THE US EGYPTIAN FREE TRADE AGREEMENT – CHALLENGES AND PROSPECTS

*Ahmed Y Zohny**

INTRODUCTION

The Arab Republic of Egypt ("Egypt") holds a strategic political, cultural, and commercial position in the Middle East at a point where Europe, Asia and Africa meet.[1] During British colonialism, Egypt and its Suez Canal constituted a viable strategic lifeline on the road to the Indian continent, the pearl of the British colonies.

In the era of US global dominance, Egypt enjoys substantial financial and political support from the US since signing a separate peace treaty with Israel in 1978. Signing a peace treaty with Israel, the main US ally in the Middle East, without the other Arab countries, cost Egypt dearly. Economists have estimated the effects of the Arab boycott one decade after the 1978 Camp David accord (where full economic and diplomatic ties were restored) to exceed $30 billion.[2] This loss included the boycotting of Egyptian goods, services of Egyptian professionals, Egyptian intellectual properties, the stopping of Arab investments and Arab tourism in Egypt.

As a partial compensation to Egypt, the USA (the broker of this peace process between Egypt and Israel) provided Egypt, to date, with over $30 billion in economic, technical and military assistance, since signing the 1978 Camp David accord.[3] Furthermore, Egypt proved to be a reliable ally to the US during the Gulf War, and its commitment to the peace process has been unwavering since 1978 with no single violation to the International Peace Treaty with Israel in the last 21 years.

To reinforce this commonality of national interests between Egypt and the USA, in April 1997, Egyptian President Mubarak and US Vice President Gore agreed to explore the possibility of creating a free trade agreement ("FTA")

* LLM, PhD, Professor and Chairman, Department of Business and Legal Studies, Strayer University, Alexandria, Va Campus, USA.

[1] Howard L Stovall, "Some Current Legal Issues Concerning Trade and Investment in Egypt" [1990] ALQ 124.

[2] Saad Eddin Ibrahim, *Egypt, Islam and Democracy, Twelve Critical Essays* (1996), 141.

[3] US Policy Toward Egypt – Hearings in H.R. before the Committee on International Relations, 105th Cong. 3 (1997), 3–10.

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between the two countries. The FTA can be the springboard for US transnational corporation involvement in Egypt, to further its economic and social development programs. Furthermore, the FTA can provide substantial geo-strategic benefits to the US and its ally, Israel.

This article argues that signing an FTA between Egypt and the USA has the potential of triggering Egyptian demand for American goods and services, promoting Egyptian economic and social development and providing peace and stability in the Middle East.

Building bridges between the two countries (US and Egypt), in the era of privatisation and free market economy, requires the active involvement between the private sector of the two countries. In order for the partnership between American and Egyptian businesses to work, both parties should acknowledge and understand the differences between the two countries' legal environment of business at both the macro and micro levels. This article intends to shed light on these differences in order to help the US and Egyptian businesses find common grounds from which they can operate.

THE EGYPTIAN LEGAL ENVIRONMENT OF BUSINESS

Scholars define the legal environment of business in various ways, according to the purposes of their research.[4] The study of the Egyptian legal environment of business and the potential of the Egyptian market for free trade agreement FTA with the US should include the following:

(1) Egypt's historical experience with European international firms and the impact of their operations on the economic, political and social development of Egypt and how these firms and their governments shaped the Egyptian legal culture;
(2) A realistic assessment of the Egyptian investment climate;
(3) The need for reconciliation between Egyptian and American law and jurisprudence.

Egyptian historical experience with European international firms

From the viewpoint of customary international law, the degree of freedom Egypt may allow for the entry or admission of foreign investment is basically a matter of policy left to the discretion of Egypt, without any general legal obligation in this respect.[5] Under the 1992 US-Egypt Bilateral Investment Treaty (BIT), Egypt is obligated to maintain certain critical elements of an open investment régime.

[4] Nancy K Kubasek, Bartley A Brenna, M Neil Browne, *The Legal Environment of Business, A Critical-Thinking Approach*, (1996), 18.
[5] Ibrahim FI Shihata, "Recent Trends Relating to Entry of Foreign Direct Investment", 9 ICSID Rev (1994), 47.

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Despite the BIT and further liberalisation, securing the approval of US investors (likewise all other foreign investors) may entail long procedures and is not yet automatic.[6] And this is not in violation of international law. The Egyptian Government seems to perceive any foreign investment as a potential risk that would lead to possible constraints on Egyptian sovereignty. Since Egypt's semi-independence from Great Britain in 1922 to 1952, (when the Egyptian revolution took place) subsidiaries of European multinational firms, mostly British, French, and Belgium, had become a visible symbol of power in the Egyptian political system.[7] Robert Vitalis states:

> In the 1930s and 1940s, representatives of some of the world's largest and most powerful firms in industry's lending sectors were drawn to Egypt and together with local investors, engaged in a long protracted and costly competition, for the contracting and concession rights to build power plants and develop the country's chemical industry. The massive archival record that exists of these projects, an artifact of Egypt's equally protracted process of decolonization, provide a rare, deep, sustained and detailed view of the objectives, capacities and political strategies of both the international firms and, even more valuably, of Egypt's local big business rivals.

Robert Vitalis documented in his research the psychological roots of the Egyptian fears and risks of admission of foreign business enterprises' domination and the "suspected activities of foreign firms", which led to the massive transfer of Egyptian resources to the giant of European corporations and their local predominantly non-Egyptian partners (Greek, Italian). Egypt's agricultural and industrial development in the first 50 years of the twentieth century was dependent development. Multinational corporations of this era invested and made profits through their partnerships with their local non-Egyptian alliances until the 1930s,[8] and with new emerging Egyptian capitalist élite, such as Ahmed Abod, Talat Harb and Ahmed Foad. It was these aforementioned Egyptian entrepreneurs that made possible from the 1930s to 1952, the creation of the private enterprises and national industries – airlines, shipping lines, chemical plants, agroindustries, spinning mills – that form the core of Egypt's embattled public sector today.[9] It was these local Egyptian capitalists who controlled and operated the interlocking board of directors of most corporations in every sector and corrupted the Egyptian policy process before the 1952 revolution, a policy process which was controlled and manipulated by the British ambassador in Egypt.

Vitalis describes this episode of Egypt's history which later on, with the Suez Canal crisis, legitimised the 1952 revolution expropriation measures of both foreign and domestic corporations, from 1956 to 1961. He states:

> Industrial policy in the "liberal era" (1922–1952) was synonymous with power politics. The state played a specific role in the expansion of the country's capitalist sectors. Britain's

[6] Ahmed Galal *et al.*, *Building Bridges, An Egypt–U.S. Free Trade Agreement* (1998), 76.
[7] Robert Vitalis, *When Capitalists Collide, Business Conflict and the End of Empire in Egypt* (1995), xii.
[8] See Vitalis, *supra*, note 7, at xiv.
[9] *Id.*

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unilateral grant of Egyptian independence in 1922 and introduction of a constitution in 1923 resulted in the fracturing of the state executive. In the place of a single agency ruling Egypt, three executive agencies existed that are the British residence, the palace, and the cabinet. Each player contested for control and reduced the state's capacity to coordinate policy. At the same time the administrative agencies of the state began a new period of growth marked by the hastened pace of Egyptianization of the bureaucracy.

Egyptianisation as described by Vitalis had two facets. As is commonly recognised, the bureaucracy was rapidly politicised. For the first time party politics intruded on the civil service, producing a great turnover of personnel with every change in government.[10] Perhaps less recognised, the bureaucracy was also rapidly "colonised" by family and other networks that had established ties to investors or sought to forge them. This particular route from government office to company boardroom was well marked.[11]

Despite the aforementioned circumstances, the new revolutionary government of 1952 welcomed foreign capital and local Egyptian capital, to eliminate the barriers that blocked the road to the nation's industrialisation, modernisation and development.[12] After only one week of the *coup d'état*, the government of the revolutionary council modified Law No. 138 of 1947, dealing with admission of foreign corporations.[13] The mandatory proportion of Egyptian capital was reduced from 51 to 49 per cent. The ownership of the 49 per cent, according to Abdel Malek's documentary analysis, could now include "legal parties", which meant corporations already in existence, where the majority of shares were held by foreigners.[14] Only the armed forces and security sectors were reserved for companies having a higher percentage of Egyptian shareholders.[15] Despite this encouraging development, Dr Riad Ghoneimy's study concluded that the actions of foreign financial institutions and international firms (subsidiaries of European US corporations), proved to be draining off Egyptian deposits of hard currency.[16] Foreign corporations preferred to invest their profits abroad rather than investing them in domestic projects, which would lead to generating job opportunities and the development of the Egyptian economy.[17] Furthermore, the study shows that they invested in sectors that provided quick high returns, rather than in projects which would satisfy the population's basic needs, such as drinking water, housing for the poor, or light industry (micro-enterprise development).[18] The greater part of the profits had been exported abroad, including the profits generated from the Giant Suez Canal Corporation,[19] which was a corporation where assets were

[10] See Vitalis, *supra*, note 7, at xiv.
[11] *Id.*
[12] Anour Abdel Malek, *Egypt Military Society* (1969), 88–91.
[13] *Id.*
[14] *Id.*
[15] See Abdel Malek, *supra*, note 12, at 89.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

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guarded by 80,000 British soldiers stationed in military bases in the Canal Zone. It constituted a state within the Egyptian polity. Egyptian citizens were not permitted to enter their private exclusive clubs in the cities of Port Said, Ismailia, and Suez.

