

# EGYPT'S PROCUREMENT RÉGIME AND BUILDING AN EXPORT ORIENTED ECONOMY

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## INTRODUCTION

Located at the crossroads between the Middle East and Africa, Egypt has acted throughout history as a major link between markets. With 66.4 million people, Egypt is the largest market in the Arab world.<sup>1</sup> The 2001 nominal Gross Domestic Product (GDP) was about \$97.4 billion and the real GDP growth rate is about six per cent. The Egyptian workforce is the most skilled and educated in the Arab world and on the African continent.<sup>2</sup> They constitute more than 18 million men and women, which accounts for a quarter of the total Arab workforce.<sup>3</sup> According to the latest World Economic Forum's World Competitiveness Report, Egypt ranks twenty-eighth out of 54 countries in the "growth rate" index. It is ahead of Sweden, India, Spain, Mexico, Portugal, France, Germany, Belgium, Israel, Poland, Turkey, South Africa, Argentina, Greece, Brazil, Italy and Russia.<sup>4</sup>

Egypt's public procurement régime, however, has had an adverse impact on the country's development and economic growth throughout its history. Lack of transparency and an efficient system of procurement cost Egypt dearly. The cost ranged from military defeat in the 1948 war against Israel (when the Egyptian army fought with defective ammunition and less competitive arms), to the inability of both former Presidents Gamal Abdul Nasser (1956–1970) and Anwar Sadat's (1970–1981), Governments to realise the economic and development goals of their respective administrations. Both administrations were not successful in importing, or developing locally, the state-of-the-art technologies necessary to satisfy local consumers and build an export oriented economy. A public procurement régime is defined in the context of the complicated realities of Egypt's development as: "the system of rules, regulations, processes and government acts of procuring, obtaining, maintaining, managing, and improving public goods, equipment and

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<sup>1</sup> Egypt and the United States, *A partnership for peace, stability and progress, economic and strategic cooperation 2* (2001).

<sup>2</sup> *Id.*, at 6.

<sup>3</sup> *Id.*, at 2.

<sup>4</sup> *Id.*, at 6.

services to serve the national development goals". Both Nasser and Sadat's legislators gave low priority to this vital area of law that is "procurement law". Furthermore, both administrations lacked an effective system of acquisition planning for the public sector. This article argues that for President Hosni Mubarak's administration to be successful in capitalising on Egypt's current strengths to build up an export oriented economy, liberal implementation of Procurement Law 89 of the 1998 Procurement Law is needed. Liberal implementation of the Procurement Law is necessary to institutionalise an effective public procurement system that meets international standards without compromising Egypt's national interests.

This article will provide insights into the dynamics of the public bidding process in Egypt to guide international law firms or global corporations which are currently engaged or may be engaged in the future in Egyptian public procurement for equipment, goods and/or services.

To realise the aforementioned research goals, a pragmatic review of the role of the main players of the public procurement process in Egypt is necessary. Furthermore, how these players influence and affect each other and how their interplay affects the outcome of the public procurement process will be presented and critically analysed. Finally, the article will develop some recommendations for Egyptian law makers and international law firms engaged in Egyptian business transactions.

#### PLAYERS IN THE PUBLIC PROCUREMENT PROCESS IN EGYPT: AN ANALYTICAL FRAMEWORK

Egypt is the nation that introduced bureaucracy to human society.<sup>5</sup> Yet, the same invention has been the major hindrance to Egypt's development in the last 50 years. Richard Adams attributes this phenomenon to the Egyptian Government's central policy of "control" instead of "management".<sup>6</sup> It is a political technique used by the British since their occupation in 1882 to their departure in 1954 to maintain law and order and it was followed by the Egyptian Government after the British departure, despite the sincere efforts made to upgrade the capability of the bureaucracy through training programs sponsored by local and international donors. The policy of control instead of management is no longer working at the time of transforming Egypt into a modern state integrated into the global economy.

