International Investment Law and Domestic Legislations in MENA: Egypt, Jordan and Morocco

Internationaal investeringsrecht en nationale wetgeving in MENA: Egypte, Jordanië en Marokko

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Preface

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I. Introduction

The competition between developing economies in order to attract more foreign direct investment (FDI) forced them to introduce several legal measures to meet their objectives of hosting more FDI inflows. The adopted legal measures were based on bilateral or unilateral efforts. The examples of bilateral efforts include the conclusion of Bilateral Investment Treaties (BITs) and in other instances Free Trade Agreements (FTAs). On the other hand, on the unilateral side, the host economies tried to attract FDI through reforming the domestic legal rules in order to make them more appealing for foreign investors. The examples of the unilateral efforts include the introduction of investment laws to govern all the legal issues related to investment in general and foreign investors specifically. These laws appear as the main unilateral legislative tool used by developing economies to attract FDI. Other examples include the establishment of free zones and economic zones where investments are subject to special rules, which are less strict and cumbersome when compared to the in-land legislations.

The thesis discusses the attempts of three developing economies in reforming their legal frameworks in order to make them more attractive for FDI. The main question addressed throughout the thesis is *how are the legal rules applied in an economy correlated with the FDI inflows into it?* In other words, the thesis explores from a Law and Economics viewpoint the possibility of a State to develop its domestic legal system and how is it correlated to attracting more foreign investors. The Law and Economics viewpoint will be provided from a civil law-based side, which intends to address the holistic picture of the States' macroeconomic statuses and their legal systems. In this regard, the thesis will deviate from the established Law and Economics school principally based upon the common law notions of contract, tort, property and etc.

The initial answer for the thesis's question would depend on the degree of protections and guarantees the domestic legal system accords to foreign investors. Investing in developing economies could trigger threats and risks for an investor, the most likely of them is the State's regulation of the private investment. Hence, the attempt of the governments in the developing economies to protect foreign investors (through bilateral or unilateral measures) will reduce the latter's risks and possibly increase their investment flows to these host economies. The governments when engaging in such bilateral and unilateral efforts try to signal their seriousness in protecting investors. The accumulation of signals can prove the State's reliability and credibility as an investment partner. For example, in developing economies during the 1960, a private investment could have been nationalized (or at least suffer such risk) in the absence of any legal rules requiring the communication of a prompt, effective and adequate compensation.

Currently, the situation featured two changes. First, on the bilateral level, the developing economies concluded BITs with their developed counterparts ensuring a standardized treatment and protection for the latter's investments in the former. Second, on the unilateral level, many developing economies modernized their domestic legal systems through explicitly adopting the protections provided in the BITs and the international investment law as part of their domestic laws. From these two changes, two observations become clearer. First, the changes on the bilateral and the unilateral levels were always favouring the investors through *(i)* guaranteeing more protections, *(ii)* granting wider tax and non-tax incentives to operate business activity and *(iii)* deregulating the local market through reducing the State's involvement in economic planning and activity. Second, the changes restricted the rights of the States to exercise their sovereignty and rights to intervene against investments. Accordingly, they were signals of the States' willingness to compromise their sovereignty and regulatory rights in order to reflect their seriousness and credibility when protecting investors and investments.

I.A Problem background

The background of the problem under examination in this thesis stems from the flows of FDI into the three countries: Egypt, Jordan and Morocco[1]. Based on possible merits of the FDI inflows into an economy on the levels of economic growth, the three economies attempted to adapt their legal rules aiming to attract more FDI. Increased inflows of FDI reflects an increase in the inflows of capital, know-how and foreign currency (FX) into the economy. The three pillars of the inflows are drivers to stimulate the economic growth in the three countries. The thesis addresses the updates in the legal rules of the three countries, besides the possible correlations arising from such adaptations on the inflows of FDI into the three economies.

The problem's background is connected to the frameworks governing cross-border investments. On the international level, the BITs between contracting states govern the cross-border investment flows, while on the domestic level, the three countries introduced domestic legislations to govern specifically the investments legal frame-

[1] The choice of the three countries is discussed more in depth under the subsection *Why these three countries?*

work. The main purpose of both legal layers is to create an investment climate attractive for the FDI. On the one hand, the countries developed their domestic legal systems in order to align them with the BITs protections. The alignment process implicitly entailed deregulating the domestic market, allowing its operation upon the market forces and not the government interventions. On the other hand, the countries exerted obvious efforts in liberalizing their domestic markets in order to create a wider room for the private sector and the inflows of the FDI. Therefore, the continuous developments in the domestic legal systems and rules may have impacted the inflows of the FDI into the three economies.

I.B Problem definition

A foreign investor's decision to route his funds into an investment destination is influenced by two legal questions. An investor from a developed country would appreciate receiving a treatment in the developing country similar to that received at home. This kind of standardized treatment is more predictable for the foreign investor, which makes him more certain about his investment. Hence, the legal and economic questions for a foreign investor regarding the location of his investment can be associated with; first, the presence of a BIT in place between his home state and the potential investment's host state. Second, the level of protection guaranteed under this BIT, whether encouraging the attraction of FDI through *(i)* rationalizing the prices of the factors of production (*e.g.*, repatriation of profits), *(ii)* reducing transaction costs (*e.g.*, cost of establishing a green-field investment), and *(iii)* moderating the potentially incurred risks (*e.g.*, guarantees against government's expropriation). The more rationalized the factor prices, the lower the transaction costs and the more guarantees accorded against risks the higher the possibility of attracting FDI into an economy.

On the other hand, a State may conclude a BIT, while preserving restrictions under its domestic law or acting in violation of the BIT protections. This creates ambiguities and raises questions regarding the harmony between the domestic legal system and the BIT. The importance of the domestic legal system and unilateral guarantees increases in the absence of a BIT between the investor's home state and the investment's host state. Generally, the first question addresses the treatment accorded to the foreign investors in the host states, in order to identify the investors' *(i)* levels of certainty, *(ii)* prices of production factors, *(iii)* operational transaction costs and *(iv)* expected risks from their investments in a specific host state. The higher the degree of certainty regarding the treatment accorded in a specific host state, the lower the risks of the investor and the higher the possibility an investor would route his investments into this economy.

The second legal and economic question an investor is interested in answering when deciding on the location of his potential investment, is the level of the State's involvement in an economy and the degree of the host state's openness to the private sector. This question may be implicitly answered in the cases when the developing economies are complying with the BIT protections. Complying with the latter could reflect the position of the host state from the private sector and the interaction of the free market forces. On the other side, State's unilaterally reformed their legislations, inviting the private sector for a wider participation in economic activity. In case of *(i)* wide government intervention and *(ii)* highly regulated economic activities, there is a limited opportunity for the private sector to operate and for the market forces to lead such economy. Conversely, in cases of *(i)* limited government intervention and *(ii)* de-regulated economic activities, a wider opportunity appears for the private sector to route investments and for the market forces to lead such economy.

I.C Research question

The research question addressed throughout the thesis could be narrowed down to: *how are the legal rules applied in an economy correlated with the FDI inflows into it?* With the interest of developing economies to attract FDI, several legislations are introduced to promote investment and stimulate foreign inflows. The thesis intends to review the developments in the legal rules of three countries, which, since the 1990s attempted to attract FDI by introducing special investment laws. The second part in answering the above research question would address the possible correlations arising from *(i)* aligning the domestic legal system with the BITs and *(ii)* deregulating the domestic market and opening it for wider participation by the private sector instead of the previous lead of the governments, on the FDI performance in the three countries. It is important to note that such economic analysis would focus more on correlations (and not causations) between the patterns of the chosen variables and the FDI.

The initial hypothesis to answer the question would comprise of three pillars. First, the countries exerted efforts in developing their economies from being highly regulated to become more opened and investor friendly. Second, the alignment of the domestic legal rules with the international standardized rules provided in the BITs would make the domestic legal system more predictable and certain for foreign investors to route more of their investments to these destinations. Third, and in addition to the alignment process, the unilateral government reforms would make the domestic legal rules of the countries more liberal and opened for the inflows of foreign investments.

On the way to answer the research question introduced above, a set of systematically relevant questions are addressed including;

(i) what are the main obligations under the BITs? This question will be addressed within chapter II being the theoretical framework;

(ii) what are the potential conflicts between the countries domestic legal rules and the BITs? how did the countries develop their legal rules in light of the BITs? how did the countries develop their legal rules to deregulate the economy and make it more open? These questions will be addressed in chapter IV focusing on the developments in the legal frameworks of the three countries;

(iii) what are the possible law and economics conclusions derived from the final arbitral awards ruled by the ICSID Tribunals in the claims filed against each of the three countries? These questions will be addressed in chapter V focusing on the ICSID arbitration case law against each of the three countries; and

(iv) what are the possible economic correlations between the domestic legal rules and the FDI inflows taking into account the continuous legal developments? This question will be addressed in chapter VI focusing on the economic determinants of the net FDI inflows to each of the three countries.

I.D Academic context

The thesis fits within the literature regarding the interaction between law and development. Having the three countries as developing economies increases the societal relevance of the thesis since it tackles possible legal challenges hindering the development of the three countries. The thesis attempts to address the developments in the three countries domestic legal rules and the possible correlations of such changes with the performance of FDI inflows to the three countries. It is important to note that the thesis does not intend to address questions regarding neither the role of law nor FDI in attaining development.

The thesis extends the earlier discussions of LLSV[2], Trebilcock[3], Laffont[4] and Stiglitz[5] concerning the interaction between law, regulation and development. In the LLSV, the study investigated the correlation between the historical origins of countries and their legal rules affecting their economic outcomes. The thesis continues with the concluding remarks of the LLSV regarding the role of globalization in stimulating competition between countries to adopt market-friendly legal rules aiming to attract FDI. The market-friendly legal rules were perceived as synonyms of deregulating the market's interaction from its burdening legal barriers, evident in the ease of doing business, strict labour regulations etc[6]. For Trebilcock, a country's legal rules are an outcome of the interactions between culture, history, institutional and political traditions. Hence, the modernization of the legal rules in developing economy may depend on the legal knowledge of the domestic stakeholders who may later request further support from the international institutions, organizations and developed economies[7].

From Stiglitz's *Making Globalization Work*, the thesis provides evidences for the countries' attempted transformation to comply with the Washington Consensus[8] entailing the deregulation of their local markets, liberalizing trade and capital accounts, downsizing the role of their government in economic activity and launching privatization programs. It sheds light on the significant transitions in the policies executed in the three countries starting from the protectionism after de-colonization to the deregulation and openness to markets after the debt crises of the 1980s[9]. Also, the thesis remains connected to the studies of Laffont concerning the transfer of the legal rules from the developed economies to the developing ones, turning the difficulty to the second stage, which is the enforcement of these rules[10]. In other words, Laffont's discussion deals with the actual enactment of the good legal rules transferred into the domestic legal systems of the developing economies, instead of keeping them on paper.

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[2] Porta et al. 2007 The study focused on the impact of investors protection on the financial development evident in an economy.
[3] Davis, and Trebilcock 2008.
[4] Laffont 2003.
[5] Stiglitz 2007.
[6] Porta et al. 2007 327.
[7] Davis, and Trebilcock 2008 945.
[8] For further information regarding the Washington Consensus rise and fall, please refer to Gore 2000.
[9] Stiglitz 2007 47.
[10] Laffont 2003 3.

I.E Society and policy relevance

The thesis topic is highly relevant to the current societal developments of the three countries for different reasons. First, the three countries are interested in attracting FDI in order to stimulate their economic growth restoring the rates recorded prior to the global financial crisis of 2008, taking into account the additional downward pressures on FDI inflows due to the instabilities resulting from the Arab Spring uprisings. Second, the topic remains up to date since the three countries have either recently introduced new investment laws (*e.g.*, Egypt and Jordan) or are still in the process of drafting a new one (*e.g.*, Morocco).

Third, the topic relates to the LLSV's discussion in relation to the impact of colonization in framing the domestic legal rules of the countries. This was evident in the hostilities between the colonized states and their former colonizers, during the early years of decolonization. Moreover, the colonization has raised the sensitivity of the countries in specific legal matters (*e.g.*, the rights of foreigners to own agricultural lands). Fourth, the thesis addresses the changes in the quality of the domestic legal rules on the way of the countries to align with the international laws of treating foreign investors. For example, the inclusion of the right to refer disputes to third-party arbitration offers a new alternative to settle state-investor investment disputes other than referring to local courts, which could be partial and unpredictable. Moreover, such third-party dispute settlement alternative limits the possibilities of the politicians' interventions in influencing the decisions of the domestic courts.

On the policy side, the topic fits within the questions concerning the need to align the domestic legal rules with the international law obligations as a means to signal the countries credibility within the international arena. The alignment question is associated with the importance of signalling the willingness of the countries to adhere to the international laws governing the standardised treatment accorded to foreign investors. Another policy issue under consideration in the thesis is the trade-off between adhering to the treatment of foreign investors as per the international laws versus the countries' interest in preserving their full sovereignty. Adhering to the international laws treatment of foreign investors requires a compromise of sovereignty, which may signal the willingness of a State to respect the international laws.

I.F Methodology

The thesis required the employment of four different methodologies in order to pursue the detailed analysis. The four methodologies as further detailed below include; *(i)* legal historical desktop approach, *(ii)* functional comparative analysis, *(iii)* case law analysis and *(iv)* economic descriptive analytics approach, before justifying the choice of the three countries.

I.F.1 Legal historical desktop

Starting from chapter IV, the thesis will base the analysis upon the legal historical desktop approach, where the domestic legal frameworks of the three countries and their historical developments are analysed in details. The legal analysis starts from the domestic legal frameworks prevalent at the independence period, before covering its developments until the years of market openness. It encompasses the developments in the domestic legal framework featured in Constitutions being on top of the domestic legal system before narrowing it to the developments in domestic investment legislations.

I.F.2 Functional comparative analysis

The second legal methodology employed within the thesis is the functional comparative analysis. The legal analysis in chapter IV will focus primarily on the domestic legal frameworks of the three countries and how they governed the specific topic of investments. This entails comparing the domestic legal rules of the three countries to the international investment law obligations. The objective of the three countries from introducing the special investment laws was the attraction of investments and specifically foreign ones. Taking into consideration the civil-law based legal systems and the nearly shared cultural and moral values between the three countries, the comparative analysis may provide an additional strength point to the analysis.

I.F.3 Case law analysis

The third legal methodology used is the case law analysis. As part of the legal analysis aiming to realize the compliance of the countries domestic legislations and actual practices with the substantive protections accorded under the concluded BITs, the thesis will analyse a set of ICSID disputes for each of the countries. This analysis will start by providing a brief overview of the facts of the dispute, and since the chapter V is interested in analysing the application of the BITs in the countries, the focus will be directed to the claims filed against them as respondents, before moving to the Tribunal's final ruling. The case law details will be followed by an analysis of the main understanding of the countries claims in an attempt to foresee the compliance of such understandings with the BITs and the international investment law.

I.F.4 Economic descriptive analytics

Chapter VI adopts a descriptive analytics approach when examining the performance of the FDI inflows into the countries. The assessment broadens the investigation to encompass other variables of proven impact upon the FDI inflows to an economy. It aims tracing correlation and not causations between the variables and the FDI's performance. The economic variables under analysis will be chosen based on the previous literature concerning the variables affecting FDI as identified in the theoretical framework above. The list refers to indicators featured in the FDI host state and includes, for example, the levels of economic freedom, the market size, the level of human index development, the infrastructure's quality, the inflation rates and the recorded rates of real GDP growth.

At this stage, it is important to justify the choice of the descriptive analytics methodology over the implementation of an econometric model. The three countries experience data limitations and more specifically structural breaks in their time series datasets, which influences negatively the planned model's reliability. This results from the significant and recurrent changes in the policy orientations between a centrally planned economy with the government leading the economic activity during the 1960s and 1970s, followed by a significant shift to a market-oriented economy, where the government limited its role in the economic activity during the 1980s until the 2000s. With the *(i)* significant structural changes on the policy levels, *(ii)* weak norms and practices of data collection in these countries, the higher the probabilities of flaws and inaccuracies in the data and the lower its comparability. Furthermore, and more importantly, the legal framework inconsistencies may highlight the legislative chaos. With legislations restricting foreigners' ownership of lands and others guaranteeing a treatment equal to that accorded to national investors, the contradiction appears eminent. Another pillar for the structural breaks could be the political instability precedent either in wars, terrorist attacks or even popular uprisings as in the Arab Spring.

The chapter's assessment of the FDI performance and the variables impacting it would assist in concluding a set of patterns from the available data. The chapter intends to identify correlations (and not causations) between the chosen variables and the FDI performance in the three countries. The datasets under analysis are all based on the World Bank Data bank. The unification of the data source remains a strength point in order to avoid any reporting errors since a standardized methodology is used in the process of data collection. Moreover, the dependence on datasets from an international institution could enhance the credibility of the data when compared to the local sources of data if any. The chapter's timespan starts from 1990 until 2015. This is the period during which the Investment Guarantees and Incentives Law was promulgated in 1997 and many BITs were concluded and specifically in the 1990s. Hence, it assists in actually understanding the role of these changes in the investment framework on the performance of FDI flowing into Egypt. In addition, this period embraces the Egyptian economy's transformation from the wide intervention of the 1980s to the partial and further openness of the 1990s and 2000s respectively.

I.F.5 Why these three countries?

At a preliminary phase, there are several reasons behind choosing the three countries as the countries subject for analysis. The thesis's in-depth analysis will consolidate such understating of the comparability between the three countries through identifying many more similarities. However, the initial similarities include; first, the three states are developing economies featuring to an extent similar rates of economic growth. This appears in having the three economies falling within the lower middle GDP per capita categories of economies. Second, the three economies approached the International Monetary Fund (IMF) seeking financial assistance and support to adjust their economies and transiting them towards market oriented economics. This is an obvious outcome of the comparability between the three economies. This does not apply to Algeria, Syria and Iraq that have more closed economies and less globally integrated. Third, the three countries have their domestic legal systems based on the civil law.

Fourth, the three economies are not rentier[11] based ones as those of the Gulf Cooperation Council (GCC), Libya or Algeria since their GDPs and government

[11] Rentier economic are the ones who managed to realize their experienced rates of economic growth based on the exploitation of the abundant natural resources. A clear example in the MENA region are the member states of the GCC, Algeria and Libya as further explained in El Beblawi 2016.

budgets are not fully dependent on the extraction of minerals and natural resources. This puts the three economies under tighter pressures to diversify their economies through engaging in industrial activities, provision of services and further integration in the international economic system. Fifth, the three states engaged in several negotiations attempts to further integrate their economies in global trade through concluding FTAs with for example the US and the EU. Examples include the *(i)* US-Jordan FTA signed in 2000, *(ii)* US-Morocco FTA signed in 2004, *(iii)* Qualifying Industrial Zones (Q.I.Z) established in Jordan and Egypt as part of the efforts to conclude a EU-Mediterranean FTA. Also, the three states have in common the Agadir Agreement signed between Egypt, Jordan, Morocco and Tunisia, which provides a precedence of comparability among them. Finally, the three states currently feature higher levels of political stability, besides a similar heritage of civil-law based systems, which is not the case for other Arabian economies as Sudan, Saudi Arabia and Iraq.

I.G Structure of the thesis

The thesis is split into seven chapters providing the law and economics viewpoint for the analysis including the introduction and conclusion. Chapter II is the theoretical framework governing the thesis. In this regard, the chapter intends to familiarize the reader with the international investment law, its history until reaching the BITs, the motives of policy-makers to engage in BITs and finally the latter's substantive protections. Chapter III provides a brief insight regarding the economic history of the countries from their independence until their market openness and passing through their debt crises. The chapter will assist in identifying more similarities between the three countries.

By chapter IV starts the legal analysis which extends also to chapter V. In chapter IV, the analysis introduces the domestic legal framework governing investments in the three countries. This entails reviewing the Constitutions and the domestic legislations of the countries. This chapter will allow the reader to follow the development in the countries legislations in order to align their domestic legislations with the protections accorded under the BITs. Moreover, it will assist in tracing the changing nature of the legislations from being highly restricted towards a more liberal and market oriented legislation. Chapter V continues the legal analysis, however, this time it is based on the case law filed against the countries in the ICSID arbitration. The chapter intends to analyse a set of cases for each country study in order to draw conclusions regarding the understandings of the international investment law obligations and the behaviour towards foreign investors in the three countries.

Chapter VI is the last body chapter and it proceeds with the economic analysis of the FDI in the three countries. Based on the chosen set of variables, the chapter intends to identify the correlations and main patterns between the reviewed variables and the net FDI throughout the study period. The analysis focuses on tracing the correlations and not the causations in the three countries. This moves the discussion to the chapter VII, where the main conclusions derived from the thesis are collected with a set of concluding remarks.

II. Theoretical Framework

II.A Introduction

This theoretical framework adopts a descriptive approach. After introducing the types of FDI, it examines the rise of international investment law, followed by the failures of multilateralism in sections B, C and D respectively. In section E, it is necessary to understand why state officials engage in BITs and how this is connected to the process of economic openness in developing countries under the Washington Consensus in the 1980s. The framework in section F defines substantive protections, posing questions such as: Are the substantive protections offered by international investment law defined well enough? How can substantive protections affect the cross-border flows of FDI?

The framework focuses on the incentives for policymakers of developing countries when deciding whether to conclude BITs, examining how the engagement incentives differ depending on the type and nature of investment received or expected for the developing economy compared to its offered and guaranteed substantive protections. Additionally, the economic analysis deals with issues like: the signalling effect linked to engaging in BITs as well as the concerns related to the sovereignty of the contracting states.

II.B Definition of foreign direct investment

This section confronts the notion of FDI. The definition of this term is crucial for this paper since its attraction remains the main target driving the policymakers of the three countries studied. The understanding of the notion will also assist in identifying the risks associated with it. The attraction of FDI is the publicly disclosed aim of promulgating the domestic investment laws of the 1990s in many countries (including the three countries as discussed in details within chapter IV).

Andrew Kerner began his cost-benefit analysis of BITs by defining FDI. The main characteristics differentiating FDI from foreign portfolios were listed as: corporate control, timeline, and speculative intentions[12]. FDI is a long-term investment providing an investor with practical corporate control over inflows of capital and

[12] Andrew Kerner, 'Why should I believe you? The costs and consequences of bilateral investment treaties' (2009) 53(1) International Studies Quarterly 73 <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2478.2008.01524.x/full> 73.

assets that could be moved again only at extremely high costs[13]. This control includes the investor's rights to exploit the resources, manufacture exports or serve the domestic markets' needs. FDI is expected to last for a long time to restore the fixed and sunk investment costs and reach a positive cash flow and return on investment. With a productive capacity, this is expected to last for a longer period when compared to portfolio investments known as "*hot money*" in reference to its speedy and short-term nature[14]. Finally, the speculative nature appears clearly in the case of portfolio investments, while it nearly diminishes in case of FDI where the productive nature of a long-term investment prevails over any speculation interests.

The IMF provides two main definitions[15] of cross-border investments: *(i)* FDI, *(ii)* foreign portfolio and *(iii)* other investment. Under the FDI, an investor *(i)* seeks the creation of a long-term interest in an enterprise resident in another economy and *(ii)* manages and influences the latter enterprise. Foreign portfolio investment is defined as ownerships of any money market instruments including debt (*e.g.*, bonds), equity, notes and options on the international markets.

Another point of divergence between foreign portfolios and FDI is that the advantages of attracting FDI include higher rates of job creation together with the transfer of capital and knowledge[16]. The knowledge spill-overs are experienced through employees being seconded or firms' internal transfers of know-how between home and host states[17]. Finally, FDI is mostly characterised by the interest in exportation activities. This allows the host states to boost their balance of payments surplus as well as foreign exchange reserves.

Investors' interest in seeking FDI protection is correlated with the fear from political and time inconsistencies. Investors route their capital and funds to host states where they are assured against expropriation or any host state regulation threats[18]. This assurance is a necessity for the inflow of investments, especially if accompanied by a compensatory agreement if host states fail to comply. The absence of compensatory remedies puts investors in risky, insecure positions against the host states, which may decide to forgo their initial commitments of protection in times

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[13] Tim Büthe and Helen V Milner, 'The politics of foreign direct investment into developing countries: increasing FDI through international trade agreements?' (2008) 52(4) American Journal of Political Science 741 <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-5907.2008.00340.x/full> 743.
[14] Chaudhuri, Mukhopadhyay 2014 3.
[15] Laurence 2013 531.
[16] Sussangkarn et al. 2011 177
[17] World Bank Group 2017 3
[18] Dalupan et al. 2015 8

of instability[19]. This will be further addressed in section E below, where the thesis examines politicians' fear of displacement as an incentive for expropriating private property.

The characteristics of FDI paved the way for the "*obsolescing bargain*" concept through which host state governments gain an advantageous position over already established FDI investments. This advantage may motivate host states to reconsider FDI contractual terms[20]. In other words, inflowing FDI is always under the threat of expropriation by the host state government. The risk is aggravated when the governments of host states feature problems of time-inconsistency. During periods of economic crisis or fiscal difficulties, policymakers tend to be more inclined to expropriate foreign investments as a means of fiscal or economic support. This depends on policymakers' prior assessment of the short-term benefits versus the long-term costs of expropriation. If short-terms benefits outweigh the long-term expected costs, policymakers may decide to expropriate. Considering the time inconsistency problems in least-developed and developing countries, these scenarios become more probable in these countries than in industrially advanced economies[21].

Jang in his study examined the impact of FTAs on FDI when the parties to the agreement are developed countries. To undertake his examination, he introduced three classifications of FDI.

He first identified horizontal FDI, tested by Markusen and Venaubles in 1998[22]. This type prevails when a company establishes manufacturing facilities in a set of states. Each facility produces finished products that are later sold within the host state's domestic market to meet its needs, or are exported. This notion of investment flourishes on high tariffs, transportation costs, and other non-tariff trade barriers[23]. It focuses on moving multinationals' activities into the host states, which guarantees the avoidance of high trade costs by guaranteeing proximity to end consumers. From this definition and later studies, it was concluded that two factors affect this type of FDI. First, higher trade costs turn the movement of a multinational's activity in the host state into a rational economic choice. Second, in terms of market size, a larger market motivates a multinational to move its business into the

19 Kerner (n 1) 73
20 Inadomi 2010 33
21 Büthe and Milner (n 2) 743
22 Yong J Jang, 'The impact of bilateral free trade agreements on bilateral foreign direct investment among developed countries' (2011) 34(9) The World Economy 1628 <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9701.2011.01356.x/full> 1629
23 Lim, International Monetary Fund. Middle Eastern Dept 2001 12-13

host state, serving its demand. Therefore, this reduces the applicable trade costs and tariffs[24].

Jang's second classification is vertical FDI, comprising two-phase production projects. The production facilities are geographically separated. This allows the investor to take advantage of the benefits arising from lower wages, skill disparities and accessibility to natural resources[25]. This notion spreads among global chain multinationals when local subsidiaries complete their production process before exporting these intermediary products as inputs for a second production phase. It stresses the need for labour availability regardless of the workers' skill levels, and the abundance of labour encourages multinationals to move their production operations to the host state. Accordingly, multinationals boost their efficiency by taking advantage of cheaper labour and later imports the produced end products to offer them to its consumers in the home state.

The factors that influence vertical FDI can be summarised in the difference in skilled labour levels between the host and home states along with trade costs. The higher the trade costs of importing end products from the host state, the less inclined a multinational is to follow a vertical FDI plan. On the skill differentials side, the wider the difference between the home and the host state, the lower the wages that are paid to labour in the host state[26]. Therefore, a multinational would prefer to move its production operations to the host state based on cost efficiency concepts. In Tim Buthe and Helen Milner's study regarding the impact of FTAs upon FDI inflows, vertical FDI proved more economically appealing in the case of liberalising trade barriers when compared to horizontal FDI[27].

Jang's third classification combines the horizontal and vertical FDIs. According to this combination, the wider the skill difference between the home and host states, the more dominant the vertical FDI impact is over the horizontal one. Hence, the more positive the benefits on FDI from eliminating trade costs through concluding a FTA. In fact, this was Jang's hypothesis claiming that, between OECD (Organisation for Economic Co-operation and Development) for members as developed countries, differences in skilled labour are limited, implying a dominant horizontal FDI effect over vertical FDI[28].

[24] Jang (n 5) 1630
[25] Moran et al. 2005 274
[26] Lim, International Monetary Fund. Middle Eastern Dept 2001 12-13
[27] Büthe and Milner (n 2) 744
[28] Jang (n 5) 1633

This briefing of the notion of FDI is necessary prior to introducing BITs, which originated primarily to guarantee the required protection for investors against host states' hostile approach to FDI.

II.C Origins of international investment law

This section aims to provide an overview of the historical background of international investment law, briefly addressing its origins and development until it reached its current status. The historical background highlights former failed protection regimes (*e.g.*, the Calvo Doctrine addressed below) driving the need for the creation of international investment law with its current form embracing the necessary substantive protections. These protections will be introduced in section F and will be the base for chapter IV of this paper.

The history of expropriation dates back to the initial claims arising after the American war when Americans expropriated the British nationals' properties. The process of fairly compensating Britons for these expropriations was developed through recourse to the Jay Treaty between the British and the Americans[29]. The traditional protection was offered under the state's responsibility for injuries. In accordance with this concept, the expropriated investor's home state is exclusively entitled to claim compensation on behalf of the injured investor[30]. Additionally, and under the same treatment, a simple violation of investor-state contracts was not sufficient for the injuring state to be held liable for compensation under state responsibility claims.

The only situation raising compensatory rights for the home state investors was in the event that the host state treated investors egregiously in an approach breaching the customary minimum treatment standards[31]. Breaching these standards entitled foreign injured investors the right to bring international action based on the host state's responsibility and after exhausting all local remedies. All stipulations in BITs provide the minimum standard as the general rule, and national laws cannot fall shorter[32]. A disadvantaged settlement system was created and was thus less favoura-

[29] Dugan et al. 2011 34

[30] Tom Ginsburg, 'International substitutes for domestic institutions: Bilateral investment treaties and governance' (2005) 25(1) International Review of law and Economics 107 <http://www.sciencedirect.com/science/article/pii/S0144818804000328> 110

[31] Ryan J Bubb and Susan Rose-Ackerman, 'BITs and bargains: Strategic aspects of bilateral and multilateral regulation of foreign investment' (2007) 27(3) International Review of law and Economics 291 <http://www.sciencedirect.com/science/article/pii/S0144818807000580> 293

[32] C. Yannaca-Small, *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives* (OECD Publishing 2005) 75

ble for individual investors who suffered low-value expropriations. Moreover, a state espousal system forced the government to bear part of the litigation costs; therefore, claimants pursued claims of less merit as the state bore a share of the costs. Conversely, under normal third-party settlements, claimants fully bear litigation costs and higher quality claims are submitted to settlement bodies. Because of these shortcomings, a new doctrine known as the Calvo Doctrine was introduced[33].

This new doctrine was named after an Argentinian jurist who survived the extended wave of expropriations during the nineteenth century throughout Latin America. The doctrine prevented expropriation-injured investors from requesting fair compensation through home state diplomatic protection or armed intervention unless the host state's local resolutions were exhausted[34]. Consequently, foreigners were subject to the territorial jurisdiction of the host states and their internal laws without any interference from their home state governments. The doctrine terminated the 'reverse discrimination' by guaranteeing preferential treatment for foreign investors under international law in comparison to domestic investors who referred their disputes only to domestic legislation. Afterwards, the Drago-Porter Convention codified the prohibition of using military force in handling foreign investment disputes[35]. The convention prohibited recourse to armed conflict if the host state accepted the settlement through recourse to international arbitration[36]. The Calvo Doctrine was viewed as favouring developing countries since local jurisdictions are those responsible for first addressing investment-related disputes.

The Mexican Revolution and the expropriation of US companies' investments was a turning point in the history of international investment law, especially after the initiation of the US-Mexico Claims Commission[37]. The origin of the Hull Rule dates back to a Mexican attempt to expropriate US investments in 1938[38]. The rule was named after US State Secretary Cordell Hull, and began through a note Hull communicated to Mexico's Foreign Affairs Minister. The note prohibited any government from expropriating foreign businesses unless in presence of prompt, adequate

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33 Baker 1999 91

34 Newcombe, Paradell 2009 18

35 Blokker et al. 2005 32

36 Jan Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78(5) The Modern Law Review 793 <http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12144/full> 797

37 Ginsburg (n 12) 110

38 Bubb and Rose-Ackerman (n 13) 294

and effective compensation[39]. This requirement enabled Hull to establish the widely applied rule, which requires expropriating host states to deliver "*prompt, adequate and effective*" compensation to investors[40]. The Hull Rule, different from the Calvo Doctrine being seen as favouring developing countries, was criticised for favouring the developed world[41], because of the wide compensation guaranteed to home state investors when compared to the Calvo Doctrine that provided more ground for expropriation action by host states.

The wave of decolonisation in the aftermath of World War II was accompanied by nationalistic attempts at confiscation and regulation threatening cross-border investments[42]. Hence, customary international law proved insufficient in providing the necessary protection. Later, developing countries managed, through the United Nations, to articulate a new standard allowing a state to expropriate foreign nationals' property in exchange for "*appropriate compensation*". The new standard was incorporated upon the ideology of saving the host state's national interest and was completely vague in terms of what "*appropriate compensation*" meant[43]. This was demonstrated, for example, in General Assembly Resolution No. 1803 of 1963, which prescribed that states exercise permanent sovereignty over their natural resources. Consequently, expropriations were allowed if conditional upon appropriate compensation based on the rules enforceable in the host states and in accordance with international law[44]. This resolution ignored the Hull Rule's three requirements of prompt, adequate and effective compensation in favour of a merely "*appropriate*" one.

In 1973, Resolution No. 3171 further worsened the situation of foreign investors. Besides stressing permanent sovereignty, the new resolution entitled host states to pay the "*possible compensation*"[45], means of payment and exclusively setting its jurisdiction as the guiding tool when deciding on any disputes regarding compensation. Other following resolutions preserved the same stance of sovereignty over resources and expropriation compensation as an issue to be internally decided. A clear outcome was an increasing number of expropriations associated with mining and

39 Eric Neumayer and Laura Spess, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33(10) World Development 1567 <http://www.sciencedirect.com/science/article/pii/S0305750X05001233> 1569
40 Newcombe, Paradell 2009 18
41 Posner, Sykes 2013 293
42 Ismail 2016 77
43 Ginsburg (n 12) 110
44 Morosini, Badin 2017 9
45 Schutter et al. 2013 31

petroleum activities during the 1960s and 1970s and that reached a peak in 1975[46]. Guzman confirmed that the expropriations of the 1960s and 1970s provided evidence of the invalidity of the "*appropriate compensation*" concept, as several investors considered the compensation they received to be inadequate[47].

By the 1970s, the International Court of Justice questioned the absence of crystallised rules governing the foreign investments scenery on the eve of the expansion of multinational corporations'. This issue was later addressed due to four shortcomings in customary law stimulating the codification of international investment law into treaties. First, customary law was incomplete as it ignored basic investor rights, including monetary transfers from host states. Second, it was vague and lacked unified interpretations[48]. Third, there was the contestability of the customary law principles in the 1970s between the developed and newly decolonised economies requiring the creation of a more just economic order. Fourth, the prevailing customary law failed on enforcement, since investors could not pursue claims against host states' implementation of any injurious measures violating their rights. These shortcomings represented the continuous threats to investors[49].

Another issue was the inverse relationship between political risk and governmental power. In other words, a state that operates under an ineffective rule of law and waning institutions is considered more politically risky. Accordingly, investors seek to mitigate these political risk effects by taking advantage of the BITs in place[50]. The above shortcomings encouraged industrialised states to engage in investment treaties on a bilateral and multilateral level with developing countries, thereby guaranteeing the necessary protection to investors. The potential treaties – which aimed to address the above shortcomings – provided protection to investors by restricting the host states' power to unilaterally act against them based on the states' economic and political developments[51].

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46 Bubb and Rose-Ackerman (n 13) 294
47 Andrew T Guzman, 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1997) 38 Va j Int'l L 639 <http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vajint38&section=30> 643
48 Norbert Horn, Stefan Kroll 2004 52
49 J. W P Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015) 155
50 C. Ignacio Suarez Anzorena and William K. Perry, 'The Rise of Bilateral Investment Treaties: Protecting Foreign Investments and Arbitration William Perry - Google Search' (Summer 2010). In House Defense Quarterly <https://www.google.de/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=The+Rise+of+Bilateral+Investment+Treaties%3A+Protecting+Foreign+Investments+and+Arbitration+William+Perry> accessed 24 July 2016 58
51 Salacuse (n 22) 156

The 1960s intensification of the Cold War incentivised several developing countries' governments to expropriate foreign owned property. This was seen in Cuba as well as in North Africa. In the meantime, the waning of customary international law encouraged developed countries to turn to BITs as a new alternative to provide necessary protection and guarantees to their investors[52]. Thus, the World Bank, determined to protect foreign investments, launched its initiative to create the International Centre for the Settlement of International Disputes (ICSID). This was successfully accomplished by finalising the ICSID Convention in Washington D.C. in March 1965[53]. The ICSID acted as a catalyst, facilitating the international investment law codification process, since it became the competent institution to resolve international investment disputes[54]. The convention focused on founding a neutral forum to review investment disputes between states and state nationals as well as ensure the enforcement of its forum's awards.

The ICSID managed to establish its leading position as the top forum for international investment disputes based on two reasons. First, ICSID awards are not subject to extensive review by the national courts of host states, which could be the case under other arbitration alternatives[55]. The review in place is a limited one conducted by an ICSID-appointed specialised committee. The second reason is associated with ICSID's awards recognition within host states[56]. ICSID contracting states agreed on adopting ICSID awards as a final award with the same binding power as local courts' rulings. Consequently, ICSID awards require no additional procedures to be recognised locally.

The basic prerequisites to initiate an ICSID claim include the following. First, there must be a legal dispute between a national of the home state and the host state. Second, the dispute must be directly connected with the national's investment in the host state. Third, both states must provide written consent for the ICSID to adjudicate the dispute. However, investing in an ICSID-ratifying state eliminates the need to meet the third requirement, as the provisions of a BIT in place between the host and home states satisfies this condition of written consent. Other investment contracts may cover the consent provision, while other limited cases of domestic jurisdictions entitle foreign investors to freely access international arbitration[57].The trea-

52 Bubb and Rose-Ackerman (n 13) 111
53 Ginsburg (n 12) 295
54 Salacuse (n 22) 157
55 Douglas et al. 2014 427
56 Reed et al. 2004 106
57 C. Ignacio Suarez Anzorena and William K. Perry (n 23) 61

ties and the ICSID committed host states to their obligations. Hosts states' failures in compliance were all filed as claims in international arbitration, where host states acted as respondents and were held liable for their injurious acts, based on the circumstances[58]. The first ICSID claim filed in 1987 stimulated the extension of the network of BITs. Another point of momentum for BIT-based arbitration claims was the Argentinian debt crisis and its related investment disputes[59].

The newly created ICSID issued a model convention guiding all subsequent BITs concluded, with special regard to resolving investment-related disputes between investors and host state governments. The model convention denoted a leap forward, offering individual investors the possibility to claim benefits against the government without recourse to the home state's espousal[60]. The ICSID symbolised developed countries' efforts to restore application of the Hull Rule with special focus granted to its "*prompt adequate and fair compensation*". Starting from the first BIT concluded between Germany and Pakistan in 1959, the ICSID assisted in unifying the subsequent BITs concluded in line with the US Model[61]. Thirty years after the Germany Pakistan BIT in 1959, BITs started to gain momentum. In the 1960s, there were 75 BITs, 167 in the 1970s, and these numbers reached 389 by the end of the 1980s.

The momentum was in conjunction with the debt crises spreading throughout the developing countries in the 1980s and the significant decline in Western financial assistance. The restriction in funds was soon replaced by the large inflow of FDIs. In the meantime, developing countries managed to expand their share in FDI from only 20 per cent in the 1980s to nearly 31 per cent in 2003. The larger inflows to developing countries stimulated the spread of BITs regulating investments between developed and developing countries[62]. The expansion of BITs began in the 1990s, growing until it reached 2,495 by 2005. The principal aim in concluding BITs was to attract FDI and protect investors[63]. Several treaties prescribe investment protections as an integral part regardless of the initial purpose. An example of this includes the US Poland Trade Agreement addressing explicitly the investment protection and promotion provisions. This amplifies the number of investment-protection- related treaties into around 6,000 treaties, with EU members party to nearly 50 per cent of

58 Salacuse (n 22) 157
59 Mourra, Carbonneau 2008 53
60 Lalani, Lazo 2014 299
61 Ginsburg (n 12) 111
62 Neumayer and Spess (n 18) 1569
63 Rodolphe Desbordes and Vincent Vicard, 'Foreign direct investment and bilateral investment treaties: An international political perspective' (2009) 37(3) Journal of Comparative Economics 372 <http://www.sciencedirect.com/science/article/pii/S0147596709000456> 373

them. Regional examples of investment treaties embrace the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty[64].

The above brief examination of international investment law highlights the continuous changes between the developed and developing countries in different periods, from the Calvo Doctrine, the Hull Rule, the spread of expropriations, developing countries' diplomatic pressuring within the UN to abolish the Hull Rule, to the creation of the ICSID in 1965. The changes reflect the struggle in global hegemony between the developed and the developing countries throughout modern history. With these developments, economies began to engage in BITs in 1959, with the number of BITs increasing until the 1990s when the number of concluded BITs skyrocketed; nowadays, there are more than 3,000 BITs.

The second part of this section addressed the failures associated with the older dispute settlement mechanism. It required state espousal and diplomatic protection to back the expropriated multinationals' claims before the host state courts for the proceedings to begin. Making it more limited, this protection was applicable only to egregious expropriations and not the regular simple contractual violations[65]. The establishment of the ICSID represented a leap forward in terms of granting an investor the right to file claims against the BIT-breaching state to hold it liable for its actions. It limited the capacity of host states to act against foreign investments as it prevailed during the 1960s and 1970s in conjunction with the decolonisation era. Moreover, the binding nature of its rulings boosts its credibility among investors since they are allowed to obtain compensation, if any is awarded.

II.D Failure of multilateralism

The current regime of investment treaties is obviously framed at a bilateral level with occasional regional examples. This section addresses the failures to establish a multilateral investment framework, the understanding of which will assist in further understanding policymakers' motivations when engaging in investment treaties.

The efforts to establish a multilateral investment treaty regime was not as successful as in trade. The exceptional scenario was featured in the ICSID success to formulate a multilateral investor-state dispute resolution mechanism with the support of the World Bank. The ICSID did not expand to enact legally binding protections or

[64] Alexander J Belohlavek, 'International Organizations in Domain of International Investment Law' [2014] Studia Społeczne 119 120
[65] Desbordes, Vicard 2009 373

guarantees. The OECD attempted twice to create a multilateral venue for investment treaties. The first attempt was in 1967, through the Draft Convention on the Protection of Foreign Property[66]. Although the Convention was never adopted, it became a model inspiring the majority of subsequent European BITs. The second attempt was launched in 1995 under the Multilateral Agreement on Investment (MAI)[67]. It was framed primarily between developed countries with the developing ones attending negotiations as observers with restricted authority to influence the negotiated framework[68]. The draft included a broader definition of investment, performance requirement limitations covering obligatory technology transfer and local content, a retaliated prohibition of expropriation lacking public purpose and prompt redress, freedom to repatriate and transfer assets, together with a dispute settlement mechanism similar to that of the ICSID and the United Nations Commission on International Trade Law (UNCITRAL).

The spread of the news of MAI in international media created outrage between civil society and non-governmental organisations from 600 groups in nearly 70 states[69]. The MAI was criticised principally for three reasons. First, its supranational position allowed multinationals to reach superior positions compared to sovereign states. Second, the concern of environmentalists was principally of the limitation of states' intervention in cases of environment protection. Under the broad sense of protection, there was a continuous debate regarding the possibility that governmental actions for environmental purposes could constitute an act of expropriation[70]. Finally, on the developing economy side, the abolishment of a performance requirement went against the domestic developmental policies of, for example, employment and exportation. These policies depended on granting tax and non-tax incentives upon the fulfilment of a set of performance requirements including exportation levels, nationals' employment or job creation rates.

Guzman was one of the earliest scholars to question the multilateralism of investment treaties. Supporters of the notion claim it is easier when compared to trade especially that most BITs are homogenous. Instead, Guzman exemplified the conclusion of BITs as defection under a prisoners' dilemma scene[71]. According to Guzman, the competition for FDI inflows from developed economies enthused

[66] Bjorklund et al. 2009 211
[67] Spero, Hart 2009 174
[68] Bubb, Rose-Ackerman 2007 297
[69] Kerner 2009 79-80
[70] Neumayer 2001 91
[71] Schutter et al. 2013 256

developing countries to engage in BITs with developed countries seeking a wider share of the investment pie[72]. This engagement constituted an advantage for the developing countries over its competitors. Hence, neighbouring competitors, as in a Prisoners' Dilemma Game, responded similarly to eliminate any advantages and concluded BITs with the developed economies. This trend advanced and spread over developing countries to mark the jump in BITs throughout the 1990s[73]. Guzman attributed failures to reach a multilateral system upon the eruption of the war to conclude BITs during the 1990s.

An additional reason for multilateralism failure was host states' different negotiation powers on a case-by-case basis. Establishing a multilateral system would eradicate such negotiation differences, setting all countries under the same protection level with no advantageous positions. Therefore, players that refrained from joining the initiative exploit their negotiation power differences through prioritising bilateral treaties over multilateral ones[74].

According to the OECD reports, the multilateral efforts failed based on three reasons. First, the willingness of OECD governments to hinder foreign competition such as in cases of Canada and France foreclosing US investments in cultural industries. Consequently, this right to exclude foreign competition obliged states to take protective stances regarding their advantageous industries, reducing the possibilities of multilateral openness. Secondly, the EU member states requested entitlement to preferentially treat other members, though this request was illogical since it purely contradicts the most-favoured-nation concept. Thirdly, non-governmental organisations and civil society objected this draft since it did not oblige its contracting members and beneficial investors with any human rights or environmental responsibilities[75]. Thus, 1998 marked the termination of this draft and the OECD's second failure[76]. More importantly, this raised public awareness regarding BITs, with civil society challenging them and pressuring for amending the investment protections negotiated[77].

Several examples exist of public dissatisfaction influencing the outcome of BITs, reviving the Calvo Doctrine. One of the most prominent is Evo Morales' case in Bolivia. A congressman in 2000 who survived the Cochabamba Water Wars crisis in

[72] Guzman 1997 666
[73] Neumayer, Spess 2005 1569
[74] Ginsburg 2005 118
[75] Caliskan 2008 181
[76] Bubb, Rose-Ackerman 2007 297
[77] Cotula 2017

Bolivia, Morales – benefiting from public discontent – won the presidential elections in 2005[78]. The case involved a Bechtel subsidiary operating in Bolivia and responsible for the water distribution in Cochabamba. The company's inflation of prices and suspension of services for non-payment ignited a wide range of protests in Bolivia. The Bolivian government was forced to revoke the concession and this was challenged in arbitration under the Bolivia-Netherlands BIT. Morales preserved his standpoint against BITs and, together with Ecuador's President Correa, exited the ICSID[79].

An added challenge is associated with BITs' role in forming a customary international investment law. With views considering BITs binding only on parties to those BITs, some scholars considered BITs and arbitral awards as sources for designing a customary international investment law[80]. The power of ratifying BITs specifically in developing countries was transposed into domestic investment codes, embedding nearly the same guarantees, protections and incentives prevailing under their concluded BITs. On the other hand, the codification of international investment law into bilateral treaties facilitated the creation of the international economic law for the interest of academics besides governmental officials, investors, multinationals, non-governmental organisations and legal counsellors. In other words, BITs could not be ignored when planning, executing or negotiating cross-border investments[81].

The advantages associated with BIT protections are linked with the absence of costs and the conditioned enjoyment only upon passing the nationality test. Accordingly, foreign investors encouraged strategic planning to utilise BITs in boosting their protection[82]. This planning concentrates on three pillars: *(i)* the presence of a BIT in place between the investor's home state and the investment host state; *(ii)* the BIT network of the host state with other states to decide on the convenience and efficiency of bypassing investments through third-party states; and *(iii)* the provisions of the BIT in place regarding the provided substantive protections and means of arbitration specified as ICSID or other options[83].

One of the growing concerns between arbitration tribunals is treaty-shopping BITs, where investors increasingly used BITs to introduce bad-faith structures of no substance, aiming at treaty benefits. The usual forms of treaty shopping are the estab-

[78] Morgan 2011 111
[79] Kerner 2009 79-80
[80] Ripinsky, Williams 2008 41
[81] Salacuse 2015 163
[82] Vandevelde 2009 68
[83] C. Ignacio Suarez Anzorena and William K. Perry 2010 61

lishment of no-substance entities in countries having the good BIT clauses with the host states[84]. The challenges regarding BITs include civil society's and environmental groups' questioning of sovereignty, especially in developing countries. Additionally, the BIT dispute settlement system is under threat of developing countries' acceptance, considering the rising number of claims filed against them[85].

Moreover, BITs affect competition between market players based on protection. BIT signatories' investors take advantage of their position over unprotected ones to circumvent slower, less friendly bureaucracy. Examples refer to foreign protected companies' ability to challenge a national policy[86] and receive compensation accordingly, compared to unprotected and domestic investors who remain subject to this challenged national policy. Moreover, this diminishes any advantage for pre-BIT participants who invested in knowing the host state's legal framework. The BIT will create a new model of treatment – likely easier – disregarding the formerly prevailing legal framework. In addition, BITs opening the market for easier access raises uneven competition within the market, ruining the position and shares of pre-BIT players[87].

From the above overview, the conclusion derived is the failure of several attempts to establish the multilateral regime. The reasons differ starting from the threats posed to belittling the states' rights to regulate investments if violating the labour and environmental standards. This urged states to leave investment treaties even on a bilateral level. Second, the loss of the essence of BITs as promoters and protectors of investments – which applies with the risks of treaty shopping in which treaties are exploited by investors to attain benefits without inflowing investments to the contracting states. The only inflows are sufficient to incorporate a false entity to allow the investor to enjoy the treaty benefits. Third, the policymakers in developing countries would like to exploit their varying negotiation powers in accordance with their potential to attract FDI. This variation together with the prisoners' dilemma game can result in a war to conclude BITs.

II.E The Economics of engaging in BITs

Scholars have attempted to analyse the motivations behind concluding BITs. Considering these treaties as a tool for economic cooperation and development as pro-

[84] Spies, Petruzzi 2014 672
[85] Salacuse 2015 163
[86] Dimopoulos 2011 16
[87] Kerner 2009 79-80

vided in their preambles, the economic spirit of these treaties is important. This section provides an overview of the costs and benefits of engaging in BITs from an economic point of view, focusing on the inflow of investments, risks associated and costs borne by stakeholders after concluding a BIT. This analysis is divided into two sections that separately address the benefits and costs.

II.E.1 Benefits

The benefits of engaging in BITs, and motivations to do so, have been the subject of examination in several studies. Guzman studied this behaviour and analysed developing countries' interest as capital importers in widening the manner of BITs engagement to attract FDI. Benefits from this attracted FDI were fewer to host states in conjunction with higher protection costs, granted guarantees and waived regulatory rights. Nevertheless, developing countries insisted on engaging in BITs to achieve extra benefits based on their advantageous position in comparison to non-BIT signatories[88]. This positive influence of BITs incentivised other developing countries to create and extend their BIT network aiming at similar benefits[89]. Guzman's second finding addressed the benefits in the post-capital importation period concluding that fierce BITs competition results in less utility or even losses to host states from each unit of attracted foreign investments. This moved the discussion to the initial status, where non-BIT signatories secured investment inflows, and managed to realise extra utility from each investment inflow.

The third inference was associated with investment elasticity. For Guzman, a developing state attracting inelastic investment – mostly natural resources-oriented – reaps greater benefits from preserving a domestic legal framework offering less guarantees and protections to foreign investment and contract enforceability rules in comparison to BITs. A clear example appears in the case of Algeria, where the economy preserves its protectionist stance since investment inflows are oil- and gas-oriented[90]. Hence, the Algerian government is to an extent assured that investments will inflow regardless of engaging in BITs and guaranteeing protection to foreign investments. Thus, Algeria can reap all the benefits from the investment inflows without bearing the costs of guaranteeing protection to foreign investors or even negotiating BITs[91]. This relates to the Hull Rule disagreement between developing

88 Posner, Sykes 2013 293
89 Guzman 1997 673
90 Botchway 2011 408
91 Bubb, Rose-Ackerman 2007 298

and developed countries since the developing countries objected to the new rule, showing their bad faith and willingness to keep an open door for expropriation. The non-BIT signers showed, in some cases, higher FDI/GDP. This was justified upon the presence of inelastic FDI flow due to availability of a natural resource as in cases of oil and minerals[92].

(A) Investment promotion

Another scholar is Salacuse[93], who questioned and examined the motivations behind the engagement and conclusion of BITs between developing and industrialised economies. For Salacuse, the presence of this trend between developed economies was a source of reciprocal protection of investors. The first explanation Salacuse identified was investment promotion efforts. The clarity and enforceability of BITs mitigates investors' uncertainty and risks, thus stimulating their investments[94]. The investment promotion notion of developing countries intensified with the debt crises of the 1980s and the 1990s. Based on this understanding, developing countries viewed BITs as a contractual agreement to protect investors in return for the continuous future inflows of capital and know-how. This appeared in titling BITs the "*protection and encouragement of investments*".

The empirical studies provided different outcomes to the role of BITs in increasing the FDI inflows into developing countries. Hallward Driemeier[95] was one of the first scholars to address the topic[96]. He concluded that there was no relationship between BITs and FDI inflows. The second study was prepared by Tobin and Rose Ackerman[97], which showed that FDI inflows constitute a larger share of GDP only in cases of low political risk, and vice-versa, regardless of the number of BITs concluded[98].

Neumayer and Spess tested the effect of BITs on FDI, with the results supporting the positive relationship between BITs and FDI. Additionally, the results provided minimal evidence that BITs act as substitutes for domestic institutions. Both scholars recommended that developing countries comply with their protection obliga-

[92] Ginsburg 2005 113, 119-22
[93] Salacuse 2015 158-9
[94] Dolzer et al. 1995 13
[95] Hallward-Driemeier 2003
[96] Using data over 1980 to 2003 from 20 OECD states and 31 developing economies
[97] Tobin, Rose-Ackerman 2011
[98] Used the data over 1980 to 2003 for 63 economies. Its assessment was not limited to institutions' qualities, however, extended it to political risk measure embracing ethnic and religious instabilities and conflicts.

tions under their BITs since this pays off in the form of higher FDI inflows[99]. In Egger and Pfaffermayr's study, a positive impact of 30 per cent was traced between BITs and FDI in certain specifications. Furthermore, both scholars deduced that signing a BIT had a positive impact on FDI at a smaller magnitude when compared to BITs signed and combined with other legal reforms[100]. Kerner verified the direct effect of concluding BITs on increasing the FDI inflows from protected investors[101].

(B) Relation-building

Salacuse's second explanation was linked to the relation-building process between developing and industrialised economies[102]. The friendship trend offers the former further benefits and assistance from the latter. The governments of developing countries forecasted BITs conclusion with industrialised states to amplify trade, technology transfer, aid and security assistance based on tighter relations[103]. This understanding was evidenced in Uruguay in 2005 when a newly elected government ratified the US-Uruguay BIT targeting the protection of the Uruguayan export markets. States with developed legal frameworks are less willing to engage in BITs since their domestic framework guarantees foreign investors the necessary protection. On the other hand, developing countries tend to engage in BITs to offer a substitute to the lacking domestic legal framework[104].

The relation-building explanation was empirically studied by Desbordes and Viscard who explored the role of BITs in amplifying investment inflows. According to the study's hypothesis, better interstate political relations between the home and host state boosts FDI flows due to lower risks of expropriation. In other words, diplomatic disputes pose an additional risk of expropriation, leading to lower FDI[105]. Thus, additional return would be necessary before a multinational decides on investing in an uncertain state where political interstate tensions prevail or are more likely to erupt. The second result concerning the effectiveness of BITs in FDI flows between host and home countries experiencing different interstate relations was mixed. In cases of good political interstate relations, the BIT effect on FDI decreases or is insignificant due to the absence of political expropriation threats. Thus,

99 Neumayer, Spess 2005 1572
100 Egger, Pfaffermayr 2004 790
101 Kerner 2009 82, 97
102 Salacuse 2013 358
103 Walter, Sen 2008 202
104 Rogers et al. 2009 135
105 Papanastasiou 2015

BITs play a more important role under political interstate disputes. Finally, the study results validated the complementarity – and not substitutability – of sound domestic institutions and BITs[106].

(C) Market openness

Salacuse's third explanation was the debt crisis and the Washington Consensus fuelling developing countries' efforts to liberalise their markets and foster private investments. The state-owned economies – highly regulated and import-substitution-led through the 1950s, 1960s and 1970s – failed to provide essential development without incurring lump sum debts[107]. Accordingly, there was a shift towards more neoliberal economics, prioritising private sector in leading economic activity, concentrating on liberalisation and market forces for assigning resources instead of central planning[108].

In the same context of market openness, the US policymakers numbered three goals for BITs as clearly stipulated in the US Trade Representatives reports. First, BITs extend the necessary protection for US rights in host states whenever FTAs and double tax treaties in place are not sufficient. Secondly, BITs motivate host states to reform their legal frameworks, transforming them into more investor-friendly and market-oriented frameworks[109]. Thirdly, BITs assist in initiating international legal standards regulating cross-border investments. This standardisation reduces uncertainty, risks and in turn mitigates investment costs[110]. Further proof for the same conclusion was provided in the US president Clinton's message to the government of Albania when concluding the US-Albania BIT. The president's wording in his 1995's message stressed the protection of US investments in Albania together with encouraging the Albanian government to create more friendly market conditions to stimulate private sector activity.

(D) Signalling

Other goals attained through BITs include openness to private investments inspiring domestic investors to operate within their domestic markets. The BIT conclusion signalling protection for foreign investors highlighted the developing countries

[106] Desbordes, Vicard 2009 373-77
[107] Salacuse 2015 158-9
[108] Vandevelde 2009 68
[109] Maniruzzaman, Aaron Schwabach 2010 201
[110] Egger, Pfaffermayr 2004 789

governmental intentions regarding the private sector's role in steering economic activity[111]. The domestic investors managed to benefit from nearly equal treatment offered to inflows of foreign capital. This represents a confirmation to Andrew Kerner's efforts to understand developed countries' interest in concluding BITs.

In Kerner's study, he identifies BITs as restricting host states' hostile behaviour towards investors. High compensation enforceable upon injurious behaviours ties the host states' hands. The hand-tying mechanism is exemplified on several levels[112]. First, the dispute settlement procedure forces host states to comply with BITs since whether their actions qualify as expropriation is decided by an independent arbitration tribunal[113]. Second, linking the host (developing) state's failure to respect its treaties and arbitration awards to the downgrading or the ceasing of diplomatic relations with home (developed) states poses an additional burden upon the host state to act lawfully and comply with the treaties. Third, failure to fulfil the compensatory requirements of arbitral awards affects host states investment reputations, downgraded credit ratings, and finally the case may be referred to the International Court of Justice for not respecting the ICSID's award[114].

Andrew Kerner's second explanation for developed countries conclusion of BITs is associated with Neumayer and Spess's consideration of BITs as signals of host states' intention to protect and securely treat foreign investments. This signalling incentivises third-party investors to inject their funds and capital into those host states assuming an equal treatment as BIT-covered investments[115]. Kerner denoted these signals under the sunk costs mechanism. Under this concept, the conclusion of BITs marks the host states' disinclination to expropriate foreign investments regardless of being covered by BITs or not. This is considered the indirect effect, since it is connected to the hand-tying mechanism by stressing the importance of the investment climate reputation globally[116]. Governments and states may have features that third parties cannot recognise. These hidden characteristics could be witnessed in the state's compliance behaviour regarding its treaty-based international obligations. Based on this analysis the conclusion deemed the legal reform as a signal for a state's committed intention to pursue its economic reform[117].

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[111] Parisi, Fon 2009 234
[112] Lehavi 2013 282
[113] Bantekas 2015 305
[114] Kerner 2009 76
[115] Yen 2014 195
[116] Kerner 2009 79
[117] Sasse 2011 100

Bubb and Rose-Ackerman's model when analysing the hostility of developing countries to the Hull Rule highlighted their lack of motivation to respect the ownership rights for investments prior to the decolonisation era. Disregarding the importance of BITs in signalling the states' willingness to protect foreign investments, after independence the expropriation constituted an opportunity to reap the benefits of the former foreign investments[118]. In consequence, developing countries opposed the Hull Rule in order to preserve their rights to expropriate the colonisation investments without incurring high compensation. Afterwards, the same developing countries concluded BITs to signal their respect to foreign investments concerning future investments. In other words, the BITs were used as an instrument to declare the end of the era of expropriations and signal the launch of a new phase where foreign investors' rights were secure and protected[119]. The rise in the numbers of treaties confirm such behaviour of the developing countries since the colonial era investments were expropriated during the 1960s and 1970s and the maximum value was reaped without bearing compensation, followed by the surge in concluded BITs in the 1990s to signal the new legal regime and the respect of foreign investments[120].

In another context, Neumayer and Spess praised BITs for signalling the successful management of the dynamic inconsistencies risks[121]. These inconsistencies arise when host states do not comply with their former promises of FET to foreign investors who incur sunk costs by investing. Once a host state has violated a substantive protection, it can exploit the opportunity and expropriate the foreign investment. Other developing countries refrained from engaging in BITs, claiming further sovereignty, and promulgated several legal changes to attract foreign investors. Conversely, unilateral moves were never as sufficient as BITs to ensure protection commitments. Success in reducing dynamic inconsistencies was evident in the plunge of expropriations in the 1980s and 1990s, which was simultaneous with the increased momentum of BITs. However, the challenges of BITs for developing countries is the remarkable waive in sovereignty[122].

(E) Substitutability vs. complementarity

An important prevailing discussion regarding the nature of BITs is the substitutability and complementarity to local domestic institutions. Ginsburg viewed the BITs

118 Example from Zaire is evident in Haskin 2005 47
119 Bubb, Rose-Ackerman 2007 306
120 Menaldo 2016 201
121 Menaldo 2016174
122 Neumayer, Spess 2005 1569-71

third-party settlement mechanism as a substitute for a poor domestic judiciary[123]. In general, domestic courts lack the independence and foreign investors lack the information necessary to assess the soundness of the judicial system applicable to their investments. Therefore, investors are inclined towards a third-party settlement with less uncertainty and longer precedence.

In line with Ginsburg, Salacuse's fourth explanation asserted that developing countries utilised BIT law enforcement mechanisms as substitutes for their arbitrary and lacking institutions. BITs provide only a partial substitute for the domestic legal framework since an investor must still interact with the local government's shortcomings[124]. Under BITs, foreign investors were treated equally as national investors in compliance with the MFN (most favoured nation) principle and the national treatment (NT) principle. The presence of arbitration dispute settlement procedures guided the host states' public institutions to improve governance and respect of law. This concept was translated in the Uruguayan Ministry of Finance press release verifying the signing of the US BIT as a necessity to benefit Uruguayans more than Americans[125].

Ginsburg empirically assessed the complementarity of BITs to domestic institutions[126]. The hypothesis adopted deemed the BITs to open the markets for foreign entrants, enhancing market competition. Higher competition boosts domestic institutions' regulatory and judiciary independence. In addition, BITs spurred competition between dispute settlement alternatives, including the local courts and the international arbitration. This competition would incentivise local courts to develop their qualities and receive more commercial disputes[127]. On the other hand, according to Desbordes and Vicard, the BITs constitute a new framework offering multinationals favourable property rights treatment and avoiding inefficiencies of the host state domestic institutions. In spite of this, the second view considers the BIT as a pledge of the host state institutions not to undertake any actions threatening multinationals property rights. Thus, under the second description, BITs and domestic institutions are complements[128].

The five benefits from an economy's engagement in a BIT can be divided into two categories. The first focuses on the direct effects, as mentioned by Salacuse, includ-

[123] Ginsburg 2005 113
[124] Rogers et al. 2009 135
[125] Salacuse 2015 161
[126] Ginsburg 2005 113, 119-22
[127] VanDuzer et al. 2013 516
[128] Desbordes, Vicard 2009 373-77

ing direct increase in investment and relationship building between the investment partners. On the indirect effects side, the benefits seem more institutional. First, the complementarity or even substitution of the inefficient partial judiciary in favour of third party dispute settlement. Second, BITs' role in encouraging the transformation of the legal framework governing the developing countries to a more liberal, investor-friendly one. The direct and indirect effects are both outcomes of BITs' impact in tying states' hands in conjunction with the reputational and signalling costs associated with the violation of BITs.

II.E.2 Costs

The second subsection examines the costs associated with engaging in BITs. As mentioned above, the issue is addressed from an economic point of view. On the costs side, the nature of BITs was denoted by Martin Wolf as constraints on a state's experience of sovereignty especially towards multinationals. In other words, BITs represent a credible commitment of the host state's government not to expropriate a protected multinational in the future[129]. Other studies failed to verify a single understanding since a set of studies authenticated the positive influence of BITs on foreign capital inflows, conflicting with another set portraying a negligible effect on inflows, compared to others featuring a limited effect on liberalising the economy or improving the quality of governance.

Other costs for developing countries are associated with concluding BITs include the failures to promulgate new legislation postulating necessary protections on the environment and labour along with other standards[130]. In accordance to BITs, any developing countries' attempts to issue these needed amendments were all conveyed under international arbitration. Study groups concentrated on the role of international arbitration as a means to sue states violating their BIT obligations. Among the clear conclusions was the state's limited sovereignty when regulating enterprises within its borders. Another conclusion is correlated with the possibility of forcing injurious states to provide compensation for damage borne by investors. These two changes uniquely characterised the BIT dispute settlement mechanism[131].

To assess the BIT system economically, further emphasis is directed to the cost of BITs, which can be split into two categories. The first encompasses the direct negotiation and conclusion costs. The second and the more complex cost is the one as-

[129] Wolf 2001
[130] Sornarajah 2010 178
[131] Salacuse 2015 161

sociated with breaching the BIT. These costs, known as "*sovereignty costs*", involve the host state's preclusion from adopting domestic policies when addressing developmental and environmental issues. These policies are usually represented in several ways including taxation, property seizure and capital controls[132]. The most imperative sovereignty cost is associated with delegating the host state's judiciary competence to an international arbitration tribunal. The first simple direct cost of a BIT linked to negotiation, conclusion and ratification includes resource investment in negotiations. The availability of BIT models reduced the cost of negotiations and facilitated the conclusion of BITs[133]. Moreover, the UNCTAD (United Nations Conference on Trade and Development) provides continuous technical advises to developing countries together with direct hosting of BIT negotiations. The second direct cost is represented in ratifying the BIT. This process differs in each state depending on its governing constitutional procedures. The two above highlighted costs can be easily managed by host states unlike the sovereign costs as addressed below[134].

Desbordes and Vicard investigated the spill over of political relations between the BITs host and home states and FDI flows. Political tensions between BIT parties pose a risk on multinationals. Retaliatory actions by any party in response to political tensions threatens multinationals with expropriation. Therefore, a BIT secures multinationals from political tension in two ways[135]. First, the negotiation of a BIT constitutes an opportunity for the host and home states to approach each other economically, thus excluding or at least reducing disagreement and tensions possibilities. Second, the BIT restricts the host state's ability to expropriate a multinational in case of any future tension[136].

This moves the discussion to the indirect and actual costs of breaching a BIT. The indirect costs can be represented by the three "*Rs*"; retaliation, reputation and reciprocity[137]. With reciprocity, indirect costs can be seen in the home state's ceasing to comply with the BIT, in the event the latter is breached by the host state. The asymmetric nature of investment flows results in the net FDI exporter home state's failure to exploit reciprocity in threatening the host state to forcefully comply with

[132] Sornarajah 2010 231
[133] Schill 2009 91
[134] Sasse 2011 78
[135] Mutsau 2017 72
[136] Desbordes, Vicard 2009 373
[137] Ginsburg 2005 112

the BIT. The second enforcement mechanism is retaliation or punishment[138]. The threat of punishment in the event of breach of the BIT pressures both parties to further BIT compliance. Retaliatory acts take different forms, starting from economic sanctions to militarised interventions. The common principle prevailing in different retaliatory measures is the cost borne by the retaliating party. Accordingly, governments may refrain from adopting retaliatory action to seek protection for only an individual investment.

The last of the three R's is reputation, split into two classifications. The first is connected to reputation with other states, while the second is focused on reputation with investors. Concerning reputation with other states, a host state that does not comply with BIT obligations damages its reputation within the international context[139]. The damage specifically prevails in connection to its capacity and willingness to adhere to its treaty obligations. Hence, the reputational losses usually benefit third-party states that would not engage in a similar BIT, by knowing the state will fail to abide by its international obligations. The second pillar of reputational threat was associated with investors. A host state interested in attracting investments should act within the clauses of concluded BITs. Non-compliance with BITs will prevent investors from injecting their funds to the BIT-violating host state. Investors access information regarding the arbitration claims filed against a host state through visiting the ICSID and relevant websites as well as media sources and arbitral awards handed down, which are a reliable information source benefiting investors in assessing the host state's behaviour[140].

States engaging in BITs see their sovereignty diminish since any public policy enacted and adversely affecting foreign investors may be challenged[141]. BIT sunk costs include constraining policymakers in law-making and compromising their public image. Several publicly appealing policies were disputed in arbitration cases. Examples include land reallocation during South Africa's post-apartheid era. Another example is the Canadian government's non-extension of public healthcare to avoid the violation of foreign entities provision of services[142]. Moreover, these disputes may be raised without exhausting the available host state legal remedies. In other words, BITs entitle foreign investors to bypass domestic courts for international arbitration, where the BIT articles are surely applied and panellists are decided based on

[138] Tabari 2016 45
[139] Norbert Horn, Stefan Kroll 2004 95
[140] Sasse 2011 79-82
[141] Neumayer, Spess 2005 1569-71
[142] Kerner 2009 79-80

the parties' choices. This contrasts with the domestic judiciary, where parties have no voice in deciding on judges or the status of BITs against domestic legislation. With these waivers, Elkins et al. denoted BITs for developing countries as a trade of sovereignty for credibility[143]. Liberal economists criticised BITs for not banning developing countries from offering foreign investors tax incentives or tariff protection, further raising the overall borne costs[144].

When addressing the substitutability of BITs to domestic inefficiencies, the access to a third-party dispute settlement mechanism under BITs contested the role of domestic judiciary as a determinant of FDI inflows to an economy[145]. The foreign investors will bypass the local courts in search for a more independent dispute settlement mechanism as prescribed under the BIT. A clear example for substitutability is China, where commercial disputes are handled through a two-tier system. The first tier is of higher quality and concerned with foreign investors claims under the China International Economic Trade Arbitration Committee. The second tier is corrupted, lower quality domestic Chinese courts deciding on local commercial disputes. Ginsburg concluded that BITs played a limited role in improving domestic governance and may end up putting local investors in disadvantageous position institutionally and competitively. Another conclusion linked to BIT signers' characteristics. Ginsburg utilised the means of a set of developing economy indicators concluding that BIT signers are richer, larger and more stable regarding their policies[146].

With the three Rs, the direct and indirect classification of costs and the burden of engaging in BITs may exceed the benefits, triggering policymakers' exits. The costs are mainly connected to having less sovereignty under BIT-imposed limitations upon the host state's right to regulate investments. Another obvious example is the substitution of the domestic judiciary as a symbol of a state's sovereignty in favour of a third-party dispute settlement regime. Finally, costs were classified as the three Rs, denoting reciprocity, retaliation and reputation. The three costs can be deemed direct as their impact is an inevitable outcome of a host state's violation of a BIT.

II.F Substantive protection

This section provides a preview of the core protections to be discussed in more detail in chapter IV. It introduces the substantive protections guaranteed under almost

143 Elkins et al. 2006
144 Neumayer, Spess 2005 1571
145 Trebilcock, Prado 2014 200
146 Ginsburg 2005 113, 119-22

all BITs and addresses protections based on the general understanding and definition of them within international investment law. Prior to categorising the substantive protections, the section overviews the usual components of BITs. Subsequently, the section briefly introduces each protection to familiarise the reader with them prior to the legal framework's benchmarking analysis in chapter IV.

All BITs rest on three pillars: the first covers the scope, the second provides the protections and standards of treatment, and the third deals with the mechanism of settling disputes under the BIT. The scope decides on the treaty's subjects, including both persons and investments covered. With regard to persons, foreign investors are entitled to benefit from BITs as per the legal frameworks of the contracting states. This applies to individuals and companies, where the latter are mostly responsible for cross-border investments. BITs usually cover companies founded under the laws of the contracting parties. However, in a limited number of BITs, protection extends to shareholders who are nationals of the contracting parties regardless of the legislations governing the foundation of the company whether in the host state or a third party. Legalist scholars attempted to tackle treaty shopping through conditioning the benefit from BITs upon the presence of an entity's seat in the home state or having substance and operations in the contracting state's jurisdiction.

The second pillar upon which a BIT rests is investments covered. BITs expand the definition of investments protected to embrace all rights and assets invested in host states. Relevant case law has provided claims filed regarding concession rights, shareholders' interests, private contracts, bonds and other assets[147]. The third pillar of BITs is the resolution of investment-related disputes. Third-party involvement in dispute resolution epitomises two commitments of the host state. The first is not to expropriate the foreign investments. Regardless of relations strength between governments, BITs ensure that future host state governments do not expropriate foreign entities, since otherwise a claim would be filed with the International Chamber of Commerce, the ICSID, or an ad hoc arbitration following rules of the United Nations Commission on International Trade Law. This commitment exists regardless of the political situation prevailing between the home and host states. The second commitment is linked to future host state governments' recourse to local courts. BITs provide mechanisms to resolve any disputes arising between host states and investors in relation to the latter investments through a third party[148].

[147] C. Ignacio Suarez Anzorena and William K. Perry 2010 59
[148] Ginsburg 2005 112

The third pillar addresses the temporal framework of the BIT. This adopts the procedural process of ratifying the BIT if this is needed. An important example is that of Brazil, which engaged in dozens of BITs without undertaking the necessary domestic additional steps to ratify them[149]. Besides this, the temporal effect of the BIT usually guarantees protection to investments executed prior or after the treaty comes into force. However, the host states' measures adopted prior to the BIT taking effect are not part of the scope of the BIT. Investments are guaranteed extended protection for a while after the treaty's periodic end date. This duration depends upon the contracting states' agreement regarding the protections after the treaty ends[150].

BITs comprise nearly the same articles guaranteeing similar protections[151]. Those protections fall under six categories, which are detailed below including: most-favoured nation and national treatment, expropriation and compensation, FET, third-party dispute settlement, others protections, and extended special protection under US BITs.

II.F.1 Most-favoured nation and national treatment

These clauses entitle foreign investments to treatment that is at least equal to, if not more favourable than, that provided to local national investors[152]. Under these clauses, any preferential treatment or even simpler procedures as incentives for domestic investors are deemed a violation of the concept of NT. Additionally, MFN implies that foreign investors should be granted equal treatment including privileges and exemptions as do all investors from other home states[153]. The MFN clause obliges a host state to treat an investor or investment from the other contracting party no less favourably than the treatment provided to other foreign investors from third-party states. The absence of a MFN clause in a BIT entitles both parties to discriminate when treating foreign investors[154].

Both protections are considered guarantees against discrimination[155]. Hence, any kind of discrimination based on preferential agreements is abolished in the event of

[149] Collins 2013 38
[150] C. Ignacio Suarez Anzorena and William K. Perry 2010 59
[151] Zdenek, C 2013 58
[152] Neumayer, Spess 2005 1569
[153] Bubb, Rose-Ackerman 2007 296
[154] Houde 2006b 128
[155] European Commission 2013 4

foreign investors or domestic laws in case of nationals[156]. The same protections are present in the World Trade Organization agreement, where member states are obligated to accord investors treatment that is not inferior to that accorded to nationals or investors from other home states. The ICSID jurisprudence for each of the three countries in chapter V will provide a detailed example and explanation guaranteeing the two protections under international investment law.

II.F.2 Expropriation and compensation

The second category of protection clause shields foreign investors from unlawful expropriation[157]. BITs stipulation of compensation signifies a means of protecting foreign investments. In absence of compensation, potential expropriation represents an obligatory transfer of resources and a discouraging risk factor for foreign investors[158]. The definition of expropriation witnessed several developments to extend it from a direct possession and change of ownership to a constructive and creeping expropriation.

The modernised definition of expropriation is traceable to Article 10, paragraph 3 of the State's International Responsibility Draft Convention of 1961. Under this article, expropriation represents any outright seizure by any state's unreasonable intervention, and that influences the use, enjoyment or disposal of the expropriated asset. Here, an owner is barred from enjoying, using or disposing of his property for a period after expropriation[159]. This includes the revocation of licenses necessary for factories operation. The concept was usually the base for claims against states banning chemical products for health purposes as part of its environmental legislation[160]. The above article went further, considering intervention resulting in the owner's lack of control over property as expropriation even if temporarily as for a time[161].

The acts of expropriation against foreign investors' private property was constrained with a set of limitations. First, the host state is obliged to communicate prompt, adequate and effective compensation to the investor. The compensation concept is defined as the value at which an investor is indifferent between preserving his investment and expropriation. Another constraint provided in BITs is that

156 C. Ignacio Suarez Anzorena and William K. Perry 2010 59
157 Neumayer, Spess 2005 1569
158 Ginsburg 2005 112
159 Subedi 2012 7-8
160 European Commission 2013 8
161 Subedi 2012 7-8

of conditioning expropriation on serving the public interest or good. This precludes governments from using their power to expropriate to transfer foreign entities to local favoured investors[162]. These two reasons, in addition to the changing structure of FDI inflows towards more manufacture and service-based industries, made concrete expropriations rare.

FDI became more diverse and less dependent on natural resources. Thus, the expropriation of a manufacturing plant – part of a global chain – would leave the host state holding a worthless establishment. Accordingly, host state governments used their policymaking capacities to reap benefits from foreign investments through amending regulations, taxation, fees and tariffs. These restrictions are usually associated with local content requirements or limiting borrowing to domestic uncompetitive lenders[163]. Arbitral tribunal's review of expropriation as lawful depends on the qualification of the broad interpretation of "*public purpose*", thereby potentially providing states with wide discretion[164]. Deciding on the lawfulness of expropriation shifts the discussion to effective, fair and prompt compensation. Therefore, lawful expropriation has to be differentiated from foreign property confiscation (illegal expropriation). According to the first, most scholars agreed that lawfulness of expropriation depends on both presence of public purpose together with non-discrimination. In cases of lawful expropriation, a state is obliged to fairly compensate or at least pay the expropriated property's value when taken. With regard to property confiscation or illegal expropriation, this gives rise to state responsibility, requiring sufficient restitution or reparation[165].

This in addition to prescribing fair and adequate compensation in cases of public interest expropriation[166]. The significance of compensation can be examined on three levels. First, it covers damages arising from the illegal intervention of the host state against the investor[167]. Second, a compensation represents costs for host-state decision makers while deciding on the implementation of such intervention. Thirdly and lastly, the potential compensation may encourage the host state to recourse to out-of-court settlements. The main theme of compensation aims at restitution for losses resulting from the host state's intervention[168].

162 Ginsburg 2005 112
163 Büthe, Milner 2008 744
164 Dolzer et al. 1995 104
165 Subedi 2012 7-8
166 Neumayer, Spess 2005 1569
167 Laird et al. 2015 330
168 Belohlavek 2014 120

The protection covers expropriation in its broad sense comprising both direct taking of assets together with any measures equivalent to expropriation depriving foreign investors of their property rights or ability to enjoy and control their investments. Indirect expropriation prevails in the latter case since the intervention does not comprise a transfer of ownership title[169]. The US model provided a test of three conditions to assess the host state government's action as constituting indirect expropriation or not. The three conditions include, first, the intervention's economic impact, though this is not limited to direct adverse losses. Second, the nature of the government's action is examined, and finally the interference of the intervention with investors' reasonable and distinct expectations. Concerning the non-compensable regulation, the US model permitted host state governments to intervene in exceptional cases without compensating foreign investments. This applies when the intervention takes place without any discriminatory behaviour and seeks the protection of public welfare such as safety and health[170].

II.F.3 Fair and equitable treatment

The third category governs fair and equitable treatment (FET), with BITs providing minimal treatment of host states towards investors[171]. The absence of a general understanding of the FET created several debates. Muchlinski consolidated this conclusion, stressing unfairness and arbitrary treatment as the main violations of this concept. However, this is separately decided by tribunals in each case based on the facts and circumstances of each case. Arbitration tribunals' awards identify four points in applying this principle[172].

The majority of current disputes are filed upon challenges to the application of FET, the first point under which a two-test analysis must be performed in order to enforce the FET principle. The first test deals with the legality of governmental interventions in light of domestic law; the second tests whether the intervention raises concerns of arbitrariness and unreasonableness[173]. Moreover, host states have an obligation to exercise vigilance towards foreign investments. Although a state does not have the duty to prevent certain events from happening, a necessary level of diligence must prevail, and failure to apply this vigilance renders host states liable[174].

169 C. Ignacio Suarez Anzorena and William K. Perry 2010 59
170 Houde 2006a 160
171 Kerner 2009 76
172 Muchlinski 2006
173 C. Ignacio Suarez Anzorena and William K. Perry 2010 59
174 Tudor 2008 156

The second point in classifying FET is the host states' ability to respect the due process without engaging in attempts to deny justice[175]. Bochard introduced FET under this classification as the foreign investors' accessibility to host states' local impartial and politically independent courts assuring the prevalence of objective justice and fair trial[176]. The third point is the host state's behaviour and its compliance with foreign investors' legitimate expectations. This compliance is highlighted in the host state's efforts to preserve a stable business and legal environment, similar to that prevailing when the investor decided on his investment plans[177].

The fourth point provides a new level of FET behaviour introduced under Pope & Talbot Inc. v. Canada. In this case, the tribunal presented a new threshold of treatment, known as "*egregious treatment*", to represent unfair bad faith conduct that violates FET under Article 1105 of NAFTA[178]. Therefore, the NAFTA application of the FET concept featured the latest caselaw highlighting the intended arbitrariness of governmental intervention backed and incentivised by bad faith[179]. In consequence, BITs secured foreign investment from discriminatory or arbitrary policies, besides relaxing labour laws and protecting investors from direct and indirect uncompensated expropriations[180].

II.F.4 Third-party dispute settlement

This substantive protection provides for a binding dispute settlement mechanism when conflicts arise in regard to the potential violations of its articles[181]. The issued awards are binding upon host states and the failure to comply burdens states with additional retaliatory actions[182]. BITs permitted investors to access international arbitration by virtue of the treaty. This development circumvented former concepts of exhausting local remedies and home state diplomatic involvement resulting in several inefficiencies and delays. Furthermore, this permission allowed foreign investors to fully control their claims and challenges against host states in the event of infringements by the latter.

175 Kläger 2011 227
176 Yannaca-Small 2005 103-8
177 Mitchell et al. 2015 51
178 Yannaca-Small 2005 123
179 Hindelang, Krajewski 2016 74
180 Kerner 2009 76
181 Neumayer, Spess 2005 1569
182 Kerner 2009 76

BITs provide four possibilities for dispute settlement; however, regardless of the method pursued, most BITs require a "*cooling-off period*" of three to six months before initiating the arbitration process[183]. The first possibility is the pre-requisite to file a claim in local courts before taking advantage of arbitration. The second possibility requires deciding on challenging host states' actions locally or before the ICSID, with any decision precluding the resort to the other choice. In the third possibility claimants can initiate local court claims for declaratory and preliminary procedures before waiving the claim and referring the dispute to arbitration. The most flexible option is the fourth one when an investor is entitled to file an international arbitration claim directly after the cooling-off period. From these possibilities, foreign investors are under an obligation to review their BIT provisions closely to avoid foregoing their entitlement to access international arbitration[184].

Two determinants influence an investor's decision to revert an investment dispute to international arbitration. The first determinant adopts a collateral versus hostage scenario[185]. Under this scenario, a host state acts unlawfully against a private foreign investment. Hence, the injured investment presents a hostage taken by the host state. This hostage-taking scenario could transform into collateral whenever an arbitral award is issued and compensation is paid to the injured party. The injured party guarantees his compensatory right through the possibility to enforce the award upon the host state, besides the reputational loss of the host state. Accordingly, the idea of submitting international arbitration claims always depends upon the cost of the lost property or investment. Situations in which winning an arbitral claim involve high litigation costs discourage investors from filing claims; conversely, the opposite is true, with lower litigation costs with higher expected returns motivating investors to file claims[186].

On the host state side, the award already represents the reputational cost. Hence, if the additional non-reputational costs are minimal, with high awarded compensation, the host state's choice to ignore the award is strategically rational[187]. Therefore, arbitral tribunals are encouraged to issue low compensation awards, since the host state will be more inclined to meet the required compensation requirement to avoid any claims raised against it in third-party states and any further reputation damage.

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183 Mourra, Carbonneau 2008 51
184 C. Ignacio Suarez Anzorena and William K. Perry 2010 59
185 Sasse 2011 95-100
186 Polinsky, Shavell 2007 264
187 Parisi 2017 296

The second determinant that influences the decision to seek international arbitration is the expected enforcement outcome. The higher the return of enforcing the arbitral award and the lower the cost of enforcement, the higher the incentive for investors to engage in arbitration seeking redress from the host state's unlawful conduct[188]. In other words, the level of litigation costs in addition to the parties' pessimism regarding their ability to win the case are the principal factors determining the host state's interest in settlement rather than arbitration[189]. The higher the costs borne by host states represented in compensation and reputation damage, the higher the probability of the host state will ignore the arbitral award. This ignoring of the award represents the short-term implication, while in the long run the host state may decide to exit the whole BIT system by terminating the available BITs and avoiding engagement in new ones[190]. Also, the broader the interpretation of the BIT clauses, the more expensive compliance is and the less the host states will be interested in preserving its current BITs or signing new ones. This was evidenced in Brazil, which abstained from ratifying any BITs; likewise, Ecuador ceased or terminated its previously concluded and ratified BITs throughout the 2000s[191].