The growing European political and financial presence in Egypt since the opening of the Suez Canal have lead to Egypt's loss of its sovereignty in its territories and over its resources. The creation of the Mixed Courts as an independent branch of the Egyptian judiciary in 1876, in fact undermined the ability of the Egyptian Government to govern. The Courts were staffed with a large European contingent and ruled on the basis of European derived codes.[20] Egypt had to accept a foreign majority on the bench and a fairly faithful adaptation of the Napolean Code. Nathan J Brown identified two kinds of courts operating within the alien system. First, the consular courts, which would retain criminal jurisdiction in cases involving foreigners; second, the Mixed Courts which would deal only with civil and commercial cases.

Various measures by Great Britain and France (the owners of the stocks of the Suez Canal Corp.), ensured not only the independence of the mixed judiciary from the Egyptian authorities, but also, in some ways, its predominance over the Egyptian policy process. Two specific concessions which were challenging to the Egyptian sovereignty and dignity merit mention here. First, an article in the Mixed Courts codes (and borrowed neither from the Napolean Code, nor from the English common law) required the government to enforce judgments against itself;[21] that is, if a foreigner brought a suit against the government and won, the government was obligated to carry out the ruling.[22] Second, Egypt agreed to adapt the French *parquet* system which designated officers of the courts to investigate and prosecute crimes, advise the court on legal matters, and represent the general interests of the state.[23] The Mixed Court *parquet* was to be headed by a foreigner and staffed by both foreigners and Egyptians. This system consituted what Enid Hill called a substantial control over the economy of Egypt and formative influence on the development of the legal culture[24] and a court system not friendly to foreign business particularly.[25] The Mixed Courts were abolished in 1949 after influencing the Egyptian legal culture for 73 years.

The Government of European Business, who invested in Egypt, brought another system, which is called capitulations, which gave their subjects immunity even from criminal prosecution by the Egyptian authority. The capitulations were another grave challenge to Egyptian sovereignty. Brown states that in 1887 the

[20] See also Nathan J Brown, *The Rule of Law in the Arab World, Courts in Egypt and the Gulf* (1997), 26.

[21] See Brown, *supra*, note 20, at 27; see also *Mixed Courts of Egypt*, Dr Mark Hoyle, Graham & Trotman, London, 1991, pp. 31–35, dealing with Articles 6 and 7 of the Mixed Civil Code of 1875.

[22] See Brown, *supra*, note 20, at 27; see Hoyle, *supra*, note 21, at 32–33, where leading cases are discussed. Hoyle points out that acts of sovereignty were protected by Article 7 of the 1875 Code.

[23] See Brown, *supra*, note 20, at 27; see Hoyle, *supra*, note 21, at 27–28.

[24] Ibrahim M Oweiss *et al.*, *The Political Economy of Contemporary Egypt* (1990), 240.

[25] See Brown, *supra*, note 20, at 222.

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Mixed Court of Appeal ruled that the Egyptian Government had no authority to change the codes of the Mixed Courts unilaterally guaranteeing each capitulatory power a veto over legislation by the Egyptian Government.[26]

The aforementioned circumstances were the result of the European multi-national corporations interference in the economic and political life of the Egyptian people, which brought a mostly foreign judiciary (the Mixed Courts) operating on Egyptian soil and maintained the residue of a capitulation system which discriminated against Egyptians in favour of Europeans who ran all aspects of Egyptian business life. Little wonder transnational corporations stand in the Egyptian consciousness as a visible symbol of power, abuse of power, and corruption of the Egytian political system prior to the 1952 revolution. The concept of the good corporate citizen in international business never materialised in the Egyptian business environment, possibly to date.

Egyptian–American relations from 1952 to 1956

This article argues that reviewing Egyptian-American relations from 1952 to 1956 indicates that the US had contributed to President Nasser's drastic measures aimed at nationalising both foreign and domestic assets to serve Egypt's economic and social development projects. Jon B Alterman of the Washington Institute for Near East Policy's Study, published in 1998 about American aid to Egypt, blames the US for Egypt's inevitable shift from a market economy to a socialist, centralised economy.[27] The study provides insights into worsening US-Egyptian relations in the mid 1950s. It portrays the frustrations Egyptians experienced in their efforts to win large-scale US assistance to finance the High Dam at Aswan,[28] a project which was perceived by Egypt as well as the World Bank as the springboard for economic and social development of upper Egypt.[29] US policy during the Eisenhower administration appears to have backed Nasser into a corner.[30] American aid to Egypt was always a part of a larger US strategy in the region designed to create alliances to contain the Soviet influence. US aid to Egypt to build the High Dam at Aswan according to this study was delayed first by US differences to British concerns about the Suez Canal base negotiations, and then by a desire to make such aid contingent on an Arab-Israeli peace agreement, which was not possible for Egypt and Nassar in the context of the time to accept.[31] Nasser had no choice but to nationalise the Suez Canal to finance the High Dam at Aswan

[26] See Brown, *supra*, note 20, at 34; see also Hoyle, *supra*, note 21, at 55–58, where he discusses the effect of Article 12 of the Mixed Civil Code, and the leading case of the Mixed Court of Appeal of 27 January 1887. Hoyle makes the point, at pp. 28–29, that the Mixed Courts resulted from Egypt's approach to the Capitulatory Powers.

[27] Jon B Alterman, "American Aid to Egypt in the 1950s: From Hope to Hostility", 52 No. 1 *Middle East Journal* (1998), 51–53.

[28] *Id.*

[29] Ahmed Y Zohny, *The Politics, Economics, and Dynamics of Development Administration in Contemporary Egypt* (1988), 111.

[30] See Alterman, *supra*, note 27, at 53.

[31] *Id.*

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after the World Bank withdrew its earlier approval because of American pressure.[32] By 1960–61, the Egyptian Government had nationalised most of Egypt's large- and medium-scale economic enterprises owned by Egyptians and foreigners.

Creeping expropriation or de facto expropriation

This article argues that the current business regulatory system in Egypt, its rules, processes, and institutions, do not serve the purpose of economic development; do not allow the private sector to grow; do not ensure competition; and do not allow prices and wages to be determined rationally,[33] as a result of the incremental approach of President Hosni Mubarak of Egypt. Furthermore, bureaucracy in Egypt plays a crucial role in the enforcement and implementation of investment law. Bureaucratic inaction or long delays in implementing foreign investment laws can be considered within the meaning of creeping expropriation or *de facto* expropriation, as outlined by Rudolf Dolzer.[34] In the case of *Arab Republic of Egypt* v. *Southern Pacific Properties Ltd* before the Court of Appeal in Paris, the Egyptian Government refused to abide by the court decision, which was in favour of the foreign investor (Southern Pacific Properties Ltd).[35] The case was presented to the International Centre for the Settlement of Disputes (ICSID) (almost 10 years after the initial FDI was approved by the Egyptian Government in 1974). And it took another eight years to settle this dispute through the ICSID arbitration tribunal. The dispute was finally settled again in favour of the foreign investor in 1992. Dr Ahmed El Kosheri, a well known Egyptian jurist, criticised the Egyptian Government's tactics of delay by stating that:

> ... I personally think that it would have been more useful to Egypt, instead of raising objections to jurisdiction, regardless of whether they were justified or not, to welcome ICSID arbitration as consistent with the declared governmental public policy of providing foreign investors with effective legal guarantees that should normally prevent any type of "denial of justice" including any delay in rendering justice. (It should be recalled in this respect that since the cancellation of the Pyramids Plateau touristic project by the late President Sadat in 1978, valuable time was wasted in pursuit of an ICC arbitral award which had been annulled by the Paris Court of Appeal in 1984, and the case was then before ICSID from August 1984 to March 1993.)[36]

Another two cases are described in the following paragraphs and reported by the American Chamber of Commerce in Egypt.[37]

[32] See Zohny, *supra*, note 29, at 108.
[33] Ibrahim F I Shihata, *The World Bank in a Changing World*, Selected Essays and Lectures (1995), 514.
[34] Rudolf Dolzer, "Indirect Expropriation of Alien Property", 1 ICSID Rev (1986), 41–65.
[35] W Lawrence Craig, "The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk", 8 ICSID Rev (1993), 264–293.
[36] *Id.* at 264.
[37] The Arab World Online, Egyptian Investment Climate Statement, 13–14 <http://wwwawo.net/business/invest/egyl.asp.