The significance of bureaucracies in Egypt has long been apparent and it has a negative spill over effect on any attempts to create a successful legal framework conducive to attracting foreign investment and the development of a successful public procurement régime. Ibrahim Shihata portrays the elements of a successful légal framework, to include:

<sup>5</sup> Mohamed Heikal, *Egypt's development challenges*, Al-Aharam 1-3 (1964).

<sup>6</sup> Ibraheim M Oweiss, *et al.*, *The Political Economy of Contemporary Egypt* 125 (1990).

- (1) Legal binding rules;
- (2) Appropriate processes, through which such rules are made and enforced in practice (or deviated from when necessary);
- (3) Well-functioning public institutions, which are staffed by trained individuals, are transparent and accountable to citizens, are bound by and adhered to by regulations, such regulations to be applied without arbitrariness or corruption.<sup>7</sup>

An efficient and fair judicial system is likely to provide the institution which acts as the final arbiter of a functioning legal system.<sup>8</sup>

The aforementioned elements of a successful legal framework may seem not to exist in Egypt generally and as applied to the public procurement régime particularly. This article argues that the effectiveness of Government procurement management is one of the ongoing challenges to all governments all over the world from the developed and the developing world and not only Egypt alone. The literature which addressed public purchasing is still in its infancy. Stanley N Sherman argues that "while numerous texts have been written on the subject of purchasing, most of them are cast in the organizational setting of the industrial firm in the private sector and are not applicable to public organizations".<sup>9</sup>

For instance, procurement in the private industry, in most economies, usually takes place with the two parties, the supplier and the buyer, as equal legal entities, even if they differ in size and financial strength. By contrast, if the buyer is a public entity, it has more power (derived from sovereignty as agent of the nation state), than the supplier. The buyer is a party, but has legitimate power to change its mind (and reverse its decision at the last minute).<sup>10</sup>

In terms of accountability, procurement between private industries follows general standards, such as compliance with law and precedent and ethical conventions. By contrast, when one party is a public organisation, there is public oversight of funds, compliance with political standards and required legal procedures with public disclosure of pertinent information.<sup>11</sup>

In terms of process complexity, the argument runs, procurement between buyer and supplier from the private sector is relatively simple, practical and follows individual corporate procedures.<sup>12</sup> By contrast, when one party is a public organisation, the processes are more complicated.<sup>13</sup> Because detailed procedural guidance is dictated by public oversight, there is concern for "equity" in public decisions and social policy issues.<sup>14</sup> In terms of operational objectives, procurement between private industries can be aimed at supporting the production plan of

<sup>7</sup> Ibrahim F Shihata, *Contemporary Reform, Essays on legal, judicial and other institutional reforms, supported by the World Bank* 3 (1997).

<sup>8</sup> See Shihata, *supra*, n. 7, at 3.

<sup>9</sup> Stanley N Sherman, *Government Procurement Management* 53 (1985).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Sherman, *supra*, n. 9, at 6.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

the purchasing party, or for non-product purchases or for commercial resale.<sup>15</sup> By contrast, when one party is a public organisation, the operational objectives can be for the consumption or use by the government agency or for the public current or future use and benefit.<sup>16</sup>

Finally, in that respect (comparison of private and public procurement) is the end objective. Procurement between two private industries are tested against profit and loss standards and enhancing the competitive posture of the purchasing party. By contrast, when the Government is a party, the primacy of objectives are unclear.<sup>17</sup> In all the aforementioned issues, all bureaucracies of the developed and developing countries are the same. The Egyptian bureaucracy is no exception. Further, studying the following organisational components of the Egyptian bureaucracy (pertinent to the procurement process) may enhance one's ability to deal with it more successfully.