With regard to types of arbitration, BITs may stipulate alternatives for investors to commence their claims, including before the ICSID and ad hoc arbitration in accordance with UNCITRAL. Other options under some BITs include the Stockholm Chamber of Commerce, the International Chamber of Commerce and the International Court of Arbitration[192]. UNCTAD prioritised arbitration over other dispute settlement alternatives, which were either dismissed or less efficient. The dismissal of the former diplomatic protection had three justifications. First, there are cases in which home state decide not to adopt an investor's claim against the host state, hence, BITs entitles investors to directly access to arbitration[193]. Second, the difficulty of transmitting the compensation attained by the home state from the host one to the investor is not drafted in any binding agreements. Third, multinational corporations feature complexities in deciding their nationality to determine their eligibility for home-state diplomatic protection.

188 Sasse 2011 95-100
189 Marciano, Ramello 2016 193
190 Polinsky, Shavell 2007 264
191 Kleinheisterkamp 2015 798
192 C. Ignacio Suarez Anzorena and William K. Perry 2010 59
193 Bjorklund et al. 2009 129

Another method of dispute settlement is mediation, wherein investors manage their claims against the host state directly[194]. Also, another option is resorting to host states' domestic courts, although, while some BITs provide for this alternative, this has not been put into practice yet[195]. BIT protection extends to cover political risks due to instabilities in developing countries[196]. This third-party dispute settlement mechanism originated to avoid judiciary's inefficiencies, reduced trust or lack of transparency under the host state's domestic constitutional and administrative laws and judiciary system. Consequently, the ICSID aimed to provide equal treatment to home state investors regardless of where their investments are located. Under this similar treatment abroad, investors are more certain, reducing risks and encouraging further flows of FDI[197].

II.F.5 Other protections

Other protections include freedom of profit repatriation and capital transfer[198]. In terms of currency transfers, US BITs clearly prescribe foreign investors' rights to transfer investment-related funds from host states without delay. These currency protections are extended a step further guaranteeing US investors the full entitlement to convert their investment funds using market exchange rates, to assure a swift transfer in or out[199].

With regard to the freedom of capital transfer, modern BITs preserve the same standpoint using similar provisions to those present in the Japan-Korea BIT. Under this treaty, all financial transfers must be transacted freely without any interventions from contracting parties delaying their processing. Transfers are broadly defined to include initial capital, payments, proceeds and dividends. The same treaty exceptionally permitted contracting states to delay or prevent a transfer if related to its application of internal laws governing bankruptcy, insolvency, the issuance and trade of securities, criminal offences or judicial rulings and decisions. However, this action has to be equitable, non-discriminatory and enforced in good faith. Modern BIT models entitle states to delay transfers when suffering balance of payment crises and shortages of foreign currency[200].

[194] Newman 2016 57
[195] Belohlavek 2014 121
[196] Neumayer, Spess 2005 1569
[197] Kleinheisterkamp 2015 811
[198] Neumayer, Spess 2005 1569
[199] C. Ignacio Suarez Anzorena and William K. Perry 2010 59
[200] Houde 2006a 163

Ginsburg criticised this protection before its modernisation since it constituted an additional pressure for developing countries, especially those experiencing foreign currency difficulties. Ginsburg appeared to criticise developed countries' insistence to include such articles in treaties ex ante and not later based on subsequent negotiation[201].

II.F.6 US BITs Extended Special Protection

US BITs preserved a unique position by presenting three sets of rights under an umbrella clause, full protection and security and pre-establishment rights. First, to begin with umbrella clause, BITs have utilised different wording to determine the scope of the treaty obligations on its contracting parties. A set of BITs have limited parties' liability and access to international arbitration only to non-compliance with BIT clauses. In other cases, the jurisdiction scope was extended to encompass all investors and states under in any contractual agreements in connection with a foreign investment[202]. Therefore, the wording in the second case tends to be more generic covering any disputes arising in relation to investments. This extended investment protection is known as an umbrella clause, and covers all contractual agreements concluded between host states and foreign investors[203]. The umbrella clause counts any violation or prejudice to an investor's contractual obligation as a breach of the treaty itself. In other words, it raises contract violations to the level of treaty breaches, thus entitling investors to file claims in arbitration tribunals similar to a regular BIT violation[204].

Second, the full protection and security standard aims to secure *(i)* foreign investments physically, against any destruction or damage perpetrated by the host state through assaults by military, police or NGOs, and *(ii)* civilians at times of public uprisings[205]. The US recently rephrased its BIT models to include "*full protection and security*" accompanied by FET, granting foreign investors additional protection against the spread of creeping expropriations. The ICSID adopted these terms in a manner inclined towards investors rather than states[206].

Third and last, the recently appearing protection in BITs and FTAs are pre-establishment rights. Under this protection, US investors are entitled to access eco-

[201] Ginsburg 2005 112
[202] Muchlinski 2007 689
[203] Yannaca-Small 2006 102
[204] Thomson Reuters 2016
[205] Reinisch 2008 131
[206] Subedi 2012 15

nomic sectors formerly reserved for other foreign investors[207]. The US targeting the extension of its free trade networks has encouraged developing countries to engage in FTAs and BITs. Often, developing countries establish restrictions and limitations upon foreign investments competition in governmentally monopolised sectors. Therefore, the pre-establishment rights guarantee US investors preferential treatment in accessing markets that were formerly monopolised and controlled by the government and where foreign investors were prohibited from entering[208].

With regard to performance requirements, Ginsburg tackled the issue of preventing, in BITs, host states from setting performance requirements on foreign entities operating in the market subject to BIT protection[209]. The US and Canadian model successfully transposed this prohibition on performance requirements by introducing exceptions permitting contracting states to ensure foreign investors' compliance with public health and safety protection for humans, animals and plant life together with conserving natural resources. A clear example of this is Article 1106 of NAFTA, which preventing contracting parties from setting requirements concerning exportation targets, local content, technology transfer, and limitation of imports to a specified share of exports. However, the clause does not prevent private parties from mutually agreeing upon the setting of internal performance requirements since the state was not involved in encouraging this arrangement[210]. Immunity against performance requirements was criticised for favouring investors over developing countries. As an example, technology transfer provisions to developing countries help in fostering their growth and development; however, such treaty articles preclude this transfer.

The importance of the above introduction of the substantive protections underlying any BIT is to familiarise the reader with the expected points of discussion within chapter IV of the three countries that will follow. The above protections are deemed the bases of the international investment law. In chapter IV, the framework regulating investments of the countries studied will be assessed against the above-introduced benchmarks.

[207] C. Ignacio Suarez Anzorena and William K. Perry 2010 59
[208] Deese 2014 139
[209] Ginsburg 2005 112
[210] Houde 2006a 151

II.G Conclusion

This intent of presenting the above theoretical framework is to provide insight into the subject matters that will be addressed in this paper. The primary goal in defining FDI is to differentiate it from indirect foreign investment (*i.e.*, hot money investments in different kinds of securities), where the latter falls outside the scope of this paper. In other words, the notion of FDI used throughout this paper only refers to direct investment flows.

Section C above sought to provide a base for the research laid out below in the chapter III. This chapter sheds light on the spread of expropriation during the 1950s and 1960s in the three countries studied, when expropriation was worldwide due to lack of protection to foreign investors. Additionally, the 1980s debt crisis will be also discussed highlighting the initiative of the three countries to liberalise their economies.

The economics of engaging in BITs was addressed in order to understand policy-makers' economic motivations when engaging in BITs. These incentives include the stimulation of investment, building economic relations between developed and less developed economies, supporting less developed economies to reform their legislations and adopt market-oriented policies, the provision of standardised legal treatment and protection for wealthy host state investors in other developing countries. Section E is fundamental to the theoretical framework guiding the thesis, tracing a connection between international investment law and law and economics.

Lastly, section F paves the way for assessing the domestic investment legislations promulgated in the three countries studied in light of their standard international obligations under BITs.

III. Economic History

III.A Introduction

Chapter III intends to provide an overview for the economic and political incidents that framed the background of the three countries. This background familiarizes the reader with the social and political context prevailing at the times of promulgating such legislations a set of the current legislations are still applicable. Prior to assessing the legal frameworks of the country studies, it is beneficial to review their historical context. This assists in understanding the mind sets of policy-makers when promulgating the currently enacted legislations. Moreover, it allows the reader to witness the reasons behind the development in the legal framework for example the shift from being a restricted, state run and highly regulated economy to an opened, liberal and investors friendly one, which will be more evident in chapter IV below. Also, this background will help in further highlighting the similarities between the three countries studies, which solidifies the bases of their choice as previously introduced in sub-section 1.F.5 above.

The chapter focuses mainly on the state's role in economic activity. It features the development in the state's role throughout the different historical phases. It provides a geo-political perspective since the impact of the political formation in the Middle East and North Africa (MENA) region is inevitable. Furthermore, the chapter provides a narrative for the state's activity as an evidence for the development of the economic freedom indicator as calculated by the Fraser Institute. Finally, the chapter intends to provide an insight for the main macroeconomic indicators from the 1950s until the late 1990s, which will be beneficial for the analysis of chapter VI below.

III.B Egypt Economic History

III.B.1 Introduction

The discussion of the three periods will initially address the Egyptian history from an economic perspective, with slight reference to both the social and political contexts. The chapter will reference the prevailing economic conditions resulting from the policy-makers' adoption of the periodic economic orientation. The primary focus within this chapter will be the development experienced in the role of the Egyptian Government (GOE) and the levels of restrictions and regulations imposed upon economic activity. Furthermore, the analysis shall contain the effect of the international and regional developments on the Egyptian economy. This attempt to undertake an in-depth analysis of the Egyptian economic history will facilitate the process of noticing the shared and differentiated features with the other country studies meaning Morocco and Jordan.

There are four aims for revisiting the fifty years' economic performance of Egypt. First, investigating the Egyptian economic history obviously highlights the similarities between the three country studies in their path of economic development. Stressing these similarities is necessary to justify the choice of these three country studies specifically in the first place. Second, the historical review will assist the reader to understand the background of the policy-making process in Egypt. For example, referring to the socialist oriented era during the 1960s assists in reasoning to extent the current protectionist investment policies witnessed there. Furthermore, it tackles the reforms executed over a long time and their positive and negative impacts in each country study. This policy assessment takes the discussion back again to the first aim of the historical chapters and tracing of country studies' similarities.

Thirdly, the economic history development allows shedding light on the degree of governmental intervention and influence over the Egyptian economy's activity. The progress from a big government to a relatively small one has a significant effect upon the legal and economic freedom analysis required for the second and third chapters. The chapter focuses on the shift from a restricted regulated public sector based economy to a liberalized, less regulated and private based economy. Fourthly, the historical chapters postulate the economic status prevailing throughout the last fifty years. Accordingly, the final outcome would be considered the base from which chapter VI is starting. In other words, the historical chapters analyse Egypt's until the late 1990s, when Egypt introduced its domestic investment legislation.

The historical period under examination begins since post-independence years in 1950s until the late 1990s and early 2000s. The Egyptian economic history chapter will be split into three periods. This categorization shall assist in paving the way to feature the main similarities and differences in policies executed between the three country studies. The first period will be the post-colonial and independence period characterized by concentration on the nation building process and promotion of national identities. Thus, the national identity incentive drove the newly born states' policy-makers to adopt policies in line with the above-mentioned goals of national identity and nation building. This period commenced from the mid-1950s and extended until mid or late 1970s.

The second period elapsed from the 1970s to 1980s. It was characterized with a slump in minerals prices and degraded foreign support aggravating domestic financials and in turn accumulating foreign debts. The thesis will approach this period recognizing the outcomes of the two above mentioned impacts on Egypt's budgets and debts. The third and last period covers the 1990s until the early 2000s. This period evidenced the post-crisis effects and how the policies implemented to mitigate the crisis impacted Egypt. Hence, the third period will be necessary to proceed further within the econometric modelling chapter, which fully concentrates on the economic assessment of Egypt's rates of economic freedom.

III.B.2 Independence and State Intervention (1952 – 1970s)

The first period under examination focuses on the political changes and their economic impact on the interaction of the economic stakeholders in Egypt. It examines the establishment of the modern state of Egypt at its current borders. This entails check the initial role of the GOE and what motivations encouraged it to intervene significantly in the economy's activity.

All started with the Free Officers movement overthrowing the King in July 1952 marked a turning point in Egypt's history[211]. As per the Officers, the monarchical corruption and the failure to conclude the British occupation lasting since 1882[212] were the drivers of the movement. When the Free Officers seized power, they had no specific understanding for ruling and controlling Egypt. The primary aim shaping their economic policies was terminating the former regime's control comprised mainly of financial capitalists and large sized land owners[213]. In 1952, the Egyptian bourgeoisie controlled the economy through natural monopolies and ties with foreigners along with large scale land-owners[214]. The new regime inherited a primitive economy dependent on agriculture and exportation of primary commodities, principally cotton[215]. The GOE's represented only 13 per cent of the GDP. This share was limited to providing social services and developing a sound irrigation system[216].

[211] Gordon 199214
[212] Douer 2015 84
[213] Rubin 2015 178
[214] Yildirim 2016129
[215] Aoude 1994 5
[216] Ikram 2007 1-2

The Free Officers conserved a pro-capitalist orientation and engaged in consultations with the private sector representatives such as the Federation of Egyptian Industries[217]. The private sector demanded a protectionist trade policy. The new regime accepted the request and imposed higher tariffs on imported final goods[218]. Moreover, the imports of capital goods and raw material were subject to lower tariffs. This allowed the spill over of know-how to the Egyptian industries. The GOE announced its intention to invest only in heavy industries enabling the private sector to lead all other manufacturing sectors. Attempts to promote the GOE private sector partnership are traced in reduced profits and dividends undistributed taxes[219]. Other legislative changes included the Law No. 120 of 1952[220] abolishing the 51 per cent Egyptian majority requirement. In addition to promulgating the Law No. 26 of 1954[221], entitled foreigners to own 100 per cent of newly established businesses[222].

The Free Officers sole move against private ownership was demonstrated in the introduction of the Land Reform Law No. 178 of 1952[223]. In September 1952 and for political purposes of strengthening the new regime's position, the Land Reform Law was promulgated limiting an individual's ownership to a maximum of 200 feddans[224]. This agrarian reform was backed by launching agricultural cooperatives to systemize and instruct farmers plus providing necessary inputs and marketing. Therefore, these cooperatives represented a mean of indirect governmental control of agricultural activity[225]. Accordingly, imperialists and feudalists hegemony during the monarchy rule was ceased. The new regime redistributed large scale lands owned by monarchy supporters among farmers in small sized holdings[226].

The turning point paving the way for the GOE wide intervention in economic activity was linked to the plans of funding the Aswan High Dam project[227]. The GOE rejected the conditional funding offered by the UK and US governments as well as the World Bank. The conditions raised concerns the funding shall be completed only upon the settlement the Arab – Israeli dispute and probably under unfavourable

217 Aidi 2008 53
218 Dan Tschirgi 1996 76
219 Ikram 2007 1-2
220 Law No. 120 of 1952, Egyptian Gazette, Issue No. 118 (annex), 4 August 1952.
221 Law No. 26 of 1954, Egyptian Gazette, Issue No. 4 (bis) (a), 16 January 1954.
222 Farah 2009 33
223 Land Reform Law No. 178 of 1952, Egyptian Gazette, Issue No. 131 (bis), 9 September 1952.
224 Ibrahim, Barbara Ibrahim 2003 115
225 Ikram 2007 3
226 King 2009 53
227 Holland 1996 101

terms[228]. Hence, the Egyptian disapproval forced the US and UK to withdraw their financial offer followed by the World Bank[229]. This justified President Nasser's declaration on July 26 1956 of nationalizing the Suez Canal[230]. The declaration transferred the Canal's full control to Egyptian hands who were determined to successfully handle the Canal's operation[231]. The nationalization was the green light for the 1956 tripartite invasion[232].

The nationalization of Suez Canal and the subsequent war turned the regime against foreign ownership. The new GOE's economic policy was engineered upon two pillars. First, the Egyptian private sector maintained its welcomed position. The first post-revolution Constitution of 1956[233] explicitly confirmed this setting ideological context in which the private sector may operate. Second, the initiation of the Economic Organization in 1957[234] to effectively control the recently confiscated French and British private businesses after the aggression[235]. These private entities were mostly involved in banking and insurance industries improving the GOE access to credit[236]. By 1958, the Economic Organization's accounted for half of commercial banks loans as well as 68 per cent of insurance transactions[237].

Thirdly and finally, the creation of the National Planning Committee in 1957 marked the peak of GOE intervention in economic activity. The new body responsible for setting the five-year industrial plans, highlighted the newly adopted economic policy focused on the public sector[238]. The public sectors gross investments hiked from 28 to 74 per cent between 1952 and 1960. This trend continued throughout the 1960s and by 1973 the public sector accounted for 90 per cent of investments and managed nearly 63 – 70 per cent of resources[239]. Funds were directed to the public sector since it became the only solution to reach the targeted growth rates. By 1960, the public ownership of most economic sectors as banking, insurance, construction, transportation together with wholesale trade defined the GOE as the sole market player[240].

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228 Ikram 2007 4
229 Almog 2004 75
230 Alexandrov 1996 150
231 Boughton 2001 1
232 Chalcraft 2016326
233 Constitution of 1956, Egyptian Gazette, Issue No. 5 (bis), 16 January 1956.
234 Tignor 2015 137
235 Vitalis 1995211
236 Rubin 2015 178
237 Ikram 2007 3
238 Waterbury 2014 71
239 Rutherford 2013 136
240 Weston 2012 234

In the first five-years economic plan 1960-61, and the second wave of nationalizations known as the "*Socialist Revolution*"[241]. It targeted the Egyptian owned private sector. It nationalized 44 companies engaged in different industrial sectors as cement, copper and electricity, half of share capital in 86 companies operating in commercial activities was expropriated[242]. The GOE size remained growing and the private sector flexibility was evident only in rural, real estate and the informal economy[243]. Moreover, this flexibility was never freely practiced since their activity was always moderated and subject to margins fixation and restrictions as in the rent controls[244].

The nationalizations were justified upon the private sector's failure to lead the economic activity. Furthermore, such policy represented a Third World states trend[245]. The import substitution plan implemented during the first five-year plan 1960-65[246] resulted in an unprecedented industrial growth of 9 per cent annually, fostering GDP growth to record 4.5 per cent annually[247]. Industry growth qualified manufacturing activities to constitute 19 per cent of GDP. Although an import substitution plan was in place, the importation bill in 1965-66 accumulated principally due to capital and intermediate goods imported covering 24 and 38 per cent of imports respectively[248].

The National Charter of June 1962 stipulated "*Arab Socialism*" as the state's ideology[249]. The National Charter radical socialist pillars included; first, the public ownership of economic infrastructure including industrial, banking, insurance and mining activities[250]. Second, public sector's full responsibility and control over importation as well as 75 per cent of exports. Third, the implementation of rent controls, land reform and taxation legislations to prevent any exploitative behaviours by private owners. Finally, the state's obligation in providing the basic social welfare rights including healthcare, education, social security along with minimum wages[251].

241 Vatikiotis 2015 40
242 Ikram 2007 6
243 Alissa 2007 2
244 Stewart 1999 139-40
245 Shechter 2008 573
246 Rivlin 2001 95
247 Hossain 2015105
248 Farah 2009 35
249 Ferris 2013 40
250 Ferris 2013 28
251 Ikram 2007 7

The above socialist evidences of the regime were accompanied by introduction of extensive price controls and subsidies[252]. With the socialist shift, the notions of income distribution and social justice were prioritized. The GOE expanded its budgetary expenditure increasing educational spending from 3 to nearly 5 per cent within the period from 1953 to 1970[253]. Health expenditure nearly quadrupled from 0.5 per cent in 1953 to around 1.9 by 1975. The recorded GDP growth 1952 to 1974 allowed a GDP per capita rise of more than 1 per cent on annual basis[254]. The GOE guaranteed employment generally and specifically tertiary schooling graduates. In consequence, public sector employees swelled from 325,000 in 1952 to 1.035 million by 1966-67. However, this burdensome economic performance did not last especially after considering the continuous militarized conflicts with Israel on top of them the defeat in June 1967[255].

The expansion in GOE spending on social services and military spending pressured the state's finances. The 1960s featured continuous budget deficits forcing the GOE to reduce its public investments from 1964 to 1968[256]. The 1960s marked a stagnant increase in domestic investments. Exceptionally, Helwan Steel complex[257] and the High Dam were the megaprojects, where lump sum amounts of domestic investments were allocated[258]. In the meantime, military spending maintained its wide share and even increased from 27 to 35 of published expenditures.

On the foreign currency side, the accumulated British sterling from the World War II were depleted and foreign debt requests were inevitable. The westernized financial institutions suspended any funding and the United States inconsistent financial support was terminated by June 1966 worsening the situation more. The 1967 six-day war defeat worsened the foreign currency threats. The economic losses of the six-day war defeat in June 1967 were remarkable. First, the costs of attrition war against Israel in an attempt to consume exert pressures on the way of military rebuilding. Second, was closing the Suez Canal due to hostilities after the Sinai invasion foregoing a lump sum amount of revenues. Finally, Israel's accession of Sinai dawdled Egypt's petroleum proceeds[259]. The only option was the return to the import restrictions as of 1966. These reduced imports in one year by nearly 20 per

[252] Braun, Haen 1983 24
[253] Stewart 1999 139-40
[254] Ikram 2007 9-10
[255] Alissa 2007 2
[256] Braun, Haen 1983 35
[257] Nayyar 197774
[258] Choucri, Eckaus 1979 786
[259] Sela 1998 97

cent and by 17 per cent in the six months following the defeat[260]. The socialist ideology discouraged the inflow of foreign capital and precluded exportation of Egyptian input material was dismissed[261]. Regardless of the socialist ideology in place, the US preserved its aim program providing the necessary wheat, the GOE could not afford due to the foreign currency imbalances[262].

By the turn of the 1970s, the GOE was pursuing two contradicting policies. First, was a developmental plan aiming to extend accessibility and availability of social services. The higher investments required presence of savings as a pre-requisite[263]. The second policy promoted consumption through offering public employment and raising wages. The policies conflicted due to the obvious lack of resources, the absence of foreign inflows and the mounting military spending. Throughout the 1960s and early 1970s, the GOE was involved in conducts affecting its survival and continuity. These conducts included continuous militarized conflicts with Israel[264], participation in Yemeni War[265], backing anti-colonial moves in Africa[266] plus provoking Western governments and international funding institutions.

The economic history of Egypt since independence signals the limited role of the GOE at the first years of its governance and was limited to the Land Reform Law. Conversely, the political updates connected to the High Dam project triggered the regime's hostile interaction with the private sector directly after the tripartite aggression and followed by the socialist revolution of 1961. The features associated with the policy shift include; the central economic planning through five years' economic plans, the public-sector expansion and hegemony, the introduction of subsidies, prices and housing rent controls.

(A) October War and the shift to the Private Sector

The Sadat rise to power in 1970 and even prior to October War marked a less-socialist policy. The new president grasped the ambitious policies humiliating the economy's performance could not last forever[267]. The military spending maintained its leading share in governmental spending. This started to change only after the

260 Ikram 2007 11
261 Stewart 1999 137-8
262 Rubin 2015 178
263 Ikram 2007 12
264 Ro'i, Morozov 2008 93
265 Louis, Shlaim 2012 150
266 Adi, Sherwood 2003 140
267 Ikram 2007 12

Kippur War and specifically in 1974. President Sadat viewed the private sector and foreign investments specifically Arab ones as the new engines of Egypt's potential economic prosperity[268]. This was translated into October Paper of 1974, formally highlighting the public and private sectors' roles[269].

The post-1973 war period offered the private sector an opportunity to foster its activities widening its share in total output[270]. The new economic policy focused on facilitating the investment climate through promulgating Law No. 43 of 1974[271] offering tax holidays, several importation and exportation licenses besides an exemption from burdensome labour laws[272]. The Law introduced two regimes of investments, the first applicable in Free Zones (Port Said), where no local partners were necessary for incorporation and tax exemptions were indefinite. The second regime enforced for inland businesses, where a local investor is necessary to establish a partnership[273]. The new policy proved success by lifting the economy's average growth rates to 9 per cent annually for the 1970s[274]. The sustained growth resulted from; the oil boom of the 1970s, the restoration of Sinai oil fields after the war, the reopening of Suez Canal and finally the remittances inflow of Egyptians employed in oil-rich Gulf states[275].

Under the unprecedented rates of budget deficit, the GOE referred to domestic and foreign money markets for borrowings. These attempts jointly were successful in funding 60 per cent of the deficit. Besides social security and pension funds borrowings, the monetary policy was utilized to cover part of the deficit. The money supply in 1974 rose by nearly 29 per cent compared to a real boom in output of only 4 per cent, which created harsh inflationary burdens[276]. On the wages side, rises were planned to meet prices acceleration. Regardless of productivity, employees received higher wages covering rise in living costs. However, the pay rises were not sufficient to equalize real wage increases with inflation rates[277].

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[268] King 2009 81
[269] Arafat 2009 63
[270] Sullivan 1986 127
[271] Law No. 43 of 1974, Official Gazette, Issue No. 26, 27 June 1974.
[272] Goldschmidt 2013 202
[273] Belev 2000 111
[274] Aliboni 2013 162
[275] Alissa 2007 3
[276] Aliboni 2013 54
[277] Ikram 2007 13-5

The GOE shared the flourishing results with lower income classes through boosting subsidies and preserving Nasser's policy of public sector employment[278]. In 1974, the budget deficit added 6 per cent to 1973's rate totalling to 17 per cent of the nominal GNP[279]. Expenditures in 1974 increased by 28 per cent compared to only 12 per cent rise in the same year's receipts. On the revenue side, the drop had two justifications. First, the widening in tax base due to the population growth or the property expansion did not result in a proportionate rise in the tax proceeds. Secondly, the public-sector enterprises transferred profits to the GOE budget significantly deteriorated due to price fixations and inefficient investment mismanagement[280].

The balance of payment deficiency began from the 1970s. This decade signalled the growth in consumer goods importation[281]. A significant rise in international commodities markets and specifically foodstuffs amplified importation total cost. Additionally, an overvalued exchange rate was maintained to satisfy an economically nationalist population throughout the 1960s. Hence, domestically produced were significantly affected by a demand reduction later transferred to domestic less competitive industry[282]. In consequence, 1970 – 1975 period recorded an average growth of consumer goods importation at 9.7 per cent in real terms[283].

This was criticized by both import substitution supporters accompanied by market oriented promoters. For Nasserists, growing consumption totally opposed ideologies of central planning and production quotas. Infitah was blamed for abolishing any sense of austerity prevailing under Nasser's economic nationalism beliefs[284]. For the market oriented supporters, consumption represented an inefficient use of resources instead of directing them to more macro economically rewarding activities as savings and investments[285]. For intermediate goods, the same period recorded an average increase in real terms though at a lower rate of only 7.5 per cent. The remarkable feature in the 1970 – 1975 importation trend was in the average rise in capital goods imports to arrive at 21 per cent. Machinery imports proliferated by 60

278 Alissa 2007 3
279 Wickham 2005 235
280 Ikram 2007 15
281 Choucri, Eckaus 1979 786
282 Alissa 2007 3
283 Choucri, Eckaus 1979 786
284 Shehata 2009 135
285 Shechter 2008 577

per cent from 1973 to 1974. In the meantime, input metals imports hiked by 150 per cent[286].

On exportation side, Western demand on Egyptian products plunged worsening the trade gap. The commodities trade gap recorded a $1.75 billion in 1974 and nearly $2.5 billion in 1975. Arabs financial assistance grants in 1974 reached $1.2 billion[287]. Moreover, the US aid of nearly $1 billion assisted in narrowing the trade deficit and fostering importation[288]. However, this financial assistance was not sufficient to cover the balance of payments gap[289]. Hence, additional $510 million were attained from short term borrowings. These debts becoming mature shortly, besides the insufficiency of export proceeds, the projected Arabian aid, the balance of payments deterioration was inevitably pushing the economy into deep crisis[290].

These pressures were relieved only by 1976-77, when Saudi Arabia, Kuwait, Qatar and Abu Dhabi decided to intervene reimbursing the short-term debts and backing the importation of intermediate goods[291]. The GOE depended primarily on short term credit to fund its expenditure. Therefore, mounting debts falling due shortly reaching 100 per cent of GDP in 1981 and a remarkable trade deficit due to a fourfold of wheat imports between 1973 and 1976, both resulted in a severe balance of payments crisis[292].

The Open Door policy of 1977 demonstrated closer ties between the GOE and the international and regional financial institutions including the IMF, World Bank and the Kuwaiti Development Fund. These institutions were concerned of the GOE irrational planning strategies and increasing external debt[293]. Pressures mounted with the inefficiencies of the GOE unnecessary bureaucracy and its implications on the utilization and usage of available resources[294]. President Sadat approached the IMF and the World Bank for financial support[295]. The support was conditional upon cutting food subsidies. This condition was applied by January 1977, erupting the "*bread riots*"[296] of the 18th and 19th of January against such price hikes. Against these masses,

286 Choucri, Eckaus 1979 787
287 Ikram 2007 15
288 Cook 2011
289 Shehata 2009 31
290 Zahid 2012 102
291 Ikram 2007 15
292 Alissa 2007 3
293 Zahid 2012 41
294 Choucri, Eckaus 1979 792
295 Selim 2015 52
296 Ahmed 2001 7

the regime was under obligation to relief and slowly reform the economy rather than undertaking sudden critical moves[297].

An important problematic characteristic of the economy was precedent in the large unskilled, high pressuring labour force seeking public sector employment opportunities. The 1970s promotion of migration to the Gulf oil monarchies assisted economically in moderating such heightening employment pressures offering an inflow of foreign currency remittances[298]. Data available for Egyptian migrants in 1965 show a total number of nearly 100,000 Egyptians. In more than a ten-year period and based on 1976's census, Egyptians abroad recorded a 1.4 million[299]. The 1970s-migration drift did not differentiate in the labour skills'. Professionals along with construction workers had employment opportunities in the other Arab countries[300].

After the October War, President Sadat interested in changing the lifestyle of the population, the door was opened widely for the private sector to the lead the economic scene. Legislations were pertaining incentives and facilitation for investment, the GOE referred to financial institutions to fund its growing budget and trade deficits. The was accompanied with a rise in the importation costs and a plunge in exports. This paved the way to the second period under investigation.

III.B.3 Debt Crisis and Conclusion of Structural Adjustment Programs (1980s – 1990s)

The second period under investigation focuses on the outcomes of the GOE expansion in economic activity. The success of these policies was conditioned upon meeting a set of conditions. Non-compliance with these conditions, pushed the GOE into the accumulation of foreign debt and the necessity of applying for financial assistance from the international financial institutions.

(A) Mubarak rise to power and accumulation of debt

Mubarak accession of power in 1981 did not mark any changes in policy orientation[301]. Mubarak conserved Sadat's policies of gradual openness and global integration[302]. Mubarak managed to reign the maximum benefits from two rentier posi-

297 Aoude 1994 13
298 Menza 201372
299 Choucri, Eckaus 1979 789
300 Menza 2013 66
301 East, Thomas 2014156
302 Rabinovich, Shaked 1988 345

tions. First, is the economic rent and this is linked to international oil pricing and remittances inflows from migrants employed in oil rich Gulf states[303]. The oil receipts permitted the GOE to expand its public spending ranking Egypt the second public spending state in MENA region[304]. The sharp fall in oil prices precedent in 1986 commanded the GOE to launch its third policy shift focused on austerity especially with its notable budget deficit[305]. The second rent was a strategic one, since the GOE benefited from its political position in the Middle East in order to promote the US regional policies. This guaranteed the GOE the backing of the US administration even with the international financial institutions influenced by the US as the IMF[306].

To understand the Egyptian economic situation during the 1980s, it is important to review the three deficits recorded in the investment/savings balance, trade balance and the GOE budget. To begin with the investment savings balance, savings originated from public or private sources. The public sources were negatively affected by the collapse in the oil proceeds with the eruption of the Iran-Iraq War[307]. In addition, public sector enterprises composed of 391 entities and employing 1.2 million workers constituted only 20 per cent of GDP with a return on investments of only 1.5 per cent[308]. On the private sources level, the banking system offered negative real interest rates that did not stimulate the official savings. However, the banking system was not appealing for depositors who preferred unofficial channels to maintain their funds, thus lowering the overall public savings[309].

The second experienced deficit is the trade one. In the 1980s, exports recorded a sluggish performance for several reasons. First, the collapse in oil proceeds from $2.9 billion to $1.36 in a four-year period starting 1983 until 1987. In 1986, oversupply of oil and the slack demand reduced the oil prices further forcing the GOE to cut its production[310]. Another trade deficit crucial variable change was the population growth in absence of the necessary agricultural expansion especially in wheat cultivation to cover the growing needs[311]. Hence, the food importation bill worsened the deficit[312].

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303 Richards 1991 1721
304 Sulayman 2011 40
305 Alissa 2007 4
306 Richards 1991 1721
307Shojai 1995 109
308 Cammett et al. 2015 242
309 Richards 1991 1722
310 Taylor & Francis Group 2003 330
311 Hopkins, Westergaard 1998 77
312 Ikram 2007 151

On the exportation side, cotton exports in 1990s deteriorated to a to only a third of the early 1980s exports, which were already 50 per cent below 1974's exportation rates[313]. Exceptionally, the textiles exports performed and it constituted 60 per cent of the exports components. Conversely, these industries were highly subsidized and supported by the GOE. Moreover, in 1987, the Egyptian Pound (EGP) appreciated by around 60 per cent compared to its value in 1970, further pressuring the export rates[314]. With such aggravated performance of exports, the GOE failed to cover its trade deficit unless introducing through trade restrictive measures[315]. The restrictions were of a limited scope since two thirds of Egypt's imports were of capital and intermediate goods. The World Bank data proved the decline in imports to its lowest in 1987, when it recorded $10.63 with a 17 per cent decrease in only one year[316].

Conversely, the two other pillars limiting the current account's gap where tourism and remittances. Tourism performed positively throughout the 1980s accumulating annual proceeds of $2 billion[317]. For remittances, the official inflow went from $123 million in 1972 to $3.74 billion by 1989. The Iraqi invasion of Kuwait deeply severed the Egyptian economy forgoing nearly $3.5 billion in declining tourism and trade flows through Suez Canal[318]. Furthermore, it forced the return of around 1 million Egyptians employed in the Gulf adding further pressures on the Egyptian labour market[319]. All reasons justified a current account deficit of 8 per cent by 1989. The GOE responded with currency devaluations in a three-years period from 1987 until 1991, seeking the enhancement of the economy's competitiveness[320]. The devaluation was principally in compliance to Western pressures and International Financial Institutions recommendations.

Egypt reverted to international markets and succeeded to receipt $3 billion of annual assistance and mostly in loans. The sustained twin deficits urged the GOE to extend its borrowing[321]. According to the World Bank data, foreign debt surged from $2 to $21 and $50 billion in the years 1970, 1980 and 1990 respectively. Based on free exchange rates, the Egyptian owing debt totalled to 150 per cent of GNP, rank-

313 Yeats, Mundial 1996 13
314 Richards 1991 1724
315 Hopkins, Westergaard 1998 77
316 Richards 1991 1723
317 Ibrahim, Ibrahim 2003 177
318 Richards 1991 1723
319 Dieter, Ulrich 1998 44
320 Subramanian 1997 5
321 Soliman 2011 70

ing Egypt the first among indebted economies[322]. The debt borrowed at burdensome conditions raised the servicing expenditure from 26.2 to 42.4 per cent between 1982 and 1987[323].

In turn, this introduces the third deficit, the GOE budget. Public expenditure recorded a 61 per cent of GDP and compared to revenues of only 40 per cent in 1980. This reflected a 20 per cent of GDP budget deficit[324]. Under such pressures, the deficit was reduced to 16.3 per cent of GDP in 1989. In 1982, expenditure constituted 63.5 per cent of GDP, while revenues were only 40 per cent. By 1988, both rates decreased to 41.4 and 25.1 per cent of GDP[325]. The high rates of deficit required excessive borrowing beside the foreign one. The prevalent deficit fuelled an expansionary monetary policy that added 18 per cent of liquidity annually. An expected outcome was a surge in inflation to reach 20 per cent and in fact it recorded 25 per cent in 1991[326]. The unsustainable deficits urged the GOE to approach its Paris Club creditors and the IMF[327].

The critical situation compelled the GOE to apply a set of austerity measures[328]. The cornerstones of the budget expenditure comprising 80 per cent were public sector salaries, subsidies, military and servicing public debt. The earlier two divisions offered the GOE a wider flexibility to cut its spending when compared to the latter ones[329]. Starting with the public-sector wage bill, the GOE did not severely use layoffs, instead it suspended wage rises and new hiring. This policy successfully reduced wage expenditures, since the public-sector employees in 1988 were earning only 55 per cent of their 1973 earnings[330]. However, the downside was the demoralization of the public-sector employees who were responsible for over 50 per cent of the GDP[331].

Moving to the second division concerning subsidies, the situation was more complex. Subsidies consisted of explicit and implicit ones. The first – mainly represented in food subsidies – were managed and controlled decreasing from over 10 per

322 Richards 1991 1724
323 Soliman 2011 103
324 Cammett et al. 2015 242
325 Richards 1991 1724
326 Dinh, Hinh T. and Guigale, Marcelo 1991 4
327 Ikram 2007 152
328 Moghadam 2003 54
329 Dinh, Hinh T. and Guigale, Marcelo 1991 4
330 Lust-Okar 2005 9-11
331 Cammett, Diwan 2013 3

cent to nearly 5 per cent throughout the 1980s[332]. On the implicit subsidies side, the first was evident in the overvalued exchange rate and its impact when valuing imports. By 1988, these implicit subsidies recorded 14 per cent of GDP[333]. Second, in case of implicit subsidies created from selling domestically produced oil at lower than international prices. This favoured the capital-intensive industries over the labour-intensive ones, and lowering the job creation rates. For scholars, the implicit subsidies remained around 20 per cent of the total subsidies throughout the 1980s[334].

(B) Egypt's formal referral to the IMF's assistance

With the triple deficits and benefiting from the US administration support, the GOE moved towards the IMF and World Bank seeking financial assistance packages. A kick-start agreement concluded in 1987[335], followed by several others urged the GOE to reduce its deficit through further subsidies reductions, cutting public spending and launching of a public-sector privatization program[336]. However, the GOE did not fulfil its reform obligations under the 1987 agreement. It exerted pressures on the US, benefiting from the strategic rent and seeking an engagement in a more lenient debt arrangement[337]. The second attempt of reform engaging in the IMF support programs was more successful. As always, the region's politics assisted in the successful conclusion of the second IMF funding program. In 1991, after the GOE position favouring the coalition liberating Kuwait from the Iraqi invasion, it concluded several debt-relief arrangements. In addition, an increased coordination between the Paris creditors' clubs and international funding institutions prevailed[338].

The main obstacles hindering the implementation of the IMF structural changes to the second attempt were two. The first obstacle was the stronghold of the negatively affected interest groups. The conditioned funding indicated a smaller share of the economy is controlled by the GOE. This is compared to a 50 per cent of the GDP before agreeing upon the funding program[339]. The ministers, GOE officials and public-sector administrations defended their grip over the economy, slowing the

332 Hopkins, Westergaard 1998 29
333 Harris 2005 9
334 Richards 1991 1724
335 Harris 2005 41
336 Aoude 1994 16
337 Bensahel, Byman 2004 89
338 Park, Vetterlein 2010 33
339 Richards 1991 1727

privatization process in the 1990s[340]. The second group resisting openness was the private sector computing profits from the corruption opportunities arising from a large inefficient government. The second obstacle was public disorders and civil unrest. The IMF-program negatively affected the Egyptians' incomes, subjecting them to additional poverty burdens especially with low rates of job creation[341]. Other justifications for reform postponement relate it to Eastern Bloc collapse strengthening the regime's liberal decision makers turning reforms more appealing[342].

As forecasted, the IMF-program deepened poverty through cutting the public spending as well as the food subsidies. Based on the data published during the program's enforcement, the poverty rates ranged between 20 and 25 per cent[343]. Other medium term challenges developed and were mostly associated with the job creation rates. First, the projected boom in labour force in the 1990s due to the population growth of around 2.8 per cent during 1980s. Estimates of needed jobs covering new entrants were nearly 6 million jobs[344].

Second, attempts to slash unemployment below the 1980s average of 10 per cent, required setting job creation estimates of 9 million jobs. At first, the labour migration to the Gulf dried the Egyptian labour market, raising the relative pricing of labour to capital[345]. However, the return of nearly all the Egyptian in Iraq and Kuwait after the Iraqi invasion deepened the unemployment crisis[346]. The fourth and last challenge was linked to the nature of unemployed labour force. The tripling of university graduates from 1975 to 1985 was reflected in higher unemployment or less quality jobs[347]. This appeared after the GOE's failure to fulfil its promises of civil service employment due to the widening budget deficit[348].

The slump in oil prices during the 1980s, the decline in Egyptian migrants' remittances together with the large government, lack of fiscal discipline and the overvalued currency resulted in triple deficits. The unsustainable economic conditions of the GOE necessitated the formal application for financial assistance from the IMF. The GOE hesitation to comply with the borrowing conditionality was overcame

[340] Zahid 2012 49
[341] Ayalon 1994 366
[342] Sulayman 2011 45
[343] Aoude 1994 16
[344] Talani, McMahon 2015 29
[345] Richards 1991 1724
[346] Talani, McMahon 2015 338
[347] Assaad, Economic Research Forum for the Arab Countries, Iran, and Turkey 2002223
[348] Povey 2016 123

only when the terms were more flexible after Egypt's participation in the Gulf war international coalition.

III.B.4 Economic Openness and Market Deregulation (1990s – 2000s)

The third period under examination is aligned with the economy's status in the post-IMF program. The section intends specifically to address the impacts of the IMF SAP on five of the Egyptian economy's pillars including; the public sector, the investment deregulation process, the exchange rate reform, the budget deficit control and the free market forces interaction.

(A) IMF Structural Adjustment effects

The effects of the IMF Structural Adjustment Program (SAP) were more obvious throughout the 1990s. The Egyptian SAP program implementation is split into three phases. The first elapsed from 1991 to 1998 and represented the start of the stabilization process[349]. In this phase, GOE adhered strictly to the IMF's SAPs concluded in both 1991[350] and 1993[351]. This boosted confidence in the economy reflecting the political will to comply with the economic conditions. In October 1996, the GOE seeking an economic stimulation referred to the IMF to conclude a new stand-by agreement. The arrangement centre-focused on encouraging a sustainable economic growth embracing unemployed, reducing inflation along with accumulating foreign reserves[352]. The second phase started from 1998 and ended by 2004. It was characterized with targeting further openness and institutionalization. The third period started in 2004 onwards. It was centre-focused on validating the openness benefits through adopting a set of neoliberal policies[353].

The first phase witnessed the liberalization of interest rates in January 1991[354]. In addition, the initiation of primary and secondary exchange rates before the full unification[355]. In fact, these were initial bona fide steps prior to agreeing on the economic stabilization and SAPs with both the IMF and World Bank in May and November of 1991[356]. Under the slogans of transforming the Egyptian economy to a

349 Cheney 1997 115-6
350 Cordesman 2016 328
351 Zahid 2012 47
352 al-Dīn 2009 80
353 Alissa 2007 4
354 Shehata 2009 44
355 al-Dīn 2009 172
356 Alissa 2007 4

market oriented one and restoring Egypt's creditworthiness, the new IMF program Economic Restructuring and Structural Adjustment Plan (ERSAP) attended six pillars. These included; privatization, abolishing price controls and subsidies, liberalizing trade together with macroeconomic stabilization[357].

Firstly, the public sector, its restructuring was executed through two policies handled in parallel. The first set of policies concentrated on enhancing the public-sector's efficiency, decentralizing its management and eliminating all the legal and institutional privileges guaranteeing a preferential treatment over the private sector[358]. The second set was based on the privatization program launched in 1991[359]. Under this plan implemented principally between 1993 and 2003, the government alienated 197 public entities[360]. The disposed entities constituted one sixth of its owned enterprises net worth. By 1996, the GOE had privatized its shareholding ownership fully or partially in 46 companies[361]. The privatization program developed revenues of $1.2 billion until 1996[362]. It is important to mention the alienations executed were for the profitable public entities. The losing exerting entities required liquidation or restructuring. This remained a challenge for the GOE[363].

Secondly, free pricing policies and specifically for energy products were advocated by the lending institutions to equal the international prices[364]. The ERSAP targeted a gradual abolishment of subsidies to equalize international ones by June 1995. In agriculture, the Law No. 96 of 1992[365] augmented agricultural lands rents to 22 times the land tax moving from only 7 under the former law. By October 1997, it terminated the land rentals liberalizing the contractual relationship between the landlords and the tenants[366]. On the housing side, rent controls were eradicated and a Law No. 4 of 1996[367] was issued similarly liberalizing the contractual terms governing the relationship between the landlords and the tenants[368].

Thirdly, investment policies, a deregulation policy was pursued to create an attractive investment climate. This reached climax by the promulgation of Law No. 8 of

357 Blaydes 2010 43
358 Squire, Fanelli 2008 337
359 Korayem 1997 1-2
360 Farah 2009 45
361 Celasun 2013 119
362 Lieberman, Kirkness 1998 82
363 Cheney 1997 117
364 Abdel-Khalek 2001 19
365 Law No. 96 of 1992, Official Gazette, Issue No. 26 (bis) (a), 28 June 1992.
366 Bernard-Maugiron 2008 292
367 Law No. 4 of 1996, Official Gazette, Issue No. 4 (bis) (a), 30 January 1996.
368 Singerman 2011 267

1997[369]. The execution of the SAP and the enhanced investors' confidence to invest in Egypt. This inflow relieved the interest rate pressures where the nominal interest rate falls with more than 4 per cent in 1993-4[370]. Moreover, the inflows reduced the current account deficit to a 1 per cent surplus, besides, accumulating foreign currency reserves of $19 billion[371]. The liberalization of interest rates in 1991 encouraged the capital inflows in EGP to benefit from the higher interest rates. In consequence, the less dollarization pressured down the interest rates by the above rates[372].

Fourthly, the adjustments on the external economy side were signified in the exchange rate reform and the trade openness. On the exchange rate side, after the dual system initiated in February 1991, by October 1991[373], the exchange rate was unified, devalued and upon presence of necessary licenses non-bank traders were permitted[374]. Currency devaluations of 56.7 per cent in 1987 followed by a 23.4 per cent in 1991 depreciating EGP from 1$ equalling EGP 2.708 to equalling EGP 3.342 in February 1991. On the trade openness side, in October 1996 tariffs were reduced from 70 to 55 per cent[375]. Additionally, Egypt adhered to the World Trade Organization in 1995[376] and accomplished the Greater Arab Free Trade Agreement[377]. These outcomes were an accumulation of several changes including devaluations increasing diversified exports and reducing importation. In addition, public investment cuts and interest rate rises inflated imports prices reducing their demand[378].

A challenge surfaced regarding the levels of integration in the world economy. The Egyptian economy's share in world exports and imports verifies declined from 0.2 per cent in 1985 to only 0.07 1995, while for imports a fall from 0.5 to 0.2 per cent over the same time period[379]. The significant reduction in exports was reasoned upon less diversification along with cheaper more competitive imports[380]. On the foreign debt side, the post-Gulf War debt relief and simultaneous rescheduling arrangement with Paris Club[381] enriched the balance of payments cumulatively by

369 Law No. 8 of 1997, Official Gazette, Issue No. 19 (bis), 11 May 1997.
370 Subramanian 1997 30
371 Cheney 1997
372 Korayem 1997
373 Stokke 2013275
374 Blaydes 2010 86
375 Cheney 1997 117
376 Galal, Diwan 2016 110
377 Alissa 2007 4
378 Korayem 1997 13
379 Subramanian 1997 58
380 Adly 2013 71
381 Arslan et al. 2009 9

nearly $15.5 billion[382]. The World Bank valued the forgone debt service obligations based on written off debts to reach 2.5 per cent of GDP[383].

Fifthly, the budget deficit reaching 17.2 per cent in 1990-1 was planned equivalence in 1996-7[384]. The fiscal adjustment executed under the SAP diminished the GOE's budget from a 15 to a 2 per cent deficit from 1989 to 1994. The overall deficit reduction was due to a revenue generation of 42 per cent as well as expenditure cut of 58 per cent. To start with the revenue side, the currency devaluation in 1991 augmented revenues realized from oil exportation, Suez Canal fees and the custom duties[385]. Furthermore, introduction of Sales Tax[386] in 1991 represented an important pillar in revenue raising as it was responsible for 1.4 per cent upsurge in revenues[387].

Moving to the expenditure side, the austerity was denoted in two classifications; current and investment totalling to 7.5 per cent of GDP[388]. In regard to subsides, the GOE exerted further efforts successfully reduced subsidies to 2.6 per cent of GDP, then 1.9 per cent in the years 1992-3, 1993-4 and 1994-5 respectively. Finally, interest payments on public debt significantly increasing during the ERSAP's execution due to treasury bills issuance to fund the chronic Egyptian budget deficits. It is important to mention that interest expenditure absolute value in 1993-4 exceeded the wages bill and was nearly three times the subsidies[389].

(B) Post-IMF Structural Adjustment Plan

The Egyptian economy reigned the advantages of its fierce SAP by the second half of the 1990s. To start with inflation, recording 21.1 per cent in 1991-2[390] before plummeting to a 10 per cent average for the following five years and only 4 per cent for 1997 to 2000 period[391]. On the wages side, nominal pay rises successfully contained inflationary pressures. This applied obviously in the post stabilization period, hence, reducing the program's austerity outcomes. The current account attained a positive value of 1.1 per cent in 1990s after recording negative 5 per cent in the late 1980s[392]. The real GDP growth was remarkably affected during the implementation

382 Subramanian 1997 47
383 Ikram 2007 153
384 Korayem 1997 1-2
385 Subramanian 1997 8
386 General Sales Tax Law No. 11 of 1991, Official Gazette, Issue No. 18 (cont.) (a), 02 May 1991.
387 A.M. Abdel-Rahman 1998 2
388 Farah 2009 43
389 Korayem 1997 13
390 Agénor 2004 234
391 Farah 2009 47
392 Subramanian 1997 8

of the program, slumping to 1.9 and 2.5 per cent in 1991-2 and 1992-3. However, a jump started from 1993-4 allowing growth rates to achieve 5 per cent by 1997[393].

The second phase of the SAP was launched in 1998 and it appeared in the legal framework reform, EGP depreciation and further global trade integration. To start with the legal framework update, a set of new market oriented laws were promulgated staring from 2002. These laws include for example; export promotion, intellectual property rights and more importantly was the Special Economic Zones followed by the Central Banking Law. Secondly, in January 2003 a long-awaited step of devaluing the EGP was implemented[394]. Thirdly and finally, the global trade side, Egypt concluded an Investment and Trade Framework with the US in 1999[395], a FTA in 2000 with the Common Market for Eastern and Southern Africa (COMESA) members[396], plus the Agadir agreement in 2004 involving Jordan, Tunisia and Morocco. Also, the EU Association Agreement entered into force in June 2004[397].

III.B.5 Conclusion

The section of Egypt in chapter III was divided into the same skeleton of Jordan and Morocco to facilitate the process of comparison between the country studies and in order to trace easily the differences and similarities. The similarities represent an essential part in reasoning the choice of three country studies for undertaking such research project. Moreover, the historical developments until the 2000s are the base from which the economic chapter of the research project will kick start. Finally, the historical analysis will assist in analysing the protectionist and investments restrictions still traced in the country studies since the era of nationalism and wide state intervention. The main witnessed similarities highlighting the prevailing economic orientation can be listed based on each time period under examination.

To begin with, the first period in each country study was titled "*Independence and State Intervention*" elapsing from the 1940s until the 1970s. Politically speaking, Egypt secured its independence and full decolonization in 1952. During this economic period, the GOE expanded its economic role within the new states. Features of GOE intervention include; the re-introduction of the Egyptianization legislation to restrict foreign ownership of entities. Also, Nasser's "*Socialist Revolution*" entailing the ex-

393 Galal, Diwan 2016 82
394 Sharp 2011 87
395 Sharp 2011 15
396 Lansford 2014 1656
397 Alissa 2007 5

propriation wave of 1961. Other private sector limitation policies enacted were the pledge of guaranteed state employment to all university graduates, besides, the introduction of rent controls and land reforms legislations setting ownership maximums.

On the trade level, import substitution – as globally executed – were implemented in the three country studies to support domestic production. The fall in the rentier benefits experienced in the 1980s in oil negatively influenced the Egyptian budgets. These factors severed the economic situation in Egypt who could not afford the expansionary fiscal policies paving their ways to the second phase titled "*Debt Crisis and Conclusion of Structural Adjustment Programs*". The period was principally characterized with budget deficit and foreign debt. The foreign debt accumulation and the continuous failures to service it, forced Egypt to revert for the IMF assistance more than once within a decade period.

The adjustment programs as part of the 1980s Washington Consensus executed in developing economies experiencing debt crises, were enforced in the three country studies. The programs allowed Egypt to reach the "*Economic Openness and Market Deregulation*" era prevailing until the 2000s. Examples of enforceable policies include austerity and currency devaluation of 56.7 per cent in 1987 followed by a 23.4 per cent in 1991. This period highlighted the introduction of privatization programs with different paces of implementation, Egypt secured a 3.5 per cent of GDP annual revenues. Finally, the deregulation process was evidenced in a series of market oriented policies enforced in Egypt including the introduction of the Investment Law targeting the attraction of domestic private sector as well as FDI. The creation of tax incentives and free zones were the basic methods of attraction.

III.C Jordan Economic History

III.C.1 Introduction

The discussion of the three periods shall initially address the Jordanian history from an economic perspective, with slight reference to both the social and political contexts. The chapter will reference the prevailing economic conditions resulting from the policy-makers' adoption of the periodic economic orientation. The primary focus within this chapter will be the development experienced in the role of the Government of Jordan ("GOJ") and the levels of restrictions and regulations imposed upon economic activity. Furthermore, the analysis shall contain the effect of the international and regional developments on the Jordanian economy. This attempt to undertake an in-depth analysis of the Jordanian economic history will facilitate the process of noticing the shared and differentiated features with the other country studies meaning Egypt and Morocco.

There are four aims for revisiting the fifty years' economic performance of Jordan. First, investigating the Jordanian economic history obviously highlights the similarities between the three country studies in their path of economic development. Stressing these similarities is necessary to justify the choice of these three country studies specifically in the first place. Second, the historical review will assist the reader to understand the background of the policy-making process in Jordan. For example, referring to the socialist oriented era during the 1960s assists in reasoning to extent the current protectionist investment policies witnessed there. Furthermore, it tackles the reforms executed over a long time and their positive and negative impacts in each country study. This policy assessment takes the discussion back again to the first aim of the historical chapters and tracing of country studies' similarities.

Thirdly, the economic history development allows shedding light on the degree of governmental intervention and influence over the Jordanian economy's activity. The progress from a big government to a relatively small one has a significant effect upon the legal and economic freedom analysis required for the second and third chapters. The chapter focuses on the shift from a restricted regulated public sector based economy to a liberalized, less regulated and private based economy. Fourthly, the historical chapters postulate the economic status prevailing throughout the last fifty years. Accordingly, the final outcome would be considered the base from which chapter VI is starting. In other words, the historical chapters analyse Jordan's performance until the late 1990s, when Jordan introduced its domestic investment legislation.

The historical period under examination begins since post-independence years in 1950s until the late 1990s and early 2000s. Jordan's historical analysis under chapter III will be split into three periods. This categorization shall assist in paving the way to feature the main similarities and differences in policies executed between the three country studies. The first period will be the post-colonial and independence period characterized by concentration on the nation building process and promotion of national identities. Thus, the national identity incentive has driven newly born states' policy-makers to implement policies in line with the above-mentioned goals of national identity and nation building. This period commenced from the mid-1950s and extended until mid or late 1970s.

The second period elapses from the 1970s to 1980s. It was characterized with a slump in minerals prices and degraded foreign support. The thesis will approach this period recognizing the outcomes of the two above mentioned impacts on Jordan's budgets and debts. The third and last period covers the 1990s until the early 2000s. This period evidenced the post-crisis effects and how the policies implemented to mitigate the crisis impacted Jordan. Hence, the third period will be necessary to proceed further within the econometric modelling chapter, which fully concentrates on the economic assessment of Jordan's rates of economic freedom.

III.C.2 Independence and State Intervention (1946 – 1970)

The first period under examination focuses on the political changes and their economic impact on the interaction of the economic stakeholders in Jordan. It examines the establishment of the modern state of Jordan nearly at its current borders. This entails check the initial role of the GOJ and what motivations encouraged it to intervene significantly in the economy's activity.

Based on the mandate System introduced by the League of Nations, the British established the Transjordan Emirate in 1922. After 24 years and in 1946, the British concluded an alliance and friendship treaty with Jordan abolishing mandate and granting the Emirate independence[398]. This independence created an internationally recognized state known as the Hashemite Kingdom of Jordan[399]. The Hashemite family originated in Hejaz and ruled Mecca until defeated and expelled by Al-Saud family forces. However, the British awarded their expelled allies the opportunity to rule the newly created Monarchies in Iraq and Transjordan. Regardless of overthrowing the Hashemite Iraqi monarchy in a deadly coup in 1958, the Hashemite family in Jordan maintained its power control mainly based on the Jordanian army's loyalty[400].

The ruling family in Jordan focused on establishing tight alliances with Jordanian tribes. The British assistance was necessary to clinch the tribal support in favour of a foreign King[401]. This alliance assisted in preserving the Hashemite control over the

[398] Anderson 2009 79
[399] Salameh et al. 2015 142
[400] Mutawi 2002 16
[401] Yom, Gause III 2012 6

new state even after the Palestinian refugees' waves in the post 1948 and 1967 wars[402]. The new regime adopted a state employment strategy to consolidate further levels of social welfare and nation building. In addition, the state funded nation building strategies through executing public development projects as Aqaba Port, easing the integration of tribes and gaining their support to the Hashemite new regime[403]. A clear example was the GOJ's cash funding to tribal leaders in alliance with the regime fostering this alliance[404].

With the spread of the Arab nationalism ideology during the 1950s, Hashemite's were always accused of disloyalty to the ideology[405]. Under these pressures, the GOJ welcomed the Palestinian refugees' and granted them the Jordanian citizenship. The Palestinian refugees including guerrillas benefited from the Jordanian lands to raid on Israel disregarding the Jordanian domestic rule of law[406]. This threatened King Hussein's control and sovereignty with the possibility of potential Israeli reprisal. In consequence, by September 1970 a civil war erupted between King Hussein's Jordanian Army and the guerrillas of the Palestinian Liberation Organization (PLO). This was known as the Black September incidents. The PLO were defeated and expelled to Lebanon[407]. After the war, the Palestinian Jordanians remaining in Jordan were encouraged to migrate to the Gulf countries taking advantage of higher returns and standards of living in consequence of the oil boom[408].

In the 1950s, Jordan's political economy was formulated on close business – GOJ relations[409]. This close relation was an obvious outcome of the population structure at Jordan's independence in 1946. The governmental economic development plan by independence was articulated on state-led development as well as import substitution. The state and elite merchants from – Syrian and Palestinian origins – launched co-operation policies through initiating various public-private partnerships. These partnerships lasting until nowadays exemplify the business – GOJ close ties[410].

In the post-independence period Jordan preserved an underdeveloped economy characterized by being; first, an average population growth rate of 3.2 per cent. Sec-

402 Ryan 2011 566
403 Becker, El-Said 2013 125
404 Baylouny 2008 287
405 Doran 2002 194
406 Lukacs 1999 111
407 Wolf 2015 163
408 Baylouny 2008 287
409 Becker, El-Said 2013 125
410 Richter 2013 776

ondly and despite the high population growth the market remained small. Thirdly, the economy was widely agricultural and lacks both mineral and financial resources required to stimulate economic growth and development[411]. The economy was in deep need for governmental spending to assist in encouraging development and growth. The needed spending actually amounted to nearly half of the GNP throughout the 1970s. These high rates of spending in conjunction with lack of financial resources reflected a necessity to accept foreign grants and financial assistance[412].

The remarkable history of GOJ in receipting foreign financial assistance dates back to the UK mandate and afterwards the friendship and alliance treaty concluded in 1946[413]. The UK maintained this position exclusively until 1957, when the alliance and friendship treaty was terminated[414]. One of the justifications for the economic underdevelopment is the creation of Israel in 1948. Hence, finances and expenditures were prioritized to militarization rather than promoting development and infrastructure projects[415]. By the 1950s, the military was the primary employer in Jordan and in the 1960s the military employed 30 per cent of the workforce[416].

The economic history of Jordan since independence signals the wider role played by the GOJ as an employer and infrastructure promoter. The wide state involvement in economic activity was a necessity to ensure several objectives. First, the state employment accelerated the process of the Jordanian nation building. Second, the wider the role of the state absorbed the increase in the workforce due to the high population growth rates. This limited the rates of unemployment experienced within the economy. This state involvement depended on the foreign financial assistance. This assistance as introduced below remains a form of rentier income used by the GOJ to cover its budgetary deficits arising from the executed expansionary fiscal policies[417].

411 Lipchin et al. 2009 42
412 Nevo, Pappé 1994 47
413 Paine 2015 192
414 Pillai 1982 6
415 Henry, Springborg 2001 10
416 Baylouny 2008 287
417 Ryan 2002 50. The rentier income is a notion for revenues derived from extensive dependence on natural resources and its associated extractive industries. It applies clearly in the context of the Gulf monarchies. Jordan is deemed by Ryan as a semi-rentier state exploiting its geopolitical position in receiving more financial aid, besides the inflows of remittances of expatriates employed in the Gulf economies.

(A) Jordan and the 1970s Oil Boom

The leading GOJ position in the economic activity continued and was even extended in with the start of the oil boom in the 1970s. As in the earlier section, the Jordanian economy preserved its dependence on foreign funds. The oil discoveries and the geo-political changes (the waning of Britain) shifted the foreign funding from the UK to the Gulf states. This inflow of Arabian originating funds allowed the GOJ to complete its centrally planned policies of lifting the economic developmental levels. In addition, it allowed the GOJ to expand its welfare role within the economy.

Pillai justified the importance of foreign assistance for Jordan in three reasons. First, the establishment of the Jordanian Development Board in 1952 followed by the National Planning Council in 1971, principally focused on attaining economic development through designing and implementing different central planning plans depending on the UK assistance[418]. The external grants were utilized in funding these centrally planned development projects. Secondly, the involvement of Jordan in the 1967 and 1973 wars added further fiscal pressure turning the external assistance mandatory, especially after considering Palestinian refugees fleeing from conflict zones to Jordan[419]. Thirdly and lastly, being an agricultural underdeveloped economy, Jordan's imports exceeded four times its exports deteriorating the economy's balance of payment and foreign currency reserves. Accordingly, the need for foreign financial assistance heightened[420].

The foreign assistance of the 1970s survived two obvious features through this decade. First, the inflow of remittances from Jordanian employment in Gulf wealthy states[421]. Secondly, is the direct inflows of funds from the surplus recording Gulf economies[422]. To start with the 1970s, the Palestinian Jordanians amounting to 300,000 migrated to the Arabian Gulf states as expatriates. Inflowing remittances to Jordan accumulated to attain nearly half of the GNI during that period[423]. These remittances represented 124 per cent of exported trade and was realized through 40 per cent of the workforce who moved to the Gulf. Remittances receipted by Jorda-

[418] Robins 2004 111
[419] Nevo, Pappé 1994 47
[420] Pillai 1982 6
[421] Nevo, Pappé 1994 48
[422] Ryan 2002 50
[423] Yom, Al-Momani 2008 7

nian families were primarily used in acquiring basic necessities and in other cases purchase of lands and construction of residences.

The GOJ benefited from these revenues through enforcing an open banking system imposing fees on funds exiting the baking system. The foreign income sources of aid and remittances had clear implications on the Jordanian labour and production structure. First, the labour force was more inclined towards employment either in the Gulf or state employment where higher salaries are achieved. Second, the agricultural output and production declined due to an obvious decrease in workers, leading to a deficiency in rural industry. Third, a rise of services sector to support remittances and migration flows rather than industry. However, agriculture prevailed as the principal private sector employer though at declining rates dropping from a third of the workforce in the 1960s to 10 per cent in 1980s. Afterwards, the GOJ began to accept migrants mainly Egyptians to participate in agricultural activities replacing the outflow of Jordanian workers[424].

The Arabian flow of funds enabled the GOJ to intervene and foster the social welfare. Examples of intervention include; the introduction of regulated prices, subsidies as well as the expansion of the state's employment. The inflow of foreign exchange remittances and the currency overvaluation - as part of the import-substitution policy in place[425] - stimulated additional consumption domestically especially of imports. Thus, inflation mounted and without any adjustments in place for the state employed civil servants' salaries. The costs of living in the 1970s tripled and in response a Ministry of Supply was initiated to govern the subsidization of basic goods[426]. The GOJ imported goods and offered them for sale exclusively to its employees in cooperatives. As a result, the market general prices decreased. Other alternatives included setting price limits and fixing several products prices including petroleum, sugar, meat, cigarettes and school notebooks[427].

In regard to the domestic fiscal balances, during the 1970s the GOJ was mostly dependent on indirect taxation to raise revenues due to its weak administration. With the import-substitution policy enforced a trade restricted regime offering protection for domestic infant industries was adopted[428]. In total custom duties accounted to half of the taxation revenues and was highly affected by the flow of international

424 Baylouny 2008 285-6
425 Richter 2013 776
426 Pillai 1982 12
427 Baylouny 2008 291
428 Richter 2013 776

trade and the product exemption policies introduced by the GOJ[429]. In the post 1967 war period, a set of the enforceable restrictions were abolished especially in relation to holding foreign currency in Jordan's domestic banks[430].

The second pillar of GOJ funding were the domestic revenues represented in; first, income taxes. These revenues accounted for nearly 90 per cent of the direct taxes revenues. Conversely, the tax base was evidently narrow embracing only 120,000 tax registered names in 1975. In 1977, the Corporate tax rate was a flat one at 45 per cent, with several exemptions offered under the Investment Encouragement Law of 1972. In 1978, the corporate tax revenues represented only an eighth of the total governmental tax proceeds[431]. The main non-tax source of revenue to the Jordanian budget was the Central Bank. It mainly represented the profits receipted by the Central Bank from owning shares in profitable companies. In 1976, this Central Bank represented 3 per cent of the budget's total revenues.

Based on the above assessment of the Jordanian budget revenues, it appeared that expenditures essential for attaining the targeted economic development should be funded externally. However, Pillai concluded that external loans did not considerably affect the expenditure and revenue sides since the funding was directed to capital construction. The GOJ was channelling its investments through joint ownerships with the Jordanian private sector. Nevertheless, these partner-ownership did not reflect any specific strategy or philosophy of economic development introduced by the ruling regime[432].

From the above we can conclude *(i)* the change in the population's interest for employment shifting to the gulf, *(ii)* the extension of dependence on foreign sources of funding the domestic economic development, *(iii)* the execution of an import-substitution policy with an overvalued currency *(iv)* the expansion of GOJ welfare policies to include subsidies, regulated pricing.

III.C.3 Debt Crisis and Conclusion of Structural Adjustment Programs (1980s – 1990s)

The second period under investigation focuses on the outcomes of the GOJ expansion in economic activity. The success of these policies was conditioned upon meet-

429 Pillai 1982 9
430 Richter 2013 776
431 Askari et al. 2013 151
432 Baylouny 2008 284

ing a set of conditions. Non-compliance with these conditions, pushed the GOJ into the accumulation of foreign debt and the necessity of applying for financial assistance from the international financial institutions.

(A) First Gulf War and IMF

By the 1980s, the eruption of Iraq Iran War induced a plunge in oil prices. Therefore, the Arab Gulf economies were hit significantly resulting in less financial assistance flowing into Jordan either in aid[433] or remittances[434]. The GOJ struggled in coping with these changes. The lower inflows triggered a twin deficit due to the losses of Jordanian remittances from the Gulf, less exports to downturned Gulf economies and more importantly the decline in Arabian financial support[435].

Officials intervened to mitigate the negative implications using three different paths; first, the recourse to foreign debt in order to cover the budget deficit[436]. Second, the introduction of more trade restrictive measures aiming to alleviate pressures on the current account and to protect domestic industry. These restrictions included raising import duties and taxes, introducing advance import deposits and finally restricting license-free importation. Thirdly, an expansionary monetary policy was implemented targeting the stimulation of economic players in the Jordanian economy. These moves were criticized by the IMF as misallocating resources towards less efficient domestic industries. However, these interventions were not successful success in attaining the aforementioned targets[437].

The GOJ - civil administration and military - preserved the position as being the principal economic employer having on average 47 per cent of the workforce. These rates would even hike in areas outside Amman to 92 per cent of the labour force as in Karak. In 1986, the private sector employment reached 11 per cent mainly in raw material exploration and extraction[438]. In addition, the strategy of channelling investments through the private-public partnerships remained in place, with difficulties identified in differentiating the private and public shares[439].

433 Nevo, Pappé 1994 52
434 Yom, Al-Momani 2008 7
435 Ryan 2002 50
436 Nevo, Pappé 1994 54
437 Richter 2013 777
438 Shair 1997 143 The plan for privatization was an initial plan since 1986 by the appointment of Al-Rafai as a prime minister motivated to reform the Jordanian economy.
439 Baylouny 2008 285

The foreign indebtedness mounted, the shortage and speculation on foreign currency severed and the loan repayments were delayed, pushing the Jordanian banking system to a crisis. An outcome was the bankruptcy of Jordan's third bank in 1988[440]. The economy's previously comfortable foreign currency reserves depending on oil-states grants and remittances plummeted in five years obliging the Central Bank in October 1988 to suspend its economy allocation of foreign currency. Hence, a devaluation of Jordanian Dinar by around 20 per cent became indispensable and by 1989, the dinar lost a third of its value. In addition, more trade restrictive measures came into force including the complete ban of high quality products importation as well as a surge in duties applicable[441].

The real GDP per capita experienced a significant deterioration from $2227.8 in 1981 to only $652 in 1989[442]. In addition to this, the threats of default forced the GOJ referral to the IMF seeking financial assistance[443]. After negotiation of one month, the GOJ concluded a stand-by arrangement with the IMF in April 1989[444]. The arrangement was related to further financial assistance from the World Bank as well as a debt restructuring program conditionally upon the application of economic reforms[445]. The IMF's structural adjustment plan reforms agreed included privatization, abolishment of subsidies, gradual eradication of customs and lay-offs in state employment.

The privatization encompassed public utilities as electricity, water, telecommunication as well as the state's national airline Royal Jordan[446]. The Ministry of Supply in charge of price subsidies was demolished. In compliance with the arranged plan, the GOJ attempted in 1989 to lift subsidies on fuel, striking wide protests especially in Ma'an a southern city popular for transportation services between Iraq and Aqaba port[447]. The inflation ranged between 30 and 50 per cent, with hikes in most products and services as cigarettes, fuel, water and phone bills after considering the standalone dinar's devaluation ordinary effect. Farmers were hit by the fertilizers and irrigation water price increases[448].

440 Heydemann 2004 145
441 Richter 2013 777
442 Shair 1997 145
443 Piro 1998 101
444 Milton-Edwards, Hinchcliffe 2009 77
445 Richter 2013 P. 778
446 Ryan 2002 115
447 Schwedler 2006 48
448 Baylouny 2008 293

The "*bread riots*" forced the regime to introduce a controlled political liberalization process aiming to defuse part of the public's dissatisfaction[449]. A clear motivation for this shift was the fiscal assistance provided by the US reflected in the IMF program. This assistance enabled the GOJ to restrict the intense liberalization process. This kept the tight grip over liberalization and the decision-making powers all under the monarchy elite. The monarchical regime's stability was strategic for the US since it was viewed as one of the corners for the American peace plans introduced in the region[450].

The beginning of the Second Gulf war after the Iraqi invasion of Kuwait in 1990 aggravated Jordan's compliance with the IMF conditions. The lack of necessary reforms and the political status of Jordan from the aggression encouraged the IMF to suspend the program[451]. On the political side, King Hussein's refused to join the US coalition in liberating Kuwait[452]. This alienated Jordan from Western and Arab financial support through aid and ties severance from the US as well as the Gulf states, that even expelled the Jordanian expatriates. In regard to Arabian assistance, Jordan prior to the Gulf War was granted $600 million annually from Gulf allies. This support totally vanished as soon as the war erupted and the Jordanian position proved unfavourable for Arabian backers[453]. In addition, the IMF program was partially suspended, with only fewer millions stabilization loans were concluded offering certain relief.

(B) The Second Gulf War Effects

This sub-section addresses the Second Gulf War effects on the Jordanian economy, role of GOJ and remittances inflow. The Gulf War of 1991 purported an economic downturn due to several factors. First, the forfeiture experienced by the Jordanian regime being a close recipient of financial support and aider from Iraq[454]. Iraq was the main trading partner for Jordan during the ten years preceding the war, the UN Security Council Resolution No. 661 has set economic sanctions on Iraq in connection to its trade activities[455]. Thus, the Jordanian companies missed their Iraqi companies' dues and receivables. In November 1990, Amman's Commerce Chamber declared a $2 billion Jordanian trade costs for the UN Resolution's. Other losses

449 Ryan 2002 15
450 Yom, Al-Momani 2008 5
451 Richter 2013 778
452 Paloni, Zanardi 2012 76
453 Swaidan, Nica 2002 73
454 Richter 2013 778
455 Lauterpacht et al. 1991 233

were represented in importing oil from international markets at higher prices compared to the former subsidized price as received from the Iraqi government before the sanctions[456]. In the meantime, Jordan and specifically the Aqaba port became denoted as the Iraqi hub for import and export activities. The imposed sanctions were reflected in lower Jordanian imports throughout 1989 to 1991 from 6.2 to 1.5 million tons. Hence, Bush administration offered financial assistance to Jordan mitigating the sanctions' trade costs[457].

Secondly, on the Jordanian side, the warship activities disrupted the Jordanian trade flows through the Aqaba port. The vessels cost of security and monitoring the economic sanctions implementation increased. In consequence, Jordan's exports of potassium and phosphate through the port fell. In the meantime, and for political reasons, the Jordanian trade flows suffered again from the Kuwaiti and Saudi embargo against Jordan. Exports declined from nearly $530 million in 1990 first half to zero by 1990's end and 1991's first quarter. The embargo was based on Jordan's stance during the War. Hence, the direct grants and assistance dipped to low rates, if any[458]. As expected, the tourism proceeds were negatively affected. The effect remained significant when compared to other sectors as trade and transportation. The number of tourists fell from 2.5 million in 1990 – providing net receipts exceeding these of phosphate exports – to 2 million visitors by 1991[459].

Thirdly, were the remittances the Jordanian expatriates in the Gulf. For the same political reasons mentioned above, Kuwait expelled 300,000 Jordanians and the other Gulf States followed the same policy after the liberation completion[460]. Jordan acted as the principal source of the oil states' educated labour force[461]. Hence, this expulsion raised the unemployment in Jordan specifically between professionals recording a 13 per cent between dentists and even 40 per cent for agricultural engineers. The overall unemployment rate accumulated to reach in the late 1991 25 to 30 per cent[462].

The return of Jordanians created two economic pressures. First, a sudden rise in demand of public services including education, health and supply of basic needs. Second, the decline in foreign currency remittances to only $460 million from a rec-

456 Piro 1998 101
457 Hufbauer et al. 1990 286
458 Piro 1998 101
459 Swaidan, Nica 2002 73
460 Piro 1998 101
461 Baylouny 2008 294
462 Milton-Edwards, Hinchcliffe 2009 80

ord of $1.2 billion annually during the mid-1980s. The poverty rates jumped from 20 per cent in the pre-war period to above 30 per cent by the post-war period. Another pressure resulting from the war was inflow of one million refugees that costed nearly $60 million expenditure. This burdened the agonized Jordanian budget with only $12 million reimbursed by the UN[463]. Consequently, the return of expatriates from the Gulf was more injurious than expected by the Jordanian policy-makers since migrants turned to a burden instead of a foreign currency source.

On the positive side, the migrants' return represented an inflow of deposits to the Jordanian financial system. Moreover, it stimulated the retail business investments by the returnees[464]. This inflow eased the pressures of the shortage in the foreign currency reserves. This allowed the GOJ to postpone the execution of socially unfavourable policies for two more years[465]. In February 1992, a second arrangement was launched, and the GOJ commenced applying the conditions regarding trade and capital flow[466]. Arab nationalist economists failed to provide alternatives to enhance the economic situation other than the IMF policies[467].

III.C.4 Economic Openness and Market Deregulation (1990s – 2000s)

The third period under examination is aligned with the economy's status in the post-IMF program. The section intends specifically to address the impacts of the IMF SAP on five of the Jordanian economy's pillars including; the public sector, the investment deregulation process, the exchange rate reform, the budget deficit control and the free market forces interaction.

(A) IMF Structural Adjustment effects

The SAP threatened the long-living state employment policy. Agricultural employment became less rewarding featuring lower employment rates. The transportation industry flourishing dependent on the Iraqi products was impaired by the sanctions. The state employees halved the employed workers below the poverty lines. The unemployment and poverty rates were uneven all over Jordan, the situation was slightly less damaging in the capital compared to other peripheral cities as for example Karak and Ma'an. The income per capita deteriorated from $1500 in mid 1980s to

463 Swaidan, Nica 2002 73
464 Baylouny 2008 293
465 Milton-Edwards, Hinchcliffe 2009 80
466 Mansur, Maciejewski 1996 114
467 Henry, Springborg 2001 13

$1000 by 1990 and $850 in 1998, with a disparity of three fourths figured between rural and urban areas incomes[468].

The costs of living recorded an escalation in the basic items prices during the 1990s[469]. For example, food items increased by 80 per cent in 1992 and cereal products doubled from 1994 to 1998, electricity and heat increases reached 150 per cent, clothing costs tripled as compared to their prices in 1986. In total, a consumer living cost index rocketed by 73 per cent from 1987 to 1993. The provided consumer index excludes imports, where the Jordanian economy depended by 60 per cent on foreign goods. The actual cost of living increases would outweigh the above recorded index. The austerity plans continued through the 1990s when the regime experienced a new wave of riots in 1996 again after the lift of bread subsidies and an increase in public services fees as schooling[470].

On the public services level, other than higher pricing for services, the quality was eroded. The public healthcare system was available for the state's public sector employees and the military were both represented more than half the population. Poorer areas were mostly outside the formal healthcare system. They depended mainly on direct payments for services supplied. An alternative for serving the poor was registering in the Ministry of Health to receive the services at negligible or no costs. This system attracted nearly one third of the population in 1992 to hold the healthcare cards. The services provided were inferior due to the continuous bureaucracy, lack of availability and queuing. Hence, the beneficiaries evaded using this service unless essential[471].

The continuous austerity and cutting GOJ welfare allowed the reduction of budget deficit from a record of 18 per cent in 1989 to 8.2 per cent by 2002[472]. The GOJ started together with the private sector and NGOs initiatives to alleviate poverty. three poverty targeting programs were introduced. First, the Family Income Supplement, through this program the GOJ provides cash either through additions to the state employees pay checks or bank collection to families surviving with incomes below JD500 per month[473]. Second, the National Aid Fund provided similar cash payments to unemployed poor, with an estimate of 50,000 beneficiary families in 1998. Finally, the Zakat Fund controlled by the GOJ and funded privately pro-

468 Baylouny 2008 294-6
469 Ryan 2002 54
470 S, Baudot 2007 288
471 Baylouny 2008 293-7
472 Knowles 2005 189
473 Robins 2004 183

vided cash payments to nearly 3,000 households. Conversely, these programs were always criticized for failing to reach poor families in rural areas as well as insufficiency to alleviate poverty threatening beneficiary families[474].

The second mean of countering poverty was the provision of micro-financing to small and medium sized private initiatives. The main program was the Social Productivity Program funded through World Bank loans. It aimed only for mitigating the social effects of the economic structural adjustments[475]. Several other programs were introduced on top of them was the Development and Employment Fund financing nearly 500 projects only in 1993 mostly in capitalized service's sector[476].

(B) Peace treaty and the upturn

The participation in the US-led Middle East Peace Process Conference in Madrid allowed the re-engagement of western and Gulf allies with Jordan[477]. In addition to signing the peace treaty with Israel in 1994. Both events were a turning point for the Jordanian regime. Jordan became the US cornerstone political ally in the region. The financial relief and assistance returned to normality and even at higher rates in the post-treaty period. Benefits were featured promptly in aid from western governments, IMF and World Bank support, development loans as well as debt relief[478]. Examples of western support included; first, in 1994 a rescheduling of $2.5 billion sovereign debt owing to Paris Club creditors was negotiated. Second, the US government augmented its financial aid to the GOJ from nearly $50 million to over $220 million in 1999. In addition, $200 of the $700 million of the Jordanian debt owing to the US was unilaterally written off by the latter two days after the treaty ceremonial signing (Washington Declaration between Hussein and Rabbin)[479].

Thirdly, the US trade officials in 1998 supervised the establishment of the first Qualified Investment Zone in Jordan assisting in solidifying economic ties with Israel heading towards stimulating job creation and export development. Although not very successful, it highlighted the interest in consolidating the peace process through enforcing bilateral economies ties[480]. Fourthly, and from the EU side the

474 Baylouny 2008 298-9
475 Knowles 2005 118
476 Kan'ān et al. 1997 92
477 Milton-Edwards, Hinchcliffe 2009 83
478 Yom 2009 155
479 Lucas 2012 93
480 Milton-Edwards, Hinchcliffe 2009 86

partnership concluded with the Mediterranean countries directed a total of €550 million to the GOJ for the years between 1996 and 2000. Another phase of re-scheduling with the Paris Club was finalized 1994 and 1997, further structural loans were granted from the IMF and the World Bank worth $700 million between 1994 and 1998[481]. Jordan failed to comply with the austerity conditions under the latter loans due to its narrow tax base and high public-sector employment[482]. The GOJ maintained its position as a US strategic ally for the 1990s and early 2000s during the latter's war against terrorism. This entitled the Jordanian regime further diplomatic and economic support regardless of the domestic political transition status from King Hussein to his successor King Abdullah[483].

By the late 1990s, the GOJ realized the importance of foreign investments. This encouraged launching a process of policy-shifting towards investment promotion[484]. King Abdullah's consolidation of power in 1999 was threatened by an uneven economic performance where unemployment recorded 20 per cent and growing external debts[485]. Hence, the King targeted stimulating economic growth through implementing a set of neoliberal policies. The two pillars of the proposed policies were both trade and the public sector. Technocrats with western background studies were appointed to supervise this process openness[486]. The process included promulgating new economic laws sticking to the international financial institutions advices, besides, acceding in the WTO during 1999 – 2000[487]. Moreover, the Qualified Investment Zones are investment zones exempted from Jordan's labour and social security legislations. The exemption is conditioned upon joint investment between Israelis and Jordanians. It allows the products resulting from these investments to access the US markets duty free. Another example of openness and inclination towards investment was the inauguration of the Aqaba Special Economic Zone in 2001[488].

Jordan's foreign policy during the early 2000s maintained the alignment with the US and western powers. This alignment was crystalized during the US war on terrorism and the invasion of Iraq in 2003, yielding an unprecedented level of financial aid[489].

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481 Knowles 2005 118
482 Yom, Al-Momani 2008 52
483 Dralonge 2008 Prados, A. and Sharp, J. in P. 138
484 Baylouny 2008 299
485 Milton-Edwards, Hinchcliffe 2009 87
486 Yom 2009 155
487 Budhwar et al. 2006 147
488 Looney 2014 346
489 Yom, Al-Momani 2008 52

The US financial aid to Jordan for the 30 years prior to 2001 totalled $4.5 billion, and after 2003 average aid annually reached $750 million. In 2003, standing alone the US directed $1 billion to offset the Iraq war negative implications on the Jordanian economy[490]. Regardless of the US public less support to this aid, it is growing especially after in 2011 the Congressional supplemental funding was approved. The aid had its strategic and political value, and was used by the GOJ to promote employment and mitigate fiscal pressures[491]. Nearly a half of aiding funds were reserved for military expenditure on training, border control and equipment. This lump sum represented 28 per cent of the GOJ's total expenditure. With this flow of US funds, Jordan turned to become one of the top recipients of US aid worldwide[492].

Lately, other financial assistance became more obvious and was from the Saudi government during the Arab Spring protests, which offered aiding the GOJ as a mean to maintain political stability for a close ally monarchy against the rising wave of protests in the Middle East[493]. This aid represented to the GOJ a rentier income assisting it in stabilizing its economy. The first $1.4 billion granted by the Saudi government to the Jordanian one in August 2011 precluded the latter from announcing a record budget deficit[494]. The financial aid as mentioned above enabled the GOJ to expand its state employment and offer additional subsidies as an alternative to absorb the publics dissatisfaction as in the riots of 1989 and 1996[495].

In the same context, Jordan concluded a FTA with US government promoting the latter's share in Jordan's exports to reach 31 per cent by 2004 being on top of Jordanian products foreign markets. The same trend applied for the EU through the enforcement of an Association Agreement in May 2002 in line with Barcelona Multilateral Process pursuing by 2010 a free trade area[496]. Other examples include an American straight assistance of $2.8 billion from 2000-2006, $2 billion debt restructure program with Paris Club, $730 million loans and grants from European funds from 2001-2004 and finally $660 million financial facilities from the IMF and World Bank after the completion of the SAP[497].

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490 Jamal 2012 51
491 Yom, Gause III 2012 12-3
492 Baylouny 2008 301
493 Kamrava 2014 335
494 Yom, Gause III 2012 12-3
495 Ryan 2002 57
496 Jonasson 2013 50
497 Yom, Al-Momani 2008 52

The promotion of King Abdullah program extended to include the privatization of public owned enterprises as part of the IMF renewed program of 1998. The IMF program was focused on fighting the inefficiencies of the public sector through opening the door more for the private sector for economic activity. The plan was formulated upon the divestiture or full privatization of the public-sector enterprises. By 2002, eight public authorities completed their privatization transactions through leases or management agreements[498]. The IMF-led policies reigned the benefits by recording a 7 per cent growth, and a reduction in poverty to around 15 per cent[499]. In parallel, the GOJ launched the Social and Economic Transformation Plan[500] and Enhanced Productivity Program targeting an improvement in technological and living standards, as well as the National Housing Initiative offering the distribution 120,000 cost efficient residences from 2013 onwards.