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The following is a description of two investment disputes over the past few years involving US investors, where the US Government attempted to resolve by raising issues at a political level:

(1) A US company's contract to operate airport duty-free shops was cancelled in 1988, the government-owned airline was given the management contract, and inventory and equipment were confiscated, which would indicate that *de facto expropriations and nationalisation* still occur. The owner has initiated several legal suits in the court system over the past eight years with no visible result. Government of Egypt officials indicated that they cannot intervene in court processes. In July 1995, the company won a suit in the courts but the government appealed and the case is back in the "closet";
(2) A UK/US company entered into a contract with a public sector company to operate two hotels in Egypt. Disputes arose over both properties, and the government party was reluctant to settle the disputes in court. Both disputes were finally arbitrated in 1994, but the government company has refused to honour either arbitration, and in 1995–96 took over both hotel properties via police intervention.

A realistic assessment of the Egyptian investment climate

The aforementioned historical background of Egypt's experience with international business enterprises will naturally make the Egyptian Government very cautious in the degree of freedom which they may allow for the entry or admission of foreign investment.[38] Admission of French investment in Egypt in the 1850s (under favourable conditions) to build the Suez Canal led to geopolitical rivalry between France and England to control this lifeline to international trade (the Suez Canal). It ended with Great Britain occupying Egypt for more than 70 years (1882-1954). When Egypt nationalised the Suez Canal on 26 July 1956 to finance the High Dam at Aswan after the World Bank rejected its earlier offer, England and France, the owners of the majority of the corporate stock, collaborated with Israel

[38] See *Columbia Encyclopedia*, p. 45, "Egypt/European Domination and Independence". In 1854, Said granted Ferdinand de Lesseps a concession for the construction of the Suez Canal, a project that put Egypt into deep financial debt and robbed it of its thriving transit-trade on the Alexandria-Cairo railroad. In addition, the strategic nature of the canal, which opened in 1867, shifted Great Britain's focus in the Middle East from Constantinople to Cairo and opened the door to British intervention in Egyptian affairs. Said was followed by Khedive (Viceroy) Ismail Pasha, whose rule was characterised by accelerated economic development, Westernisation, and the establishment of Egyptian autonomy. However, the cost of Said's reforms, of the construction of the Suez Canal, and of his conquests in Africa put Egypt deep into debt and forced Ismail to sell (1875) his Suez Canal shares to the British. Egypt's financial problems led to further subordination of the country to great power interests. Ismail was forced to accept the establishment of a French-British Debt Commission. In 1879, Ismail was compelled to abdicate in favour of his son Tewfik Pasha, who was confronted with financial and political chaos; his situation was complicated by the outbreak of a nationalist and military revolt (1881–82) under Arabi Pasha. The British reacted to the revolt with a naval bombardment of Alexandria in July 1882, and by landing British troops, who defeated Arabi Pasha at the battle of Tel al-Kabir and went on to occupy Cairo. The British consolidated their control during the period (1883–1907) when Lord Cromer was Consul General and *de facto* ruler.

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and their military forces, and attacked and occupied the Suez Canal Zone. This tripartite attack on Egypt in 1956 was in violation of the United Nations (UN) Charter, which prohibits the use of force by a state, except in limited cases of self-defence.[39] The general prohibition against the use of force is set out in section 2(4) of the UN Charter.[40] It is fair to put the historical record straight. Great Britain, France and Israel attacked Egypt after mediation efforts failed and President Nasser of Egypt refused any compromise, which would provide compensation to the owners of Suez Canal stock. In fact, the US, which was gradually seeking to expand its influence to replace England and France in the Middle East region, sided with Egypt and voted with the USSR for the immediate withdrawal of their countries' forces from Egyptian territories.

Investment Laws in Egypt

Reviewing Laws 43 of 1974, 230 of 1989, and 8 of 1997, reflects a general tendency which is designed to achieve two basic and often conflicting objectives. On the one hand, they seek to attract and encourage foreign investment, and therefore take into consideration and reflect the foreign investors need for security and profit,[41] whilst on the other hand, the aforementioned laws of Egypt (like all other developing countries investment laws), seek to maintain some control over foreign investment to ensure that only those investments that would make a significant contribution to the development of the national economy are encouraged and promoted.[42] The investment laws of Egypt also reflect the legitimate exercise by the host state of its sovereignty over investments made in its territory. Ibrahim F Shihata, Senior Vice President of the World Bank and General Counsel, argues that there are some areas of concern which are sending negative signals to international investors. He states:

First, the excessive use of legislation and regulation and the frequency of the changes they undergo. It is difficult, even for the government employees in charge, to know all applicable rules regulating a certain activity. In spite of considerable liberalization in recent years, many approvals are still, for no convincing purpose, required before initiating many economic activities and too many "fees" are attached to these approvals. Numerous limitations were introduced to achieve short-term social objectives or political gains without consideration of their long-term impact, including their negative impact in the long run on the very objectives they were meant to serve (e.g., arbitrary rent control, excessive tax rates, rigid employment conditions, etc.). Past abuses resulting from the absence of any regulations in certain areas often led to excessive state intervention (e.g., the legislative provisions responding to the scandal of the so-called "Islamic money management

[39] Paul E Comeaux and N Stephen Kinsella, *Protecting Foreign Investment Under International Law, Legal Aspects of Political Risk* (1997), 65.
[40] Comeaux, *supra*, note 39, at 224.
[41] Ahmed Sharaf Eldin, "Legislative Stability and the Investment Climate: A Comment on the Unified Agreement for the Investment of Arab Capital in the Arab Countries", 3 ICSID Rev (1988), 147.
[42] Sharaf Eldin, *supra*, note 41.

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companies"). The pressing needs of special circumstances, the special interests of powerful groups and the prolonged state of war or emergency have in the past added further restrictions to an already heavily regulated system. The result is a mosaic of a tremendous number of laws and regulations, some dating to the time of the Ottomans, which stifle competition, impede innovation and invite corruption. In their totality, they give conflicting signals, increase business costs and require constant changes at the expense of certainty. Worse still, they have led to the establishment of a formidable hidden economy with its informal and sometimes illicit sectors. Comparative experience shows that prior rigorous analysis and adequate consultation are the best guarantee for the making of rules which are fair and durable. Crisis situations should not lead to the adoption of legislation which outlives the crisis and continues to impose constraints no longer justified after the disappearance of the crisis. The work that has started in Egypt to purify the legal and regulatory framework from its intricate net of limitations, approvals and meaningless signatures still has a long way to go. This is *not* to suggest that regulation is not necessary. To the contrary. Competition is not an alternative to regulation; it should be its direct beneficiary. What matters in the end is to have an effective legal and regulatory regime which serves clear economic and social purposes on a sustained basis, i.e., a regime which avoids arbitrariness and excesses, promotes and maintains competition and prevents market concentration and the abuse of a dominant market position by a single operator. Once this regime is established, it should not be subjected to frequent changes.