### **Egyptian banks' bureaucracy**

Article 70 of Law 89 of 1998, which replaces Law 9 of 1983, concerning guarantees of tenders and bids, did not come up with a new mechanism to prevent some bureaucratic abuses by the Egyptian Government owned and operated banks.<sup>18</sup> Under the Egyptian Government Tender Law of 1998 (Article 70), there are three types of bank guarantees generally required in Egyptian Government contracts:

- (1) The bid (or provisional) guarantee;
- (2) The performance (or final guarantee); and
- (3) The advance payment guarantee.<sup>19</sup>

Each of these guarantees must be unconditional, payable on first demand, and issued (or confirmed) by a qualified bank in Egypt. Sometimes the unreasonable demand by the banks to extend the duration of the guarantee or else pay it, causes harm to international suppliers, particularly because the MIS system of government banks are not linked (in some cases) to the global financial network.<sup>20</sup>

When at least one of the parties of an international contract is working in a foreign language, problems over contract interpretation are to be expected.<sup>21</sup> The results are inevitable delays, protracted disputes, and additional costs to international suppliers. According to Stovall, foreign contractors in Egypt are being denied timely provisional or final acceptance of their work, which, in turn, delays the start of their warranty period and, eventually, the release of retention

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Law 89 on Tenders and Bids (1998) Egypt.

<sup>19</sup> See *id.*, at 47.

<sup>20</sup> Howard L Stovall, "Some current legal issues concerning trade and investment in Egypt" [1990]

ALQ 124.

<sup>21</sup> *Id.*

monies and guarantees.<sup>22</sup> The aforementioned testimony of the Associated General Contractors, before the US House of Representatives (the Committee on Foreign Operation of April 1987), seems to be politically motivated by the anti-Egyptian lobbyists in the US Congress, who are opposing the magnitude of US aid to Egypt.

This article argues that the problems over contract interpretation occur not only in Egypt or developing countries, but also in the USA, where the two parties speak the same language. US law firms are usually involved in large procurement contracts, acting on behalf of suppliers. Their lawyers spend long (and expensive) periods of time clearing up ambiguities of some of the provisions which are automatically recycled and used in many contracts, and which have lost their meaning due to the change of time.

The problem which does exist in Egypt, however, is that the area of procurement is not an interesting specialisation to many Egyptian law firms or skilful politicians inside the Egyptian Parliament. Working on building law practices based on generating business from public procurement is a self-defeating proposition in Egypt. Particularly, lawyers have to deal with low level career bureaucrats in the Ministry of Finance and/or the Ministry of Public Works, which may lead to ruining their reputation (and/or disbarring them from the profession of law by the powerful Egyptian Bar Association). Likewise, an ambitious member of the Egyptian Parliament will not serve in such a committee dealing with procurement law, which will not help his/her political career.

The advice which Stovall gives to foreign companies in bidding or negotiating for a specific government contract in Egypt is that 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), with the help of a US trained Egyptian lawyer. A US company, with the help of a US trained Egyptian lawyer, can bridge the gaps which still exist between the US common law and Egyptian civil law approaches to the law of contracts. This article argues that even though the jurisprudence of both systems' acknowledge the internationalised standard contracts and *Lex Mercatoria*,<sup>23</sup> differences of cultural proximities, language, and distance may result in an international contractual relationship being more complex than a purely domestic contract.

In international contracts, Egyptians and any foreign nationals have a greater degree of insecurity when they get involved in a contract. The Egyptian public purchaser will pay hard currency for his purchases (and has to arrange for this in the international currency market), and the foreign supplier is selling expensive pieces of equipment and/or tied up with guarantees and performance bonds. In this kind of relationship, tensions are likely to build up with any kind of unforeseen circumstance, or if *force majeure* occurs unexpectedly, which may cause delay of delivery. Furthermore, international contracts tend to be relational due to the fact

<sup>22</sup> See Stovall, *supra*, n. 20, at 131.