On the other hand, these economic reforms were not as successful from a social perspective. The fact of higher job creation was true, though not sufficient to meet all market entrants reaching an annual 60,000 entrants[501]. In consequence, the unemployment rate inclined striking a two third of youth below 25 years. In the meantime, further lifts of subsidies fuelled higher inflation rates eroding individuals' purchasing powers. This inflation was counteracted by hikes in civil servants' salaries to cover for increase in price levels. With the above-mentioned privatization plan and aiming to mitigate the back effect from laying-off unutilized employees, the public entities were offered to closely tied regime investors[502] and the GOJ maintained a stake in these privatized entities[503].

III.C.5 Conclusion

The section of Jordan in chapter III was divided into the same skeleton of Egypt and Morocco to facilitate the process of comparison between the country studies and in order to trace easily the differences and similarities. The similarities represent an essential part in reasoning the choice of three country studies for undertaking such research project. Moreover, the historical developments until the 2000s are the base from which the economic chapter of the research project will kick start. Finally, the historical analysis will assist in analysing the protectionist and investments re-

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[498] Shair 1997 98 and 185
[499] Yom 2009 155
[500] Looney 2014 346
[501] Springer 2016 71
[502] Kadhim 2013 346
[503] Yom 2009 155

strictions still traced in the country studies since the era of nationalism and wide state intervention. The main witnessed similarities highlighting the prevailing economic orientation can be listed based on each time period under examination.

To begin with, the first period in each country study was titled "*Independence and State Intervention*" elapsing from the 1940s until the 1970s. Politically speaking, Jordan secured its independence and decolonization in 1946. During this economic period, the GOJ expanded its economic role within the new state. Features of governmental intervention include; the expansion in governmental job offerings and the introduction of subsidies. In addition, the GOJ backed by the foreign aid magnified its public investment in infrastructure and even established new entities.

On the trade level, import substitution – as globally executed – were implemented in Jordan to support domestic production, pushing customs to represent at times around half of the Jordanian tax revenues. For the Jordanians, the Arab support decreased with the eruption of the Iran-Iraq War limiting the granted Arabian assistance. These factors severed the economic situation Jordan who could not afford the expansionary fiscal policies paving their ways to the second phase titled "*Debt Crisis and Conclusion of Structural Adjustment Programs*". The period was principally characterized with budget deficit and foreign debt. Examples of other worsening conditions include the GOJ employment of 47 per cent of the Jordanian workforce. All of the above incidents in total accumulated foreign debt with continuous failures to service it, forcing Jordan to revert for the IMF assistance more than once within a decade period.

The adjustment programs as part of the 1980s Washington Consensus executed in developing economies experiencing debt crises, were enforced in Jordan. The programs allowed Jordan to reach the "*Economic Openness and Market Deregulation*" era prevailing until the 2000s. Examples of enforceable policies include austerity and currency devaluation reaching 33 per cent in Jordan. This period highlighted the introduction of privatization programs with different paces of implementation. Moreover, the deregulation process was evidenced in a series of market oriented policies enforced in Jordan including the introduction of the Investment Law targeting the attraction of domestic private sector as well as FDI. The creation of tax incentives and free zones were the basic methods of attraction.

III.D Morocco Economic History

III.D.1 Introduction

The discussion of the three periods shall initially address the Moroccan history from an economic perspective, with slight reference to both the social and political contexts. The chapter will reference the prevailing economic conditions resulting from the policy-makers' adoption of the periodic economic orientation. The primary focus within this chapter will be the development experienced in the role of the Government of Morocco ("GOM") and the levels of restrictions and regulations imposed upon economic activity. Furthermore, the analysis shall contain the effect of the international and regional developments on the Moroccan economy. This attempt to undertake an in-depth analysis of the Moroccan economic history will facilitate the process of noticing the shared and differentiated features with the other country studies meaning Egypt and Jordan.

There are four aims for revisiting the fifty years' economic performance of Morocco. First, investigating the Moroccan economic history obviously highlights the similarities between the three country studies in their path of economic development. Stressing these similarities is necessary to justify the choice of these three country studies specifically in the first place. Second, the historical review will assist the reader to understand the background of the policy-making process in Morocco. For example, referring to the socialist oriented era during the 1960s assists in reasoning to an extent the current protectionist investment policy witnessed there. Furthermore, it tackles the reforms executed over a long time and their positive and negative impacts in each country study. This policy assessment takes the discussion back again to the first aim of the historical chapters and tracing of country studies' similarities.

Thirdly, the economic history development allows shedding light on the degree of governmental intervention and influence over the Moroccan economy's activity. The progress from a big government to a relatively small one has a significant effect upon the legal and economic freedom analysis required for the second and third chapters. The chapter focuses on the shift from a restricted regulated public sector based economy to a liberalized, less regulated and private based economy. Fourthly, the historical chapters postulate the economic status prevailing throughout the last fifty years. Accordingly, the final outcome would be considered the base from which chapter VI is starting. In other words, the historical chapters analyse Morocco's performance until the late 1990s, when Morocco introduced its domestic investment legislation.

The historical period under examination begins since post-independence years in 1950s until the late 1990s and early 2000s. The Moroccan economic history chapter will be split into three periods. This categorization shall assist in paving the way to feature the main similarities and differences in policies executed between the three country studies. The first period will be the post-colonial and independence period characterized by concentration on the nation building process and promotion of national identities. Thus, the national identity incentive has driven newly born states' policy-makers to implement policies in line with the above-mentioned goals of national identity and nation building. This period commenced from the mid-1950s and extended until mid or late 1970s.

The second period elapses from the 1970s to 1980s. It was characterized with a slump in minerals prices and degraded foreign support. The thesis will approach this period recognizing the outcomes of the two above mentioned impacts on Morocco's budgets and debts. The third and last period covers the 1990s until the early 2000s. This period evidenced the post-crisis effects and how the policies implemented to mitigate the crisis impacted Morocco. Hence, the third period will be necessary to proceed further within the econometric modelling chapter, which fully concentrates on the economic assessment of Morocco's rates of economic freedom.

III.D.2 Independence and State Intervention (1956 – 1970)

The first period under examination focuses on the political changes and their economic impact on the interaction of the economic stakeholders in Morocco. It examines the establishment of the modern state of Morocco at its current borders. This entails check the initial role of the GOM and what motivations encouraged it to intervene significantly in the economy's activity.

(A) Independence and 1950s Economy

The modern Moroccan economic history dates to the decolonization and independence in 1956. The independence of 1956 marked a turning point allowing the instatement in power of a new regime[504]. This regime was under obligation to formulate its own economic policy. Prior to 1956, the economy was operating in a liberal

[504] Storm 2007 14

manner where the commercial urban bourgeoisie, the rural notables and the elites were prioritized. The Moroccan private sector started with the undertaking of trade and commerce activities during the colonial rule. This created a layer of bourgeoisie who even benefit more from the supply shortages experienced during the World War II (WWII)[505].

The post WWII period featured a significant shift of French investments to Morocco. In addition, the Moroccan capitalists (especially in Fes) were encouraged by the liberal approach in governing the economy[506]. Thus, they intruded the industry field, previously being under the full control of colonialists. Two of the prominent Moroccan investment industries at the time were the vegetable oil in Casablanca and textiles in Safi. The post-war economic formulation paved the way for concentrating investments in the coastal cities with a lead for Casablanca.

In 1955, the Moroccan ownership share in the economy corporations did not exceed 5 per cent. Businesses were mostly formulated upon individual or family entrepreneurships rather than properly incorporated entities[507]. These low ownership per centages did not bother the newly governing regime. Oppositely, the new state preserved the European and French owned entities offering the latter's full capacity to continue operating[508]. Conversely, several of these firms began to withdraw their investments and exit the market. On the Moroccan domestic side, a wider opportunity for investment was opened especially with the termination of favouritism and the former colonial business restrictions[509].

The new regime stressed the need for economic reform aiming at economic growth and GDP amplification, besides their reflections on the per capita incomes and standards of living[510]. Therefore, on the GOM side, policy makers adopted an import substitution policy supported by seeking self-sufficiency on the agricultural level[511]. In addition, the Moroccan infant industry requested protection as a mean to ensure its development. These interests required the enforcement of a protectionist trade policy; demonstrated in imports quantitative restrictions and higher tariffs.

505 Bank 2009 185
506 Sater 2016 10
507 Bank 2009 185
508 Sater 2016 114
509 Clement, Paul 1986 13-4
510 Yusuf 2014 415
511 Galal 2008 53

This trend continued throughout the post-independence era beginning from 1956 and until the fiscal crisis featured in the early 1980s[512].

Consequently, capital goods imports prevailed since GOM attempted to moderate its consumption imports. On absolute importation rates, consumption goods share of total imports decreased from 17.6 in 1967 to 10 per cent by 1985. In the meantime, capital goods share in total composition of imports climbed from 22.6 to 29.3 per cent between the years 1973 and 1980[513].

The post-independence period was characterized by the royal regime's endeavour to consolidate its political power through favouring economic elites and rural nobilities. By 1956, 7,500 elitists managed a quarter of agricultural lands, while 15 per cent of the urbanists handled mostly the Moroccan economic activities. These traditional elites were the main gainers from colonialists exit since they became eligible to acquire their abandoned assets and lands[514]. Accordingly, the elites preserved their role as the principal economic and political actors. Having this scenario, it was foreseen that such inclination shall continue with the execution of any future reform processes. The elites' takeover facilitated the creation of a middle layer bourgeoisie[515]. In the meantime, the seeds of corruption were cultivated since independence, by the new regime's recourse to the elite through favouritism and bribery as a mean to generate additional revenues in return for requested services[516]. On the state side, the GOM backed such corruptive behaviours to enable the new powerful elitist group to reconcile their positions as the regime's allies, solidifying the new system's political base[517].

The low Moroccan ownership per centages flagged the GOM to stimulate local investments. The nationalization of the French Banque d'Etat du Maroc (Central Bank of Morocco as known as "*Bank Al-Maghrib*") in 1958, qualified the GOM to control the currency, credit and the foreign exchange transactions[518]. Favourable tax and investment codes were promulgated in 1958 and 1960. The new legislations permitted the importation of capital assets free from duty. Additionally, 20 per cent of the tax incentives and state investment grants were directed to the new indus-

512 Haddad, Harrison 1993 55
513 Bertola, Faini 1990 274
514 Lust 2014 672
515 Sandberg, Aqertit 2014 41
516 Joffé 2009 157
517 Clement, Paul 1986 14
518 Aksikas 2009 26

tries[519]. The National Bank of Economic Development was established in 1959, targeting the provision of facilitated funding for the Moroccan start-ups[520]. The outcome was a flourished inflow of Moroccan investments into the textile and leather industries, having a precedent advantage based on the former Moroccan trading lines of textiles[521].

The above GOM's stimulation proved insufficient to attract Moroccan investments into heavy industries. Therefore, the GOM intended to fulfil this need through engaging in joint ventures with the foreign firms in specified projects. An example was SAMIR, an entity initiated based on a cooperation agreement between GOM and with ENI to construct an oil refinery in 1959[522]. In the same year, another similar arrangement was concluded with Berliet, Simaca and Fiat, resulting in the foundation of SOMACA an automotive assembly plant[523]. At the same time, the GOM did not dismiss its intention to industrially intervene and invest independently. Examples included the establishment of sugar refineries, where the GOM still invited the Moroccan private sector to join as shareholders[524].

An additional GOM backed policy was the direction of the public funds to modernize the agricultural sector through installing machinery, new irrigation systems allowing the output and the lands actual values to fold[525]. The GOM's policy towards the inauguration of proper accessible public infrastructure including schools, roads and bridges stemmed a significant boom in the field of construction and contracting activities. In conclusion to all of the above provided incentives and trends, the Moroccan investors on individual basis preferred closely-held medium and small less risky businesses. Thus, a GOM plan to privatize the entities owned by foreigners and exporting until 1965 before being nationalized did not succeed[526].

The foreign hegemony over the Moroccan economic activities was ascertained between the leaders of the spreading private sector entities. The Planning Service studied in a survey in 1970 the per centage of Moroccans appointed in directors' positions around the economy. The survey results reflected the considerable influence of foreigners in the Moroccan private sector since the sample covered 160 private

[519] Galal 2008 53
[520] Özel 2014 193
[521] Clement, Paul 1986 15
[522] SAMIR Group 2016
[523] Groupe Renault International
[524] Clement, Paul 1986 15
[525] Sater 2016 116
[526] Clement, Paul 1986 15

entities, of them only 13 were Moroccans. Other estimations during the same period highlighted that in the banking sector only 500 of the top 1,000 managers were Moroccans[527]. In addition, fifteen years after independence the foreigners still held around 1,500 positions in public offices from a total of 6,000. The same trend was experienced in the case of academics and professionals including university professors, engineers, doctors and lawyers[528].

The strong GOM did not prevent the French from preserving partially their share in the Moroccan economy's operations and activities. The French Banque de Paris et des Pays through Omnium Nord African[529] (ONA) had control over 50 Moroccan companies dispersed in different fields including the real estate, mining, tourism and transportation. The Moroccan market share in most of these fields was minimal if excluding the textiles and hotels industries[530]. However, this changed by the GOM's decision in 1965 to undertake its influential investment plan as mentioned above in the examples of the automotive and sugar industries[531].

(B) Phosphate and Rentier Economy 1970s

By the early 1970s, Morocco experienced a rise in its intellectuals who led the political scene adopting a pro-nationalistic sense. This strengthened the GOM's attempt to decolonize its economy from the foreign hegemony[532]. The GOM in line with the identity sense introduced the Moroccanization program[533]. In 1973, the Moroccanization program was promulgated to limit the foreign ownership of entities in specified sectors to only 49 per cent[534]. The sectors covered included; fertilizers, textiles, edible oils, clothing, leather as well as processed vegetables and fruits. The program was enforced through introducing two legislations in March and May 1973 setting the threshold requirement of ownership which will be further addressed in the chapter IV. The state backed this plan by offering to fund the foreigners' compensations for their abandoned shareholdings[535].

527 Sater 2016 121
528 Clement, Paul 1986 15-6
529 Groupe SA, 'Groupe ONA SA: Private Company Information - Bloomberg' (Bloomberg.com, 2017) <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=135415> accessed 23 July 2017.
530 Lust 2014 672
531 Clement, Paul 1986 16
532 Abderrezak 2002
533 Eken et al. 1995 5
534 Bank 2009 186
535 Clement, Paul 1986 16

The program aimed to reduce the French entities dominance in the Moroccan economy[536]. The foreign enterprises were obliged to follow the Law and in turn handed over their equity shares and owned lands to the State of Morocco[537]. This nationalistic step represented a hurdle for additional FDI inflows[538]. In the same context, though at a different manner, GOM declared a direct seizure of lands still under foreign ownership. The World Bank described these Moroccan moves as a mean to accelerate the rise of Moroccan entrepreneurs[539]. These steps widened the public sector's role in conjunction with the minimal market constraints due to natural monopolies or tariffs protection[540].

The Moroccanization program's implications were drastic. It affected 1,500 companies and nearly 400 thousand hectares of land. Foreign companies offered partnerships to share profits with Moroccans who had added no investment value to these partnerships. Other foreign companies managed to attract politically influential Moroccans who eased the companies' business operation and widened their economic influence[541]. Conversely, an insignificant number of companies benefited from a Moroccan partner interested who boosted the companies' investments. A study assessing the program's effect on 4,000 entities inferred that only half of them were affected. Non-affected entities were either closed, changed the course business activity or successfully eluded the law[542].

The execution of the program on the larger entities was implemented through a different strategy. The GOM through its financial branch under the *Societe Nationale d'Investissements*[543] (SNI) had two choices. First, to acquire the shares directly in the large foreign companies. In case of SAMIR, Italian owned shares were purchased by the GOM[544]. The second choice – put into practice even before the Moroccanization program – was to participate in the foreign companies as shareholders after contributing a new capital. The examples include; Mines de Zellidja selling 200,000

[536] Ramanadham 2003 188
[537] Article 1 of the March Moroccanization Law.
[538] Ramanadham 2003 228
[539] Clement, Paul 1986 16
[540] Eken et al. 1995 8
[541] Yildirim 2016 188
[542] Clement, Paul 1986 16
[543] Societe S.A., 'Societe Nationale D'investissement S.A.: Private Company Information - Bloomberg' (Bloomberg.com, 2017) <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=20360036> accessed 23 July 2017.
[544] SAMIR Group 2016

shares to the above-mentioned bank in 1971, followed by Lesieur, Lafarge Maroc and Brasseries du Maroc in 1975[545].

The GOM commanded 40 per cent of the economic activity since independence until the late 1970s[546]. The economy recorded a growth of 5.5 per cent for the period 1968-1972[547]. Two additional features catalysed the import substitution policy and the GOM wide intervention. First, the rise in remittances inflows and secondly, the hike in the international prices of phosphate as a mineral ore. The dependency on the phosphate revenues through the public holding company Office Cherifan des Phosphates (OCP) turned Morocco into a rentier state[548]. The revenues allowed the GOM to execute an expansionary fiscal policy were subsidies, higher civil servants' employment and wages were introduced[549].

The rise in public spending was used to launch a Moroccan industrial sector, especially in the 1975-77 period, when the phosphate prices quadrupled[550]. The economic prosperity attained enabled the GOM to act as the primary employer. This created a new urban middle class. Data available from 1970-77 show an increase in public employment by 5.5 per cent. Also, the university enrolment tripled where the graduates were directed to the public sector[551]. In consequence, public spending relative to GDP surged to 22 per cent in 1976 from only 12 per cent in 1967. In the twenty years' period from 1960 to 1980, the number of civil servants jumped from 50,000 to 500,000[552]. On the growth side, the average 5 per cent growth was mostly obliterated by a rate of population growth reaching 3.2 per cent. Inflation, fall in living standards the rise in unemployment ranging between 20 and 30 per cent and 40 per cent in rural regions, signified the stagnation precedent since 1960s[553].

Another failure for GOM's policies was in the phosphate's exportation and pricing. Inspired by the Gulf countries lead after the oil boom in the 1970s, Morocco attempted to exploit its quasi-monopoly in the international phosphate market. The phosphate exports were priced-up to forecast wider revenues needed to proceed with the development projects planned. The low-cost phosphate producers intensely launched new investments, raising supply and negatively affecting the phosphate

545 Groupe Des Brasseries Du Maroc 2013
546 Joffé 2009 157
547 Damis 1975 43
548 White 2014 32
549 Awad, Tayem 2015 78
550 Bertola, Faini 1990 274
551 Bogaert 2015129
552 Awad, Tayem 2015 78
553 Damis 1975 43

pricing. Consequently, the projected revenues were never achieved. Furthermore, the global recession and the downturn in the phosphate trade terms lowered the phosphate proceeds further[554]. Along with the continuous heightened public expenditure, the GOM was forced to record a budget deficit of 18.1 per cent in 1976 from only 3.9 per cent in 1974[555].

The GOM difficult choices were any of two. First, the suspension of the ambitious development plans. Second, the referral to the international financial markets for borrowing[556]. Simultaneously, the threat of lower international phosphate prices turned real, paving the way for a severe hit for the Moroccan economy and the GOM budgets. Therefore, the second choice became inevitable. The foreign debt increased from $2.9 billion in 1976 to $11.7 in 1984 (equal to 16.5 per cent of GDP[557]) allowing Morocco to join the 15 most indebted countries list[558]. The World Bank and the IMF simplified the Moroccan economic struggle in the need to achieve annual growth rates between 5 and 7 per cent.

With the above-mentioned collapse in development projects and infrastructure, the economy could not offer better living standards to citizens nor capable to industrialize the agrarian economy. The economy conserved its stance as an agricultural one, primarily dependent on rainfalls, and always threatened by severe droughts. Moreover, the employment if available was mostly informal allowing it to cover 69 per cent in 1971 and around 40 per cent by late 1990s[559]. In the south, Marrakesh suffered in the 1970s from an extreme drought shaping the food availability and living costs. Similar bad economic conditions were featured in the northeast former colony of Spain that suffered from high unemployment, lack of infrastructure and a credit insufficiency for agricultural progress[560].

In 1971, when the Moroccan economy reached a 35 per cent unemployment, Al-Hoceima a north-eastern province was experiencing solely a 65 per cent. The national development plan for 1973-77 did not devote lump sum financials to this underprivileged area of Morocco. The residents of Morocco's underprivileged areas had no alternatives other than migrating to the neighbouring Algeria or Western

554 Mouna 2000 4
555 Eken et al. 1995 8
556 Joffé 2009 158-9
557 Bertola, Faini 1990 274
558 Awad, Tayem 2015 78
559 Joffé 2009 158
560 Awad, Tayem 2015 13

Europe[561]. The success of migration allowed the Moroccan families in the under-privileged areas to substantially survive. On the other hand, the failing migration attempts especially at higher frequency due to growing trends when compared to the earlier years resulted in further depressed incomes as opposed to rising living costs[562].

With the rise of food prices during the 1973-77 by 11.1 per cent exceeding the wage increases, the seasonally employed were more aggravated. In addition to the 1981 economic crisis and referral to the IMF for a package assistance allowed the food index to jump by 10.6 per cent from 1973 to 1983. This raised the costs of living index by 8 per cent[563]. The cost of living rises were embraced by the middle classes, organized labour and small businessmen who were able to raise their incomes to cover the rise in costs. For the unorganized and seasonal labour, the situation was exacerbated since the pay rises did not fulfil the cost increases. Hence, the living standards deteriorated as of the World Bank report in 1984 realizing that 40 per cent of Moroccan population lives in absolute poverty[564].

The EU enforced an economic development policy when entering into agreements with the Southern Mediterranean states. It aimed to reach a level of social and political stability with its southern neighbours. The EU-Morocco trade and economic bonding started in 1976. The launch was the European Economic Community conclusion of the Cooperation Agreement with the GOM[565]. The agreement covered a set of tariff reductions varying between 30 and 40 per cent, the liberalization of the EU's industrial sector offering an opportunity for Moroccan exports. More importantly, it proliferated the financial support directed by the EU to the GOM from €339 to €1167 million[566].

The EU successfully sealed the position as Morocco's main trading partner. Moroccan exports flowing to the EU expanded from less than 4 per cent in 1960s to nearly 47 per cent by the 1990s, especially with the enlargement of the EU to involve Spain and Portugal[567]. The composition of exports changed from agricultural products and food representing 55 per cent and mineral ores of 35 per cent in the 1960s to only 25 and 6.5 per cent respectively in the 1990s. In turn, the electrical engineer-

561 McMurray 2001 1994
562 Ennaji 2016 165
563 Goldin et al. 1992 95
564 Awad, Tayem 2015 13
565 Jovanovic 2006 372
566 Yusuf 2014 414-5
567 Mangala 2013 99

ing and chemicals increased from 0.46 and 1.2 to 9.3 and 8 per cent respectively. The overvalued Moroccan dirham (to account for less debt burdens) had always countered the Moroccan products competitiveness in international markets[568]. Furthermore, it raised imports, which recorded their peak in the fiscal year 1976-77[569].

The new Moroccan ruling elite preserved its stance towards the private sector. However, it was interested in Moroccan entrepreneurs owning the economic activity and not foreigners seeking further nation building and cohesion. These plans were supported by the GOM entering in joint ventures with foreign investors to establish investments. By the 1970s, the increase in the international phosphate prices in conjunction with the oil boom, Morocco exploited its rentier natural resource. The exploitation expanded the GOM's size, its welcoming public employment system accepted more beneficiaries. The downturn began with the decline in the oil prices. The ambitious development plans became unattainable and the GOM started to struggle with its financials.

III.D.3 Debt Crisis and Conclusion of Structural Adjustment Programs (1980s – 1990s)

The second period under investigation focuses on the outcomes of the GOM expansion in economic activity. The success of these policies was conditioned upon meeting a set of conditions. Non-compliance with these conditions, pushed the GOM into the accumulation of foreign debt and the necessity of applying for financial assistance from the international financial institutions.

(A) Government intervention and economic downturn

The economy suffered a downturn in the 1980s resulting in the accumulation of foreign indebtedness. The debt was necessary for the GOM to pursue its proposed investment and development plans. The economic circumstances experienced at the late 1970s paved the way for a twin deficit[570]. On the balance of payments side, the foreign debt in 1986 reached $11 billion, with a servicing cost skyrocketing from 700 million dirhams in 1976 to 5 billion dirhams in 1983. Imports realized 14.3 million dirhams in 1979 from only 10.4 million dirhams in 1975. Thus, a trade deficit

[568] Bouoiyour, Rey 2005 307-9
[569] Bertola, Faini 1990 274
[570] Goldin et al. 1992 95

emerged, especially that Morocco turned from a cereals net exporter in the 1950s to importing nearly 50 per cent of its domestic needs[571].

On the business side, the GOM held a significant share in the main Moroccan economic entities including the national airline, the telephone company, banks, petroleum refinery, the main phosphate mining entity along with 700 other companies[572]. The chambers of commerce and the business press criticized the extensive GOM intervention in the economic activity. The examples of intervention included; introducing red tape measures and taxes affecting negatively the business environment's openness and attractiveness. The GOM was interested in privatizing its business ownerships, however, the private sector's lack of capacity to operate these companies postponed execution[573].

The outcomes of the large GOM's economic size were contradicting. The first classical view paired the GOM role in economics with the inefficiencies deterring growth. The second view praised the GOM especially with the presence of an underdeveloped private sector. Under this view, public investments acted as market stimulants spilling over developmental effects on the private sector. The empirical findings supported the first view blaming GOM's spending policies for deterring economic growth[574]. In consequence, decision makers realized the importance of diversification and the need to concentrate on promoting the private manufacturing and services sectors. This implied GOM's ceasing of its rentier behaviour primarily dependent on the phosphate exportation[575].

The economy throughout the 1960s and 1970s recorded averages of 4 per cent growth. These averages did not last in the 1980s, where the growth slowed to an average of 3.8 per cent[576]. The reasons for the downturn include; first, the significant decline in the phosphate international prices foregoing one of the main revenues for the whole economy[577]. The second reasoning was the drop in Moroccan migrant workers' remittances inflows, due to the 1970s impact of oil shock stagflation experience in Europe and its subsequent recession[578].

571 Seddon 1986 17
572 Jilberto, Mommen 2002 197
573 Clement, Paul 1986 17
574 Abderrezak 2002 45-7
575 White 2007 44
576 Bouoiyour, Rey 2005 305
577 Nsouli 1995 8
578 Bureš 2008 1994

Third, the non-delivery of the pledged foreign grants during which the economy was witnessing a soared import demand[579]. Fourthly, and more importantly, the unprecedented drought evidenced in 1981 ruined the agricultural output leading to food shortages and a spread of rural urban migration[580]. Fifthly, the trade restrictions and quotas imposed by the European states over imports of Moroccan fruits. Also, the involvement in Western Sahara war worsened the situation more[581].

Gregory Joffee blamed two other reasons for the economic downturn and the difficulty to develop the economy's underinvestment endogenously. The first reason was colonialism. Colonialists left Morocco dependent mostly on labour and a less capital-intensive economy. As a result, the economy remained under-industrialized, dependent on the cultivation and exportation of primary agricultural products to mainly France and the European Union[582]. Secondly, the demographic expansion mounted the pressures on the economic indicators. The expansion was experienced on two levels; the high population growth and the rise in the rural urban migration[583].

(B) Morocco's formal referral to the IMF's assistance

The GOM tried to adjust for the mounting debt crisis through executing a set of emergency austerity measures. The measures included; budget and public investment cuts, freezing public servants' wages and introducing a privatization plan. The budgeted spending cut reflected in lower subsidies for primary products and less social security support. This negatively influenced the poorer classes and burdened the middle one. By May 1981, a plan of subsidies alleviation and price increases was executed[584]. This pushed the products' prices to an upsurge ranging between 14 and 77 per cent. The public dissatisfaction forced the regime to slash such increases in one-week time[585]. The dissatisfaction was evident in demonstrations that even turned violent in several cities[586].

The referral to International Financial Institutions as the World Bank and the IMF was the only available solution[587]. The negotiations succeeded in 1983 to conclude

579 Bertola, Faini 1990 274
580 Moutadayene 2001 71
581 White 2014 133
582 Joffé 2009 158
583 Werner 2013 331
584 Rubin 2009 223
585 Bogaert 2015 128
586 Moutadayene 2001 71
587 Campbell, Loxley 1989 252

the Moroccan SAP[588]. This had put Morocco as the first North African to engage in a SAP[589]. The "*Washington Consensus*" of the IMF was the condition for receiving the institution's support. The IMF package totalled to nine interventions from 1980 to 1993. Six debt rescheduling plans were pursued with the Paris Club and three commercial with the London Committee[590]. The conditions list covered privatization, currency devaluation, government spending austerity, relaxing export and import restrictions, inflation targeting and finally the promotion of foreign direct investments[591].

The first policy examined under the SAP was the privatization[592]. By privatizing state owned enterprises, the GOM abandoned its role in leading the economy in favour of the private sector. The GOM waived its obligations to create wealth and jobs to the private sector through stimulating economic efficiency and entrepreneurship[593]. In fact, the privatization plan was effected only by the 1990s. For example, the privatization of SAMIR Company was implemented in 1997 after floating it in CSE in 1996[594]. Again, the Moroccan elites - in a manner similar to that of the decolonization period - managed to benefit from the privatization plan in strengthening their economic power within the economy[595]. The process was publicly criticized for the lack of transparency and corruption[596].

The second policy under the SAP was the trade liberalization through the reduction of import tariffs and quantitative restrictions[597]. This included; firstly, the elimination of the Special Import Tariff. It was replaced with a uniform duty imposed on the CIF imports' value. Secondly, the reduction of the tariffs' maximum from 400 per cent in 1983 to only 60 and 45 per cents in 1984 and 1985 respectively[598]. By January 1988, and interested in raising the fiscal revenues rather than industrial protection, the Special Import Tariff and the customs duties were combined to initiate the fiscal imports levy. This levy was at 12.5 per cent of the imports. In effect, the new levy was higher than the total duty rate prevailing under the two abolished tariff systems.

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588 Yusuf 2014 415
589 Layachi 2000 18
590 Joffé 2009 158
591 Yusuf 2014 415
592 Layachi 1998 58
593 Awad, Tayem 2015 81
594 SAMIR Group 2016
595 Joffé 2009 159
596 Awad, Tayem 2015 81
597 Layachi 1998 58
598 Bertola, Faini 1990 274

Thirdly, and on the quantitative restrictions side, the restrictions were gradually dismantled from 1984 to 1989. The List B products in need for licensing approvals were mostly transferred to List A where no licenses are required[599]. Furthermore, the prohibited imports list C was abolished in 1986[600]. This trade integration adversely affected the GOM's revenues. The GOM's revenues only began to accumulate positively by 1986, with the introduction of the value added tax as another IMF policy recommendation[601].

The third policy of the IMF conditional funding was the cut on public spending and austerity[602]. The austerity policies were formulated on two tiers. The first concentrated on the subsidies cuts. Subsidy cuts were introduced in August 1983. These cuts had hit all the basic products at different rates, with tea largely consumed by lower classes rising by 77 per cent, butter proliferated by a half and cooking oil surged by 18 per cent. By January it was concluded that basic food items have featured on average a 20 per cent price increase. The second tier of austerity was demonstrated in the GOM's refrainment to invest in its publicly provided utilities including health, education and transportation. Public investments share in the budget fell 13 per cent in 1982 to only 4 per cent in 1986[603]. Capital expenditure was restricted to only 5 per cent of GDP[604].

The first wave of price soaring in 1981 was accepted by the public as an emergency non-frequent move. However, when the GOM proposed similar cuts in the 1984's budget, Moroccans were not ready for accepting additional burden[605]. In 1984, the students of Marrakesh rejected rises in their schooling tuition igniting protests, and were later supported by the deprived residents of Marrakesh in what was later called "*bread riots*"[606]. The 1984 protests can be easily linked to deprivation, disadvantage, unemployment and inequality[607].

The implications of IMF and World Bank funded SAPs were studied by several scholars, especially on the main two public utilities including; education and health. First a new two tier educational system was established, where students affording

599 General Agreement on Tariffs and Trade, World Trade Organization 1996 40
600 Haddad, Harrison 1993 56
601 Mouna 2000 1
602 Cohen 2004 116
603 Awad, Tayem 2015 79
604 Mouna 2000 4
605 Seddon 1986 1
606 Campbell, Loxley 1989 249
607 Cohen 2004 117

private schooling enrol in it[608]. Second, although 30 per cent of Moroccans benefited from the health insurance, public hospitals had absent doctors, obsolete equipment and medications. The austerity program forced the GOM to instigate a new civil servants' hiring strategy with a ceiling of annually appointing only 10,000 employees[609]. This reduced the GOM's annual job creation to only 10,000 and 15,000 throughout 1983 to 1994 after reaching at 40,000 for the period 1979 to 1982[610]. Other complementary policies included the provision for early retirement schemes and non-automatic replacement of employees and later wage freezes[611].

The decline in GOM's spending shaped job creation levels for poor country-side migrants who became more burdensome and pressuring the stability of these cities and the GOM itself[612]. The unemployment experienced in Morocco had two characteristics. First, it was more urban[613] by recording a 20.3 per cent in 1994 after being only 12.3 in 1982. On the rural side, the unemployment increased only from 9.5 to 10.8 per cent during the same period. Second, it was spread among educated individuals. The data provided that urban unemployment reached 18.3 per cent in 2002, among which 32.3 are university graduates compared to 5.6 per cent unemployment between uneducated calibres. The reason was the GOM's reduction in hiring since graduates were mostly serving in governmental positions[614]. The trap of poverty swelled to an unofficial rate of 14 per cent. Moreover, 25 per cent remain were threatened to join in case the policies enacted continued[615].

By the turn of the 1980s, Morocco suffered from a set of simultaneous changes aggravating its position forcing the formal application for the IMF financial assistance. Of these changes were the decline in the international phosphate prices, the drought hitting the Moroccan agricultural activity and the plunge in remittances accompanying the oil shocks of Europe. The IMF's program was pillared upon trade deregulation through abolishing quantitative restrictions and cutting tariffs, freezing the GOM hiring plans and finally launching the public-sector privatization process.

[608] Sater 2009 82
[609] Cohen 2004 81
[610] Khachani 2009 1610
[611] Mouna 2000 4
[612] Bogaert 2015 129
[613] Shahin, Dibeh 2000 52
[614] Awad, Tayem 2015 79
[615] Joffé 2009 159

III.D.4 Economic Openness and Market Deregulation (1990s – 2000s)

The third period under examination is aligned with the economy's status in the post-IMF program. The section intends specifically to address the impacts of the IMF SAP on the Moroccan economy's pillars including; the public-sector privatization, the exchange rate reform and remittances, the budget deficit control and the trade

(A) IMF Structural Adjustment effects

The deterioration in the economy's basic indicators continued at least in the early 1990s. First, the unemployment reached a decade record[616] of 17 per cent in 1991 compared to only 13.9 in 1985. In 1992, the employment distribution of the labour force was 50 per cent in the fishing and agricultural activities regardless of the sectors annual decrease in participation in the GDP. Secondly, the GDP growth featured a decline for the years 1989, 1992 and 1993 reaching an annual rate of 5 per cent in 1994 down from 8 per cent in 1991[617]. Growth in the 1990s remained dependent on the climatic conditions affecting the agricultural output. Besides, the economic partners' growth as in the EU and their demand on the Moroccan products[618].

Thirdly, inflation increased in 1990 and 1991 recording a peak of 8 per cent in 1991 followed by a decline to 5 per cent before slightly rising again in 1995 to more than 6 per cent[619]. For the foreign debt, the IMF instalments were added to the foreign debt. It evidenced its first decline only in the 1990s. The debt maintained its upward trend in the 1980s by totalling to $48.9 billion in 1990, while in 2006 recorded only $16.6 billion. In terms of GDP per centage, it deteriorated from 125 to 80 and 53.6 per cent in 1993 and 2007 respectively[620].

On the budget side, the SAP enabled the GOM by late 1990s to control the budget deficit around the 2 per cent. In regard to the trade deficit, it preserved its deficit for the period between 1991 and 2001. The main factors impacting it were; first, the climatic conditions as droughts pressuring the GOM to import more cereal filling the demand gap resulting from the decline in domestic output[621]. Secondly, was the

[616] Griffiths 2010 48
[617] Moutadayene 2001 71
[618] Bouoiyour, Rey 2005 305-6
[619] Moutadayene 2001 71
[620] Joffé 2009 159
[621] Malak et al. 2017 12

international oil products prices since Morocco is highly dependent on imports in meeting its demand for petroleum products[622]. Finally, the Moroccan dirham over-valued exchange rate has always exemplified a factor against the competitiveness of Moroccan exports in international markets[623].

In the 1990s, the European Union attempted to counteract the African migration, seek regional stability and economic prosperity in the Mediterranean and especially North Africa. A major conference was convened in Barcelona by 1995 to refresh the long-term bilateral economic ties between the EU and the Middle Eastern and North African countries initiated since 1969[624]. The proposed economic cooperation was based on technology transfer and investment flows adopting a neoliberal stance. The arrangement stressed setting a friendly environment for the private sector either foreign or domestic to lead the Moroccan economic activity[625].

The signing of the Association Agreement in 1996 signalled the necessity of further openness. The GOM was under obligation to reform its specified economic sectors. The aim is to raise their competitiveness and enable them to survive in a competitive market[626]. The Association Agreement second plan was the initiation of a Free Trade Area over a transitional period of 12 years commencing from 1996[627]. The way was paved for the gradual elimination of customs and tariffs on European products permitting their free access to Moroccan markets. This troubled the Moroccan manufacturers who lack the competitiveness necessary to survive under this higher competition with the European products[628].

(B) Post-IMF Structural Adjustment Plan

The GOM appointed in March 1998 concentrated on maintaining a prudent fiscal budget balance[629]. It intended to confirm compliance with the SAP programs outcomes as in 1990s.The new government was tested over several economic problems. First, in combating unemployment, the data witnessed an increase in unemployment rate from a 17 per cent in 1997 to a 23 per cent in 2001. Second, with an annual labour force growth of 3 per cent. Analysts calculated an average economic

622 Bouoiyour, Rey 2005 306
623 Eur 2002 838
624 Goffredo, Dubinsky 2013 637
625 Joffé 2009 159
626 Florea et al. 2010 6
627 Yusuf 2014 416
628 Denoeux 2001 72-3
629 Sater 2007 87

growth of 6 per cent is required to assure a job creation rate meeting the labour force growth. In fact, the annual average recorded growth from 1991 to 1998 was only 1.9 per cent[630].

Third, the GOM could not progress the economic transformation plan towards being more industrial. Hence, the droughts maintained their outcomes as in the 1999-2000[631]. First, a downfall in GDP growth since agriculture constitutes 17 per cent of the GDP. Second, when employing around half of the labour force, droughts increased unemployment. The failure to diversify created a volatile economy realizing 11.5 per cent growth in 1996 followed by a slump to -2.2 per cent in 1997. Expectedly, the income per capita recorded $1,300, which when compared to neighbouring Maghreb countries appeared vulnerable[632]. By 1999, the data revealed a growing non-agricultural sector at only 3 per cent annually. The industry spread close to the three coastal cities of Casablanca, Kenitra and Rabat. A population share of 15 per cent was employed in industrial activities. The principal industry focus was the phosphate related products, followed by foodstuffs including olive oil, vegetables and etc.[633].

Fourth, on the poverty alleviation level, the GOM featured difficulties. The number of inhabitants falling below the poverty line (having an income of less than 10 Dirhams a day) mounted from 13 to 19 per cent of the population for the period from 1991 to 1999[634]. The per centage was split into 10 per cent in extreme poverty and another 30 per cent were vulnerable. The rural population's marginalization was ascertained through several data. The water did not access 63 per cent of the rural areas, access to electricity was for only 13 per cent and only 7 per cent reached healthcare[635].

The gross remittances flowing to Morocco skyrocketed to $2.1 billion in 1992 compared to only $23 million in 1968. This trend did not continue throughout the 1990s. Remittances stagnated at the same level before jumping by 2001 to reach $3.3 billion. Analysts argued that the 2001 jump was due to euro introduction. Moroccan migrants depositing their savings in different European local currencies in

[630] Denoeux 2001 69
[631] Kavanaugh 2014
[632] Denoeux 2001 70
[633] Gray, K. R. and Amine, L. S. 2002 389
[634] Lahnait, North Atlantic Treaty Organization. Public Diplomacy Division 2009 276
[635] Denoeux 2001 70

Moroccan banks benefited by changing them to dirhams without justifying sources[636].

The three means of transferring remittances were banks, postal orders and cash. By the 1980s, money transfers through the banking system prevailed over the postal office orders. In 1995, the permission for Moroccans to open foreign currency bank accounts eased transfers through banks[637]. On the other hand, cash transfers signified a 22.5 per cent of the total remittances. This rate nearly tripled in 2001 from 6.8 to 16.2 billion dirhams They preserved their steady trend and led the economy's sources of foreign currency by averaging at 6.4 per cent of Morocco's GNP in the 1990s[638].

For the reasons introduced above, regarding the GOM economic activity, by 1997-8 and from 719 SOEs, the GOM owned a majority in around 351 entities. Of the 351, 244 enterprises fully owned by GOM and 107 with GOM's ownership exceeding 50 per cent of shares. The 719 enterprises in the 1980s participated with only 17 per cent in Morocco's GDP[639]. The GOM investment in the SOEs signified 22 per cent of the economy's total investments. SOEs employed nearly 200,000 Moroccans who received around 43 per cent of the Morocco's budget wage bill. On the other hand, by 1998, only 56 out of 112 enterprises were privatized mostly of a profitable nature. Therefore, the privatization process allowed the flow of revenues since 1995 accumulating to 13.5 billion dirhams, while the expenditure did not decrease as projected[640]. With half of the targeted SOEs, the GOM was criticised for its sluggish progress in complying with privatization pre-set goals.

III.D.5 Conclusion

The section of Morocco in chapter III was divided into the same skeleton of Egypt and Jordan to facilitate the process of comparison between the country studies and in order to trace easily the differences and similarities. The similarities represent an essential part in reasoning the choice of three country studies for undertaking such research project. Moreover, the historical developments until the 2000s are the base from which the economic chapter of the research project will kick start. Finally, the historical analysis will assist in analysing the protectionist and investments re-

636 Lahnait, North Atlantic Treaty Organization. Public Diplomacy Division 2009 134
637 Besharov, López 2016 404
638 Haas, Plug 2006 611-4
639 Sullivan 1986 68
640 Mouna 2000 5

strictions still traced in the country studies since the era of nationalism and wide state intervention. The main witnessed similarities highlighting the prevailing economic orientation can be listed based on each time period under examination.

To begin with, the first period in each country study was titled "*Independence and State Intervention*" elapsing from the 1940s until the 1970s. Politically speaking, Morocco secured its independence and decolonization in 1956. During this economic period, the GOM expanded its economic role within the new state. Features of governmental intervention include; the introduction of the Morocconization legislation to restrict foreign ownership of entities, the exploitation of discovered rentier position based on phosphate exportation, magnified its public investment in infrastructure establishing new public entities as SAMIR in Morocco.

On the trade level, import substitution – as globally executed – was implemented in Morocco to support the domestic production. The fall in rentier benefits experienced in late 1970s and 1980s in phosphate negatively influenced the Moroccan budget. These factors severed the economic situation in Morocco who could not afford the expansionary fiscal policies paving their ways to the second phase titled "*Debt Crisis and Conclusion of Structural Adjustment Programs*". This period was principally characterized with budget deficit and foreign debt. Examples of other worsening conditions include unexpected droughts in Morocco. All of the above incidents in total accumulated foreign debt with continuous failures to service it, forcing Morocco to revert for IMF assistance more than once within a decade period.

The adjustment programs as part of the 1980s Washington Consensus executed in developing economies experiencing debt crises, were enforced in Morocco. The programs allowed Morocco to reach the "*Economic Openness and Market Deregulation*" era prevailing until the 2000s. Examples of enforceable policies include austerity and currency devaluation reaching 9.25 in Morocco. This period highlighted the introduction of privatization programs with a slower pace of implementation in the Moroccan case where only 66 companies were privatized. Moreover, the deregulation process was evidenced in a series of market oriented policies enforced in Morocco including the introduction of investment laws targeting the attraction of domestic private sector as well as FDI. The creation of tax incentives and free zones were the basic methods of attraction.

III.E Comparative Conclusions

III.E.1 Introduction

The conclusion of the economic history chapter is divided in the same skeleton for the three country studies in order to facilitate the process of comparison between them and to follow the differences and similarities. The similarities identified between the three country studies is a critical part of justifying the choice of these three country studies specifically. The chapters address the historical developments until the 2000s, when the economic chapter of the thesis will focus more. Finally, the historical analysis will assist in analysing *(i)* the transformation in the orientation of the policy-makers from highly regulated markets to deregulated ones, and *(ii)* the heritage of protectionist policies and investments restrictive legislations still in place in the country studies since the era of nationalism and wide state intervention. The main witnessed similarities highlighting the prevailing economic orientation can be listed based on each time period under examination.

From the three-time periods under examination within chapter III, the conclusion provides an overview for the main policies similarly implemented in the three country studies. This will serve two objectives within the thesis. First, it highlights the similar challenges, policies and solutions applied by the policy-makers when addressing the economic difficulties experienced by the three country studies. Second, it provides an insight for the background of the policy-makers in the three country studies when introducing legislations that are possibly still effective and could be hostile towards foreign investors (*e.g.*, imposing restrictions on foreign investors ownerships in companies) as further discussed in the chapter IV.

III.E.2 Independence and State Intervention

To begin with, the first period in each studied country was titled "*Independence and State Intervention*" elapsing at earliest from the 1940s until the 1970s. The main theme in the three country studies for that period was expanding the role played by the central governments in an attempt to control and monitor the economic activity taking place within the economies of the three country studies. During this period, the central governments intensively intervened in the economic activity in various ways as exemplified in each of the three country studies. The general orientation favoured a big government benefiting from rentier positions, in conjunction with limited private sector presence, if any. In addition, a hostile approach was evident in guaranteeing protections and treating foreign investors, as a retaliation for the very recent colonization.

(A) Egypt

Egypt secured its independence and decolonization in 1952. During this economic period, the GOE expanded its economic role within the new State. Features of GOE intervention included; the re-introduction of the Egyptianisation legislation to restrict foreign ownership of companies and the nationalization of the Suez Canal in 1956. Also, Nasser's "*Socialist Revolution*" entailing the private businesses expropriation wave of 1961. Other private sector limitation policies enacted were; *(i)* the pledge of guaranteed state employment to all university graduates, *(ii)* the introduction of rent controls and *(iii)* land reforms legislations setting ownership maximums. The October War marked a turning point in Egypt's modern economic history since it featured the first openness attempt towards the private sector. This was evident in the introduction of the Arab and Foreign Investment Law No. 43 of 1974.

(B) Jordan

Jordan secured its independence and decolonization in 1946. During this economic period, the GOJ interested in consolidating its power over the new State engaged in direct businesses connections with the private sector. The historical incidents featuring the GOJ's intervention include; the expansion in GOJ's job offerings and the introduction of subsidies. It is important to highlight the role played by the foreign financial assistance in *(i)* backing the budgets of the GOJ *(ii)* funding imports and *(iii)* mitigating the fiscal burdens of the 1967 and 1973 wars. The foreign aid magnified the public investment pursued by the GOJ in the fields of infrastructure and establishing new business entities. On the trade level, import substitution – as globally executed – and were implemented in Morocco to support domestic production.

(C) Morocco

Morocco secured its independence and decolonization in 1956. During the post-colonial period, Morocco's private sector led the economic activity before the GOM decided to step-in and expand its economic role within the new State. The expansion was based on widening GOM's control over the economy's activities after the almost complete control of foreigners. Examples of GOM's expansion in economic activity include; the *(i)* introduction of the Morocconisation program in

1973 setting a maximum limit over the foreigners' shareholding per centage in companies, *(ii)* magnified public investment in infrastructure through establishing new public entities jointly with the private sector as in the case of SAMIR. The GOM's intervention in economic activity was supported by *(i)* the inflows of remittances from Moroccans migrating to Europe and *(ii)* exploiting the rentier position resulting from the exportation of the mineral ore of phosphate.

III.E.3 Debt Crisis and Conclusion of Structural Adjustment Programs

The second period under investigation focused on the outcomes of the governments expansion in economic activity in the three country studies. The main theme during this period was the incapacity of the central governments to preserve their high intervention levels in the economic activity. This created fiscal crises in the country studies pushing them to apply for financial assistance from the international financial institutions. During this period, the central governments of the three country studies did not have the capacity to proceed with their pursued expansionary fiscal policies. The referral to the international financial institutions (*e.g.*, IMF) was subject to the policies prescribed under the Washington Consensus of the 1980s. The Consensus entailed policies including mainly; *(i)* liberalizing trade (*e.g.*, cutting tariffs) and domestic markets (*e.g.*, abolishing price controls), *(ii)* reaching macroeconomic stability (*e.g.*, bringing budget deficit into control through austerity).

(A) Egypt

The start of the second phase was characterized by dependence on exporting oil and strategically receiving financial support from western powers through aligning with the US policy in the MENA region. The eruption of the Iraq-Iran war and the fall in oil prices affected negatively the rentier benefits and the GOE's budgets. These factors severed the economic situation in Egypt which began to feature unsustainable triple deficits and could not afford the expansionary fiscal policies. This paved Egypt's way to the second phase titled "*Debt Crisis and Conclusion of Structural Adjustment Programs*".

The period was principally characterized with *(i)* cutting the budget deficit through severe austerity measures and *(ii)* the accumulation of the foreign debt. The continuous failures to service the growing foreign, forced Egypt to revert to the IMF for assistance more than once within a decade. During the austerity phase, the population resisted through engaging in the bread riots of 1977. The launch of the Iraqi invasion of Kuwait in 1990 worsened the situation further by pressuring downward the remittances of Egyptians abroad in Iraq and Kuwait.

(B) Jordan

For the Jordanians, the slump in oil prices after the eruption of the Iran-Iraq War limited the granted Arabian assistance to Jordan. The GOJ *(i)* referred to international debt markets to cover up its financial needs, and *(ii)* adopted a trade restrictive policy to moderate its current account deficit. The *(i)* continued expansionary fiscal policy severed the economic situation Jordan, *(ii)* mounting foreign debt, and *(iii)* delayed debt repayments paved GOJ's way to the second phase titled "*Debt Crisis and Conclusion of Structural Adjustment Programs*".

The GOJ concluded a stand-by agreement with the IMF in 1989. With public employees lay-offs and subsidies cuts, the austerity plan triggered the bread riots of 1989. Another worsening update was King Hussein's from joining the international coalition of liberating Kuwait from the Iraqi invasion. Examples of the worsening conditions include the *(i)* expulsion of the Jordanian expatriates in the GCC, *(ii)* decline in GCC and US financial assistance, and *(iii)* disruption of trade flows due to the war in Iraq being the main trading partner of Jordan.

(C) Morocco

As part of the expansionary fiscal policy adopted due to the phosphate exports, the GOM expanded its intervention in various economic activities in Morocco. Its continuation resulted in a twin-deficit with possibly negative impacts on the economy's growth rates. The economic downturn due to several reasons including *(i)* lower phosphate prices, *(ii)* lower migrants' remittances, *(iii)* demographic pressures and etc. negatively influenced the Morocco's budgets. This paved the way to the second phase titled "*Debt Crisis and Conclusion of Structural Adjustment Programs*".

The GOM concluded a stand-by agreement with the IMF in 1983. The agreement required the GOM to implement a plan of *(i)* privatization, *(ii)* alleviation of subsidies and *(iii)* trade liberalization. This triggered a wave of bread riots in 1983 against the austerity plan. The plan was executed at different speeds, with an extreme delay in the privatization one when compared to the cutting of subsidies. The continuous austerity resulted in *(i)* additional poverty rates pressuring the stability of the GOM, *(ii)* lower quality of public services including health and education.

III.E.4 Economic Openness and Market Deregulation

The third period under examination is aligned with the economy's status in the post-IMF program. The section intends specifically to address the impacts of the IMF SAP on the country studies' economic pillars including; the public-sector privatization, the exchange rate reform and remittances, the budget deficit control and the trade. The main theme within this section is the obvious continuation of the transformation towards the market-oriented policies and openness of the domestic markets for investments (in compliance with Washington Consensus and the conditionality of the IMF). The deregulation process of the domestic markets of investment was evident in the three country studies in policies like *(i)* limiting the role of central governments in economic activity (*e.g.*, privatization), *(ii)* openness to foreign investors (*e.g.*, introduction of investment laws guaranteeing partially a standardised treatment and protections to FDI). This phase will be more under discussion within the following legal chapter since it focuses more on the developments in the domestic legal rules of the country studies in favour of openness to investments and free market forces interaction.

(A) Egypt

Egypt's engagement with the IMF during the 1990s comprised of three stand-by agreements. Starting by the liberalization of interest and exchange rates, the policy-makers prioritized the restoration of confidence in the economy. The implementation of the SAP allowed Egypt to reach the "*Economic Openness and Market Deregulation*" era prevailing until the 2000s. Examples of enforceable policies include *(i)* enhancing the efficiency of the SOEs, *(ii)* the partial elimination of subsidies, *(iii)* currency devaluation of 56.7 per cent in 1987 followed by a 23.4 per cent in 1991, *(iv)* launching the privatization programs where Egypt secured annual revenues of 3.5 per cent of GDP, and *(v)* the deregulation process was evidenced in the introduction of the Investment Law targeting the attraction of domestic private sector as well as FDI. The creation of tax incentives and free zones were the basic methods of attraction.

(B) Jordan

With negative outcomes on the rates of state-employment, steep rise costs of living, an under-control budget deficit, the GOJ was finalizing its engagement with the IMF's SAP. The SAPs of Jordan program allowed the economy to access the third phase denoted as the "*Economic Openness and Market Deregulation*" era. Examples of policies enacted during this era include the alignment with the US and western policies regarding the peace process in MENA. This allowed Jordan a strategic position, where it benefited from generous financial support from the US and the EU. Other policies include *(i)* introducing the privatization program by 1998, *(ii)* engaging in a FTA with the US as well as the Qualified Industrial Zones (QIZ) program with the US and Israel, and *(iii)* the deregulation process evidenced introducing the Investment Law targeting the attraction of domestic and foreign investors. The creation of tax incentives and free zones (*e.g.*, Aqaba Free Zone) were the basic methods of attraction.

(C) Morocco

The severe outcomes of the SAP implemented in many developing economies as part of the Washington Consensus of the 1980s, were evident also in Morocco. The implementation of the SAP allowed Morocco to reach the "*Economic Openness and Market Deregulation*" era lasting until the 2000s. Together with the signing of the Association Agreement with the EU, the remittances played an important role in shaping Morocco's economic status that controlled its budget deficit after the series of austerity policies. Examples of other enforceable policies include *(i)* introducing the privatization programs with a slower pace of implementation where only 66 companies were privatized, and *(ii)* introducing the investment laws targeting the attraction of domestic private sector as well as FDI. The creation of tax incentives and free zones (*e.g.*, Tangiers Free Zone) were the basic methods of attraction.

IV. Legal Framework

The title of this paper reflects the intent to undertake a comparative analysis between the enforceable laws and state actions of the countries studied in terms of their obligations under international investment law. The approach taken is to assess the countries' legal compliance in two ways. First, there is a focus on the formal legal compliance of the countries' domestic laws with their international obligations in BIT models: in other words, the aim is to develop a 'checklist' to analyse the degree to which they transpose international investment obligations into their investment-related domestic legislations. The second part of the analysis (provided in chapter V) more practically addresses the cases filed against the three countries under the auspices of the ICSID. This will enable an assessment of the countries' actions regarding the obligations prescribed under their BITs concluded with investment partners.

The process of comparing the three countries' domestic legislation to the prescribed international investment obligations requires an understanding of their domestic legislations governing foreign investments. This chapter examines the framework of Egypt's, Jordan's and Morocco's legislations connected to international investment law principles as briefly introduced in chapter II. The analysis provided in chapter IV has two objectives. First, it targets narrowing the gap between the international investment principles and their adoption in the countries' domestic laws. The Egyptian Investment Guarantees and Incentives Law No. 8 of 1997[641] (IGIL) is the base for the benchmarking analysis. Protections provided under the law are compared to the protections that the three countries are under obligation – in accordance with international investment law and BITs – to guarantee to foreign investors.

The second objective of this chapter is to analyse the changes in the three countries' legal rules in an attempt to make their investment climates friendlier and more liberal in order to attract more FDI than before liberalisation. Changes in the legal rules making a country's legal framework more liberal can be evident in offering investors additional guarantees and incentives. Also, the three countries' legal transformations from centrally planned economies towards private sector led ones is directly linked to making their economies' investment climate friendlier and more liberal. This is examined through the three countries' engagement in trade liberalisation and privatisation, with positive spill overs on the performance of investments.

[641] Law No. 8 of 1997, Investment Guarantees and Incentives Law, Official Gazette, Issue 19 (bis), 11 May 1997.

In this regard, a helpful guide in dealing with the role of legal rules in attracting FDI is available in the study of Gray and Jaroz[642] regarding legal rules in Central and Eastern European. The paper revealed that any host state legislation seeking the attraction of FDI should: *(i)* rationalise factor prices (*e.g.*, allow foreign ownership of immovable property and repatriation of profits); *(ii)* reduce transaction costs (*e.g.*, cost of establishing a green-field investment), and *(iii)* allocate risks (*e.g.*, guarantees against a government's expropriation). The more rationalised the factor prices, the lower the transaction costs and the more guarantees against risks, the higher the possibility of an economy's attracting FDI.

The following sections on Egypt's, Jordan's and Morocco's legal frameworks are divided into three subsections that provide an overview of: the country's legal framework, international investment obligations from each country's legal perspective, and each country's openness to the private sector through privatisation or trade liberalisation.

IV.A Egypt: Legal Framework

IV.A.1 Introduction

The Egyptian IGIL and the Investment Law No. 72 of 2017[643] (IL) will be the base for the benchmarking analysis. Protections provided in the law are compared against the protections Egypt is under obligation to guarantee for foreign investors under international investment law and BITs.

Egypt's legal framework chapter is divided into three subheadings covering: the overview of the Egyptian legal framework, international investment obligations from an Egyptian legal perspective, and openness to the private sector through privatisation or trade liberalisation.

IV.A.2 An overview of the legal framework

Analysing the investment legal framework in Egypt requires starting from the top of the legal pyramid before narrowing the research. This analysis commences with the constitutional articles that reference and prescribe investments and private ownership, based on the two modern and permanent Egyptian constitutions of 1971 and 2014. In the second phase, the analysis delves into more details by examining the

[642] Gray, Jarosz 1995
[643] Investment Law No. 72 of 2017, Official Gazette, Issue No. 21-bis(c) of 31 May 2017.

structure and main components of the IGIL and the IL. A third area covered is incentives in general offered under the IGIL to highlight deregulation and openness to the private sector and foreign investors.

(A) Investments in the Constitution

It is worth providing an insight into Egypt's constitutional heritage in connection to ownership and investments before comparing it with the current prevailing constitutional practice. The first permanent constitution[644] under the Egyptian republic was promulgated in May 1971 during the transition from Nasser's Arab socialism to Sadat's rule. During this period, as highlighted in the chapter III, the socialist ideology principally framed the policies that were implemented. The Constitution of 1971 reflected a general sentiment favouring the state's intervention and central planning economics. The socialist inclination is obviously traceable by comparing the articles of the Constitution of 1971 to those of 2014. Prior to proceeding with the comparison between both constitutions, it is important to review the circumstances during which the Constitution of 2014[645] came into existence. This Constitution was drawn up after the uprising against President Mubarak and the Muslim Brotherhood. It reflected the economic status prevailing while drafting it based upon free market interactions and private sector promotion. The new Constitution drafters tried to frame the document in a manner that would permit the creation of a competitively knowledge-based economy.

Comparing both constitutions clarifies the shift in the Egyptian society's preferring private over public sector investments. In the Constitution of 1971, the prevailing tone prioritised the public sector and the working classes union as the cornerstones of the Egyptian state. This view was transformed in the Constitution of 2014 that translated the prevailing economic conditions by the time of the drafting of the constitution. These conditions arose after years of continuous attempts to restructure the economy from the 1980s until today. Hence, the Constitution of 2014 appeared more investor- and private-sector friendly, allowing these actors to participate in providing basic services as well as protection against state actions.

To facilitate the process of comparing constitutions, a set of words will be used to evidence the ideological shift from a regulated, entry-restricted economy, towards a market based and liberalised one. The three words used for this comparison are "*so-*

[644] Constitution 1971, Official Gazette, Issue 36 (bis) (a), 12 September 1971.
[645] Constitution 2014, Official Gazette, Issue 3 (bis) (a), 18 January 2014.

cialist", "*private*" and "*investment*". The comparison depends on checking the number of times any of these three words was used in the 1971 and the 2014 constitutions. The hypothesis is that of a higher reference to "*private*" and "*investment*" in the Constitution of 2014 compared to that of 1971. On the other hand, the word "*socialist*" appears fewer times in the Constitution of 2014 than that of 1971.

The first word is "*socialist*", which was located in the Constitution of 1971 constitution in fourteen articles. The important references to "*socialist*" highlighted the state's economic system, as in Article 1 that presented Egypt as a "*Socialist Democratic State*" established upon working class alliances. Another instance of the word was evident in Article 4, clearly laying out Egypt's economic system as one structured upon social democracy, targeting the narrowing of the gap between different income levels and tackling exploitation and justice in duties and expenditure distribution. Other references to "*socialist*" were focused on consolidating socialist gains, and preserving and spreading the socialist behaviours, conducts and manners. Remarkably, the public prosecutor was named in Article 179 as the "*Socialist Public Prosecutor*" and was responsible for protecting socialist achievements and committing to socialist practices. The latest amendments of the Constitution of 1971 in 2007 aimed at developing the constitutional articles to represent the free-market orientation experienced since the Open-Door Policy of 1970s followed by the IMF restructuring programs. The amendments focused primarily on restricting or eliminating any ideologically socialist or leftist senses prevailing in the Constitution of 1971.

Expectedly, the promulgation of the Constitution of 2014 highlighted the continuous trend of the Egyptian state in favouring the free market and openness. Clear evidence of this was this constitution's lack of the word "*socialist*". This confirms the new sense of liberalising the Egyptian economy, boosting the private sector's role in development and abolishing the former state hegemony over economic activity. The constitution drafters were clear in replacing the former socialist context of the Constitution of 1971 with a constitution that set out a social contract that more accurately reflected the prevailing sentiment of the economy.

The second word utilised in comparing both constitutions is "*private*". The analysis checks "*private*" only within the context of private ownership. By revisiting the Constitution of 1971, the word "*private*" was located four times. The first was in Article 29, prescribing the three forms of ownership as public, private and cooperative. Article 32 defined private ownership as non-exploitative capital. Besides this, the article cited the legislative framework's role in organising such ownership to ensure attaining its socially intended benefit in line with the population's welfare. The third time in which the word "*private*" was used obliged the state to safeguard private ownership and disallowed expropriation unless it was for public interest and against statutory compensation. This must be read alongside Article 35, which allowed conditional nationalisations if they were in conformity with the law, served public interest and occurred in exchange for compensation. The fourth time highlighted the state's welcoming of private ownership of newspapers.

Alternatively, in the Constitution of 2014, the word "*private*" is located in eight instances. Of these, some locations are in common with the Constitution of 1971, such as types of ownership, plus the allowed private ownership of newspapers. The new instances of use of the word emphasised the obligation for the private and public sectors to jointly provide services. This prevailed in sectors such as education, health and scientific research. The abolishment of the state's right to nationalise all types of private property and investments was a remarkable step towards the state's promotion of a free market. Moreover, the state's right to lawful requisitions serving the public interest was conditional upon the payment of advance "*fair compensation*" to the injured party and by virtue of law.

From the above, three developments can be deduced. First, the use of the word "*private*" within the ownership context doubled between both constitutions. This verified the new stance of legislators and how the role of the private sector was considered. Second, the drafters of the Constitution of 2014 – grasping the shortcomings of nationalisation and its harmful impact on a host state's investment climate – preferred to abolish the state's right to expropriate or nationalise private property and investments. Third, the requisition right that Article 35 granted to the state is not a synonym of "*nationalisation*". The validity of the requisition of privately-owned property is conditional upon this being done by virtue of law, in return for advance fair compensation, and must be done only to serve the public interest.

The third word under analysis is "*investment*". Under the Constitution of 1971, this word was detected only once in Article 123 in connection with the granting of mineral resources exploitation contracts. In revisiting the original Arabic version, it clearly stipulates exploitation of natural resources without any reference to the literal Arabic meaning of "*investment*". Therefore, the role of investments was nearly negligible in the Constitution of 1971.

The situation is logically different in the Constitution of 2014. The notion of "*investment*" is found in four articles, most obviously in the section of the constitution that addresses the country's economic components. First, under Article 27, the economic system encourages investment as part of an overall objective of establishing a transparent, competitive and fair economic system that is able to generate jobs and confront unemployment. The second reference is in Article 32, which lays out the state's willingness to maximise its use of renewable energy sources by incentivising investments in this sector. The third and fourth uses of the "*investment*" notion are in articles 17 and 41, which speak of the state's obligation to safely invest pension contributions and invest in human capacity development to attain inclusive growth targets. The "*investment*" notion in the Constitution of 2014 highlights that the drafters understood the concept in a broad manner, embracing both private investments as a source of economic activity and obligatory public investments in human development.

The above comparison of the two Egyptian constitutions of 1971 and 2014 helps to understand the shift in the Egyptian policymakers' view of the role of the public and private sectors in the economy. The evolution of the articles is obvious when analysed from a perspective of the three keywords "*socialist*", "*private*" and "*investment*". The rise in the use of the latter two words in the Constitution of 2014, compared to a complete lack of use of the first word (used fourteen times in the Constitution of 1971) allows the reader to grasp the constitutional drafters' changed view regarding the role of each sector in the larger Egyptian economic picture. As mentioned above, the new constitutional articles mirrored the prevailing economic conditions, where the state is deregulating the economy and retreating from economic activity in favour of a wider role for the private sector.

(B) Egyptian investment laws

The Constitution – being on top of the legislative pyramid – guides the following in-depth analysis of the enforceable investment laws. The investment laws throughout history were the tool through which the Government of Egypt (GOE) signalled its interest in attracting investors. These signals were communicated through expanding the guarantees, protections and incentives granted to financial inflows. Before deeply analysing the prevailing investment framework, it is beneficial to provide a brief historical overview. As mentioned above, driven by the interest of attracting investment flows, the GOE promulgated the Arab and Foreign Investment

Incentives Law No. 43 of 1974[646]. This law was followed by a set of amendments and brand-new investment laws.

This section analyses the IGIL and IL, first addressing the IGIL and its subsequent amendments, and then focussing on the IL.

- The Investment Guarantees and Incentives Law No. 8 of 1997

Globalisation and the waves of deregulation forced the GOE to interact closely with the private sector and exert more efforts to adopt the latter's requests. The Egyptian policymakers' heeding of the private sector's calls can be seen in the promulgation of the IGIL in May 1997. The legislation's primary objectives were to attract investors by cutting transaction costs – by facilitating the establishment of investments – and offering a range of tax incentives. Further, the GOE targeted the expansion of investments to regions other than the Nile Valley[647]. The IGIL abolished the former Investment Law No. 230 of 1989[648]. Additionally, it abolished all provisions in other laws governing foreign investments. The legislator's intent was obvious in addressing all foreign investors based on the IGIL provisions[649].

Another intent of the IGIL was to modernise the legal framework governing foreign investments in Egypt to stay abreast of updates and changes. Under the law, eighteen sectors benefited from the prescribed treatment. These sectors were not specifically identified[650], as the Cabinet of Ministers was entitled to add any sector to the scope of the IGIL[651]. With the long list of beneficiary investments, the IGIL sealed its leading position as influential legislation affecting the majority of foreigners willing to engage in business in Egypt[652]. The IGIL's modernity was evident in the integration of advanced fields such as technology (*e.g.*, software production) and finance (*e.g.*, financial leasing). Another positive characteristic of the IGIL over the preceding law was the firm identification of the sectors eligible for the favourable treatment under the IGIL[653].

646 Law No. 43 of 1974, Arab and Foreign Funds Investment and Free Zones Law, Official Gazette, Issue 26, 27 June 1974.
647 IBP 2009 74.
648 Law No. 230 of 1989, Investment Law, Official Gazette, Issue 29 (bis A), 20 July 1989.
649 United Nations Publications 2001 41.
650 Hashem, Ibrahim and Tawfik Law Office 1998 75.
651 Article 1 of the IGIL.
652 El-Dean 2002 24
653 United Nations Publications 2001 42

The IGIL introduced no developments regarding the legal form of incorporated businesses, and preserved the three forms of partnership limited by shares, joint stock companies and limited liability companies. Incorporation requests are filed with the General Authority for Investment and Free Zones (GAFI) as the body responsible for monitoring fulfilment of establishment conditions and commercial registration[654]. Subsequently, Law No. 94 of 2005[655] amended the IGIL and unified the legal regime governing the incorporation of companies[656].

Prior to the amendment, the IGIL created its own procedural incorporation process parallel to that of Companies Law No. 159 of 1981 (Companies Law)[657]. This contradiction influenced investors' certainty and created inconsistencies. Hence, the GOE – driven by the interest to facilitate investment – unified the incorporation process procedures provided under the Companies Law and the IGIL under the former's regime[658]. The amendment[659] extended the guarantees of the IGIL – including, for example, the prohibition of expropriation and the right to free pricing without intervention – to other companies incorporated under the previous Companies Law regime.

- Investment Law No. 72 of 2017

The Arab Spring uprisings of 2011 negatively influenced investment flows into Egypt. The GOE engaged in continuous attempts to attract investments to the same level as that reached before the global financial crisis of 2008. The main step in these attempts was introducing the IL. As with previous investment legislation, the IL's main objectives are to establish a more investor-friendly business environment and easing business in Egypt. The IL abolished the IGIL and all its subsequent amendments. It is important to highlight that investments benefiting from any incentives under the IGIL continue to benefit until the incentives come to a natural end[660].

The main highlights of the IL include the endeavour of the Egyptian legislator to moderate the risks of investing in Egypt through aligning the articles of the IL with international investment law obligations under BITs. An example is the list of defi-

654 Hashem, Ibrahim and Tawfik Law Office 1998 75
655 Law No. 94 of 2005, Amendment of Companies Law No. 159 of 1981 and Investment Guarantees and Incentives Law No. 8 of 1997, Official Gazette, Issue 24 (bis), 21 June 2005.
656 Ray Jureidini 2010 21
657 Law No. 159 of 1981, Companies Law, Official Gazette, Issue 40, 01 October 1981.
658 OECD 2007 25
659 Article 7 of Law No. 94 of 2005.
660 Article 2 of the promulgation Articles of the IL.

nitions in Article 1 similar to that of BITs. This enhances the understanding and enforcement of the IL's articles (*e.g.*, investment, investor). These highlights send three signals. First, the unilateral interest in guaranteeing protection to all domestic and foreign investors eliminates the privilege that foreign investors, protected under the BITs, had over their domestic counterparts under previous investment laws. Second, the alignment of domestic law with BITs provides unilateral protection to the nationals of non-BIT signatories. This confirms Egypt's credibility and interest in respecting its obligations under BITs even towards non-protected investors.

By comparing the scopes of the IGIL and the IL, the IL's broader scope becomes more obvious. The definition of an "*investment project*" for the purposes of applying the IL covers 13 investment sectors (*e.g.*, industry, agriculture, trade, energy)[661]. The IL mentions the eligible sectors in a generic sense. This conveys the interest of the legislator to broaden the scope of the IL's application by entitling more investors to its benefits and incentives. Moreover, the IL listed technology as a sector of investment eligible for the benefits under the IL. The broader use of "*technology*" further proves the wider scope of the IL when compared to the IGIL, which was limited to software production. On a geographical side, the IL applies to the entire territory of Egypt. However, the IL promotes investments in underdeveloped areas by offering higher tax incentives (as detailed below). The IL did not change the legal framework governing the legal forms of incorporated businesses under the Egyptian laws.

The above is intended to familiarise readers with the laws governing the investment climate and framework in Egypt. The objectives and targets set out in the laws' explanatory memorandums reflect continuous efforts, since the 1990s, of the state to retreat from economic activity in favour of the private sector and foreign investors. The subsections below detail the components of the IGIL and the IL compared to international investment law, highlighting Egypt's development towards further liberalisation and openness.

(C) Investment laws incentives

This subsection highlights deregulation efforts in the field of taxation by examining tax holidays and exemptions under both laws. A tax holiday or exemption remains an obvious example of deregulation, as it lowers the legal burden on an investor in terms of taxes due, and at times exempts the taxpayer from filing a tax return.

661 Article 1 of the IL.

The first subsection below addresses the IGIL tax incentives, while the second focuses on the investment incentives granted under the IL.

- IGIL incentives

The IGIL, in both its cornerstones of fiscal incentives and guarantees, consolidated the sense of deregulation and liberalisation of the Egyptian economy. The guarantees are examined below as part of the comparison with international investment obligations[662].

The second part of the IGIL addressed incentives, and specifically tax-related ones. These incentives were an example of deregulating the economy, as a tax exemption relieves a taxpayer from paying taxes due and even from filing tax returns. First, companies were exempted from taxes on business and industrial revenue or profits for five years. A ten-year exemption applied to investments established in remote areas, new urban communities and new industrial zones. The longest exemption lasted for twenty years and applied to investments incorporated away from the Old Valley of the Nile in areas determined by a decree of the Cabinet of Ministers. The exemption period commenced on the year following that in which production or business was commenced.

An additional important aspect under Article 21 allowed investments with more than one exempted activity to commence the exemption period separately for each activity. Second, the same article exempted corporate profits, equalling a per centage of the paid-in capital, from tax[663]. This per centage was decided by the Central Bank of Egypt (CBE) and was conditional upon the listing of the joint stock company's shares on the stock exchange where the shares were registered. Moreover, profits arising because of mergers, divestitures or a change in the investment's corporate legal structure were exempted.

These exemptions were all terminated by the promulgation of Income Tax Law No. 91 of 2005 after a debate between two conflicting schools of GOE thought. The first group's argument – supported by pointing out the positive implications of tax holidays in boosting investment flows to other emerging economies – was the necessity to introduce tax holidays to attract foreign investors. The second group deemed tax holidays as trivial when undertaking an investment feasibility study. Ad-

662 IBP 2015 110
663 Article 21 of the IGIL.

ditionally, a tax holiday meant foregoing revenues for the host state, as investors pay their taxes to their home states when repatriating generated profits from host states.

The second group prioritised the establishment of a generally more favourable investment climate with less bureaucracy and corruption to stimulate investment flows rather than resorting to tax expenditures[664]. After introducing this argument, the final decision was widely ceasing applicable tax incentives and limiting them to exemptions of taxes associated with notarisation, stamp duties and registration of mortgages, loans, and land sale contracts along with the initial incorporation contracts. The exemption lapsed after a three-year period and was conditional upon its connection to the investment's establishment or actual operations[665].

The IGIL introduced three different types of free zones. The first was the least common and prevailed under the whole city free zone structure. The second and more precedent in Egypt was the public free zone. The third and the last was the private free zone. Egypt public free zone areas were considered to be outside the state's borders and, as a result, several foreign currency, labour, trade and tax laws and regulations did not apply to companies incorporated in these zones[666]. The difference between the first and the second types was the geographical area constituting the free zone. For the second and the third forms of free zones, the difference was the number of beneficiary investments. Under private free zones, a single investment could be considered a free zone, while under public free zones, a set of investments benefited from privileged treatment[667].

Another significant difference between the three types of free zones was the legal framework governing their establishment. Whole city free zones were established by laws introduced by parliament. Conversely, public free zones were set up through a decree of the Cabinet of Ministers based on a proposal by the GAFI. Although private free zones could only be set up by a decree of the GAFI, Article 29 lists three conditions to set up a private free zone. The investment had to be operational, export at least 50 per cent of its production, and meet free zone safety requirements.

The IGIL guaranteed the same minimum legal benefits to investments in free zones as those granted to inland investments, but also applied additional incentives if the investment complied with its prescribed purpose under the GAFI-issued licence.

[664] El-Dean 2002 25
[665] Hashem, Ibrahim and Tawfik Law Office 1998 77
[666] Bureau of Economic and Business Affairs 2015a 26
[667] General Authority for Investment and Free Zones 2016

These incentives included the fact that investments in free zones were not subject to Egyptian taxes or custom duties. Investments, until 2005, were exempt from all types of taxes including taxes on income and sales. Not being subject to Egyptian tax meant the investments in free zones were also exempted from filing tax returns. Accordingly, a free zone entity was obviously deregulated when compared to inland entities as they are not only exempt from tax but also from filing returns.

Deregulation included a greater number of work permits being granted to foreign expatriates working in Egyptian free zones. Moreover, free zones saw exemptions from procedures governing exportation and importation outside of Egypt. However, customs duties were applied to goods originating from investments in free zones when being imported to the Egyptian market[668]. Therefore, the transportation of goods from free zone areas to the inland was subject to custom duties at checkpoints. The second obligation was compliance with social security provisions regarding the work force of free zone investments[669]. Finally, the most important duty was under Article 35, which required investments and entities with no goods entering or exiting the free zone (such as professional services) to pay a flat rate of 1 per cent of their annual revenues to the GAFI[670].

The private free zone regime was abolished by the IGIL amendments introduced under Law No. 17 of 2015[671]. However, entities benefiting from the regime were entitled to continue enjoying their status until the expiry of their licences. This created a contradiction in the legislation that triggered uncertainty among investors.

Several studies attempted to assess the Egyptian investment framework as a sufficient attractor of foreign investments. El-Mikawy and Handoussa summarised a set of weaknesses in the Egyptian investment framework under three points. The first weakness identified was the absence of a unified framework to guide reforms. This was seen in inconsistent legislative amendments influencing investment inflows in a contradictory manner. A clear example was the provision of tax exemptions under the IGIL before completely abolishing them in 2005 under Income Tax Law No. 91 of 2005[672]. The second weakness was the continuous subsequent legislative interventions amending or partially abolishing preceding laws, creating a loss of legislative harmony, clarity and raising investor's uncertainty. The third weakness was that

[668] Abdallah 2001 69
[669] Hashem, Ibrahim and Tawfik Law Office 1998 80-1
[670] Abdallah 2001 69
[671] Law No. 17 of 2015, Amendment of the Investment Guarantees and Incentives Law No. 8 of 1997, Official Gazette, Issue 11 (continued), 12 March 2015.
[672] Law No. 91 of 2005, Income Tax Law, Official Gazette, Issue 23 (continued), 09 June 2005.

the speed of the legislative process negatively influenced its credibility: the speedy approval of laws without proper serious discussion lowered the integrity of the laws for both investors and the public. Accordingly, the swift promulgation of laws at times resulted in doubts regarding their constitutionality[673].

Another weakness, explained by the Egyptian Centre Economic and Social Rights (ECESR), considered the IGIL as being biased toward the petroleum, construction and, to a lesser extent, the financial sectors. This meant disregarded labour-intensive industries, which lessened the impact of FDI on inclusive growth possibilities. FDI did now flow towards new fields of investments (*i.e.*, green field investments); however, they were mostly represented in mergers and acquisitions. In 2012, Egypt secured the first position within Arab economies in mergers and acquisitions after France Telecom acquired 100 per cent of Mobinil. These investment examples raise the same set of questions regarding the validity of FDI inflows' developmental impact, whether in the form of potential transfer of technology or know-how and the possibility of introducing new industries[674].

- <u>IL incentives</u>

The IL – with the same objective as the IGIL in attracting private investments – introduced a similar set of fiscal incentives. The IL preserves incentives such as those provided under the IGIL. This applies to the continuation of the free zones regime, including its three forms: *(i)* city, *(ii)* public, and *(iii)* private. The IL re-introduced the private free zones regime after its abolishment in 2015[675]. The tax incentives granted to the free zone investment projects under the IGIL were transferred to the IL, though the fees applicable upon free zone investment projects under the IGIL were slightly increased under the IL[676]. Additionally, the GAFI remained in place without any changes under the IL.

The new tax incentives offered under the IL are special incentives[677], taking the form of a tax deduction (deductible from the taxable income) and applicable to investment projects that: *(i)* begin after the introduction of the IL, and *(ii)* are located within the investment map[678]. Two tax deduction rates are available depending on

673 Louis, M., El-Mahdy, A. and Handoussa, H. 2004 55
674 Sherif, N., Khalil, H. and Zayed, H. 2015 82
675 4th Article of Law No. 17 of 2015.
676 The old fees applicable upon free zones projects under the IGIL are still applicable they naturally come to an end.
677 Article 11 of the IL.
678 Article 17 of the IL identifies the investment map providing details such as the type and the system of investment, its geographical regions and sectors.

the geographical location and field of investment. First, investors with projects in sector A (which covers the Suez Canal Economic Zone and geographical areas most in need of development)[679] can deduct 50 per cent of their investment costs from their taxable income.

Instead, investors with projects in sector B, which covers geographical areas outside of the scope of sector A (*i.e.*, the rest of Egypt), can deduct 30 per cent of their investment costs from their taxable income. The second incentive applies to a list of investment projects including labour intensive projects[680], small and medium enterprise projects, national and strategic projects as determined by the Supreme Council for Investment, and projects that export their products outside of Egypt's borders.

In all of the above cases, the special investment incentive cannot exceed 80 per cent of the capital paid in up to the date the project starts producing revenue[681]. Additionally, the period of deduction from the taxable income cannot exceed seven years from the date the project starts producing revenue. The Executive Regulations (ER) defines[682] "*investment cost*" for the purposes of calculating the special incentive as the costs necessary to set up the investment, including equity and debts (*e.g.*, financial, long-term obligations), which are invested in tangible and intangible assets[683].

The IL provides four conditions for an investment project to qualify for the special incentives[684]. First, the project must be for a newly incorporated company or establishment. Second, the new company or establishment must be incorporated within three years from the date the ER enter into force. Third, the company or establishment must be able to demonstrate that it keeps proper accounting records. If the company or establishment operates in sector A and sector B, it may benefit from the different deduction rates of each area only if it keeps separate accounting records for the investments in each area.

Finally, none of the company's or establishment's shareholders, partners or owners must have contributed or used in the founding, incorporation or establishment of the investment project any of the tangible assets of a company or establishment that already existed when the IL entered into force. Moreover, none of the above parties

679 These areas are identified based on the: *(i)* investment map, and *(ii)* data and statistics provided by the Central Agency for Public Mobilization and Statistics.
680 in accordance with the guidelines provided in the ER.
681 See Income Tax Law No. 91 of 2005, Official Gazette, Issue No. 23 (cont.) of 9 June 2005.
682 Article 11(2) of the ER.
683 Investments in intangible assets must be made in cash.
684 Article 12 of the IL.

must have liquidated a company or establishment during the three-year period (second point above) with the aim of establishing a new investment project to benefit from the special incentives. If these two conditions are breached, the new company or establishment is ineligible for the special incentive.

The introduction of the IL is the GOE's attempt to limit the inconsistencies created by the continuous amendments of the previously in place IGIL. This enhances investors' certainty regarding the legal framework applicable to their potential projects to be established in Egypt. From the above critiques of El-Mikawy and Handoussa, the one potentially valid for the IL could be in connection to the speed of approving the IL within the parliament. Although, some members of parliament raised serious red flags in relation to the IL, it was passed after hurried, brief discussions, which may have a negative impact on the integrity and credibility of the IL.

The re-introduction of corporate income tax incentives under the IL after abolishing the ones of the IGIL by the Income Tax Law No. 91 of 2005 comes as an obvious example for the GOE's interest in cutting investors' transaction costs and rationalising the factors of production prices. Generally, the tax incentives offered under the IGIL and the IL have two implications. First, the incentives confirm the GOE's interest in limiting its role in the economic activity in favour of the private sector. Second, the minimising of the GOE's size through tax incentives signals the deregulation of economic activity in Egypt. By approving the incentives, the GOE forgoes a portion of revenues in favour of attracting investors.

IV.A.3 Investment laws principles and international obligations

The development towards a more liberal economy appears obvious, especially by benchmarking the IGIL's and IL's guarantees against the obligations prescribed by BITs. The guarantees were deemed the signal necessary to attract foreign investors to flow into the Egyptian economy. This relates to the discussion introduced under the theoretical framework concerning the benefits investigated by the policymakers when deciding on their states' engagement in BITs. The guarantees were deemed as important as the fiscal incentives in assuring the foreign investors and translating Egypt's willingness to accord foreign investors the standardised treatment as required under international investment law. Prior to starting the benchmarking analysis to assess the level of compliance, the chapter introduces briefly the main components of Egypt's BITs, while introducing the guarantees offered under the IGIL and the IL.

The Egyptian policymakers maintained activity on the international scene regarding the engagement and conclusion of BITs. With 72 already BITs in force[685], the increase in concluded BITs justified the current slower pace of finalising new ones since the possible investment partners available without BITs decreased. The policymakers did not concentrate merely on signing BITs with partners from the northern hemisphere. However, Egypt widened its treaty network to encompass several South-South BITs with other African and Middle East and North African economies. Another characteristic evident in Egypt's management of BITs is the non-ratification of several signed BITs. This applies to most BITs concluded with African states due to the lack of an actual investment flow between their economies. With the current potential outflow of Egyptian investments to other African economies, ratification of BITs must be of interest for Egyptian investors seeking protection against treaty-breaching actions by the host states[686].