The second source of uncertainty is, in my view, the growing gap between constitutional principles and new legislation and regulations. This point has been referred to in a number of the papers before us. Unfortunately, it is true. The present constitution of Egypt is clearly based on a different ideology than that which underlies recent laws and regulations. It explicitly provides for comprehensive central planning and endows the state with pervasive powers in the economic sphere. And it makes the public sector the backbone of the economy, describing it as "the vanguard of progress in all spheres". This is hardly consistent with the new trend towards privatization and a Market economy. Pro-market laws and a socialist constitution cannot co-exist for a long time. Their co-existence is bound to create confusion and hesitation on the part of long-term investors. They can also add greatly to the cost of their investments.[43]

The researcher argues that international investors from the western democracies must learn how to deal with a totalitarian state, such as Egypt, where economic decisions are centralised. In the aforementioned investment Laws of 1974, 1989, and 1997, the central Government of Cairo, represented by the General Authority for Investment and Free Zones ("GAFI") (which is a highly bureaucratic entity), is still in charge. Despite the government's desire to upgrade the efficiency of GAFI through training, the development of employees and financial incentives, it is still large and inefficient. Howard L Stovall states that (in advising foreign investors in Egypt) "there are no easy 'solutions' to the Egyptian bureaucracy, therefore, patience, is recommended.[44] If the Egyptian market appears attractive to a US company, the company should be prepared to make a commitment of time to it".[45] If a foreign corporation is bidding or negotiating for a specific government

[43] See Shihata, *supra*, note 5, at 516–517.
[44] See Stovall, *supra*, note 1, at 127.
[45] *Id.*

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contract, it should review and consider those aspects of the contract which require government approvals, involvement, and the like (for example, in areas such as preliminary and final inspection and certification for payments).[46] A US company might reduce the time by retaining the services of an Egyptian development specialist with first hand experience of Egyptian development problems and with Arabic language capability to work side by side with the legal counsel to devise a strategy to reduce the potential for government delay by carefully defining and limiting necessary government supervision and approvals.[47] Stovall cited an example of at least one foreign company which now includes a "draw down" clause in most of its contracts, requiring the government and Egyptian public corporations to open a letter of credit from which that company can obtain payment after invoicing.[48]

The Egyptian customs department, "*Maslahet Al Gamarek*", is a main obstacle for attracting foreign investors to Egypt. The following criticism is attributed to the Egyptian customs department; the failure of the department to provide justification for its administrative decisions, failure to recognise and accept the stated invoice value of imports; failure to announce new administrative circulars and instructions; insufficient numbers of responsible officials to meet workloads; and, finally, complicated and unclear customs categories and sub-categories for imported products.[49] To overcome these problems, it is recommended that a US multinational company ("MNC") exporting goods to Egypt should seek to shift responsibility to its Egyptian business partner for customs clearance of all imports.[50] Furthermore, the MNC should demand an express contract provision, whereby the company is excused from liability in the event of the delay or impossibility of performance caused by the Egyptian customs administration.[51]

Promoting the activities of US MNCs in Egypt

This article argues that the aforementioned obstacles to foreign investors generally may not apply to US MNCs, or can be alleviated by a centralised decision from the President of Egypt or Prime Minister due to the close political relationship between the Egyptian Government and the US Government (since Egypt's signing of the peace treaty with Israel in 1978) evidenced by the hearing before the Committee on International Relations of the US House of Representatives 150th Congress of 1997. Chairman Gilman states that:[52]

> ... since the 1970s, our relations with Egypt have been a key element in the American policy in the Middle East. Our two nations have been united in the pursuit of several common goals, including the promotion of regional peace and stability, the opposition to terrorism

[46] See Stovall, *supra*, note 1, at 127.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] See Stovall, *supra*, note 1, at 128.
[52] See Chairman Gilman, *supra*, note 3, at 2.

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and extremism, and more recently, our joint efforts to promote Egyptian economic reform. The U.S. economic and military aid to Egypt is politically motivated. The U.S. wants above all to help stabilize and strengthen Egypt so that it can continue to pursue a peace-oriented foreign policy and be a strong and reliable friend to its allies.

Egypt has a strong presidential system and political power is very much concentrated in the hands of the President and he can utilise presidential prerogatives to mobilise the Egyptian bureaucracy towards certain directions, as happened when former President Nasser of Egypt mobilised the Egyptian bureaucracy resources along with Soviet technical know-how to build the Aswan High Dam. The same Egyptian bureaucracy which foreign investors and the US MNCs are complaining about now succeeded then in completing the High Dam project eight years ahead of World Bank estimates.[53] The High Dam increased the Government's annual income by approximately $60 million and increased the Egyptian national income by around $600.[54] The US MNC can play a significant role in energising the Egyptian economy as the High Dam project did.

Ahmed Galal and Sahar Tahamy stand in favour of building on the close political ties between Egypt and the US by arguing that:[55]

> ... the economic relationship between Egypt and the United States has several distinctive features. First, it does not rest on economic grounds alone. Political factors play an important role, as evidenced by the magnitude of U.S. aid to Egypt (2.3 billion annually). Second, both sides are aware that the case for continued economic aid may weaken in the future. At the same time, the United States will continue to be interested in supporting Egypt because of its role in promoting peace in the region, which is essential for the secure flow of oil from the region. Third, whether or not aid to Egypt diminishes in the future, the United States and Egypt need to see trade and investment as beneficial to both parties.

To further understand the political dimension of the legal environment of business in Egypt, it is important for any US investor to understand the institutional framework for private/public sector interface in Egypt. Hopefully this will lead to recommending the best approaches to US Egyptian organisational collaboration at three possible levels: large enterprises (US transnational corporations); middle-sized firms and small firms (as recommended by the United Nations Conference on Trade and Development ("UNCTAD")[56] within the proposed framework of an FTA between the US and Egypt.

Institutional framework for private/public sector interface in Egypt

The institutional framework for the private/public sector interface of Egypt in the era of free domestic markets and open borders to trade and investment among

[53] See Zohny, *supra*, note 29, at 111.
[54] *Id.*
[55] See Galal, *supra*, note 6, at 2.
[56] United Nations Conference on Trade and Development (UNCTAD), *Handbook on Foreign Direct Investment by Small and Medium Sized Enterprises, Lessons from Asid* (1998), 69.

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nation states should be guided by the dynamic concept of comparative advantage of government and business. Comparative advantage according to Dale M Sievert occurs when a particular resource has the lowest opportunity cost in producing something of all resources of that type.[57]

In the new challenges of the international economic order and the rising expectations of local consumers, the private and public sectors in Egypt should be aware of and utilise their respective strengths (in the form of human, capital and natural resources) to their comparative advantage. Also, their organisations should be ready to exchange each other's roles to respond to changes and challenges of market economics and attracting US direct investment. According to George A Steiner and John F Steiner, only the Egyptian Government can perform the following significant functions (which represent the Government Advantage over Business).[58]

(1) Only Government can set forth national goals and work out the necessary compromises to reconcile conflicting regional interests;
(2) Only Government can develop the ground rules under which private industry must work;
(3) Only Government can formulate a national policy, for instance; dealing with the environment and/or utilising energy sources, taxation for social programs and national security policy.

One may argue that the above significant functions of the Egyptian Government can produce policies and programs which may hurt the population in the long run particularly if a country such as Egypt lacks effective political institutions and mechanisms to build a national consensus around issues of economic and social development. This article argues that adapting democratic mechanisms or a Western style of democracy is not a prerequisite for realising economic development in developing countries. Ronald Findley and Stanislaw have challenged this proposition in their study of *The political economy of poverty, equity and growth of five small open economies (Hong Kong, Singapore, Jamaica, Mauritius and Malta), a comparative study* published by the World Bank. The five of them were British colonies. The success of Singapore and Hong Kong of this group, lies primarily in the ability of the private and public sectors to interact effectively to stimulate private business by attracting foreign investors and stimulating domestic saving. Their political institutions are not democratic by any standards, but their business, government and social organisations collaborated with each other effectively and each sector found its comparative advantage.[59] Hence, US negotiators in the proposed (FTA) between Egypt and the US should not raise the issue of Egypt's lack of democratic institutions; a Western style of democracy. Egypt tried it from 1922 to 1952, and it did not work due to the complicated realities of Egypt's historical development.

[57] Dale M Sievert, *Economics, Dealing with Scarcity* (1994), 407.
[58] George A Steiner and John F Steiner, *Business, Government and Society* (1994), 292.
[59] A World Bank Comparative Study, *The Political Economy of Poverty, Equity and Growth, Five Small Open Economics* (1993), 1–320.

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Business (private sector) advantage over government in Egypt

(1) The cost of government management of productive facilities are likely to be higher than those of the private sectors, because in government personal loyalty is often more valued than efficiency;
(2) Any activity assumed by the Egyptian Government becomes part of a huge bureaucracy with inherent inefficiencies resulting from its size;
(3) The largest businesses are smaller than governments and therefore enjoy an advantage in flexibility and adaptability.