<sup>23</sup> American Chamber of Commerce in Egypt, Highlights on privatization in Egypt. [Http://www.am\\_cham.org/summit/invest/story\\_11.htm](http://www.am_cham.org/summit/invest/story_11.htm) July 1999. Also see Naim Attia, "Egyptian Law 9 and US AID Regulations Related to Tenders and Bids" (1986) 1 ALQ 177.

of the larger amount of money involved and the duration. The more the two parties (or their agents) know each other, the more they develop confidence and trust. But this relationship usually ends with the completion of the contract, and bidding for new contracts is a whole new game, particularly if the general rule of the procurement process is by publicised competitive general tenders (as per Article 1 of the Egyptian Procurement Law 89 of 1998).

Finally, the difference between domestic and international contracts in the Egypt procurement régime is that the international contractual relationship is regarded differently than the domestic relationship by lawmakers and judges with respect to selection of the governing law.<sup>24</sup> Both Law 9 of 1983 and its successive Law 89 of 1998, "Procurement Law", affirmed that Egyptian law is to be applied to contracts concluded by Egyptian Government ministries, administrations, local government units, and general organisations, even if these contracts of purchases shall be financed with loans or grants submitted by international donors.<sup>25</sup> This is one area of contention between Egyptian and US negotiations working on the proposed Free Trade Agreement (FTA) between the USA and Egypt. The Executive Regulations of the Procurement Law gives the Minister of Finance the authority to exempt foreign financed contracts from provisions of the Law in certain kinds of contracts.<sup>26</sup> The aforementioned exemptions are, in most cases, directed by the political leadership in the course of the ups and downs of the complicated realities of the Egyptian economic and social development process.

### **Egypt's customs bureaucracy**

The Government of Egypt, like all governments around the world, purchases products as inputs into the production of public goods and services – education, defence, utilities, infrastructure, local government and the public sector organisations (which include public utilities and public sector corporations). These purchases of goods and services account for more than 30 per cent of the Egyptian Gross Domestic Product (GDP) or \$84 billion (1998 est.).<sup>27</sup> Most of these purchases are hardware and equipment for infrastructure projects and to update the technological capabilities of the public sector corporations targeted for privatisation. Despite the fact that most of this equipment is not taxed, it is required to be inspected by customs and each ministry has a stake in this, is involved, and represented in this lengthy process, such as the Ministry of Industry, the Ministry of Public Works, the Ministry of Agriculture and Land Reclamation and the Ministry of Health, etc. It is important to point out that a large portion of Egyptian customs officers' income is derived from an incentive compensation program based on how much one is generating for the Egyptian

<sup>24</sup> Bernard M Hackman, *et al.*, *Law and policy in public purchasing, the WTO Agreement on Government Procurement 1* (1997).

<sup>25</sup> Egypt, 5 [Http://www/CIA.gov/CIA/publications/fact book/eg. html](http://www/CIA.gov/CIA/publications/fact%20book/eg.html).

<sup>26</sup> See Stovall, *supra*, n. 20, at 127.

<sup>27</sup> See Oweiss, *supra*, n. 6, at 130.

treasury. The more the custom officer brings to the treasury, the more he/she (and their supervisors) will receive in terms of financial rewards. Hence, the majority of them work hard to find ways and means to raise the country's revenues, thus irritating and frustrating international suppliers and causing unnecessary delay. What may add to this delay is the work which needs to be done by the Central Auditing Agency and members of the National Security Organization (NSO) who are actually representing the "control mechanism" in the Egyptian system as will be explained in the next section of the article.

### **The Egyptian National Security Organization (NSO)**

This article argues that the security measures built into the bureaucratic structure of the Egyptian Government system since the Nasser administration is responsible for some of the delay and procrastination observed by international suppliers of goods and equipment to Egypt and it has cost them dearly.<sup>28</sup> Customs officials and representatives of all the ministries involved in the inspection of any imports for Government use are under the control of the National Security Organization (NSO), which is comprised 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, whose members are recruited from the Army and the police, the Illicit Gains Office of the Ministry of Justice, and the Egyptian Intelligence Service (Sector of Economic Security). In this environment, it is difficult for any customs official to make a quick decision for a ministry representative to act, based on only his own judgment and in the absence of a standardised estimate. Another political dimension that should be mentioned here regarding foreign suppliers of public goods to Egypt, is that their supplies or technologies, whether in the form of equipment, public works, or consulting services, are not only evaluated in terms of cost and benefits to the Egyptian economic and social development programs, but are also viewed from other angles pertinent to the country's national security and the dynamic of the Arab-Israeli conflict and the terrorism threat posed by Muslim fundamentalists' groups financed by terrorist states.