On the other hand, Egypt has engaged in similar BITs with most of the members of the EU members. These BITs in general prescribe the same protections as the ones available under BIT models. This encompasses the principles introduced before within the theoretical framework including NT and MFN. Other guarantees under Egyptian BITs include the rights of currency transferability and the referral of disputes between states as well as state and investors to a third-party dispute settlement mechanism[687]. The US-Egypt BIT provides a list of investment sectors to which the NT principle does not apply. The long list of sectors was subject to subsequent legislative amendments reducing its scope[688].

Being the base for the legal analysis in the three countries studied, it is important to introduce briefly the guarantees under part 2 of the IGIL[689]. The guarantees prohibit: *(i)* nationalisation or confiscation of investments[690], *(ii)* administrative sequestration of investments[691], *(iii)* administrative intervention in pricing products or profit margins[692], and *(iv)* abolishment or suspension of the property's usufruct licences

685 United Nations Conference on Trade and Development 2017a
686 OECD 2007 34
687 Congress 11/3/1986
688 OECD 2007 16-7
689 Articles 8–13 of the IGIL. The enforcement of these guarantees was extended to the entities established under the Companies Law No. 159 of 1981 as per the 7th Article of Law No. 94 of 2005.
690 Article 8 of the IGIL.
691 Article 9 of the IGIL
692 El-Dean 2002 24, Article 10 of the IGIL

unless the latter's conditions are violated[693]. In a generic sense, this guarantee protects investors against any kind of creeping or indirect expropriation negatively influencing their rights to own, possess, benefit from and operate their investments.

Other guarantees under the same part of the IGIL include the explicit entitlement of foreigners to own buildings and lands (assigned for building purposes) as necessary for their investment activities, regardless of their nationality[694]. Investors are also entitled to freely repatriate the proceeds of their investments from operation or liquidation abroad in accordance with investment-related laws and decrees[695]. Additionally, investments became entitled to import their production and activity necessities without engaging an Egyptian agent, besides waiving them from being listed in the Importation Registry[696]. The same exemption prevails regarding the requirement of licences or listing in the Exportation Registry[697].

To proceed with the legal question of comparing the IGIL and the IL with Egypt's international obligations under international investment law, the discussion will now include four subsections covering NT and expropriation, dispute settlement and, finally, foreign ownership of investments, the right to transfer currency and employ foreign employees.

(A) National treatment and foreign ownership

The above leads to three clear inferences. First, the GOEs exerted efforts to liberalise the economy from its protectionist policies. This was exemplified in the introduction of three complete investment laws from 1974 until 2017. The common feature of all these laws and amendments is easing the doing of business and creating a more open economy that is investment-friendly, especially for foreigners. Although the influence of the socialist era was fading by the mid-1970s, several pieces of legislation from the socialist heritage (mostly hostile to foreign investors) remained in place. The first international investment law principle under consideration in the benchmarking analysis is NT[698].

693 Article 11 of the IGIL. The decision of abolishing or suspending the licence is issued by the prime minister. The investor may challenge the decision before the administrative courts within 30 days.
694 Article 12 provided limitations of foreigners' ownership in certain zones as Sinai.
695 Article 10 (bis) of the IGIL as introduced by Article 5 of Law No. 17 of 2015.
696 Article 13 of the IGIL
697 Hashem, Ibrahim and Tawfik Law Office 1998 77
698 See II.F.1. The NT was introduced in the theoretical framework chapter as one of the substantive protections under the international investment law regime.

- Ownership of shares

The increased liberalisation was not sufficient to ensure full compliance with principles of international investment law. With restrictions still in place to the disadvantage of foreign investors, the reasoning behind them seemed to be mistrust in foreign investors, along with Egypt's socio-political sensitivity in the post-colonisation socialist era. The differential treatment between Egyptian and foreign investors was continuously evident. For example, earlier investment laws conditioned offering shares in companies to foreigners only after a one-month period had gone by without the shares being subscribed by Egyptians. In an attempt to align with the NT, in 1998 the Companies Law[699] was amended. The amendment[700] abolished the obligation on companies to offer 49 per cent of their shares exclusively to Egyptians and, accordingly, foreign investors became entitled to subscribe 100 per cent of a company's shares regardless of nationality[701].

The IL consolidated the equal treatment of Egyptian and foreign investors regarding ownership rights through the general reference to the law's enforcement on domestic and foreign investments without any differences. For example, this appears in the IL's definition of an "*investor*"[702] as any: *(i)* natural person or legal entity, or *(ii)* Egyptian or foreigner – regardless of the legal framework governing the investment – who invests in Egypt pursuant to the IL. Another important example confirming the development of Egypt's legal rules towards liberalisation and openness is the elimination of the Companies Law[703] restriction on the alienation of shares in joint-stock companies within the first two financial years of the newly incorporated company[704].

As can be seen, the IGIL and the IL did not foresee different treatment of domestic and foreign investors. This helps Egypt move its legal framework closer toward its NT obligations under its concluded BITs. On the other hand, the equal treatment of domestic and foreign investors rationalises the prices of production factors in Egypt, which may stimulate an increase in FDI inflows. Foreign investors are allowed direct ownership of their businesses without framing special business organisations to qualify for benefits under the IGIL or the IL. Additionally,, the elimina-

699 Law No. 3 of 1998, Amendment of Companies Law No. 159 of 1981, Official Gazette, Issue 3 (bis), 18 January 1998.
700 Article 1 of Law no. 3 of 1998.
701 Bureau of Economic and Business Affairs 2015a 5
702 Article 1 of the IL.
703 Article 45 of the Companies Law.
704 Article 53 of the IL.

tion of the Companies Law time limitations on shares subscriptions and trading is another step favouring the rationalisation of the prices of production factors in Egypt.

- Ownership of land

An example of other legislative restrictions against foreigners were related to the right of foreigners to own immovable property and land, a right that the IGIL was the first law to grant[705]. This right was limited to owning buildings and lands (assigned for building purposes) as necessary to perform the activity. The theoretically unified treatment accorded to both Egyptian and foreign investors is another example of the GOE's willingness to adhere to the international investment law principles of MFN and NT. The authorities tried to ensure equitable treatment to investors regardless of their citizenship or background. Compliance with the NT was a step towards bringing the IGIL more in line with international investment law obligations. However, this situation was aggravated again by amending[706] the IGIL and explicitly restricting foreigners' ownership in special areas falling in the scope of special laws as in Sinai Semi-Integrated Development Law No. 14 of 2012[707] upon the fulfilment of specific conditions.

In the same context of land ownership restrictions, the plan to liberalise Egypt's legislation did not address the restrictions on foreigners' ownership of arable agricultural lands stipulated plainly in Law No. 15 of 1963[708]. The lands were explicitly identified as the Nile Delta and Valley, plus oases lands. Egyptian investors were eligible to own agricultural lands for any purpose, while foreign investors remain were a disadvantaged position. Although the IGIL moved closer toward compliance with the NT principle by narrowing the differential treatment accorded to Egyptian and foreign investors, the Egyptian investors were still treated more favourably compared to the foreigners in connection to areas governed by special laws and arable agricultural lands falling within the scope of Law No. 15 of 1963. These inconsistencies highlight the Egyptian authorities' need to develop their frameworks and depart from the old-fashioned socialist oriented policies in place since the 1960s.

705 Article 12 of the IGIL.
706 Article 4 of Law No. 17 of 2015 amended Article 12 of the IGIL.
707 Law No. 14 of 2012, Integral Development in Sinai Law, Official Gazette, Issue 3 (continued), 19 January 2012.
708 Law No. 15 of 1963, Prohibition of Foreigners Land Ownership Law, Official Gazette, Issue 16, 19 January 1963.

The IL introduces no amendments to the treatment of domestic and foreign investors regarding their rights to own lands as accorded in the IGIL after its latest amendment[709]. The IL entitles an investor to own immovable property necessary to undertake its business activity regardless of its shareholding per centage or contribution in capital[710]. An obvious difference between the IL and the amended IGIL is that the former entitles the investor personally, and not the company or the entity he or she owns, as was the case was under the IGIL. This entails attaching the right to the investor and not to the incorporated company or entity. Concerning the restriction applicable for geographical zones governed by special laws and agricultural lands, the IL does not offer any alternatives to ownership.

The continued application of special laws and restrictions on the foreigners' ownership of agricultural lands may seem to be a violation of the NT as domestic investors are guaranteed a favourable position compared to foreign counterparts. Furthermore, such differential treatment increases prices of the factors of production and costs of doing business in Egypt, which may result in lower FDI. Such restrictions ban foreigners from accessing the immovable property needed to develop their business activities, preventing them from reaching business goals in Egypt. Even if a foreigner indirectly establishes a 100 per cent Egyptian-owned company to overcome the restrictions on certain areas of land ownership, the authorities could question the foreign shareholding in the parent company. If the authorities do not question the business structure, it requires additional burdens, thereby raising the total transaction costs, which could make the business opportunity for the foreign investor less favourable.

- Importation

A significant advantage under the IGIL was the exemption from registration in the Importers' Register if connected to imports of operational and activity necessities[711]. However, in the case of importation for trading and commercial purposes a significant advantage prevailed for Egyptian investors over foreigners. This constituted an obvious limitation and violation of the NT, negatively influencing the investment climate in Egypt. After introducing the guarantee under the IGIL, the analysis in this section addresses limitations on foreigners' eligibility to import for trading purposes.

[709] Law No. 17 of 2015 amended the IGIL.
[710] Article 55 of the IL.
[711] Article 13 of the IGIL.

Importation rights for trading purposes were exclusively exercised by Egyptian nationals or Egyptians fully owned entities[712]. The law required any natural or legal person wishing to import goods for trading purposes to be registered in the Importers' Register after meeting registration requirements[713]. For natural persons, eight requirements were necessary to register, among which the requirement of holding Egyptian citizenship. For companies, registration required the company to be fully owned by Egyptians. Additionally, the CEOs, board members and managers had to be Egyptian citizens or ten years had to have passed from the acquisition of citizenship[714].

This limitation obviously violated the NT since it restricted the right to import for trading purposes only to companies fully owned and operated by Egyptians. Foreign entities executed several structures to circumvent this limitation. One of these was by entering into agency agreements with fully owned and operated Egyptian companies to import on behalf of the foreign entity in return for a commission or an agency fee. Another alternative was the establishment of an Egyptian fully owned subsidiary to exercise importation. Under both scenarios, the production factors of an investor increased significantly.

Within its efforts to promote investment, Egypt introduced an amendment[715] to its law governing the importation for trading purposes and moved it a step toward the equal treatment of foreigners and Egyptian investors (*i.e.*, the NT). Under the amendment, companies that were 49 per cent owned by foreigners became eligible to import for trading purposes. With regard to Egyptian citizenship, the amendment limited the requirement to the company's manager responsible for the importation[716]. The IL maintains (as provided in the IGIL) the exceptional treatment of the investment projects from registration in the Importers' Register when importing raw material, production necessities, machinery and spare parts required for the incorporation, expansion or operation of the business activity[717]. However, in the event of importation for trading and commercial purposes, the amendment explained above applies to such business activity.

With the entitlement under the IL and the amendment of the legal framework governing importation for commercial purposes, Egypt's rules in this regard are moving

712 Law No. 121 of 1982, Importers' Register Law, Official Gazette, Issue 31, 05 August 1982.
713 Articles 1 and 2 of Law No. 121 of 1982.
714 Article 2(2)(f) of Law No. 121 of 1982.
715 Law No. 7 of 2017, Official Gazette, Issue 9 (bis)(a), 07 March 2017.
716 Article 1 of Law No. 7 of 2017.
717 Article 7 of the IL.

closer to the NT obligation under BITs. Conversely, 49 per cent Egyptian ownership remains a prevalent limitation on foreigners interested in undertaking a business activity of importation for commercial purposes in Egypt. On the legal rules related to FDI, the IGIL's and the IL's exemptions from registration in the Importers' Registry rationalise the prices of the factors of production and cut the transaction costs of doing business in Egypt, which can be reflected positively on FDI inflows to Egypt. The same applies for easing the rules governing importation for commercial purposes since the amendment releases foreigners from the need to establish a 100 per cent Egyptian-owned subsidiary through which importation can take place.

- Public procurement

Under public procurement, a more favourable treatment is accorded to Egyptian investors over their foreigner counterparts. The general rule in public procurements is deciding on the winning bid with the best financial and technical offers[718]. Under the Tenders and Bids Law[719], Egyptian bids are awarded the project only if they exceed the lowest foreign bid by no more than 15 per cent[720]. This provides Egyptian investors more favourable treatment over their foreigner counterparts. Another example is the Preferred Egyptian Products in Government Contracts Law[721] introduced principally to assist domestic industries in expanding their activity. Under the law, Egyptian manufacturers hold a more favourable position over foreign ones in the GOE's procurements and public contracts. The favourable position appears in forcing the GOE to ensure that 40 per cent of the values of the total offered projects is from an Egyptian source[722].

By revisiting the status of the GOE procurement in connection to NT, a distinction must be made between international trade and investment laws. Article III:8(a) of the General Agreement on Tariffs and Trade allows preferential treatment of domestic goods in governmental purchases. On the other hand, in the international investment law arena several BITs have treated government procurement as an exception to NT under international investment law. An example is paragraph 5 of Article 15.12 of the US-Singapore FTA permitting the exception of government

[718] OECD 2010 98
[719] Law No. 89 of 1998, Tenders and Bids Law, Official Gazette, Issue 19 (bis), 08 May 1998.
[720] Article 16 of the Tenders and Bids Law No. 89 of 1998
[721] Law No. 5 of 2015, Preferential Treatment of Egyptian Products in Governmental Contracts Law, Official Gazette, Issue 3 (bis), 17 January 2015.
[722] Article 3 of Law No. 5 of 2015.

procurement from the NT[723]. The Egyptian-concluded BITs did not refer in any articles to such exceptional treatment of government procurement. Therefore, Article 16 of Law No. 89 of 1998 and Article 3 of the Preferred Egyptian Products in Government Contracts Law No. 5 of 2015 could be in conflict with Egypt's international investment obligation of NT.

(B) Expropriation

The second notion in the process of benchmarking is "*expropriation*". The principle was introduced in the theoretical framework chapter as one of the substantive protections under the international investment law regime[724]. The presence of this clause in all BITs encouraged Egypt to introduce it within its domestic investment legislation. In the IGIL, protection of investments from direct and indirect expropriations was prescribed in the guarantees section[725].

As provided in the introductory part concerning the guarantees accorded under the IGIL, the IGIL prohibited: *(i)* nationalisation or confiscation of companies or entities, *(ii)* administrative blocking, sequestration or requisition of companies' assets, and *(iii)* interventions with the companies' or entities' pricings or profit margins. Finally, the IGIL provided a guarantee to safeguard the licenced projects from any administrative measures revoking the licences unless the licences were violated. Moreover, an investor whose licence is suspended or cancelled had 30 days to challenge the order from when it is notified[726]. This exemplified the legislator's stance against any attempts of creeping expropriation.

The prohibition of expropriation under the IGIL was absolute in nature as it made no reference to the state's exceptional right expropriate a private investment in the event of the need to serve the public interest and in return for effective and adequate compensation to the injured party. The absolute protection granted to investors seemed against the World Bank Guidelines permitting non-discriminatory expropriations executed in good faith for public interest purposes. On the other hand, the absolute prohibition under the IGIL[727] appeared in line with the elimination of any reference to expropriation in the Constitution of 2014.

723 {Wehrlé 2016 #176} 7
724 See II.F.2.
725 Article 8 of the IGIL.
726 Hashem, Ibrahim and Tawfik Law Office 1998 76
727 Article 8 of the IGIL.

Scholars question the validity of the absolute expropriation prohibition and whether it effectively banned the GOE from nationalising private investments[728]. Under the Constitution of 2014, a property requisition is effective only if to serve public interest, in return for a fair compensation and pursuant to the Egyptian law[729]. In this respect, Egypt governs requisitions of property that serve public interest by the Law No. 10 of 1990[730].

The mentioned Law provides examples for works serving "*public interest*" among others infrastructural roads, irrigation, sanitations, energy, transportation[731]. A requisition of private property is due when a presidential decree is issued *(i)* determining the public interest and *(ii)* the property to be requisitioned in order to serve that public interest[732]. The Law creates a committee, as responsible to evaluate the compensation due to the property owners[733]. The compensation must be equal to the property market price at the time when the requisition's presidential decree was issued. Furthermore, compensations must be paid within one month from the requisition decrees[734]. A presidential decree requisitioning private property as per the guidelines provided in the Law No. 10 of 1990 remains a pre-requisite to limit the possibilities of an investor challenging the validity of the requisition decree.

Another form of requisition is provided under the notion of "*temporary occupation of property*" in which by virtue of a presidential decree, a property can be temporarily (maximum for three years[735]) seized by the government to serve public interest. The rules of valuing the compensation apply in this case, however, the compensation must consider the owners forgone revenues from not using the property during the seizure period[736]. Section three of the Law governs appeals against requisition decrees and compensations due to property owners[737].

The compliance with the due process under the Law No. 10 of 1990 would render the state immune against any investors' claims of damages since the requisition of property was also pursuant to the Egyptian law. The mentioned Law is aligned with

728 {El-Dean 2002 #229} 31.
729 Article 35 of the Constitution of 2014.
730 Law No. 10 of 1990 concerning Requisition of Property to Serve Public Interest, Official Gazette, Issue 22 (bis), 31 May 1990.
731 Art. 2 of the Law No. 10 of 1990.
732 Art. 3 of the Law No. 10 of 1990.
733 Art. 6(1) of the Law No. 10 of 1990.
734 Art. 6(2) of the Law No. 10 of 1990.
735 Art. 16 of the Law No. 10 of 1990.
736 Art. 14 of the Law No. 10 of 1990.
737 Art. 9 of the Law No. 10 of 1990.

the constitutional right provided in Article 35 of the Constitution of 2014 through which the state can requisite privately owned property in order to serve the public interest, however, this must be in return for fair compensation and in accordance to the Egyptian law.

Debates exist regarding the scope of Article 35 of the Constitution of 2014, and whether requisition constitutes expropriation. Under Article 8 of the IGIL and Article 4(1) of the IL, the reference is explicit to the prohibition of nationalising companies and entities. In this sense, the legislator seems to differentiate between the state's action of nationalisation and requisition. As clarified above, the state's act of requisition is still allowed under Article 35 of the Constitution of 2014 and the Law No. 10 of 1990 only after meeting certain conditions. On the other hand, Article 8 of the IGIL and Article 4(1) of the IL absolute prohibition of nationalisation are now compliant with the Constitution of 2014. The new Constitution makes reference only to requisition and eliminated any reference to nationalisations, which was the case in Article 35 of the Constitution of 1971. Based on this conclusion, the absolute protection under Article 8 of the IGIL and Article 4(1)[738] of IL gains further validity from the elimination of the word "*nationalisation*" from the Constitution of 2014.

The IL explicitly prohibits the expropriation of investments[739], and maintains the prohibition on requisition unless it serves the public interest and is in return for fair, advance compensation. The compensation must be *(i)* equal to the fair economic value of the requisitioned funds on the day prior to the act of requisition and *(ii)* be transferrable without restrictions[740]. The IL prohibits the sequestration of investments or their funds unless in accordance with a final court ruling or order[741].

From the IL's guarantees accorded to investments against expropriation by the GOE, the wording of the IL is more aligned with the wording of Article 35 of the Constitution of 2014 and the Law No. 10 of 1990. The explicit prohibition of expropriations confirms the Egyptian legislator's interest to differentiate between expropriation and requisition. Both the Constitution of 2014 and the IL allow requisitions only upon certain conditions being met[742]. With such developments, the IL seems more in line with BITs' guarantees against unlawful expropriation. On the

738 The same applies for Article 8 of the IGIL before its abolishment.
739 Art. 4(1) of the IL.
740 Art. 4(2) of the IL.
741 Art. 4(3) of the IL.
742 In compliance with the Law No. 10 of 1990.

other hand, the alignment of the IL with the constitution removes any doubts regarding the words "*expropriation*" and "*requisition*". Furthermore, this guarantee lowers investors' risks from any potential intervention by the GOE since any risky violations could be managed through referring the violations to a third-party dispute settlement, where the investor may be awarded compensation. The reduction of possible risks of investing in Egypt may stimulate investors to route more funds into Egypt.

With the absolute protection of investors against nationalisation, the constitutional and legal references lower the potential risks featured by investors seeking to invest in Egypt. Such guarantee lowers the uncertainty and unpredictability regarding the investor being a subject of an act of nationalisation. With lower investor uncertainties in accordance with the no nationalisation guarantee, the volume of the FDI inflows to Egypt can increase.

(C) Dispute settlement

The third notion in the comparison process is the right of a foreign investor to revert the disputes against the host state to the ICSID. As per the theoretical chapter, the referral of a contractual dispute between the host state and foreign investors to a third party for international arbitration is a fundamental protection under BITs[743]. The Egyptian legislator has struggled since the 1970s with granting the right to turn disputes over to the ICSID.

Law No. 43 of 1974 represented a change in the GOE's orientation regarding the private sector's role in economic activity[744]. The law had several innovative features, one of which was embracing the ICSID Convention in Egyptian laws[745]. The law explicitly referred to the ICSID Convention as a mechanism to settle investment disputes between investors and Egypt. The explicit reference did not prevent the GOE from declaring its lack of consent necessary for filing an arbitration claim against it. This claim was filed within the case of Southern Pacific Properties v. Arab Republic of Egypt. The tribunal ruled that Article 8 of Law No. 43 of 1974 was sufficient to evidence Egypt's unilateral consent to the ICSID's jurisdiction. This was justified upon the mandatory nature of the article's wording "*shall be settled*" when referring to disputes between the state and the investor. Accordingly, no subsequent

743 See II.F.4.
744 Haim, Kedourie 2005 108
745 This was firstly stipulated in Article 8 of the Arab and Foreign Funds Investment and Free Zones Law No. 43 of 1974.

agreements were needed to allow both parties' rights to arbitration before the ICSID.

This ruling on the ICSID's jurisdiction resulted in the introducing Investment Law No. 230 of 1989, with the right to revert a dispute to the ICSID based on "*optional*" wording. Examples of the language used were disputes "*may be settled*" or parties "*may agree*". This language entailed that the parties' prior consents were prerequisites to filing an arbitration claim. The same language was used in Article 7 of the IGIL. The positive aspect of adopting this language was the signalling, to foreign investors and states, the GOE's willingness to respect its obligations under the ICSID Convention and its BITs.

With the development featured in international arbitration case law, the optional language in itself became a sufficient reference for the host state's unilateral consent to arbitrate. In other words, the only way to avoid the ICSID's jurisdiction over arbitration claims was to make explicit reference to the need to conclude a subsequent consent agreement between Egypt and the investor. The new trend in interpreting the referral to the ICSID in domestic laws was an outcome of the concepts of "*investor reasonable expectations*", "*good faith*" and finally host states' "*duty to avoid ambiguity*". With the witnessed proliferation of concluded BITs, the fact that Egypt's domestic laws granted the right to turn disputes over to the ICSID benefited foreign investors of non-signatory home states since they became eligible to initiate claims against Egypt before the ICSID. Hence, Article 7 of the IGIL was amended[746] to eliminate any reference to international arbitration or to the ICSID Convention. The same wording is used in the IL[747].

In accordance with the wording used in the IL, Egyptian Arbitration Law No. 27 of 1994 (AL)[748] grants investors the right to settle disputes as contractually and independently agreed with the GOE[749]. The amendment eliminating the referral to ICSID and the IL do not limit the foreign investments protection. However, it ensured the advantageous position granted to the foreign investors who are nationals of the BIT signatories or those in contractual investment agreements with the GOE. Therefore, these continuous amendments aimed to abolish Egypt's permanent unilateral consent to revert disputes to the ICSID regardless of the existence of

[746] 4th Article of Law no. 17 of 2015.
[747] Article 90 of the IL.
[748] Law No. 27 of 1994, Arbitration in Civil and Commercial Affairs Law, Official Gazette, Issue 16 (continued), 21 April 1994.
[749] Hashem, Ibrahim and Tawfik Law Office 1998 76

BITs. This precluded foreign investors with no investment contracts and nationals of non-BIT signatories with Egypt from initiating arbitration claims against the latter[750].

Regardless of consent within Egyptian investment laws, the Egypt-US BIT granted investors the right to initiate claims under a binding third-party arbitration system to settle disputes. The Egyptian judicial system validated these international arbitration clauses. In several rulings, the Court of Cassation endorsed the arbitration clauses prevailing in foreign investors' contractual agreements with Egyptian authorities. The recourse to the ICSID and international arbitration was essential to mitigate the damaging effects of the slow Egyptian judiciary, where disputes can last for years.

Most foreign investors engaging in contracts with Egyptian parties are inclined to add a binding arbitration clause to avoid the partial, arbitrary and extremely slow judgments of the Egyptian judiciary[751]. Under the current framework, the settlement of investment disputes involving foreigners in Egypt passes through a process aiming to ensure solving the dispute prior to referring the conflict to the judiciary or arbitration[752]. This was clarified in the IGIL amendment under Law No. 17 of 2015, where three committees were established to review investment contract disputes.

Firstly, the Investment Contract Disputes Ministerial Committee's[753] competence prevails over all investment contract-related disputes to which the GOE or its authorities or companies are a party. The second is the Complaint Committee, which can only receive complaints filed in association with enforcement of the IGIL. The final committee is the Investment Disputes Settlement Committee, whose responsibility is to decide on complaints regarding the implementation of the IGIL. The process was an attempt to reduce arbitration claims filed against the GOE before the ICSID. The three committees exist under the IL[754], with a slight difference in their hierarchy and names. Additionally, it establishes an Egyptian Centre for Arbitration and Mediation[755] to settle investment disputes. The centre has jurisdiction over disputes between investors, and between investors and the GOE or its authorities or companies.

750 Salah 2015
751 IBP 2015 119
752 Bureau of Economic and Business Affairs 2015a 12
753 Known under the IL as the "*Ministerial Committee to Resolve Investment Disputes*".
754 Articles 82-91 of the IL.
755 Article 91 of the IL.

The process of enforcing a foreign arbitral award in Egypt is applicable upon meeting a set of conditions. First, the award must be under the umbrella of international agreements to which the GOE is party, such as the New York Convention of 1958 governing the enforcement of arbitral awards, the ICSID Convention of 1965[756] and the Convention on the Settlement of Investment Disputes between States Hosting Arab Investments and Citizens of Other States of 1974. The second way to enforce such awards is complying with the conditions set out in the AL. Under this law, the foreign entity requesting enforcement is bound to file for an exequatur[757]. This filing is procedurally similar to initiating a regular lawsuit. In addition, the Egyptian court must verify the arbitral tribunal's remit in deciding on the dispute. Finally, the investor's home state must respect the reciprocity principle[758].

The investment laws are a clear example of attempts to align with international investment law obligations as prescribed under the BITs. Both the mandatory and optional language in granting the right to settle disputes succeeded in qualifying Egyptian investment laws as unilateral consent. The IL[759] highlights the GOE's success in complying with its international obligations, specifically regarding dispute settlement and referral of claims to international arbitration[760]. The Egyptian legislator continuously intervened to amend the article dealing with Egypt's unilateral consent, intending to limit the dispute settlement methods to those agreed contractually with investors or under the AL.

On a practical level, the amendments did not influence the ability of foreign investors from BIT-signatories to initiate claims against the GOE. The reasoning is connected to the GOE's BIT network of 72 signatories. Most of the investment flows into Egypt arise from BIT partners, with BITs already allowing their investors the right to access arbitration in the event of disputes[761]. The various mechanisms of dispute settlement offered under Egypt's legal framework boosts the certainty of foreign investors regarding the expected treatment accorded by the GOE. The guarantee of third-party dispute settlement lowers the risk of investing in Egypt can be likely reflected in increased FDI.

756 Law No. 90 of 1971, Approving Egypt's Membership in ICSID Law, Official Gazette, Issue 45, 11 November 1971.
757 Articles 56 of Law No. 27 of 1994.
758 IBP 2015 119
759 See footnote 94.
760 Salah 2015
761 IBP 2015 119

(D) Currency transfer, pricing freedom and performance requirements

The fourth and the last subsection within the benchmarking analysis is that covering the right of foreign investors to repatriate their profits, freely price their products and employ foreigners[762]. The right to employ foreigners is the test to determine whether Egypt applies performance requirements in its legal framework.

- Currency transfers

Under the US-Egypt BIT, investors have the right, among others, to freely transfer foreign currency to the home state, hold operational licences, and employ foreigners. Article 5 of the BIT provides investors the full right to transfer any type of foreign currency payments in connection to the different sources of foreign exchange (FX) receipts, whether royalties, dividends, compensations, sale proceeds or contractual instalments[763]. The BIT entitles the investors to freely transfer their funds at the market currency conversion rate.

The IGIL consolidated this international investment law obligation by granting investors the full right to freely transfer their investment proceeds and profits abroad[764]. This applies to individuals as well as to corporate entities. Additionally, the banking law (BL)[765] governing the process of profit transfers and repatriation confirmed the banking system's pledge to ensure the repatriation of foreigners' profits to attract investments[766]. Accordingly, the IGIL was theoretically in line with the international obligation. It explicitly guaranteed foreigners' right to repatriate funds abroad. This allowed the IGIL to pass the benchmarking test in connection to currency transfer rights.

Practically, the political turmoil of 2011 increased capital flight, pressuring Egypt's FX reserves. The CBE introduced a set of caps on the transfers of FX out of Egypt[767]. This was reflected in Egypt's rating with the OECD Arrangement on Officially Supposed Export Credits, which rates the risks of FX convertibility on a scale from zero to seven, with seven being the riskiest. Egypt kept its risk level at four at length. The January uprising lowered the country's rating to level five by

762 See II.F.5.
763 Congress 11/3/1986
764 Article 10 Bis of the IGIL introduced by Law No. 17 of 2015.
765 Law No. 88 of 2003, Central Bank, Banking Sector and Monetary System, Official Gazette, Issue 24 (bis), 15 June 2003.
766 Article 111 of Law no. 88 of 2003.
767 Salah, F. & Riad, M. 2016

January 2012, with level six being reached in June 2013[768]. Restrictions on the flows of foreign currency continued 2014–2016. This verified the lack of the practical enforcement of the guaranteed right to repatriate profits. In other words, the right was guaranteed only on paper without actual enforcement.

In November 2016, the CBE floated the EGP against foreign currencies[769]. This helped abolish several FX limitations and eliminated the backlog experienced by foreigners on their FX transfers of profits[770]. This entailed Egypt's increased compliance with its treaty obligations of currency transfers. Hence, in accordance with the Egypt-US BIT, the investment and banking laws theoretically provide the same rights for foreign investors. On the other hand, the current practice of the CBE puts actual practise in line with the IGIL and BITs.

The introduction of the IL preserves the IGIL[771] guarantee since an investor may incorporate, establish, expand and fund an investment from abroad in foreign currency and without restrictions. Additionally, an investor is eligible to own, manage, use and alienate profits from an investment project and transfer them abroad and finally liquidate the project and partially or fully transfer the proceeds abroad[772]. In the IL, Egypt allows the swift transfer of all foreign currency connected to foreign investment. Finally, foreigners employed in the investment projects are guaranteed the full right to transfer their earnings abroad and in foreign currency[773].

As mentioned above, the IL seems to be in line with Egypt's obligations to ensure the rights of foreign investors to transfer their funds abroad and in a convertible currency. From the legal rules development perspective, such entitlement rationalises the prices of the production factors since the movement of capital is theoretically easier under the amended IGIL and the IL. Concerning cutting transaction costs, the foreign investor may easily transfer his funds in and out of Egypt without framing complex business structures to facilitate the flow of funds. This entitlement will possibly have a positive effect on FDI inflows to Egypt, taking into account the actual sufficiency of the FX reserves in the CBE.

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768 IBP 2015 118

769 Kholaif 2016

770 On 14 June 2017, the CBE moved another step towards the full application of the free FX market: it removed the USD100,000 (or equivalent) cap on the annual FX transfers for Egyptian individuals and companies (without an underlying commercial transaction).
Bicciato, R. & Elfar, M. 2017

771 See footnote 107.

772 Art. 6(1) of the IL.

773 Art. 8 of the IL.

– Freedom of pricing

The second right considered in this subsection is the one connected to investors' right to freely price their products. The IGIL prohibited administrative bodies from intervening on the pricing of companies and entities[774]. This obvious prohibition does not extend to the judicial right of intervening with the private sector's pricing policies. Another side is the broad definition of the notion of "*products*" to embrace both goods and services, and not only goods. Consequently, the legislator guaranteed absolute immunity for the private sector to set its pricing policy based on market forces. This guarantee preserved its importance in folding any GOE intervention with pricings unlike the 1960s and 1970s when the price controls restricted the interaction of the market forces.

The IL does not make explicit reference to the right of investments to price their products. However, the IL prohibits administrative authorities from: *(i)* issuing regulatory decrees, and *(ii)* imposing fees, increasing the financial and procedural burdens of incorporating or operating an investment project unless the regulations were primarily approved by the Supreme Council of Investment and the Cabinet of Ministers[775]. This guarantee is of the same essence as the full right of investors to price their products under the IGIL. With this guarantee, a foreign investor is protected from any administrative decrees setting the prices for the sold products since it would qualify as a regulatory decree that burdens the investment's operations. Accordingly, this guarantee lowers the risks of investing in Egypt and makes it more appealing for foreign investors.

– Performance requirements

The limitations on foreign investments in Egypt under the IGIL can be grouped into two subheadings. First, the operational restrictions applicable based on the eligibility and conditionality of hiring foreign employees. In this regard and in accordance to the Companies Law[776]: *(i)* the number of foreigners employed may not exceed a maximum of 10 per cent of a company's total employees, and *(ii)* their salaries may not exceed 20 per cent of total salaries paid by the company. The IL entitles an investment to hire foreign employees representing no more than 10 per cent of total employees in an investment project[777]. This number may be increased to no more than 20 per cent of total employees, if it is not possible to use Egyptian labour

[774] Article 10 of the IGIL.
[775] Art. 4(4) of the IL.
[776] Article 174 of the Companies Law.
[777] Art. 8 of the IL.

with the necessary qualifications. This remains another disadvantaged position for foreign investors who face this quota or limitation on hiring the necessary calibres. This implies an increase in the prices of the factors of production, which may be reflected negatively on the FDI inflows to Egypt.

The second category of investment restrictions is connected to licence issuance. The GOE may suspend the issuance of operational licences. Hence, no new entrants are allowed to access the market unless they acquire an operating incumbent entity (*i.e.*, brown field investments). This suspension is currently experienced in the banking sector. Another licencing-related restriction is evident in existing monopolies. The SOE Telecom Egypt and Egypt Air monopolies over fixed lines and international airline services are pure examples of the FDI restrictions[778]. However, the IL intends to protect the licensee by prohibiting the administrative authorities from: *(i)* revoking or suspending the licences issued, and *(ii)* claiming back the lands allocated to the investment projects unless the investor was: *(a)* warned of the committed violations, *(b)* clarifies his viewpoint and *(c)* is granted time to remedy the situation[779]. This guarantee lowers foreign investors' risks of investing in Egypt, which may be reflected positively on FDI inflows to the economy.

The licence issuance restrictions depend on the Egyptian authorities' policies regarding business operations within the restricted sectors. In the case of the banking sector, the CBE – vested with the powers to supervise and regulate the financial sector – has the full right to issue operation licences for new banks'. Concerning the monopolised public services markets, foreign entities are excluded on a practical basis. Although the GOE is taking several steps to liberalise markets such as electricity, these steps are still in the early phase. Other sectors are still far from liberalisation and the monopolising entities are protected by the GOE regardless of their efficiency. Such protection could be triggered by the dependence on the generated state revenues resulting in the lack of the GOE's interests to liberalise the market.

IV.A.4 Trade, privatization and openness to the private sector

The aim of discussing this section is to highlight the additional legislative efforts to deregulate the Egyptian economy. This section addresses the trade aspect as well as the GOE's political changes, demonstrating its liberalisation stance. The start will be with the trade openness pillar. Then, the analysis examines changes in the political

[778] OECD 2007 32-3
[779] Art. 5 of the IL.

structure and how they catalysed the privatisation program and the shift towards deregulation and the private sector. Finally, a brief overview is provided of Egypt's privatisation program and the conclusions derived by the European Bank for Reconstruction and Development (EBRD) mission regarding the compliance of Egypt's legislation with international standards.

(A) Trade

On the trade openness pillar, Egypt concluded a set of FTAs, allowing it access to the global markets. These agreements include the Common Market for Eastern and Southern Africa (COMESA) and the EU Association Agreement in force since 2004. Other FTAs were concluded with Turkey in 2007 and Mercosur in 2013. Egypt does not have a FTA agreement with the United States. Moreover, Egypt engaged with Israel and the US in the QIZ Agreement to allow Egyptian products imported to the US to enter customs-free if at least 10.5 per cent of the value of the product is of Israeli content[780]. Of all the above FTAs, the QIZ maintains a specific nature in this analysis since it simplifies comparison with the situation in Jordan, which is both a case study in this research and engaged in a QIZ agreement with Israel and the US.

The QIZ agreement originated initially to promote business ties and cooperation between former hostile states. It was an attempt to spread a peaceful economic development. Although, the GOE concluded the Camp David Peace Treaty in 1979, economic relations with Israel never normalised. The QIZ was subject to continuous critiques from the Egyptian public generally and businesspersons specifically. Egyptian opposition parliamentarians criticised the agreement as another opportunity by the then-ruling regime to normalise ties with Israel against the public's will[781]. Other members blamed the GOE for engaging in the agreement in the dark without obtaining prior parliamentary approval[782]. In this sense, the reduction of the Israeli content per centage requirement was expected to mitigate the mounting opposition.

780 Bureau of Economic and Business Affairs 2015a 14
781 Press-Barnathan 2014 44
782 Shama 2013 191

(B) Market oriented policies

On the political side, the reform attempts in the early 2000s were not limited to a set of legislative changes. The GOE that was appointed in July 2004[783] and its shuffle after the general elections of November 2005 raised the number of ministers with experience in business to six. Prominently ministers of tourism, transportation, industry and social solidarity have been operating in the private sector at different levels. The personnel appointed in policy-designing positions were shuffled to fit with the new forecasted direction of the economy. The ministerial shuffle of 2004 was significant in highlighting the regime's enthusiasm for market reform.

Examples of ministers include Unilever's regional president (for Africa, Turkey and the Middle East) appointed as Minister of Industry and Foreign Trade, the founder of the Nile Cotton Trade Company (leader of Egyptian market cotton exporters) as Minister of Agriculture, and Zoheir Garana, the managing director of Garana Travel Company (widely involved in hotel and tourism industries) as the Minister of Tourism. On a parliamentary level, the same trend prevailed where businesspersons secured their seats in the legislative chamber. Of them was Ahmed Ezz, the CEO of Ezz Steel, the dominant steel company holding 70 per cent of the market share[784]. The conflict of interest was aggravated by his leading the Budgeting and Planning Committee in the Egyptian parliament. According to the Al-Ahram Center for Political and Strategic Studies, the number of parliamentarians who were businesspersons more than doubled from 31 in 1995 to 68 in the 2005 elections[785].

These appointments were considered in line with the new economic orientation of the regime in favour of accelerated liberalisation. Principally appointed to catalyse the pace of orienting the economy towards market-based policies. The public accused the GOE of its adherence to the IMF and World Bank instructions to globalise and liberalise the economy. The GOE of 2004 began executing the third generation of the investment reforms. This generation of openness evidenced the promulgation of a set of investment-related legislation including consumer protection, competition, e-signatures, customs, telecommunication, intellectual property and a unified new income tax law. The tax changes emphasised widening the tax base and

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783 IBP 2015 116

784 Joya 2011 377. As a consequence of the speedy, unregulated liberalisation, new elites and monopolies were created by benefiting from their political stances and links with the ruling regime. A clear example was Ahmed Ezz, the CEO of Ezz Steel, dominating two-thirds of the steel market, while being the head of the Budgeting and Planning Committee in parliament.

785 Alissa 2007 9-10

expanding the tax revenues to adjust the budgetary deficits. Therefore, the tax legal reforms were accompanied by structural reforms in the management of the tax authority by the creation of a large taxpayers' unit covering the biggest 2,000 taxpayers[786].

(C) EBRD and privatization

To evaluate the Egyptian legal framework from a commercial point of view, the EBRD assessed the pace of liberalising the Egyptian legislation. The pillars examined include laws connected to insolvency, corporate governance and judicial capacity[787]. The insolvency law proved cumbersome and unfriendly to investors. The judicial capacity suffered from its inefficiency and complex system of judicial rulings and enforcement of contracts. Attempts to reform were translated into the Economic Courts Law No. 120 of 2008[788]. Conversely, the judges responsible for enforcing the laws lacked the required knowledge and training to decide on the reviewed disputes. This amplified investors' interest in adding arbitration clauses to their contracts, resulting in an increase of arbitration claims filed against Egypt[789].

Accusations of the GOE's liberal stance were supported by the stimulated pace of privatisation between 2004 and 2006 (as briefed below), when the GOE alienated the public entities and the unexploited lands. The GOE executed the privatisation plan using five methods. These included: *(i)* initial public offerings (IPOs) for minority or majority shares, *(ii)* direct alienation to strategic investors, *(iii)* liquidation, and *(iv)* the disposal or leasing of unutilised assets. The method most largely employed was IPOs. The GOE approached strategic investors to ensure their acquisition of large shares; therefore, the GOE was essentially substituting its leading position with a private sector investor[790]. This was a significant example of the GOE's interest in withdrawing from economic activity and opening up to the private sector.

From the three components of section IV.A.4, the trade openness pillar, the change in political elite together with the privatisation and the EBRD mission, all these elements reflect the Egyptian economy's experience of intense legislative changes during the 2000s. The unified title for all of these changes is justified based on the

786 Zahid 2008 6
787 General Counsel Office 2012 4-5
788 Law No. 120 of 2008, Economic Courts Law, Official Gazette, Issue 21 (continued), 22 May 2008.
789 General Counsel Office 2012 4-5
790 United Nations Publications 2001 35

interest in recording the process of deregulating, liberalising the Egyptian economy and exiting the former restrictive, highly regulated protectionist economy of the 1950s–1970s. These changes should be analysed in conjunction with the IGIL, the IL and their prescribed incentives and guarantees. They all serve the same interest of deregulating and opening the economy to the private sector and foreign investors.

IV.A.5 Conclusion

The conclusions from the overview of the Egyptian legal framework can be placed into three categories. The first regards the IGIL's level of compliance with international investment law obligations. The second tackles the shift in the Egyptian legal framework from being a restricted regulated economy to a more open and liberal one. This moves the discussion to the third category connected to the concept of economic freedom (this is investigated further as part of chapter VI).

Under the first category, and from the second section assigned principally for the benchmarking analysis, the guarantees provided resemble a commitment by the GOE to create a legal and investment climate standardised with the international framework. This commitment of treatment is a signal that the Egyptian economy is less regulated and more open than before. In addition to that, it reflects the GOE's assurance to foreign investors to provide this standardised credible minimum standard of treatment. Finally, in the third section, the trade agreements pillar, besides the new private sector backed GOE were additional proofs of the Egypt's obvious shift towards the private sector.

From the benchmarking analysis, the Egyptian IGIL and IL prove compliant with the international obligations in several instances as detailed above. Examples of such levels of compliance are evident in connection to national treatment through abolishing the 49 per cent maximum foreign shareholding capital. Another example is the simplification of foreigners' ownership as long as it is connected to undertaking business activity. On the other hand, the violations of the national treatment principle are witnessed in the exclusivity of Egyptian nationals over foreigners to undertake importation activities for trading purposes. Another traced violation is the one connected to the foreigners' right to own agricultural lands in the Nile Valley and the Delta.

For the compliance with the guarantee against expropriation, the Egyptian IGIL and IL theoretically are in conformity with the international investment law obligations. The IGIL and IL refer to expropriation in the broad sense encompassing direct and indirect expropriation. State interventions against investments are prohibited explicitly in the Law. The IGIL and the IL stay silent regarding the State's right to requisite private property to serve public interest and in return for a prior paid fair compensation. The State's requisition right preserves its superiority by being a constitutional right under Article 35 of the Constitution. The constitutional right is exercised by Law No. 10 of 1990 providing a due process framework for determining a "*public interest*", compensations due and means of appealing the relevant administrative decrees.

For the dispute settlement, the analysis provided an overview of the development of the guarantees under the Egyptian Investment Laws. All of these developments confirm the same understanding that Egypt is complying with its international obligations in allowing the referral of disputes to third parties for dispute settlement. A clear evidence of the investors' eligibility to practise such right appears in the high number of cases filed against Egypt in ICSID as will be further detailed in the following chapter associated with Egypt's adjudication. This guarantee allows Egypt's legal rules to reduce the risks borne by an investor in case decided to direct his investments to Egypt.

On the compliance with the currency transfer, pricing freedom and the employment of foreigners, the Egyptian IGIL and IL partially comply with the international obligations. On the currency transfer side, the conformity appeared theoretical after the practical experience provided for the lack of actual repatriation of profits due to backlogs or even caps on international transfers. For the pricing freedom, it falls within the indirect expropriation scope as introduced above. Finally, the last notion under this conclusion paragraph is connected to the foreigners' employment as an indicator for performance requirements. The IGIL and IL limit the right of employing foreigners. This represents an advantageous position for nationals over foreigners. Moreover, it restricts investors from hiring the needed calibres, besides conflicting with the international investment law principle of limiting performance requirements. This restriction increases the cost of labour and the factor prices in general.

The second category dealing with the shift in Egypt's legal framework from being restricting to more open and liberalized, the evidences are located in the three sections of the analysis. For example, the constitutional analysis highlighted the increase in using the words "*private*" and "*investment*", accompanied with a reduced usage of the word "*socialist*" between the Constitutions of 1971 and 2014. Another important example was provided in the sub-section related to the fiscal incentives. These incentives are an obvious example of liberalizing and deregulating the economy through relieving investors from paying taxes or even filing tax returns in some instances. Finally, the unification of the incorporation processes is another proof of reducing transaction costs through cutting legal difficulties for new investments. These were all evidences from different sections consolidating the shift towards less regulation and more interaction of market forces. Besides that, it signals the invitation to the private sector to participate in the liberalized economy, aiming to fill the gap from the GOE's retreat.

This moves the discussion to the last conclusion, briefly highlighted in this chapter. The last conclusion is introduced here before tackling it with more details in chapter VI. The above evidence of compliance with international obligations, the shift from a regulated to a deregulated economy, the privatization and trade openness are all explanatory changes with the variable known as economic freedom. The notion of economic freedom is the base used for the economic analysis upon the other macroeconomic variables. The above legal changes and examples will help the reader to grasp the legal meaning of the economic freedom when it is discussed in a more economic sense in the final chapter specifically dealing with the possible impact of the legal rules on the net FDI inflows to an economy.

IV.B Jordan: Legal Framework

IV.B.1 Introduction

The Jordanian Investment Promotion Law No. 16 of 1995[791] (IPL) and the Law No. 30 of 2014[792] (Inv. Law) will be the base for the benchmarking analysis. Protections provided in the law are compared against the protections Jordan is under obligation to guarantee for foreign investors under international investment law and BITs.

Jordan's legal framework chapter is divided into three subheadings covering: the overview of the Jordanian legal framework, international investment obligations from a Jordanian legal perspective, and openness to the private sector through privatisation or trade liberalisation.

IV.B.2 An overview of the legal framework

Analysing the investment legal framework in Jordan requires starting from the top of the legal framework before funnelling the research to a narrower context, concentrating on more detailed issues. The section first identifies the constitutional articles that refer to and prescribe investments and private ownership, by examining the only Jordanian Constitution promulgated in 1952 with the establishment of the new state. Secondly, the structure and main components of the IPL and the Inv. Law are examined. Lastly, the tax incentives offered under the IPL and the Inv. Law are highlighted, to show the country's deregulation and openness to the private sector and foreign investors.

(A) Investments in the constitution

The Jordanian Constitution instituted a constitutional monarchy. Incorporated upon the civil and criminal codes, Jordan's legislations was inspired by several legal backgrounds. Within Jordanian laws are references to French codes instituted under Ottoman rule, as well as British laws adopted during the 20th century mandate period. More importantly, Sharia Law has played a role in influencing the western originating codes, contextualising them within the state's culture[793].

The review of Jordan's Constitution of 1952 - and its amendment of 2011[794] - assists in formulating a general understanding of the legal orientation concerning an individual's right to own private property and the state's right to regulate the private sector. In the Constitution of 1952, the word "*private*" could not be found in the context of ownership. In other words, individuals' and corporate entities' right to private ownership was not explicitly provided by the constitution. The same applies to the word "*investment*". However, the constitution was unique compared to its regional counterparts in adopting, to a certain extent, the Hull Rule. In this period, most developing economies gaining independence were engaged in nationalisations as a mean to promote sovereignty and national identity. The different stance in Jordan justified the west's welcoming of Jordan's position by the opening door for continuous flows of assistance and aid, especially from the US, since the 1950s.

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793 General Counsel Office 2013b 2

794 The amendment of Jordan's Constitution of 1952 in 2011 did not change Article 11 dealing with expropriation of private property.

With only one reference to ownership, the constitution prohibited expropriation unless upon three conditions[795]. First, expropriation must serve the public interest or be necessary for public utility purposes. Second, the injured party is entitled to just compensation based on the law governing compensation for expropriation. Article 12 of the Constitution expressed the drafters' interest in protecting private ownership rights by explicitly prohibiting unlawful confiscation of movable and immovable property. The understanding of the constitution promoted broadening the scope and the definition of investment to embrace movable and immovable property as well as loans[796].

The Constitution of 1952 requiring compensation for the state's unlawful intervention in the ownership of private property 1952 remains remarkable. This reference highlights the orientation of the ruling elite during the state's institution phase. What arises is a sensation of the drafters' interest in promoting the private sector by protecting private ownership of property. Moreover, granting exceptional protection under the new Hull Rule (when compared to other developing states) reflects the level of the ruling elite's modernity and view towards the importance of protecting private ownership. With the nationalisation policy spreading in neighbouring countries, the inclusion of the three conditions of the Hull Rule within Jordan's the Constitution of 1952 is an advanced leap in the field of treating foreign investments.

(B) Jordanian Investment Laws

The openness of the GOJ to private property was not in conjunction with the plans of attracting foreign investors. As explained in the historical chapter, the GOJ widened its role throughout the 1960s and 1980s and depended on foreign governmental assistance until the region's geopolitics forced the country to liberalise its economy. From the constitutional analysis, it appears that the constitution of 1952 was private sector-oriented and this was evident in investment legislation only by the 1990s. This section of the analysis addresses the openness and liberalisation of Jordanian legislation, which was adopted to signal the GOJ's willingness to comply with its international obligations. The analysis is split into two subsections with the first addressing the IPL and its subsequent amendments through Law No. 68 of 2003 and the second focussing on the latest Inv. Law.

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795 Article 11 of the Constitution of 1952.
796 Article 12 of the Constitution of 1952.

- <u>The IPL and amendment of Law No. 68 of 2003</u>

The history of Jordanian investment laws dates back to even before Law No. 27 of 1992. This law was the first Jordanian domestic legislation governing both domestic and foreign investments[797] and it provided investors with a limited set of guarantees that inspired subsequent investment legislation. The law set a maximum non-Jordanian ownership of any commercial, construction or transportation project at 49 per cent. Furthermore, it granted Arab investors the privileged treatment equal to that offered to Jordanian nationals, removing the requirement of the Cabinet of Ministers (Cabinet) prior approval, as non-Arab investors were required to obtain prior approval from the Cabinet to undertake an investment project in Jordan[798]. Taking into account the levels of bureaucracy, the law was not successful in attracting the necessary flows of investments[799].

The worked continuously in the 1990s to promote investment and revolutionise Jordan's framework to put it at the top of the MENA region legal reformers. The GOJ's inefficiencies associated with bureaucracy remained the primary problem for businesses. An obvious example was the ease of obtaining operational licences to start business activities. The Jordanian Investment Board (JIB) was criticised for its inefficient one-stop shop vested with partial authority to grant all necessary licences. Other prominent deficiencies included the increasing number of authorities' that investors are forced to interact with and the minimal budget assigned for investment promotion purposes[800].

The GOJ drafted the IPL in 1994 and issued it in 1995. The IPL had two cornerstones, the first of which was reducing bureaucracy by abolishing the formerly required Cabinet approval for all foreign investments. It also opened the door for the full foreign ownership in certain fields of investments (*e.g.*, tourism) only if the capital contribution of the foreign shareholder was transferred into Jordanian bank accounts in foreign convertible currency. The second element was widening investment incentives with primary focus on tax holidays and tax rate reductions. On a corporate level, tax rates were cut to 30 per cent rather than 50 per cent in the insurance and banking sectors, and in the mining and tourism industries were reduced to 15 per cent from 40. A follow-up regulation was enacted to govern non-Jordanian investments. The implementing regulation allowed foreigners to access

797 Article 5 of Law No. 27 of 1992.
798 Article 3 of Law No. 27 of 1992.
799 Knowles 2005 182
800 Rey M. 2013 77

the tourism industry by floating on the Amman Stock Exchange[801]. In other economic sectors, such as trade, transportation, telecommunications and construction, the 49 per cent foreign ownership limit remained in place. The same regulation set a minimum for foreign investor capital in any projects at JOD 100,000[802].

The IPL paved the way for investment laws adopting similar understandings until the latest Inv. Law. The IPL was principally focused on the establishment of an investment-friendly climate through explicitly prescribing incentives for qualified investors. The IPL published in October 1995 divided Jordan into three regions based on each level of development. Investment in the least-developed regions guaranteed investors the most incentives, and vice versa[803]. The IPL defined foreign capital broadly through integrating cash transfers, importation of assets, intangibles and capital increases funded by reinvestment of profits[804].

The private sector pressured to abolish the 50 per cent foreign investment ceiling for commercial services, mining and construction. The Higher Council for Investments adopted this recommendation. The GOJ acknowledged this pressure and intended to eliminate all foreign ownership restrictions. However, the new implementing regulation's[805] final outcome liberalised all the economic sectors except for the three recommended by the Higher Council for Investments. Furthermore, the regulation reduced the non-Jordanian minimum capital requirement for an investment to JOD 50,000. The Higher Council for Investments preserved its stance and recommended abolishing the 50 per cent ceiling, but no changes were implemented[806].

The following legislative step was the issuance of Investment Law No. 68 of 2003[807]. It included articles similar to those provided in the IPL[808]. The similar guarantees include the right to repatriate profits and revenues[809] and freedom of labour management. A development in comparison to the IPL was the composition of a committee authorised to review investors' applications for incentives and other requests to obtain operational licences. On the other hand, the law eliminated articles

801 Regulation No. 1 of 1996.
802 Knowles 2005 182
803 Kanaan, T. and Kardosh, M. 2005 15
804 Article 5 of the IPL.
805 Regulation No. 39 of 1997 to promote the investments of non-Jordanians. It amended the preceding Regulation No. 1 of 1996.
806 Knowles 2005 182-3
807 Law No. 68 of 2003, Temporary Investment Law, Official Gazette, Issue 4606, 16 June 2003.
808 Rey M. 2013 56
809 Article 30 of the IPL.

addressing the dispute settlement regime. Reference was only made to Arab and international agreements related to the matter.

The guarantees under Law No. 68 of 2003 first include explicit ones on the right of non-Jordanians to invest in Jordan through ownership, participation or partnership depending on specific factors and minimum capital requirements[810]. The sectors and capital requirements were determined through subsequent regulations. The sectors not specifically regulated in the previously mentioned regulation were open to foreign investors on equal basis with the Jordanian counterparts. Second, the law prohibited the expropriation of investments unless for public interest purposes and in return for fair compensation in convertible currency[811]. Third, the law guaranteed investors' right to repatriate profits and proceeds abroad in convertible currency[812]. The same rights were guaranteed to employees regarding their salaries and wages[813].

The law recognised all Arab and international agreements in relation to investment dispute settlement[814]. It also prohibited banning the entry of any entities due to the absence of necessary licences unless it justified based on public policy, national healthcare, security, education, environmental concerns or the national economy's interest[815]. Moreover, the law obliged the administrative authority to respond within seven days to applicants' licence requests[816]. The administrative rejection had to be reasoned and applicants could challenge the decision within sixty days.

The OECD mission reviewing Jordan's investment framework criticised the framework's lack of clarity, with consequent uncertainty for investors. The investment framework was governed by three pieces of legislation. The first prescribed the tax incentives under the IPL. Second, Law No. 68 of 2003 amended the IPL and prescribed the procedures to obtain the operational licences. Third, Regulation No. 54 of 2000 set the maximum foreign ownership in Jordanian investments. The 2003 laws were promulgated, initially, only temporarily. However, the authorities enforced them until issuing the Inv. Law. The continuous amendments and overlap of legislation created several loopholes and raised uncertainty. The prevalent ambiguity encouraged Jordan's policymakers to issue unified investment legislation integrating

[810] Article 12 of the Law No. 68 of 2003.
[811] Article 25 of the IPL and Article 13 of Law No. 68 of 2003.
[812] Article 18 of Law No. 68 of 2003.
[813] Article 19 of Law No. 68 of 2003.
[814] Article 20 of Law No. 68 of 2003.
[815] Article 21, 23 and 24 of Law No. 68 of 2003 (further elaboration in trade, privatization and openness to the private sector).
[816] Article 22 of Law No. 68 of 2003.

all the investment-related authorities into one new institution, known as the Higher Investment Council. The founded institution included primarily the JIB and the Free Zones Development Commission[817].

- The Inv. Law

For the same reasoning of boosting investment inflows and dealing with the deficiencies witnessed in the governing investment legislation, the GOJ introduced the Inv. Law. It was promulgated with the same mind-set of openness to the private sector and granting tax incentives. The Inv. Law remains further evidence of the continuous focus of favouring the private sector through opening more investment fields to foreign investors. Similar understandings of tax incentives appear in the Inv. Law. These are confirmation of the GOJ's priority in deregulation.

The essence of the Inv. Law is granting investors a wide range of incentives to stimulate their interest to invest. The Law defines the "*foreign capital*"[818] in line with the broad definition provided in the IPL[819]. It addresses the forms of foreign investment in Jordan as owners, partners or shareholders[820]. Moreover, it identifies the willingness to introduce a new subsequent regulation to govern the maximum per centages of foreign ownership in Jordanian entities. More importantly, it reflects Jordan's respect of the NT[821].

Chapter 6 of the Inv. Law embraces most of the international investment law obligations. It starts with preserving investors' right to swiftly repatriate any amount of profits, returns or liquidation proceeds abroad[822]. The same right of repatriation applies to employees' salaries and wages. The law prohibited actions by the GOJ that constituted indirect expropriation. These actions constitute a compensation right for injured investors[823]. The Inv. Law guides foreign investors with the process of approaching their investor-state disputes. The first period lasts for less than six months, where both parties pursue settlements amicably. Afterwards, investors are entitled to proceed with the dispute in international arbitration, through Jordan's domestic arbitration law, or even Jordanian courts[824]. On the administrative side, the Inv. Law established the Jordanian Investment Commission (JIC) as the sole com-

817 Rey M. 2013 53
818 Article 41(a) of the Inv. Law.
819 Article 41(a) of the Inv. Law uses a definition to that provided in Article 5 of the IPL.
820 Article 10 of the Inv. Law.
821 Article 10(b) of the Inv. Law.
822 Article 41(b) of the Inv. Law.
823 Article 42 of the Inv. Law.
824 Article 43 of the Inv. Law.

petent authority to supervise and govern investments. The Higher Investment Council after the Cabinet approval sets the guidelines upon which the JIC has to act. The JIC's primary objective is enhancing the investment's climate administratively.

Returning to the start of the Inv. Law, the first two chapters focus on the investment incentives in and outside development zones. The third chapter addresses the investment window regime and licencing regimes as elaborated on below. Chapters four and five are the administrative umbrellas for the JIB and the Commission determining their goals of interacting independently to avoid overlaps resulting in ambiguities. The JIB is a higher authority and is responsible for consulting the GOJ regarding legislatively enhancing the investment climate[825]. The GOJ representation is undeniable within the composition of the JIB. The second body is the JIC, targeting the attraction of foreign and Jordanian investors. The JIC can issue the necessary regulations in development zones. Other capacities include the marketing of investment opportunities in Jordan through establishing representative offices and participating in exhibitions.

Before moving the discussion to the investment incentives, from the above analysis of the three investment laws of 1995, 2003 and 2014, an obvious conclusion can be drawn. The legal development reflects the continuous efforts of the GOJ to liberalise its regulatory framework, allowing wider access of foreign investors to economic activities. With all critics to the investment legislations, it is possible to conclude that the policymakers' ultimate interest remains the attraction of foreign investors at whatever cost. The benefit from such developments in investment legislation is recognising the concessions the policymakers are willing to offer over time to achieve their objective.

(C) Investment laws incentives

This subsection highlights deregulation efforts in the field of taxation by examining tax holidays and exemptions under both laws. A tax holiday or exemption remains an obvious example of de-regulation, as it lowers the legal burden on an investor in terms of taxes due, and at times exempts the taxpayer from filing a tax return.

The first subsection below addresses the IPL tax incentives, while the second is focuses on the investment incentives granted under the Inv. Law.

[825] Article 19 of the Inv. Law

- IPL

Under the IPL, Jordan was split into three development zones and the associated investment incentives were granted according to the designated zone. Zone C projects were subject to the widest range of incentives since implemented in the least developed part of the country, when compared to zone A, which received the lowest benefits due to its initial higher development rates. The second categorisation for incentives was the nature of business or activity. Transportation investments such as railway and maritime, besides agriculture are all deemed Zone C projects regardless of their location. On the other hand, tourism-related investment through the Dead Sea's coast were treated as zone A projects[826].

The incentives under the IPL included custom duties, municipalities and localities fees. As an example, spare parts imported under an investment project within the first ten years from the start of production were exempted from social taxes and custom duties if they were worth 15 per cent or less of the total fixed assets of the investment. For industrial zones, investments were subject to a two-year full exemption from property, social services and income taxes. Other exemptions were granted for projects located in the three Jordanian development zones after receiving the necessary approval of the competent administrative authority[827]. Under Article 7, paragraph (a), income tax exemptions lasted for ten years and their rates depended upon the investment's location. Thus, investments in development zone A benefited from a 25 per cent exemption. The rate increased to 50 per cent for zone B investments and 75 per cent for zone C. An additional year of exemption applied if investors successfully raised their investment production capacity by no less than 25 per cent. More importantly, the IPL did not discriminate between domestic and foreign investors. In other words, exemptions and holidays were available to all investors regardless of nationality or citizenship.

Investment Law No. 68 of 2003 abolished several clauses of the IPL without changing the investment exemptions and incentives. The law had transparently addressed the necessary procedures to enjoy the provided incentives. The Investment Incentives Committee was vested with powers to review incentive application requests and decide on their validity within 30 days. Rejections were justified and investors were entitled to challenge such rejections[828]. However, the Income Tax Law of 2009

[826] Bureau of Economic and Business Affairs 2015b 9
[827] Starchild 2000 16
[828] Rey M. 2013 106

terminated all applicable tax exemptions except, for example, in the Aqaba Special Economic Zone.

- Inv. Law

The new Inv. Law of Jordan maintains the same stance in exempting newly established investments from various applicable taxes. Additionally, the law preserved an overlap between different investment zones regimes, with Article 8 prescribing the Cabinet competent to offer additional exemptions and holidays to whatever economic activity. With regard to investment incentives, under the law the Cabinet can grant a set of incentives to investments based on the Higher Investment Council's prior recommendation.

Incentives include exemption from custom duties and the refund of general taxes borne upon receiving production inputs within 30 days after filing the necessary request to the competent tax department. Other crucial tax incentives are connected to the development and special economic zones. Investing in these zones offers the investor at least a 30 per cent exemption if not more, based on the investment's location. Finally, exporting entities were eligible for an income tax exemption without extending this exemption to fields of phosphate and fertiliser exportation. However, these exemptions were terminated by 2015 based on an agreement with the WTO[829].

The first and second chapters are fully focused on the granted holidays and exemptions under and outside the development and free zones. Of the main incentives, the reduction of income tax rates to 5 per cent for entities established within development zones. Article 12 provided a zero tax for purchases and imports connected to business activity. Under Article 14 and in the event of investments located in free zones, a full income tax exemption applies. The third chapter initiates the one-stop-shop regime. Article 15 founds an investment window to streamline bureaucracy and issue the necessary operational licences.

Further interpretation and clear competencies were stipulated in the subsequently issued Investment Window Regulation No. 32 of 2015[830]. The window system was composed of bureaucrats vested with all powers and authority to facilitate and issue several approvals and licences turning applicants' investments operational. The approvals issued under Article 4 of the Regulation include incorporating and register-

[829] Bureau of Economic and Business Affairs 2015b 10
[830] Regulation No. 32 of 2015, Investment Window Regulation, Official Gazette, Issue 5338, 29 April 2015.

ing entities, construction, employment and all similar miscellaneous permits. The exclusive purpose for initiating this Window was the facilitation of business incorporation and operation. The objective was achieved by gathering all governmental authorities and departments necessary for approving and licencing the business operation in one place. By then, investors can apply for any necessary licences and approvals in a simpler manner[831].

- Other beneficial incentives

Another legislative reform promoting investment was promulgating the Aqaba Special Economic Zone. The law issued in August 2000[832] considered the zone outside the scope of applying customs and general sales tax on imported products. All investments operating under the regime are fully exempt from customs and subject to a mere 5 per cent income tax on net profits, 7 per cent general sales tax instead of the inland rate of 13 per cent, and are exempt from real estate taxes and fees on buildings necessary for operations. The exemptions apply to all investments in the zone with exclusion of insurance and financial institutions that remain subject to the regular Jordanian income tax laws[833]. The zone provides a set of different incentives including a 5 per cent flat income tax and facilitated customs treatment through the Aqaba Port[834].

The three sections above address the tax incentives granted under the Jordanian investment laws to attract investors. The cornerstone of the policy is relieving investors from the obligation of paying taxes or even filing a tax return. Hence, as assumed throughout this research, tax exemptions, holidays or even rate reduction all remain examples of deregulating the economy and moving further towards the private sector. This conclusion is confirmed as the three laws provide similar tax incentives.

IV.B.3 Investment laws principles and international obligations

In this section, the development towards a more liberal economy appears more obvious, especially through benchmarking the IPL's and the Inv. Law's guarantees against the obligations prescribed by BITs. The guarantees were deemed the signal necessary to attract foreign investors to flow into the Jordanian economy. This re-

831 Hanin Abu Ghazaleh 2015
832 Law No. 32 of 2000, Aqaba Special Economic Zone Authority.
833 Kanaan, T. and Kardosh, M. 2005 30
834 Bureau of Economic and Business Affairs 2015b 10

lates to the discussion introduced under the theoretical framework concerning the benefits investigated by the policymakers when deciding on their states' engagement in BITs[835]. The guarantees were deemed as important as the tax incentives in translating Jordan's willingness to accord foreign investors the standardised treatment as required under the international investment law. Prior to starting the benchmarking analysis to assess the level of compliance, the chapter briefly examines Jordan's BITs and introduces the guarantees offered under the IPL and the Inv. Law.

Jordan has 48 BITs in force[836]. The high rate of ratifying BITs in Jordan compared to the region's average (non-ratification of 25–30 per cent of the signed BITs), highlights the GOJ's interest in granting foreign investors the needed protection. The high rate of ratification places Jordan second regionally in terms of ratified BITs after Egypt (one of top ten signatories world-wide). Jordan's BITs have been primarily concluded with MENA region partners, besides 20 OECD members. Another important feature is the engagement in most BITs over the last two decades, where the openness and liberalisation processes intensified. In this sense, the behaviour of the GOJ in concluding BITs conforms to the global trend of a surging number of BITs.

The second cornerstone pillar of increase in BITs was through engaging in FTAs. On the bilateral level, FTAs concluded with the US included a chapter on the promotion of investment[837]. The EU Association Agreement tackled investment promotion once[838], when it urges Jordan to: *(i)* simplify its administrative procedures linked to the investment climate, and *(ii)* maintain its behaviour in framing an investment environment favourable for investors through expanding its BITs and double tax treaty (DTTs) networks[839]. An additional regional investment charter is the Unified Agreement for Investment of Arab Capital in Arab States of 1980 as promoted by the League of Arab States (LAS). The unified agreement provides a protection umbrella for Arab-Arab investments between LAS members[840]. It adopted the classical investment protection understandings, besides setting an institutional framework to decide on disputes. Protections provided under the agreement in-

835 See II.E.1.
836 United Nations Conference on Trade and Development 2017b
837 Government of the US and Government of Jordan 10/24/2000
838 Article 67 of the EU-Jordan Association Agreement, 01 May 2002.
839 European Council and Commission 5/15/2002
840 League of Arab States 11/26/1980

clude the MFN, NT, direct expropriation without reference to the indirect expropriation, freedom of capital transfer and finally the Arab Investment Court[841].

This section intends to benchmark the legal analysis provided above regarding the domestic investment laws in Jordan against the State's international obligations under its BIT network. The base for the analysis will be the BIT substantive protections as introduced in the theoretical framework[842], and the IGIL guarantees will determine the fields of law to be addressed under this section regarding Jordan[843]. In other words, the silence of the Jordanian investment laws regarding the investment's right to freely price its products, will be determined through visiting other Jordanian domestic legislation to ensure compliance with such BIT obligation. Four subsections below cover NT and expropriation, dispute settlement, and foreign ownership of investments, currency transferal rights and employment of foreign employees.

(A) National treatment and foreign ownership

The first notion in the phase of benchmarking Jordan's legislations and the BIT obligations is NT. The notion was introduced in the theoretical framework chapter as one of the substantive protections under the international investment law regime. Jordan pursued continuous attempts to modernise its domestic legislation to: *(i)* standardise the treatment of foreigners, *(ii)* rationalise the costs of the factors of production, and *(iii)* cut transaction costs of doing business in Jordan.

- Ownership of shares

Jordan's legislation features a minimal level of foreign ownership limitations. This minimal level confirms the effect of the former protectionist policies adopted by the government at earlier stages. The foreign ownership restrictions were enacted by Regulation No. 54 of 2000[844], which provided three forms of non-Jordanian participation in private sector investments. The first form permitted foreigners to own a maximum of 50 per cent of investments in Jordan in activities such as trading of goods, importation and distribution, construction, advertising, money exchange and

841 Rey M. 2013 94-7
842 See II.F.
843 See IV.A.3.
844 Regulation No. 54 of 2000, System of Regulating the non-Jordanians Investments pursuant to Article 24 of the IPL, Official Gazette, Issue 4465, 16 November 2000.

engineering services. In total, 13 services and six commercial activities fall within the 50 per cent limitation[845].

The second form of foreign ownership restriction allowed foreigners a maximum of 49 per cent ownership in investments. Two services only fell within this scope, including regular airlines and jet rental services. Finally, the third form of restriction prohibited foreigners from any kind of ownership or participation in investments associated with security services and sports clubs[846]. Therefore, the regulation identified three categories of investments with limitations of 50, 49 or 0 per cent. Activities falling outside these three categories entitled foreigners to own up to 100 per cent of the investments without any restrictions[847].

Openness was still restricted in specified sectors and the minimum capital for foreign owned investments engaging in commercial activities was exceptionally set at JD 50,000[848]. The minimum capital requirement could obviously violate the international investment law principle of NT. Aiming to eliminate any differential treatment, the IPL accorded non-Jordanian investors treatment equal to their Jordanian counterparts[849]. An additional step was the theoretical elimination of any formal screening processes concerning foreign investors interested in sectors governed by the IPL. Practically, the prior implicit approval of the central GOJ remains a cornerstone for foreign investors' success in doing businesses in Jordan[850].

In the Inv. Law. the legislator explicitly treats the foreign investor as a national investor when applying the provisions of that law[851]. However, the Inv. Law still referred to a subsequent regulation governing foreign investors' participation in investments in Jordan[852]. The new regulation[853] maintains the right of non-Jordanians to fully own any investments without any restrictions and without prejudice to any national security, public purpose and national healthcare[854]. It shifts activities and services between the three forms of private sector participation with ownership per centages of 50, 49 or 0 per cent.

845 Article 3 of Regulation No. 54 of 2000.
846 Article 6 of Regulation No. 54 of 2000.
847 Articles 2 and 5 of Regulation No. 54 of 2000.
848 Article 7 of Regulation No. 54 of 2000.
849 Article 24(b) of the IPL.
850 Kanaan, T. and Kardosh, M. 2005 17
851 Article 41(c) of Law No. 30 of 2014.
852 Article 10 of the Inv. law. Regulation No. 77 of 2016 abolished former Regulation No. 54 of 2000.
853 Regulation No. 77 of 2016, System of Regulating the non-Jordanians Investments under Article 10 of Investment Law No. 30 of 2014, Official Gazette, Issue 5402, 16 June 2016.
854 Article 3 of Regulation No. 77 of 2016.

The 50 per cent foreigner ownership restriction includes 11 services and two commercial activities. Conversely, six services are capped at 49 per cent, while there are eight prohibited ownership activities. The regulation entitles non-Jordanian entities, where Jordanians own 50 per cent or more, to own and fully or partially operate investments in Jordan[855]. Finally, it verifies Jordan's obligation to adhere to its concluded BITs[856]. A significant change is abolishing the minimum capital requirements for foreigners. In this sense, foreigners are only restricted from entering certain activities without any additional restrictions.

In examining a set of the BITs the GOJ recently concluded, several observations and conclusions can be drawn regarding the GOJ's behaviour in adopting the NT. First, Jordan adheres to a broad definition of "*investments*" in BITs (as in the domestic law), when entitled to exercise the benefits of the BIT. The definition embraces assets utilised in non-business purposes and portfolio investment. On the side of defining "*investors*", for legal persons, Jordan's nationality is granted based on the place of incorporation, taking into account the necessity of undertaking a real business activity. Another important concept related to the NT application is "*pre-establishment rights*".

Pre-establishment rights appears in Jordan's BITS with Canada[857], the US[858] and Singapore[859]. Under these clauses, investors are granted protections as NT and MFN, as well as the right to claim BIT benefits when they have seriously considered a potential investment and have concretely moved forward towards making the investment. It extends the scope of applying the NT to include investments at the potential phase and not only in the post-establishment one. This is connected to the above list of foreign ownership restrictions on certain activities, which may violate the NT under the pre-establishment rights. The discrepancies in Jordan's BIT wordings of the NT principle raise ambiguities. For example, the Jordan-Russia[860] BIT entitles each contracting state to promulgate domestic legislation that conflicts with the NT. Conversely, the Jordan-Singapore BIT prescribes pre-and post-establishment rights for investors with the inclusion of NT.

The US trade office representatives when engaging in free trade/investment agreements negotiations prioritises transparency and the facilitation of investment and

855 Article 7 of the Regulation No. 77 of 2016.
856 Article 11 of the Regulation No. 77 of 2016.
857 United Nations (UNCTAD) 2009
858 United Nations (UNCTAD) 2000
859 United Nations (UNCTAD) 2004b
860 United Nations (UNCTAD) 2007

trade climates. One of the means to attain these goals is through listing the legislative investment and trade related restrictions applicable to US investors in the FTA's partner. These restrictions are prescribed in the FTAs' annexes attached to it. Revisiting the US-Jordan FTA, the Services Schedule A in Annex 3.1, sets limitations regarding the incorporation of US businesses in Jordan. These restrictions are often in violation of the NT. Examples of restrictions include the setting of a higher minimum capital for entities incorporated in Jordan and owned by foreign investors. This minimum capital was abolished by the Inv. Law.

With the IPL, explicitly treating foreign investors at least in a similar manner[861] to how domestic investors are treated[862], the Inv. Law adopted a set of clauses prevailing under the former IPL. More importantly, the Inv. Law verifies the equal treatment of foreign and domestic investors[863]. Internal efforts of liberalising the Jordanian legal framework have produced two effects. First, in terms of the minimum capital requirement for a foreign investor to invest in Jordan, the requirement of at least JOD 100,000 as per the regulation of 1996, was reduced to JOD 50,000 by the regulation of 2000, and was totally abolished by the regulation of 2016. The reduction and later abolishment of the amount further prove Jordan's liberalisation and opening of its economy to foreign investors.

The second effect is evident in the legislator's becoming more flexible regarding the protected sectors formerly reserved only for domestic investors. This even puts the Jordanian laws more in compliance with the NT though not in full compliance.

- Land ownership

The second concept analysed in this subsection is connected to restrictions on non-Jordanian ownership of real estate. The Foreigners' Ownership of Immovable Property Law[864] differentiates between individuals and corporate entities. For an individual, the law conditions non-Jordanians ownership of lands upon: *(i)* the individual's home state accordance of reciprocal treatment to Jordanians, *(ii)* whether ownership is necessary for the non-Jordanian's activity and projects, and *(iii)* whether the land is within the cities' and villages' specified borders and does not exceed a specific size[865]. For corporate entities, the law allows ownership regardless of the na-

[861] Article 24 of the IPL.
[862] Elkhafif et al. 2012a 101
[863] Article 10(b) of the Inv. Law.
[864] Law No. 47 of 2006, Renting Immovable Property and Selling them to Non-Jordanians and Juridical Persons, Official Gazette, Issue 4785, 1 October 2006.
[865] Article 4 of Law No. 47 of 2006.

tionality of the corporate entity as long as it is necessary to undertake the entity's business activity and upon the receiving the required approvals from the competent minister or the Cabinet itself depending on the size of the land required[866]. Similarly, the law facilitates the leasing of lands to non-Jordanians for periods less than three years (otherwise approval from the Minister of Interior is required)[867].

Under the Economic Boycott Law[868], non-Arab nationals are eligible to acquire, lease and own immovable property in Jordan. The law differentiates between Arab and non-Arab investors. The latter are entitled to own lands in Jordan only if four conditions[869] prevail *(i)* the accordance of reciprocal treatment to Jordanians in the investor's home state, *(ii)* the business utilization of the land within five years' period since ownership or lease, *(iii)* the business activity performed over this property does not threaten national security, and *(iv)* the investor obtains the Cabinet's approval. In case of corporate entities, they are prohibited from investing in the agricultural sector[870].

From the above, it appears that the Immovable Property Law of 2006 adopts a softer and more open stance when compared to the tone of the Economic Boycott Law of 1995. The conditions required under the latter are still applicable upon foreign investors' individuals or corporate entities. The strictness of the Economic Boycott Law clearly appears in the usage of vague notions as threatening "*national security*". This opens a wide door for the GOJ to intervene to favour Jordanian and Arab investments over non-Arab ones. Moreover, prohibiting foreign companies from investing in the agricultural sector under the Economic Boycott Law resembled an obviously favourable treatment for domestic and Arab investors, triggering concerns of NT violations.

The business-friendly tone of the Immovable Property Law of 2006 demonstrates the new orientation of the GOJ adopted in the early 2000s. Apart from the law's specific application to foreign subjects, it simplifies the process of foreigners' land ownership for business purposes upon receiving the required approvals. This lowers the prices of the factors of production necessary for the foreigners' business activity in Jordan and can increase the inflows of FDI into Jordan. In addition, with no limi-

866 Articles 10 and 11 of Law No. 47 of 2006.
867 Article 12 of Law No. 47 of 2006.
868 Law No. 11 of 1995, Economic Boycott and Prohibition of Transacting with Enemies Law, Official Gazette, Issue 4062, 16 August 1995.
869 Article 6 of Law No. 11 of 1995.
870 Article 6(b) of Law No. 11 of 1995.

tations on nationalities, the transaction costs of operating business in Jordan decline, which can have a positive result on the volume of the FDI inflows to Jordan.

- Importation

Another notion subject to under the NT is the right to import. Jordan does not allow importation through foreign entities unless they have the necessary licences to operate an activity in Jordan. Without a licence, a special business structure is needed to import. This includes hiring a direct registered agent as indirect or sub-agents are not legally sufficient[871].

The importation and exportation law (IEL)[872] permits importation of goods with no restrictions other than showing the importer's card[873]. Under Regulation No. 114 of 2004[874] (concerning exportation and importation licences[875]), foreign entities with operational licences to undertake non-commercial operations are allowed to obtain importation cards through which they can import in their own names after registering in the importers' registry[876]. For foreign contractors and companies operating under Jordan's laws the imported goods must be necessary for the implementation of the contracts concluded with the GOJ, which must be approve the quantity and the type of the imported goods.

With having the necessary licenses as a pre-condition to engage in importation activities for nationals and foreigners, Jordan has taken a leap forward regarding the compliance of the foreigners' right to import with the NT principle. In this regard, Jordan's equal treatment for nationals and foreigners eliminates any advantages for local investors over their foreign counterparts since both are required to register in the importers' registry. Regarding the doing of business, with such entitlement of importing the business necessities, Jordan significantly allows foreign investors to lower the transaction costs of their business operations through engaging directly in the importation and not through agents. In addition, the ease of access to business necessities through importation lowers the prices of the factors of production. Hence, both factors can positively affect the volume of FDI inflows to Jordan.

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871 Usa International Business Publications 2008a 112

872 Law No. 21 of 2001, Importation and Exportation Law, Official Gazette, Issue 4494, 01 July 2001.

873 Article 3 of Law No. 21 of 2001.

874 Regulation No. 114 of 2004, System of the Importation and Exportation Licences and IDs, Official Gazette, Issue 4677, 30 September 2004.

875 The Regulation is promulgated in compliance with Article 12 of the Importation and Exportation Law No. 21 of 2001

876 Article 4 of the Regulation No. 114 of 2004.

- Public procurement

With regard to public procurement, Jordan's score has put its legal framework in the region's lowest quarter. The main negativities were the preferential treatment of domestic products, the weak administration of the procurement process and the contractual management. Although the Public Procurement Law advocates free, fair competition, contracts are awarded to offers close to the Cabinet of Ministers' predetermined price preference.

(B) Expropriation

The second concept in the process of benchmarking is that of expropriation. As the preceding one, the notion was introduced in the theoretical framework chapter as one of the substantive protections under the international investment law regime[877].

Jordan's right to expropriate is granted under Article 11 of the constitution. The generic provision conditions expropriation on its serving the public interest, being in return for compensation, and conforming with domestic law. Investment Law No. 68 of 2003 refers to "*expropriation*" as depriving an owner of his possession or adopting any measures resulting in similar experiences[878]. This wording permitted the law to encompass both direct and indirect forms of expropriation, while preserving the above principles of the expropriation being in the public interest, for compensation and in conformance with the law. The compensation was expected to be in a convertible currency, though the law was silent on[879] investors' rights to transfer compensation freely as in the case of proceeds and profits. The Inv. Law. adopts[880] an understanding similar to that of the above-mentioned law in prohibiting the expropriation of any business activity or subjecting it to any procedures that tantamount to expropriation unless the expropriation is deemed a requisition for public purposes and is effected only after fairly compensating the investor in a convertible currency. From the Law of 2003 and the Inv. Law, both had totally forgone other essential referrals to implementing an expropriation without any discrimination, in respect of due process and subjecting it to judicial review.

An important reference to expropriation is found in Law No. 12 of 1987[881] (Requisition Law), which regulates requisitions. It explicitly allowed the GOJ to requisition

[877] See II.F.2.
[878] Article 13 of Law No. 68 of 2003.
[879] Article 18 of Law No. 68 of 2003.
[880] Article 42 of the Inv. Law.
[881] Law No. 12 of 1987, Requisition Law, Official Gazette, Issue 3468, 01 April 1987.

property in the public interest, in conjunction with the necessity of fairly compensating the owner[882]. In this case, the discussion regarding the similarity between requisitions and expropriation applies, as in the section on Egypt[883]. The Requisition Law details the pre- and post-requisition procedures in terms of notifications and entitlements to the tenants injured by the requisition[884]. The Requisition Law also details the rules of compensation. To begin with, compensation must be determined by the court if both parties (the GOJ and the private owner) fail to agree[885].

The Law lists the components and the criteria guiding the determination of the compensation based on the court's ruling or the parties' agreement[886]. The compensation must fairly cover: *(i)* the utilisation of the property and the potential revenues arising therefrom, and *(ii)* the damages incurred by the owner due to the restricted usage of the property after the establishment of the project. For the criteria to be considered, the value of the neighbouring properties is used[887]. Another important guarantee is the imposition of an annual interest of nine per cent for the delay in communicating the compensation due. The compensation payment's delay starts by the first day after one month from the court's ruling or the parties' agreement[888]. Finally, the owners are entitled to restore their property ownership after requisition, if it is proved in court that the GOJ – within three years from the requisition – did not commence the public interest project upon which the property was requisitioned[889].

The OECD review mission praised the coverage of expropriation in Jordan's domestic laws. Moreover, it recommended the harmonisation of Law No. 68 of 2003 and the Requisition Law by adopting unified and precise definitions and procedures to attain prompt judicial review for requisition decisions. An additional amendment can be introduced by explicitly listing the criteria to deem an expropriation (requisition) lawful. These recommendations were principally proposed to preserve a balance between the state's right to expropriate and the investor's right to protect private property[890].

[882] Article 3 of the Requisition Law.
[883] See IV.A.1(A).
[884] Articles 4 to 9 of the Requisition Law.
[885] Article 22(a) of the Requisition Law.
[886] Article 10 of the Requisition Law.
[887] Article 10 (c) of the Requisition Law.
[888] Article 14 of the Requisition Law.
[889] Article 20 of the Requisition Law.
[890] Rey M. 2013 93

All Jordanian BITs contain expropriation clauses. The model Jordanian BIT is an apparent example of lawful expropriation conditions. The four conditions that legitimise the state's attempt to use its expropriation rights encompass compliance with the domestic investment law, subjecting the action to judicial review promptly and in return for a compensation as detailed under the BIT. The Jordan-Canada BIT in Annex B 13 permits the review of case-by-case decisions to investigate the constitution of an indirect expropriation.

On the BITs side, Jordan's BITs successfully adopted international customary law in the clauses related to expropriation. All treaties cover the two notions of expropriation indirect and direct. The recent Jordan-Canada BIT uniquely defined indirect expropriation providing for the host state's right to regulate in connection to public health and environment. On the compensation side, Jordan approved the concepts of fair market value and full transferability of compensation. The assessment of the market value is based on period during which the expropriation took place. Conversely, the right to judicially review the expropriation decisions domestically is not prescribed in all BITs.