This article argues that US MNCs must be aware that the pattern of communication between the private and public sectors of Egypt (as in other developing Arab countries) is not the way US private/public sectors communicate and interact. There is an apparent social distance between members/employees of the public and private sectors in Egypt as in many of the developing countries who followed the socialist model of development. The corporate managers of public sector corporations and holding companies who lead the development efforts were appointed by the ruling élite without considering in many cases technical expertise. The system succeeded in achieving development goals in some large-scale projects, such as the High Dam at Aswan in Egypt and managing the Suez Canal after nationalisation. The system, however, did not succeed in managing smaller projects to satisfy the population's basic needs (agriculture, health, food and social services programs). In the current era of privatisation, restructuring and inviting foreign investors, a new pattern of communication should exist between the public and private sectors of Egypt. This is one of the areas in which Egypt needs technical assistance from the US through the US AID Program.

COMPARISON BETWEEN CORPORATE GOVERNANCE IN THE US AND EGYPT

Based on a study published by *The Economist*:[60]

The American version of corporate governance, emphasizes liquidity in the stock market, which makes it cheaper for companies to raise capital by reducing the risk that investors will be unable to sell their shares. Shareholders have left the Board of Directors or the managers to their own devices. Their performances are monitored by shareholders by reviewing the companies stock being traded on the market – with share prices and comparative values as an approval rating. If the shareholders are unhappy with the performance of the corporate directors and managers, shareholders will dispose of the company's stock. A fall in the share price on the stock market gives the Board of Directors and management a poor performance rating. If the performance of the governing body (Board members and managers) does not improve an outsider may take control of the company by buying a majority of the shares through a hostile takeover bid. In other words this mechanism should work as an outside force to put the corporate governance body on track with corporate strategic objectives. This

[60] See *The Economist*, "A Survey of Corporate Governance, Watching the Boss" (1994), 1–18.

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model, of course, depends on the assumption of presence of savings and investors in the economy, on the individual and institutional levels, and the assumption that a large number of corporations are public corporations (i.e., their stocks are traded openly on a stock exchange) under the jurisdiction of the Securities and Exchange Commission (SEC) in the U.S.A. The success of this model depends on the full disclosure of financial data to shareholders, according to this study.

Egypt's corporate governance is moving gradually, but reluctantly, towards adapting this model.

In the German and Japanese systems:[61] ... liquidity for investors had been played down. This is because many of their companies are private (i.e., all stocks are held privately and not traded on the open market or stock exchange). In this model shareholders reduce risks by monitoring managers closely, through joint committees of investors and members of the governance body, or through an intermediary organization such as a bank. Accounting information is not often available to the public.

Egypt's corporate governance used to be closer to this model until the recent resurgence of the Egyptian capital market reported by the American Chamber of Commerce in Egypt which is a positive sign. It states:[62]

One of the many benefits of economic reform is the revival of the Egyptian capital market, which is regarded as vital to the development of the Egyptian economy. The Egyptian stock market has achieved a high level of success, reflected in the flow of privatization shares and the resulting increase in the volume of traded shares, the increase in the efficiency of securities companies working in the capital market, and increasing overall stock market efficiency. Finding solutions to hindrances to trading activity has contributed greatly to this success.

After the issuance of Law No. 95 of 1992, a law that was designed to modernise the capital market, the total volume of traded shares increased dramatically from 396.6 million pounds in 1992 to 3849.4 million pounds by the end of 1995.[63] Traded stock value reached 3236.1 million pounds during the first half alone of 1996, roughly equivalent to the annual traded value for all of 1995.[64] This increase in activity can be explained by the acceleration of the privatisation program in the first half of 1996, when many public company shares were offered for sale and oversubscribed.[65]

In the American model:[66] "individuals who own smaller stakes and are less able to monitor the governance body are more significant. In Germany and Japan the largest shareholders are banks and firms that often have business links with the companies they own". This was the case in Egypt while under Socialism from 1960–1974.

[61] *Id.*
[62] The Arab World Online, *supra*, note 37, at 12.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] See *The Economist*, *supra*, note 60, at 1–18.

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Supporters of the Anglo-American system contend that Japanese and German firms have suffered from their lack of liquidity which made them more reliant on debt than equity for finance.[67] This is true in the case of Egyptian public corporations under the Socialist régime.

In both systems (the Anglo-American) and the (German/Japanese) the freedom of the press enabled shareholders and the public at large to know of any abuse of power by members of the governance of the corporations (Board members or top managers). Hence, changes in this top leadership usually occur to restore public confidence and to improve the image of the corporation which has an impact on the value of stock and the exchange rate. Consumer advocate groups (like Ralph Nader's in the US) play a very important role in disseminating information to consumers about not only the quality of products manufactured by a particular corporation, but also by criticising strategies (i.e., marketing strategy, merger, takeover, and so on) in particular industries. Federal Government authorities, such as the Federal Trade Commission, the Bureau of Corporations (under the Justice Department) in the US usually act quickly in responding to media criticism of a particular corporation, or by opening an investigation in response to consumer group claims against a particular corporation. The system is not perfect, but corporate abuse of power or unethical practices is usually discovered and remedied. In Egypt and the developing countries, particularly the ones who followed the Socialist model of development, enterprise governance took a different shape in state-owned and managed enterprises. Since its reinception in the mid 1950s over the last three decades the public enterprise (or state holding companies as they are sometimes called) has been subjected to repeated changes in organisational patterns and governance and management arrangements. The reasons given for these successive changes are ostensibly all in the name of reforming its organisation and management pattern and the enhancement of management prerogatives in day-to-day decision making. Instability has been created by these repeated organisational changes and management patterns as already pointed out by Ibrahim Shitata.

THE CONTINUED INFLUENCE OF THE SOCIALIST IDEOLOGY ON CORPORATE GOVERNANCE

By 1960–61, the Egyptian revolution had nationalised most of Egypt's large- and medium-scale economic enterprises. From 1960 to 1970 when Nasser died, the Board of Directors of public organisations, general organisations and public holding companies were appointed by the President by presidential decree. In describing this period, a former Under Secretary of the Ministry of Industry stated that approximately 300 army officers (most of them engineers) were appointed to manage the 38 public agencies and 367 public corporations. They

[67] See *The Economist*, *supra*, note 60, at 13.

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were instructed to administer the revolutionary measures initiated in July 1961 by President Nasser, such as the following: "25% of the companies' profits would be distributed to the workers, (2) two elected workers would be representatives on the corporation boards, and (3) 10% of the 25% would be distributed to workers and 5% to social services and housing and 10% to provide other services to the workers through their union".[68]

Members of the Board of Directors and senior executives of this era implemented a social economic model in managing the business of public corporations. They instituted values that still exist in the Egyptian corporate culture and the legal environment of business after more than 35 years. These values are the need for active government involvement in the market place, and the need for balancing economic return and social return for any business activities. Nathan J Brown cites an example of the unfriendliness of the Egyptian legal system to business which involves small-scale merchants.[69] Neighbourhood vendors of basic commodities in Egypt not only have many of their operations fixed by law, but violations come under the state security courts and can result in jail sentences for fairly minor offences.[70] Members of the Boards of Directors and senior executives of this era did not look for economic return (profit) or improving the quality of production, due to the state protectionist policies from foreign competition. They were accountable to only one person, the President of the Republic who appointed them rather than shareholders in the free market economy. Gradually, the concept of the corporation *Al Sharika* as a legal entity disappeared with the general bureaucratisation of the whole system. Egyptian public corporations gradually became an institution with a loose internal structure that seeks to increase its certainty by decreasing its own autonomy and discretion over its environment.[71] It utilises various strategies to increase its dependence on the central government revenues, a revenue which was gradually fading away due to the large public service programs such as free education and health care. Law and lawyers did not play a significant part in the decision making and enforcement mechanisms underlying Egyptian public corporation co-operation.[72] This era resembles the corporate culture of Japan. Egyptian public corporations were woven into seamless webs of affiliated groupings that hold reciprocal blocks of stock and engage in an ongoing series of transactions.[73] The Egyptian Central Bank through the network of publicly owned commercial and investment banks monitors industry and intervenes voluntarily to rescue troubled borrowers. All of this supposedly occurs without the bothersome American rituals of contracts, courts, and corporate lawyers, according to Curtis J Milhaupt. This tendency seems to continue in the Egyptian legal culture even after the new

[68] See Zohny, *supra*, note 29, at 72.
[69] See Brown, *supra*, note 20, at 226.
[70] *Id.*
[71] Lawrence E Mitchell, Lawrence A Cunningham and Lewis D Solomon, *Corporate Finance and Governance Cases, Materials, and Problems for an Advanced Course in Corporations* 1 (2nd edn, 1996), 41.
[72] Curtis J Milhaupt, "A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law", 37 Harv. Int'l J. s (1996).
[73] *Id.*