This article argues that the above-mentioned circumstances of institutionalising security measures in the Egyptian Government system of procurement, which may delay the international procurement process, is not peculiar to Egypt alone. After the September 11, 2001 attack on the World Trade Center in New York and the Pentagon in Washington, the US Government, and all governments from the developed and developing world, adopted security measures (similar to the Egyptian system) aimed at securing their mainland and deterring international terrorist attacks. Many of these new measures are already contributing to the delay of the international procurement process around the globe. The consequences of the tragic events of September 11, may prove that Egypt's security measures of the

<sup>28</sup> The Arab World Online, Egyptian Investment Climate Statement 1. [Http://www.awo.net/business/invest/egy/.asp](http://www.awo.net/business/invest/egy/.asp).

1960s under the Nasser régime, which continue to date, can be justified in the context of the Arab-Israeli conflict and the continuous threat of Muslim fundamentalist organisations in Egypt.

This article argues that selecting a good agent in Egypt (possibly a former member of the NSO who entered private business after retirement), can expedite the process of procurement, particularly for obtaining security clearance for some high tech equipment, such as telecommunications and computers. Many former officers of the Egyptian Ministry of Interior (where one is required to have a law degree before commission as an officer), after retirement have their own reputable private law practices and join the Egyptian Bar Association. They can represent foreign suppliers very well by virtue of their access to members of the NSO. They can guarantee faster processing of procurement, but without jeopardising the Egyptian national interest and security. Some patience on the part of international suppliers is needed to enter the lucrative Egyptian market.

### **Egyptian state owned enterprises bureaucracy**

The Egyptian Procurement Law gives national bidders (public sector corporations) a 15 per cent price advantage.<sup>29</sup> The tender process is still criticised for its lack of transparency, poor enforcement of rules, and corruption,<sup>30</sup> despite the passage of the new Procurement Law of 1998, which rings with the words of fairness, non-discrimination, equality, open opportunities (Article 2)<sup>31</sup> and transparency (Articles 10, 11, 12 and 13).<sup>32</sup> What may constitute a hindrance towards creating a framework for dynamic competitiveness in the Egyptian economy, is that Egypt is delaying joining the WTO Government Procurement Agreement (GPA).<sup>33</sup> The prevailing explanation of this delay is that the Egyptian Government is buying time for the Egyptian state owned enterprises and private corporations which constitute legal monopolies, such as the Osman Ahmed Osman Conglomerate, which is investing in almost every sector of the economy, including manufacturing, agriculture, services (insurance, health care), tourism, fishing and retail. It is difficult for any international supplier of goods and services to compete with the Osman Ahmed Osman Conglomerate. This is particularly so because the Osman Ahmed Osman's name is affiliated with Egypt's big achievements, such as the High Dam at Aswan, and supplying the Armed Forces during the successful 1973 war against Israel.

This issue is addressed by the US negotiators for the Free Trade Agreement (FTA) with Egypt. But one may argue, to defend the Egyptian position, that an authorised monopoly sometimes has its own benefits in a small economy such as Egypt's, or even a large economy, such as the USA. AT&T was granted a legal

<sup>29</sup> See the Arab World Online, *supra*, n. 28, at 13.

<sup>30</sup> See Law 89 on Tenders and Bids, *supra*, n. 18, at 3.

<sup>31</sup> *Id.*, at 6.

<sup>32</sup> Ahmed Galal, *et al.*, *Building Bridges, An Egypt-US Free Trade Agreement* 35 (1998).