The legal framework governing expropriation lowers the uncertainties of investing in Jordan, which can affect positively the inflows of FDI to Jordan. It moderates the possible risks to be borne by the foreign investor through two means. First, the constitution as well as the investment laws have all prohibited direct and indirect expropriations. This lowers the risks of expropriating the business activity or burdening it with imposed fees or obstacle procedures (*i.e.*, indirect expropriation). Second, the presence of a Requisition Law to govern the procedures of implementing requisitions, the compensation's valuation, components and timing of calculation, besides the significant guarantee of the investor's right to restore the requisitioned property in case it was not used by the requisitioning authority in serving the public purpose within a time period.

(C) Dispute Settlement

The third notion in the comparison process is the right of a foreign investor to revert the dispute to the ICSID. The referral of a contractual dispute between the host state and foreign investor to a third party for international arbitration is a fundamental protection[891].The constitution's exceptional reference to expropriation was complemented by verifying the necessity of paying adequate compensation to inves-

[891] See II.F.4.

tors in a convertible currency. With regard to dispute settlement, Jordan's legal framework is an outcome of a mix of civil law, customary international law, and Sharia Law.

Jordan's commercial law does not differentiate between non-Jordanian and Jordanian investors. The foreign rulings including international arbitration awards are executed in Jordan after the application to enforce these rulings through a special procedure in the domestic judiciary. Jordanian law grants foreign investors the right to revert conflicts to third-party dispute settlement mechanisms. Evidence of arbitration provision prevail in the US-Jordan BIT[892]. Similarly, the US-Jordan FTA and the WTO Dispute Settlement Mechanism of which Jordan is a member provide for similar settlement options. On the international scene, Jordan signed the ICSID Convention in 1972. The early accession did not trigger several cases against the GOJ in ICSID arbitration. In the same context, Jordan signed the New York Convention of 1958 concerning the Recognition and Enforcement of Foreign Arbitral Awards.

International arbitration seems to be in an advantageous position when compared to the local judiciary since cases, which extend up to four years to reach a final ruling. However, in arbitration, disputes are decided in 12–18 months. Another reasoning favouring arbitration is the lack of necessary knowledge on the domestic side of judiciary regarding commercial and investment disputes[893]. Finally, Law No. 68 of 2003[894] provided a third-party dispute settlement under international arbitration. In the former Law, the article referred to the ICSID since Jordan signed its Washington Convention. Regardless of the article in the law, foreign investors are recommended to include an international arbitration clause in their contractual arrangements with the GOJ since the latter will always prefer reverting disputes to local courts[895].

The Inv. Law allows amicable settlement between the State and the investor during a cooling-off period of six months[896]. Alternatively, investors may settle their claims with the State through filing claims in Jordanian courts or in accordance with Jordan's arbitration law or the other means of dispute settlement as agreed by the dispute's parties. Conversely, half of the OECD-reviewed Jordan BITs include a fork-

[892] Article 9 of the US-Jordan BIT.
[893] Bureau of Economic and Business Affairs 2015b 8-9
[894] Article 33 of Law No. 68 of 2003.
[895] Kanaan, T. and Kardosh, M. 2005 18
[896] Article 43 of the Inv. Law.

in-the-road clause, prescribing the mutually exclusive relationship between international arbitration and domestic judiciary[897].

In line with the interest in alternative dispute resolution mechanisms, the new Arbitration Law[898] widened its scope to cover both civil and commercial disputes arising from any legal relationship between private and the public personnel without limitation to contractual arrangements. The conditional recourse to arbitration requires the presence of an arbitration agreement either within the contractual arrangement as a clause or as a separate subsequent agreement between parties when the dispute arose. Concerning procedural matters, arbitration proceedings in Jordan are not subject to any mandatory international arbitration rules. The rules closely linked to the dispute are applicable unless they contravene Jordan's public policy. The rendered arbitral award is final and cannot be appealed under the Jordan's civil procedures law.

The award is later directed to the competent court to issue its execution orders. For foreign arbitral awards governed by the New York Convention, the award is enforceable only if already enforceable in the jurisdiction where it was rendered. Appeal of foreign arbitral awards is possible under Jordanian law, though limited to challenging them only based on specific grounds. Jordan attained a unique position in its region by introducing separate legislation in 2006 regulating mediation as an alternative dispute resolution mechanism. It is defined as a voluntary process and informal, whereby settlements must be accepted by the disputing parties'. The Jordan Chamber of Commerce encourages the settlement of disputes out-of-court through benefiting from the alternative means under arbitration and mediation[899].

The guarantee of dispute settlement in accordance to the possible agreements between the State and the investor is another important point in reducing the potential risks borne by foreign investors when investing in Jordan. This protection allows foreign investors to avoid the partiality of domestic judiciary or bias through offering an alternative route by accessing international dispute settlement mechanisms as arbitration. This comes in line with recommendations provided by donor groups to involved investors to incorporate dispute settlement clauses and specifically arbitration ones within their contractual arrangements in Jordan so as to boost their certainty and predictability. The guaranteed access to third party dispute settlement,

[897] Rey M. 2013 102-3
[898] Law No. 31 of 2001, Arbitration Law, Official Gazette, Issue 4496, 16 July 2001.
[899] Rey M. 2013 90-1

lowers the potential risks of foreigners investing Jordan, which can increase the volume of FDI inflows to the latter.

(D) Currency transfer, pricing freedom and performance requirements

The fourth and final subsection of the benchmarking analysis is that covering the right of foreign investors to repatriate their profits, freely price their products, and employ foreigners. The three notions were to an extent introduced in the theoretical framework. The right to employ foreigners appears to be an indicator of the presence of performance requirements within the domestic legal framework.

- Currency transfers

The IPL guaranteed foreign investors the right to repatriate their profits and incomes abroad without restrictions in line with BITs[900]. The US and Canada BITs with Jordan provide for exceptional circumstances where the GOJ is entitled to apply restrictions upon FX transfers. Two exceptions exist: *(i)* transfers are restricted if connected to insolvency, bankruptcy or whatever criminal offenses, *(ii)* during crises in the Balance of Payments (BoP) accompanied with the fall in FX reserves, host states are exceptionally permitted to apply limitations on FX transfers[901].

The monetary regime in Jordan adopts fully convertible dinars without restrictions on capital and commercial transactions. The Jordan Central Bank (CBJ) grants the licences and supervises the operations of FX exchangers. The main FX-related regulations entitle non-residents to create FX bank accounts. The CBJ offers an advantageous treatment to such accounts by exempting them from commission fees associated with transfers. Furthermore, residents are free to deposit whatever FX amounts within their accounts without enforceable limits or ceilings[902]. Additionally, residents' transfers of profits, returns, liquidation, alienation or exit proceeds, in FX abroad, even if for investment purposes are permitted without ceilings[903]. The transfer rights are not subject to the CBJ's prior approval. The same flexibility applies to foreigners remitting their profits, liquidations proceeds or salaries and compensations abroad[904].

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900 Article 30 of the IPL.
901 Rey M. 2013 102-3
902 Usa International Business Publications 2008a 109
903 Article 41(b) of the Law No. 30 of 2014.
904 Article 31 of the IPL.

The same rights of repatriation were guaranteed under the investment law of 2003[905]. The guarantee to repatriate FX abroad puts Jordan's investment framework in conformity to its international obligations under its BITs. Moreover, guaranteeing such right of FX repatriation reduces the risks experienced by foreign investors during the periods of Jordan's deficits in the BoP. In addition, such guarantee reduces the transaction costs of investing in Jordan since no special business structures are needed to ensure the repatriation of the FX. Finally, the freedom to transfer FX abroad lowers the price of accessing money in Jordan, which is an inevitable factor of production necessary for any business activity.

- Freedom of pricing

The second right considered in this subsection is that connected to investors' right to freely price their products. Jordan's Competition Law[906] provides that market forces and the principles of free competition are the only factors considered in pricing goods and services[907]. The law prescribes two exceptions for the free pricing including: *(i)* goods and services fixed priced under the Industry and Commerce Law or any other laws, and *(ii)* prices determined by the Cabinet based on temporary procedures as necessary to face exceptional circumstances or emergencies[908].

The two exceptions raise a red flag regarding the capacity and scope of the competition authority's right to intervene with the pricing of goods and services whether based on the aforementioned Industry and Commerce Law or to face the exceptional circumstances. The absence of concise definitions may raise investors' concerns regarding the instances of applying such wide powers.

The obscure understanding of the two exceptions raises the risks faced by foreign investors when operating in Jordan as their business operations can be subject to fixed pricings either *(i)* under the scope of the Industry and Commerce Law or *(ii)* becomes part of the necessary measures in exceptional circumstances. The higher risks can affect negatively the certainty of investors if interested in investing in Jordan, which in turn can influences the forecasted volume of FDI inflows to Jordan. Furthermore, the investors can bear additional compliance costs in order to identify the basic products and services subject to the price fixing under the Industry and Commerce Law. Accordingly, investors going to Jordan and not interested in price

905 Article 18 of Law No. 68 of 2003.
906 Law No. 33 of 2004, Competition Law, Official Gazette, Issue 4673, 01 September 2004.
907 Article 4 of Law No. 33 of 2004.
908 Article 4(b) of Law No. 33 of 2004. The procedures should be reviewed within a maximum of six months since its first application.

fixing their products or services must ensure that their offered products and services do not within the scope of the Industry and Commerce Law or any other price fixing legislation.

- Performance requirements

The third and last guarantee considered in this subsection is the investors' entitlement to employ foreigners in Jordan. Jordan applied no quotas or per centages of total employees or paid salaries. As per Jordan' labour law[909], the employment of non-Jordanians is possible on two conditions: *(i)* the prior approval and permit from the Ministry of Labour, and *(ii)* the job's requiring a high level of experience and technical skills that cannot be found among Jordanian workers[910]. For residential purposes[911], the foreigner must have a residence permit to stay and work in Jordan[912].

Residence permits are awarded based on the applicant's fulfilment of any of seven legally stipulated cases[913]. Of importance is the requirement dealing with employees offered employment contracts. The only prevailing obligation is the non-crowding of Jordanian employees in their jobs and this can be proved through a certificate issued from the Ministry of Social Affairs. The fourth possibility for working in Jordan is proving that Jordanian workers lack the necessary skills for the position (proved through official accredited certificates).

With regard to other performance requirements, Singapore's and Canada's BITs with Jordan maintain their unique position in eliminating any performance requirements[914]. The US-Jordan BIT bans Jordan from imposing any performance requirements linked to local content requirements in purchases or manufacturing[915]. By Jordan's simplifying of the process of hiring foreigners to the proof of the lack of specific technical skills among nationals, it allows foreign investors to lower the prices of an important factor of production as labour. This can have a positive influence on the volume of the FDI inflows to Jordan.

909 Law No. 8 of 1996, Labour Law, Official Gazette, Issue 4113, 16 April 1996.
910 Article 12 of Law No. 8 of 1996.
911 Law No. 24 of 1973, Residence of Foreigners Law, Official Gazette, Issue 2426, 16 June 1973.
912 Article 16 of Law No. 24 of 1973.
913 Article 26 of Law No. 24 of 1973.
914 Rey M. 2013 98
915 OECD 2008c 95

IV.B.4 Trade, privatization and openness to the private sector

The aim of this section is to highlight the additional legislative efforts to deregulate the Jordanian economy. This section addresses the trade aspect as well as the GOJ's political changes, demonstrating its liberalisation stance. The analysis begins with the trade openness pillar. It then examines changes in the political structure and how they catalysed the privatisation programme and the shift towards deregulation and the private sector. Finally, a brief overview is provided concerning Jordan's privatisation programme and the conclusions derived from the EBRD's mission regarding Jordan's legislation compliance with international standards.

(A) Trade

King Abdullah's taking the Jordanian throne in 1999 marked an explicit turn in the state's orientation towards the institution of a competitive economy dependent upon market forces interaction and qualified to FDI. The new king's orientation was directly reflected in Jordan's participation in the WTO in April 2000. Moreover, October 2000 marked the date the US-Jordan FTA was signed[916] before fully implementing it only by January 2010. In conjunction, the BIT between both partners was signed in 1997 before ratification and entry into force only in 2003.

Before reaching the US-Jordan FTA and aiming to benefit from the settlement of armed conflicts between Jordan and Israel in 1994, the US government initiated the QIZ agreement in 1996. The US Congress initiated the QIZ regime in 1996 after signing it in Doha in November 1996[917]. Its introduction was primarily political in consolidating the peaceful settlement of the Arab-Israeli conflicts by deepening the economic interaction between the former enemies[918]. Another simultaneous trade agreement was the US-Jordan FTA in force since 2001 and fully executed by 2010. The FTA was enforceable in conjunction with QIZ initiative without abolishing it. Accordingly, the exporters preferred to trade their products under the FTA, where 35 per cent Jordanian content still applies, however, with no further detailed specifications.

Other trade liberalisation efforts are seen in the EU economic association agreement signed in 2002 establishing the founding of a free trade area foundation in a period of 12 years. A similar agreement was concluded with the European Free

[916] United Nations (UNCTAD) 2000
[917] Kanaan, T. and Kardosh, M. 2005 28
[918] Bureau of Economic and Business Affairs 2015b 17

Trade Association, completing its transitional duration by 2014[919]. Additionally, under the Greater Arab Free Trade Area, the exchange of goods between 17 Arab states free from customs has been in place since 2005. A set of other FTAs was completed with Egypt, Morocco and Tunisia under the Agadir Agreement[920] in 2004, Singapore in 2004, and Canada and Turkey in 2009[921].

(B) Market oriented policies

The new monarch's continuous efforts to strengthen economic ties with the US government resulted in sealing both states agreement regarding the Statement of Principles for International Investment. According to Ron Kirk, former US trade representative, the 2012 agreement was a step towards stimulating economic growth and job creation in Jordan as a close political and economic partner[922]. The main aim of this list of principles was the creation of a transparent, friendly and competitive business environment necessary to attract investors and protect them from any discriminatory governmental behaviour[923].

On the GOJ unilateral side, attempts to stimulate the Jordanian private sector and attract foreign investors to participate in Jordan's economic development took place through several measures, implemented simultaneously to create a favourable business climate. An important measure was opening the door to the private sector representation in the investment policy setting authorities. Private sector representatives were members in the Council for Higher Investment, whose remit covers both supervising the promotion of corporate investment, as well developing the future investment policy. The private sector was represented through five members in a council constituted only of thirteen members.

The interaction between the GOJ and the private sector regarding the development of the IPL was fruitful for the business environment by June 1999. It resulted in granting automatic approvals for businesses unapproved during the official process. The amendments of the IPL were welcomed by business stakeholders since they bypassed the lengthy inefficient bureaucracy. The main difficulty was the private sector's failure to unify its claims directed to the GOJ. Questions linked to how the private sector should participate and who should represent it created several ten-

[919] European Council and Commission 5/15/2002
[920] Government of the Kingdom of Morocco, the Government of the Kingdom of Jordan, the Government of the Republic of Tunisia and the Government of the Arab Republic of Egypt 8/5/2001
[921] Bureau of Economic and Business Affairs 2015b 18
[922] Office of the United States Trade Representative 1/28/2012
[923] Bureau of Economic and Business Affairs 2015b 3-4

sions within the private sector environment, resulting in an unfavourable outcome[924].

Another move towards deregulation was reflected in launching the plans of incorporating free trade zones[925]. A set of eligibility criteria were required to qualify to operate in free trade zones. The four criteria included: *(i)* the introduction of new industries and know-how, *(ii)* the use of local inputs, *(iii)* the reduction of Jordanian imports allowing for the import substitution effect, and *(iv)* the improvement of Jordan's skilled labour. Wide tax incentives and exemptions were granted, especially with regard to corporate and personal income taxations with the entities benefiting from a twelve-year exemption[926]. Furthermore, Jordan promulgated Law No. 31 of 2014 on public-private partnership[927], under which the private sector engaged with the GOJ entities in a set of developmental projects. Examples of such projects include the foundation of an industrial and medical waste project and a large water desalination project.

(C) EBRD and privatization

To assess the Jordanian legal framework from a commercial perspective, the EBRD assessed the pace of liberalising the Jordanian legislations. The pillars examined include laws connected to insolvency, corporate governance and judicial capacity[928]. The efficiency of the Jordanian judiciary and the enforcement of contracts represents a significant difficulty. An average commercial claim in Jordanian courts is likely to last over two years, with costs constituting 30 per cent of the claim's value. Policies under consideration to ease judicial claims include the foundation of special courts governed through a digital system controlling case management. The outcome is a higher inclination towards mediation and other dispute settlement alternatives[929]. An important aspect is the inspiration of Jordan's arbitration law[930] by Egypt's Arbitration Law No. 27 of 1994, based initially upon the United Nations Commission on International Trade Law[931].

924 Carroll 2003 185, 195
925 French 2011 29
926 IBP 2016a 107
927 Bureau of Economic and Business Affairs 2015b 3
928 General Counsel Office 2012 4-5
929 General Counsel Office 2014 3-12
930 Law No. 31 of 2001, Arbitration Law, Official Gazette, Issue 4496, 16 July 2001.
931 Rey M. 2013 89

The privatisation programme began in the 1980s, and the second half of the 1990s witnessed the further stimulation of privatisation efforts. The acceleration of privatisation is clearly seen in data collected by the Amman Financial Market. The privatisation confirmed the new economic orientation of the regime[932]. The actual execution steps were delayed until early 2000s after promulgating the Privatization Law No. 25 of 2000[933]. Privatisation in Jordan puts the economy in a leading position when compared to Middle Eastern counterparts since it extended to encompass public services including electricity, telecommunications and national airways. For example, in telecommunications, a GOJ stake of 40 per cent in the national telecommunication company was alienated to a consortium headed by France Telecom in 2007[934].

The privatisation programme was an opportunity for Jordan to seek more openness and global integration instead of the prevailing direct GOJ intervention and control. In the meantime, the private sector consolidated its position as a drive of future development. The change in international donors from governments to financial institutions results in executing the SAP cutting the GOJ, lessening the GOJ's involvement in economic activity, especially in productive investments[935]. The GOJ preserved its right to intervene administratively through listing reasons upon which an official can justify the non-issuance of the required sector licences[936].

The range of reasons included national security, national economic plans, national healthcare and education, environmental and public interest and morality. The lack of further interpretation or guidance broadened the administrative authorities' right to reject licence requests. Law No. 68 of 2003 banned any administrative authority from refraining to issue the necessary licences based on limitations of market entry or the exceeding of the maximum number of issued licences[937]. In this case, the administrative authority was restricting market competition and size. It is worth highlighting that the administration's failure to decide on sector licence applications within one month permits applicants to request the licence issue from the Cabinet.

FDI attraction did not prove successful for several factors. The foremost of these factors is the small size of Jordan's market. The low demand hinders multinationals

932 Knowles 2005 183-4
933 Law No. 25 of 2000, Privatisation Law, Official Gazette, Issue 4443, 2 July 2000.
934 General Counsel Office 2014 5-8
935 Knowles 2005 183-6
936 Chomo 2002 12
937 Article 21(b) of Law No. 68 of 2003.

from considering the occasion of relating their productive activities to Jordan[938]. With the evident FDI restrictions on sectors and minimum capital, Jordan did not manage to reach a high score in the OECD's FDI Restrictiveness Index. Jordan's score (0.3) proved below the OECD average (0.079) and the non-OECD members average (0.145). On a regional level, the Jordanian framework score was even below Morocco's and Egypt's scores, which showed lower rates of restrictiveness. The OECD mission recommended the consideration of the high restrictive score of the Jordanian framework in order to facilitate it procedurally to secure a more investment favourable outcome[939].

From the three components of section IV.B.4, the trade openness pillar, the privatisation together with the EBRD mission conclusion, all evidence reflects the Jordanian economy's experience of intense changes during the 2000s era to promote deregulation. These attempts were all started by the accession of the new King Abdullah II in 1999. The engagement in FTAs and the promulgation of new legislation such as the public-private partnership law are further evidence of Jordan's aim to liberalise and deregulate its economy. This represented the same thread of policies executed since the structural adjustment process of the 1980s, even though at an obviously quicker pace. These changes should be analysed in conjunction with investment laws and their prescribed incentives and guarantees. They all serve the same interest of deregulating and opening the economy to the private sector and foreign investors.

IV.B.5 Conclusion

The conclusions deduced from the overview of the Jordanian legal framework can be grouped into three categories. The first addresses the title of the thesis regarding Jordan's level of compliance with international investment law obligations, and the second the shift in Jordan's legal framework from being a restricted regulated economy to a more open and liberalised one. This moves the discussion to the third category connected to the concept of economic freedom.

Going through the same form of the Egyptian case study conclusion, the first principle under examination is the national treatment. Under this notion and as explained above, Jordanian efforts are partially successful in aligning domestic legislation with international obligations. This was evident in the abolishment of foreign

938 Chomo 2002 23
939 Rey M. 2013 70

investors' applicable minimum capital requirement. On the side of foreign ownership, the services under restrictions are being reduced with each legislative amendment to the investment laws. Concerning importation, Jordanian law maintains a strict position on banning importation for trading and commercial purposes. The analysis under this subsection concerned restrictions on foreigners' acquisition and ownership of land. Jordan maintains a firm position, prohibiting acquisition without the Cabinet's approval after filing a request citing the connection between business operations and land ownership. Approval is required for rent exceeding three years. With such restrictions, Jordan raises the prices of the productive factors for investors seeking investment opportunities in the country.

With regard to expropriation, the Jordanian position under domestic laws and BITs remains remarkable. The Jordanian constitution of 1952 adopted the Hull Rule, Law No. 12 of 1987 provided for requisition procedures and compensation, and investment laws prohibited direct and indirect expropriation unless in the public interest and in return for adequate and prompt compensation. This places Jordan a step closer to compliance with its international obligation under BITs and reduces possible risks for investors.

In terms of dispute settlement, the Jordanian investment laws guarantee access to international arbitration. This comes in compliance with Jordan's obligations under its concluded BITs. The new arbitration law allowed for dispute settlement in connection to commercial and civil affairs through a third-party regime. This widening serves the benefit of complying with the BITs since it unifies the treatment between commercial and civil affairs and establishes it upon the contractual parties' agreement. Second, Jordan in 2006 promulgated mediation, becoming an early adopter of this regime of dispute settlement that remains an additional mechanism to settle investment disputes.

For the last category of other guarantees, Jordan proved more relaxed when compared to Egypt. Jordan allows foreign repatriation of profits without restrictions on amount or duration. Moreover, it entitles non-residents to open foreign currency bank accounts in Jordan. From the freedom of pricing side, the Jordanian legislator adopted a vague position when allowing market forces to determine prices of products if the products do not fall under the scope of the Industry and Commerce Law (which allows setting prices for basic products and services). This vagueness threatens Jordan's compliance with its international obligations as pricing freedom falls within the scope of protections against indirect expropriation. Hence, the Jordanian legislation deviates from the international principle. The most relaxed domestic legislation is connected to the rights of employing foreigners. This right appears as an indicator for the presence of performance requirements within the Jordanian legal framework. The only requirement in connection to foreigners' employment is the need to finalise residency documents. The law imposes no quotas or restrictions on foreigners' employment in Jordanian investments. This comes more in line with the principle of limiting performance requirements. Such entitlements reduce productive factor prices as well as transaction costs of hiring foreign employees.

The second category of conclusions is connected to the orientation of the Jordanian state. From the birth of the modern Jordanian state, it appears that country has maintained a pro-private sector approach. This appeared in adopting the Hull Rule in 1952. However, from the economic history chapter, the wider intervention of the state in economic operations to promote public employment during the 1960s and 1970s was recognised. With the SAP, Jordan returned to its prior position, when the private sector was leading economic activity, and the new king's rise to the throne catalysed such process. This is witnessed in section IV, where the continuous bilateral and unilateral efforts promoting openness and deregulation were discussed. All evidence provided throughout the chapter consolidates the same conclusion regarding the Jordanian policymakers' efforts to deregulate and liberalise the economy. As in the Egyptian case, Jordanian policymakers utilised this liberalisation and deregulation to market Jordan as a favourable investment destination, targeting the amplification of development and filling the gap from the government's retreat.

This moves the discussion to a third conclusion associated with economic freedom that will be used in the context of the economic analysis provided in chapter VI. The above section on Jordan has outlined the legal development, showing Jordan's movement from a regulated to a less regulated economy. These developments must be analysed in parallel with the county's economic changes to observe the impact of deregulation on economic indicators. The processes of privatisation, trade openness, tax incentives are all examples of deregulation policies.

IV.C Morocco: Legal Framework

IV.C.1 Introduction

The Moroccan Investment Charter Law No. 18 of 1995[940] (IC) will be the base for the benchmarking analysis. Protections provided in the IC will be compared against the protections Morocco is under obligation to guarantee to foreign investors under international investment law and BITs.

Morocco's legal framework chapter is divided into three subheadings covering: the overview of the Moroccan legal framework, international investment obligations from a Moroccan legal perspective, and openness to the private sector through privatisation or trade liberalisation.

IV.C.2 An overview of the legal framework

Analysing the investment legal framework in Morocco requires starting from the top of the legal framework before funnelling the research to a narrower context, concentrating on more detailed issues. The section first identifies the constitutional articles that refer to investments and private ownership, by examining the two constitutions of Morocco: *(i)* the one promulgated in 1962 with the establishment of the new state, and *(ii)* that of 2011 in conjunction with the Arab Spring uprisings. Secondly, the structure of the IC and its main components are examined. Finally, the tax incentives offered under the IC are highlighted to show the country's deregulation and openness to the private sector and foreign investors.

(A) Investments in the constitution

After the country's independence in 1956, the King of Morocco, Mohamed V, pursued a plan to build up the nation and institutionalise Moroccan society. The cornerstone for both targets was the creation of a social contract binding on the entire population. The early attempts to establish the Moroccan constitution were inspired by the Constitution of 1958 of the French Fifth Republic[941]. The first Constitution[942] of Morocco was promulgated on 14 December 1962. The inspiration from De Gaulle's authoritarian democracy resulted in a Moroccan constitution that con-

[940] IC, Official Gazette, Issue 4336, 6 December 1995.
[941] Maghraoui 2001 78
[942] Dahir Sharif No. 61 and 172 of 192, Constitution 1962, Official Gazette, Issue 3098, 10 March 1972.

solidated the king's wide powers compared to parliament, and made little reference to citizens' rights and entitlements. In other words, the basic rights guaranteed under the Constitution of 1962 did not represent a principal part of that constitution. Generally, compared to other legislations of Muslim world countries, Morocco's legal framework was influenced by Western legislations and specifically the French one[943]. Thus, Moroccan law mixed with the French Civil Code with Islamic Sharia Law[944].

The new ruling regime targeted benefiting from the pre-independence wealthy groups to consolidate its grip on power. This appeared in the guarantee of private ownership in the Constitution of 1962[945], which allowed the law to limit private ownership if social and economic growth required limitations. Finally, the Article 15(2) of the Constitution of 1962 prohibited requisition unless it is in line with the domestic law in determining the circumstances and procedures for such intervention. Article 15 of the Constitution of 1962 was the only reference to the private property as well as the GOM's right to limit private ownership or requisition it.

By comparing the reference to private property and associated rights in the Constitution of 1962 to the Constitution of 2011[946], several conclusions can be derived. Prior to introducing these conclusions, it is worth mentioning that the Constitution of 2011 was adopted in a referendum of 1 July 2011. The new constitution attempted to modernise Morocco's monarchical system by moving it towards a constitutional monarchy rather than a traditional form similar to the Gulf Cooperation Council (GCC) monarchies.

In comparing the constitutions, Article 35 of the Constitution of 2011 did not amend Article 15 of the Constitution of 1962 by continuing to guarantee individuals' right to own private property[947]. Therefore, there was no change between the two constitutions since the GOM had the right to limit private ownership in the same manner in both constitutions. An important update to the new constitution was that parliament was granted the exclusive right to issue legislation governing the expropriation of private property or the privatisation of public enterprises[948]. This

943 Gömmel 2015 8
944 Bureau of Economic and Business Affairs 2015c 9
945 Article 15 of the Constitution of 1962.
946 Constitutional Council Decree No. 815 of 2011, Constitution 2011, Official Gazette, Issue 5964, 30 July 2011.
947 Additionally, the second paragraph of Article 35 used the exact wording of Article 15 of the Constitution of 1962.
948 Article 71 of the Constitution of 2011.

change explicitly vested the parliament with the power to introduce legislation to manage expropriations and privatisations.

The second conclusion from the comparison of the Moroccan constitutions of 1962 and 2011 was the infinite use of the word "*social*". Different from in the case of Egypt's Constitution of 1971, the references to the word "*social*" were all in the context of the family and solidarity rather than as the reflections of the ruling regime's political orientation and adoption of the leftist socialist policies. The third conclusion of the comparison is the complete absence of the word "*investment*" in both constitutions. This highlights the lack of Moroccan emphasis on the promotion of investment and the GOM's or the population's obligation to adopt investment-friendly legislation or policies. The GOM's guarantee of the preservation of a freely competitive market and the criminalisation of anti-competitive practices is not enough to make up for the constitution's silence regarding promoting investments and adopting market-oriented policies.

The Constitution of 1962 and 2011 maintained the same position regarding the GOM's right to requisition private property if the state's socio-economic plan required this. However, this notion of "*socio-economic growth plans*" is vague enough to justify any type intervention. Accordingly, the following reference to the domestic law as the governing framework for the procedures and the conditions of requisition could be helpful in defining such "*socio-economic growth plans*" (further discussed below). Conversely, the fact that the state's critical right to requisition property is determined under domestic law rather than explicitly regulated in the constitution undermines the guarantee of private property ownership. The reasoning appears in the ease of amending legislation when compared to the extreme difficulty of amending a constitutional article. Moreover, the conditioning of the expropriation in Morocco upon the issuance of new laws through the parliament puts Morocco in a lower position when compared to Egypt regarding the protection of private ownership. Egypt's Constitution of 2014 totally abolished references to expropriations and permitted only requisitions under strict limitations.

The silence of Morocco's constitution in referring to the word "*investments*" resembles the failure of the Constitution of 2011 to reflect the prevalent economy's interactions. In other words, it did not represent the shift in Morocco's economic structure towards the private sector rather than the public sector as in the 1970s. Thus, by using the same wording in the Constitution of 2011, there are no signals of the continuous openness and deregulation pursued by the GOM. Different from the scenario in Egypt, Morocco's transformation towards the private sector appeared in domestic legislation without any explicit references in the constitution.

(B) The Investment Charter No. 18 of 1995

Chapter III asserted the GOM's wide involvement in the economic activity of the 1970s. This was primarily based on the production and exportation of phosphate. With the debt crisis and the IMF interventions, the GOM came under the obligation to open its markets to its trade and investment partners. This attempt at deregulation was witnessed on several levels. On top of these attempts came the introduction of the IC. The guarantees and incentives awarded in the IC were a mere translation of the intentions to open and deregulate the economy. In Morocco, different from Egypt[949] and Jordan[950], the IC of 1995 has remained in place to this day.

Before the IC, Morocco had investment legislation specifically governing each sector of activity[951]. The legislative efforts to promote Morocco as an investment destination started by promulgating the IC. On the executive side, 16 investment centres were founded in order to handle the investors' requests. The centres were one-stop shops that eased the process of incorporation businesses and decentralised the investment-related decision-making process. Moreover, the centres published catalogues guiding the investors while interacting with it or with any of its administrative partners when issuing the necessary licences or permits[952].

The IC terminated the sector-by-sector investment regulation system. Unifying the investment laws permitted extending the scope of the IC to cover all sectors on an equal basis. The main highlights of the IC include its embracing of the international principles of non-discrimination and freedom of income transfers. Regardless of the tax and importation incentives, the IC opened the competitive markets and industries to foreign competition, excluding phosphate, where the GOM preserved its monopoly. On the institutional side, the GOM created a competent ministerial committee to supervise the process of establishing a more investor-friendly climate. Furthermore, the committee was vested with the authority to simplify obstacles hindering foreign investors from pursuing or progressing with their investments[953].

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949 For Egypt, the IGIL experienced several amendments before its abolishment by the IL of 2017.
950 For Jordan, the IPL experienced several amendments before its abolishment by Law No. 30 of 2014.
951 Usa International Business Publications 2008b 42
952 Elkhafif et al. 2012b 117
953 Koplan, S., Okun, D. etal 2004 75

One of the IC objectives was to unify the frameworks governing investments. Economic activities such as exportation, real estate, mining, industrial and maritime were each regulated under independent investment rules. The goals announced under the IC were threefold[954]: *(i)* to cut costs of the importation of raw material, equipment and machinery (the IC provided a wide range of incentives from value added tax (VAT) and custom duties); *(ii)* to encourage regional development by prescribing tax preferential treatment to investments located in underdeveloped areas; and (iii) to establish exportation free trade zones and allow the operation of financial off-shore entities.

The IC was promulgated by the Moroccan House of Representatives on 3 October 1995 and contained five sections: *(i)* objectives, *(ii)* fiscal measures and incentives, (iii) investment rights and guarantees, *(iv)* agricultural sector, and *(v)* enforcement measures. The IC targeted the promotion of investment through the improvement of the business environment and reconsideration of the taxation regime[955]. The objectives included: *(i)* reducing taxes on income and profits, *(ii)* providing regional development tax holidays, *(iii)* giving investors the rights to appeal tax assessments, *(iv)* lowering taxes associated with importing equipment and purchasing lands during the business establishment phase, and *(v)* sponsoring financial centres and exportation free zones[956]. The announced targets for these policies included increased employment and exportation, in conjunction with a reduction of investment-related costs, environment protection and rationalising of the consumption of energy and water.

The IC offered different tax incentives for custom duties, VAT, registration, corporation, income, real estate, franchising, and urban taxes[957]. The incentives ranged from abolishing variable taxes on licences and a five-year exemption[958] from the corporate income tax in cases of exportation. Additionally, the latter corporate exemption could be followed by a 50 per cent reduction in tax rate starting from the date the exemption elapsed. The incentives are discussed in more detail below.

The third section of the IC governs the guarantees and rights of investors, and administration of the investment process. Investors are accorded two rights, encompassing the right to freely transfer their investments capital, profits and liquidation

954 Usa International Business Publications 2008b 42, 50
955 Article 1 of the IC.
956 Article 2 of the IC.
957 Articles 3 to 14 of the IC.
958 Article 7 of the IC.

proceeds abroad and in foreign currency without amount or time limitations[959]. Second, the GOM is under obligation to allocate to the investor sufficient lands that are properly serviced in order to establish new investments. On the administrative side, the IC established an administrative authority acting as a caretaker in guiding investors. Additionally, the IC still requires the GOM to make the maximum effort to ease the administrative procedures governing investments.

The IC provides additional non-tax incentives, allowing the GOM to enter into contracts to reimburse investors for costs borne in connection to the infrastructure, employee training or land acquisition upon meeting the eligibility criteria[960]. These criteria include: *(i)* the project's size, *(ii)* the number of jobs created, *(iii)* the level of know-how or technology transferred, and *(iv)* the region of the investment. Meeting any of these criteria is sufficient to qualify the investor for a reimbursement of costs paid from the "*Investment Promotion Fund*"[961].

Additionally, the IC allows the GOM to introduce international arbitration clauses as a mechanism to settle disputes arising in connection to investments. Under the IC, Morocco's BITs govern claims filed in international arbitration[962]. The last form of investment incentives is prescribed under the "*Industrial Zones*"[963]. The incentive is a form of financial support from the GOM to cover the costs borne by investors in establishing their industrial projects in underdeveloped regions.

The IC sets a precedence in Morocco's investment legislation by deeming the investors' operational licence application approved, if the administrative authority provided no response for sixty days from the application[964]. Hence, the IC moved the obligation to the authority's side, which is forced to justify its decisions if it rejected licence requests. This allowed imposing a judicial review over the authority's decisions. Finally, the IC established a committee to solve the difficulties arising from cumbersome bureaucracy and delaying the establishment, the operation or the commencement of investments. The committee is responsible for monitoring the modernisation of the investment legal framework and to transform it into a more investor-friendly one with less procedures and requirements[965].

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959 Articles 15 and 16 of the IC.
960 Article 17 of the IC. The eligibility criteria were listed in Article 3 of Decree No. 895 of 2000, Official Gazette, 31 January 2001.
961 The fund is instituted as per Article 18 of the IC.
962 Article 17 of the IC.
963 Article 19 of the IC.
964 Article 22 of the IC.
965 Elkhafif et al. 2012b 117

More importantly, the IC aims to assure investors the continuity of the: *(i)* investment promotion plans, *(ii)* the accorded guarantees, and *(iii)* the granted incentives until expired[966]. The pledge ensures the guarantees and incentives maintain their nature and form as when initially granted against any future interventions[967]. The only limitation of the IC appears in the exclusion of the investments in the agricultural sector from benefiting from the incentives and guarantees[968]. This may be justified based on the special nature of this sector as witnessed below in prohibiting foreigners from owning agricultural lands. This is another difference when compared to the Egyptian IGIL, as the latter applies to land reclamation projects, whereas in the case of Morocco, agricultural activities are completely excluded from the scope of the IC.

Before moving the discussion to the investment incentives, from the above analysis of the IC one conclusion can be confirmed. The legal developments reflects the continuous efforts of the GOM to liberalise its regulatory framework and allow additional access for foreign investors to the economy. With all the critics of the investment legislation, the conclusion derived remains the policymakers' ultimate interest in attracting investors at whatever cost. The IC remains a clear example of attempts to rationalise the prices of the factors of production and cut investment transaction costs.

(C) IC incentives

Examining the process of deregulating the economy, this section observes the investment schemes opened to investors in Morocco. The Moroccan efforts of incentivising investors has two bases. The first is the granting of tax and non-tax incentives under the IC. The second is the establishment of free zones where investments were incorporated and operating in it are exempted from tax.

The IC comprises a set of incentives to attract investors. The list of incentives extends to cover corporate tax holidays prescribed for the five years in the event of exportation[969]. Machinery, raw material and other goods are exempted for VAT on imports for the first three years from when the business is incorporated, if the project's value exceeds the threshold of MAD 200 million (USD 24 million). The same

966 Article 23 of the IC.
967 This differs in the case of Egypt, which actually abolished the tax incentives regime applicable under the IGIL by introducing the Income Tax Law No. 91 of 2005.
968 Article 24 of the IC.
969 Article 7 of the IC.

exemption applies regarding import duties for projects exceeding the same threshold[970]. The tax incentives are split into two categories. First, the incentives relate to the investment installation[971]. Under this phase, investors are exempted from importation tax levy and the urbanisation tax for the first five years after establishing and completing new buildings. Moreover, the incentives encompass an exemption from a set of cumbersome procedures in connection to land acquisition. By the second phase of operation, the incentives are closely linked to operative taxes. Businesses are entitled to create annual reserves not subject to tax. Finally, a real estate tax exemption applies if buildings established proved to be used for accommodation purposes[972].

Other than the tax incentives, the IC provides domestic and foreign investors four regimes through which to implement their projects. The first[973] requires the fulfilment of any of four options to qualify for governmental support: *(i)* the creation of no fewer than 250 permanent jobs to be filled, *(ii)* an investment value exceeding MAD 200 million, *(iii)* location of the project in one of the 20 least-developed Moroccan regions, or *(iv)* the founding of the investment with environmental protection impacts. Meeting any of the above provided cases qualifies the investing entity for the incentives scheme. Incentives include the GOM funding of investors' costs connected to training employees, acquiring land, and extending infrastructure as introduced above.

The second investment scheme was issued under the 1990–1999 Budget Law granting investments a customs and VAT exemption for three years from incorporation upon capital goods importation. The threshold to benefit from the exemption is having an investment value of over MAD 200 million that is arranged through a state-investor agreement. The scheme applies to mega-projects, complemented by the Hassan II Fund for Economic and Social Development addressing small and medium-sized projects[974]. The third investment scheme was the GOM foundation of the Casablanca Finance City, granting investors another batch of incentives in 2010[975]. The Casablanca Finance City authority's mission is to encourage foreign entities to carry on business activities in the city through initiating continuous reforms

970 Bureau of Economic and Business Affairs 2015c 12
971 Article 4 of the IC.
972 IBP 2016b 131
973 Article 17 of the IC.
974 Kalinova 2010 58
975 Benner 2013 6

improving the investment climate[976]. In addition to the five-year exemption following incorporation, a reduced corporate tax rate of 10 per cent (compared to a standard of 30 per cent) applies after the exemption period. Other benefits are associated with administrative support in cases of cutting the waiting periods for issuing foreign employees work permits to one week instead of six months[977].

The last investment scheme is the Tangiers Free Zone Area (TFZA), established in 1999[978]. The TFZA grants investors a wide range of incentives, besides the general ones applicable under the IC of 1995. In addition to the infrastructure extension present in the Tangiers port and the international airport, the TFZA projects benefit from a specific customs treatment exempting importation from taxes and duties as well as imposing a simplified customs regime. The TFZA's projects benefit from a unique taxation regime exempting them from registration and stamp duties upon capital and lands acquisition. Tax incentives include: a 15-year exemption from VAT on purchases of goods, and CIT holidays for five years from the start of the business activity, following which the same investments are subject to a permanent reduced CIT rate of 7.5 per cent[979]. The TFZA provides an advantageous investment regime for foreign and Moroccan investors. Entities operating within the free zone are eligible to import without custom duties and benefiting from tax exemptions. The sole obligation is that of communicating workers' salaries in foreign currency (converted into MAD)[980].

The various forms of investment schemes and continuously granted incentives are obvious examples of the GOM's shift in its orientation towards the private sector as the leader of economic activity. The more incentives were granted, the greater the deregulation and the more opportunities opened to the private sector to enter the market. Tax exemptions and incentives are deemed examples of deregulation, since a taxpayer is relieved from paying tax due or even filing a tax return.

IV.C.3 Investment laws principles and International Obligations

In this section, the development towards a more opened economy appears more obvious. The section benchmarks the IC's guarantees to the international investment law obligations as prescribed in Morocco's BITs. The guarantees were deemed

976 Casablanca Finance City 2013
977 Bureau of Economic and Business Affairs 2015c 6
978 Tanger Med Zones (TMZ) 2017
979 Kalinova 2010 58
980 IBP 2016b 133

the signal of standardised treatment, encouraging foreign investors to invest in Morocco. Moreover, it highlights the means available to foreign investors to mitigate the risk of the GOM intervening in their private investments.

The section is associated with the discussion introduced under the theoretical framework concerning the benefits investigated by policymakers when deciding on their states' engagement in BITs[981]. The guarantees were deemed as important as the fiscal incentives in assuring foreign investors and reflecting the willingness of Morocco to grant foreign investors standardised treatment in line with international investment law. Prior to beginning the benchmarking analysis and assessing the levels of compliance, the chapter provides a brief overview of Morocco's BITs and introduces the guarantees granted under the IC.

Morocco participated in several regional and international initiatives to promote investment and attract foreign investors. An example is the UNCTAD training session arranged for Moroccan officials to enhance their FDI statistics analysis and their capacity to negotiate BITs. Another initiative was the MENA-OECD Investment Programme in which the MENA economies' decision makers interact with their OECD counterparts to exchange experiences and policies to enhance the performance of FDIs. This programme was the base for the GOM's preparation of the foreign investors' restriction list, which comprises the sectors where foreign investments are restricted or even prohibited. The initiative: *(i)* identifies the reforms, *(ii)* ranks them as per the discussions with the stakeholders, and *(iii)* executes them and offers an evaluation follow-up process[982].

Morocco's efforts to attract foreign investments have been continuous since the late 1990s. The GOM's investment orientation is evident in having 51 BITs in force[983], in addition to 51 double tax conventions. On a bilateral level with the US, Morocco is engaged in a comprehensive FTA since 2006[984]. Morocco comes in second place (after Egypt) in terms of the number of signed BITs in Africa. Its treaties prescribe additional protections for foreign investors when compared to the protections granted under the constitution and the IC. Moroccan BITs' substantive protections are deemed to be of high value for foreign investors to preserve their rights under international investment law, especially when domestic legislation is criticised for its insufficient protection.

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981 See II.E.1.
982 Kalinova 2010 62
983 United Nations Conference on Trade and Development 2017c
984 Bureau of Economic and Business Affairs 2015c 4

Morocco's BITs include the same BIT model protections as the NT, the MFN, the lawful non-discriminatory expropriation in presence of an adequate and prompt compensation, the right of investors to freely transfer their funds, the right of foreign investors to initiate claims under international arbitration or domestic judiciary, and the extension of the scope of the BIT's based on umbrella clauses[985].

Another important step was the GOM's endorsement of the US Joint Principles for International Investment in December 2012[986] (Principles). The endorsement allowed Morocco to become the first investment partner of the US in the MENA to engage in such a partnership. The Principles are similar to those of international investment law introduced within the theoretical framework with slight additions. Apart from the re-confirmation of the NT and the MFN, another important principle is represented in the "*competitive neutrality*" concept. It is a concept introduced by the OECD to ensure equal treatment for state owned enterprises (SOEs) versus private entities. The principle seeks to promote a commercially competitive market by eliminating any favourable treatment accorded to SOEs.

The Principles include the investors' right to participate in developing the domestic legislation of the other signatory with a special focus to the investment-related laws. Furthermore, the Principles adopted a narrowed definition of the "*national security*" concerns. If any restrictions are imposed on the foreign investors based on national security concerns, these concerns should be a result of genuine risk. Finally, they addressed the protection of foreign investors against any kind of discriminatory, arbitrary, or harmful treatment. Moreover, it entitled investors injured from nationalisations and expropriations to the Hull Rule effective, prompt and adequate compensation[987].

The next section benchmarks the IC's guarantees against Morocco's international obligations based on the BITs. The base for the analysis will be the BIT substantive protections as introduced in the theoretical framework[988], and the IGIL guarantees will determine the fields of law to be addressed under this section from the Moroccan side[989]. In other words, the silence of the IC regarding the investment's right to freedom of pricing will be addressed by visiting the other Moroccan laws to ensure the compliance with this BIT obligation. The discussion will now include four sub-

985 Kalinova 2010 47
986 Embassy of the kingdom of morocco in the USA 1/23/2014
987 U.S. Trade Representatives 2012
988 See II.F.
989 See IV.

sections covering NT and expropriation, dispute settlement and finally foreign ownership of investments, currency transferal rights and employment of foreign employees.

(A) National treatment and foreign ownership

The first notion in the phase of benchmarking the IC and the BIT obligations is NT. The notion was introduced in the theoretical framework chapter as one of the substantive protections under the international investment law. Morocco pursued continuous attempts to modernise its domestic legislations to: *(i)* standardise the treatment of foreigners, *(ii)* rationalise the costs of the factors of production, and *(iii)* cut the transaction costs of doing business in Morocco. However, the restrictions imposed on foreigners wishing to do business in Morocco vary between restrictions on FX, precluding entry to specific economic sectors, and prohibiting foreign investors from acquiring and owning agricultural land.

Under the OECD Declaration on International Investment and Multinationals Enterprises (OECD Declaration)[990], Morocco notified the FDI restrictions hindering its full conformity to international investment principles. In accordance with the Declaration, Morocco was under the obligation to provide a negative list covering foreign investment restrictions. Similarly, under the Morocco-US FTA, Morocco was obliged to provide a negative FDI restrictions list[991]. The arbitration tribunals' enforcement of the NT depends on a comparison of the treatment of national and foreign investors, regardless of the BIT clause and whether it refers to the treatment of national and foreign investors. The tribunals' main role is setting the criteria to assess how treatments accorded to foreign and national investors under the Moroccan laws should coincide[992].

- Ownership of shares

Morocco began to align its domestic legislation with the NT since it abolished the Morocconisation Law in 1983[993]. The legislation waived foreign investors from the 50 per cent Moroccan ownership threshold in business incorporation. This allowed foreigners to establish their investments without any nationality limitations on

[990] Morocco adhered to the OECD Declaration on International Investment and Multinationals Enterprises 2007 becoming the 47th member.
[991] Kalinova 2010 24
[992] Newcombe, Paradell 2009 161
[993] Kalinova 2010 46, as introduced within the historical chapter.

shareholdings[994]. Moreover, it waived the investments from the previously required Moroccan majority on the board of directors[995]. On the IC side, it provides an equal footing treatment with no differentiation between foreign and domestic investors. Although the IC does not adhere explicitly to the non-discrimination principle, the implicit message of the text is sufficient to conclude with such an understanding[996]. Under the Tangier's Free Trade Zone, the enforcement of the NT remains vague and specifically concerning the tax incentives and the benefits reached by investors operating in there[997].

On the potential conflicts with the NT regards the restrictions on foreigners interested in investing in the maritime industry, with a requirement that 75 per cent of the ownership of a vessel be in Moroccan hands. If a company owns the vessel, a Moroccan majority on the company's board of directors is sufficient to deem the vessel Moroccan[998]. With regard to the fishing business, the same restrictions apply in order to qualify the licensee as an enterprise. In airline services, foreign ownership in Moroccan entities cannot exceed 49 per cent[999]. It remains possible to consider the sectors fully monopolised by the GOM as potential conflicts to the NT. In these sectors, the GOM precludes foreigners' entry into such activities as in the case of rights to explore and exploit phosphate as limited to the GOM entity Office Chérifien des Phosphates (OCP).

The last decades have witnessed developments in Morocco's domestic legal rules to align them with international investment law. This included abolishing the Morocconisation Law of 1973 regarding the maximum limits imposed on the right of foreigners to share holdings in investments in Morocco. Conversely, the efforts of GOM were still confronted with potential conflicts with the international investment law as prevalent in the phosphate market. The benefits of aligning the legal rules with the NT include permitting foreigners to carry on business activities in Morocco through their full and direct control over their business. Moreover, the abolishment of the ownership limits reduces the transaction costs of establishing a new investment in Morocco since local partners or shareholders are no longer necessary. Finally, it lowers the risks borne by foreign investors who are not forced to

[994] Cammett, M. in Heydemann, S. 2004 256
[995] Usa International Business Publications 2008b 50
[996] Kalinova 2010 24
[997] OECD 2008a 105
[998] OECD 2008a 103
[999] Bureau of Economic and Business Affairs 2015c 7

agree on future businesses since they can establish their business without local partners.

- Land ownership

The second limitation related to the NT is experienced under the right of the foreigners to own agricultural lands. Under the Acquisition of Agricultural Property Law[1000], Moroccan entities are exclusively entitled to own lands and property outside urbanised zones required for and utilised in agricultural purposes[1001]. The prohibition of foreign ownership of agricultural land ownership is explicit. Introduced in 1973 as part of the nationalist moves accompanying the Morocconisation policy of 1973[1002] and still in place until today. The main reason for its issuance was protecting the agricultural sector when it employed 42 per cent of the population and accounted for 14 per cent of GDP.

In an attempt to circumvent the restriction, the GOM managed to reduce the negative impact of prohibited foreign ownership through introducing the 99-year lease program. It allowed foreigners to benefit from the agricultural lands under long-term lease contracts rather than full ownership. On the other hand, the mentioned restriction does not preclude the foreign investors from owning lands for non-agricultural purposes. Morocco applies strict limitations on foreigners' rights to acquire lands, preventing them from acquiring agricultural lands unless they are licensed to use the lands for non-agricultural purposes. The main restriction is connected to the need to use convertible MAD accounts to acquire the lands[1003]. The general entitlement to own lands is governed by Morocco's obligations and contracts law (OCL)[1004], which regulates the sale of property, requiring a written contract covering the price and other terms agreed between the buyer and seller[1005].

Thus, NT inconsistencies are recognisable in relation to the different treatment of Moroccan and foreign investors in terms of ownership of agricultural lands. The difficulties experienced by foreigners in owning agricultural lands increases the costs of the factors of production for any foreigner looking for investment opportunity in

1000 Dahir Sharif No. 645 of 1973, Acquisition of Agricultural Property, Official Gazette, Issue 3264, 21 May 1975.
1001 Article 1 of the Acquisition of Agricultural Property Law.
1002 Dahir Sharif No. 213 of 1973, Transferring agricultural or potential agricultural lands owned by foreign individuals and companies to the State, Official Gazette, Issue 3149, 7 March 1973.
1003 OECD 2008a 105
1004 Dahir Sharif of the OCL, 12 August 1913.
1005 Article 488 and 489 of the OCL.

Morocco's agricultural sector. This can negatively influence FDI in Morocco when compared to other more open economies.

- Importation

The third reference to the NT is related to foreigners' right to import. The Foreign Trade Law[1006] guaranteed individuals and companies, regardless of their nationality, the right to import after registering in the importers' registry[1007]. The law does not differentiate between nationals and foreigners regarding their rights to engage in importation[1008]. This is aligned with the notion of equal footing under the NT principle. More importantly, such treatment guarantees Morocco a leading position over Egypt, where foreigners are subject to more restrictions if engaging in importation activities for trading purposes[1009].

The above equal treatment allows foreigners to carry on their business activities in Morocco at rationalised prices for the factors of production. In the current situation, the foreign produced know-how and technologies could be easily imported into Morocco without nationality restrictions, permitting foreign investors to access needed tech at lower prices. The second important benefit from the equal treatment is cutting transaction costs borne by foreign investors in Morocco. The foreign trade law allows foreign investors to access the importation markets without establishing any special business structures to undertake the importation (*e.g.*, as the case before in Egypt prior to the recent changes of 2017). These two benefits may justify a foreign investor's decision to direct his investments into Morocco.

- Public procurement

The last concerns of the NT appears in government procurement. Under the public procurement law[1010], if a Moroccan entity's bid for public works or designs is more expensive than the foreign one up to 15 per cent, the Moroccan entity's bid is deemed the best financial offer[1011]. This 15 per cent is similar to the percentage provided under the Egyptian Tenders and Bids Law. This percentage appears to not be in line with the NT. The preference price is granted for Moroccan entities regardless of their foreign control or ownership. Therefore, this general application of the

1006 Dahir Sharif No. 25 of 2016, Foreign Trade Law, Official Gazette, Issue 6450, 24 March 2016.
1007 Article 6 of the Foreign Trade Law.
1008 Santander Trade Portal 2016
1009 Newcombe, Paradell 2009 161
1010 Art. 155, Dahir Sharif No. 349 of 2012, Public Contracts, Official Gazette, Issue 6140, 04 April 2013.
1011 Galal, Ahmed and Najib Harabi 2008 55

preferable treatment accorded to the Moroccan entities could be a violation of the NT[1012].

(B) Expropriation

The second notion in the process of benchmarking is "*expropriation*"[1013]. Morocco's constitution generally prescribes requisition only in cases explicitly stipulated by law. The constitution guarantees private ownership of property as long as this does not conflict with Morocco's social planning and economic needs. According to the US Trade Mission, there was no property requisitioned for reasons other than public purpose in the recent years. The same applies with regard to incidents of arbitrary or discriminatory GOM interventions[1014]. The Constitution of 2011 refers to expropriation when it permits requisition only within the context of and at the conditions explicitly stipulated in domestic law[1015]. The constitutions of Morocco did not refer to the Hull Rule principles of prompt, adequate and fair compensation.

Under the requisition law (RL)[1016], which governs the requisition of private property for public use, the requisition is permitted only if serving the announced public interest[1017]. Requisition can be applied by the public and private law entities and individuals to which the state assigns its right to participate in operating activities of public interest[1018]. The RL proposed compensation equal to the value of the requisitioned property's value as effectively used[1019], with the assessment of the value taking place on the day the requisition is announced. The Law provides an additional guarantee to investors by requiring that any requisition for public purposes be based on a judicial ruling[1020]. This moves the discussion to the protection of foreign investors under the BITs concluded by the GOM. The BITs condition lawful expropriations upon serving the public interest, without discrimination, in respect of due process and in return for effective, prompt and adequate compensation[1021].

1012 Kalinova 2010 24
1013 See II.F.2.
1014 Bureau of Economic and Business Affairs 2015c 9
1015 Article 15 of the Constitution of Morocco of 2011
1016 Dahir Sharif No. 254 of 1982, Requisition and Temporary Occupation, Official Gazette, Issue 3685, 15 June 1983.
1017 Article 1 of the RL.
1018 Article 3 of the RL.
1019 Article 20 of the RL.
1020 Article 2 of the RL.
1021 Kalinova 2010 45

The RL addresses the procedures and details necessary to assure the requisition's compliance with the due process and compensation[1022]. Damage compensated is the injuries incurred when the requisition occurs[1023]. Any forecasted, potential or indirect damages cannot be accounted for when calculating the compensation due. The value base for the compensation calculation is the property's value on the date of the requisition (*i.e.*, when the requisition notification was communicated). Any increase in the property's value after the communication of the requisition notification is disregarded. With regard to challenging the requisition and the compensation order, the RL entitles the property owners to challenge only the awarded compensation and not the requisition order[1024]. The RL, which provides detailed procedures to govern: *(i)* compensation requests, *(ii)* compensation payments, *(iii)* compensation appeal procedures, and the *(iv)* impact of requisition, puts Morocco in a leading position when compared to Jordan and Egypt. It is especially ahead when compared to Egypt, which even lacks special legislation to govern the compensation process.

The second form of intervention under the RL is "*temporary occupation*". The RL entitles the GOM and its authorities to occupy private properties temporarily in return for fair compensation. The failure to agree on compensation allows the dispute to be referred to courts to decide on the fair compensation. The RL[1025] provided three criteria to govern the calculation of compensation: *(i)* the damage due to the temporary occupation, *(ii)* the value of the explored and extracted material or resources during the temporary occupation, and *(iii)* the appreciation in the land's value due to the continuous undertaken activities. The law sets a maximum limit for the temporary occupation at five years[1026].

The third part of the RL regards the appreciation in the land's value due to the public works. In these circumstances, landowners and beneficiaries are obliged to share the burden of repaying the GOM compensation in return for the land's appreciation due to the public works[1027]. When the announced public works result in the appreciation of the requisition property's value by more than 20 per cent, the compensation is determined by taking into account three criteria: *(i)* the value of the property prior to announcing the public works, *(ii)* the value of property on the day of announcing the public works and filing for requisitioning the property, and *(iii)*

1022 Section 2 of the RL.
1023 Article 20 of the RL.
1024 Article 32(3) of the RL.
1025 Article 56 of the RL.
1026 Article 57(1) of the RL.
1027 Article 59 of the RL.

the court's assessment of the appreciation in the property's value for reasons other than the public works execution. Under the current Moroccan ICSID cases, none of the claims were associated with requisition. This highlights the smooth application of the RL in Morocco.

Morocco provides significant guarantees to operational investors against the risk of expropriation or requisitioning of their private property in Morocco. This appears on several levels: *(i)* the payment of compensation to the party damaged from the requisition, *(ii)* the requisition must be under a judicial ruling, and *(iii)* details of the procedures regarding the process of carrying out the requisition – including notification timings, transfer of ownership, and establishing compensation – appears as a guarantee by the GOM to respect due process when acting against investors. These guarantees lower the risks borne by foreign investors when investing in Morocco, which can encourage them to invest even further.

(C) Dispute settlement

The third notion in the comparison process is the right of a foreign investor to revert the dispute to the ICSID. In the theoretical chapter, the referral of contractual dispute between the host state and foreign investors to a third party for international arbitration is a fundamental protection[1028]. For dispute settlement, the IC has no explicit reference to international arbitration as an alternative means for dispute settlement. The failure to settle disputes in a friendly manner at local levels transfers the dispute to the GOM's committee chaired by the prime minister. The arbitration law of 2007 (AL)[1029] amended the Civil Procedures Law introducing the notions of mediation, conciliation and international arbitration in a separate chapter.

The AL defines international arbitration and its pre-requisite conditions. It is the first legislation of Morocco to prescribe international arbitration as a means to settle disputes arising between states and investors[1030]. The AL is inspired by the UNCITRAL model, with limited differences. The AL differentiates between the arbitration agreements and the clauses, since the UNCITRAL provided only for arbitration agreements. In the AL, the legislator successfully differentiated between domestic and foreign arbitration. Furthermore, the reform of 2007 opened access to domestic and international arbitration for the public and the SOEs[1031]. The AL rec-

[1028] See II.F.4.
[1029] Dahir Sharif No. 169 of 2007, AL, Official Gazette, Issue 5584, 6 December 2007.
[1030] Kalinova 2010 37
[1031] Aḥdab, Jalal El-Ahdab 2011 488

ognises foreign tribunal awards and rulings and deems them enforceable in Morocco. It vested the commercial courts with the right to enforce international arbitration awards in the presence of an exequatur. The enforcement procedure is as simple as requesting an enforcement order from the competent commercial court's president. The president issues the order only after examining the award's conformity to public order and the parties' rights to defence.

The history of Morocco in international arbitration dates back to the signing of the New York Convention on 12 February 1959. Followed by its becoming a member state of the ICSID Washington Convention on 10 June 1967[1032]. Under the current AL, the wording can be interpreted as extending the application of the arbitration clause to foreign investors from non-BIT signatories with Morocco. The unilateral consent appears in the AL in a manner similar to the legal wording of the arbitration settlement clause in the former versions of Article 7 in the IGIL.

A subsequent attempt to stimulate alternative dispute resolution mechanisms was in partnership with the United States Agency for International Development and the International Finance Corporation. The plan targeted the foundation of mediation training centres and an accreditation system for certifying mediators[1033]. These attempts were in line with the US-Morocco FTA, specifically the dispute settlement section aimed at founding a transparent, effective, and timely regime to settle disputes. The US trade representative advisory report cited the efficiency of the FTA's dispute settlement regime[1034].

Under the current dispute settlement regime, a 12-month procedure is required to initiate proceedings at the different levels of Morocco's judiciary from first instance to appeal. Moreover, a court ruling is usually expected to be issued in a period of 2–10 years (if not more). In turn, filing for alternative and third party dispute settlements became more common through submitting claims to the Rabat International Mediation and Arbitration Centre[1035]. Under the Moroccan law, mediation efforts are capped at six months, which can be renewed. In fact, mediation efforts were usually reported successful in periods of no more than three months. Regarding arbitration, no ceilings for settlement periods are stipulated in Moroccan law, although the practice highlighted that complicated disputes last a maximum of 12–18 months.

1032 ICSID 2017
1033 Bureau of Economic and Business Affairs 2015c 11
1034 Koplan, S., Okun, D. etal 2004 91-92
1035 Centre International de Médiation et d'Arbitrage à Rabat 2016

The practice assists in highlighting the advantage of alternative dispute resolution methods over litigation in the domestic Moroccan courts. A disadvantage of court litigation appears in inconsistent rulings due to lack of the publication of case law, dissemination and sharing[1036]. Additionally, poor legal knowledge and practice of lawyers, judges and magistrates promotes fallacies in litigation. The shortcomings in Morocco's domestic judiciary highlights more emphasis on the role played by the IC's reference to international arbitration as an accepted (alternative to domestic litigation) mechanism of dispute settlement between the state and investors. This reference lowers risk for foreign investors in connection to the need to litigate within the unpredictable Moroccan judiciary, as it guarantees the possibility to settle investment disputes in a more predictable manner. Guaranteed access to third party dispute settlement lowers the risks of investing in Morocco and possibly stimulates more FDI.

(D) Currency transfer, pricing freedom and performance requirements

The fourth and the last subsection within the benchmarking analysis is the one covering the right of foreign investors to repatriate their profits, freely price their products and employ foreigners[1037]. With regard to the right to employ foreigners, this appears as an indicator of the presence of performance requirements within the domestic legal framework.

- Currency transfers

The IC eradicated all FX restrictions hindering the inflows of foreign investments[1038]. It complemented the original step adopted by the FX office executing the convertibility regime. Based on those two policies, foreign investors became eligible to freely remit their profits and transfer their funds to and from Morocco without delays or restrictions on quantities[1039]. This entitles foreign investors to freely convert and transfer their foreign currency as profit repatriation and/or dividend distribution. The only requirement is that of notifying the GOM through the necessary financial and legal documentation. With regard to dividends and bonuses, investors are bound to submit their annual financial statements plus the adjusted income

1036 Bureau of Economic and Business Affairs 2015c 11
1037 See II.F.5.
1038 Article 16 of the IC.
1039 Kalinova 2010 46

statement providing their taxable income[1040]. The right was asserted explicitly twice in the IC[1041]. This resembles the GOM's interest in complying with the principle of investors' freedom to transfer their currency abroad. The legal provisions of the IC reveal and did not initiate the legal right of foreign investors to freely transfer their funds, as it was actually in practice since the 1993 liberalisation.

The FX office was established by the monarchical decision of January 22 of 1958. The office represented the authority responsible for governing the MAD foreign exchange rate. The adoption of a more flexible exchange rate in 1993 as part of IMF membership highlighted the FX office's role in overseeing the trade of foreign currencies in Morocco. The role of the office was confined to verifying transactions and identifying any opportunities for illegal activities[1042]. In 2007, the FX office introduced another set of liberalisation policies allowing the outflow of foreign currency as direct investments if connected to activity and below MAD 30 million per entity annually. The right was limited to setting new entities, participation in existing ones or creating a permanent establishment for the Moroccan entity abroad[1043]. Currently, Morocco executes no controls upon the transfer of funds abroad in connection to profits, capital gains and liquidation proceeds[1044].

The IC's guarantee of investors' right to repatriate their profits and proceeds is possibly reflected positively on FDI inflows into Morocco. This guarantee rationalises the prices of the factors of production since investors can easily move their capital into and outside of Morocco with fewer restrictions. The lower the restrictions on capital flow, the lower the prices of the factors of production (*e.g.*, assets bought by injected capital). Moreover, the more aligned with the FX transfers principle under international investment law, the lower the transaction costs for an investor. In economies where the central banks impose severe restrictions to control the flow of FX, investors tend to structure their financial flows in less efficient manners to circumvent the restrictions. Here, transaction costs for injecting funds into an economy increase as an outcome of the inefficient structure.

1040 Bureau of Economic and Business Affairs 2015c 8
1041 Articles 15 and 16 of the IC.
1042 Ministry of Economy and Finance - Kingdom of Morocco 2013
1043 IBFD Tax Research Platform 2007
1044 OECD 2008b 103

- <u>Freedom of pricing</u>

The constitution of Morocco[1045] prescribed a general umbrella for the role of free market forces' interaction in setting market prices. The GOM began abolishing price-fixing strategies and liberalised the services sectors around the early 2000s[1046]. The attempt to liberalise the market forced the GOM to adopt the competition law (CL)[1047]. The CL was significant in reflecting the new orientation of economic and legal policies and their inclination towards a free market. Under the CL[1048], products including goods and services must be priced in accordance with market competition rules without any intervention from administrative authorities regarding pricing policies.

The CL[1049], however, allows the competent authority to intervene and administratively adjust the market outcomes in exceptional circumstances. These circumstances are broad, including sectors and geographical regions where competition is restricted due to natural or existing monopolies. In these cases, the administrative authority, after consulting the competition council, can impose administrative measures accordingly. This broad scope of intervention can mean several risks for foreign investors, based on the wide powers vested in the administrative authorities regarding the competition environment in markets.

Morocco's transformation towards the private sector by the turn of the century required respecting the outcomes of the interaction of free market forces. This came to align Morocco's practise with international investment law regarding government intervention in pricing schemes of private investments. Entitling the private sector to freely price products allows private investors to compete freely in the local markets based on costs and forecasted returns. The interaction of the market forces allows investors to access the factors of production at lower prices. Therefore, the lower the prices of the factors of production, the higher the enthusiasm of an investor to bring funds into the economy. Conversely, the intervention of the administrative authority can increase risk for investors.

1045 Article 35 of the Constitution of 2011.
1046 Galal, Ahmed and Najib Harabi 2008 55
1047 Dahir Sharif No. 225 of 2001, Free Pricing and Competition, Official Gazette, Issue 4938, 27 September 2001.
1048 Article 3 of the Competition Law.
1049 Article 4 of the Competition Law.

- Performance requirements

Morocco's laws have not imposed any performance requirements on investments, a principle adopted in several Moroccan BITs. An obvious difference appears from comparing the wording concerning the performance requirements between the US-Morocco BIT[1050] signed in 1985 and the subsequent Morocco-US FTA[1051] signed in 2006. Under the BIT[1052], both parties endeavoured to avoid establishing any performance requirements[1053]. The FTA used mandatory wording to ban imposing any performance requirements in connection to the operation, institution, activity or disposal of an investment. Examples of prohibited requirements include the setting of periodic exportation thresholds, the abidance with a minimum per centage of local content or the assurance of transferring know-how to the host state[1054].

The development between both treaties can be justified based on the change in the US BIT Model. The US-Morocco BIT was concluded under the US Model of 1983, while the US-Morocco FTA of 2006 was concluded under the US Model of 2004. By comparing both wordings, one can notice that performance requirements changed from a weakness to avoid to a grave threat requiring prohibition. The assessment of Morocco's compliance with Trade-Related Investment Measures concluded the lack violations to the WTO obligations. On the other hand, performance requirements may prevail under public procurement conditions through prioritising goods produced in Morocco as embracing a higher local content per centage. The second example of performance requirements is free zones projects that benefit from flexible labour and tax laws with obligations to export no less lower than 85 per cent of production[1055].

The final consideration under this subsection is investors' right to employ foreigners. The labour law (LL)[1056] guarantees investors the right to freely employ foreigners[1057] as long as they comply with set procedures. An investor interested in employing a foreigner must apply for a licence from the competent GOM authority[1058]. The LL[1059] held an investor under obligation to bear the costs of the foreigner's return to

[1050] United Nations (UNCTAD) 1985
[1051] United Nations (UNCTAD) 2004a
[1052] Article II (5) of the US-Morocco BIT
[1053] Vandevelde 2009 397
[1054] United States 19
[1055] Bureau of Economic and Business Affairs 2015c 12
[1056] Dahir Sharif No. 194 of 2003, LL, Official Gazette, Issue 5167, 8 December 2003
[1057] Articles 516 to 521 of the LL
[1058] Article 516 of the LL.
[1059] Article 518 of the LL.

his home state if the licence application was refused. Another caveat[1060] for foreign employees is limiting the right of investments engaged in public procurement and projects to cash their insurance-deposited amounts unless demonstrating, through an administrative certificate, the fulfilment of any obligations towards foreign employees including their return to their home states.

The elimination of the performance requirements in the business environment of Morocco assists in reducing the prices of the production factors. From the above, the entitlement of investors to hire foreigners increases competition in the labour market, potentially driving down labour costs, which is reflected in lower prices of the factors of production. Additionally, Morocco's respect of the endeavour not to impose performance requirements cuts transaction costs of operating in Morocco since investors have fewer restrictions imposed on them. However, the public procurement law[1061] allowed[1062] employing at least 10 per cent of the labour force in a public contract from Moroccan nationals. Such requirement if strictly applied may have an opposite impact on the investments through raising the prices of the factors of production and the transaction costs of carrying out public contracts in Morocco.

IV.C.4 Trade, privatization and openness to the private sector

The aim of this section is to highlight the additional legislative efforts to deregulate the Moroccan economy. This section addresses the trade aspect as well as the GOM's political changes, demonstrating its liberalisation stance. The analysis begins with the trade openness pillar. It then examines changes in the political structure and how they catalysed the privatisation programme and the shift towards deregulation and the private sector. Finally, a brief overview is provided concerning Morocco's privatisation programme and the conclusions derived from the EBRD's mission regarding the country's legislation compliance with international standards.

(A) Trade

On the trade side, the efforts of trade liberalisation were evident in the Morocco-US FTA, in the Agadir Agreement and in the Morocco-EU Agreement. The first to ad-

1060 Article 519 of the LL.
1061 Article 141 of the public procurement law.
1062 This was introduced as part of a policy to stimulate domestic employment. The 10 per cent reference was permitted and is not mandatory in all public contracts. In other words, whenever a public authority sticks to the article's permission, this may constitute a performance requirement.

dress is the Morocco-US FTA. The US, dissatisfied with the outcome of its engagement in multilateral agreements, began to engage in bilateral discussions in the MENA to conclude trade and investment agreements. Priority was granted to Jordan, Egypt and Morocco. The reasoning was the absence of mineral resources and the need to pursue economic openness policies. At the political level, the three states were adopting conciliatory behaviour towards Israel and were backing the US in the first against terrorism in the early 2000s[1063]. These efforts were in conjunction with concluding the US-Morocco FTA. In accordance with such treaty, the GOM was under obligation to list all restrictions applicable for market access and national treatment in the negative list. The motive behind the stipulation of the negative list of restrictions was to promote transparency and reflect the continuous reforms in the business climate. Chapter 10 of the FTA provided Morocco's obligations in connection to investment.

The obligations complied with international standards, encouraging the GOM to extend information access and improving interaction with investors and stakeholders. With the BIT network concluded by Morocco, these benefits were attainable to all investors for BIT signatory states based on the MFN principle[1064]. In this sense, Morocco was also a member of the initiative concluding the OECD Policy Framework for Investment. The framework was founded to target questions in connection to governmental efforts to create favourable business environments. The framework aims to assess the progress in the involved economies on ten aspects covering trade and investment policies. Hence, the investment policies are a cornerstone for such a framework analysis. The assessment linked to it is tested upon the progress recorded in three pillars; non-discrimination, transparency and dispute settlement. Starting with transparency, the GOM adopted a consultative manner in allowing online access to the draft laws and receiving feedbacks from stakeholders and the population. Another website was established to address the restricted sectors and the necessary prerequisites and procedures prior to operating in such sectors.

There were four motivations for the US trade representatives to recommend the conclusion of a FTA with Morocco. First, the agreement would highlight US interests in spreading openness and economic growth across Islamic countries. Second, the agreement would strengthen the GOM in liberalising and adopting more market-oriented policies. Third, an FTA with the US would directly result in enhancing

[1063] Fernandez-Molina 2015 2037
[1064] Kalinova 2010 27

the governance rates within partnering institutions. Fourth, the agreement prescribing protection to US investors in Morocco would grant investors equitable treatment to European investors benefiting from the EU-Morocco Association Agreement[1065].

The second indication of the trade efforts was Morocco's involvement with Egypt, Jordan and Tunisia, in signing the Agadir Agreement on 25 February 2004 in Rabat (Agadir Agreement)[1066]. The Agadir Agreement created a free trade zone between its contracting parties. This came as part of the efforts to facilitate the creation of the Euro-Mediterranean free trade area. The agreement's commitments covered the elimination of tariffs, duties and taxes, besides the abolishment of non-tariff trade barriers. Non-tariff barriers were defined in a broad sense to include cash administrative limitations, plus the measures curbing the flow of imports and goods. Accordingly, goods produced in a contracting state benefit from the NT in the other contracting states of the agreement[1067]. This agreement was complementary to the association agreement concluded with the European Union and effective from March 2000[1068].

Finally, the EU-Morocco FTA signed in 1995 granted a preferential treatment to Moroccan exports to the EU. The agreement allowed access for industrial products to EU markets without neither quantity restrictions nor imposing duties. Another FTA was concluded with EFTA States including Iceland, Norway, Liechtenstein and Switzerland. The agreement provides similar access for Moroccan products to these countries' markets. In return, Morocco was under obligation to eliminate tariffs over a twelve-year period from the entry of force date in 1998[1069].

(B) Market oriented policies

Proof of Moroccan liberalisation have been continuous since the 1990s. Initially, this started since the 1992 legalisation of currency convertibility system allowing investors to freely remit their profits and funds. The IC of 1995, the trade liberalisation and the US FTA and the privatisation programme are additional proof of Morocco's economic transformation. A significant change was allowing the private sector to participate in fully SOEs as concluded by the EBRD mission. More im-

1065 United States General Accounting Office 2004 47
1066 International Monetary Fund 2005a 16
1067 Praussello 2011 74
1068 Publications 2007 68
1069 IBP 2016b 133

portantly was Morocco's adherence to the Declaration, completing the efforts to integrate globally and improve competitiveness[1070]. The role of the IC was discussed above in detail. This section focuses on the complementary policies connected to trade and privatisation.

The rise of Mohammed VI to the Moroccan throne in 1999 was in conjunction with the continuous GOM efforts to liberalise the market. The economic diplomacy was an essential pillar in Mohamed's VI vision for Morocco. Accordingly, the two-decade shift from protectionist policies was extended, the plan of globalising Moroccan companies was under way, the attraction of FDI was an ultimate objective, together with boosting tourism proceeds. These core activities of Morocco's Ministry of Foreign Affairs were performed jointly with other competent technical ministries[1071]. The legislative developments include issuing an industrial property law and a copyright law providing the necessary intellectual property protection. Additionally, the customs code of 2000 abolished cumbersome procedures and computerised the process of customs clearance, reducing its duration from five days in 1997 to only one hour in 2012. In the international arena, the GOM in 2002 appointed an Investment Inter-Ministries Committee. The primary mission of the committee was to handle contractual agreements that brought foreign investments to mega projects and reform the investment environment to attract more foreign investors[1072].

(C) EBRD and privatization

To assess the Moroccan legal framework from the commercial side, the EBRD assessed the pace of liberalising the Moroccan legislations. The pillars examined include laws connected to insolvency and judicial capacity[1073]. With regard to insolvency legislation, Morocco's insolvency law was affected by the French insolvency law. This is a positive signal since the French insolvency code is considered one of the most debtor-friendly pieces of legislation worldwide. With regard to Moroccan judges, besides their lack of updated knowledge, they are not allowed to specialise in any field of law and the process of case allocation is unclear. This raises investors' uncertainty concerning the predictability of judiciary decisions. Furthermore, the cumbersome procedures to file claims result in a two-year lapse of time between fil-

1070 Kalinova 2010 24
1071 Fernandez-Molina 2015 1968
1072 Elkhafif et al. 2012b 117
1073 General Counsel Office 2012 4-5

ing a claim and the trial. The outcome is higher inclination towards mediation and other dispute settlement alternatives[1074].

The privatisation programme began in 1993, targeting tourism, banking and telecommunications. The programme was opened for foreign investors and resulting in total revenues into the GOM by its end in 2011 of USD 13 billion[1075]. The privatisation law[1076] facilitated the floating of the SOEs on Morocco's and foreign stock exchanges[1077]. Morocco applied an intense privatisation plan, reflecting the GOM's interest in opening its markets. The forecasted plan for 1996 covered the privatisation of approximately 112 public sector business entities worth nearly USD 2 billion. However, shortcomings in Morocco's economic performance in 1995 permitted the GOM to collect only USD 400 million in privatisation proceeds[1078].

The three consecutive phases of updating Morocco's public enterprises system commenced by reforming the SOEs, followed by modernisation and finally privatisation. After the completion of the three phases in 2000, the public enterprise regime comprised of 241 SOEs. The three categories of public enterprises included: *(i)* SOEs fully owned by the GOM and known as a state company; *(ii)* the public subsidy, where the GOM held more than half of the shareholding capital; and *(iii)* the semi-public entities, the capital of which GOM held less than 50 per cent.

In conjunction with privatisation, the liberalisation process allowed the private sector to enter the previously monopolised sectors such as electricity and water distribution, and the construction and operation of highways. Nevertheless, sectors under public monopoly included railways, post, airport sector, and phosphate production[1079]. The privatisation and liberalisation allowed the creation of several monopolies, which triggered the requirement of listing the restricted markets in accordance to Morocco's obligations under the Declaration and the US FTA as part of its transparency rating. The Declaration permits two kinds of monopolies. The first is the state monopoly, where the producer or service provider is the central or local government. The second is the licensed monopoly where a private entity is granted an exclusive licence to provide such product or service on a monopolistic basis.

[1074] General Counsel Office 2013a 4, 37
[1075] Bureau of Economic and Business Affairs 2015c 7
[1076] Law No. 39 of 1989, subject to amendments in 1995 and 1999.
[1077] Elkhafif et al. 2012b 118
[1078] IBP 2016b 133
[1079] Bureau of Economic and Business Affairs 2015c 17

Under the Moroccan list, the main examples of state monopolies prevailed in the phosphate market of exploitation and exploration are managed by the OCP, besides the railway transportation, postal services and airport management. Mining projects executed in Morocco are usually owned and managed by SOEs as the case of the OCP in the phosphate extraction. The OCP is 94.12 per cent held by the GOM, while the remaining 5.88 per cent are owned by the Banque Centrale Populaire (governmental bank)[1080]. The efforts to liberalise these markets depended upon transforming public authorities into public corporations. Additionally, the GOM launched a process to split the regulatory authorities from the actual service provider engaged in commercial activities[1081].

From the three components of the last section, the trade openness pillar, the political rise of King Mohamed VI, and the catalysed privatisation and the EBRD mission, all elements reflect the fact that the economy of Morocco experience intense changes during the 2000s. Each change signalled the willingness to exit the former protectionist and state interventionist policies in favour of a liberalised, deregulated economy. Starting from the rise of the new king promoting the private sector, the conclusion of the FTA with the US and the EU, the fuelling of the privatisation programme, to the final step of legislatively permitting public private partnerships. All these changes can be grouped under the process of deregulating and liberalising the Moroccan economy and leaving behind the former restrictive, highly regulated protectionist economy of the 1950s–1970s. These changes should be analysed in conjunction with the IC and its prescribed incentives and guarantees. They all serve the same interest of deregulating and opening the economy for the private sector and for the foreign investors.

IV.C.5 Conclusion

The conclusions deduced from the overview of the Moroccan legal framework can be grouped into three categories. The first category addresses the title of the thesis regarding the Moroccan IC level of compliance with the international investment law obligations. The second category tackles the shift in the Moroccan legal framework from the restricted regulated economy to the more opened and liberalised one. This moves the discussion to the third category connected to the concept of economic freedom (this will be briefly highlighted here and more deeply investigated as part of the economic chapter).

[1080] Office Chérifien des Phosphates 2016
[1081] Kalinova 2010 29

Starting from the notion of the "*national treatment principle*", the Moroccan legislator managed to secure a better compliance position with its international obligations when compared to Egypt. Based on the notions identified to test compliance, which are the right of foreigners to own lands and the right to import and access all investment sectors, Morocco still has further steps to implement to attain full compliance with the principle of national treatment. The main inconsistency appears in the prohibition of foreigners' ownership of agricultural lands. This exclusion of foreign investors from owning land raises the cost of undertaking an investment in Morocco.

Under the "*expropriation*" notion, the Moroccan legal framework regime is the most aligned with the international investment law principle. This alignment appears in several instances. First, in the presence of a specialised requisition legislation. This legislation offers an explicit guarantee that is absent in the Egyptian and Jordanian legal frameworks – that is, basing a requisition policy only upon a judicial ruling and not only upon an administrative decree subject to later judicial review. In other words, the Moroccan legislator adopted a form of a prior review rather than a subsequent one as in the Egyptian and Jordanian cases. Moreover, the legislation governs the procedures and criteria for compensation in a detailed manner. For example, the law prescribes the treatment of forecasted forgone profits due to the executed requisition. This grants an investor a better guarantee, thus reducing the risks arising from the possibility of the GOM intervening to expropriate an investment.

Under the third notion titled "*dispute settlement*", the conclusion from the Moroccan developments in this field are split into two parts. The first tackles the legislative efforts reflected in the promulgation of a new AL. The law adopted a form of a unilateral consent as discussed in the Egyptian country study. This unilateral consent permitted investors from non-BIT signatories to benefit from such consent and file claims against Morocco. This represents the GOM's acknowledgment of the right to revert disputes to arbitration as a substantive protection. Moreover, this law permitted the public sector and SOEs to access the international arbitration arena. Hence, the legislative update moved the Moroccan legal framework closer towards the international one.

Finally, in the last subsection of the substantive protections comes the referral to the right to repatriate profits, the freedom to price products, and employ foreigners. First, with regard to the right to repatriate of profits, Moroccan laws are closely aligned with international investment law requirements. The right is exercised in relation to profits, liquidation proceeds, as well as salaries and wages of foreigners. With regard to the freedom to price products, the Moroccan authorities abolished by the millennium price controls and issued a new competition law. A red flag appears within this law concerning the role of the competition authority as an administrative body entitled to intervene under undefined exceptional circumstances. This obscurity of the exceptional circumstances diminishes the outcome of legal compliance with the principle of pricing freedom and, in turn, indirect expropriation. The last notion under this conclusion paragraph is connected to the employment of foreigners as an indicator for performance requirements under Moroccan laws. Entities are entitled to hire foreigners if the they successfully finalise the procedural requirements to obtain the necessary work licences. This resembles a clear step within the scope of rationalising factor prices for investments flowing into Morocco.

From the above referral to the IC, two general conclusions can be derived. First, the Moroccan investment legislator attempted to grant the investors wide guarantees to signal the state's interest in attracting foreign investors and offering them their needed protections. This was even reflected in the explicit referral to the BITs indicating the state's willingness to respect its international obligations. The second obvious conclusion is the economy's deregulation and shift towards the private sector. All of the above tax and non-tax incentives are serving the same aims prescribed in Articles 1 and 2 of the IC. The incentives represent an explicit example for the legislator's interest in cutting the transaction costs for all investments established in Morocco. By revisiting them, it appears that Morocco opened the door for the private sector to engage in economic activities, incentivising it to lead the state's economy instead of the former public sector hegemony.

The efforts to deregulate the Moroccan laws and economy were addressed under three pillars. The first was the political one, when referring to King Mohamed VI's rise to power. This catalysed the shift towards deregulating the economy and opening it to foreigners. This was evident on the trade level by engaging in a set of trade agreements with the EU, US and other Arab countries. More importantly, this was translated into a more intense privatisation programme that focused on previously highly restricted public services. Moreover, and in connection with the dispute settlement conclusion above, the Moroccan authorities established a mediation centre providing a new alternative for settling disputes other than the inefficient, less informed judiciary. Additionally, the EBRD mission approved the compliance levels of the recent Moroccan legislation connected to public private partnerships. Finally, the widely granted tax and customs incentives, as in the case of Jordan, are explicit proof of the authorities' interest in deregulating the economy, decreasing the burden of compliance for investors.

The above analysis provides an important base for the economic analysis in chapter VI . Chapters IV and VI are closely linked since the above analysis provides an evidence of the changes in the legal rules of Morocco over time, which relates to the correlation analysis to be provided in chapter VI. . The transformation of the Moroccan investment climate from being restricted and highly regulated to a more opened and liberal one can have positive correlations with the FDI inflows to Morocco, which will be discussed more in depth in chapter VI.

V. Case Law

V.A Egypt ICSID Cases

V.A.1 Introduction

After the introduction of the Egyptian investment legal framework in the chapter IV, chapter V intends to examine the practical compliance of the State of Egypt with its international investment law obligations from an adjudication side. The international obligations under investigation in this chapter are the ones introduced within chapter II.F covering the BIT substantive protections. The analysis within chapter V assists in fulfilling two aims. First, it highlights the reasoning behind the number of disputes filed against Egypt in ICSID. Second, it assists in understanding the position taken by the Egyptian side when responding to the claims of violating the international investment law principles filed before ICSID.

