responsibility as to follow these inherent rules, but affirmatively declaring its dissatisfaction with the severe violations that encompassed the transactions.

It could have admitted its constitutional, judicial, and legislative boundaries, along with expressing its national considerations with regard to the significance of these assets and to condemn unfair criteria of evaluating and disposing of them.

It should also announce that it had to take the Egyptian people's side by avoiding worsening the Country's financial crisis due to expected arbitration awards and anticipated failure to manage these retained enterprises.

The Court also should have abstained from degrading Egypt's investment ambiance through expropriating investors' properties, disregarded banks' and individuals' rights and economic interests.

In conclusion, the Court should have made a careful balance between conflict interests. It should have avoided the influence of the contextual atmosphere, which weakened its rationale. The Court would deliver less harmful consequences if it had safeguarded Egypt's long-term interests by avoiding nullifying legal transactions that took place years ago, which resulted in a sequence of stable rights. This is instead of focusing on the near future gain, which turned out to be a great loss that affected the Egypt's judiciary, economy, and investment credibility.

[276] *Id.* at 195.

VI. Conclusion

The pre-2011 governments urged to get rid of its affiliates' industrial and commercial enterprises, as they were viewed as burdens on the economy, so it decided in collaboration with foreign governments and international financial institutions to privatize these entities. However, some enterprises were hard to be disposed of due to their particular conditions, so that the competent body chose to violate its own regulatory measures, or not to object to these violations happening at best, to facilitate concluding the sale transactions.

Like the case was in *Omar Effendi*, there was a severe violation of law and regulations in order to conclude its sale contract, particularly, with regard to the evaluation process of its assets. Four years later, the revolutionary context that prevailed after the 25 January 2011 revolution incited many individuals to challenge the legitimacy of these transactions before the State Council.

The Court reacted to these lawsuits under the influence of that current. It delivered a poor decision in which it was motivated by national considerations rather than justice and rule of law considerations.

The Court in *Omar Effendi* committed numerous legal faults in which it reversed well-established legal principles and inherent judicial precedents. It was aspired to render the sale contract of the Company null and void in order to rectify the odd results of privatization; however, it equally violated the law.

Hence, it violated domestic laws and public policy consideration with regard to the claimant's capacity, the nature of the contested contract, its own jurisdiction to decide on the case's subject matter and on the validity of the arbitral clause. The violations extended to include deciding on the parties' criminal liability and the validity of a previous arbitral award rendered on the same conflict.

What more is, the Court's motivations led it to adopt an unprecedented form of reasoning. Accordingly, it considered that the contested contract was a result of a criminal act that targeted destroying the Egyptian economy and dissipating its public

wealth and that both the ex-political elite and foreign investors were corrupt and concluded their contracts corruptly.

On the international level, it anticipated the investor's resorting to international arbitration, so it wanted to show that it was not biased against the investor. It first affirmed that the ICSID has no jurisdiction over the dispute, then it cited *WDF vs. Kenya* which turns contracts of corruption inadmissible before the ICSID arbitration in light of the concept of transnational public policy.

Granted that, the paper explained the concept of public policy in general, and crystalized the concept of transnational public policy in particular. It further illustrated that the Court's logic was wrong. It shows that it made a series of legal faults in light of the domestic law in order to stigmatize the sale contract as corrupt, and that rationale does not fit in the realm of international arbitration when the allegation of corruption is raised.

The thesis analyzed the different approaches of different arbitral tribunals with regard to perceiving evidentiary matters, the analysis of adduced evidence, and matters related to the burden of proof. It showed that there is a great discrepancy amongst these tribunals in administering issues of evaluating the adduced evidence, which in turn makes the outcome of raising the challenge of corruption unpredictable.

The Thesis then compared the position of the Court with that of the Tribunal in *Union Fenosa* when Egypt used the Court's rationale to substantiate its defense with regard to the existence of corruption on the part of the investor. It also presented other patterns when corruption was manifested. It eventually argued that the Court was completely wrong about deciding on the inadmissibility of the *Omar Effendi* investor's potential claims before the ICSID.

This study did not aim at comparing the Court's rationale in *Omar Effendi* with the Tribunal's rationale in *Union Fenosa* in order to prove that the latter's methodology is more convenient, or that the Court should have followed the Tribunal's rationale. On the contrary, the thesis explained that the Tribunal's rationale in respect of excluding the allegation of corruption is criticized as well. However, the

purpose of this comparison was to show that the Court's position would lead to worsening Egypt's defense in potential claims before the ICSID arbitration.

The thesis eventually argued that the Court's noble intentions did not yield to what it aspired. It gave wrong legal analysis to the subject matters in question, and wrong legal answers to the non-contested subject matters. On the contrary, it was biased against the parties to the case before it, added unmanageable burdens on the economy, and jeopardized the notions of justice and rule of law.

In fact, the Court's noble motivation to empower the national economy and safeguard public ownership was actually a weapon directed at justice, rule of law, and Egypt's economy and investment credibility.