<sup>33</sup> *Id.*, at 75.



monopoly by Congress in the early twentieth century, which helped to set standards for the long distance industry.

### **The courts bureaucracy in Egypt/the Council of State**

Egyptian courts may not seem like friendly fora to business interests, according to Nathan Brown, due to the influence of the socialist ideology and policies for almost 13 years under former President Nasser. In the 1970s, Nathan Brown argues that, the Egyptian Government changed its attitude towards business, because of a larger effort to attract foreign investment to the country.<sup>34</sup> Political bargaining between Western countries (particularly the United States) and Egypt played a role in this shift.<sup>35</sup> Investment law in Egypt was changed to encourage arbitration.<sup>36</sup> Bilateral investment treaties between Egypt and the USA and other Western countries and Far Eastern countries have been negotiated with the same effort.<sup>37</sup> Furthermore, external aid agencies, such as the World Bank Group and the US AID (Agency for International Development) and the EU, have sometimes threatened to withhold grants or loans unless arbitration clauses are included in funded contracts.<sup>38</sup>

The aforementioned circumstances do not mean that the Egyptian judiciary is excluded as a player in any civil or criminal case involving foreign suppliers to the Government, according to Law 89 of 1998 (the Procurement Law). Any problem arising from violation of Egyptian procurement laws by the Egyptian Government organisations or foreign suppliers is under the jurisdiction of the Council of State which is an additional judicial forum that can be used to uphold the law.<sup>39</sup> The Council of State, established in 1946, is at the peak of a hierarchy of administrative courts that rule on administrative disputes and discipline cases within the Government bureaucracy (including public procurement from local or international suppliers of equipment, goods, and works).<sup>40</sup> As an independent judicial body, it also offers legal opinions on points of law, at the request of the legislative or executive branches of the Egyptian Government.<sup>41</sup> The Egyptian Council of State oversees the validity of the public procurement decisions made by the various committees established to check and balance each other's work under Articles 15 through to 32 of the Procurement Law.<sup>42</sup>

Judge Naim Attia, the Egyptian Legal Advisor of the US AID in Cairo, describes, in the following paragraphs, the powers of the Egyptian Council of State pertinent to the procurement of public equipment, goods and works and the

<sup>34</sup> Nathan J Brown, "The Rule of Law in the Arab World", *Courts in Egypt and the Gulf* 223 (1997).

<sup>35</sup> *Id.*, at 232.

<sup>36</sup> *Id.*, at 94.

<sup>37</sup> *Id.*, at 95.

<sup>38</sup> *Id.*, at 96.

<sup>39</sup> Gabriel A Almond, *et al.*, *Comparative Politics Today* 623 (1996).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Law 89 on Tenders and Bids, *supra*, n. 18, at 7-13.

dynamics of this process. He states that: "... according to the Council of State law, no government organization can conclude, approve or permit any contract, conciliation or arbitration decision, or carry out any arbitration's order concerning an issue exceeding in value five thousand pounds without seeking advice from the Council of State".<sup>43</sup>

Furthermore, Article 61 of Law 47 of 1972 of the Egyptian Council of State required that each head of an agency should seek advice from the Council of State when dealing with the following issues:

- A. A concession for exploitation of the country's natural resources or public services.
- B. Procurement and public works contracts and all contracts raising pecuniary obligations exceeding in value fifty thousand pounds on the State or any Public Judicial Person.
- C. Authorization for establishment of companies requiring a presidential decree.
- D. Other issues in which a counsellor shall give an opinion to the contrary of a precedent opinion of any department or committee.<sup>44</sup>

In describing the relationship between the Egyptian Council of State and all Government organisations, Judge Attia argued that:

... failure to acquire a Council of State review prior to implementation of the contract does not result in the contract (procurement contract) being void or voidable, but it does subject the Government official who signed the contract to possible administrative censure or even criminal sanctions should the Central Auditing Agency subsequently object to the terms of the procurement contract.<sup>45</sup>