Chapter V will be split into two main sections. Section 2 addresses numerically and factually the disputes filed against Egypt in ICSID arbitration. Section 3 is dealing with the legal analysis of Egypt's ICSID disputes is split into two sub-sections. First, an analysis of two ICSID disputes where a final award was rendered, and second, an analysis of two ICSID disputes settled amicably. The dispute analysis includes; a brief factual background for the filed claim, an overview of the respondent's claims, an overview of the tribunal's ruling and the final concluding legal remarks concerning the dispute overall.

V.A.2 Egypt in International Arbitration

Chapter IV has covered the legal framework regulating the investment climate in Egypt. As a brief recap, Egypt has concluded 110 BITs and is a member of the New York Convention for Arbitral Awards Enforcement of 1958 and the Washington Convention on State Nationals Investment Disputes Settlement of 1965. The Egyptian history in ICSID arbitration is quite long. With the first case registered in 1984 and the latest in 2016, Egypt has played the respondent part in 29 ICSID cases. This puts Egypt in the third position as the highest number of participant in ICSID arbitration after Argentina and Venezuela[1082]. The situation of the latter two states can be explained based on their economic and political developments. In the case of Argentina, the severe financial crisis in 2002 creating legal difficulties raised the total

[1082] Sherif, N., Khalil, H. and Zayed, H. 2015 22 registered claims until today to 53 cases. For Venezuela, the rise of Chavez to power followed by Maduro and the execution of hostile leftist policies against foreign investors explained the hike in the number of the filed cases to 43 from 2000 to 2016.

For the Egyptian side, an opinion may blame the Arab Spring uprising of January 2011 for the witnessed increase in ICSID cases registered. This could be true since the number of cases filed against Egypt only after 2011 reached 17 cases. However, prior to the January 2011, Egypt already was a respondent in 12 cases. This number still remains high especially when recognizing that Egypt as one of the top investment destinations in Africa. Moreover, the number contradicts with the essence of the Egyptian policies implemented within the IMF reform program of the 1990s. The IMF recommended Egypt to execute more market oriented policies in order to promote investment flows and create jobs. The high number of cases filed mirrors the hegemony of the former restrictive mind set of Egyptian officials who adopted the market oriented policies economically as per the IMF recommendations without translating them into the regulatory perspective. Hence, the hostile behaviour against foreign investors in actions, laws or regulations prevailed over the economically pro-investment implemented policies.

The comparison of Egypt's ICSID history with Morocco and Jordan would demonstrate the positive lead of the latter two over Egypt. Morocco with only three cases registered in ICSID and Jordan with eight cases show Egypt's negative experience with the ICSID. Furthermore, Egypt's worse situation appears in the number of cases where it was held liable for violating a BIT obligation. This happened in four cases, when Egypt was rendered liable and under obligation to compensate the foreign investors for its violations. In the case of Morocco this never happened. In the case of Jordan, it was held liable in one case and a judicial restitution was sufficient without any additional compensation[1083]. This verifies the above statement concerning the Egyptian officials' true belief in welcoming foreign investors and protecting them when engaging in BITs. It confirms the officials interest to engage in BIT as a signalling tool to promote Egypt as an investment destination.

For the 17 cases filed against Egypt after January 2011, the justification is obvious. The instability resulting from the uprising was reflected in changing governments, policies and regulatory frameworks. Accordingly, the legitimate expectations of investors were negatively impacted. This encouraged more investors to register more

[1083] Please see under subsection V.B.3(A) the case of ATA Construction, Industrial and Trading Company v. Jordan.

claims against Egypt in the ICSID. The uprising remains an important point differentiating Egypt from Jordan and Morocco since the latter two countries featured a stable political regime with a peaceful throne succession far from any political instabilities. This hike in cases after January 2011 undeniably influenced the inflow of FDI in the following years. Therefore, the Egyptian side has undertaken a set of policies to settle the already filed cases, while assuring the reduction of the potentially registered claims.

The enforced policies included the introduction of the Law No. 4 of 2012[1084]. The Law guaranteed the right of investors to engage with the Egyptian authorities in informal reconciliations if the investor was held liable for any legal violations. The domestic informal settlement highlighted the GOE prioritization of settling foreign investors internally and informally rather than via referring disputes to ICSID where a rise in claims provides negative signals for potential investors[1085]. This Law was actually used to settle one of the claims filed in ICSID by Hussain Sajwani in the DAMAC case[1086].

Another joint move was the promulgation of the Law No. 32 of 2014[1087]. As per the referenced Law, the third parties were denied the right to challenge the validity of public contracts without identifying a direct interest in the claim. The legislation immunized all the privatization contracts concluded by the GOE with investors against any legal challenges. Finally, the last legislative move was present in Chapter 7 of the IGIL added by the Law No. 17 of 2015[1088]. The Law established through Article 108 a specialized ministerial committee to work on settling the investment disputes prior to filing them in domestic courts or ICSID. This committee successfully settled many of the post-January 2011 filed cases.

V.A.3 Egypt ICSID Disputes

In this section, the research approaches closely the facts and flow of proceedings associated with the only three cases registered in ICSID against Egypt. For each of the cases, a brief overview is provided for the background facts. The second part addresses the respondent state's claims on the jurisdiction and the merits within the scope of the international investment law. The third and last part of the section ex-

[1084] Law No. 4 of 2012, Official Gazette, Issue No. 52-bis (E), 3 January 2012.
[1085] Sherif, N., Khalil, H. and Zayed, H. 2015 22
[1086] United Nations Conference on Trade and Development 2011
[1087] Law No. 32 of 2014, Official Gazette, Issue No. 16-bis (H), 22 April 2014.
[1088] Law No. 17 of 2015, Official Gazette, Issue No. 11 (cont.), 12 March 2015.

amines the arbitration Tribunal's decision. The outcome of the filed case either verifies the understanding and the position of the respondent state or conflicts it to trigger in certain situation a liability over the respondent. It is worth mentioning that the publicly available material differs on case by case basis. This depends upon the agreement of the dispute parties to share the arbitral awards or the final agreement in case of amicable settlement.

(A) Final Awards

ICSID Tribunal has rendered a final award in seven of the 29 cases filed against Egypt. Of these seven, in four cases the Egyptian side was held liable and under obligation to compensate the claimant for the violation of the BIT obligations. In the three other claims, the Tribunal ruled in favour of the Egyptian side by dismissing the registered claims of the foreign investors.

- Southern Pacific Properties (Middle East) Limited v. Egypt

The first ICSID request for arbitration registered against Egypt was in 1984. The request was filed by the Southern Pacific Properties (SPP) (Middle East) Ltd. v. Arab Republic of Egypt[1089].

❖ Facts

The background facts started since September 1974 when an agreement (agreement) was concluded between SPP a Hong Kong company engaged in developing touristic resorts and the Egyptian Ministry of Tourism represented in the Egyptian General Organization for Tourism and Hotels (EGOTH)[1090]. EGOTH was a public-sector entity regulated in accordance to the Law No. 60 of 1971[1091] and is controlled by the Minister of Tourism. The agreement was governed by the Law No. 43 of 1974 encouraging Arab and foreign investments. Its subject was the development of two touristic complexes in the Pyramids area and the Mediterranean coast. The agreement allowed the incorporation of a joint venture (EDTC) between SPP and the EGOTH where the former controlled 60 per cent and the latter controlled 40 per cent. SPP was under obligation to provide the funding for the project. On the EGOTH and the Ministry of Tourism side, the two main obligations were obtaining the necessary licenses and allocating the land usufruct rights to commence the project.

1089 ICSID, International Arbitration of Registration Date 8/28/1984
1090 See Paras. 42-43 of the Award of the ICSID Case No. ARB/84/3.
1091 Law No. 60 of 1971, Official Gazette, Issue No. 39, 30 September 1971.

The project's execution started smoothly until interrupted in the earlier months of 1978. A parliamentary opposition to the project took place on the grounds that the land allocated to the project within the Pyramids zone included antiques where developmental projects should be prohibited under the UNESCO Convention[1092]. In line with the mounting opposition and the Egyptian Antiques Authority, the Minister of Information and Culture issued a decree prescribing the lands surrounding the Pyramids as Antiques public property. In turn, the Egyptian General Investment Authority (GIA) withdrew its previously granted approval for undertaking the project. Afterwards, the Presidential Decree No. 267 of 1978[1093] abolished the previous Presidential Decree No. 457 of 1977[1094] assigning the Pyramids surrounding land for tourist utilization[1095].

❖ Respondent's claims

✓ Jurisdiction

The first claims filed by Egypt in the SPP case were concerning the lack of ICSID's jurisdiction to decide on the dispute. Egypt's claim was based on the lack of an arbitration clause within the agreement. Also, the absence of BIT between Hong Kong and Egypt by the time of filing the request. For Egypt, the registration of the arbitration request in ICSID had no legal bases due to lack Egypt's necessary consent as required by Article 25 of the ICSID. The analysis would not extend to the Tribunal's ruling on the compensation.

✓ Merits

From the several claims filed by the Egyptian side regarding the dispute's merits, the most important for the purpose of this research remains the challenge of "*expropriation*". The Egyptian side confronted the deeming of the project's cancellation as an "*expropriation*" pursuant to the Egyptian and international laws. The challenge was justified on a set of reasons. First, the concept of "*expropriation*" under the Egyptian laws applies only to real property and not to contractual rights. Therefore, the damaged rights of the SPP do not represent a real property and in turn cannot be subject to "*expropriation*" under the Egyptian laws. Second, the Law No. 43 of 1974 prohibited the State's interventions in the form of "*confiscation*" (deprivation from

1092 See Award Para. 62 – 150 of the Award of the ICSID Case No. ARB/84/3.
1093 Presidential Decree No. 267 of 1978, Official Gazette, Issue No. 23, 5 June 1975.
1094 Presidential Decree No. 475 of 1975, Official Gazette, Issue No. 26, 29 June 1978.
1095 See Para. 65 of the Award of the ICSID Case No. ARB/84/3.

property or interest with the payment of a compensation) and "*nationalization*" (referred to as the transfer of ownership) and not the mere cancellation of project.

Third, SPP was offered substitute lands to proceed with the cancelled project in a new area with similar characteristics. This confirms the diminished value of SPP's rights without amounting to expropriation. Finally, and although the Egyptian officials offered a compensation to the SPP in order to proceed with alternative projects in Egypt, it was the latter's full decision to reject the compensation and fully abandon the previously agreed projects.

❖ Tribunal's ruling

✓ Jurisdiction

Article 21 of the agreement provided the legal basis for reviewing the Law No. 43 of 1974 for being one of the agreement's governing legislations[1096]. The Law No. 43 of 1974 provided three alternatives to settle the investor-state disputes arising pursuant to this Law including; *(i)* the agreement between the State and the investor, *(ii)* the BITs in place between Egypt and the investor's home State and *(iii)* the ICSID Convention to which adhered by the Law No. 90 of 1971[1097]. Article 45 of the Executive Regulations issued by the Minister of Economy's Decree No. 375 of 19771098 provided a mandatory hierarchy when using the available dispute settlement mechanisms in line with above mentioned ranking.

With the Tribunal verifying the *(i)* lack of an ICSID arbitration clause in the State-investor agreement and *(ii)* the absence of a BIT between Egypt and Hong Kong, the Tribunal deemed the reference to the ICSID Convention in Article 8 of the Law No. 43 of 1974 amounting to a unilateral consent. Thus, the deemed unilateral consent qualified the ICSID Tribunal to extend its jurisdiction over the SPP v. Egypt dispute after fulfilling the requirements of Article 25 of the ICSID Convention[1099].

✓ Merits

The Tribunal acknowledged the right of the GOE to cancel the project in order to serve the public purpose after proving the presence of antiques within the Pyramids area. The Tribunal secured evidence under the Egyptian Law where a lawful expro-

[1096] See Para. 51 of the Award of the ICSID Case No. ARB/84/3.
[1097] Law No. 90 of 1971, Official Gazette, Issue No. 39, 30 September 1971.
[1098] Minister of Economy Decree No. 375 of 1977, Egyptian Gazette, Issue No. 1 (cont.), 1 January 1978.
[1099] See Para. 24 of the Award of the ICSID Case No. ARB/84/3.

priation requires paying a compensation to the damaged party. Reference was made to the Egyptian domestic legal framework to decide on the compensation basis and means. This connects this chapter to the preceding one related to the investment legal framework in Egypt. As mentioned in the preceding chapter, Article 34 of the Constitution of Egypt 1971 granted the GOE the right to expropriate private property if for public purpose, against a fair compensation and in compliance with the law. The second important reference was to the Egyptian Protection of Monuments and Antiques Law No. 215 of 1951[1100], where in Article 11, the authorities were granted the right to expropriate the private spaces were the antiques were located in case they were difficult to remove. The expropriation must be against compensation that disregards the value of the discovered monument.

In turn, the Tribunal ruled the investor's right in a compensation for the damaged interests by the project's cancellation. From the Constitutional and domestic law side, the second condition for a lawful expropriation was the communication of a fair compensation. The Tribunal considered the compensation the differential point between counting the GOE's measures as a confiscation or a lawful expropriation. The Tribunal ruled the subject of the lawful expropriation was the SPP's shareholding rights in the EDTC and not the land or the rights to its usufruct. These shareholding contractual rights were under the protection of international law and created the SPP's right to a compensation. In regard to the third Egyptian claim, the subsequent Egyptian authorities' actions against the EDTC turned the possibility to proceed with the other touristic complexes into impossible. The withdrawal of EGOTH from the EDTC joint venture (terminating the joint venture's affection societatis), the blocking of EDTC's bank accounts and sequester of the EDTC assets were all evidences of the SPP's impossibility to proceed with the alternative touristic projects in Egypt.

❖ Case analysis

✓ Jurisdiction

With the three necessary pre-requisites for creating ICSID's jurisdiction over disputes including; first, the nature of the dispute as constituting an investment or not. Second, the parties of the dispute as one of them must be an ICSID Contracting State against a foreign investor. Thirdly, is the most important pre-requisite represented in the parties' consent. This consent has to be in writing approving ICSID's

[1100] Law No. 215 of 1951, Egyptian Gazette, Issue No. 105, 12 November 1951.

jurisdiction over investment disputes. Consents can be explicitly provided as a BIT clause in a bilateral sense. The second option is the unilateral consent when stipulated in the investment promotion domestic laws. The SPP v. Egypt remains one of the most significant cases in connection to the unilateral consent.

The significance appears in ICSID's only decision of its jurisdiction based on the broad unilateral consent prevailing in the Egyptian Investment Law No. 43 of 1974. The Egyptian understanding for Article 8 of the Law No. 43 of 1974 was not in line with the understanding of the Tribunal. The debate stressed whether Article 8 constituted a unilateral consent or not. The GOE deemed the Article insufficient to fulfil the pre-requisite consent. The Tribunal rejected the GOE position considering adding Article 8 on its own representing a unilateral consent based on the mandatory nature of the wordings. The claims were rejected, since the GIA marketed the Law No. 43 of 1974 to foreign investors through English translated brochures guaranteeing ICSID access in cases of any disputes arising connected to the Law's enforcement.

The claimant upheld the hierarchical regime in place under the Executive Regulations of the Law No. 43 of 1974 issued by the Minister of Economy's Decree No. 375 of 1977. As per the Decree, the mandatory hierarchy governed the dispute settlement mechanisms. In the SPP v. Egypt, the claimant communicated his approval to the State's ICSID consent through a letter directed to the Egyptian Ministry of Tourism. The Tribunal held the claimant's requests, and ruled the unilateral consent in Article 8 of the Law No. 43 of 1974 as an express consent sufficient to invoke ICSID's jurisdiction over the dispute as per the Convention's Article 25. In addition, it rejected the GOE request concerning the need for complementary agreements to create ICSID's jurisdiction.

From the above case, the Egyptian legislator adopted a legislative change to avoid the wide interpretation of the unilateral consent under Article 8 of the Law No. 43 of 1974. The amendment required the conclusion of an additional subsequent agreement in order to establish the ICSID jurisdiction. By reviewing the wording of the dispute settlement article in the initial IGIL, two changes would be recognized. First, the wording of the Article adopted an optional sense for the dispute settlement mechanisms instead of the former mandatory tone. Second, the Law explicitly required an independent bilateral agreement between the investor and Egypt in order to qualify an investment law-related dispute to the ICSID. In absence of such agreement, the dispute cannot be automatically invoked at ICSID.

Afterwards, and in a subsequent legislative amendment, the Law No. 17 of 2015 adopted a vaguer wording in connection to the investor-state dispute settlement article. The aim was to avoid any kind of ICSID's jurisdiction reference in the domestic law. This limited the Tribunal's powers to extend their jurisdictions through broadly interpreting the domestic law to locate any form of unilateral consents. As per the legislative amendment, the new Article 7 provides investors with the right to settle disputes as per the agreement with the State or in accordance with the Arbitration Law No. 27 of 1994. It is clearly the case that the new Article is vaguer and does not explicitly refer to ICSID avoiding any broad interpretations of unilateral consent.

✓ Merits

Another important conclusion regarding the Egyptian policymakers understanding of their international obligations is evident in the Tribunal's acknowledgement of the lawful expropriation implemented by the GOE in order to serve the public purpose of protecting the antiques. This verifies the alignment of the GOE understanding of its right to regulate private property after considering the protections and obligation of interacting with foreign investors. On the other hand, the Tribunal rejected the Egyptian understandings in connection to the constitution of the project's cancellation of an "*expropriation*" under the Egyptian and international laws. For the Tribunal, the Egyptian narrow understanding of the "*expropriation*" concept as only valid over real property was invalid. The Tribunal ruled the protection against expropriation under the international law extends to interests and contractual rights. Thus, the compensation awarded to SPP was in return for the expropriated shareholding in the EDTC and not for the land or the usufruct rights.

Second, the Tribunal rejected the Egyptian understanding regarding the Law No. 43 of 1974 guarantees only against nationalization and confiscations and not expropriation. In this regard, the Tribunal referred to the Constitution of 1971 and the domestic Law governing Antiques where the legislator refers to the withdrawal of lands as an expropriation. The narrow definition of the confiscation and nationalization were also deemed invalid and the project cancellation was considered an expropriation. Third, the Tribunal held the Egyptian officials offer to proceed with the investment projects as invalid since all proofs (GOE hostile actions) verified the impossibility to execute such investments. This entailed the officials lack of intention to allow the SPP to proceed with its investments in Egypt.

- Wena Hotels Limited v. Egypt

The second case under examination within the final awards section is the Wena Hotels Limited v. Arab Republic of Egypt[1101]. In the international arbitration precedence, the Wena case features the application of the FET and full protection and security. The analysis would not extend to the Tribunal's ruling on the compensation.

❖ Facts

WENA Hotels Limited, (Wena) a UK company, was engaged with the Egyptian Hotels Company (EHC) a public-sector entity under the control of the Tourism Public Sector Authority in two contractual agreements[1102]. The first agreement was the Luxor Hotel "*lease and development agreement*" for a 21.5 year' period, while the second (identical agreement to the first agreement) was for 25 years and connected to the Cairo's El Nile Hotel. Both agreements granted Wena the right to operate and manage the contract subjects aiming at raising the efficiency and quality standards including the upgrading of the hotels as per the Egyptian Ministry of Tourism specifications[1103].

The dispute erupted directly after the conclusion of the agreements based on Wena's claims that the subject hotels were far below that provided in the lease agreement[1104]. On the other side, EHC claimed Wena's failure to pay the due rents, forced the EHC to liquidate Wena's performance security amount. After several unsuccessful meetings to settle the dispute between EHC and Wena involving the Minister of Tourism, the EHC Board Chairman issued the Decree No. 215 of 1991 on March 27th to seize the two hotels by force[1105]. The actual exercise of the repossession process was on April 1st.

The General Prosecutor in January 1992 ruled the seizure measures as illegal, and entitled Wena to repossess the hotels. Regardless of the entitlement, the Ministry of Tourism preserved its stance against Wena and delayed the return of the hotels[1106]. In addition, the returned Nile Hotel was in a bad status after EHC auctioned the hotel's furniture and fixtures. Although Wena's repossession of the Luxor Hotel was executed in April 1992, still the same conditions in the first hotel applied in the

1101 ICSID, International Arbitration of Registration Date 7/31/1998.
1102 Yannaca-Small 2005 107.
1103 See Para. 17 of the Award of the ICSID Case No. ARB/98/4.
1104 See Para. 19 of the Award of the ICSID Case No. ARB/98/4.
1105 See Para. 29 of the Award of the ICSID Case No. ARB/98/4.
1106 See Para. 54 of the Award of the ICSID Case No. ARB/98/4.

second. The domestic arbitration filings ruled a compensation for Wena, before its later nullification by the Cairo Court of Appeal. Hence, Wena initiated a claim in ICSID arbitration under the Egypt-UK BIT[1107]. Wena's two claims were the Egyptian authorities' unlawful expropriation of the two hotels, besides, the violation of the BIT obligations of FET and "*full protection and security*"[1108].

❖ Respondent's claims

✓ Jurisdiction

Egypt filed three claims against the jurisdiction of the ICSID over the dispute. First, the Egyptian authorities raised the lack of agreement to arbitrate with Wena by deeming it treated as an Egyptian company. Second, the lack of any legal dispute between Egypt and Wena. Third, Egypt confronted Wena's undertaking of an "*investment*" in Egypt since the claim was filed in an early phase prior to directing any actual flows to Egypt (this claim was later withdrawn).

✓ Merits

With the two claims of Wena regarding the expropriation and the breach of the FET principle under the UK-Egypt BIT, Egypt denied its involvement in the process of repossessing the previously handed hotels of Luxor and the Nile. It negated any kind of awareness with EHC's interest to illegally seize the two hotels. The second defence (more of a jurisdictional nature) was the time barring of Wena's claims due to filing it after the elapse of the Egyptian Civil Law statute of limitation. The third defence was the ephemeral nature of the intervention. In other words, the intervention did not constitute an act of expropriation especially with the afterwards return of the hotels to Wena possession.

❖ Tribunal's ruling

✓ Jurisdiction

The Tribunal responded to the two jurisdictional objections. It rejected the Egyptian claims and upheld its jurisdiction to decide on Wena's claims. In connection to the first contention by the Egyptian authorities, the Tribunal ruled Wena cannot be deemed an Egyptian company for the purposes of applying the UK-Egypt BIT. Accordingly, the Tribunal ruled Wena was a British company. In regard to the presence of a legal dispute, the Tribunal ruled Wena's claims were sufficient to identify a

1107 See Para. 62 of the Award of the ICSID Case No. ARB/98/4.
1108 See Para. 80 of the Award of the ICSID Case No. ARB/98/4.

prima facie legal dispute between Wena and Egypt falling within the scope of a State-investor dispute.

The Tribunal disagreed with the time barring claim filed by the Egyptian side. For the Tribunal, Article 42(1) of the ICSID Convention entitled the Tribunal to apply the domestic law and "*the international law as may be applicable*". By referring to the Egyptian Civil Law as reference for the domestic law, the Tribunal recognized the elapse of the statute of limitation. The Tribunal considered such strict enforcement of the three years limitation would conflict with the general rule concerning the prevalence of the international law norms and precedence over the domestic law articles in cases of conflict. Accordingly, the Tribunal followed the international precedence and rejected the time barring jurisdictional claim.

✓ Merits

The Tribunal ruled in favour of Wena's claims of violating the FET concept and rejected the defences of the Egyptian authorities[1109]. It asserted the direct link between the State of Egypt and the repossession process triggering the violation of the BIT. The Tribunal provided six evidences for the link. First, the Egyptian GOE officials' other than the EHC ones had all the opportunities to realize the measures implemented by EHC and still refrained from intervening to settle the escalating situation. Second, the police reports concerning the damages constituted clear evidence of the Egyptian police's failure to protect Wena's investments.

Third, the hotels stayed for nearly one year under the control of the EHC with no attempts to restore Wena's possession over the hotels. Fourth, the Egyptian authorities failed to avoid the physical damages to the two hotels prior to returning them to Wena's control. The hotels were returned in an operational state different than the one as before exercising the seizures. Fifthly, the EHC officials involved in this dispute were promoted and never sanctioned or penalized for their activities. This signals the authorities approval of their adopted measures. Finally, no compensation was communicated to Wena to cover its incurred losses.

The filing of claims and processing of the case held Egypt as violating its obligations under the Egypt-UK BIT due to its non-implementation of all the necessary measures to assure the foreign investor's enjoyment of security and protection. The facts highlighted the GOE's prior knowledge of the EHC willingness to seize the hotels. In addition to the lack of the initial GOE's physical protection, the Minister

[1109] See Para. 82 of the Award of the ICSID Case No. ARB/98/4.

of Tourism *(i)* refrained from terminating the illegal act by returning the hotels to Wena in a timely manner, *(ii)* did not compensate Wena for any damages and *(iii)* did not prosecute the EHC officials, were all proofs entitling the Tribunal to hold Egypt liable for its violation of the FET and the full protection and security[1110].

Regarding the second claim from Wena's side concerning the Egyptian authorities' expropriation of its private property without communicating a prompt effective and adequate compensation, the Tribunal ruled again in favour of Wena[1111]. The Tribunal justified the prevalence of expropriation since the Egyptian authorities' actions deprived Wena of its fundamental right to own the hotels. Examples of the deprivation were the seizure of the hotel, for a period exceeding one year and finally a return of the hotels to Wena in a grave status lacking fixtures and furniture.

In the same context, the Tribunal rejected the authorities claim that the measures were "*ephemeral*" not constituting expropriation. The rejection prescribed that a one-year full and effective control of EHC over the hotels exceeds the notion of "*ephemeral*" intervention in the use and enjoyment of property. The second part of the same claim was more focused on the communication of the prompt, effective and adequate compensation[1112]. The authorities did not indemnify Wena for the losses it incurred in consequence to the interventions of EHC precluding Wena from possessing the hotels and enjoying their benefits.

❖ Case analysis

✓ Jurisdiction

The Tribunal ruled in favour of its jurisdiction against the objections of the Egyptian side. The claims of Egypt having a jurisdictional nature were three. First, the nationality of Wena as a British or an Egyptian entity. In this regard, the Tribunal disregarded the claims of Egypt and considered Wena a British company for the purposes of applying the UK-Egypt BIT. Such decision highlighted the Egyptian side's lack of understanding for the definition of a national within the scope of BITs.

The second contention of ICSID's jurisdiction was the lack of a legal dispute. The Tribunal managed to identify from the initially submitted documents a set of prima facie disputes to which it may extend its jurisdiction. Finally, in regard to the time

1110 Yannaca-Small 2005 107
1111 See Para. 99 of the Award of the ICSID Case No. ARB/98/4.
1112 See Para. 100 of the Award of the ICSID Case No. ARB/98/4.

barring, the Egyptian side stressed the importance of sticking to the Egyptian Civil Law. For Egypt, being the Contracting State, the Egyptian Law should be the law applicable to the dispute. However, the Tribunal rejected this claim. The justification was the domestic law's violation of an international law precedence and norm. Accordingly, the Tribunal upheld the international norm over the domestic law.

✓ Merits

The case of Wena Hotels Limited v. Egypt preserves its position as a remarkable case in applying the BIT obligations connected to FET, full protection and security, and expropriation. The lack of definition for FET as briefly introduced in the theoretical framework chapter did not bar the Tribunal from evidencing and ruling the measures of EHC constituting a violation to it. Unfairness can be simply evident in the treatment accorded to Wena. The justifications provided above by the Tribunal are explicit proofs of unfairness. In connection to the full protection and security, the process or seizing the hotels from Wena's possession is a clear violation. The Tribunal rejected the defences provided by the Egyptian side. Theref were many evidence proving the Egyptian side's awareness and connection to the illegal seizure of the hotels from Wena.

Finally, in relation to expropriation, the seizure of the property for such lone period amounting to a year negatively influencing Wena's opportunity to benefit from the hotels is an obvious example of expropriation. The one-year period of seizure was a sufficient evidence for the Tribunal to reject the defence concerning the "*ephemeral*" nature of the intervention as not amounting to an "*expropriation*". The Egyptian authorities' denial of wrong-doing resulted in the non-communication of the necessary compensation to cover for the losses incurred by Wena in consequence to the seizure, physical damage and lost commercial opportunity.

Of the main insights connected to the Wena v. Egypt case include; first, Egypt was held liable for the wrong-doing represented in a set of actions and not only in legislative interventions or changes in the domestic law resulting in breaches to the BIT. In other words, the theoratical framework represented in the Law No. 43 of 1974 guaranteed protection against expropriation. However, the actual practice of the Egyptian authorities was ruled amounting to an "*expropriation*" in violation to the UK-Egypt BIT. Secondly, the Tribunal held Egypt liable for its passiveness and not its active action. In case of an earlier intervention by the Egyptian authorities to erase the damaging effects of the illegal seizure, Egypt could have been in a better position. Conversely, the passiveness of Egypt activity allowed the long seizure increasing the possibilities of deeming the intervention as an "*expropriation*". Finally, the follow-up actions by the Egyptian authorities played a major role in driving the Tribunal to reach its final ruling. The complimentary actions highlighted the intentions of the Egyptian authorities and consolidated Egypt's liability.

(B) Amicable Settlement

The second subsection in the Egypt ICSID Tribunal part addresses the cases where the investors and Egypt resorted to settling it amicably. As introduced above, the efforts of amicable settlement intensified after the January 2011 revolution to mitigate the obvious increase in filed claims. Moreover, to enhance the reputation of Egypt as an investment destination especially with the economy's desperate need for investment inflows to amplify job creation and assist the economy to restore the pre-January 2011 economic performance. Within the last three years, the Egyptian GOE through the specialized ministerial committee reached successfully an amicable settlement in eleven disputes, ten of them were registered after the January 2011 uprising. On the pending cases side, Egypt is still a respondent in seven cases all filed after January 2011.

The fifteen cases filed against Egypt in ICSID after the January 2011 uprising were mostly incorporated upon violating the expropriation principle in the BITs. Of these claims settled amicably and to be considered for further investigation would be the Hussein Sajwani case of DAMAC and Arcelor Mittal due to the legislative changes accompanying their settlement.

- Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Egypt

  ❖ Facts

The dispute registered in June 2011 by the Emirati Hussain Sajwani against Egypt was connected to his real estate project in the field of tourism development[1113]. The dispute erupted after convicting the Emirati investor and sentencing him to five years in jail. The revolutionary wave of January 2011 opened the door for investigating the land awarding contracts concluded by Egyptian ministers in the recent years preceding the uprising. These contracts were all examined under accusations of fraud and corruption. One of these cases was the one in connection to the Gamsha

[1113] ICSID, International Arbitration of Registration Date

Bay Project where the Minister of Tourism granted the Emirati investor the dispute subject land to develop a luxurious compound. The claim filed by the Emirati investor invoked protection under the Egypt-UAE BIT[1114]. The claims submitted were all associated with the investigation and prosecution processes as damaging the investor and ruining his investments in Egypt and the Gulf area[1115].

❖ Case analysis

With the calmness of the uprising, the GOE attempted to restore investments. The first mechanism was through introducing a legislative amendment through the Law No. 4 of 2012. The Law established a dispute settlement committee to review the pending investment disputes aiming to finalize an out of court settlement binding on Egypt and the investor. In addition, the Law allowed reconciliations with investors convicted in criminal cases related to public interest as long as before the verdict rendered is not final. The conditions for reconciliation include refunding the subject of the crimes from funds, movables, lands or immovable property or its equivalent in case of refund impossibility.

One of the earliest cases benefiting from the above provided legislative amendment was the Hussain Sajwani case. The Egyptian officials arranged several negotiation rounds with the representatives of the investor and concluded a settlement in May 2013[1116]. The investor discontinued the proceedings. The details of such settlement were never published. As part of the dispute settlement agreed, the investor filed a criminal reconciliation request to the competent authorities seeking the avoidance of spending the five years in jail sentence.

- ArcelorMittal S.A. v. Egypt

❖ Facts

The Luxemburg ArcelorMittal S.A. bided for a license to construct a steel plant in Egypt in 2008[1117]. After clinching the license in February 2008, ArcelorMittal postponed the launch of the plant construction process due to the financial crisis of the late 2000s claiming it impacted the demand for steel. With an initial timeline of production start in 2009, the Industrial Development Authority in June 2010 requested the steel producer to begin the execution of actual steps reflecting their commit-

1114 United Nations Conference on Trade and Development 2011
1115 Tarek El-Tablawy 2011
1116 Reuters 2013
1117 ArcelorMittal 6/2/2008

ment in retaining the awarded license[1118]. The data available provide no further details regarding the exact timing of terminating the awarded license. However, the claim filed with ICSID demanded compensation for losses arising from the license and land withdrawal by the Egyptian authorities[1119]. The claim[1120] was registered in December 2015 invoking protection under the Luxemburg-Egypt BIT.

❖ Case analysis

Continuing its stance in settling investment disputes out-of-court, the GOE introduced another legislative amendment improving the out-of-court dispute settlement mechanism[1121]. The new regime depended on the compromise reached between the two counterparts[1122]. It was composed of specialized ministerial committees vested with the full authority to examine the disputes and seek their resolve or settlement with the investor prior to the latter's filing of an arbitration claim in ICSID. The committee was under obligation to prepare reports regarding the examined disputes and present them to the Council of Ministers for approval. The Council's approval of the final settlement between the ministerial committee and the investor bound both the State and the investor. In the ArcelorMittal case, the investor benefited from the ministerial committee in reaching the final out-of-court settlement. No details were provided regarding the agreement terms. Obviously, the discontinuation of proceedings in ICSID was a direct outcome for such settlement[1123].

V.A.4 Conclusion

The analysis regarding the Egyptian engagement in ICSID arbitration can be a source of long analysis. To start with this analysis, it is worth categorizing the cases registered based on their outcomes. From the 29 cases, eight of the cases witnessed the Tribunal rendering an arbitral award. Four of these final awards held Egypt liable, while the other four dismissed the claims of the foreign investors. Going back to the 29 cases, four of them were dismissed for the Tribunal's failure to extend its jurisdiction over the dispute. Moreover, eleven of the registered claims were settled amicably between the Egyptian authorities and the foreign investors. Finally, there are seven cases still pending for a final award or the amicable settlement.

1118 Reuters 2010
1119 IAReporter 9/12/2015
1120 ICSID, International Arbitration of Registration Date 9/12/2015.
1121 The regime was initially provided under the IGIL amendment provided by the Law No. 17 of 2015. However, the new Investment Law No. 72 of 2017 has kept the same regime in place.
1122 Enterprise 2016
1123 Daily News Egypt 2016

The long history of Egypt in the ICSID puts it in a different category compared to Jordan and Morocco. However, there are three basic reasons for such long interaction between ICSID and Egypt when compared to the other country studies. First, the political instability experienced in Egypt since 2011 and until nearly 2014. This period the legislative and executive chaos costed the Egyptian economy its credibility and reputation as an investment destination. The chaos encouraged the foreign investors to register their arbitration claims in order to preserve their rights taking into account the damaging uncertainty.

Second, with the higher inflows of FDI to Egypt, the higher the probabilities of dispute between the foreign investors and the Egyptian authorities. This allows Egypt to suffer more registered claims due to its hosting of more FDI when compared to Jordan and Morocco. Thirdly, and although 17 claims were registered after 2011, having 11 claims registered before reflects a worrying position for Egypt in comparison to Jordan and Morocco. The high number of registered claims verifies the lack of Egyptian officials understanding to Egypt's obligations under the BITs. This triggered holding Egypt liable in four of the eleven cases filed prior to the January 2011 uprising.

In this regard, it is important to refer to the Egyptian authorities' legislative efforts to ease the process of settling investment disputes out of court and out of international arbitration. This mechanism depending on the exchange of compromises allowed the GOE to settle amicably a set of disputes allowing Egypt to restore its credibility and reputation as an investment destination upholding its international obligations in connection to the protection of foreign investors.

The 29 cases appear to cover different scopes and natures of contracts. It cannot be restricted to infrastructure development contracts as in cases of Jordan and Morocco. The Egyptian authorities seem at different economic sectors inclined to non-respecting their international obligations under BITs. However, from the eleven disputes registered prior to January 2011, four were related to the Tourism industry either in managing and operating hotels or in the development and construction of touristic resorts. This observation confirms the important role the tourism industry played in the Egyptian economic structure until 2011.

From the case examined throughout the section of Egypt in chapter V, a set of conclusions can be deduced. First, the Egyptian officials have a deficient knowledge of Egypt's obligations under the BITs, especially when compared to Jordan and Morocco. This appears in defence claims provided to the Tribunal's, which usually adopt narrow definitions for the international investment law obligations as "*expropriation*" and the FET. In turn, this results in holding Egypt liable to compensate the investors in the two above reviewed cases. Second, the Egyptian violations of the BITs were not only an outcome of legislative changes. The state actions were on their own sufficient to breach the international obligations. This was witnessed in incidents when the Egyptian authorities unilaterally terminated contracts, seized property or even revoked licenses or lands.

Third, the significant increase in the number of filed arbitration claims in ICSID against Egypt and specifically after the uprising of 2011 encouraged the Egyptian legislator to intervene and try to stem the number of ICSID filed claims against Egypt. In this regard, it is important to note the role of the filed international arbitration claims in pushing the Egyptian legislator to adopt a different policy seeking the resolution and settlement of state-investor disputes amicably prior to their filing in international arbitration. The change in the policy was evident in the legislative amendment of the IGIL by the Law No. 17 of 2015.

V.B Jordan ICSID Cases

V.B.1 Introduction

After the introduction of the Jordanian investment legal framework in the chapter IV, chapter V intends to examine the practical compliance of the State of Jordan with its international investment law obligations from an adjudication side. The international obligations under investigation in this chapter are the ones introduced within chapter II.F covering the BIT substantive protections. The analysis within this chapter assists in fulfilling two aims. First, it highlights the reasoning behind the number of disputes filed against Jordan in ICSID. Second, it assists in understanding the position taken by the Jordanian side when responding to the claims of violating the international investment law principles filed before ICSID.

Chapter V will be split into two main sections. Section 2 addresses numerically and factually the disputes filed against Jordan in ICSID arbitration. Section 3 is dealing with the legal analysis of Jordan's ICSID disputes is split into two sub-sections. First, an analysis of two ICSID disputes where a final award was rendered and second, an analysis of two ICSID disputes settled amicably. The dispute analysis includes; a brief factual background for the filed claim, an overview of the respondent's claims, an overview of the tribunal's ruling and the final concluding legal remarks concerning the dispute overall.

V.B.2 Jordan in International Arbitration

As provided in the preceding legal chapter, Jordan has ratified in 1972 the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, while in 1980 it ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards. The effectively in force 45 Jordanian BITs all encompass international arbitration and dispute settlement clauses. The Investment Law No. 16 of 1995 guaranteed access to ICSID for dispute settlement amicably, conciliatorily or through arbitration[1124].

The ICSID cases registered against the Kingdom of Jordan until 2017 are eight cases. The first case was registered in 2002 and the last was in 2015. The higher number and the shorter time frame of dispute registration when compared to Morocco reflects the wider conflict arising between Jordan as a host state and the foreign investors. Conversely, Jordan was never held liable to compensate any foreign investor, which is a position similar to that of Morocco. The non-compensation does not acquit the Jordanian authorities from the possibility of breaching the BIT obligations in any instance. The eight cases filed against the Hashemite Kingdom of Jordan include the JacobsGibb Limited (ARB/02/12) - Salini Costruttori S.p.A and Italistrade S.p.A (ARB/02/13) - Trans-Global Petroleum, Inc (ARB/07/25) - ATA Construction, Industrial and Trading Company (ARB/08/2) - International Company for Railway Systems (ICRS) (ARB/09/13) - Orange SA (ARB/15/10) - Ali Alyafei (ARB/15/24). From the eight cases, a final award was rendered in only the ATA Construction case and the Salini Costruttori. Five cases were settled amicably and the case of Al-Ghanim is still pending.

The higher number of cases filed signals a discrepancy in treating foreign investor by the Jordanian authorities when compared to Morocco. In addition, the eight cases were registered during the rule of the current King Abdullah who rose to power by 1999. This notes another difference when compared to Morocco having its most recent claim filed in 2000. The rise in the registered cases lowers the outcomes of the GOJ efforts to promote Jordan as a favourable investment destination in the Middle East. This may sound more reasonable only when the host state is held liable for violating its BIT obligations. However, the reputational damage from the

1124 Rey M. 2013 106

registration of ICSID claims is undeniable. By the initial review, Jordan was held liable in only the ATA Construction case. In the seven other cases, the dispute was settled amicably or denied by the ICSID Tribunal. At this point Jordanian authorities seem in a better reputational position compared to Egypt in regard to respecting BIT obligations. Therefore, the negative impact of the cases registration is minimal since only one arbitral award was rendered holding Jordan liable for BIT violation.

V.B.3 Jordan ICSID Disputes

In this section, the research approaches closely the facts and flow of proceedings associated with the only three cases registered in ICSID against Jordan. For each of the cases, a brief overview is provided for the background facts. The second part addresses the respondent state's claims on the jurisdiction and the merits within the scope of the international investment law. The third and last part of the section examines the arbitration Tribunal's decision. The outcome of the filed case either verifies the understanding and the position of the respondent state or conflicts it to trigger in certain situation a liability over the respondent. It is worth mentioning that the publicly available material differs on case by case basis. This depends upon the agreement of the dispute parties to share the arbitral awards or the final agreement in case of amicable settlement.

(A) Final Awards

- ATA Construction, Industrial and Trading Company v. Jordan

The only case against Jordan where the Tribunal successfully rendered a final award was the ATA Construction, Industrial and Trading v. Hashemite Kingdom of Jordan[1125].

❖ Facts

The claim was filed in ICSID on January 14th 2008. In the claim, ATA Construction, Industrial and Trading Company (ATA) alleged that the Jordanian State had violated its obligations prescribed under the Turkey-Jordan BIT. The dispute was connected to a FIDIC Contract upon which the claimant was responsible for executing a dam construction project in favour of the Jordanian Arab Potash Company

[1125] ICSID, Internation Arbitration of Date of Registration 2/28/2008.

(APC). With the completion of the construction, the dike was submitted to the beneficiary entity, that commenced filling it with water.

During this process, the dike partly collapsed[1126]. This was the starting point for the claim since both parties began arguing about the responsibility for such collapse. The Jordanian entity initiated arbitration proceedings against the claimant in the FIDIC Arbitration Tribunal as per Article 67 of the contract. The FIDIC Arbitration Tribunal dismissed the claims of APC and ruled that no responsibility shall fall on the claimant. The Turkish entity was awarded a $6 million compensation[1127]. This award was later annulled by the domestic Jordanian Court of Appeal before the Court of Cassation upheld the ruling. The Court of Cassation's ruling upholding the annulment of the FIDIC Arbitration Tribunal was the dispute leading ATA to file its case in ICSID.

❖ Respondent's claims

✓ Jurisdiction

The ICSID Tribunal started investigating the claims by reviewing its jurisdiction over this dispute. Jordan objected such jurisdiction under the ratione temporis[1128]. The ratione temporis notion refers to the principle of prospective enforcement of legislations. In the current case, the first jurisdiction challenge by GOJ was the Turkey-Jordan BIT entrance into force only in 2006, while the disputes arising in connection to annulling the FIDIC Arbitration Tribunal award were initiated only in the year 2003. Second, there was no "*investment existing*"[1129] to which the Turkey-Jordan applies since the contract was fully executed before the BIT's entry into force.

✓ Merits

On the merits, the GOJ claims can be provided in four points[1130]. First, the rulings of the Jordanian courts are erroneous since in line with Jordan's domestic legal procedures, which both parties acknowledged, which was enforced in a fair and equitable manner. Second, the failure of ATA to identify the misapplication of the Jordanian Arbitration Law amounting to a violation of the Turkey-Jordan BIT. Third,

[1126] Rey M. 2013 106.
[1127] Sabahi 2011 78.
[1128] See Para. 63 of the Award of the ICSID Case No. ARB/08/2.
[1129] See Para. 66 of the Award of the ICSID Case No. ARB/08/2.
[1130] See Para. 84 of the Award of the ICSID Case No. ARB/08/2.

ATA's failure to prove both the procedural and substantive denial of justice. Finally, ATA's failure to signal any unlawful expropriation.

❖ Tribunal's ruling

✓ Jurisdiction

From a jurisdictional side, the Tribunal ruled it extension of jurisdiction over the ATA's claims related to the Jordanian Court of Cassation ruling extinguishing the Arbitration Agreement in the FIDIC Contract between the ATA and the APC[1131]. Pursuant to Article 9(1) of the Turkey-Jordan BIT read as follows: "[…] *investments existing at the time of entry into force* […]", the jurisdiction would extend only if the dispute arose after the Turkey-Jordan BIT entered into force in January 2006. The Tribunal ruled the Court of Cassation ruling of 2007 raised a new dispute, to which the Turkey-Jordan BIT apply since it was established after the treaty entrance into force in 2006.

The ruling of the Court of Cassation annulling the Final Award of the FIDIC Arbitration Tribunal, would entitle ATA to file a new arbitration claim under the New York Convention and the Jordanian Law. However, the promulgation of the new Jordanian Arbitration Law No. 31 of 2001 and specifically Article 51 deemed a Court of Cassation's ruling annulling a final arbitration award was in itself an automatic extinguisher for the right to arbitrate[1132]. Accordingly, the ruling of the Court of Cassation in 2007 extinguished ATA's right to arbitrate since the Arbitration Agreement in the FIDIC Contract was extinguished. The Tribunal deemed the extinguished right to arbitrate fitting within the definition of an "*investment*" under Article 1(2)(a)(ii)[1133]. Based on this, the Tribunal revisited the definition of "*investment*" and deemed the right to arbitrate a "*right having a financial value associated with an investment*".

✓ Merits

The second phase after ruling on jurisdiction was the Tribunal's role to decide on the merits. For the Tribunal, the automatic extinguishment of the arbitration agreement by nullifying the final award was considered a violation of the FET stipulated in the preamble of the Turkey-Jordan BIT and Article 2(2) of it[1134]. The Tribu-

1131 See Para. 95 of the Award of the ICSID Case No. ARB/08/2.
1132 Rey M. 2013 106
1133 See Para. 117 of the Award of the ICSID Case No. ARB/08/2.
1134 See Para. 125 of the Award of the ICSID Case No. ARB/08/2.

nal ruled the nullification of the Arbitration Agreement concluded in 1998 as part of the FIDIC Contract was a retrospective enforcement of Article 51 of the Jordanian Arbitration Law provision promulgated only in 2001[1135]. The Tribunal expressed its willingness to dismiss the ATA's claims in case the Jordanian Court of Cassation applied the extinguishment of the right to arbitrate and the arbitration agreement prospectively and not retroactively[1136].

The third phase is deciding on the appropriate remedy and relief after holding Jordan liable for violating the BIT. The awarded reliefs granted by the Tribunal aimed to; first, eliminate the effects of extinguishing the claimant's right to arbitrate allowing the latter full access to the Arbitration Agreement of 1998. Second, the termination of all the judicial proceedings in Jordanian courts connected to the dike dispute.

❖ Case analysis

The analysis of the ATA case can be split into two discussions. The first examines the Jordanian understanding of the notions under the disputed contract and the BIT. The second investigates the role of the Tribunal in setting the precedence of the judicial restitution.

✓ Jordan's position

The Jordanian understanding of the BIT notions and obligations was denied by the Tribunal in more than situation. First, the ratione temporis claims of the GOJ were rejected since the claimant's dispute in connection to the extinguishment of the right to arbitrate (Court of Cassation ruling in 2007) was after the Turkey-Jordan BIT entered into force in 2006. Second, in regard to the existence of an "*investment*", the right to arbitrate was deemed as an "*investment*" and it existed at the date the Turkey-Jordan BIT entered into force and until it was extinguished by the Court of Cassation ruling in 2007.

On the merits side, the four claims of the GOJ reflect a conflict in understanding when reviewed in comparison to the Tribunal's award. To start with the erroneous application of the domestic law, the Tribunal ruled the Article 51 of the Jordanian Arbitration Law is violating the Turkey-Jordan BIT, regardless of the parties' initial acknowledgment of the Jordanian legal system prior to contract conclusion in 1998 (the new Law was promulgated in 2001). Second, the Tribunal managed to identify

1135 See Para. 129 of the Award of the ICSID Case No. ARB/08/2.
1136 Rey M. 2013 106

the misapplication of the Jordanian Arbitration Law, when it recognized the extinguishment of the Arbitration Agreement in the FIDIC Contract through the Court of Cassation ruling in 2007.

Thirdly, the Tribunal ruled the automatic extinguishment of the right to arbitrate was a violation of the FET obligation and the legitimate expectations of the ATA as a party to the Arbitration Agreement in the FIDIC Contract. The precedence held Jordan liable for the retroactivity of its legislation. This retroactivity was considered a violation to the general principles of justice and the legitimate reliance on the Arbitration Agreement in the FIDIC Contract. Thus, the Tribunal was clear in accepting only the prospective application of the Jordanian Arbitration Law. Finally, it amounted the extinguishment of the right to arbitrate as a retroactive deprivation of the ATA from a valuable asset. Therefore, the final ruling held the extinguishment of the Arbitration Agreement in the FIDIC Contract as a violation for the Turkey-Jordan BIT.

✓ Precedence

From the ATA case, the ICSID Tribunal has set a significant precedent in two instances. First, its consideration of the right to arbitrate as an "*asset*" and an "*investment*" in itself. The initial dispute connected to the arbitration rights extinguished fell within the Tribunal's jurisdiction. This is another incident where the Tribunal adopts a broad definition of an "*investment*" in a manner unfavourable for the Respondent State.

The second instance of precedent was the provision of judicial restitution as a matter of compensation. This was the case when the Tribunal directed the prompt unconditional termination of proceedings in front of Jordanian courts, while revalidating the Arbitration Agreement in the FIDIC Contract. This order granted the claimants the right to arbitrate under the parties' arbitration agreement. Hence, the award returned the arbitration agreement into effect. This revival represents a situation of juridical restitution[1137].

– Salini Costruttori S.p.A and Italstrade S.p.A v. Jordan

The only dispute filed against Jordan, where the Tribunal dismissed the claimant's request due to lacking jurisdiction was the one registered by the joint venture of Salini Costruttori S.p.A and Italstarde S.p.A (JV)[1138].

1137 Sabahi 2011 78
1138 ICSID, International Arbitration of Registration Date 7/11/2002

❖ Facts

The registration of the arbitration claims dated to August 2002[1139]. The dispute was in connection to the "*Construction of the Karamah Dam Project*" invoking the Italy-Jordan BIT. The construction contract of 1993 was concluded between the Jordanian Valley Authority and the JV[1140]. As per the contractual agreement, and specifically the dispute settlement Clause 67.3, any proceedings of settlement in association with the contract could be initiated only by the completion of the contractual work.

The contracted construction work was completed by October 1997. The presence of amounts due for the JV and the eruption of contractual disputes motivated the JV to communicate a letter to the Minister of Water and Irrigation with the undecided issues[1141]. The failure of the amicable settlement and the presence of conditional arbitration encouraged Dr. Salini to request an arbitration settlement during his often visits to Jordan when meeting officials[1142]. The requests were raised to the highest rank of officials in both states. The dispute was listed over the meeting's agenda of the Italian delegation headed by the Italian Prime Minister Massimo d'Alema who visited Amman officially in February 2000[1143]. The outcome of this meeting was still disputed between both the JV and the GOJ.

The continuous rejections from the GOJ to revert the JV's claims to arbitration rather than Jordanian judiciary forced the JV to file their claims in ICSID[1144]. The JV claimed the GOJ's restriction from accessing international arbitration constituted a violation of the FET principle guaranteed under the Italy-Jordan BIT. For them, the GOJ's failed to comply with its obligation of preserving a legal framework for investors to adhere to in good faith.

❖ Respondent's claims

✓ Jurisdiction

Jordan's objections to the Tribunal's jurisdiction cane be provided in five points. First, establishing the ICSID jurisdiction as per Article 9(2) of the Italy-Jordan BIT, which excludes the ICSID's jurisdiction. Jordan deemed the construction project

1139 See Para. 1 of the Award of the ICSID Case No. ARB/02/13.
1140 See Para. 52 of the Award of the ICSID Case No. ARB/02/13
1141 See Para. 53 of the Award of the ICSID Case No. ARB/02/13
1142 See Para. 54 of the Award of the ICSID Case No. ARB/02/13.
1143 See Para. 59 of the Award of the ICSID Case No. ARB/02/13.
1144 See Para. 69 of the Award of the ICSID Case No. ARB/02/13.

met the definition of an "*investment*". Accordingly, the construction contract became an "*investment agreement*" under Article 9(2) of the Italy-Jordan BIT[1145]. This was supplemented by the understanding that the Jordan Valley Authority was a public entity and not the State of Jordan itself. This entailed the under-consideration disputes should be settled as per the Clause 67 of the construction contract (the "*investment agreement*"). In other words, it is obvious that investment agreements are excluded from the scope of the ICSID.

The second objection was the absence of an "*Umbrella Clause*" for the construction contract's breaches to qualify as violations to the Italy-Jordan BIT[1146]. The third objection was connected to the ratione temporis. For Jordan, no violations for the BIT were committed after the Italy-Jordan BIT entered into force[1147]. The fourth objection stressed the lack of the written consent as per Article 25(1) of the ICSID Convention. In case of considering the project as an "*investment*", the jurisdiction of the ICSID over the dispute required the presence of the dispute parties' written consents as a pre-requisite for jurisdiction. This written consent was not available in case of Jordan whether in regard to the ICSID or even any other form of arbitration.

The fifth objection of jurisdiction appeared in connection to the JV's plan to benefit from the MFN clause of the Italy-Jordan BIT[1148]. Jordan objected the JV's request to apply the MFN principle as per the US-Jordan BIT, which entitled them to benefit from the favourable treatment granted to US investors under Article 9 of the US-Jordan BIT. As per the referenced Article, the investors were entitled to submit their claims to the ICSID regardless of any contractual clauses providing for any different dispute settlement regimes. The objection stressed the MFN in Article 3 of the Italy-Jordan BIT cannot apply to procedural obligations and cannot prevail over the intentions of the Italy-Jordan BIT parties.

- ✓ Merits

The JV filed this case in ICSID and the GOJ objected the Tribunal's jurisdiction. By referring to Clause 67.3 of the construction contract, the contractual disputes should be referred to the Jordanian competent court unless amicably settled. In addition, the same Clause stipulated two conditions. First, the dispute parties should

[1145] See Para. 30 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.
[1146] See Para. 41 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.
[1147] See Para. 44 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.
[1148] See Para. 43 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.

agree on settling it through arbitration. Second and more importantly, the referral of the dispute to arbitration was conditioned upon the receipt of the Jordanian Council of Ministers prior approval in case the dispute involved a public entity (government or any other). The GOJ considered the Jordanian Valley Authority as a public entity and not the State of Jordan itself. This entailed the need for the Jordan's Council of Ministers prior approval in order to fulfil the condition for referring the dispute to arbitration[1149]. Under this understanding, the GOJ deemed the referral of the dispute to arbitration was breaching the Clause 67(3) of the construction contract and that the Tribunal lacked jurisdiction.

The second complementary claim of the Jordanian side was the lack of sufficient evidence for any agreement communicated by the GOJ regarding its approval to refer the dispute to arbitration[1150]. This included the dispute over the outcome of the meetings between the different ranks of state officials until the Prime Ministers of Italy and Jordan[1151]. The GOJ provided continuous evidences for letters exchanged between both States to reflect its continuous rejection regarding the referral of the dispute to the ICSID arbitration.

❖ Tribunal's ruling

✓ Jurisdiction

The Tribunal's ruling on jurisdiction considered the construction contract as an "*investment agreement*" within the scope of Article 9(2) of the BIT. This did not limit the ICSID's jurisdiction to decide on the claims in case triggering a violation of the BIT. Otherwise, the contractual breaches of the construction contract, should be governed solely by the procedures of the contract as in Clause 67 with no jurisdiction for the Tribunal[1152]. For the second objection, the Tribunal interpreted the Articles of the Italy-Jordan BIT and ruled the lack of an "*Umbrella Clause*" in the Italy-Jordan BIT[1153]. This in turn entailed the lack of jurisdiction over the contractual dispute. In connection to the third objection, the Tribunal ruled the rejection of the Jordanian Prime Minister to refer the dispute to ICSID was communicated at a date after the entry into force of the Italy-Jordan BIT in January 2000[1154].

[1149] See Para. 33 of the Award of the ICSID Case No. ARB/02/13.
[1150] See Para. 36 of the Award of the ICSID Case No. ARB/02/13.
[1151] See Para. 60 of the Award of the ICSID Case No. ARB/02/13.
[1152] See Para. 92 and 94 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.
[1153] See Para. 127 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.
[1154] See Para. 175 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.

For the fourth objection, the Tribunal asserted the differentiation between the merits and jurisdiction. It added that the lacking proofs of the Jordanian Council of Ministers approval to refer the contractual dispute to ICSID, would not exclude the possibility of breaching the FET principle under Articles 2(3) and 2(4) of the Italy-Jordan BIT[1155]. In reply to the fifth objection, the Tribunal ruled its lack of jurisdiction as per the MFN principle in Article 3 of the Italy-Jordan BIT[1156]. The reason was the lack of evidence concerning the BIT parties' intention to extend the scope of the MFN clause to govern the dispute settlement process[1157]. This is confirmed with Article 9(2) of the aforementioned BIT, where the Contracting States referred a contractual dispute settlement to the contractually agreed procedures. In addition, the Tribunal may not broadly interpret the MFN clause to extend its scope to dispute settlement.

✓ Merits

The Tribunal placed the burden of proof on the JV to provide the legal proofs for the oral agreement concluded between the two States Prime Ministers' concerning the JV's right to refer the dispute to arbitration. Both parties provided a set of letters and witnesses attending the meetings to verify their opposing positions[1158]. The opposing views confirmed the meetings of February 2000, while they totally disagreed about the content of the final outcomes.

As a result, the Tribunal ruled that the documents unilaterally provided from the JV's side were insufficient to prove the legally binding agreement between both parties regarding the claim's referral to arbitration[1159]. Therefore, the Tribunal did not proceed further to examine the violation of the BIT since no agreement was reached regarding the dispute referral to arbitration. The JV's claims "*must in any event be rejected*"[1160].

❖ Case analysis

The analysis of the Salini Costruttori and Italstrade v. Jordan case can be split into two discussions. Both examine the Jordanian understanding of the notions under the disputed contract and the BIT but once from a jurisdictional side and the other from the merits side.

[1155] See Para. 166 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.
[1156] See Para. 118 of the decision on jurisdiction of the ICSID Case No. ARB/02/13.
[1157] Houde 2006b 154
[1158] See Para. 80 of the Award of the ICSID Case No. ARB/02/13.
[1159] See Para. 99 of the Award of the ICSID Case No. ARB/02/13.
[1160] See Para. 100 of the Award of the ICSID Case No. ARB/02/13.

✓ Jurisdiction

On the jurisdiction side, the Jordanian understanding of the BIT notions and obligations proved in line with the Tribunal's ruling in three instances out of the initial five objections to jurisdiction. These instances were; first, the scope of Article 9(2) and its exclusion of the ICSID jurisdiction as long as the contractual breach does not amount to a violation of the BIT. In this sense, the Jordanian side properly understood the aim and the intentions of the BIT parties when providing such clause. The intention was obvious to exclude the ICSID's jurisdiction from contractual disputes "*investment agreement*" unless violating the BIT.

Second, Jordan successfully defined the notion of an "*Umbrella Clause*", which the Tribunal failed to locate in the Italy-Jordan BIT[1161]. The construction contract did not encompass any wordings even to mirror the Italy-Jordan BIT, which could have created any sort of doubt. Thirdly and finally, in relation to the MFN principle. The Tribunal could not broadly interpret the MFN Article 3 of the Italy-Jordan BIT especially, with the presence of Article 9(2) reflecting the interest of both parties to refer contractual disputes to contractual settlement procedures and not the BIT. An extension of the MFN principle over the dispute settlement process would have over interpreted the role of the MFN Article Italy-Jordan BIT.

The two other instances where the Tribunal identified its jurisdiction over the dispute in an opposing view to the Jordanian understanding were; first, the ratione temporis. Under this notion, the Tribunal considered the dispute start date was the negative reply the JV received from the Jordanian Prime Minister regarding the request of the Council of Ministers approval to refer the dispute to ICSID arbitration. For Jordan, the dispute dated back to the 1990s and the BIT invoked entered into force only in January 2000. Second, the Jordanian understanding required the Council of Ministers approval, while the Tribunal considered such issue within the merits scope and not a jurisdictional one. It extended its jurisdiction based on the potential violation of the FET principle.

✓ Merits

The Tribunal confirmed the validity of the Jordanian understanding of Clause 67(3) of the construction contract in connection to the dispute settlement procedures. The Tribunal entered into the long debate of proving the presence of the Council of Ministers' approval to refer the dispute to the ICSID arbitration. Its final ruling ver-

[1161] Yannaca-Small 2006 112-118

ified the proper position of the Jordanian officials in this regard where the necessary approval was never identified and the final award favoured the Jordanian side.

The new issue raised under such claim was connected to the evidence and the need to prove the possibility to arbitrate. The difficulty was in connection to the meeting convened between the states' officials behind closed doors. The Tribunal requested the JV to provide sufficient proofs of the agreement over arbitration - when the amicable settlement failed - deemed sound. Accordingly, the JV's dependence on the unilateral letters communicated to guarantee acceptance was ruled insufficient to verify the Council of Ministers of Jordan's approval to direct the case to arbitration.

(B) Amicable Settlement

The cases finalized under an amicable settlement are five. Information is publicly available for only four of them. The one considered in this research is the Trans-Global Petroleum Inc. v. Jordan[1162] based on its special nature.

- Trans-Global Petroleum Inc. v. Jordan

  - Facts

The claim was filed by Trans-Global Petroleum (claimant) against the State of Jordan (respondent) on August 2nd 2007. The claimants' allegations were three. First, the breach of the FET principles prescribed in Article 3(a) of the US-Jordan BIT. Second, the provision of unreasonable and discriminatory treatment in violation of Article 3(b) of the same treaty. Finally, the lack of consultations as stipulated in Article 8 of the aforementioned treaty. Jordan objected the claims, before agreeing with the claimant on settling the dispute amicably. The agreed settlement was issued in an award by the Tribunal and later published after the parties' agreement.

  - Case Analysis

The Trans-Global Petroleum v. Jordan preserves a noteworthy position in ICSID precedent. The settlement agreement between both parties allowed cutting the litigation and the arbitration costs[1163]. Pursuant to Article 43(2) of the ICSID Convention[1164], the parties asked the Tribunal to frame their settlement agreement in the form of a rendered award. This ensures its legally binding power against third par-

1162 ICSID, International Arbitration of Registration Date 9/24/2007.
1163 See Para. 9 of the Consent Award of the ICSID Case No. ARB/07/25.
1164 See Article 43(2) of the ICSID Convention available at World Bank 1965.

ties. The Tribunal approved the request and on March 2nd 2009, an award was rendered stipulating in details the agreement concluded between Trans-Global Petroleum and Jordan. As per the settlement agreement, the claimant should withdraw all its filed claims against Jordan. This generic statement was broadly interpreted on both sides to include all subsidiaries, affiliates, holdings and owners directly or indirectly for the claimant as well as all agencies, authorities and organs of the respondent. This was the side of dispute parties' settlement section.

On the subject matter side, the claimant guaranteed the withdrawal of any claims related to its investment in Jordan through its affiliate and all other associated agreements between the State and the investment. The settlement agreement was published in accordance to Article 48(4) of the ICSID Convention[1165]. This case on its own represents a special standard since both parties managed to settle the dispute amicably through another alternative other than arbitration. Accordingly, the need to proceed with the litigation and arbitration costs became worthless. However, both parties were still interested in issuing such settlement agreement in the form of an award rendered by the ICSID Tribunal to ensure it maintains its binding legal power and credibility against third parties.

V.B.4 Conclusion

Jordan has a wider experience in the ICSID arbitration when compared to Morocco. The number of cases filed against Jordan are eight in total and the latest two were filed in 2015. Moreover, in the eight cases, only two of them were the ICSID's Tribunals successfully delivered final awards. For the other cases, the dispute was amicably settled between the two parties.

From the above cases highlighting the Jordanian manner in treating foreign investors two conclusions can be drawn before deeply analysing the precedent set in three of the disputed cases. The first conclusion is that cases fall within the scope of infrastructure development. For example, the main two cases of ATA and Salini were construction contracts. The same applies for Orange, where the dispute arose upon the renewal of the necessary license. This nature of infrastructure development reflects the newer trend as compared to the earlier 1960s and 1970 when the government was principally responsible for the execution of public utility projects and services provision. This confirms the openness towards the private sector in the 1990s and the same trend followed by King Abdullah in the 2000s. This under-

[1165] See Article 48(4) of the ICSID Convention available at World Bank 1965.

standing appears further when checking the dates of filing the claims. The eight claims were registered between 2002 and 2015. This observation provides an additional proof for the State's interest in engaging the private sector in the economic activity when compared to the decades before under King Hussein's rule.

Another conclusion focuses upon the outcome of the ICSID arbitration cases. From the eight registered cases, five cases were settled amicably after registering the claims. This opens the door for the discussion concerning the role of registering claims in solidifying the parties' negotiation power and cutting of litigation costs. Of the eight cases, there is only the Ghanim Sons still pending for an award or amicable settlement. There were two cases where a final award was rendered that of ATA and Salini Costruttori and Italstrade. In addition, the interest of Jordan to settle amicably its disputes remains a positive point in preserving its image as an investment destination. Although, more cases are filed against Jordan compared to Morocco, still it was held liable in only the ATA case.

This moves the conclusion to the last point related to the Jordanian understanding of the BIT notions and obligations. The above analysed in detail cases highlighted different rates of compliance with the BIT obligations. In the case of ATA, the domestic Arbitration Law and the Court of Cassation triggered a violation to FET principle under the Turkey-Jordan BIT. Also, this came with the definition of the right to arbitrate as an "*investment*". In the second case, the Jordanian understanding successfully acquitted Jordan from any liability since the Tribunal failed to locate the necessary GOJ approval to decide on the Italian claims.

V.C Morocco ICSID Cases

V.C.1 Introduction

After the introduction of the Moroccan investment legal framework in the chapter IV, chapter V intends to examine the practical compliance of the State of Morocco with its international investment law obligations from an adjudication side. The international obligations under investigation in this chapter are the ones introduced within chapter II.F covering the BIT substantive protections. The analysis within this chapter assists in fulfilling two aims. First, it highlights the reasoning behind the number of disputes filed against Morocco in ICSID. Second, it assists in understanding the position taken by the Moroccan side when responding to the claims of violating the international investment law principles filed before ICSID.

Chapter V will be split into two main sections. Section 2 addresses numerically and factually the disputes filed against Morocco in ICSID arbitration. Section 3 is dealing with the legal analysis of Morocco's ICSID disputes is split into two subsections. First, an analysis of two ICSID disputes where a final award was rendered and second, an analysis of two ICSID disputes settled amicably. The dispute analysis includes; a brief factual background for the filed claim, an overview of the respondent's claims, an overview of the tribunal's ruling and the final concluding legal remarks concerning the dispute overall.

V.C.2 Morocco in International Arbitration

Prior to starting the analysis, it is important a set of background facts about Morocco. First, it is a member in the two international arbitration instruments. The first is the New York Convention concerning the Recognition and Enforcement of Foreign Arbitral Awards since June 1959. On June 1967, Morocco became a member of the Washington Convention founding the ICSID governing disputes between Host States and Foreign Investors[1166]. The cases filed against Morocco in ICSID since its initiation were three. The start was the Holiday Inns S.A. and others v. Morocco[1167], followed by the Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco (ICSID case No. ARB/00/4)[1168] and the final case of Consortium R.F.C.C. v. Kingdom of Morocco (ICSID case No. ARB/00/6)[1169].

Morocco was never held liable for any BIT breaches in the three cases. These cases were remarkable in the history of international arbitration for the reasons mentioned afterwards. In the first case of Holiday Inns v. Morocco of 1972 the dispute was settled amicably. Conversely, the dispute maintains its precedent for being the first ever filed in ICSID by 1972. In the second case of Salini, the Tribunal introduced the remarkable test for defining an "*investment*". The Tribunal in that case ruled its jurisdiction dismissing the challenges of the Moroccan side concerning the Tribunal's lack of jurisdiction. On the merits the Tribunal declined the liability for the Moroccan state.

By examining the ICSID Convention, it becomes obvious that the Convention signatories did not define explicitly "*investment*" granting signatories a wider power to decide on ICSID's jurisdiction as per their definition of investment. The inconsist-

1166 Kalinova 2010 49.
1167 ICSID, International Arbitration of Registration Date 1/13/1972.
1168 ICSID, International Arbitration of Registration Date 6/13/2000.
1169 ICSID, International Arbitration of Registration Date 6/28/2000.

encies between signatories' in defining "*investment*" leading to the start of several claims was problematic. This motivated defining the term "*investment*", in order to set the borderlines for ICSID's authority[1170]. The same applied in the case of Consortium R.F.C.C. v. Morocco where the jurisdiction challenges of Morocco were dismissed without being liable for any BIT violations on merits.

The numbers and dates of filed cases against Morocco compared to Egypt and Jordan signals the state's respect and action in line with the obligations set within its concluded BITs. A comparison of the ICSID registered claims against the three states under study in this research (regardless of the outcomes) assists in understanding the Moroccan authorities' behaviour towards foreign investors.

With the number of cases registered in ICSID against Morocco being three and the latest was in 2000. From the low number of cases and the old date of filing, two conclusions are deduced regarding Morocco's behaviour towards its BIT obligations. First, Morocco properly treats its foreign investors by granting them a non-egregious treatment. In other words, Morocco complies more with its BIT obligations when compared to Egypt and Jordan. Second, it verifies the economic thought highlighted in the chapter III regarding the new King's position from welcoming the foreign investments and the establishment of a more business-friendly investment climate.

V.C.3 Morocco ICSID Disputes

In this section, the research approaches closely the facts and flow of proceedings associated with the only three cases registered in ICSID against Morocco. For each of the cases, a brief overview is provided for the background facts. The second part addresses the respondent state's claims on the jurisdiction and the merits within the scope of the international investment law. The third and last part of the section examines the arbitration tribunal's decision. The outcome of the filed case either verifies the understanding and the position of the respondent state or conflicts it to trigger in certain situation a liability over the respondent. It is worth mentioning that the publicly available material differs on a case by case basis. This depends upon the agreement of the dispute parties to share the arbitral awards or the final agreement in case of amicable settlement.

1170 Grabowski 2014 289.

(A) Jurisdiction Awards

The second case filed against Morocco came twenty-eight years after the first one. It was submitted by the Italian Salini Costruttori S.p.A. and Italstrade S.p.A. against the Kingdom of Morocco. The Kingdom of Morocco was involved in the dispute as a respondent since the Societe Nationale des Autoroutes du Maroc (ADM) represented the GOM in the contractual agreement with the two Italian construction entities.

- Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco

❖ Facts

ADM entity acted on behalf of the Minister of Infrastructure and Professional & Executive Training i.e. the State of Morocco. In August 1994, a tender invitation was issued for the construction of the Rabat Fes 50 Km highway. The two claimants were awarded the tender and in turn had to establish a joint venture to proceed with executing the project.

The joint venture was a transparent entity where each of the two Italian entities was independent. Therefore, the arbitration claim is provided jointly. The contract execution lasted for 36 months instead of the 32 months as initially agreed. The ADM issued the final account notification to the two Italian entities, who signed the draft letter with reservations concerning the reduced payment. The reservations were communicated to the Minister of Infrastructure who neither him nor the ADM responded to. Hence, the Italian entities reverted their claims to ICSID arbitration registering it on June 13, 2000[1171] claiming a compensation for suffered damages.

❖ Respondent's claims

The GOM challenged the ICSID's jurisdiction to decide on the dispute. The respondent state's claims of Morocco against ICSID's jurisdiction can be split into two categories. First, was the formal procedural and was connected to the dates of filing and exhausting amicable settlement solutions. Secondly and more importantly, the challenges concerning both the persons (ratione personae) and the subject (ratione materiae) of the dispute.

Under the ratione personae, Morocco claimed the ADM was a private limited liability entity having its own assets and independence regardless of its GOM ownership

1171 See Para. 6 of the decision on jurisdiction of the ICSID Case No. ARB/00/4.

structure. Engaging the ADM in such public procurement contract preserved the legal nature of ADM. On the other side, the Italian companies structured their claims on the control pursued by the Infrastructure Minister over the critical decisions in association to the contractual arrangements. In addition, the contractors claimed the contract was performed in favour of the GOM and the ADM financing depended directly and indirectly on the GOM budget[1172].

The second Moroccan claim against the ICSID's jurisdiction was based on the ratione materiae. Under this notion two claims prevail. The first was linked to the qualification of the Italian entities operations to fit within the definition of an "*investment*". The second tackled the claims themselves and whether they constitute violations to the BIT or not. To begin with the definition of "*investment*", Morocco insisted on the need to reference the host state domestic law to define "*investment*" as per Article 1(1) of the Italy-Morocco BIT read in French as follows: "[…] *in accordance with the laws and regulations of the aforementioned party*".

Pursuant to the Moroccan Law, the Decree No. 2-98-482 promulgated on December 30, 1998 treats the construction activities transaction as a "*services contract*" and not an "*investment*" [1173]. The plaintiffs pleaded the contract constituted an "*investment*" based on the Italy- Morocco BIT.

For the second claim, Morocco considered the claims of the Italian entities as contractual breaches, which do not qualify to a BIT violation. For the Italians, the contractual breaches are assimilated with violating the BIT, and both can be submitted for ICSID arbitration[1174].

❖ Tribunal's ruling

When deciding on the claims, the Tribunal split the ruling into two categories. First, jurisdictional claims associated with the definition of an "*investment*". Second, the jurisdictional claims connected to Morocco's consent.

✓ Defining an "*investment*"

To start with the decision on the jurisdiction and specifically with the ratione personae, the tribunal held ADM was a public natured entity representing the State of Morocco. This was justified from a structural and functional points of view. From a structural standpoint, the majority stake in the ADM was in GOM's hands. The

1172 Omar E. Garcia-Bolivar 2012
1173 Salacuse 2015 185
1174 Omar E. Garcia-Bolivar 2012

ADM's board of directors was a representation of a wide range of public authority officials engaged in the transportation sector. Moreover, the board of directors' minutes were often communicated to Morocco's Prime Minister and to the Government Secretariat. On the functional side, the ADM's Articles of Association were an explicit proof for its role in constructing, operating and managing roads and highways as public utilities, which was granted its competence by GOM's decisions[1175].

On the other hand, and in connection to the Tribunal's jurisdiction over the ratione materiae. The Tribunal qualified the construction project to an "*investment*" in itself under the Italy-Morocco BIT and the ICSID. It disregarded the Moroccan requests to define an "*investment*" under the domestic laws as per Article 1(1) of the Italy-Morocco BIT. It deemed the reference was necessary only for deciding on the validity of the activity and its conformity to the domestic law. In other words, the illegal activities were not deemed in compliance with Article 1 of the BIT and therefore were not eligible to the treaty's protection. The construction contract was in total compliance with the Moroccan law and based on a tender invitation constituting the administrative authority's approval. As per the "*investment*" listed examples in Article 1 of the BIT, subtitles 1(c) and 1(e) refer to the competent authority approval or contract granted as a necessary pre-requisite to qualify contractual agreements as an "*investment*"[1176].

The third part of extending the tribunal's jurisdiction was the qualification of a project as an "*investment*" under the ICSID Washington Convention. In this situation, the Tribunal introduced the Salini test to define an "*investment*" for the first time in the ICISID's jurisprudence.

The evaluation of the contract as an "*investment*" was tested upon meeting the four criteria. First, the construction project obliged the Italian entities to use their know-how, equipment, personnel and moved them to the building site to participate in performing the construction work. This fulfilled the first requirement addressing the contribution by the foreign investor in asset or in money.

The second criterion dealt with the duration of the activity. The initial agreed contract was 32 months. Even though the contract was executed over a 36 months' period, the initial 32 ones were already sufficient to exceed the minimum threshold re-

[1175] See Para. 33 of the decision on jurisdiction of the ICSID Case No. ARB/00/4.
[1176] Government of Italy and Government of Morocco 1990.

quired for defining investments. The threshold falls between two and five years. Hence, the second criterion was met[1177].

The third criterion under consideration in the Salini test was the foreign investor's borne risk from engaging in the "*investment*". This test was successfully fulfilled through only reviewing the claimants' memorandum replying to the jurisdictional claims of Morocco. The exhaustive risks list included for example, the owner's right to terminate the contract prematurely, the right to execute variations within limited ranges without affecting the fixed pricing system[1178] and one last example is lack of compensation for changes in work loads by addition or reduction as long as within 20 per cent of the contract's value. From these examples of risks, it appeared the risks criterion is met[1179].

The final and last criterion, and was proposed for the first time as part of the currently known Salini test was the investment's participation in the host state's economic development[1180]. The crystal change in this case was providing for such requirement since it became a remarkable decision upon which wide debates erupted. In the reviewed case, since the dispute's subject is an infrastructure project, the contract's contribution to the Moroccan economy's development is undeniable. An establishment of a 50-km highway cannot be actually questioned as whether serving public interest or not. Highways construction falls within the competencies of central governments based on their necessity to serve the public interests. The assignment of this competency to a foreign investor through a contractual arrangement constitutes a contribution to the economic development of the host state. Furthermore, another contribution was evident in the flow of the know-how from the Italian entities to Morocco in connection to the infrastructure project completion[1181].

After the fulfilment of the four Salini test requirements of *(i)* money or asset contribution, *(ii)* the duration of activity and operations, *(iii)* the investor's borne risk and *(iv)* the economic contribution to the host state's economic development, the Tribunal concluded the contractual arrangement between the Italian companies and ADM constituted an "*investment*" in accordance to the Italy-Morocco BIT Articles 1 and 8(2)(c)[1182]. This legal definition provided pursuant to the Salini test comes in line with the definition of investments from an economic point of view being a risk-

1177 See Para. 54 of the decision on jurisdiction of the ICSID Case No. ARB/00/4.
1178 Brown, Miles 2011 596
1179 See Para. 55 of the decision on jurisdiction of the ICSID Case No. ARB/00/4.
1180 League of Arab States 11/26/1980 309.
1181 See Para. 57 of the decision on jurisdiction of the ICSID Case No. ARB/00/4.
1182 Government of Italy and Government of Morocco 1990.

taking opportunity represented in the allocation of funds to execute a long-term project aiming to create and economic value in a good or service and targeting profits.

✓ <u>Morocco's consent</u>

After the qualification of the construction contract as an "*investment*", the Tribunal started reviewing the second jurisdictional claims related to the Contracting Parties' consent. First, the Tribunal analysed the Italy-Morocco BIT Article 8 in order to confirm its jurisdiction over the subject matter. The BIT adopted a broad understanding for disputes permitting the initiation of claims under the treaty's dispute settlement system. Article 8(1) in the Italy-Morocco reads as follows:

> *"All disputes or differences, including disputes related to the amount of compensation due inthe event of expropriation, nationalisation, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party ..."*

From the above paragraph, the Article 8(1) covers all kinds of disputes and divergences arising between the national of a Contracting State and the other Contracting State where the investment is hosted. This extends to encompass all compensation-related disputes in cases of expropriation, nationalization or the undertaking of any similar actions against the national's investment in the host state. Accordingly, and from the subject matter side, the Tribunal is qualified to decide on the disputes connected to the contractual arrangement between ADM and the Italian contractors in case the former's actions breach the Italy-Morocco BIT.

On the other hand, Morocco claimed the lack of its consent for the Tribunal's jurisdiction over the BIT breaches. The Tribunal approached the consent question as a pre-requisite to extend its jurisdiction over the dispute in accordance to Article 25 of the ICSID Convention. There were two points to consider in this context. First, Article 25(1) reads of the ICSID Convention reads as follows:

> *"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 …"*[1183]

From Article 25(1) it appears the necessity of the written consent of the two parties of the dispute as a pre-requisite to establish the ICSID Centre's jurisdiction over any BIT breaches. In the considered case, it is important to differentiate between Morocco being the host state and ADM being a legally independent state-owned entity. The parties of the disputed contract were the ADM (not the State of Morocco) and the Italian contractors. Morocco claimed its unilateral consent under Article 8(2)(c) was insufficient to extend the Tribunal's jurisdiction over the breaches of the disputed contract. The Tribunal upheld this claim in connection to the ADM-Italian entities contractual breaches. It justified the lack of jurisdiction on the non-binding nature of the ADM's actions upon the State of Morocco. Although the ADM was a state-owned and controlled entity, it remained having an independent legal capacity and its actions were not binding on the State of Morocco.

❖ <u>Case analysis</u>

The analysis of the Salini case can be split into two discussions. The first examines the Moroccan understanding of the notions under the disputed contract and the BIT. The second investigates the role of the Tribunal in setting a precedent by introducing the four criteria for defining an "*investment*" in what was later identified in ICSID's jurisprudence as the "*Salini Test*".

✓ <u>Morocco's position</u>

Although the Tribunal ruled its lack of jurisdiction over the dispute, the Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco remains a remarkable case in the ICSID jurisprudence. In this section, the analysis of the Moroccan understanding of the international investment law notions and obligations can be examined from three sides. First, Morocco considered the ADM as a private legal entity and this was denied by the Tribunal. The Moroccan understanding focused on the formal side of the ADM's position. However, the Tribunal adopted a see-through approach when examining the ownership, governance and functions of the ADM. Except for the ADM's formal legal independence, on the substance side the entity was subject to the control of the GOM. Hence, the Tribunal followed the substance over form approach, when ruling the ADM is deemed a state-owned entity.

[1183] See Article 25(1) of the ICSID Convention available at World Bank 1965, Article 25(1) reads as follows: *"… which the parties to the dispute consent in writing to submit to the Centre …"*.

The second category of the GOM denied jurisdictional claims was the one related to the definition of an "*investment*"[1184]. The Moroccan claims denied the presence of an "*investment*". Morocco requested defining an "*investment*" under the domestic law in accordance to its interpretation of Article 1(1) of the Italy-Morocco BIT. As per the Moroccan interpretation, the domestic law should be consulted to define the term "*investment*". Based on this understanding, the construction contract would be deemed a "*services contract*", which for Morocco would not qualify as an "*investment*" eligible for protection under the Italy-Morocco BIT.

The Tribunal rejected this interpretation and defined an "*investment*" in accordance to Article 1(1) of the afore-mentioned BIT and introduced the four criteria Salini test. It interpreted the reference to the domestic law as a matter of an "*investment*" legality check under the host state's domestic law. In other words, the reference attempted to confirm the validity of the constriction contract as an "*investment*" under the Moroccan law as a requirement to entitle the Italian contractors to the treaty protections[1185]. Hence, illegal investments under Moroccan Law would have no access to the Italy-Morocco BIT protections since it violates the Moroccan domestic law.

Finally, the Tribunal ruled its lack of jurisdiction over the contractual breaches by ADM since they did not constitute a violation of the BIT by the State of Morocco. The Tribunal's decision on jurisdiction ruled its right to decide on claims connected to the violation of the BIT as well as contractual breaches only if binding the state directly. However, breaches of the disputed contract to which the State is not involved but represented in a state entity, were not within the scope of the BIT's Article 8. This restriction prevailed since the Italian companies' claims were principally based on the contract's breach with minimal references to a simultaneous violation of the BIT. Therefore, the Tribunal's final ruling verified its jurisdiction over the Italian claims connected only to the BIT violation and not all the ADM-Italian contractors disputed contract.

✓ Salini test

From this perspective, the case of Salini v. Morocco represents a significant position. The reason is the Tribunal's introduction of the economic development criterion as part of the definition of "*investment*" when deciding on its jurisdiction. The Tribunal's remarkable decision highlighted the BITs preamble focus devoted to

1184 Sasson 2010 16.
1185 Yannaca-Small 2008.

economic development as an essential criterion when deciding on the scope of the "*investment*" notion. The following step was the tribunal's extended attempt to define "*the economic development of the host state*"[1186]. The concept was defined based on two criteria. First, is the entity or activity's benefit to the host state's public interest, while the second addresses the know-how transfer to the host state from the foreign owned or funded entity.

Other supporting references in international law for the Salini Test appear in the Vienna Convention setting the rules for the interpretation of international treaties[1187]. As per the Vienna Convention, resolving treaties ambiguities as in the case of defining "*investment*" depends on reaching the Contracting States preparatory work, context and circumstances covering the intentions of both parties to engage in such treaties. By investigating the BITs initial work, the parties confirmed their interest in concluding the BIT for economic development purposes.

The positive impact of the Salini Test is principally highlighted in creating a form of precedent together with the Vienna Convention interpretation to guide the scope and jurisdiction of ICSID arbitration tribunals[1188]. The Test sets standards and rules informally governing the cross-border investment stakeholders. It reduces the investors' uncertainty since it highlights beforehand whether the flow can be considered within the ICSID jurisdiction and scope. Risk averse investors will benefit from the creation of the Salini Test to boost their certainty and diminish any ambiguity, allowing them to depend on these tests while framing their cross-border plans.

- Consortium R.F.C.C. v. Morocco

The second claim in the year 2000, and in a manner similar to the challenge under the Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco was the Consortium v. Morocco. The challenges of Morocco and the rulings of the Tribunal over jurisdiction were similar to the aforementioned case. There is a difficulty to analyse the case below due to lack of information, besides the similarity of challenges when compared to the Salini Case.

[1186]Omar E. Garcia-Bolivar 2012
[1187] Grabowski 2014 304.
[1188] Grabowski 2014 306.