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investment laws started in 1974. The above afore-mentioned model of Egyptian corporate governance is different from the American power model of corporate governance. The American model of corporate governance depicts the corporation as an institution with its own internal structure that seeks to decrease its uncertainty by increasing its own autonomy and discretion over its environment.[74] According to this power model, "not only are organizations [perceived as] constrained by the political, legal, and economic environment, but in fact, law, legitimacy, political outcomes, and economic climate [are understood to] reflect, in part, actions taken by organizations to modify these environmental components for their interests of survival and growth".[75] Thus, the American firm is not merely reactive with respect to its environment, but proactive.[76] As a result of the application of the Socialism ideology in Egypt, gradually the corporation disappeared as an influential actor in the Egyptian system, likewise the objective of its existence. Evaluating Egypt's experience with public corporations is a controversial issue, however. The World Bank's valuable study entitled *Bureaucrats in Business, the Economics and Politics of Government Ownership*, in which the Egyptian experience was one of the selected samples, did not come with reliable or valid conclusions or generalisations due to the complexity of the issues, and due to the absence of reliable statistics provided by the Egyptian Government.[77]

THE EGYPTIAN ECONOMY AS AN OPPORTUNITY FOR US MNCS

The World Bank categories of economics for 1993 located Egypt among the low income economics with per capita income of $635 or less per year.[78] In 1998, World Bank statistics moved Egypt from the low income economies to the low middle income categories with a slight increase from $635 to $790, an increase of 1.1 per cent[79] in five years. These statistics do not reflect the real purchasing power of the Egyptian economy, nor do they reflect the real capacity of the Egyptian economy to generate internal revenues, due to the presence of what economist Ibrahim Oweiss of Georgetown University calls the "vast informal economy in Egypt".[80] He argues, "while there is no official information regarding the flight of capital from Egypt, I believe that it is sizeable. The noticeable excess demand for U.S. Dollars in Egypt's black market is indicative of the flight of capital from the country". The same observations are confirmed by US commercial specialists in Egypt studying the informal communities in Cairo, Alexandria, and the delta

[74] See Mitchell, Cunningham, Solomon, *supra*, note 71, at 42.
[75] *Id.*
[76] *Id.*
[77] See World Bank Policy Research Report, *Bureaucrats in Business, The Economics and Politics of Government Ownership* (1995), 259–261.
[78] See World Bank Development Report (1993), 232.
[79] See World Bank Development Report (1998), 250.
[80] See Oweiss *et al.*, *supra*, note 24 at 29.

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region.[81] There is a large informal business sector which depends upon receiving financing from a combination of family assistance, partnership, and a practice known as *Al-Jama'iyya*.[82] *Al Jama'iyya* is a kind of (self-help) collective that economists call a rotating savings and credit association with no interest involved or (interest free loan).[83] It is simply a sequential pooling of money. This financing instrument is very successful in financing the start up costs of a small business outside government interference.[84] Profits are not reported, hence they are not taxed and not calculated in the Egyptian growth domestic product. Many entrepreneurs in the informal sector lacked information about, or were unaware of, the legal requirement for formalisation of their business enterprise.[85] Starting a new business in Egypt even under no fictitious name (a sole proprietorship) requires long formal procedures by the Egyptian company's authority which may take one year to be approved. Hence, large numbers of entrepreneurs prefer to work in the informal economy of Egypt (or under the table). This is creating an unrealistic picture of the real purchasing power of the Egyptian economy to potential foreign investors and US MNCs.

For many Americans, the idea of a free trade agreement between the United States and Egypt as a springboard for US direct investment by large-, medium- and small-sized enterprises in Egyptian development projects may be surprising, as Egypt is seen as a low income country, a recipient of US aid rather than an opportunity for trade.[86] This article argues that the fact is that Egypt is an opportunity for US investment and trade. According to a recent market study by US commercial specialists in Cairo, reported by the *Middle East Executive Reports* (MEER) (December 1997), Egyptian imports of environmental technologies are expected to reach $774 million in 1998, compared with $704 million in 1997 and $740 million in 1996.[87] Egypt's population problem (60 million) can be a marketing opportunity for US firms.[88] The signing of an agreement with the IMF in 1991 and Paris Club forgiveness of 50 per cent of Egypt's official debt obligations and the April 1997 announcement of the IFC that it will establish a risk management facility ("RMF") value of $400 million for the largest bank in Egypt (the National Bank of Egypt)[89] are positive indicators of a growing economy, which will spawn the need for a variety of goods and services, many of which are currently not widely available.[90] Examples are computers and industrial equipment that can help to increase the nation's productivity. The increased productivity, in particular, will help Egypt to improve the standard of living of its people, as well as providing the basis for developing an export economy that can

[81] See *Middle East Executive Reports* (1997), 8–13.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] See Galal *et al.*, *supra*, note 6, at 37.
[87] *Id.*
[88] *Id.*, at 38.
[89] The Arab World Online, *supra*, note 37, at 13.
[90] *Id.*

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help the country to grow and pay for its international purchases, particularly from the US. Cairo's National Bank of Egypt has recently acquired New York based Arab American Bank which has assets of $594 million.[91] This is a positive indicator of the seriousness of the Egyptian business community to expand into the US market, which will lead to a stronger Egyptian presence to the "mutual benefit for Egypt and America" which will attract new business between us", as stated by Mohamad Abdul Aziz, the Chairman of Egypt's Bank.

There certainly would be opportunities in Egypt for high tech American firms. Telecommunications is a good example. Firms that can offer cellular telephone technology and pagers will find Egypt to be an excellent, still largely untapped, market. One reason is that cellular technology bypasses the need to install expensive overhead (or underground) lines. This means that the current inefficient telephone system in Egypt can be replaced by a wireless system that connects all parts of the country, as well as providing an international service, at a fraction of what it would cost to wire the Egyptian nation. Other good examples of high tech opportunities for US firms in Egypt are provided by computer and electronics companies that install state of the art technology that can help increase Egypt's productivity and economic growth.

Egypt invested heavily in education since the 1952 revolution. Egypt has highly educated human resources compared to the rest of the Arab states. It means that US MNCs can draw on local talent to help staff and manage their operations, even high tech operations.

Robert Z Lawrence reports[92] "that Egypt's macroeconomic stabilization record has been impressive since 1991. It has cut the budget deficit from 21 per cent to 13 per cent of GDP, reduced inflation from 25 to 7 per cent, brought the current account into balance, and built foreign exchange reserves of up to more than $20 billion". Egypt's economy is viable enough to convince the European Union to sign a free trade agreement with (Egypt), under the Euro-Med program, under which Egypt is scheduled to remove all trade barriers to European industrial products by 2010.[93] Furthermore, an agreement has been reached among members of the Arab League to establish a free trade agreement over a ten-year period, starting in 1998.[94]

THE NEED FOR RECONCILIATION BETWEEN EGYPTIAN AND AMERICAN LAW AND JURISPRUDENCE

The influence of Islamic law

Egyptian culture may be defined as the learned norms of a society that are based on values, beliefs, and attitudes. Islamic religion in Egypt is another strong builder of

[91] The Arab World Online, *supra*, note 37, at 1.
[92] See Galal *et al.*, *supra*, note 6, at 38.
[93] See Galal *et al.*, *supra*, note 6, at 2.
[94] *Id.*

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common values.[95] In Egypt today, the mood of the Egyptian masses is religious. Egypt of the 1980s and 1990s is more conservative and Islamic fundamentalism is still an operating force in the legal and social economic fabric of Egyptian society.[96] This legal and socio-economic characteristic is reflected in existing Egyptian law. The Civil Code, effective in 1949, instructs a judge to decide a dispute on the following basis:

(1) According to the applicable specific provision of the Civil Code;[97]
(2) In the absence of an applicable provision of law, then according to customs;
(3) In the absence of custom, then according to Islamic law; and
(4) In the absence of Islamic law, then according to the principles of natural justice and rules of equity. [This text has been inserted in other Arabic civil codes (all prepared by the Egyptian jurist, Dr Abdulrzak Al-Sanhouri).][98]