In order to prevent delay in procurement contract execution which would result from seeking prior approval of the Council of State, several government agencies have recently proposed that a clause should be inserted in procurement contracts that would provide that the parties agree in advance that the Egyptian Council of State may review and modify the terms of the contract after execution.<sup>46</sup> This precautionary approach of Egyptian bureaucrats is frustrating international suppliers, particularly from the USA. Hence, the US Agency for International Development (AID) in Cairo attempted to modify the aforementioned proposed contract clause to give AID a way to help US business. Ms Barrington, the US AID legal advisor, suggested: "that AID should reserve the right to review any modifications introduced by the Council of State and if AID cannot accept those modifications, the contract could be terminated for the convenience of the Egyptian Government".<sup>47</sup>

Of course, this approach antagonised the Egyptian authorities which perceived it as an attempt to limit Egypt sovereignty over its territories. With all this debate going on, US suppliers are frustrated and losing money for every day's delay. One area of contention between Egypt and the US AID is that the new Procurement

<sup>43</sup> See Attia, *supra*, n. 23, at 183.

<sup>44</sup> *Id.*

<sup>45</sup> See Attia, *supra*, n. 23, at 189.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Law of 1998 is still requiring that all procurement contracts shall be interpreted in accordance with the law of the Arab Republic of Egypt. Another area of contention between the US AID and Egypt is that the Egyptian Council of State accepts compulsory ICJ jurisdiction, with reservations, which is leading to more delays for US suppliers in some cases.<sup>48</sup>

#### THE IMPACT OF THE NEW INVESTMENT LAWS ON LIBERALISING THE PROCUREMENT PROCESS

Before 1974, Egypt had one of the most highly regulated economies in the developing countries. Since 1974, the hallmark of the Egyptian business legal system has been changed in portraying this change. Andrew Metcalf states:

1974 marked the launch of Egyptian President Sadat's Open Door Policy, a policy designed to dismantle economic structure constructed under President Nasser. More specifically, the Open Door Policy sought to encourage foreign investment in Egypt and foster the growth of Egypt's private sector. Progress since then has been slow, but unmistakable. The numerous laws enacted in Egypt to encourage growth – including Investment Law 43 of 1974, Companies Law 159 of 1981, the Unified Tax Law 157 of 1981 (amended in 1993), New Investment Law 230 of 1989, and the Capital Markets Law 95 of 1992 – testify to the Egyptian Government's steady march toward reform. These Laws have provided a variety of incentives for investment in Egypt, including, among other things, protection from expropriation, tax holidays, and the establishment of free trade zones. Egypt's Civil and Commercial Codes and other business laws have formed a fundamental foundation for a modern economic system in Egypt. One of the more important laws in this regard is Arbitration Law 27 of 1994. This Law strengthened the use of arbitration in Egypt, permitting parties to select the rules and law that will apply to their arbitration. Thus, foreign investors are permitted to arbitrate disputes under the rules of the International Chamber of Commerce, the International Center for the Settlement of Investment Disputes, or other recognized international bodies. Furthermore, the Arbitration Law established a clear, effective procedure by which arbitral awards may be enforced in Egypt. The efforts launched over two decades ago have begun to bear fruit. Privatization of public sector companies has accelerated, with the Government announcing recently that a privatized company's land may be sold along with the privatized enterprise. The trading volume of the Egyptian Capital Market has increased. The Egyptian Government continues to speak with its European Union counterparts regarding future trade, while talk of an Arab Free Trade Zone has recently circulated in Cairo and elsewhere. Egypt must now face the challenges associated with integrating its economy into the global trading system, a step to which Egypt committed in agreeing to the results of the GATT's Uruguay Round. Integration should cause significant changes in Egypt's current customs and tariff structure, as Egypt's past trade practices have been significantly protectionist. In addition, the competition spurred by integration should produce other legal changes as well, such as with the country's intellectual property régime and its Labor Law 137 of 1981. These changes will no doubt multiply as Egyptian economic actors gain more experience with free market operations and as the deadline for full