❖ Facts

The Société National des AutoRoute du Maroc a state-owned enterprise has offered a public bid to construct a section of a Moroccan Highway. Consortium R.F.C.C has bided for this offer and secured it signing the concession contract on the 7th of June 1995. Regardless of opening the Highway for the public's use on April 1998, there were preceding events triggering disputes. Consortium R.F.C.C invoked international arbitration as per the clause stipulated in the Italy-Morocco BIT of July 18th 1990. The ICSID Centre on June 28, 2000 registered a claim for arbitration proceeding initiation presented by Consortium R.F.C.C. an Italian organized consortium against Morocco[1189].

❖ Respondent's claims

As mentioned before, the challenges of the ICSID's jurisdiction were similar to the Salini Case. First, Morocco explicitly challenged ICSID's jurisdiction ratione materiae and ratione personae[1190]. Second, the claimant had accepted earlier the administrative jurisdiction over the contract-related disputes. In July 16, 2001, the Tribunal upheld its jurisdiction over the dispute only in connection to the violations of the BIT and not the Consortium contract.

❖ Tribunal's ruling

This phase was split into two consequent steps. The first was the Tribunal's review of the assimilation between breaching the contract as violation of a BIT clause. The Tribunal investigated the role of the ADM as an independent entity and whether its actions were binding for the State of Morocco. As in the Salini Case, the Tribunal ruled ADM was acting on its own behalf without binding the State of Morocco[1191]. This entails there was no assimilation between breaching the Consortium contract and violating the BIT. Hence, the Tribunal dismissed all the Consortium claims against Morocco in connection to the most-favoured nation, national treatment, expropriation and non-discrimination.

[1189] Avila 2005 389.
[1190] Avila 2005 389.
[1191] Godfrey 2011 184.

(B) Amicable Settlement

- <u>Holidays Inn v. Morocco</u>

Generally speaking, the first case filed in ICSID arbitration was submitted by the Holiday Inns (HI) group against the state of Morocco. The project covered the construction of a set of HI hotels in Morocco. The GOM intervened through different measures and forced HI to suspend its operations, which later invoked protection under the ICSID. The dispute was settled amicably and no further information was publicly available. The lack of information implies both parties' willingness to reserve the amicable settlement agreement conditions away from third parties.

V.C.4 Conclusion

Morocco has a short experience in the ICSID. The number of cases filed against Morocco are three in total and the latest two were filed in 2000. Moreover, in the three cases, two of them the ICSID lacked jurisdiction since the breaches were only contractual breaches and not amounting to a BIT violation. For the third case, the dispute was amicably settled between the two parties.

One of two alternatives can justify Morocco's short experience with the ICSID. The first alternative considers Morocco as an investor friendly environment where the GOM successfully sticks to its BIT obligations. The second option is the low inflow of FDI into Morocco throughout the years, which makes the filing of disputes in the ICSID less probable. With Morocco one of the top FDI destinations in Africa, the first alternative seems more appealing. The legal reform introduced by the King Mohamed VI since accession to power in 1999 remains another supporting reason for the validity of the first alternative over the second one.

To understand the Moroccan position from aligning the domestic practise with the BIT obligations, evidence can be examined to an extent in the Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco. In the mentioned case, the jurisdiction challenges provided a level of understanding for the Moroccan side regarding Articles 1 and 8 of the Italy-Morocco BIT. The Moroccan side failed to validate the reference to the domestic law in defining an "*investment*". However, the Tribunal confirmed the lack of connection between the contract breach and the violation of the BIT since the ADM was not binding Morocco by its own actions. At the end, it is concluded that Morocco is more practically aligned with its BIT obligations when compared to theoretically as introduced in the chapter IV.

VI. Economy and foreign direct investments

VI.A Introduction and Methodology

VI.A.1 Introduction

Chapter VI addresses the correlation between a set of economic variables and the net FDI of the three countries. Using the word correlation explicitly excludes causation between these variables and FDI. In other words, the chapter intends to identify and calculate possible correlations between the seven chosen variables and the performance of the FDI in the three economies. The conclusion aims to highlight the economic variables with the strongest and weakest correlations with the FDI. The chapter uses a descriptive analytics approach to examine the variables and the performance of net FDI. Based on previous literature, the assessment covers variables of proven impact on FDI inflows to an economy. The list of variables refers to variables featured in the FDI host state and includes for example; the levels of economic freedom, the market size, the level of human index development, the infrastructure's quality, the inflation rates and the recorded rates of real GDP growth. Section 9 titled "*Net FDI (current US$)*" would review the performance of net FDI of the three economies over the study period in order to locate possible correlations.

At this stage, it is important to justify the choice of the descriptive analytics methodology over the implementation of an econometric model. The three countries experience data limitations and more specifically structural breaks in their time series datasets. This negatively influences the reliability of any econometric model. The limitations and breaks are direct outcomes of significant and recurrent changes in the policy orientations of the three countries between a centrally planned economy during the 1960s and 1970s, then a private sector led economy from the 1980s until the 2000s. More importantly, the legal framework inconsistencies (as provided in chapters IV and V) highlight the legislative chaos. With legislations restricting foreigners' ownership of lands and others guaranteeing a treatment equal to that accorded to national investors, the contradiction appears eminent. Another pillar for the structural breaks is the political instability precedent either in wars, terrorist attacks or even popular uprisings as in the Arab Spring.

The chapter's assessment of the available data of the net FDI and the variables influencing it would assist in concluding a set of patterns. With the research question being: *how are the legal rules applied in an economy correlated with the FDI inflows into it?*, the calculation of the correlations between the chosen variables and the net FDI of each economy is required[1192]. The datasets under analysis and used for the calculations are exported from the World Bank Data Bank. Unifying the source of the data is a strength point in order to avoid any reporting errors since a standardized methodology is used when collecting data. Moreover, the dependence on datasets from an international institution could enhance the credibility of the data when compared to the local sources of data if any.

Regarding the comparative analysis, the thesis would depend on the annual Article IV consultations implemented by the IMF on its members. The chapter's timespan starts from 1990 until 2015. This is the period during which the investment laws were promulgated, many BITs were concluded and specifically in the 1990s. Hence, it assists in actually understanding the possible correlations between such changes in the investment framework and the net FDI of the three economies. In addition, this period embraces the three economies' transformation from the wide intervention of the government in the 1980s to the market oriented liberalization and openness of the 1990s and 2000s respectively.

The chapter splits below into seven sections. Each of them addresses an economic variable of those provided above, with possible correlations with the net FDI of the three economies. The subsection provides an insight of the previous literature using such economic variable as a determinant of the net FDI of an economy. Section 1 is dedicated to GDP growth, Section 2 for the market size, Section 3 for inflation, Section 4 for the infrastructure quality, Section 5 for levels of human development index, Section 6 for levels of merchandise trade, and Section 7 for economic freedom.

VI.A.2 GDP Growth

The first variable under consideration as impacting FDI is the GDP growth. As per the general theory, holding all other variables constant, the GDP growth has a posi-

[1192] In the "*Comparative conclusions*" of Section E below, the linear correlation between the chosen variables and the net inflows into each country is calculated. The correlation coefficients between two variables are analysed as follows: *(i)* a -1 is a perfect negative correlation, *(ii)* a -0.70 is a strong negative correlation, *(iii)* -0.50 is a moderate negative correlation, *(iv)* a -0.30 is a weak negative correlation, *(v)* 0 is a no correlation, *(vi)* a +0.30 is a weak positive correlation, *(vii)* +0.50 is a moderate positive correlation, *(viii)* a +0.70 is a strong positive correlation and *(ix)* +1 is a perfect positive correlation. The same scheme of correlation coefficients analysis was provided in Willoughby 2015 208 tive relationship to the rates of FDI into a country. Bengoa and Sanchez Robles[1193], Foreman[1194] and Quere, Coupet and Mayer[1195] tested the impact of the GDP growth rates on the inflows of FDI in different economies. There are many reasons for such understanding since the features connected to the GDP growth include higher rates of job creation and even more disposable incomes. This increases foreigners interest to inflow their investments into these host economies. On the other hand, an economy experiencing lower rates of GDP growth would face difficulties in attracting FDI for the reasons opposing the above mentioned. The annual per centage of the GDP growth is the variable used to assess the indicator's performance.

VI.A.3 GDP per capita (constant 2010 US$)

The second variable under consideration as impacting FDI is the Market Size. As per the general theory, holding all other variables constant, the market size has a positive relationship with the rates of FDI into a country. Foreman[1196], Bengoa and Sanchez Robles[1197], Buckley et al[1198], Quazi[1199], Quere, Coupet and Mayer[1200], Asideu[1201], Ali, Fiess and McDonald[1202] and Meon and Sekkat[1203] tested the impact of the market size on the inflows of FDI into different economies. The market size reflects the strength of demand and the consumer purchasing power present in the economy. The larger the market size, the stronger the potential demand in that economy and the more the FDI will inflow into it. In case of the large market size, the investor seeking a market expansion will be interested to benefit from this opportunity. The larger market size allows the investor to benefit from his production's economies of scale. Thus, a small market economy will be less beneficiary for an investor to operate in when compared to a large market. There are several proxies depicting the market size. In this research, the GDP per capita (constant 2010 US$) is the chosen proxy. It represents Gross Domestic Product divided by the mid-year's population.

1193 Bengoa, Sanchez-Robles 2003
1194 Kapuria-Foreman 2007
1195 Bénassy- Quéré et al. 2007
1196 Kapuria-Foreman 2007
1197 Bengoa, Sanchez-Robles 2003
1198 {Clegg 2004 #211}
1199 Quazi 2007
1200 Bénassy- Quéré et al. 2007
1201 Asiedu 2006
1202 Ali et al. 2010
1203 Méon, Sekkat 2004

VI.A.4 Inflation

The third variable under consideration as impacting FDI is the inflation. As per the general theory, holding all other variables constant, the inflation rate has a negative relationship to the rates of FDI into a country. Bengoa and Sanchez Robles[1204], Ali, Fiess and McDonald[1205] tested the impact of the macroeconomic stability on the inflows of FDI. The inflation rate as an indicator reflects the levels of macroeconomic stability experienced within an economy. The lower the inflation rate the more the economy is stable and the opposite remains true. Investors prefer to inflow their investments into economies featuring stabilities, where the higher degrees of certainty ensure the investors their investment outcomes will align with the results of the preliminary feasibility studies. Therefore, lower inflation rates imply higher macroeconomic stability and a higher inflow of FDI into an economy.

VI.A.5 Fixed Telephone Subscriptions (per 100 people)

The fourth variable under consideration as impacting FDI is the infrastructure. As per the general theory, holding all other variables constant, the abundance of infrastructure has a positive impact on the rates of FDI into a country. Quazi[1206], Asideu[1207] and Ali, Fiess and McDonald[1208] tested the impact of the infrastructure on the inflows of FDI into different economies. The infrastructure as a variable represents the quality and accessibility to the public services and utilities including transportation, telecommunication, electricity, energy and etc. The level of an economy's infrastructure is a pre-requisite variable any investor investigates prior to deciding on the location of his investment. Therefore, the general rule provides that the higher the quality and the more abundant the infrastructure, the more the FDI will flow into an economy. There are several proxy indicators used to assess the quality and the accessibility to infrastructure. One of the proxy variables used by Ali, Fiess and McDonald was the number of fixed telephone subscriptions per 100 people in an economy. The higher the number of fixed telephone subscription per 100 people, the better the economy's infrastructure and the more the FDI will flow into this economy.

1204 Bengoa, Sanchez-Robles 2003
1205 Ali et al. 2010
1206 Quazi 2007
1207 Asiedu 2006
1208 Ali et al. 2010

VI.A.6 Life expectancy at birth, total (years)

The fifth variable under consideration as impacting FDI is the human development index. As per the general theory, holding all other variables constant, an economy's human development level has a positive relationship with the rates of FDI into a country. Foreman[1209], Bengoa and Sanchez Robles[1210], Quazi[1211], Azman-Saini, Baharumshah and Law[1212] and Asideu[1213] tested the impact of the human capital on the inflows of FDI into different economies. They used the life expectancy variable as a proxy indicator for human capital.

The FDI is more interested in an economy where the high-quality labour is abundant. The labour's quality may appear in the levels of education, productivity or health conditions. The higher the educational attainment, the higher the productivity and the better the health conditions, the higher the labour's quality and the more the FDI will be interested to flow into this economy. There are several proxies depicting the rates of an economy's human development. In this research, the life expectancy at birth, total (years) is the chosen proxy. It signals the number of years a newly born infant would survive in case the mortality rates at the time of birth remain unchanged throughout the infant's lifetime.

During the 1990s and the early 2000s the provision of the education and health was primarily through the government with a limited role for the private sector. The enhancement of the human development indices depended on the funds allocated to these services in the annual budgets. In general, an improvement in the human development indices requires huge investments in order to attain the expected outcomes. With the crises and fiscal deficits of the 1980s and 1990s, governments cut the most from the social welfare spending including education and health. The lack of sufficient funding for a significant improvement kept the annual additions in the life expectancy number of years at a minimal rate.

VI.A.7 Merchandise Trade (as per cent of GDP)

The sixth variable under consideration as impacting FDI is the Trade. As per the general theory, holding all other variables constant, the rates of trade have a positive

1209 Kapuria-Foreman 2007
1210 Bengoa, Sanchez-Robles 2003
1211 Quazi 2007
1212 Azman-Saini et al. 2010
1213 Asiedu 2006

relationship with the rates of FDI into a country. Ali, Fiess and McDonald[1214], Pain and Barrell[1215], Shapiro and Globerman[1216] tested the impact of the trade openness on the inflows of FDI into different economies. The levels of trade are a proxy for the economy's openness and integration in the global economic activity. A foreign investor maybe inclined to invest in an open and globally integrated economy in order to benefit from the opportunities to export his products and import his production necessities. Conversely, an investor may prefer to route his investments into a more closed economy under certain circumstances. Of these circumstances could be the benefit from the stronger demand in a more populous economy to justify incurring the additional costs of accessing such closed economy. There are many indicators depicting an economy's trade levels, in this research the merchandise trade (as per cent of GDP) is the chosen proxy. The merchandise trade (as per cent of GDP) is represented in the sum of merchandize exports and imports divided by the GDP.

VI.A.8 Foreign ownership/investment restriction

The seventh variable under consideration as impacting FDI is the Economic Freedom. As per the general theory, holding all other variables constant, the rates of economic freedom have a positive relationship with the rates of FDI into a country. Bengoa and Sanchez Robles[1217], Quazi[1218], Asideu[1219], Buthe and Milner[1220] and Quere, Coupet and Mayer[1221] tested the impact of the economic freedom on the inflows of FDI into different economies. The levels of economic freedom is a proxy for the economy's dependence on institutions to determine the allocation of its abundant resources. A foreign investor may prefer to invest in an economy offering a more institutionally efficient allocation of resources. Thus, the higher the score of an economy in the EFW, the more expected the inflow of the FDI to that economy.

The economic freedom is measured through the Economic Freedom of the World (EFW) Index. It is an index prepared by the Fraser Institute to assess the extent to which the institutions align to their limited roles under the classical microeconomic

[1214] Ali et al. 2010
[1215] Barrell, Pain 1996
[1216] Globerman, Shapiro 2003
[1217] Bengoa, Sanchez-Robles 2003
[1218] Quazi 2007
[1219] Asiedu 2006
[1220] Büthe, Milner 2008 797
[1221] Bénassy- Quéré et al. 2007

theories (*i.e.*, where the government guarantees the protection of property rights and provides a limited number of public goods as for example the national defence). The EFW comprises of five components, this research focuses only on the fourth component being the freedom to trade internationally. The sub-components of the freedom to trade internationally are four including *(i)* tariffs, *(ii)* regulatory trade barriers, *(iii)* black market exchange rates, and *(iv)* controls of the movement of capital and people. By examining in depth each sub-component, the last seems the most linked and specifically its indicator reflecting the restrictions imposed on foreign investments and ownerships.

With the primary focus of the research on the means of developing the domestic legal rules to attract FDI including the guaranteed protections and openness to investors, it becomes reasonable to confine the analysis in this section to the numerical outcome of the foreign ownership restrictions' indicator. This provides an understanding of the evolution in the foreign investment restrictions in the three countries throughout the indicator's time period (*i.e.*, 1995 - 2014). Based on this confined analysis, the higher the outcome of the foreign ownership/investment restrictions of an economy's indicator, the higher the expected FDI flowing into that economy. The lower the investment restrictions signal the institutional and the legal framework's reliability and openness to welcome foreign investments.

VI.A.9 Net FDI (current US$)

Section 9 of the analysis addresses the performance of FDI being the analysis's dependent variable. Throughout the preceding seven sections, Chapter IV identifies the possible relationship of a group of independent variables to the performance of the FDI inflows. In Section 9 of each country, the patterns of FDI for the study period from 1990 until 2015 will be analysed. The aim is to identify the possible relationship between the previously introduced seven independent variables and the FDI inflows. In addition, it is important to highlight the economic variables with the strongest and weakest relationships to FDI. There are several indicators recognized to measure the economy's performance in attracting FDI. For the purposes of this thesis, the indicator under consideration as introduced by the World Bank site is the net FDI (current US$). This section of the following chapters will focus on the evolvement of the net FDI over the entire study period.

The World Bank's definition of net FDI is the subtraction outcome of the outflows (representing an economy's assets) and the inflows (representing an economy's liabilities) realized when accounting for the economy's Balance of Payments financial account. Thus, for calculation purposes, the net inflows of FDI into an economy will be represented in negative values and the opposite is otherwise provided for the positive values. The more negative the value of the indicator the more the economy experiences an inflow of FDI.

On a theoretical level, the definition of "*investment*" in the context of international law was addressed under the Salini test[1222]. The test consisted of four components: *(i)* a contribution of an asset or money, *(ii)* a specified period during which the project is executed, *(iii)* a factor of risk and *(iv)* a contribution to the host state's economy[1223]. The last component remained controversial when deciding on the scope of the word "*investment*". The case law of the European Court of Justice lists three forms of FDI including for example the establishment of branches owned by the foreign undertaking in the host state, the acquisition of already present undertakings in the host state, contributions or participations in already present undertakings with a view of maintaining lasting economic links[1224].

Section 9 does not address the *(i)* role of net FDI in the economic development of the host state, *(ii)* impact of net FDI on raising the living standards of the economy's stakeholders, or *(iii)* impact of the economic conditions in the investment partnering economies (investors home economies) on net FDI flows into the three countries. Together with the economic freedom variable, the FDI is the key indicator within the economic section when answering the thesis's question concerning the correlation between the legal rules and the inflows of FDI into an economy.

VI.B The Determinants of FDI in Egypt

VI.B.1 Introduction

After the introduction of the chosen variables as per the previous literature, this chapter has two objectives. First, analysing the patterns of these variables in Egypt throughout the study period from 1990-2015. Second, the analysis aims to identify the possible correlations if any between the chosen variables and the volume of FDI inflows to Egypt. The chapter splits into nine subsections. Each of the first subsections addresses an economic variable of the list provided above. Section 2 is dedicated to the GDP growth, Section 3 for the market size, Section 4 for inflation,

1222 Further analysis in Chapter V(C)(3)a.
1223 Grabowski 2014 296
1224 Laurence 2013 532

Section 5 for the infrastructure quality, Section 6 for the level of human development index, Section 7 for the levels of merchandise trade, and Section 8 for economic freedom. Section 9 analyses the pattern of the FDI inflows to Egypt. Finally, the conclusion in Section 10 identifies the potential and significant correlations between the variables and the FDI inflows to Egypt.

VI.B.2 GDP Growth

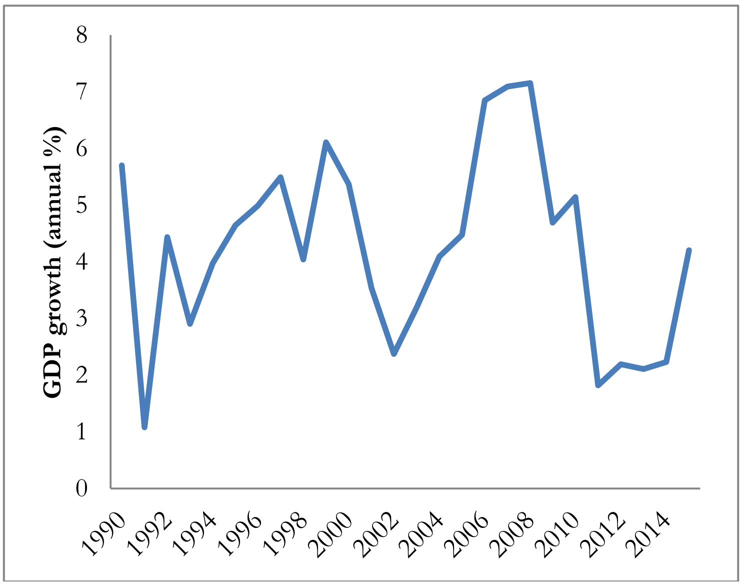
Egypt's economy did not record any contraction in its annual GDP growth rates throughout the study period (from 1990 - 2015). The first phase starting from 1990 (and until 2000) and regardless of the debt crisis of the late 1980s, the economy secured an annual growth GDP growth rate of 5.70 per cent. Possibly, the conclusion of the stand-by agreement with the IMF and its subsequent austerity resulted in the annual GDP growth rate deterioration in 1991 to 1.08 per cent. The deterioration was of a temporary nature as the economy rebounded in 1992 reaching a GDP growth rate on annual basis of 4.43 per cent. The recovery from the restructuring process extended throughout 1993 and 1994 where the economy recorded annual GDP growth rates of 2.9 per cent and 3.97 per cent respectively.

Afterwards, the economy may have begun reaping the benefits of the restructuring program concluding three years of increases in the annual GDP growth from 4.64 per cent in 1995 to 5 per cent in 1996 and finally 5.49 per cent in 1997. The annual growth inclination was discontinued in 1998 with a GDP growth of only 4.04 per cent. The reasons for the decline may include the slump in the tourism proceeds after the 1997 Luxor terrorist attack, besides, the lower inflows of FDI in conjunction with the Asian Crisis of 1997. In 1999, the economy restored its strong growth and recorded an over 6 per cent annual GDP growth for the first time in fifteen years.

By the turn of the new century the second phase started (until 2008), the pace of economic activity in Egypt slowed down pressuring the annual GDP growth rates to 5.37 per cent in 2000. The worse came afterwards when in the three years 2001, 2002 and 2003 the average annual GDP growth rate was only 3.03 per cent. The main possible justification for the economic downturn was the regional instability; due to first, the War on Terrorism and second the US invasion of Iraq. The rising threats of terror may have hit the Egyptian tourism industry proceeds resulting in a negative outcome upon the annual GDP growth rates.

The lower growth was a red-flag to launch a new process of reform. Actually, the process started in January 2003 by the devaluating the EGP against the US Dollar by 19 per cent[1225]. An additional measure in 2004 was the appointment of a business-background new government. This signalled the regime's interest in establishing a friendly business climate and integrating the economy globally. The annual GDP growth rates responded positively and this may be attributed to the preceding changes. With less than 1 per cent increase in GDP growth between 2003 and 2004, the economy in 2005 preserved its rising trend of GDP growth recording 4.47 per cent. The remarkable annual change was evident in 2005-2006 when the annual change in the GDP growth was of nearly 2.4 per cent. The proliferation in the annual GDP growth continued to attain 7.09 per cent and 7.15 per cent in 2007 and 2008 respectively.

The third and last phase started with the worldwide financial crisis of 2008 and lasted until 2015. The possible lagged impact of the crisis was reflected in the nearly halving of the annual GDP growth rate to only 4.69 per cent in 2009. The short restoration in 2010 vanished directly due to a probable reasoning as the Arab Spring uprisings of January 2011. The political instability experienced in the process of the political transformation could be considerably blamed for the annual rates of GDP growth. The average rate of GDP growth for the rates from 2011 to 2015 was only 2.51 per cent. The instability hit to the GDP growth may be more evident by comparing the five years earlier annual GDP growth to the calculated average. The rate of 2010 (5.14 per cent) was double the five years' calculated average.



[1225] Galal 2003

VI.B.3 GDP per capita (constant 2010 US$)

The Egyptian situation of the GDP per capita may mirror the role of the population growth in moderating the effects of the GDP growth rate on the GDP per capita. Starting from a low reading ($1,588), the GDP per capita preserved its low readings due to the austerity plans executed with the conclusion of the IMF's SAP (recorded an average GDP per capita from 1990 until 1997 equal to $1,661). With focus directed to tackling the population growth problem and the recovery of the growth rates to around 5 per cent, the GDP per capita inclined significantly. The average GDP per capita for the years 1998, 1999 and 2000 was $1,924.

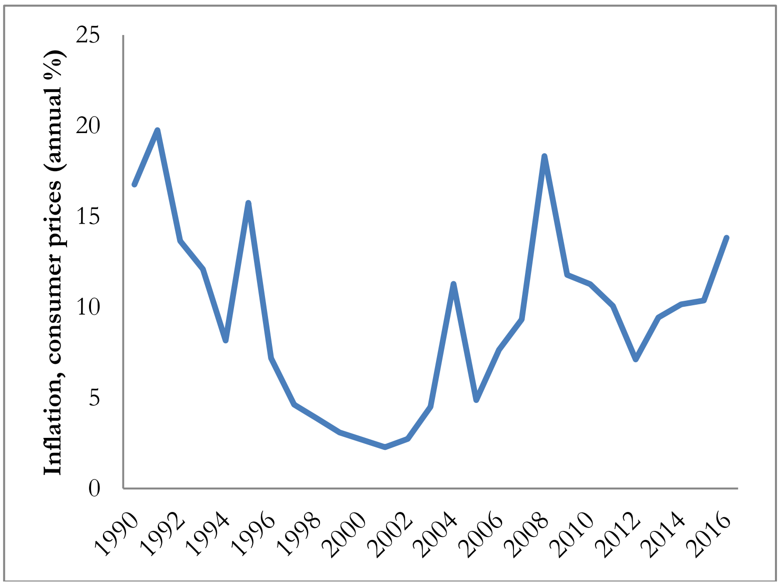
In the early 2000s, the economy experienced a slowing down in the economic activity. The GDP per capita annual increases in the GDP per capita dwindled until 2003. The changes (devaluation, appointing new government and etc.) stimulated the economic activity and the GDP per capita began its second upward trend. The highest annual increase in the GDP per capita was recorded between 2005 and 2008 when the annual increases ranged around $120. The rates started falling in 2009 possibly due to the financial crisis and was followed by the uprisings and the political instability of January 2011. From 2011 until 2014, the GDP per capita nearly stagnated around $2,659.

VI.B.4 Inflation

The annual inflation rate in Egypt started from the high rates resulting from the debt and balance of payments crisis of the late 1980s. By reviewing the data, the annual rate recorded a 16.8 per cent. In 1991, the GOE successfully concluded the SAP with the IMF. The execution of the SAP's austerity including the subsidy cuts probably increased the inflationary pressures. The higher pressures were possibly reflected in the first peak of the annual inflation rate of 1991 at 19.8 per cent. The rate began to moderate from 1992 onwards until 1994. The moderation could have been driven by the slowdown in the economic activity and the lower consumption especially after introducing the General Sales Tax in 1991. The downward pressure was evident starting from 1992 at 13.6 per cent to 8.15 per cent in 1994, before exceptionally rising to 15.7 per cent in 1995.

After the sudden hike of 1995, the inflation rate dropped to 7.19 per cent and even further to 4.62 per cent in 1996 and 1997 respectively. This moderate inflation rate around the 4 per cent or even below was preserved until 2004. In January 2003, the devaluation of the EGP against the foreign currency may justify the inflationary pressures pushing the annual inflation rate to the zone of the double-digit readings recording a 11.3 per cent. The annual rate did not moderate in a manner similar to the 1990s. It stayed at 7.64 per cent in 2006 and 9.32 per cent in 2007. In 2008, the GOE implemented a plan of lifting the fuel subsidies forcing the annual inflation rate to rise and reach its second peak of 18.3 per cent. Since 2008 until 2016, the annual inflation rate recorded a single-digit rate in only the two years of 2012 and 2013. Otherwise, the inflation rate remained at nearly 11 per cent before beginning its upward trend in 2016 in conjunction with foreign currency shortage.

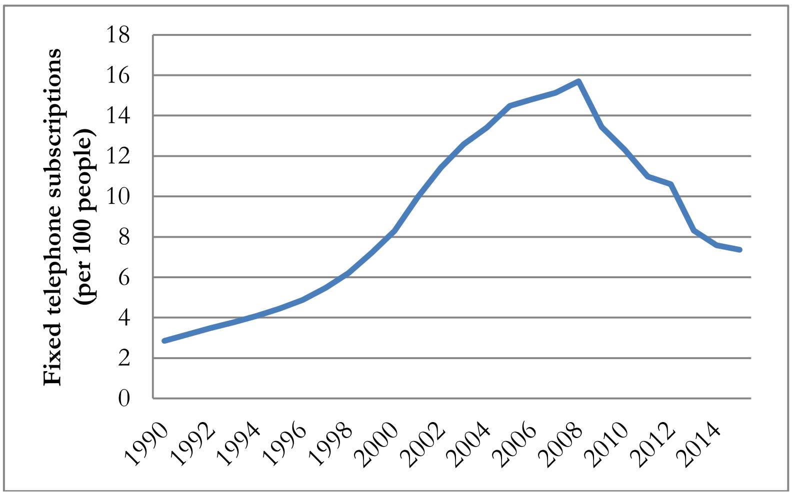
From the data and the descriptive analysis, it becomes obvious the volatility of Egypt's inflation rate. Throughout the study period, the annual inflation rate recorded two peaks at 19.8 per cent in 1991 and 18.3 per cent in 2008. Moreover, an important differentiation is the number of years where the inflation rate recorded a double-digit inflation rate. During the study period, Egypt experienced a double-digit annual inflation rate in 13 readings out of the 27 years. The average annual inflation rate for Egypt during the period under examination recorded a 9.35 per cent.



VI.B.5 Fixed Telephone Subscriptions (per 100 people)

With 2.84 subscribers per 100 people, Egypt maintained an upward slope line representing the continuous increase in the number of subscribers. This may reflect the understanding of the Egyptian policymakers concerning the importance of guaranteeing the FDI inflows an available and accessible infrastructure. The number of subscribers grew exponential especially for the period between 1994 and 2004. Afterwards, the growth in the number of subscribers moderated allowing Egypt to reach its peak in 2008. The peak point in the number of subscribers in Egypt at 15.7 per 100 people allowed Egypt to have the highest peak point between the three country studies.

The data may highlight the focus of the Egyptian policymakers to develop the infrastructure's quality and abundance. This allowed Egypt to reach higher numbers of subscribers per 100 people even before it significantly shifted to the mobile services in 2008. Moreover, taking into account the high population of Egypt, reaching a higher number of subscribers per 100 people reflects the efforts exerted by the Egyptian policymakers in order to ensure the expansion of the infrastructure and its maintenance of an appropriate quality. The shift to the mobile telecommunication services may justify the obvious deterioration in the number of subscribers in the fixed telephone per 100 people. The deterioration is an explicit evidence for the lower investment and even demand on the fixed telephone subscriptions when compared to the 1990s and the early 2000s.



VI.B.6 Life expectancy at birth, total (years)

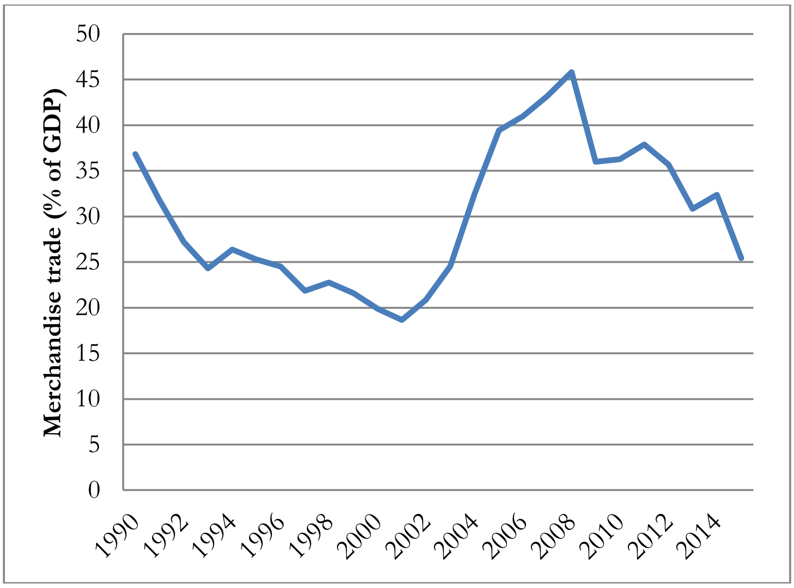
Egypt started from the lowest point between the three country studies with a life expectancy of 64.5 years. During the period elapsing from 1990 until 1999, Egypt managed to increase its life expectancy at birth number of years by 4 years to reach 68.3 years. Conversely, from 2000 until 2015, Egypt increased the life expectancy's number of years by only three years to end up in 2015 at 71.3 years. The Egyptian average life expectancy for the study period is 68.6 years old.

VI.B.7 Merchandise Trade (as per cent of GDP)

In 1990, the sum of merchandise trade as a per centage of Egypt's GDP was 31.8 per cent. The conclusion of the SAP, the austerity policies and the slowing down of the economic activity possibly strained the trade levels pushing them to record obvious decreases. The downward trend of Egypt's trade levels continued until the EGP devaluation in 2003. The dip of the merchandise trade as a per centage of GDP was recorded in 2001 when the economy less than halved its reading of the 1990 by recording a 18.6 per cent. From 1992 until 2002, the average merchandise trade recorded a 23 per cent.

The devaluation of the EGP in January 2003 may be considered a starting step in opening the Egyptian economy for further trade and integration in the global economy. In addition, the appointment of a business background government may have facilitated such process of opening and integration. The possible direct impact was the increases in the merchandise trade as a per centage of the GDP. The rate moved upward from 24.5 per cent in 2003 to 32.5 per cent in 2004 and 39.4 per cent in 2005. Egypt maintained its upward trend until 2008 recording its peak reading at 45.8 per cent. The financial crisis started the decrease in the per centage of merchandise trade to GDP and this seemed aggravated by the political instabilities featured since January 2011. The political turbulence probably had a negative on Egypt's trade levels forcing it to record its worst reading in twelve years in 2015 at 25.4 per cent.

These observations confirm the lower level of openness in Egypt's economy. The Egyptian policymakers for long favoured through the 1960s the import-substitution policies. The traces of such policies could be evident in the lower trade levels of the 1990s. On the other hand, the devaluation of the EGP followed by the business-friendly opened economy remain important steps in boosting Egypt's levels of merchandise trade as a per centage of the GDP.

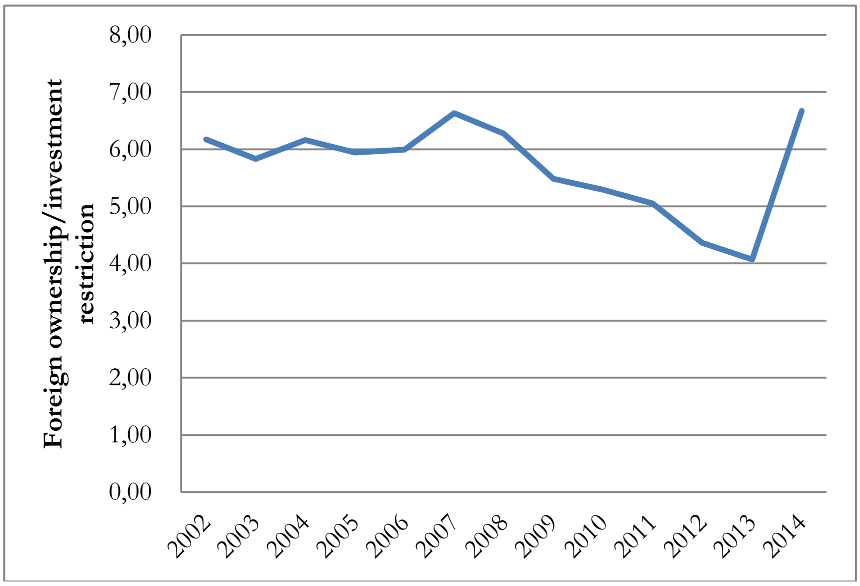


VI.B.8 Foreign ownership/investment restriction

The first reading for Egypt's foreign ownership and investment restrictions was recorded in 1995 and it was already high at 9.21. Accordingly, the introduction of the new IGIL was not expected to provide a jump in the recorded readings. The IGIL boosted the reading further putting it at 9.23 in 2000 and 2001. The overvaluation of the EGP in the early 2000s may have resulted in the deterioration of the readings to record 6.17 in 2002 and 5.83 in 2003. The economic restrictions triggered the ruling regime to appoint a new government with the mandate of stimulating FDI and opening further Egypt's domestic legal framework. A set of new legislations were introduced in 2004 onwards including the amendment of the IGIL, probably without any reflections on the investment restrictions since the readings for the years from 2004 until 2009 revolved around 6 with the highest reading in 2007 at 6.63 and the lowest in 2009 at 5.48.

The political instability arising from the January uprisings may be correlated to the deteriorations witnessed in the readings concerning the investment restrictions and foreign ownership. This was evident for example in the capital controls introduced by the Central Bank of Egypt upon the transfer of foreign currency abroad. Hence, the readings dipped at 4.36 and 4.07 in 2012 and 2013 respectively. With the establishment of the new government in 2014 and the preservation of a sense of stability the readings jumped positively to reach 6.67 in 2014.

With the lowest average between the country studies, Egypt had an average of 6.35 in connection to the investment restrictions on foreign ownership. The overhauling of the domestic legal rules in 2004 was not reflected significantly on the readings of the restrictions since the rate remained around 6. Moreover, the initial readings recorded prior to and simultaneous with the introduction of the IGIL were never reached again based on several possible justifications. This may include the lack of political stability, the lack of the political will to approach such sensitive topics connected to the abolishment of the foreign investment restrictions.



VI.B.9 Net FDI (current US$)

In 1990, Egypt's net FDI inflows recorded a $0.722 billion, then declined to only $0.191 billion in 1991. The slow-down of the net FDI inflows in 1991 (recorded the lowest net FDI inflows throughout the study period after excluding 2011 when the economy recorded a net outflow), could be related to the severe economic situation of Egypt paving the way to the conclusion of the SAP with the IMF in 1991. The IMF-agreement may have positively affected the net FDI inflows through more than doubling it to reach a $0.455 billion. The following obvious hike was in 1994, when the net FDI inflows exceeded the $1 billion for the first time to reach $1.21 billion. The increase is partially justified by the privatization proceeds amounting to $376 million. The inflows nearly halved in 1995 before rebounding in 1996 and 1997 from the lowest point at $0.505 to $0.631 and $0.761 billion respectively.

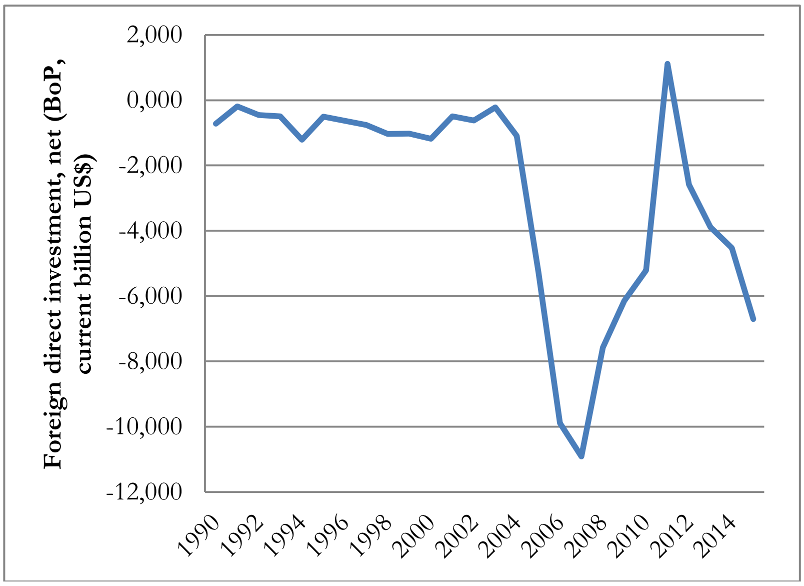
The 1997 marked the year of introducing the IGIL. It may have had a lagging impact pushing the net FDI inflows upward to record $1.03 billion in 1998. The rise of 2000's reading is justified also through the 25 privatization transactions realizing proceeds of $539 million. The net FDI inflows remained within the same range in

1999 and 2000 (with a larger share for the privatization proceeds in the net FDI inflows) before dropping in 2001 to only $0.498 billion. A possible explanation for the drop may be the lack of the regional political stability in conjunction with the start of the war on terrorism. The second lowest reading for the net FDI inflows was in 2003 when the inflows totalled to only $0.217 billion. This could be justified pursuant to the uncertainty associated with the devaluation of the previously overvalued EGP in January 2003. Also, the GOE slowed down its execution of the privatization program as evident in the data showing no privatization transactions concluded in the years 2002 and 2003.

The third phase in the net FDI inflows started in 2004 and lasts until 2010, when the Arab Spring uprising started in Egypt in January 2011. During this period, the net FDI inflows into the economy featured a significant hike allowing the average per year for the period from 2005 to 2010 to record a $7.5 billion. The reasoning for the unprecedented rates of inflows may include; first, the positive impact of the currency devaluation. Second, the appointment of a new government with a clear objective of opening legally the doors for the private sector, easing the doing business in Egypt and reviving the privatization program. Third, the completion of the legal framework with legislations deregulating the economic activities.

With the witnessed high annual averages of net FDI inflows, the benefits were noticeably being reaped. In the years 2006 and 2007, Egypt secured net FDI inflows of $9.89 (out of which $7.58 billion were privatization proceeds) and $10.9 billion respectively. There is an important observation to note connected to the share of the privatization proceeds from the net FDI inflows. In 2006, the privatization proceeds represented nearly 77 per cent of the net FDI inflows, while in 2007, this per centage dropped to nearly 3 per cent. The inflows began to gradually deteriorate in 2008 until 2010 and the possible reasoning is the less appetite to invest due to global financial crisis.

The last phase started from 2011 and lasted until 2015, where the economy experienced its only net FDI outflow throughout the study period with a magnitude of $1.11 billion. The direct possible reasoning for such outflow is the political instability resulting from the Arab Spring uprisings and the stepping down of Mubarak in January 2011. The net FDI reading returned to the inflow side from 2012 onwards. The featured rates were gradually increasing on the horizon to record $3.89, $4.53 and $6.7 billion in 2013, 2014 and 2015 respectively. The increase in the net FDI inflows may translate the continuous efforts of the GOEs after the Arab Spring to restore stability and investor confidence in order to boost the net FDI inflows and reach the rates recorded prior to the global financial crisis.



VI.B.10 Conclusion

Reviewing the FDI determinants in conjunction with the above analysis of the recorded FDI inflows can help in realizing possible correlations between the FDI inflows to Egypt and the previously introduced economic variables. To start with the GDP growth, by reviewing the pattern of Egypt's GDP growth throughout the study period together with the pattern of the FDI inflows, a positive correlation between both notions could be identified. The stability of the GDP growth rates of Egypt's economy during the 1990s was similar to the stability witnessed in the pattern of the FDI inflows around an average of $0.703. Again, the record rates of GDP growth at 7.09 per cent and 7.15 per cent of the 2007 and 2008 respectively, featured record rates in the FDI inflows to the Egyptian economy in 2007 at $10.9 billion. From these patterns, the significant positive correlation between the GDP growth and the FDI inflows could be located.

In the Egyptian case, the annual GDP growth rates could be insufficient due to the obvious annual increases in the population growth. The significant positive correlation between the GDP growth rates and the FDI inflows to Egypt could be moderated by the evident slow increases in the Egypt's GDP per capita throughout the study period. With a slightly long-time increasing value averaging at $2,125 from 1990 to 2015, Egypt's GDP per capita seems having low positive correlation, if any in connection to the net FDI inflows into Egypt. Conversely, a market seeking FDI may still have interest to invest in Egypt targeting the benefits of accessing the large growing population and regardless of the low rates of GDP per capita.

Third, in the case of inflation, tracing a correlation between the inflation rate and the FDI inflows to Egypt could seem difficult. The volatility of Egypt's inflation rate recording almost 20 per cent in two instances at 1991 and 2008, were not in conjunction with increases or decreases in the FDI inflows to Egypt. Moreover, the downward inflationary pressures of the second half of the 1990s did not feature a similar pattern of increases or decreases in the FDI inflows to Egypt. Alternatively, the increases of the FDI inflows during the mid-2000s were in conjunction with a building-up of inflationary pressures until the inflation peaked at 18.3 per cent in 2008. It can be argued that the increases in the FDI inflows of 2006, 2007 and 2008 were outcomes of the lower inflation rates, however, the low inflation of the 1990s did not lead to a similar increase in the FDI inflows. Hence, claiming the presence of a negative correlation between the inflation rate and the FDI inflows could be inappropriate.

The fourth determinant of the FDI inflows to Egypt is the quality and accessibility of infrastructure as represented in the number of fixed line telephones per 100 people. The variable denoting the infrastructure developments featured a significant increase from 1997 until 2008 were Egypt's average reached 11.2 fixed lines per 100 people. The increases in the FDI inflows to Egypt came at a later stage starting from 2004, however, it is difficult to ignore the role of the accessible infrastructure in determining the FDI inflows into Egypt during the booming period starting from 2005. Another link is evident in the low FDI inflows during the 1990s, which may be correlated with the low infrastructure. Therefore, the data can provide evidence for a strong positive correlation between the number of fixed line telephones per 100 people and the FDI inflows to Egypt.

The human development index represented in the life expectancy of Egyptians, the FDI inflows should increase with the increases in the number of years Egyptian survive since birth. Egypt had been experiencing increases in the life expectancy throughout the study period. This can be attributed to the general advancement featured worldwide and may not be related to any governmental policies. In addition, the life expectancy has been on the upward trend, which makes it more difficult to correlate it with the patterns of the FDI inflows to Egypt. The identification of a correlation between both notions requires a significant increase in the life expectancy, which was in conjunction with an increase in the FDI inflows. This is not the case, and, therefore, the positive correlation between the life expectancy and the FDI inflows may be difficult to trace.

On the trade level, the low per centages of merchandise trade as per centage of GDP during the 1990s were in line with the low FDI inflows to Egypt during the same period. Conversely, the increase in the trade openness starting from 2003-2004 resulted in an increase in the rates of the merchandise trade as of GDP until peaking in 2008 at 45.8 per cent. The increases in trade came together with the significant increases evident in the FDI inflows to Egypt starting from 2004 until peaking in 2007. Hence, the merchandise trade as per centage of the GDP possibly has strong a positive correlation with the FDI inflows to Egypt. The increases in the volumes of merchandise trade and FDI since 2004 can be direct outcomes of the GOE's policies of liberalizing the Egyptian markets for foreign products and investors. This process of openness was detailed within the legal chapter, which provides an analysis for the development in Egypt's legal framework from a high-restricted and regulated economy to an open de-regulated market through several legislative amendments.

The seventh variable under consideration is the investments restrictions pursuant to Egypt's domestic laws. With the annual calculations starting from 2002, Egypt's recording of the investments restrictions remained within the same range without much volatility between 2002 and 2008. The volatility in this regard is an excluded factor since the legal changes are of a strict nature and require difficult procedural steps in order to amend or change. Taking this into account, Egypt starting from 2003 planned to undertake another reform of its legal framework making it more investor-friendly. Besides, the examples provided for the development in Egypt's legal framework, other liberalization legislations include for example *(i)* the Competition Law promoting the market forces interaction as the determinant of products prices, *(ii)* the new Income Tax Law lowering the corporate tax rate from a maximum 40 per cent to a flat rate of 20 per cent. These continuous efforts during the mid-2000s onwards improved Egypt's ranking in the Ease of Doing Business report (World Bank), that chose Egypt as its top reformer worldwide in 2008 (based on the legal changes introduced in 2007). This year recorded the peak year for the FDI inflows to Egypt and the highest reading on the investment restrictions indicator in the 2000s at 6.63. Therefore, it is possible to locate a strong positive correlation between the investment restrictions indicator and the FDI inflows to Egypt.

VI.C The Determinants of FDI in Jordan

VI.C.1 Introduction

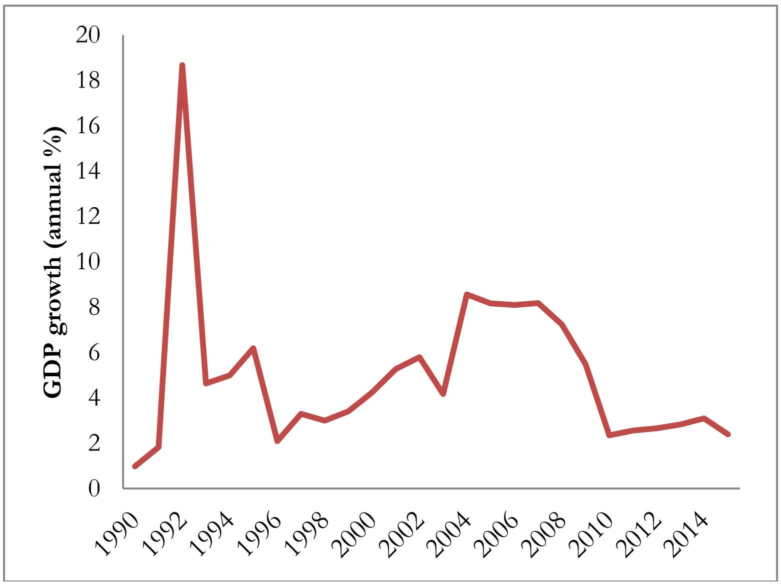
After the introduction of the chosen variables as per the previous literature, this chapter has two objectives. First, analysing the patterns of these variables in Jordan throughout the study period from 1990-2015. Second, the analysis aims to identify the possible correlations if any between the chosen variables and the volume of FDI inflows to Jordan. The chapter splits into nine subsections. Each of the first subsections addresses an economic variable of the list provided above. Section 2 is dedicated to the GDP growth, Section 3 for the market size, Section 4 for inflation, Section 5 for the infrastructure quality, Section 6 for the level of human development index, Section 7 for the levels of merchandise trade, and Section 8 for economic freedom. Section 9 analyses the pattern of the FDI inflows to Jordan. Finally, the conclusion in Section 10 identifies the potential and significant correlations between the variables and the FDI inflows to Jordan.

VI.C.2 GDP Growth

The Jordanian experience of annual rates of GDP growth appears positive throughout the study period (1990-2015). After recording negative growth rates in the late 1980s, in 1990 the economy recorded a sluggish GDP growth rate of only 0.97 per cent. The early 1990s low growth rates may be the outcomes of the political instability in the region especially after the Iraqi invasion of Kuwait resulting in the Second Gulf War. The GDP growth skyrocketed in 1992 to reach an outlier performance by recording a growth rate of 18.7 per cent. The jump may be associated with the return of Jordanian professionals from the Gulf countries and their funds after their expulsion due to the GOJ's position against the international coalition liberating Kuwait. From 1993 until 1995, the annual rates of GDP growth adjusted and averaged around 5.26 per cent. The introduction of the IPL in 1995 seemed did not strengthen a positive correlation with the annual rates of GDP growth. In fact, by 1996 the growth rates more than halved to record only 2.09 per cent. The three years following the promulgation of the IPL with its list of incentives and guarantees, the GDP growth still recorded a sluggish growth performance of 3.29 per cent in 1997, 3 per cent in 1998 and 3.41 per cent in 1999.

By the turn of the century and the accession of King Abdullah to the throne with his business-friendly policies may have assisted the economic activity began to recover. The recovery evident in the upward slope of the annual growth rates from 4.23 per cent in 2000 to 5.27 per cent and 5.79 per cent in 2001 and 2002 respectively. The upsurge of the growth rates was discontinued may be by the US invasion of Iraq in 2003 destabilizing the delicate situation of Jordan within the region. A possible direct outcome was a temporary decline in the growth rates of 2003 to 4.16 per cent. Probably through benefiting from its political position favouring the US invasion of Iraq, the Jordanian economy received more western investments allowing it to more than double its growth rates in 2004 to reach 8.56 per cent. Moreover, and for the first time, the around 8 per cent annual growth were sustained for the following three years 2005, 2006 and 2007 until the start of worldwide financial crisis in 2008.

The impact of the financial crisis on Jordan seemed lagged by one year since only in 2009 the annual growth rates fell to 5.48 per cent before slumping to 2.34 per cent in 2010. From 2010 onwards, the Jordanian economy failed to reach the mid-2000s annual growth rates. The rates of growth ranged until 2015 between 2 and 3 per cents. Of the possible reasons for such extended deterioration in growth rates was the Arab Spring and the continuous instability experienced in Jordan's neighbouring countries including the civil war in Syria since 2011 and the rise of Islamic State in Iraq and Syria (ISIS) in Iraq since 2014. These instabilities burdened the Jordanian economy with a continuous influx of refugees to an already featuring difficulties economy.



VI.C.3 GDP per capita (constant 2010 US$)

The financial aid and support from the western economies to Jordan permitted it to experience a high reading of the GDP per capita in 1990. The reading of 1990 provided a GDP per capita of $2,587. This was slightly below the $2,773, which was the average GDP per capita realized during the 1990s. As in the case of trade, the accession of King Abdullah was reflected positively on the GDP per capita.

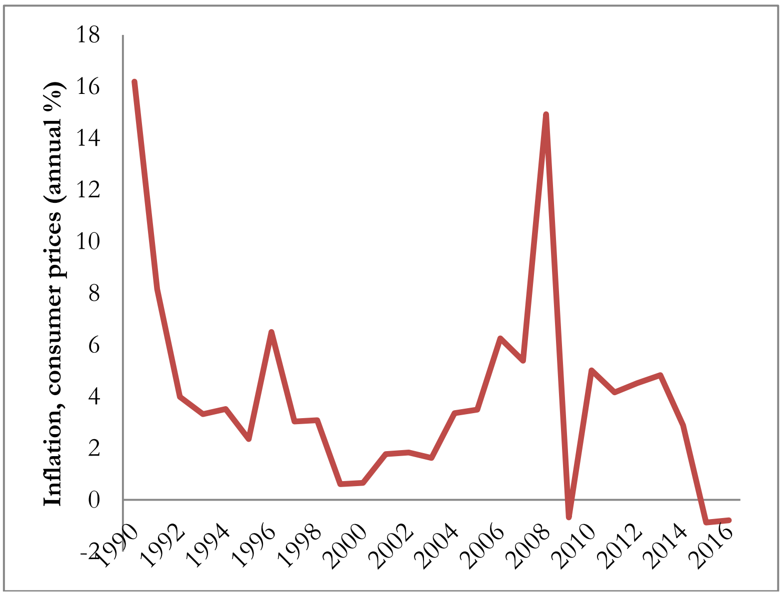
In the 2000s, Jordan began its annual upward trend of GDP per capita. Starting from $3,006 in 2000, heading to $3,297 in 2003 and $3,490 in 2004. The exponential growth in the GDP per capita was a direct reflection of increases in the real GDP growth rates recorded in the 2000s. The GDP per capita continued its upward rally peaking at $4,120 in 2009. However, the slowing of the real GDP growth rates after the financial crisis was reflected in slight decreases in the GDP per capita ending in 2015 at $3,976.

VI.C.4 Inflation

Jordan's inflation rate throughout the study period preserved a moderate inflation rate below the 7 per cent. Throughout the 25 years under investigation only three readings went over the 7 per cent. This was evident in the 1990 and 1991 when the inflation rate recorded 16.2 per cent and 8.16 per cent respectively. The high rates of inflation in these two years can be reasoned based on the effects of the SAP of Jordan. The conclusion of the SAP obliged the GOJ to adopt a plan of austerity in 1989. The direct outcome of such plan was a cut in subsidies pressuring the inflation to increase in 1989 and 1990. The jump in the inflation rate was moderated in 1991, when the pressures began to moderate.

The downward trend of the inflation rate continued in the early 1990s, where the rate halved to only 4 per cent in 1992. In the following years until 1996, the inflation rate remained around or even below the 3 per cent. Only in 1996, the rate of inflation doubled to record a 6 per cent. From 1996 to 2006, Jordan proved its maintenance of its macroeconomic stability with an inflation rate always below the 4 per cent. With the soaring of economic activity, the inflation pressures possibly began to build-up and in 2008, the economy reached its second inflation peak attaining a rate of 14.9 per cent. In the following years, the global financial crisis may justify the slowdown experienced in the economic activity. This pushed the inflation rate downward to its previous annual rates of around 4 per cent. It is worth noting that the economy in the years 2015 and 2016 recorded a deflation of 0.873 per cent and 0.788 per cent respectively.

From the available data and the analysis, it is simple to follow the stability of the economic activity in Jordan. The inflation rate experienced only two hikes at 16.2 per cent in 1990 and 14.9 per cent in 2008. The average annual inflation rate of Jordan recorded a 4.04 per cent. Otherwise, the economy was recording moderate inflation rates reflecting the macroeconomic stability in Jordan. The moderation of the inflation rate turned it even into a deflation at 2015 and 2016.

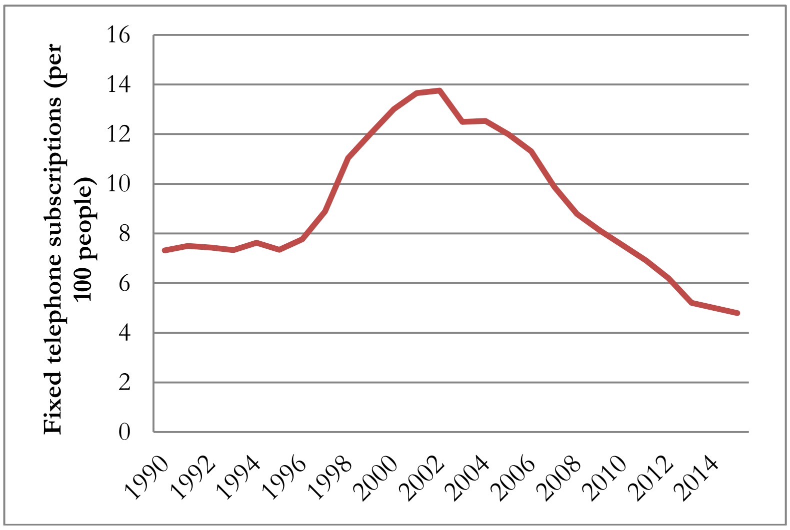


VI.C.5 Fixed Telephone Subscriptions (per 100 people)

The number of fixed telephone subscriptions per 100 people in Jordan can be represented in a normal distribution form. The starting point of the demonstration in 1990 provided that 7.31 people per 100 people had a fixed telephone subscription. From 1990 until 1996, the number of subscribers stayed around 7.47 per 100 people. By 1997, the number of subscriber per 100 people started its upward trend from 8.88 per 100 people. Following the inclining trend, the subscribers reached 11.03 and 12.03 per 100 people in 1998 and 1999 respectively. The top three years were 2000, 2001 and 2002 where the number of subscribers per 100 people were 13, 13.65 before peaking at 13.76 in 2002.

The deterioration in the number of subscribers per 100 people began in 2003 when it recorded 12.5 subscribers. From 2003 until 2015 the readings provided a decrease in the number of subscribers per 100 people. This reflected the lower infrastructure investments from both the public and the private side. The decline in the number of subscribers continued until the lowest point in 2015 when the recorded reading was 4.8. It is important to note that the decline in the rates of the subscribers in the fixed telephones was in conjunction with the development of the telecommunication services by the invention of the mobile phones.

With the importance of the fixed telephones as a proxy for the quality and the accessibility of the infrastructure, it is evident in the case of Jordan the focus of the policymakers during the 1990s to improve the infrastructure network to ensure its positive impact on the inflows of FDI. In fact, this plan proved a success where the number of subscribers reached its maximum point in 2002. Conversely, the shift of preferences and businesses towards the mobile services reduced the investments in the fixed telephones sectors and even the demand on the fixed telephone services.



VI.C.6 Life expectancy at birth, total (years)

With its small population, Jordan managed to secure the highest starting point in the life expectancy at birth indicator. An infant born in 1990 would live until 69.9 years old. Jordan secured an added year to reach 71 years only after five years-time as in 1995. The following one-year addition reaching the 72 years was reached in 2001 and the 73 years was reached in 2007. Finally, the 74 years was attained only in 2013. The Jordanian average life expectancy for the study period is 72.2 years old allowing Jordan to rank first between the country studies.

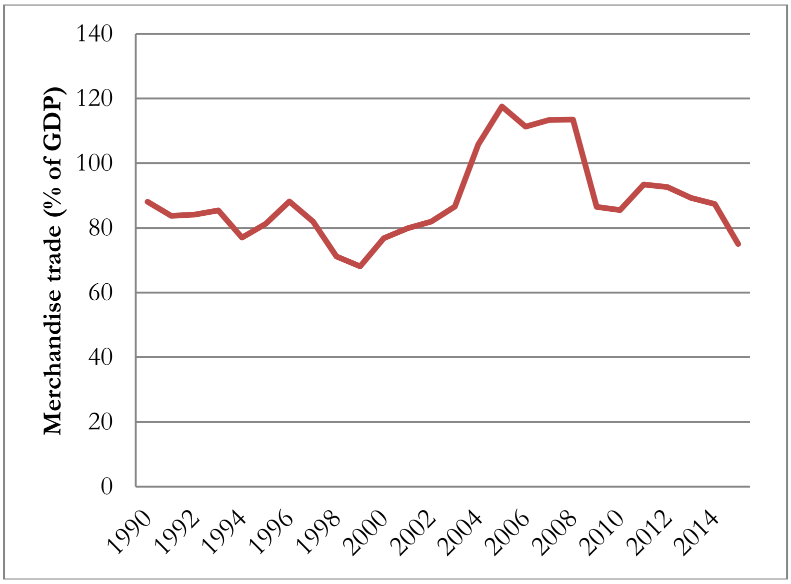
On the other hand, Jordan recorded the lowest increase in the number of years throughout the study period with 69.9 years in 1990 and 74.2 in 2015. The difference is only 4.3 years.

VI.C.7 Merchandise Trade (as per cent of GDP)

As introduced in the economic history chapter, the Jordanian position in the international scene depended to a wide extent upon the inflows of foreign aids and financial support. This may have allowed Jordan to record very high rates of trade and integration within the global economy since 1990. From 1990 until 1997, all the readings provided a merchandise trade of above 80 per cent of the GDP (except for 1994, where the rate was exceptionally 77 per cent). A possible justification was the Iraqi use of Jordan's trade outlets as an alternative to avoid the imposed international economic sanctions throughout the 1990s. The latest years of King Hussein's rule indicated a deterioration in the rates of merchandise trade. In 1999, Jordan recorded a merchandise trade equal to 68.1 per cent of the GDP. This was the lowest reading throughout the study period.

The throne accession of King Abdullah in 1999 may be chosen as the turning point for the merchandise trade as per centage of GDP. The indicator preserved an upward trend until 2005. Specifically, when in 2004 began the process of easing trade through the Aqaba port[1226]. Furthermore, Jordan possibly benefited from the US invasion of Iraq in expanding exponentially its merchandise trade levels to reach its peak reading at 118 per cent in 2005. The high rates of merchandise trade continued until 2008, when the global economy was hit with the financial crisis. The crisis seemed pushing down the merchandise trade to the before the US invasion boom rates of 86.5 per cent in 2009. From 2009 until 2014, the rates of merchandise trade as per centage of GDP recorded the lowest reading at 85.5 per cent in 2010 and the highest reading at 93.4 per cent in 2011. The difficulties to recover the readings of the peak year can be based on the outbreak of the Syrian civil war and ISIS presence in the neighbouring economies.

[1226] Cebotari, D. and Dennis, A. 2008

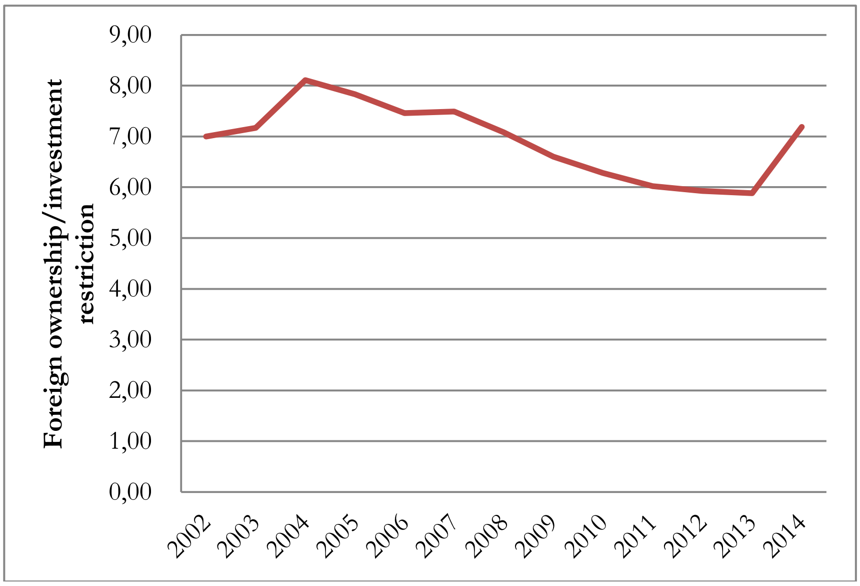


VI.C.8 Foreign ownership/investment restriction

The first available reading for Jordan's foreign ownership restriction (as part of the EFW sub-component addressing the controls on the movement of capital and people) is recorded in 1995. Being the year of promulgating the IPL, the restrictions were expected to feature a high reading reflecting low restrictions. The new legislation seemed the primary reason in allowing Jordan to record its highest reading throughout the period under investigation (*i.e.*, 1995 - 2014) at 8.85. The continued application of the IC in the same manner justified the readings of 8.71 in 2000 and 2001 respectively. In 2002 and 2003, the restrictions on capital controls experienced an increase forcing the reading to reach 7 and 7.17.

The introduction of the new Investment Law No. 68 of 2003 may have resulted in the upturning of the foreign investment restrictions to record 8.11. The non-continuation of the high readings may be based on the Law's formalisation of the foreign investors restrictions regarding the ownership in Jordanian investments. The readings of the foreign restrictions remained around 7.5 until the financial crisis in 2008. Afterwards, the restrictions of foreign ownership began the significant deterioration in conjunction with the global financial crisis of 2008. The downward trend of the readings started from 6.60 in 2009 until it reached its dip in 2013 by recording 5.88. Only the introduction of the new Investment Law No. 30 of 2014 may have resulted in the elimination of restrictions pushing the reading upward to record 7.19.

From the readings followed above, it may be concluded the obvious role of the Jordanian Investment Laws in eliminating or lessening the restrictions applicable upon foreign investments. The introduction of the three Investment Laws were directly followed by higher readings in the foreign investment restriction indicator, which implies more expected FDI inflows.



VI.C.9 Net FDI (current US$)

With only $0.069 billion in 1990, the sign of Jordan's net FDI was even reversed in 1991 resembling a net outflow of $0.025 billion. The early struggling of the net FDI indicator continued in the years from 1992 until 1995 recording a maximum inflow of $0.044 billion in 1992. The introduction of the IPL in 1995 did not assist in identifying a correlation with the inflows of FDI, which recorded only $0.041 and $0.059 billion in 1995 and 1996 respectively. In 1997, the net FDI skyrocketed to $0.361 billion and $0.310 billion in 1998. The rise may be justified on the lagged flows of FDI until investors were assured the GOJ is willing to respect and enforce the guarantees and incentives granted under the new IL. The net FDI halved in 1999 to only $0.153. A possible reasoning could be the investors' uncertainty about Jordan's political future and stability with the illness and death of King Hussein and the King Abdullah's II accession of throne in June 1999.

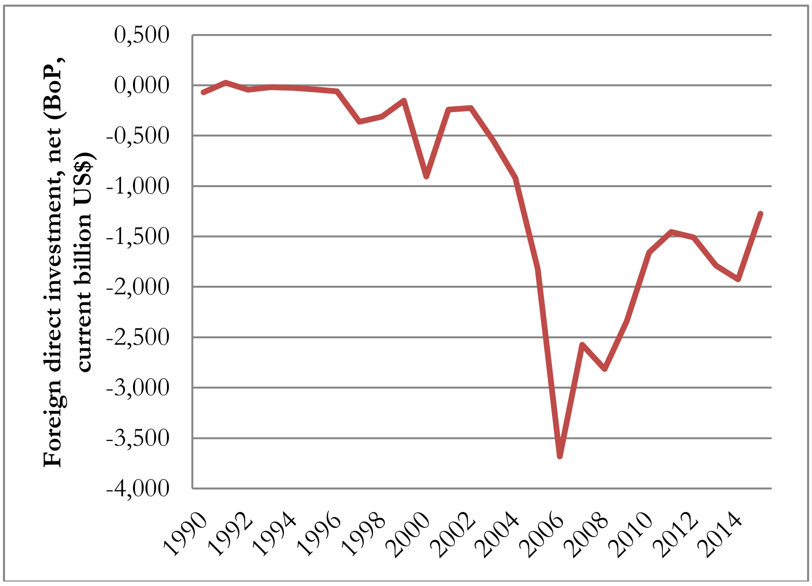
The placement of the new King and his initial policies signalled Jordan's interest to continue its transformation line towards the private sector's lead through a more intense privatization program. This seemed a positive message for foreign investors interested in the Jordanian market. The net FDI inflows at $0.905 billion in 2000 was nearly triple the highest reading recorded in 1997. After only four privatization transactions from 1995 to 1998 with total proceeds of less than $65 million, the significant increase in the net FDI inflows in 2000 seemed associated with the partial privatization of the Jordan Telecommunication Company (proceeds equal to $508 million). The surge of the year 2000 proved exceptional since the net FDI inflows returned to even below the pre-2000 levels at $0.242 and $0.224 in 2001 and 2002 billion respectively. The witnessed deterioration may be reasoned upon the deviated interest of investors to take the risks of investing in the Middle East when its already featuring several political instabilities due to the start of the Palestinian Intifada in 2000 and the War against Terrorism in 2001.

In 2003, the net FDI inflows more than doubled compared to the preceding year to reach $0.551 billion. The doubling could be justified from two contradicting sides. On the increase side, the doubling may be an outcome of the inflows of wealthy Iraqis into Jordan after the US invasion of Iraq in 2003. Moreover, the Jordan may have received more FDI inflows as a reward for its strategic alliance with the US in regard to the latter's policies against terrorism generally in the Middle East specifically. The partial privatization of Arab Potash Company[1227] (proceeds equal to $173 million) could be the last possible reasoning for the doubling of the net FDI inflows in 2003. On the other hand, on the downside level of the FDI, a view may consider the recorded net FDI was below the level which would have been recorded in case the US did not invade Iraq in 2003 due to the increased region's stability.

From 2004 until 2015, the average net FDI inflows recorded during this time frame was nearly $2 billion per year. After almost doubling in 2004 to $0.919 billion, the net FDI inflows surpassed the $1 billion on annual basis only in 2005 to record $1.82 billion. The possible justifications include the positive impact of the new Investment Law No. 68 of 2003 and the growing global investment interest in emerging markets may have affected positively the flows of the FDI into the Jordanian market. The continuous negative net FDI flows into Jordan recorded the highest reading throughout the study period 1990-2015 in the year 2006 at $3.68 billion. The net FDI inflows started moderating in the years 2007, 2008 and 2009 recording an average of $2.58 billion in net FDI inflows per year. An additional reason for the increase in the net FDI inflows in 2006 and 2007 was the rise in the number of the concluded SOEs' privatization transactions (seven transactions with total proceeds of nearly $874 million in the two years).

[1227] World Bank 2017

The global financial crisis in the late 2000s could be blamed for the decline in the readings of the net FDI inflows starting from 2010, when it recorded only $1.66 billion. In 2011, other possible factors pressuring down the net FDI inflows recorded readings may include the political instability of the region after the Arab Spring uprisings and the initiation of the Islamic State of Iraq and Syria at the borders of Jordan. This may have affected negatively the appetite of investors who may have been interested in seeking opportunities in the Jordanian market. Taking into account these possibly influencing factors, the average net FDI inflows in Jordan for the years between 2011 and 2015 was $1.59 billion.



VI.C.10 Conclusion

Reviewing the FDI determinants in conjunction with the above analysis of the recorded FDI inflows can help in realizing possible correlations between the FDI inflows to Jordan and the previously introduced economic variables. To start with the GDP growth, by reviewing the pattern of Jordan's GDP growth throughout the study period together with the pattern of the FDI inflows, it is possible to verify a strong paternal correlation between both variables. During the 1990s (apart from 1992) Jordan maintained stable annual growth rates around an average of 3.4 per cent and the similar stability in volumes of FDI was applicable to the inflows to Jordan. The beginning of the 2000s and the positive rates of annual GDP growth in Jordan came in conjunction with evident increases in the volume of FDI inflows to Jordan. The peaking of the GDP growth rates in 2004-2006 was simultaneous with the peaking of the FDI inflows in 2006. From these patterns, a positive correlation could be identified between the annual GDP growth and the FDI inflows to Jordan.

The second economic determinant for the FDI inflows to Jordan under consideration was the GDP per capita. The GDP per capita in Jordan increased from 1990 to 2015 by around $1,389. Moreover, the average of GDP per capita throughout the study period was $3,364. In theory, these data reflect the positive development in the market size and in turn the standards of living, the purchasing power and the stronger demand of Jordan's population. In other words, the economy experiences a continuous size expansion. The continuous stable incremental increases in the GDP per capita cannot be paternally correlated with the changes in the FDI inflows to Jordan. The latter changed positively and negatively throughout the study period, which is not the case of the GDP per capita. However, a weak positive correlation could be traced in the exponential increase of the GDP per capita between 2003 and 2008, when in the meantime, the FDI inflows to Jordan were recording their peak readings.

The identification of a correlation between the inflation rate and the FDI inflows to Jordan remains a possible matter. The pattern of the inflation rate during the 1990s with the recorded low rates seem coinciding with the low volumes of FDI inflows to Jordan. Similarly, the increases in the inflation rate since the 2000s upward trend until skyrocketing in 2008 timely coincides with the boosted volumes of FDI inflows to Jordan (peaking in 2006-2008). The same paternal correlation stayed valid for the years 2011-2015, where the inflation rate began its increase and the volumes of the FDI inflows to Jordan were recovering. Accordingly, it is possible to recognize a strong positive correlation between the inflation rate and the FDI inflows to Jordan.

The fourth determinant of the FDI inflows to Jordan is the quality and accessibility of infrastructure as represented in the number of fixed line telephones per 100 people. The variable denoting the infrastructure developments featured a significant increase from 1997 until 2002 were Jordan's average reached 12.1 fixed lines per 100 people. The significant rise in the FDI inflows to Jordan started from 2003. It is simple to correlate the presence of accessible and proper quality infrastructure with the volumes of FDI inflows to Jordan witnessed from 2003-2008. Alternatively, during the 1990s, the levels of the infrastructural development was in conjunction with lower FDI inflows to Jordan. Hence, it is possible to conclude a positive correlation between the number of fixed line telephones per 100 people and the FDI inflows to Jordan.

The human development index represented in the life expectancy of Jordanians, the FDI inflows to an economy should increase with the increases in the health standards of the population due to higher productivities. Jordan manged to preserve a steady increase in its life expectancy readings throughout the study period. It would not be entirely correct to praise the GOJ for such increases since it may be attributable to the general development featured in health standards and medication worldwide. Furthermore, the life expectancy did not mark any breaks in its continuous increases, which makes it difficult to identify any correlation with the FDI inflows to Jordan. The identification of a correlation between both notions requires a significant increase in the life expectancy, which was in conjunction with an increase in the FDI inflows. This is not the case, and, therefore, the positive correlation between the life expectancy and the FDI inflows may be difficult to locate.

On the trade level, Jordan's merchandise trade as per centage of GDP already recorded high readings during the 1990s. This could be justified upon the structure of Jordan's economy being highly dependent on foreign assistance and trade. During the same period, the FDI inflows to Jordan were recording their lowest rates when compared to the 2000s. Even the decline in the merchandise trade per centage of GDP during the late 1990s was in conjunction with a slight increase in the volume of the FDI inflows to Jordan. Hence, it remains difficult to identify any possible paternal correlation between the merchandise trade as per centage of GDP and the FDI inflows to Jordan. The opposite could be argued by checking the increases in the merchandise trade from 2003-2008 (in line with increases in FDI inflows to Jordan), however, the overall liberalization on investment and trade levels with King Abdullah is the justification and not the correlation between both notions.

The seventh variable under consideration is the investments restrictions pursuant to Jordan's domestic laws. The annual calculations of the indicator started from 2002, when Jordan managed to experience a strong start between 2002 and 2004. However, the strong start did not represent a clear volatility since legislations have a strict nature and several procedural steps are needed to amend them. Taking this into account, the accession of King Abdullah to the throne in 1999 helped in enhancing the business environment of Jordan. An important part of these improvements was linked to the reforms of Jordan's legal framework making it more investor-friendly. Besides, the examples provided for the development in Jordan's legal framework, other liberalization legislations within 2002-2004 include for example *(i)* the Competition Law promoting the market forces interaction as the determinant of products prices, *(ii)* the temporary Investment Law of 2003 lowering restrictions on foreign ownership of business entities in certain sectors. These years represented the base from which the FDI inflows to Jordan began its inclination until peaking in 2006. The pace of legal liberalization and lowering of foreign investments restrictions began to decrease (appears in lower readings on the indicator), in conjunction with the moderation of the volumes of FDI inflows to Jordan. Therefore, it is possible to locate a strong positive correlation between the investment restrictions indicator and the FDI inflows to Jordan.

VI.D The Determinants of FDI in Morocco

VI.D.1 Introduction

After the introduction of the chosen variables as per the previous literature, this chapter has two objectives. First, analysing the patterns of these variables in Morocco throughout the study period from 1990-2015. Second, the analysis aims to identify the possible correlations if any between the chosen variables and the volume of FDI inflows to Morocco. The chapter splits into nine subsections. Each of the first subsections addresses an economic variable of the list provided above. Section 2 is dedicated to the GDP growth, Section 3 for the market size, Section 4 for inflation, Section 5 for the infrastructure quality, Section 6 for the level of human development index, Section 7 for the levels of merchandise trade, and Section 8 for economic freedom. Section 9 analyses the pattern of the FDI inflows to Morocco. Finally, the conclusion in Section 10 identifies the potential and significant correlations between the variables and the FDI inflows to Morocco.

VI.D.2 GDP Growth

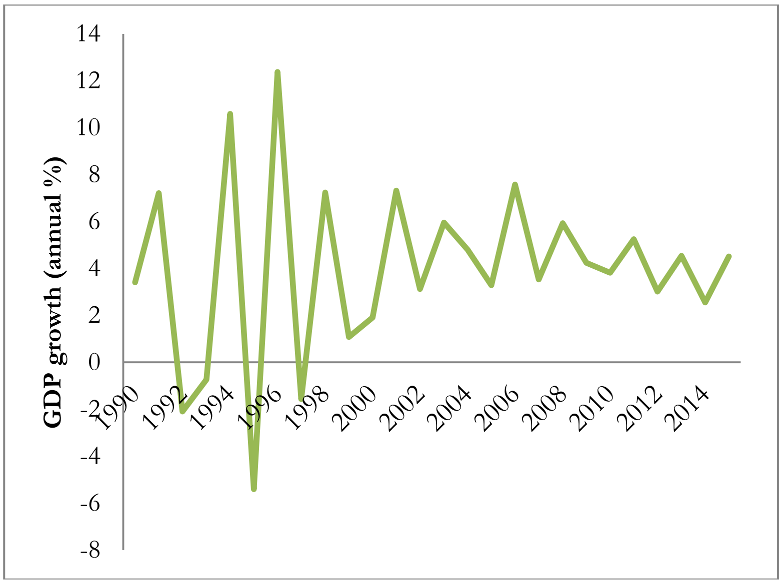
The performance of the annual rates of GDP growth of Morocco can be split into three phases. In the first phase, the economy preserves a special nature as continuously swinging between the growth and contractions. A popular phenomenon during the 1990s allowed the Moroccan economy to secure significantly high growth rates of 12 per cent before slumping to a contraction in the following year. The volatility may be primarily justified upon Morocco's concentration of economic activity in few sectors as agriculture and raw materials[1228]. These sectors return depended on the world market prices and the prevalent climatic conditions.

[1228] Castel 2015 50

In 1990, the Moroccan annual growth rates started from an annual growth rate recorded was 3.41 per cent. The rate doubled in the following year to attain a 7.22 per cent, before the economy experienced a contraction at 2.1 per cent in 1992. After a lower magnitude of contraction in 1993, the economy exceptionally grew at 10.6 per cent in 1994. The second evidence of the GDP growth rate volatility was in 1995 when the economy severely contracted at 5.41 per cent before upturning to 12.4 per cent growth in 1996. The negative-positive annual GDP growth volatility continued until 2000 with lower magnitudes of variance.

The volatility was blamed mainly upon the lack of industrialisation and diversification. Throughout the 1990s, the economy was primarily dependent on the agricultural activities irrigated principally through rainfalls. Accordingly, the witnessed annual GDP growth rates depended on the levels of rainfalls. High rainfalls would boost the agricultural activity, its outcomes and proceeds leading to higher growth rates and vice versa. Another important pillar was the dependence on the exportation of phosphate. The volatility in the international prices of the mineral influenced positively or negatively the annual rates of GDP growth. The accession to throne of King Mohamed VI in 1999 was a turning point for the economy to begin a sustained process of reform and recovery starting the second phase in analysing Morocco's annual GDP growth rates.

Although the second phase (lasting from 2001 until 2006) featured similar swinging in the rates of the annual GDP growth, the swinging remained always in the positive side without evidencing any economic contractions. In addition, the deviation between the annual rates of growth were minimized. From 2002 until 2005, the economy recorded an average annual GDP growth rates of 4.29 per cent. In 2006, the rate of GDP growth doubled to 7.57 per cent before declining again to the 3.53 per cent in 2007. When the worldwide financial crisis was starting, the economy secured an annual GDP growth of 5.92 per cent. The lagging impact of the crisis pressured the growth rates down to 4.24 per cent and 3.82 per cent in 2009 and 2010. Morocco was not severely hit by the instabilities of the Arab Spring. In 2011, the economy secured an annual 5.25 per cent of GDP growth. The rates of the GDP growth between 2012 and 2015 remained around the average of 3.65 per cent.



VI.D.3 GDP per capita (constant 2010 US$)

The performance of the GDP per capita of Morocco seems positive regardless of the slight volatility in the GDP per capita. For example, in the late 1990s the GDP per capita changed in line with the changes evident in the GDP growth of the economy, however, from 1999 onwards the economy preserved a steady growth in the GDP per capita. The volatility of the 1990s is connected to the lower rainfalls affecting the agricultural output, the GDP growth rates and in turn the GDP per capita. The average GDP per capita for the period between from 1990 until 1998 was only $1,817.

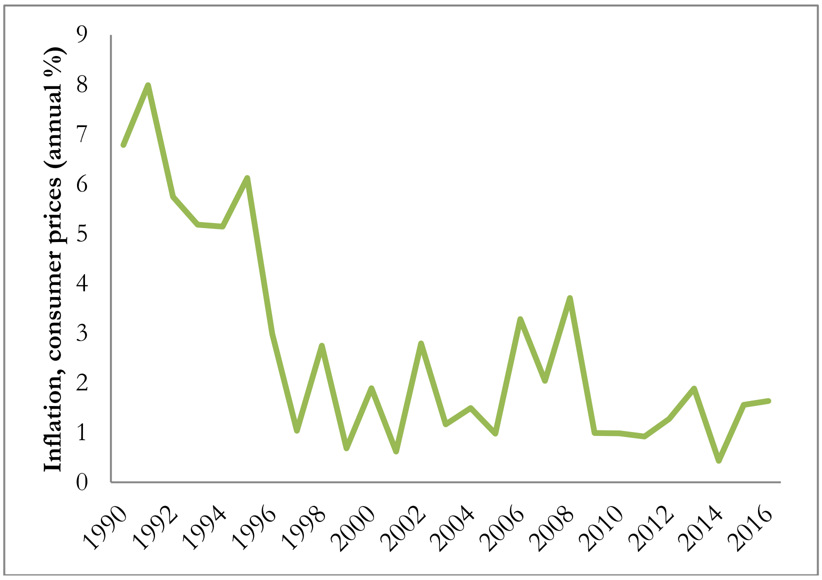
From 1999 and 2000, the economy began to operate at a faster pace. The GDP per capita started its upward rally from $2,087 in 2001, reaching $2,787 in 2009 before arriving at $3,240 in 2015. Despite the volatility in the GDP growth rates of Morocco during the 2000s, the rise in the GDP per capita was increasing at a nearly stable pace. This signals the control posed over the population growth rates. Hence, the minimal increases in the GDP growth were still reflected positively on the GDP per capita. For the period between 2001 and 2015, the average GDP per capita was $2,671.

The rise in the GDP per capita of Morocco between 1990 and 2015 was equal to $1,524. With an average GDP per capita of only $2,315 (closer to the average of 2001 to 2015), the period of the 2001 to 2015 raised the overall average of the indicator upward. The steady growth of the GDP per capita in the 2000s highlights the healthy market size and the presence of the purchasing power to consume. Even though the economy experienced downturns in its rate of GDP growth, it secured positive reflections on the GDP per capita rates after the population growth was brought more under control.

VI.D.4 Inflation

The inflation rates recorded in Morocco throughout the studying period signals the high rates of macroeconomic stability. The conclusion of the SAP with the IMF and undertaking of the austerity plans probably pushed the inflation rates to reach their peak at 1991 by recording a 7.99 per cent. From 1991 until 1997, the annual inflation rate of Morocco declined until reaching a 1.04 per cent. With an increase in 1998 to 2.75 per cent, the annual inflation rate remained below the 3 per cent until 2005. In the three years from 2006 to 2008, the inflation rate picked up with the rise in economic activity experienced in the emerging economies and the increases in commodity prices (ex: oil). It recorded a 3.28 per cent in 2006 and 3.71 per cent in 2008, which were the highest recorded rates since 1996.

Afterwards, the rise in the inflation rate moderated, possibly, due to the global financial crisis of 2008. From 2008 up until 2016, the inflation rate never surpassed the 2 per cent. From the annual inflation rate data available, Morocco's peak never exceeded the 8 per cent throughout the study period. Moreover, the average annual inflation rate of Morocco for the period under examination recorded a 2.67 per cent. With the low rates of annual inflation, Morocco maintained a reasonable level of macroeconomic stability.