This order of precedence was not expressly altered by the 1971 Egyptian Constitution, which provided that the principles of Islamic law are a principal source of legislation in Egypt.[99] The Constitution was specifically amended in 1979 (due to the rise of the Islamic movements which included the growing rule and importance of Islamic banking and finance not only in Egypt, but around the Islamic world), and now provides that Islamic law is the principal source of Egyptian legislation. More than ever, Howard L Stovall argued, modern Egyptian commercial law like all the Arab Islamic countries cannot be judged without an assessment of the influence of Islamic law.[100]

Ibrahim Shihata argues in support of the presence of an Islamic influence in the Egyptian legal environment of business, and that such influence should not send a negative alarm to potential US investors. He criticises the current Egyptian legal and regulatory system of investment and its bureaucratic approach, which is in fact in contradiction to the principles of Islamic jurisprudence (*usul-ul-fiqh*). Shihata argues:[101]

In this context, legislative policy is intertwined with economic and social policies. Through legislative and regulatory action, economic and social policies are translated into rules and procedures, the effective application of which enables societies to achieve their objectives. Experience shows that successful legislative policies are those which are based on the presumption of permissibility, i.e., those which assume that prohibitions, limitations and

[95] See Kubasek, Brennan, Browne, *supra*, note 4, at 45.
[96] See Stovall, *supra*, note 1, at 131–132.
[97] The Code is a modified version of the Western-style civil codes introduced as a result of the legal reforms in 1875 leading to the Mixed Courts and other changes, instituted by Khedive Ismail to encourage foreign investment and industrial expansion. The Mixed Courts had jurisdiction over disputes between foreigners of a different nationality (and foreigners of the same nationality who had no access to Consular Courts) and Egyptians and foreigners. Khedive Ismail faced a financial crisis, with huge debts owed to Britain and France. Britain supported the Mixed Courts plan; France opposed it to start with, although later gave its approval, especially when it became clear that foreign governments could use the courts to recover debts due from the Khedive himself.
[98] *Id.*
[99] See Stovall, *supra*, note 1, at 132.
[100] *Id.*
[101] See Shihata, *supra*, note 33, at 515.

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approvals are the exception rather than the general rule. Interestingly, this presumption is one of the basic principles of Islamic jurisprudence (*usul-ul-fiqh*) which recognizes permissibility as the general rule. This principle seems nonetheless to be commonly ignored in many countries proclaiming Islamic law as the source of legislation.

Allowing an economic agent to work with a minimum degree of state intervention has long been advocated in the Arab culture, most notably by the fifteenth century writings of Ibn Khaldun. Egypt did not need to learn this from the World Bank. This is not only good economics; it is also good law. Furthermore, it respects human dignity. It assumes goodness in people and relies more on *ex post* enforceable sanctions in case of violation of established rules than on the prior approval of every possible act. By keeping the limits to the minimum dictated by the exigencies of public interest, the state also ensures the effectiveness of the limits it introduces. Such effectiveness is often lost in systems based on the presumption of prohibition and burdened with excessive constraints. Drawing the right boundaries between state and market forces is one of the fundamentals of successful legislative policies, and it is also the underlying issue in any discussion on private sector development.

Dr Sobhi Mahmassani, the sole arbitrator of the *Libyan American Oil Company* (LIAMCO) v. *Government of the Libyan Arab Republic* case has acknowledged that there is no contradiction between the Islamic law *Shari'a* and the free market economy. He cited the following Islamic legal maxims as evidence:[102]

(1) Custom is authoritative;
(2) Public usage is conclusive and action may be taken in accordance therewith;
(3) What is customary is deemed as if stipulated by agreement;
(4) What is customary amongst merchants is deemed as if agreed upon between them;
(5) A matter established by custom is like a matter established by law;
(6) Similarly, equity (*Istihsan*) is considered as an auxiliary source of law, especially by the Maliki and Hanafi schools. Further, all Islamic rules of law are based on and influenced by religious and moral precepts of Islam.

    It is very relevant in this connection to point out that Islamic law treats international law (the law of *Siyar*) as an imperative compendium forming part of the general positive law, and that the principles of that part are very similar to those adopted by modern international legal theory;
(7) Sanctity of Contracts. The right to conclude contracts is one of the primordial civil rights acknowledged since olden times. It was the essence of *commercium* or *jus commercii* of the Roman *jus civile* whose scope was enlarged and extended by *jus gentium*. Then it was always and constantly considered as security for economic transactions, and was even extended to the field of international relations.

    This fundamental right is protected and characterised by two important propositions couched respectively in the expression that "the contract is the law of the parties," and in the Latin maxim that *pacta sunt servanda* (pacts are to be observed).

[102] Ray August, *International Business Law, Text Cases and Readings* (1997), 50–53.

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The first proposition means that the contracting parties are free to arrange their contractual relationship as they mutually intend. The second means that a freely and validly concluded contract is binding upon the parties in their mutual relationship.

In fact, the principle of the sanctity of contracts, in its two characteristic propositions, has always constituted an integral part of most legal systems. These include those systems that are based on Roman law, the Napoleonic Code (e.g. Article 1134) and other European civil codes, as well as Anglo-Saxon common law and Islamic jurisprudence (*Shari'a*);

(8) The contract is the law of the parties. It cannot be cancelled or amended except by their mutual consent or for reasons admitted by the law;

(9) A contract shall be performed according to its contents and in the manner which accords with good faith;

(10) A stipulation is to be complied with as far as possible.

This maxim is corroborated by the various sources of Islamic law. For instance, a Koranic verse ordains: "Oh, you who believe, perform the contracts".

In the same sense, a Tradition of the Prophet reads: "Muslims are bound by their stipulations".

Muslim commentators and jurists expounded this binding force of contracts in detail. In particular, the learned Ibn Al-Kayyem elaborated this principle in his great treatise *I'lam Al-Muwaq'een*.

Similarities between Egyptian law and American law and jurisprudence

The aforementioned Islamic principles dealing with contracts and commercial activities are not different from the common law of contracts, the uniform commercial code (which was adapted by 49 states in the US), and the restatement of the law of contracts.[103] Furthermore, the Egyptian foreign company law[104] and its executive regulations is very much in line with:

(1) The law made by *Peoples Trust Co.* v. *Mozuck* in dealing with *in personam* jurisdiction;
(2) The law made by *Brooks* v. *Magna Verde Corp.*, regarding the long-arm statute;
(3) The law made by *Schiavone* v. *Fortune*, regarding *service of process*; and
(4) The law made by *Colder* v. *Jones* regarding *minimum contacts*.[105]

[103] Henry R Cheeseman, *Essentials of Contemporary Business Law* (1999), 156–157.
[104] Ahmed Sharaf Eldin, *Business Law, Legal Aspects of Commerce and Economy* (1998), 125–134.
[105] See Cheeseman, *supra*, note 102, at 50–79.

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In fact, the law of reasonableness and the notions of traditional fair play and substantial justice made by *International Shoe Co.* v. *Washington*,[106] can be found in many Egyptian cases and jurisprudence.

The aforementioned Islamic influence in Egypt, along with Islamic activism in the form of Islamic banking and finance as a global force of capital, should not constitute any threat to US direct investors in Egypt. The forces of globalisation and the growing role of FDI in international development are gradually creating global law without a state and without a religion.[107] Transnational corporations are incrementally becoming transnational law making communities.[108]

Some of the encouraging signs which minimise the commercial risk of American enterprises seeking the export of goods and services, international licensing and franchising, or direct investment in the form of a subsidiary in Egypt, are the following:

(1) Both Egypt and the US have signed the UN Convention on Contracts for the International Sales of Goods (which is also known as the "Vienna Convention"). The said Convention is based on elements from both common law and civil law, would generally apply to many contracts between the US seller (as investor) and an Egyptian purchaser (or partner in the case of a joint venture between American and Egyptian firms). The scope of the Vienna Convention is fairly broad, and covers such matters as, the obligations of the seller and the buyer, the conformity of goods, remedies for breach of contract, passing of risk, and damages. Some rules in the Vienna Convention concerning contract and contract interpretation differ from US contract rules (unified commercial code). Hence, a US company selling products to Egypt should either expressly "opt out" of the Vienna Convention for its sales contract or else carefully review its sales contract in the light of the Vienna Convention.[109]

(2) Egypts current commercial agents law has no special legislation that obligates a foreign company to pay termination or non-renewal compensation to its commercial agent. This is definitely an advantage to foreign firms, who will make their Egyptian agents work harder to maximise their profits (compared to the laws of most Arab countries who require compensation for non-renewal of an agency). It is recommended, however, and due to the fact that the application of the Socialism ideology in Egypt may have affected the work ethics, that commercial agency agreements should state the detailed obligations of the commercial agents, as well as the specific circumstances which will constitute a breach of the agreement sufficient to justify the US company terminating or not renewing the agreement. This is likely to make

[106] George A Davidson, Huges Hubbard and Reed, LLP, "Stay Out of Reach US Jurisdiction Over Non-American Companies", Int. Comm. Lit. (1999), 36–42.
[107] Gunther Teubner *et al.*, *Global Law Without a State* (1997), xiii.
[108] *Id.*, at 79.
[109] See Stovall, *supra*, note 1, at 128.

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difficult litigation less likely.[110] In the case of US direct investment, the issue of bankruptcy has to be addressed explicitly in the subsidiary's articles of incorporation or by-laws.

(3) The New Egyptian Arbitration Act in Civil and Commercial Matters (Law No. 27/1994) is inspired by the UNCITRAL Model Law.[111] Abdul Hamid El-Ahdab argues that:[112]

This is a new stage in the history of Egyptian legislation (notably that concerning arbitration). Since the 19th century, the history of law in Egypt has been characterized by the coexistence between the *Shari'a* (Muslim law) and European law. At first, Egyptian law lived in the shadow of the Muslim *Fiqh*, codified in the *Medjella*, which contains, *inter alia*, the provisions and rules relating to arbitration. Later, the *Shari'a* coexisted with European laws which were applied by the consular courts and then by the Egyptian Mixed Courts. In 1875, numerous codes were issued which followed French law, e.g. Civil Code, Commercial Code, Maritime Code, Code of Civil Procedure and Code of Criminal Procedure.

Egyptian artibration was governed by the Code of Civil Procedure (which was influenced by French law), by the New York Convention, and the Convention for the Settlement of Investment Disputes between states and nationals of other states (ICSID). Egyptian arbitration and its implementation rules were thus derived from three important systems: the *Shari'a*, the old French law and a socialist arbitration system.

However, the provisions of the new Egyptian Arbitration Act apply only to arbitrations taking place in Egypt, or those taking place abroad but subject to Egyptian law. The new Act thus does not apply to arbitral awards made abroad if they do not apply Egyptian law.

In this case, i.e. if an international award was made abroad where the new Egyptian Law was not applied, enforcement of the award is governed by the provisions of the Code of Civil and Commercial Procedure (the provisions relating to foreign arbitral awards have not been repealed by the new Arbitration Act) as well as by the provisions of the 1958 New York Convention relating to the recognition and enforcement of foreign arbitral awards (to which Egypt has acceded).

The new Act applies to "commercial" arbitration, and the term commercial is defined in an extensive manner (Article 2 of the Act). This is important in a country which, like France, for example, distinguishes between "civil" and "commercial" transactions.

The new Egyptian Arbitration Act also widens the concept of international arbitration. Article 3 defines international arbitration. It does not copy the UNCITRAL Model Law in this respect. The Egyptian Law adopts the criterion of "the principal places of business of the two parties" to distinguish between national arbitration and international arbitration, whereas the *Model Law* mentions the "place of business".

This article argues that the aforementioned development is a positive step towards finding areas of common ground between the Egyptian legal system and the American legal system in which ADR plays a significant role in the settlement of business disputes.

[110] *Id.*

[111] Abdul Hamid El-Ahdab, "The New Egyptian Arbitration Act in Civil and Commercial Matters", 12 J. Int. Arb., (1995), 66–67.

[112] *Id.*

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CONCLUSION

Finally, this article concludes that the FTA between Egypt and the US and the flow of American direct investment to Egypt should be accompanied by measures to allow Egyptian goods to have easier access to US markets. These reciprocity measures are needed to satisfy the Egyptian side. According to Ahmed Galal and Sahar Tohamy, the American economy is seemingly open according to the most favoured nation ("MFN") schedule, but when you apply this to Egypt somehow it is not working.[113] They argue that exports of Egyptian textiles to the US are subject to country quotas. Egypt forces quotas on 18 textile products, including cotton yarn cloth, and various types of ready made garments and clothing.[114] In the agriculture sector, Egypt faces tariffs as high as 188 per cent on specific commodities, plus various non-*ad valorem* duties.[115] According to the proposed FTA between Egypt and the US, Egypt is expected to have almost immediate access to the US market, while American firms will have delayed access to the Egyptian market.[116] This parallels the treatment of Mexico in the context of NAFTA, in which the opening of US borders to most of Mexico's manufactures was implemented immediately, while the elimination of Mexican tariffs is phased over a period of five to ten years.[117] This argument which represents the Egyptian view, indicates that the Egyptian policymakers are still not quite sure which approach they should take in the proposed FTA, a deep integration agreement, such as the NAFTA type, or a classical free trade agreement, along the lines of the US-Israel FTA.[118] The Egyptian approach from this article's view seems to seek combining the aforementioned approaches, which can be termed as an *eclectic free trade agreement*.[119] The Egyptian position seems to seek to both liberalise the trade barriers between the US and Egypt, and to harmonise some Egyptian domestic competition policies and regulatory institutions.[120] This is a typical cautious incremental approach of President Hosni Mubarak of Egypt. President Mubarak of Egypt, like other policymakers and ordinary citizens all over the world, should have reason to be concerned about the activities of global corporations.[121] Policymakers, scholars and law makers, liberal, conservative or radical, are still puzzled about recent developments inside global corporations in the changing world of international business transactions.[122] They are worried about giving away the legitimate authority to respond to the social and economic or cultural demands of citizens to politically unaccountable actors, such as global corporations

[113] See Galal *et al.*, *supra*, note 6, at 17.
[114] See Galal *et al.*, *supra*, note 6, at 17–19.
[115] *Id.*
[116] *Id.*
[117] See Galal *et al.*, *supra*, note 6, at 19.
[118] See Galal *et al.*, *supra*, note 6, at 15.
[119] *Id.*, at 16.
[120] *Id.*
[121] Paul N Doremus, William W Keller, Louis W Pauly and Simon Reich, *The Myth of the Global Corporation* (1998), 142.
[122] *Id.*

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during the process of advancing transnational corporate integration.[123] The Egyptian position towards US MNCs seems to resemble both the German and Japanese position, which is, "to resist a diminishment of unique national values and institutions.[124] Egyptian corporations who may get engaged in a joint venture with US investors under the framework of the FTA (between Egypt and the US) will retain a much clearer sense of their distinct Egyptian national identities, a clearer commitment to Egyptian national and regional prosperity in a changing international environment.[125] Furthermore, Egyptian corporate leaders (like their German and Japanese counterparts), seem to have a much more realistic sense of the capacity of the rest of the world to adopt to their international behavioural norms of their homeland "Egypt", the mother of all civilisations.[126]

This article urges US negotiations in the proposed FTA agreement with Egypt not to raise the issues of lack of transparency, bribery and corruption in Egypt or to advance Robert Rubin's (US Secretary of the Treasury) theme that:[127]

> Corruption in international business transactions distorts trade and services and the flow of capital, has serious corrosive effects on sustainable economic development, and undermines the creation and functioning of democratic institutions. The U.S. is strongly committed to combating international corruption. We are pressing the Multilateral Development Banks to adopt improved and uniform procurement standards, and all international financial institutions to promote good governance in their respective areas of competence. Within the OECD, we are also working with the State and Justice Departments to fulfil the Denver G-7 Summit mandate to negotiate an international convention to criminalize the bribing of foreign officials.

This will be counter productive. Egypt already has mechanisms to curb corruption as a part of the security measures built into the system since the Nasser administration, and which still exist under the Mubarak administration. Officials of the Egyptian General Authority for Investment and Free Zones (GAFI), responsible for approving FDI in Egypt, and employees of the customs department, are under the watch of several security agencies operating simultaneously to check and balance each other, i.e., the Ministry of Interior (Sector of Economic Security), the Agency of Administrative Control, the Illicit Gains Office, and the Egyptian Intelligence Service (Sector of Economic Security).

Hopefully, the dividends of the FTA between Egypt and the US will promote economic development and provide political stability to the Government of President Hosni Mubarak. This in turn will strengthen peace with Israel. Furthermore, raising the standard of living in Egypt will lend to Egyptian officials less vulnerability to bribes, and/or corrupt practices.

[123] See Doremus, Keller, Pauly and Reich, *supra*, note 116, at 142.
[124] *Id.*, at 143.
[125] *Id.*
[126] See Doremus, Keller, Pauly and Reich, *supra*, note 116, at 143.
[127] *National Export Strategy Report* of the TPCC, "Transnational Bribery" (1997), 25.

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