VI.D.5 Fixed Telephone Subscriptions (per 100 people)

Morocco started from the worst position in connection to the number of fixed telephone subscriptions per 100 people by recording a reading of 1.63 in 1990. The Moroccan policymakers probably recognized in the 1990s the importance of directing investments to the field of infrastructure based on its importance in raising the standards of living and in attracting FDI. Thus, the number of subscribers preserved its inclining stance and recorded a 5.18 subscriber per 100 in 1999. By the turn of the millennium, Morocco witnessed a decline in the number of subscribers at 4.96 before remaining constant around this rate until 2006.

From 2007 up until 2011, the Moroccan economy featured a significant improvement in the number of subscribers in fixed telephones per 100 people. With 7.81 subscribers in 2007 to 9.66 in 2008 and 11.8 in 2010. In the end of the late 2000s the infrastructure investments and consumer preferences were shifted away from the fixed telephone in favour of the mobile telecommunication services. This justifies the deterioration in the number of subscribers in fixed telephone at a rapid pace pushing the number of subscribers to half at 6.55 in 2015.

The difficult start of Morocco's infrastructure quality and accessibility would not have a positive impact on the FDI inflows. The obvious development in the infrastructure was experienced in mid-2000s where the number of subscribers per 100 people increased exponentially reaching the peak in 2010. The subscribers' numbers deteriorated until 2015 due to the shift towards using mobile services over fixed telephones. It is worth highlighting the delay in shifting investments to the infrastructure as Morocco recorded its peak reading of the number of subscribers only in 2010, which came at a date after the introduction of the mobile phones services presumably by the late 2000s.

VI.D.6 Life expectancy at birth, total (years)

Morocco in 1990 started from a of life expectancy with a number of years equal to 64.7 years. In the Moroccan situation, the improvement in the life expectancy by one-year was attainable in shorter periods. For example, the first year to reach the 65.7 years was attainable in two-years' time (*i.e.*, 1992). The following year addition was in three years' time (*i.e.*, 1995), followed by another three years until 1998 to reach the 67.7 years. By the turn to the 2000s, the one-year increase in the life expectancy became attainable in less than the three years. This even puts Morocco in a better position in relation to the annual increases. The Moroccan average life expectancy for the study period is 69.6 years old allowing Morocco.

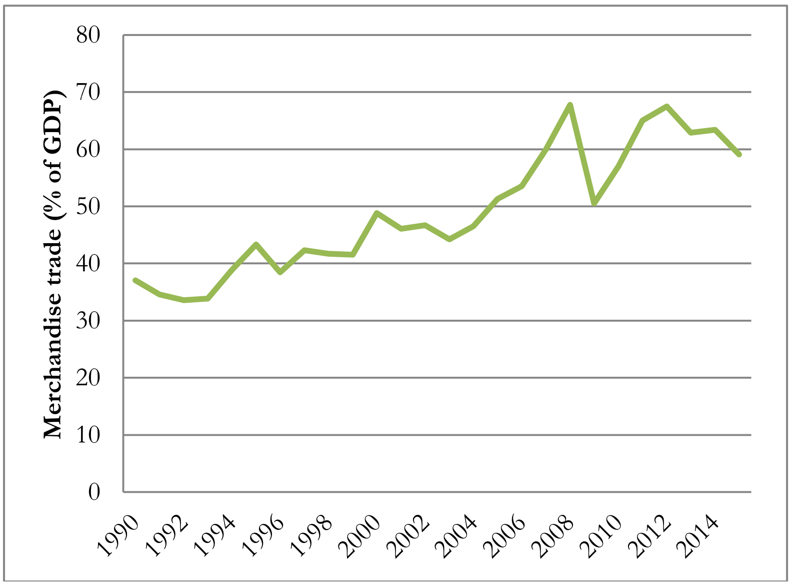
On the other hand, Morocco recorded a significant incremental increase in the number of years of the life expectancy throughout the study period from 1990 until 2015. The increase in the number of years throughout the study period from 64.7 years in 1990 to reach 74.3 in 2015. The increase amounts to 9.6 years and allowed Morocco to close the gap in the life expectancy's number of years with other members of the MENA region.

VI.D.7 Merchandise Trade (as per cent of GDP)

The merchandise trade as a per centage of GDP for Morocco experienced a positive trend throughout the study period. However, the upward line appeared nearly flat from 1990 up until 1999. During this period, the average merchandise trade per centage of GDP was 38.5 per cent. The accession of King Mohamed IV allowed the economy to open further and more integrate in the global trade. These changes towards openness permitted the economy to increase its average merchandise trade level as a per centage of GDP (for the period 2000 – 2014) by nearly 17 per cent to record an average of 55.6 per cent.

The increase in the average started since 2000 with a reading of 48.8 per cent. The rate stayed relatively stable until in 2005 it reached 51.3 per cent before jumping to 59.9 per cent and 67.8 per cent in 2007 and 2008 respectively. The increase was justified upon the flows of investments to the emerging economies until the eruption of the financial crisis of 2008. This forced the merchandise trade per centage as GDP to drop to 50.5 per cent. The Moroccan's trade recovery from the crisis was speedy with a per centage of merchandise trade to GDP at 57 per cent and 65 per cent in 2010 and 2011 respectively with similar rates recorded until 2015.

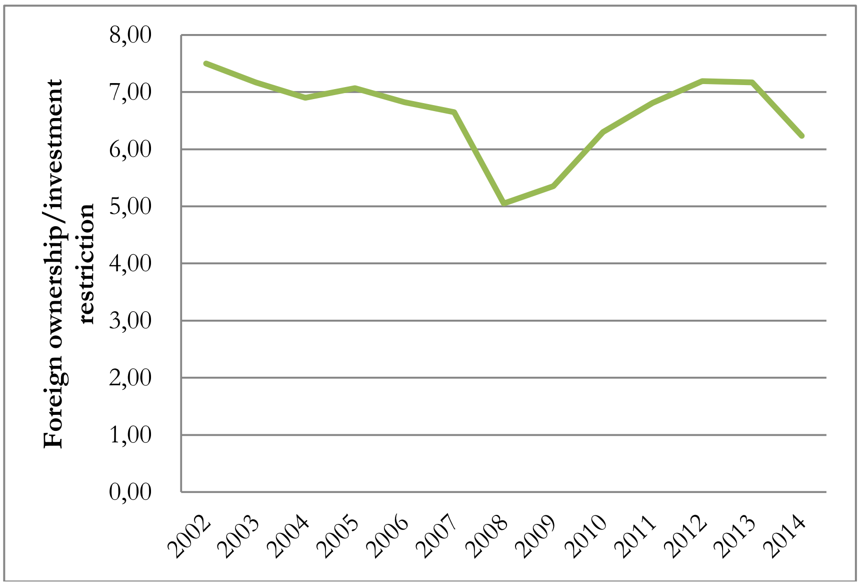
From the data, it becomes obvious that Morocco managed to boost its trade levels as per centage of the GDP. Morocco recorded a wide 26 per cent positive change when comparing the readings at the starting and the ending of the chosen indicator. This highlights the policymakers focus on enhancing the economy's openness and integration in the global economic activity. This inclination and stress of openness may have signaled the country's interest in globalization boosting the positive correlation with the flows of the FDI into Morocco.



VI.D.8 Foreign ownership/investment restriction

The first available reading for Morocco's foreign ownership restriction (as part of the EFW sub-component addressing the controls on the movement of capital and people) is recorded in 2002. After the promulgation of the IC in 1995, the Moroccan investment framework preserved its stance from the restrictions against foreign investors ownership in Moroccan entities. The readings in the early 2000s recorded higher ranging around 7. This remained the situation until in 2007, the readings began to decline significantly to reach 5.05 in 2008 and 5.35 in 2009. On the investment level, there were no legislative changes to justify these evident restrictions. However, it may be the case that the GOM introduced a set of restrictions aiming to mitigate the effect of the global financial crisis.

The rebound upward of the readings dealing with the foreign investor restrictions was evident in 2010. The readings jumped by one full point to reach 6.30 before moving forward to 6.81 in 2011 and 7.19 in 2012. This comes in line with the continuous efforts to stimulate the FDI inflows into Morocco. Although this does not appear in any legislative changes since the IC remains in place without featuring any amendments since its introduction in 1995.



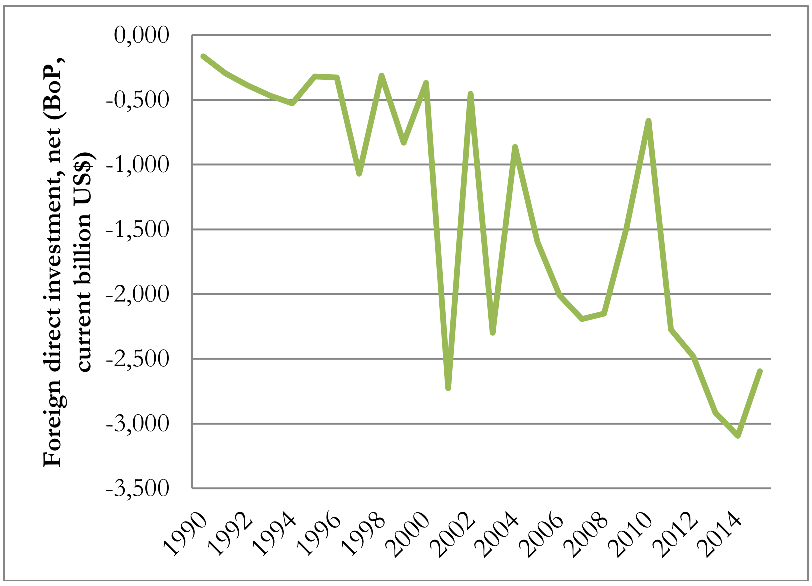
VI.D.9 Net FDI (current US$)

Morocco started its study period in 1990 recording the second highest reading for the net FDI inflows between the country studies at $0.165 billion. The following years until 1994 witnessed a continuous gradual increase in the net FDI inflows reaching its maximum for the early 1990s at $0.527 billion (including the proceeds realized from offering publicly the Société Nationale d'Investissement equaling to $227 million). In 1995 and 1996, the net FDI inflows decreased to around $0.320 per year. This may reflect the lack of any positive impact of the IC on the stimulation of the FDI inflows into Morocco. Exceptionally, in 1997 the net FDI inflows surged to slightly cross the $1 billion out of which $716 million were proceeds from the privatization of 12 SOEs (*e.g.*, SAMIR and the Societe Cherifienne de Petroles).

Nevertheless, the justification may be invalid since the years from 1997 until 2004 experienced an obvious volatility in the recordings of the net FDI inflows. The volatility in net FDI inflows may be associated with the similar volatility featured in the rates of real GDP growth. The evidences for the volatility include the net FDI inflows of $1.07 billion in 1997 followed by a significant drop to only $0.313 billion in 1998. The volatility may refute the previous possibility of the lagging impact of the IC, which would have continued if the IC had successfully convinced the international investor to route their investments in Morocco. The same applies for the rise to net FDI inflows of $0.831 billion in 1999 before dropping again to $0.368 billion in 2000. It is important to highlight that the privatization proceeds in 1999 reached $1.14 billion, while the recorded net FDI inflows were only $0.831. By excluding the privatization section from the net FDI inflows calculation, it appears the greenfield operational FDI recorded a negative number (an actual outflow).

The accession of King Mohamed VI of the Moroccan throne in 2000 and the signals of the continued inclination towards the private sector in formulating the economy's activity may have incentivized the inflows of FDI allowing the recorded reading in 2001 to reach $2.73 billion. The recorded net FDI inflows featured $2.11 billion proceeds from the privatization of the Morocco Telecom Company). The readings preserved the volatility and fell again to only $0.452 billion in 2002. The same scenario of volatility continued between 2003 and 2004. From 2005 until 2015 the economy managed to an extent to overcome the volatility problem, and recorded an annual average of $2.13 billion. A possible reason could be the successful diversification of the economic activity in Morocco away from agriculture. This allowed the creation of more investment opportunities in other fields including infrastructure and industrial activities. Accordingly, the net FDI inflows could have secured this high annual average for this long period (2005-2015) due to the investment flows seeking the new potential opportunities. In this regard, it is important to refer to the net FDI inflows featured increase reaching the $2.92 billion and even exceed the $3 billion (recorded $3.09 billion) in the years 2013 and 2014 respectively.

From the above preliminary analysis, a set of observation can be deduced. First, the average net FDI inflows into Morocco throughout the study period is $1.34 billion. Second, Morocco clinched in 2014 a net FDI inflows of $3.09 billion as its highest reading. Third, privatization played an influential role during the 1990s in boosting the net FDI inflows with a lower impact during the 2000s. An important observation is the continuous strong net FDI inflows to Morocco after 2011. This may be justified upon the non-affection of Morocco with the Arab Spring uprisings. The possible reasoning is the quick King Mohamed's VI intervention to settle the protests at an early stage through offering a constitutional amendment moving the country a step closer to constitutional monarchy.



VI.D.10 Conclusion

Reviewing the FDI determinants in conjunction with the above analysis of the recorded FDI inflows can help in realizing possible correlations between the FDI inflows to Morocco and the previously introduced economic variables. To start with the GDP growth, the volatility of the variable's annual data throughout the study period makes the recognition of a paternal correlation between the variable and the FDI inflows to Morocco difficult. The volatile pattern of the annual growth rates in the 1990s was not shared in the patterns of the FDI inflows to Morocco during the same period. For example, the difference in the FDI inflows to Morocco between 1995 and 1996 is $7 million, while in the recorded growth rates, there is a difference of nearly 17 per cent. The same applies at a lower magnitude to the period from 2000 onwards when the annual GDP growth rates began to stabilize. However, identifying the paternal correlation remained difficult. An example is 2007 and 2008, when nearly the same volume of FDI flowed into Morocco, while the annual GDP growth rates increased by around 2 per cent. From these patterns, it is difficult to trace a positive/negative correlation between the annual GDP growth and the FDI inflows to Morocco.

The second determinant of the FDI inflows to Morocco under examination was the GDP per capita. With an average GDP per capita of $1,830 for the period between 1990 and 2000, the FDI inflows to Morocco were featuring stable volumes at an average of $0.461 billion. By the turn of the 2000s, the GDP per capita started its positive rally raising its average to $2,671 (2000-2015), and this coincided with a significant increase in the volumes of the FDI inflows to Morocco reaching an average of $1.89 billion. Accordingly, the two notions seem featuring similar patterns of stability and increases, which assists in identifying a possible positive correlation between them. In other words, the increase in the GDP per capita in Morocco seems coinciding with increases in the volumes of FDI inflows to Morocco.

The identification of a correlation between the inflation rate and the FDI inflows to Morocco remains a possible matter. From a high start of the inflation rate (around 6-7 per cent until 1995) after the SAP policies of cutting subsidies, the inflation rate in Morocco began its downward trend throughout the study period. Giving a look to the pattern of the FDI inflows to Morocco, it is difficult to identify a correlation between the inflation rate and the FDI inflows. Moving to the 2000s, a slight correlation appears in the years 2006-2008, where the inflation rate increased in conjunction with the peaking of the FDI inflows to Morocco. Hence, it is inappropriate to claim the presence of a positive or negative correlation between the inflation rate and the volume of the FDI inflows to Morocco.

The fourth determinant of the FDI inflows to Morocco is the quality and accessibility of infrastructure as represented in the number of fixed line telephones per 100 people. The significant increases in the number of subscribers started only in 2007. This coincides with the period of the peaking of the FDI inflows to Morocco. The low number of subscribers prior to 2007, cannot be correlated with the FDI inflows, which maintained its performance regardless of the patter of the subscribers' number. The peaking of the number of subscribers in 2010 could be correlated with the general increase in the volumes of the FDI inflows from 2006 onwards. Accordingly, the correlation between the number of fixed line telephones per 100 people and the FDI inflows to Morocco was absent until the mid-2000s when a slight positive correlation began to appear.

The human development index represented in the life expectancy of Moroccans, the FDI inflows to an economy should increase with the increases in the health standards of the population allowing higher productivities per person. Morocco secured nearly a ten-year increase in its citizens life expectancies throughout the study period. Reviewing the steady upward trend of the Moroccans life expectancy may reflect the interest of the GOM to improve the health standards of the population. However, the identification of a correlation between the life expectancy in Morocco and the volume of FDI inflows to Morocco remains tricky. The continuous increases in the life expectancy over the years did not coincide with continuous increases in the FDI inflows volumes. Therefore, a claim of a positive correlation between both notions would be in appropriate.

On the trade level, Morocco's merchandise trade as percentage of GDP could be spilt into phases: *(i)* before King Mohamed VI and *(ii)* after him. In the period preceding his throne's accession, the merchandise trade as percentage of GDP preserved a stable performance close to the 39-40 per cent. From 1999 onwards, after the accession of King Mohamed to the Moroccan throne, the rates of merchandise trade as a per centage of GDP climbed up raising the average between 2000-2015 to 56 per cent. On the other hand, the pattern of the volume of the FDI inflows to Morocco is to a wide extent coinciding with that of the merchandise trade as per centage of GDP. The stability of the 1990s followed by the increases of the 2000s allow tracing a strong positive correlation between the merchandise trade as a per centage of GDP and the FDI inflows to Morocco.

The seventh variable under consideration is the investments restrictions pursuant to Morocco's domestic laws. The annual calculations of the indicator started from 2002, when Morocco secured a strong start at 2002 (a reading of 7.5). The readings of Morocco's investment restrictions indicator experienced continuous decreases in the following years (apart from a slight increase in 2005) until its trough point in 2008. This could be related to the non-introduction of a new Investment Law (replacing or amending the in-force IC). In regards to the FDI inflows to Morocco during the same period (2002-2008), the volume of inflows was volatile from 2000 to 2004 before reaching significantly high volumes for the period from 2005 until 2009. From 2011 onwards, the patterns of the investment restrictions variable and the FDI inflows to Morocco became more aligned. The lower the investment restrictions (increases in the variable's readings) coincided with increases in the FDI inflows to Morocco allowing the latter to reach its peak readings between 2012-2015. Hence, it is possible to conclude the lack of correlation between both notions prior to 2011, while in the period afterwards, a strong positive correlation could be identified.

VI.E Comparative Conclusions

VI.E.1 Introduction

With the Chapter IV discussing the changes in legal rules in connection to the countries' investment frameworks, deriving a more complete picture of the net FDI into the three countries requires considering the economic variables determining the levels of net FDI. As mentioned before, the variables were chosen based on the previous literature prepared in relation to the determinants of the net FDI of an economy. In chapter VI, the analysis intends to compare the calculated correlations between the seven variables and the FDI[1229] inflows to each country. The comparative conclusion of chapter VI compares structurally the correlations evident in the three countries in order to identify differences between them. This requires addressing the factors influencing the performance of the seven variables and how this paved their correlations with the net FDI in each of the three countries. The conclusion is split into seven sections in the same order of the chapter VI of each country.

VI.E.2 GDP Growth

The correlation coefficients between the GDP growth and the net FDI of Egypt, Jordan and Morocco had differing magnitudes. In Egypt's case, a strong negative correlation appears between the GDP growth (annual per cent) and the net FDI with a coefficient of -0.523[1230]. The volatility of the GDP growth rates coincided with the pattern of the net FDI simultaneously throughout the study period and specifically in the 2000s. The downward trend of the annual GDP growth rates from 1999-2003 due to the *(i)* effects of the September 11 and Iraq War[1231] on tourism and *(ii)* GOE's ambiguity regarding the exchange rate regime. The recovery of the annual growth rates from 2004-2008 onwards was driven by *(i)* growth in non-hydrocarbon sectors (*e.g.*, manufacturing, agriculture and construction)[1232] and *(ii)* rise in private consumption[1233]. The upward trend of the annual GDP growth rates was hit by the *(i)* global financial crisis[1234] and *(ii)* Arab Spring instabilities starting in January 2011 until 2015. The performance of the net FDI nearly coincided with that

1229 The Foreign Direct Investment net (BoP current US$) is the variable catching the flows of FDI into or outside of an economy. The variable is calculated through subtracting the FDI inflows from the FDI outflows. Hence, the more negative the variable, the more the FDI inflows to an economy.
1230 The correlation coefficient between GDP growth (annual %) and net inflows in Egypt is +0.529.
1231 International Monetary Fund 7/12/2004.
1232 International Monetary Fund 2007b, 4.
1233 International Monetary Fund 2009a, 4.
1234 International Monetary Fund 2010b, 8.

of the annual GDP growth rates. It peaked from 2005-2010[1235] to record an average of $7.5 billion compared to an average of only $0.71 billion from 1990-2004.

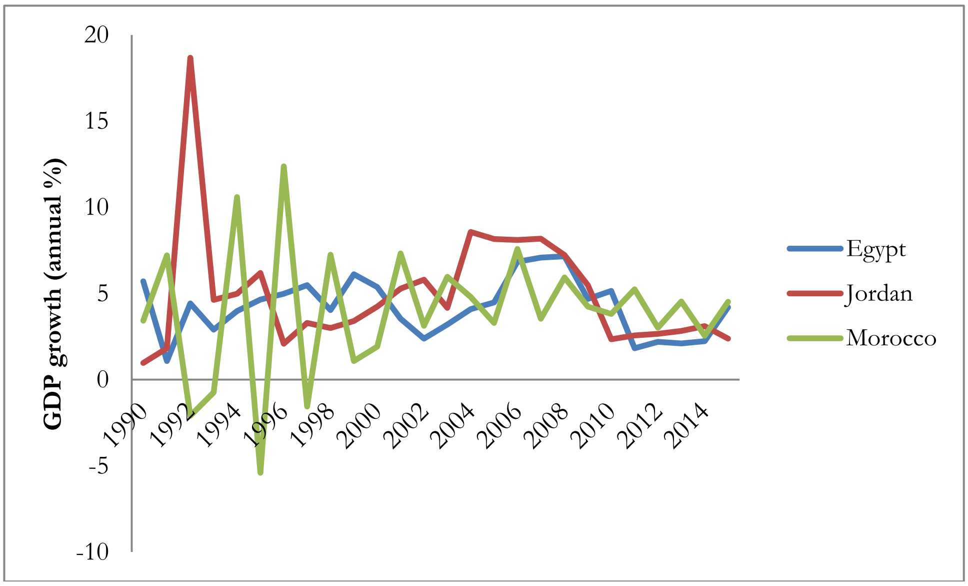
In Jordan's case, a very weak negative correlation at -0.123[1236] (weaker when compared to Egypt and Morocco's correlation coefficients) appears in the increase of the GDP growth rates and the net FDI simultaneously during the 2005-2008 period. Preserving a positive rate of GDP growth throughout the study period could be an advantage, however, the political instabilities in the region including the *(i)* Palestinian-Israeli conflict, *(ii)* Iraq War of 2003 and *(iii)* the rise of ISIS, have had downward pressures on the annual GDP growth rates precluding Jordan from reaching its full growth capacity. For example, the significant doubling of the GDP growth rates in 2004 was a direct outcome of the end of the Iraq War allowing a recovery *(i)* in foreign demand on Jordanian products (from Iraq) and *(ii)* Jordan's industrial production rates. For the net FDI of Jordan, the increase in the volume by around 67 per cent with one of its reasons being the boost in the real estate acquisitions in Jordan by Iraqis[1237].

In Morocco's case, another weak negative correlation appears between the GDP growth (annual per cent) and the net FDI with a coefficient of -0.148[1238] (weaker than in Egypt and slightly stronger than in Jordan). The patterns of both variables and specifically the volatility of the annual GDP growth rates made it difficult to identify a stronger correlation between the annual GDP growth and the net FDI of Morocco. The difficulty may be justified upon the volatility of the annual GDP growth rates specifically in the 1990s and early 2000s. This volatility was due to the economy's wide dependence on the agricultural production (especially cereals) as an important pillar of growth[1239]. With the droughts and the changes in the weather conditions, the cereals output differed resulting in significant decreases in the annual GDP growth rates. This triggered the GOM's implementation of an economic diversification process to lower dependency on agricultural as the driver of economic growth. Sectors like construction and services began to boost their share in the GDP's composition, however, the agriculture's share remained significant regardless

[1235] The volume of the FDI inflows to Egypt was negatively affected by the global financial crisis of 2008, before the severe reduction associated with the Arab Spring uprising of 2011.
[1236] The correlation coefficient between GDP Growth (annual %) and net inflows in Jordan is +0.123.
[1237] International Monetary Fund 2005b, 6-9
[1238] The correlation coefficient between GDP Growth (annual %) and net inflows in Morocco is +0.124.
[1239] International Monetary Fund 2005d, 5.

of the diversification[1240]. For the net FDI of Morocco, the diversification intentions encouraged the net FDI from 2005 to 2015 to record average annual inflows of $2.13 billion (compared to an average of only $0.76 billion from 1990-2005).

With the differences in the compositions of the GDP of the three countries, the correlations with the net FDI differ. For example, the political stability and the economic diversification in Morocco could be the reasons behind the stability featured in the recorded GDP growth rates and the inflows of FDI into Morocco specifically in the late 2000s. Conversely, in Egypt and Jordan, instabilities due to the *(i)* Arab Spring protests and *(ii)* rise of ISIS have negatively hit the GDP growth rates and the net FDI into the two economies from 2011 onwards. Still, the GOE efforts to liberalize the economy since 2004 incentivized an increase in the inflows of capital to the economy facilitating the recovery in annual growth rates[1241]. In Jordan, the GDP growth rates and the net FDI benefited for example from the *(i)* Iraqis migration to Jordan when fleeing the effects of the War of 2003 and *(ii)* the improvements in the investment climate.



VI.E.3 GDP per capita (constant 2010 US$)

The GDP per capita developments in Egypt, Jordan and Morocco have a very strong negative correlation with the net FDI with coefficients of -0.585, -0.857 and -0.795 respectively. Having strong negative correlations between the two variables entails a positive correlation between GDP per capita and net inflows to the three

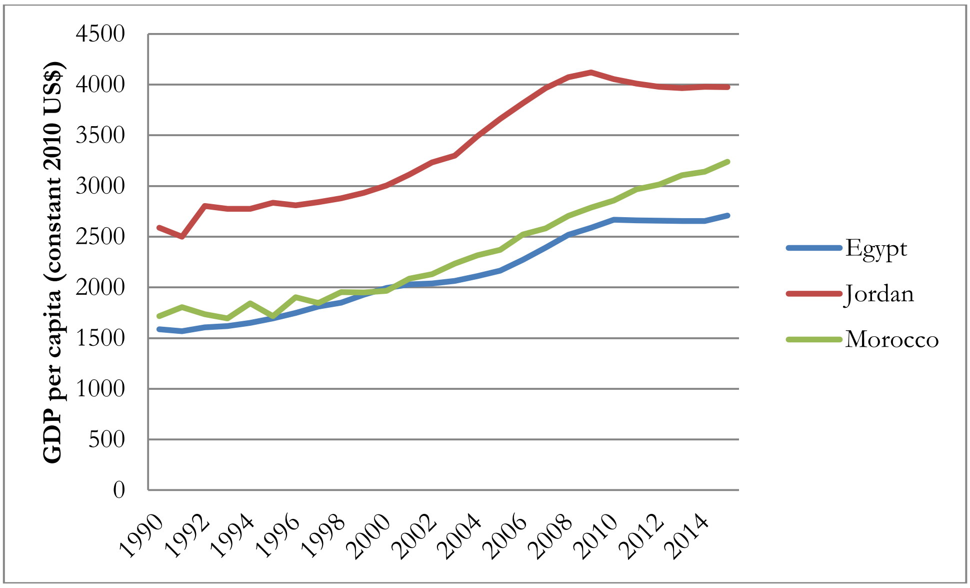
[1240] International Monetary Fund 2008, 4.
[1241] International Monetary Fund 2007b, 12.

countries. Regardless of the continuous upward trend of the GDP per capita curves in the three countries, the magnitude of the correlation coefficients differed between the three countries.

From 1990 to 2015, Egypt GDP per capita[1242] increased by $1,119. Also, during the same study period, the average GDP per capita was $2,124. In Egypt, the recorded GDP per capita was the *(i)* lowest increase and *(ii)* lowest average throughout the study period in comparison to Jordan and Morocco. It is important to note differences in the populations' sizes between the three countries. Therefore, in the Egyptian case, the annual GDP growth rates could be insufficient to significantly improve the readings of the GDP per capita due to the obvious annual increases in the population growth. This could be an advantage to Egypt's market size when compared to Jordan and Morocco. However, the steep increase in GDP per capita 2005-2008 was justified upon the rise in the *(i)* employment rates and *(ii)* possibilities of wealth creation[1243].

Jordan secured the highest average of GDP per capita[1244] between the three countries by reaching a $3,364. The economy is experiencing a continuous expansion in its size (doubled GDP per capita from 1999 to 2008[1245]). This signals a positive observation for a market seeking investors interested to invest in the Jordanian economy. In Morocco, steady growth in the GDP per capita[1246] from 2000[1247] allowed the economy to record the highest increase throughout the study period. Finally, in Jordan and Morocco, a question for a foreign investor thinking of routing his investments into these two economies will be related to the small sized populations. Moreover, it is important to note the stagnation of the GDP per capita in Egypt and Jordan from 2011 onwards did not affect the magnitude of their correlation coefficients, which remained very strong with net FDI specially in the case of Jordan.

1242 The correlation coefficient between GDP per capita (constant 2010 US$) and net inflows in Egypt is +0.615.
1243 International Monetary Fund 2009a, 4.
1244 The correlation coefficient between GDP per capita (constant 2010 US$) and net inflows in Jordan is +0.868.
1245 International Monetary Fund 2009b, 4.
1246 The correlation coefficient between GDP per capita (constant 2010 US$) and net inflows in Morocco is +0.9.
1247 International Monetary Fund 2006, 5.



VI.E.4 Inflation

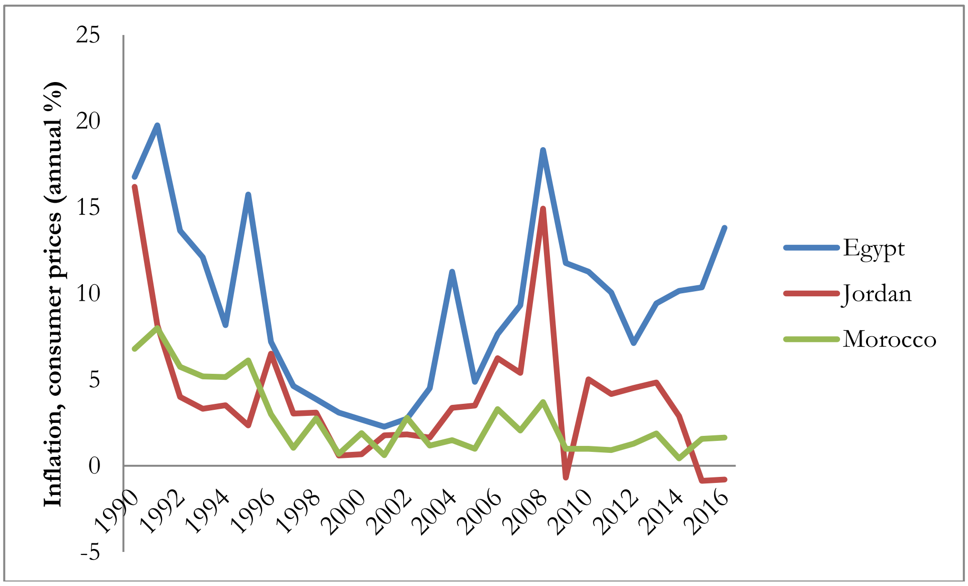
The inflation as a proxy for macroeconomic stability in Egypt, Jordan and Morocco. In general terms, Egypt maintained the highest average inflation at around 9.35 per cent throughout the study period reflecting a lower level of macroeconomic stability, when compared to Jordan and Morocco. In this sense, Egypt may be considered as the least macro-economically stable economy. Egypt's recorded peaks of 19.8 per cent in 1991 and 18.3 per cent in 2008 are the highest between the three countries with Morocco only at 8 per cent and Jordan at 16.2 per cent. The average inflation rate for Egypt is double the one recorded in Jordan and more than triple the Moroccan rate. The reasons for such inflationary pressures mainly include *(i)* depreciations in exchange rate[1248] (*e.g.*, January 2003) and *(ii)* hikes in oil prices[1249] and cuts in fuel subsidies (*e.g.*, 2008). In the meantime, pursuant on the patterns of inflation and the net FDI, claiming the presence of a negative correlation between the inflation rate and the net FDI of Egypt is inappropriate, since the calculated correlation between both variables resulted in a weak negative coefficient at -0.122[1250].

For Morocco, the annual average inflation revolved around only 2.67 per cent. This has put Morocco in the first position between the three countries. Hence, Morocco had the highest level of macroeconomic stability. With such low inflation rates, the macroeconomic stability seems the least risk to negatively influence an investor's decision to inflow his funds to the Morocco. In addition, the calculated correlation

1248 International Monetary Fund 1/30/2003
1249 International Monetary Fund 2009a, 4.
1250 The correlation coefficient between inflation and net inflows in Egypt is +0.164.

provided a strong negative coefficient at +0.590[1251] between the inflation rate and the net FDI. The data highlighted that increases in inflation rate coincided with decreases in the net FDI of Morocco. It is important to highlight the benefits of Jordan[1252] and Morocco[1253] from anchoring their local currencies with the US Dollar in lowering their inflation rates.

Jordan ranked second between the three countries maintained a low average annual inflation at around 4 per cent (reached 15 per cent in 2008[1254] driven by increases in commodity prices) throughout the study period as a decent level of macroeconomic stability. Aligned with Egypt, the calculated correlation between inflation rate and the net FDI of Jordan provided a very weak negative coefficient at -0.137[1255] (a stronger correlation in case of Jordan when compared to Egypt). In this regard, Egypt and Jordan a possible interpretation for the weak negative correlations between both variables could be interest of investors to benefit from higher demands in the two economies, which in the same time created a sort of inflationary pressures.



VI.E.5 Fixed Telephone Subscriptions (per 100 people)

With the number of subscribers in the fixed telephones used as a proxy for the infrastructure quality, Egypt and Morocco had a very strong negative correlation with

1251 The correlation coefficient between Inflation and net inflows in Morocco is -0.412.
1252 International Monetary Fund 2007a, 5.
1253 International Monetary Fund 2005d, 4.
1254 International Monetary Fund 2009b, 5.
1255 The correlation coefficient between Inflation and net inflows in Jordan is +0.125.

the net FDI with coefficients of -0.626 and -0.516 respectively. Having strong negative correlations between the two variables entails a positive correlation between GDP per capita and net inflows to the two countries. In the case of Jordan, the calculations provided almost the lack of any correlation (with a coefficient of only 0.08) between the number of fixed telephone subscribers and the net FDI of Jordan. In the three countries the boom in the number of subscribers was simultaneous with the rise in the net FDI. In Egypt's[1256] the strong continuous negative correlation may trigger conclusions concerning the possible inflows of the net FDI into Egypt's infrastructure sector. This appeared in directing a lump sum of the portfolio funds from the international financial institutions (*e.g.*, World Bank and IFC) to infrastructure projects[1257].

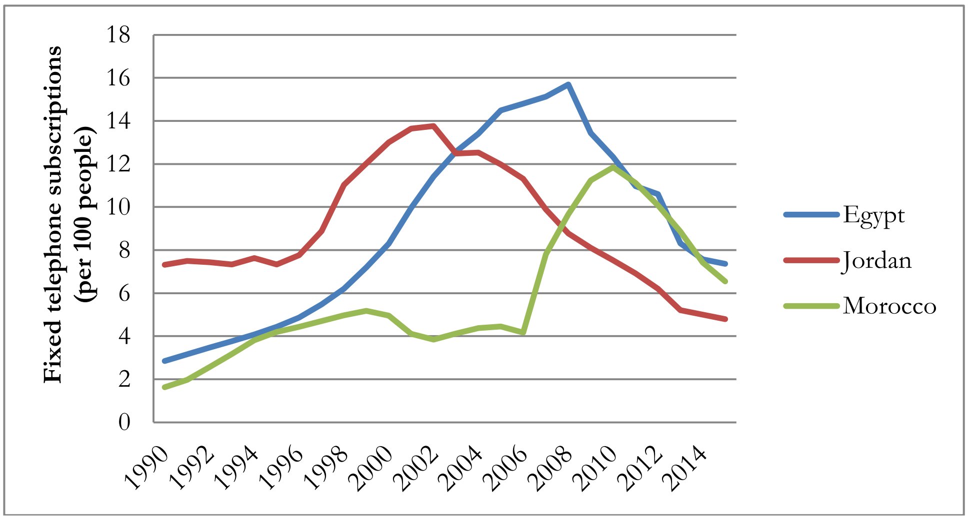
In the case of Jordan[1258], the rate of 7.31 of 100 people was seven times the number and nearly two times the number of fixed telephone subscriptions in Morocco and Egypt respectively. The development in the infrastructure quality could be a potential reason for the latter inflows of FDI in 2005 and 2006, where the economy reaped the benefits of its infrastructural improvements. An example of the GOJ attempts to enhance infrastructure appears in reforming the Aqaba port in 2003 eliminating any shipping congestions[1259]. However, the lack of almost any correlation between the number of subscribers in fixed telephones and the net FDI may deviate from the general theory regarding the positive relationship between the two variables.

In case of Morocco[1260], the strong negative correlation between the number of subscribers in the fixed telephones and the net FDI seemed graphically less evident. Only in the late 2000s, a boom was featured in the number of subscribers per 100 people, while the rise in the net FDI was experienced during the 2005–2008 timeframe. The lack of the paternal link appears in the lower net FDI at the late 2000s, while the number of fixed telephone subscriptions continued increasing. However, the calculated correlation provided a strong negative coefficient between the two variables. In this regard, a possible conclusion for the delay in the improvement of the fixed telephone subscriptions readings could be an increase in

1256 The correlation coefficient between Fixed Telephone Subscriptions (per 100 people) and net inflows in Egypt is +0.65.
1257 International Monetary Fund 2005c, 37.
1258 The correlation coefficient between Fixed Telephone Subscriptions (per 100 people) and net inflows in Jordan is -0.08.
1259 Cebotari, D. and Dennis, A. 2008, 1.
1260 The correlation coefficient between Fixed Telephone Subscriptions (per 100 people) and net inflows in Morocco is +0.632.

public spending to such infrastructural development. Morocco's consultations with the IMF confirm such understanding as in 2006 the GOM's highlighted its willingness to increase spending on infrastructure, while this was evident in the proxy data only three years later starting from 2009[1261].

The cases of Egypt, Jordan and Morocco reflect at different levels, the attention paid by the policy-makers in establishing the infrastructure as needed by foreign investors interested in seeking business opportunities in these economies. Studying the causal link or the relationship between the two variables could assist in understanding the possible roles played if any by direction or directing the inflowing FDI to contractual and constructional public works in the countries' infrastructure sectors.



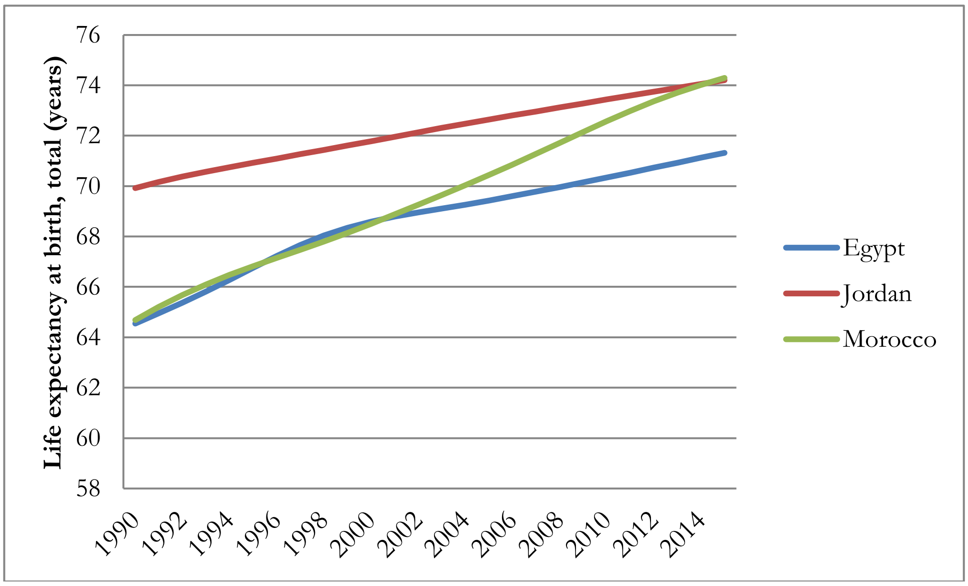
VI.E.6 Life expectancy at birth, total (years)

Life expectancy as a proxy for the human development index has a very strong negative with the net FDI of Egypt[1262] (correlation coefficient of -0.538), Jordan[1263] (correlation coefficient of -0.745) and Morocco[1264] (correlation coefficient of -0.801). Having strong negative correlations between the two variables entails a positive correlation between GDP per capita and net inflows to the three countries. Although the readings of life expectancy continuously improve throughout the

1261 International Monetary Fund 2006, 14.
1262 The correlation coefficient between Life expectancy at birth, total (years) and net inflows in Egypt is +0.554.
1263 The correlation coefficient between Life expectancy at birth, total (years) and net inflows in Jordan is +0.758.
1264 The correlation coefficient between Life expectancy at birth, total (years) and net inflows in Egypt is +0.861.

study period, regardless of the performance of the net FDI, the calculations provided a very strong negative correlation. In Morocco's case, the life expectancy rates significantly improved throughout the study period. This was supported for example by the National Initiative for Human Development introduced by King Mohamed VI in 2005[1265]. The Moroccan average life expectancy for the study period is 69.6 years old allowing Morocco to rank second between the three countries after Jordan. Furthermore, the improvement by one-year in the life expectancy of a Moroccan was attainable in shorter periods when compared to Jordan.

In Jordan, the increase in life expectancy by one-year was attainable every six years. Although the improvement in life expectancy throughout the study period was limited (possibly due to the good starting point in 1990), the World Bank funded the GOJ plans to boost education and health[1266]. In the case of Egypt, and regardless of the sluggish increases in the 2000s, Egypt secured the second ranking after Morocco in the number of years added since 1990 until 2015 with a total of 6.8 years. The life expectancy increase in the number of years could have been higher, however, the GOE's policies favoured the reduction of social expenditures on health[1267]. The International Finance Corporation (IFC) stepped-up its portfolio flows to the healthcare sector[1268].



1265 International Monetary Fund 2005d, 59 and International Monetary Fund 2008, 47.
1266 International Monetary Fund 2005b, 52.
1267 International Monetary Fund 2007b, 14.
1268 International Monetary Fund 2010b, 45.

VI.E.7 Merchandise Trade (as per cent of GDP)

From the merchandise trade, it is possible to deduce the strong negative correlation between the merchandise trade as per centage of GDP and the net FDI of Egypt, Jordan and Morocco. However, the magnitude of the negative correlation coefficients between both variables differed between the three economies. Morocco came on top of the list with a correlation coefficient of -0.774[1269], before Jordan with -0.696[1270] and finally Egypt with a coefficient -0.661[1271]. The negative correlations evident in the three countries could be a proof of the close contact between trade liberalization and the movement of capital and inflows of FDI to the three economies.

By checking the average merchandise trade as a per centage of GDP, Egypt recorded the lowest average when compared to the two other countries. The highest readings of merchandise trade per centages in Egypt and Jordan were from 2005 to 2008, came in conjunction with the highest inflows of FDI during the second half of the 2000s, while for Morocco the highest readings were from 2011 to 2015 and were in conjunction with the highest inflows of FDI during the same period. The strong negative correlation is evident with the increases in the merchandise trade as a per centage of GDP from 2003-2008.

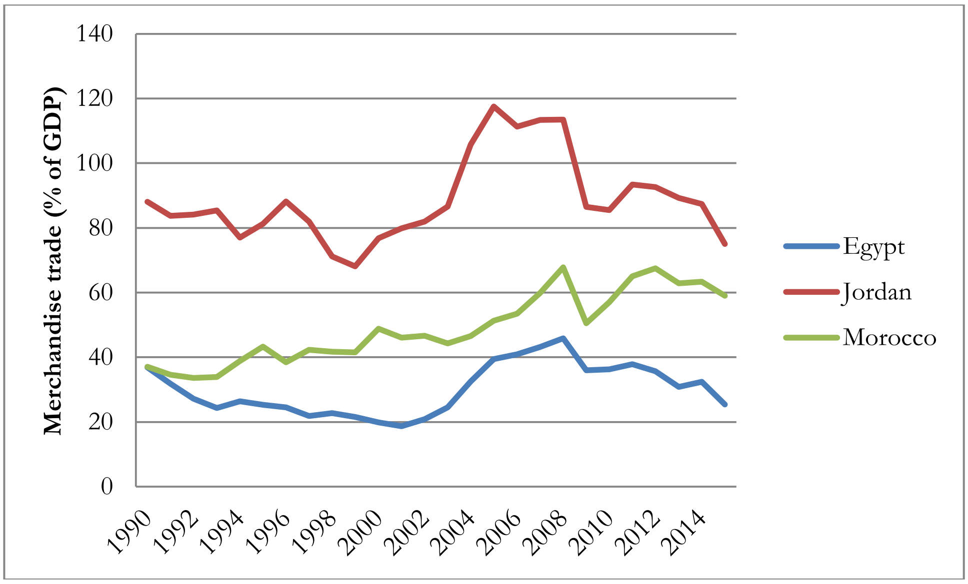
The Jordanian economy experienced the highest rates of merchandise trade as per centage of GDP. Jordan's average merchandise trade during the study period was 88.7 per cent compared to Egypt's and Morocco's averages of 30.1 per cent and 49.1 per cent respectively. Furthermore, the peak reading for the merchandise trade in Jordan was 118 per cent, while in Egypt and Morocco was only 45.8 per cent and 67.8 per cent. These evidences reflect the higher level of integration of Jordan in the global economy. In this regard, Jordan higher rates of trade and integration may have facilitated the negative correlation with the net FDI of Jordan. The continued high rates of participation in global trade were supported by the structural changes implemented by King Abdullah since acceding throne in 1999. These reforms from 2000-2004 included for example Jordan's *(i)* membership of the World Trade Organization in 2000[1272] and *(ii)* conclusion of FTA with the US[1273], Singapore and an Association Agreement with the EU[1274].

[1269] The correlation coefficient between Merchandise Trade (as % of GDP) and net inflows in Morocco is +0.834.
[1270] The correlation coefficient between Merchandise Trade (as % of GDP) and net inflows in Jordan is +0.699.
[1271] The correlation coefficient between Merchandise Trade (as % of GDP) and net inflows in Egypt is +0.696.
[1272] International Monetary Fund 2005b, 29.

Morocco recorded the widest change when comparing the starting and the ending readings of the chosen indicator. While Jordan and Egypt recording readings in 2015 below their readings in 1990, Morocco recorded a 26 per cent increase in its trade levels. This highlights the policymakers focus on enhancing the economy's openness and integration in the global economic activity. This inclination and stress of openness may have signaled the country's interest in globalization strengthening the negative correlation with the net FDI of Morocco. The increases in global trade involvement began by the accession of King Mohamed VI the throne in Morocco. The process of liberalizing trade for example included the *(i)* conclusion of FTAs with the EU, US, Turkey and the Agadir Agreement[1275] and *(ii)* reduction of tariff rates from 33 per cent in 2002 to 20 per cent in 2008[1276].

Egypt similar to Jordan finished the study period recording a reading below the starting reading. By checking the average merchandise trade as a per centage of GDP, Egypt recorded the lowest average when compared to the two other countries. This confirms the lower trade openness in Egypt's economy when compared to Jordan and Morocco. The Egyptian policymakers for long favoured through the 1960s the import-substitution policies. The traces of such policies could be evident in the lower trade levels of the 1990s. On the other hand, the *(i)* reduction of weighted average tariffs from 9 per cent to 6.9 per cent in January 2007[1277], *(ii)* cutting of the number of ad valorem customs from 27 to 6, *(iii)* abolishment of discretionary customs were all reasons to boost Egypt's merchandise trade as a per centage of the GDP[1278] *(iv)* easing the customs clearance process from 20 days in 2003 to 1 day in 2007[1279]. Furthermore, although the trade levels of Egypt are lower, it could host more FDI based on its bigger population offering investors a stronger demand. The benefits derived from such demand could exceed the cost of operating in less globally-integrated economy.

1273 International Monetary Fund 2007a, 5.
1274 International Monetary Fund 2005b, 30.
1275 International Monetary Fund 2006, 14.
1276 International Monetary Fund 2010a, 16.
1277 International Monetary Fund 2007b, 10.
1278 International Monetary Fund 2005c, 51.
1279 Rachid 2007.



VI.E.8 Foreign ownership/investment restriction

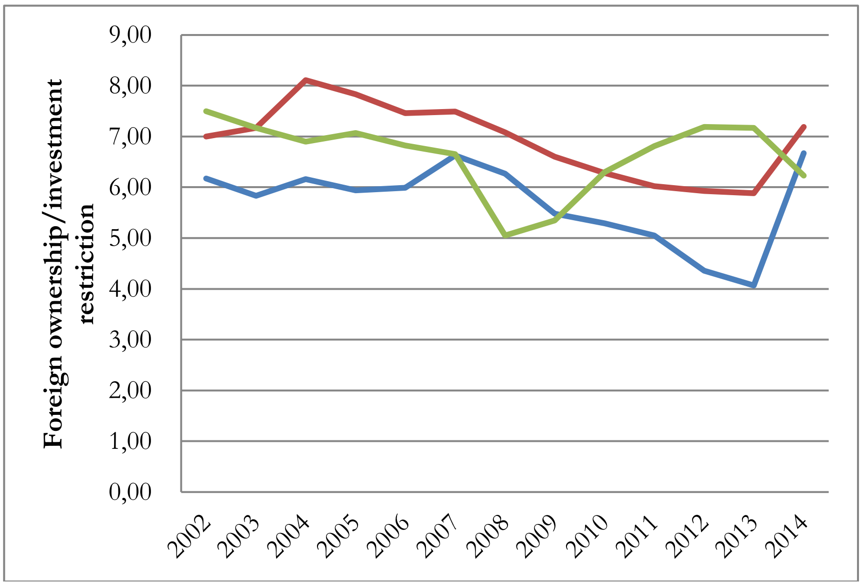
Seventh, from the economic freedom variable as represented in the foreign ownership/investment restrictions, the possible conclusion is the strong negative correlation between Egypt's investment restrictions indicator and the net FDI with a coefficient of -0.338[1280]. The negative correlation between the two variables entails that an increase in the reading of the foreign ownership/ investment restrictions variables (*i.e.*, lower foreign ownership/investment restrictions) coincides with an increase in the net FDI of Egypt. This conclusion comes in line with the general theory concerning the higher interest of foreign investors to route their investments to an economy where the legal rules impose less restrictions on their investments in general and/or their ownership of business in specific.

Egypt introduced changes to its IGIL, the deregulation of other legislations governing investment were necessary to secure the foreign investments flows into Egypt. With the lowest average between the countries, Egypt had an average of 6.35 in connection to the investment restrictions on foreign ownership. The overhauling of the domestic legal rules in 2004 was not reflected significantly on the readings of the investments restrictions since it remained around 6. Moreover, the initial readings recorded prior to and simultaneous with the introduction of the IGIL were never reached again based on several possible justifications including the lack of *(i)* political stability (*e.g.*, Arab Spring) and *(ii)* political will (reform fatigue[1281]) to approach

[1280] The correlation coefficient between foreign ownership/investment restrictions and net inflows in Egypt is +0.329.
[1281] International Monetary Fund 2007b, 12.

publicly sensitive topics as those of abolishing restrictions on foreign investments. Based on the averages, the Egypt foreign ownership/investment restrictions readings put it in the third position when addressing this variable in comparison to Jordan and Morocco. Nevertheless, Egypt remains the only economy with a significant correlation between the variable of the foreign ownership/investment restrictions and the net FDI since in the other two economies the correlation was nearly negligible.

Egypt's scenario of openness dates to July 2004 upon the appointment of businessmen based government. One of the first steps of the new GOE of developing the legal rules was facilitating the doing of business in Egypt. In this regard, Egypt topped the reformers in the World Bank Doing Business of 2008 by, for example, cutting the capital requirements for companies' incorporation as well as the number of days to finalize such process[1282]. Another measure was the introduction of a new Income Tax Law in 2005 lowering the corporate income tax rate from 40 per cent and 32 per cent to a flat rate of only 20 per cent[1283]. Moreover, the direct re-launching of the privatization program allowing the privatization of 17 companies within the first 9 months[1284]. The program continued even at a stronger pace for the following two years. Finally, the GOE since the early 2000s adopted a business-oriented legislative agenda entailing the introduction of the *(i)* Intellectual Property Rights Law, *(ii)* Special Natured Economic Zones Law, *(iii)* Telecommunication Law, *(iv)* Banking Law, *(v)* Competition Law and etc.



1282 World Bank Group 2008
1283 Ramalho 2007.
1284 International Monetary Fund 2005c, 14.

In the case of Jordan, a lag may appear between the legal changes and the increases in the volume of net FDI. Based on the calculation of the correlation between the investment restrictions indicator and the net FDI of Jordan, the coefficient a very weak negative one (nearly negligible) at -0.087[1285]. From the readings of the investment restrictions indicator, it may be concluded the obvious role of the Jordanian Investment Laws in eliminating or lessening the restrictions applicable upon foreign investments. The introduction of the three Investment Laws were directly followed by higher readings in the foreign investment restriction indicator, which may imply an increase in the expected net FDI. An additional important observation is Jordan's higher recorded average based on the 16 available readings at 7.27, when compared to Egypt and Morocco. As per this indicator, it may be concluded that Jordan's legal rules have less foreign investment restrictions when compared to Egypt and Morocco. This justifies the continuous intervention by the GOJ to stimulate net FDI through legislations. Finally, it is important to note that using the net FDI indicator in monetary terms when compared to the per centage of the GDP could reflect another view. As per centage of the GDP, Jordan could have received the highest net FDI compared to Egypt and Morocco, however, this was not the case from the monetary side.

Having the investment restrictions indicator resembling the investment climate, it encompasses the effects of developments of the investment-related legal rules. In addition to the above addressed amendments in Jordan's Investment Laws, there were examples of other plans adopted by the GOJ to develop the legal rules, the indicator's reading and possibly the net FDI of Jordan. On top of these came the privatization plan, which allowed the GOJ to dispose its shares in Jordan Telecom, the Cement factories, Royal Airlines. Such plan resulted in *(i)* improving the efficiency of these service providers, *(ii)* creating jobs and *(iii)* increase the FX reserves of Jordan with inflows of nearly $1 billion from 1996-2004[1286]. Other investment-oriented measures included the establishment of the Aqaba Special Economic Zone in 2001[1287] as a hub for environment-oriented investments. This required modernizing the Aqaba Port in 2003 from on both levels infrastructure and administration[1288].

In case of Morocco, the calculation of the correlation between the investment restrictions indicator and the net FDI, the coefficient was a very weak negative one

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1285 The correlation coefficient between foreign ownership/investment restrictions and net inflows in Jordan is +0.095.
1286 International Monetary Fund 2005b, 30.
1287 Aqaba Special Economic Zone Authority
1288 This was briefly referenced under footnote 19.

(nearly negligible) at +0.059[1289]. It may be true to conclude the lack of correlation between both notions prior to 2011, while in the period afterwards, a strong negative correlation could be identified. The Moroccan readings when compared to the two other countries show an average of 6.63 from only 13 readings. When especially compared to Jordan, the IC did not experience any legislative changes, while in Jordan three investment legislations were introduced throughout only the study period. The difficulty in identifying the correlation between the legal rules and the net FDI prior to 2011 may be connected to the absence of any subsequent amendments to the main legislation governing investments being the IC introduced in 1995. Based on the averages, the Morocco foreign ownership/investment restrictions put it in the second position when assessing the legal framework with the least/most investment restrictions against foreign investments.

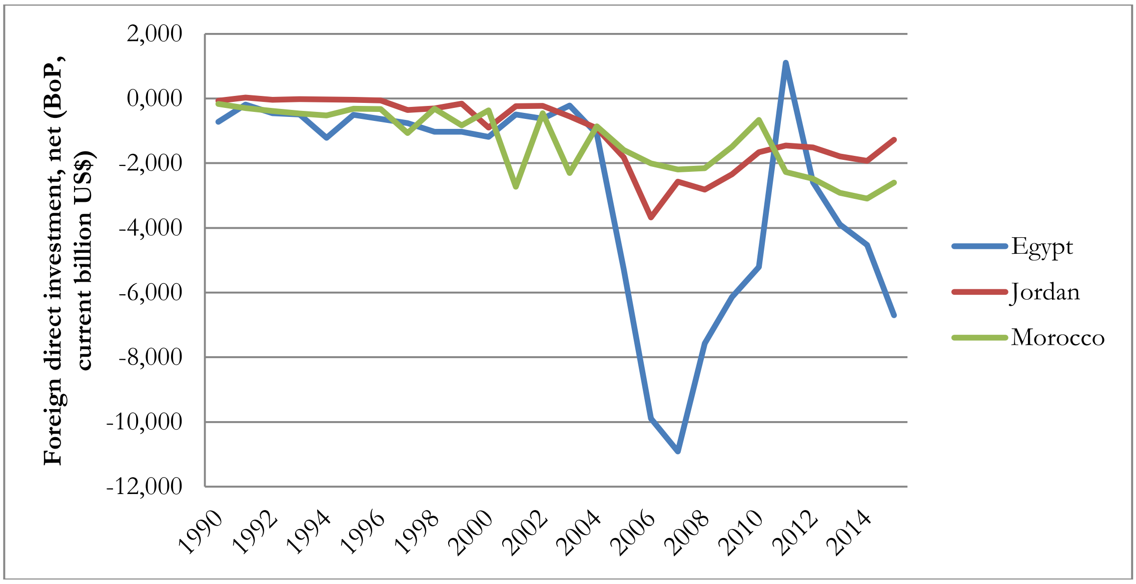
The investment climate changes in the legal rules in Morocco were more linked to the financial sector, through efforts to align it with the international practices. In addition, the GOM introduced a reduction to the corporate income tax rate in 2008 from 35 per cent to 30 per cent[1290]. In the same manner, the simplification of the VAT system in 2009 entailed reducing the general rate in order to encourage formalizing the informal sector, thus, widening the tax base[1291]. The inauguration of "*Green Morocco Plan*"[1292] in 2008 to modernize the Moroccan agricultural system through mechanization and the use of the latest technologies in order to magnify its contribution to the GDP. It aims to overcome the problems of *(i)* low water resources and droughts, *(ii)* land fragmentation between small farmers and *(iii)* weak national policy in determining the cultivated crops in order to attain the optimum benefit from agriculture.

1289 The correlation coefficient between foreign ownership/investment restrictions and net inflows in Morocco is -0.192.

1290 International Monetary Fund 2008, 47.

1291 International Monetary Fund 2010a, 15.

1292 Ministry of Agriculture and Maritime Fishing of Morocco


Foreign direct investment, net (BoP, current billion US$)
2,000
0,000
-2,000
-4,000
-6,000
-8,000
-10,000
-12,000
1990
1992
1994
1996
1998
2000
2002
2004
2006
2008
2010
2012
2014
Egypt
Jordan
Morocco

VII. Conclusion

The centre-focus of the thesis was the role of an economy's domestic legal rules in attracting FDI inflows to that economy. The legal rules governing investment were represented in bilateral (*e.g.*, BITs) and unilateral tools (*e.g.*, domestic laws). States' interested in attracting FDI attempt to use both tools in pursuing their objective. On the bilateral side, the investment partners (*i.e.*, Contracting States) conclude BITs to govern the treatment accorded to the investors of both parties in each Contracting State. These BITs encompass a set of protections and guarantees for foreign investors regarding their investments in the host states. On the other hand, the policy makers of a state may launch a program to unilaterally reform their domestic legal rules, making them more investment friendly. The thesis emphasises the unilateral efforts of the three countries covering the main legal changes on paper and in practise, besides their potential correlations with the FDI inflows.

It is important to highlight the role of BITs being the umbrella encompassing the protections and guarantees, which could have been later adopted into the domestic laws of the countries through the unilateral efforts. The substantive protections of BITs together with a brief historical overview of the creation of the international investment law were introduced in the theoretical framework to familiarize the reader with the main protections under discussion within the following chapters of the thesis. This was followed with chapter III where the economic history for each of the three countries was introduced in order to identify the *(i)* similar features between the countries economic heritage (*e.g.*, role of government in economic activity) and *(ii)* economic base from which the legal changes (*e.g.*, introduce the investment laws) of the 1990s started at the beginning of the market openness phase.

Chapter IV focused on the domestic legal framework of each of the three countries. The chapter used two methodologies; *(i)* legal historical desktop and *(ii)* functional comparative analysis. Each of the legal framework chapters provided an overview of a country's domestic legal system in relation to investment. This entailed *(i)* an analysis of references to investments in constitutions, and *(ii)* a review of the specially introduced investment laws and their main features and incentives. The chapter proceeded with the interaction between the international investment law principles (*i.e.*, substantive protections) and the domestic investment laws of the countries. It dealt with the potential alignment and mirroring of the previously introduced protections in the domestic legal rules of the countries. Moreover, the chapter addressed the policies implemented in order to consolidate transforming the domestic market into a free market where the private sector leads the economic activity. Chapter V intended through - the case-law analysis methodology - to narrow the gap between the protections on-paper under the domestic investment laws and the practice of policy makers in each of the three countries. The chapter investigated in depth a set of cases filed by foreign investors in the ICSID arbitration against any of the three countries.

Chapter VI focused on the potential correlations between the changes in the domestic legal rules and the performance of FDI inflows into each of the three countries. Using the descriptive analytics methodology, the chapter identified seven variables based on the preceding literature regarding the determinants of the FDI inflows into an economy. The variables included; *(i)* GDP Growth, *(ii)* Inflation, *(iii)* Fixed Telephone Subscriptions (per 100 people), *(iv)* Merchandise Trade (as per cent of GDP), *(v)* GDP per capita (constant 2010 US$), *(vi)* Life expectancy at birth, total (years), and *(vii)* Foreign ownership/investment restriction. The economic analysis calculated the correlations between net FDI and the seven variables. It provided the possible explanations for such patterns and correlations. Moreover, the analysis focused on identifying correlations and not causations between the patterns of the seven variables and the net FDI of each of the economies of the three countries.

VII.A Research question

As the thesis question is; *how are the legal rules applied in an economy correlated with the FDI inflows into it?* The research question was addressed in chapters IV, V and VI, however, each from a different perspective. Based on an understanding promoting the importance of a host state to accord foreign investors a standardised treatment in order to increase investors' certainty and in turn their investment flows, chapter IV answered the research question in from the theoretical on-paper perspective.

Chapter IV's answer was provided over two parts. First, it investigated the degree of alignment of the domestic investment laws with the substantive protections prescribed under the international investment law. From this side, the three countries witnessed continuous developments in their domestic legal systems on the way to align it with the international investment law. However, at varying rates these developments were not sufficient to deem the domestic legal systems of the three countries fully aligned with the international investment law, since conflicts between the former and the latter in different contexts may be still traceable. Accordingly, putting together the importance of the investors' standardised treatment and the partial alignment of the domestic legal systems of the three countries with the international investment law, the prices of the factors of production (*e.g.*, foreign investors access to lands) decreased making the countries more attractive as investment destinations. Taking into account the above, the changes in the domestic legal rules in this sense possibly would have a positive correlated to the FDI inflows.

Second, it examined the transformation in the orientation of the policymakers in the three countries towards deregulating the domestic markets in order to offer a wider space for the private sector to participate in leading the economy's business activities instead of the government. The transformation towards the private sector included for example easing the process of business incorporation, streamlining bureaucracy, introducing tax incentives and etc. These measures were all within the scope of cutting transaction costs for foreign investors interested in carrying-out business activities in any of the three countries. Apart from reducing the legal barriers to entry into the domestic markets, the deregulation allowed the foreign investors to inflow their investments in new sectors previously monopolized or highly-regulated by the State. Another important policy executed to serve the above-mentioned transformation was the launch of the privatization programs. The three countries opened doors for privatizing SOEs, as a clear evidence for the intention to reduce the government's intervention in the economic activity in favour of the private sector. These legal evidences could possibly stimulate the inflows of investments into the three countries.

On the economic side, the thesis attempted to trace the correlations between the changes in the legal rules and the performance of the net FDI into the three countries. The correlation question was addressed after the inclusion of seven other determinants of the FDI in order to catch their impacts on the FDI performance. The economic freedom variables was introduced to the chapter VI as a proxy variable to catch the impact of the changes in the legal rules by making them more investor friendly and market oriented. More specifically, only the foreign ownership/investment restriction was used as a reference for the economic freedom variable.

The initial hypothesis provided for a possible increase in the FDI inflows to an economy as it proceeds further with its deregulation and opening the market for foreign investors. The actual data of the economic freedom sub-component and the FDI inflows have confirmed such correlation between the rise in legal rules deregulation and the increase in the FDI inflows into the three countries. In Egypt, it was possible to identify a moderate negative correlation between the foreign ownership/investment restriction indicator and the net FDI to the country. This entails that the decrease in the net FDI (*i.e.*, higher FDI inflows to Egypt) is correlated with higher readings of the indicator of foreign ownership/investment restriction (*i.e.*, lower restrictions on foreign ownership/investment). In cases of Jordan and Morocco, the correlation between the foreign ownership/investment restriction indicator and the net FDI to each of the two countries was negligible. and it is possible to conclude the lack of a correlation between both notions prior to 2011, while in the period afterwards, a strong positive correlation could be identified.

VII.B Academic relevance

The thesis consolidates the conclusions derived in the preceding literature of the LLSV, Trebilcock, Laffont and Stiglitz. To begin with LLSV, the thesis consolidates two conclusions of those reached by LLSV. First, LLSV studied the role of the historical origins and culture in influencing the legal rules of a country. The similar historical origins of the three countries since colonization and even before influenced their adopted legal rules, as in the three countries establishment based on the civil law legal system. The second consolidated conclusion was related to the globalization's role in transforming the legal rules enacted in a country making them market oriented and investor friendly. The thesis consolidated such understanding as evident in the continuous deregulation of the countries' legal rules in the 1990s including the introduction of a special investment law.

The second paper considered of those part of the preceding literature is Trebilcock's. In this paper, the emphasis was more upon the role of culture, history, political and institutional influences on the legal rules. The nearly shared cultural, historical, institutional and political traditions at different decades since the 1950s resulted in similar legal rules introduced in the three countries ate nearly the same timings (*e.g.*, investment laws in 1995 and 1997). In regard to the role of the domestic stakeholders and the international institutions in modernizing the domestic legal rules, the three countries could be good examples of the interaction between the domestic stakeholders interested in attracting FDI and the international institutions that provided support when requested (*e.g.*, during the debt crisis period).

The third paper addressed within the introduction of the thesis as preceding literature was Stiglitz's book of *Making Globalization Work*. As briefly mentioned in Trebilcock's paper, the support provided by the international institutions and specifically during the debt crisis was support conditioned upon the compliance with the Washington Consensus comprising of deregulating the domestic markets, limiting the government's role in economic activity and the promotion of privatization as an easier way of boosting the private sector's share in the economic activities of the countries. The thesis provided in more than one instance evidences for the transformation in the policy-orientation witnessed in the three countries. Similarly, in Laffont's paper, the discussion studied the mirroring of the developed countries legal rules in the developing ones. In fact, this was evident as part of the Washington Consensus supporting the three countries in deregulating their markets for private investors and specifically foreign ones. However, chapter V highlighted the gap (*e.g.*, Egypt) between the of the actual implementation of the legislations and their initial form on-paper when previously copied from developed countries.

VII.C Policy relevance

The framing of the legal rules in order to attract FDI needed to stimulate economic growth has been the concern of the three countries, especially after the global financial crisis and the Arab Spring instabilities. This was evident in the continuous efforts exerted by the three countries in the recent decades principally by introducing investment laws[1293] and other market deregulatory legal changes. The thesis's discussion regarding *(i)* the alignment of the domestic legal systems with the international investment law and *(ii)* the de-regulation and opening of the domestic markets for the private sector fits within the current discussion featured in the three countries regarding the means of attracting FDI and the role of the government in economic activity. This makes the thesis up-to-date and even adds to its originality being one of the earliest academic papers to address the latest legislations of the countries (*e.g.*, Egypt's recently introduced new Investment Law No. 72 of 2017).

Another policy perspective with a slight social side is the relationship between the populations of the countries and foreign investors. The long-history of colonization and continuous western armed interventions in the MENA region resulted in the eruption of sensitivities and lack of trust between the populations of the countries and many of the home countries of foreign investors and in turn the latter were affected. The sensitivities were at their highest point directly after the de-colonization

[1293] For an example of the current discussions in Egypt, please see in Noueihed, L. and Feteha, A. 2017 period when the new regimes adopted nationalistic-oriented legal rules to establish their sovereignty. With the elapse of time and the cultural and political developments, the countries began to moderate their nationalistic tones and this was reflected on their legal rules, which accepted foreign investments and accorded them a sort of an equal treatment. However, there are still legal rules applicable in the three countries unchanged since the nationalistic tones in the post de-colonization period (*e.g.*, right of foreign ownership of agricultural lands). This remain a significant example of the detestations between the countries populations and policy-makers and foreign investors.

An important policy aspect for the thesis's discussion could be relevant to the impact of such rules on the quality of the legal system of the countries from three sides. First, the more the legal rules of the countries are aligned with the international investment law, the closer the countries in guaranteeing a standardised treatment to foreign investors. Such standardised treatment could be perceived as having a positive impact on the quality of the legal system of the host economy from the side of the foreign investors and their home countries who would welcome such developments in treatment. Conversely, a higher quality of the legal system for foreign investors does not in turn mean a positive outcome for other legal rules' stakeholders especially the host countries' policy makers who experience more restrictions over their rights to regulate investments for public purposes (*e.g.*, environmental and labour issues). This moves the discussion to the policy trade-off between the guaranteeing protection to foreign investors as part of the standardised treatment as opposed to the host state's sovereignty to act as represented in its right to regulate foreign investments for public purposes.

Second, the standardised treatment based on the alignment of the legal rules with the international investment law, allows the countries to benefit from the international support and expertise in enforcing the newly adopted legal rules. Also, after alignment, the countries may benefit from the foreign countries jurisprudence as guidance in defining and applying the international investment law substantive protections. Such benefit may be limited or delayed based on the lag in spilling over the legal rules on cross-jurisdictional level. When providing the international support or the practise in foreign jurisprudence, it is important to consider the domestic legal, cultural and political backgrounds of the countries (*e.g.*, the role of Shari'a Law in the legal systems of the countries).

Third, a substantive protection as allowing foreign investors to access third-party dispute settlements may be perceived as having a positive impact on the quality of the legal system in the countries and specifically the litigation system. Critics are directed towards the efficiency of the judiciary in the countries as concluded within the EBRD assessment concerning the judiciary system in the countries. By guaranteeing foreign investors the right to access third-party dispute settlements, the guarantee itself remedies the deficiencies associated with the judiciary of the three countries. The procedural side of international arbitration governs the composition of the Tribunals in a manner allowing them to have higher levels of knowledge and understanding of the dispute and its sector when compared to the local judges who usually lack the necessary knowledge regarding the modern business and economic related laws. Furthermore, the independence embedded in international arbitration as a mechanism for dispute settlement overcomes any negativities associated with the *(i)* partiality of the local judiciary or *(ii)* pressures of the domestic politicians and policy-makers.

The last policy aspect addressed within the thesis was the economics side. On this level, the developments in the legal rules of the countries signalled their openness generally to the private sector and specifically to foreign investors. Moreover, the alignment of the domestic legal rules with the substantive protections of the international investment law signalled the countries *(i)* willingness to compromise partly their sovereign rights in regulating investments for public purposes and *(ii)* credibility as investment partners by abolishing legal rules possibly in violation of the substantive protections. The countries objectively used both signals to attract FDI. There is no doubt regarding the success of the signalling policies as evident in chapter VI through examining the correlation between the economic freedom proxy of foreign ownership/investment restrictions and the FDI inflows into each country study.

VII.D Limitations

Although the research for the thesis required addressing the topic from different sides including history, law, economics and even other sides with a limited perspective, the list of research limitations extends to cover many issues uncovered within the thesis and on top of them are these five. First, the thesis did not address the relationship between FDI inflows and development. In other words, being focused on how the legal rules can attract FDI into the countries, the thesis did not deal with the questions regarding the effect of the FDI inflows on the levels of development in the countries. The thesis cannot reach any conclusions regarding the role of the increase in FDI inflows in making the populations of the countries better-off or live at higher standards. The previously introduced papers of LLSV, Trebilcock, Stiglitz and Laffont added to the thesis in relation to the origination of the legal rules and not their effects on development. Another issue out of the scope of the thesis is the relationship between the FDI inflows and the re-distribution of wealth between the economy's stakeholders. The thesis did not discuss any questions associated with economic inequalities.

Third, the thesis focused on the economic orientation of the countries' studied governments from the 1950s to the 2000s. However, it did not tackle the influence and implications of a country's system on the framing of its investment policy and laws. This, in particular, appears in chapter VI, where the correlations studied do not refer to any politically related variables.

Fourth, an important limitation relevant to chapter VI is the reverse causality between a set of variables chosen within the descriptive analytics. In this regard, it will be helpful to provide an example of the relationship between the economic freedom and the FDI inflows. Such a relationship may have two sides representing the reverse causality. On the one hand, the increase in economic freedom may result in an increase in the FDI inflows. On the other hand, and as a reverse causation, the increase in FDI inflows into an economy may incentivize the policy-makers in that economy to work on boosting the level of economic freedom in their economy. By then, the reverse causality affects negatively the accuracy of the outcomes. Hence, the thesis aimed at investigating the correlations (and not causations) between economic freedom and the FDI inflows.

Fifth, another limitation to Chapter VI is the non-inclusion of a proxy variable to catch the economic situation in the home countries (*e.g.*, main investment partners) from which most of the FDI inflows into the countries. Obviously, favourable economic conditions at home may incentivize a home state's national investor to inject his funds abroad in order to generate higher profits and vice versa. This was evident in the FDI inflows performance to the three countries, which experienced a deterioration in 2008-2009 in conjunction with the global financial crisis. The same remains true during the mid-2000s when the world economy featured a recovery, the FDI inflows to the three countries were on the rise. Another influential consideration is the appetite of home countries investors in case of developed economies to inject their funds in emerging markets (*e.g.*, the three countries) in order to benefit from their positive economic growth rates. Other excluded variables possibly determining the levels of FDI inflows into an economy are political stability, corruption and a proxy for the rule of law.

VII.E Further research

The future research in this context could be directly linked to the preceding subsection dealing with the research limitations. In this regard, the future research could adopt an econometric model approach to investigate the impact of the seven variables on the performance of the FDI inflows into the three countries or even on a wider sample (*e.g.*, all the MENA or Arab countries). Such approach would guarantee a more accurate outcome for the analysis since it would be easier to identify the causal links (instead of only correlations) between the seven variables and the FDI inflows. Moreover, future research may include other FDI determinants (*e.g.*, corruption, political freedom and economic status in home countries) when conducting the econometric analysis in order to catch a wider picture for the impact of each FDI determinant.

An important field of future research could address the role of legal rules in reaching development. In this sense, the thesis focused on the correlation of legal rules and the FDI inflows to an economy, without neither examining the impacts of the legal rules on development nor the impact of the resulting FDI inflows on the development of an economy. The previously discussed papers of LLSV, Trebilcock, Stiglitz and Laffont could provide preliminary guidance for any future academic works within this scope. Other issues of future research in relation to the four papers could be the role of colonization in framing the legislations concerning the rights of foreigners to own agricultural lands in developing (recently colonized) countries. Furthermore, the post-colonial nationalist ideologies and their roles in framing the legislations possibly still in place in many developing economies. This comes as part of the continuous discussion regarding the North-South relationships where the South members may signal levels of detestation towards the North members as the previous colonial powers.

The thesis discussed the motivations of policy-makers when *(i)* engaging in BITs and *(ii)* changing their legal rules (*e.g.*, deregulation, openness and privatization) to attract FDI into their economies. At the start, such developments may appear as unilateral initiatives of the countries. This could be partly true, however, would not resemble the whole big picture. In fact, the changes in the domestic legal rules of the countries was not solely based on the unilateral initiatives. Part of such changes were funding conditions imposed by the international financial institutions (*e.g.*, IMF and the World Bank) when providing financial assistance during the different interactions between the countries and former. Another party interested in such changes other than the domestic policymakers and the international financial institutions could be the investors' home state governments. Being the main investment partners, the home state governments may pressure the countries in order to frame their domestic legal rules in a manner beneficial for the home state investors. The role of each of the above parties interested in changing the legal rules should be addressed separately in future works.

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IX. Summary

The aim of this PhD thesis is to investigate the correlation between the legal rules applied in an economy and its Foreign Direct Investment (**FDI**) inflows. The paper examines, from a Law and Economics perspective, the development of legal rules in Egypt, Jordan and Morocco to promote investment and attract foreign inflows, and how this correlated with the actual volumes of FDI inflows into each of the three countries.

The thesis is split into seven chapters including the introduction and conclusion. Chapter II sets out the theoretical framework governing the thesis. It introduces the history of international investment law until the emergence of Bilateral Investment Treaties (**BIT**s), the motives of policy-makers when engaging in BITs and, finally, the substantive protections of BITs. Chapter III provides a brief overview of the economic history of the three countries, from independence to market openness and passing through their debt crises. The chapter assists in identifying further similarities between the three countries.

Using a functional comparative analysis, the legal analysis begins in chapter IV with an introduction of the domestic legal framework governing investments in the three countries. This chapter takes the reader through the development of the legislation in each of Egypt, Jordan and Morocco, with a specific focus on the alignment of domestic legislation in these three countries with the protections accorded under the BITs, and the changing nature of the legislation from being highly restrictive to more liberal and market-oriented.

Chapter V continues the legal analysis but uses a case law analysis approach when exploring the claims filed against the three countries in ICSID arbitration. The chapter analyses a set of cases for each of the three countries in order to draw conclusions regarding their understandings of international investment law and their behaviour towards foreign investors.

Chapter VI proceeds with the economic analysis of the FDI volumes in the three countries. Based on the chosen set of variables, the chapter mainly through descriptive analytics identifies correlations and patterns between the reviewed variables and the net FDI throughout the study period in the three countries. The analysis remains limited to correlations and not causations.

Finally, the thesis concludes with statements of both a legal and economic nature. On the legal side, Egypt, Jordan and Morocco continuously developed their investment legal frameworks, seeking the enhancement of their investment climates in order to attract investors through rationalizing the factors of production prices, reducing transaction costs of investments, and mitigating the risks borne by investors. Further, the three countries similarly adapted their economies from being centrally-planned, highly regulated and investment restrictive to becoming more private-sector based, deregulated and investment friendly. On the economic side, the investment legal restrictions proved to be positively correlated to the net inflows of FDI of Egypt, while the two variables were negligibly correlated in the cases of Jordan and Morocco.

X. Samenvatting

Het doel van dit proefschrift is om de correlatie te onderzoeken tussen de rechtsregels die worden toegepast in een economisch systeem en de instroom van Buitenlandse Directe Investeringen (**BDI**). In het proefschrift wordt vanuit juridisch en economisch oogpunt de ontwikkeling onderzocht van rechtsregels in Egypte, Jordanië en Marokko om investeringen te bevorderen en buitenlandse kapitaalstromen aan te trekken, en wordt nagegaan hoe dit zich verhoudt tot de werkelijke omvang van de instroom van buitenlandse directe investeringen in elk van de drie landen.

Het proefschrift is onderverdeeld in zeven hoofdstukken, waaronder de inleiding en conclusie. Hoofdstuk II beschrijft het theoretisch kader van het proefschrift. Dit hoofdstuk biedt een inleiding in de geschiedenis van het internationaal investeringsrecht tot het ontstaan van bilaterale investeringsverdragen (**BIV'**s), de motieven van beleidsmakers wanneer zij zich bezighouden met BIV's en, ten slotte, de materiële bescherming van BIV's. Hoofdstuk III geeft een kort overzicht van de economische geschiedenis van de drie landen, van onafhankelijkheid tot openstelling van de markt en het doorstaan van hun schuldencrises. Dit hoofdstuk draagt bij aan het vaststellen van verdere overeenkomsten tussen de drie landen.

Aan de hand van een functionele vergelijkende analyse begint de juridische analyse in hoofdstuk IV met een uiteenzetting van het nationale juridische kader voor investeringen in de drie landen. Dit hoofdstuk neemt de lezer mee in de ontwikkeling van de wetgeving in Egypte, Jordanië en Marokko, met bijzondere aandacht voor de aanpassing van de binnenlandse wetgeving in deze drie landen aan de bescherming die de BIV's bieden, en de veranderende aard van de wetgeving van zeer restrictief naar liberaler en marktgerichter.

Hoofdstuk V zet de juridische analyse voort, maar hanteert een analyse van de jurisprudentie bij het onderzoeken van de vorderingen die in ICSID-arbitragezaken tegen de drie landen zijn ingediend. In dit hoofdstuk wordt voor elk van de drie landen een aantal zaken geanalyseerd om conclusies te trekken over hun opvattingen over internationaal investeringsrecht en hun gedrag ten aanzien van buitenlandse investeerders.

Hoofdstuk VI gaat verder met de economische analyse van de omvang van de BDI in de drie landen. Op basis van de gekozen reeks variabelen identificeert dit hoofdstuk voornamelijk door beschrijvende analyses correlaties en patronen tussen de beoordeelde variabelen en de netto BDI gedurende de gehele onderzoeksperiode in de drie landen. De analyse blijft beperkt tot correlaties en gaat niet in op oorzakelijke verbanden.

Het proefschrift sluit af met uitspraken van zowel juridische als economische aard. Op juridisch gebied hebben Egypte, Jordanië en Marokko hun wettelijke kaders voor investeringen voortdurend verder ontwikkeld, waarbij zij ernaar streefden hun investeringsklimaat te verbeteren om investeerders aan te trekken door rationalisering van de prijzen van productiefactoren, verlaging van de transactiekosten van investeringen en beperking van de risico's voor investeerders. Voorts pasten de drie landen hun economie aan van centraal gepland, sterk gereguleerd en investeringsbeperkend naar meer op de particuliere sector gebaseerd, gedereguleerd en investeringsvriendelijk. Op economisch gebied bleek er een positief verband te bestaan tussen de wettelijke investeringsbeperkingen en de netto-instroom van BDI in Egypte, terwijl er in het geval van Jordanië en Marokko een verwaarloosbaar verband bestond tussen de twee variabelen.

XI. Curriculum Vitae

Mostafa Talal Atef El Far

Short bio	
Tax Advisor in BonelliErede Africa Project, legal and economic researcher. Former District Attorney in North Giza Court and Legal Assistant for Egyptian Deputy Prime Minister with in-depth experience of researching the Egyptian legal framework. Have worked in Ernst & Young for more than one year advising multinationals upon Egyptian and Middle Eastern tax practices and optimization strategies. Economic researcher in the Egyptian government think tank analysing the Egyptian economy, offering a background of dealing with developing emerging economies. Qualified candidate with LL.B. and BSc in Economics, besides an LL.M. of Law and Economics in Queen Mary University with an overall distinction and distinctions in International Tax and in the International Tax-focused dissertation.	
Education	
Universities of Bologna, Hamburg and Rotterdam **European Doctorate in Law and Economics Ph.D. Program** Expected Graduation Date: Jan 2019 Thesis: *International Investment Law and Domestic Legislations in MENA Region: Egypt, Jordan and Morocco*	2015-2018
Queen Mary University of London, United Kingdom **LL.M. in Law and Economics Degree** Studied International Tax Law, International Economic Law and Law and Economics Overall Grade: Distinction Thesis: *Should the OECD Model, Concepts and Guidelines be adopted by Egypt?* Thesis Grade: Distinction	2013-2014
Faculty of Law (English section) Cairo University, Egypt **Law LL.B. Degree** Final Cumulative GPA: 77% (GOOD)	2008-2012
The British University and Loughborough University, Egypt and United Kingdom **Economics BSc Degree**	2008-2012

EGY Transcript: Distinction (85%) UK Transcript: Upper Second Class Division I (68%) Thesis titled: *The Egyptian State of Competition: The Steel Market Case Study* Thesis Grade: Distinction	
Work experience	
BonelliErede - Associate and Egyptian tax advisor	Sept. 2016 – Current
Ernst & Young - International Tax Services Assistant Manager (Senior 3)	Sept. 2014 – Nov. 2015
Public Prosecution Service - District Attorney in North Giza Court	Jul. – Aug. 2015
Government of Egypt - Assistant for the Egyptian Deputy Prime Minister for Economic Development and Minister of International Cooperation Dr. Ziad Bahaa El-Din	Jul. – Sept. 2013
Prizes and awards	
Queen Mary Postgraduate Law Scholarship Winner	2013
Publications	
Should the OECD Model, Concepts and Guidelines be adopted by Egypt? Lambert Academic Publishing	2016
The Egyptian Market State of Competition: The Steel market Case Study Lambert Academic Publishing	2016

XII. Portfolio

EDLE PhD Portfolio

Name PhD student: Mostafa Talal Atef El Far

PhD-period: 2015-2018

Promoters: Prof. Dr. Iur. Stefan Oeter and Prof. Dr. Michael Faure LL.M.

PhD training

Bologna courses	***Year***
Behavioural Law and Economics	2015
Experimental Economics Class	2015
Game Theory	2015
Intro European Competition Law	2015
Modelling Private Law	2015
Seminars and workshops	***Year***
Bologna November seminar (attendance)	2015
Rotterdam Fall seminar series (peer feedback)	2016
Presentations	***Year***
Bologna March seminar	2016
Hamburg June seminar	2016
Rotterdam Fall seminar series	2016
Rotterdam Winter seminar series	2017
Bologna November seminar	2017
Others	***Year***
Associate and tax advisor in BonelliErede Africa Project	Sept. 2016 - Current