<sup>48</sup> See American Chamber of Commerce in Egypt, Highlights on Privatization in Egypt. [Http://www.amcham.org/summit/invest/story\\_11.htm](http://www.amcham.org/summit/invest/story_11.htm) July 1999.

compliance under the GATT draws closer. With low inflation, ample foreign reserves, favorable geographic location, and free repatriation of earnings abroad, Egypt offers many advantages for investors. There still exist some legal pitfalls that confront Egyptian investors, but with proper planning, these may be avoided. Legally speaking, Egypt's ongoing reform efforts have placed dynamic growth and future prosperity within the country's grasp.<sup>49</sup>

The aforementioned reform process which has been described as one of the most comprehensive economic reform programs undertaken by any Arab or African country in recent decades, included trade and financial liberalisation, taxation reform, deregulation and public sector restructuring and privatisation.<sup>50</sup> Many of these changes contributed either directly or indirectly to the liberalisation of the procurement process.<sup>51</sup>

Of most direct relevance for the liberalisation of procurement was public sector restructuring and privatisation under the auspices and recommendations of the World Bank, the IMF and the US AID. Egypt also maintains good ties with members of the EU which allows its International Development Agencies to provide input in this process of change.

This article argues that the success of Egypt's economic achievements is recognised around the world and the following indicators should encourage suppliers of equipment, goods and services to consider the Egyptian market as a business opportunity:

*According to Commerce Secretary William Daley:* "It pleases me greatly that, like last month's historic peace signing [Sharm El Sheik], this occurred also in Egypt, a country that is truly a leader, not only in the regional peace process, but also in world business". [Cairo, Egypt, 14 October 1999]

*According to US Ambassador Daniel Kurtzer:* "The United States has committed to working with Egypt as a partner to build Egypt's capacity to expand in the world trade sector, especially in the services sector, just as we have stood with Egypt over the past twenty-five years to help grow the Egyptian economy". [Cairo, Egypt, 21 September 1999]

*According to a White House Joint Statement with President Mubarak and Former Vice-President Gore:* "President Mubarak and Vice-President Gore met 28 March [2000] in the context of the US-Egypt Partnership for Economic Growth. The President and Vice-President noted that as the US-Egypt relationship continues to mature, our economic ties will continue to assume a higher profile. Vice-President Gore congratulated Egypt on its record of consistent growth with low inflation and low budget deficits, and noted that American investment has almost doubled over the past five years". [Washington, DC, 28 March 2000]

<sup>49</sup> See American Chamber of Commerce in Egypt, Highlights on Privatization in Egypt, *supra*, n. 48, at 11.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

*FY 2000 Egypt Country Commercial Guide*: "The Government is working to translate macroeconomic stabilization into private sector-led, export-oriented sustainable GDP growth rate of 7–8%. It is a critical goal in a country with 1.9% annual population growth, an annual 3.2% increase in the labor force, and significant unemployment. The flagship effort of this process is Egypt's privatization program. Through this program, the Government seeks to reduce the size of the civil service, expand the share of private sector activity in the market, and boost Egypt's investment and savings rates. The program will include plans for the privatization of one of the four public sector banks as well as one of the three public sector insurance companies". [US Commercial Service, Department of Commerce, 1999]

*According to US Trade Representative Charlene Barshefsky*: "Entering into a Trade and Investment Framework Agreement (TIFA) with Egypt marked the first step toward creating freer trade between our countries, and established the basis for stronger economic ties to bolster our joint efforts at furthering peace in the region. Today's inaugural TIFA Council meeting builds on this foundation and clearly demonstrates the importance that both the US and Egypt attach to our bilateral economic relationship. Our continued dialogue on trade and investment issues reinforces our belief that this relationship has enormous potential for growth". [Washington, DC, 18 November 1999]<sup>52</sup>

Furthermore, critical review of the new Procurement Law 89 of 1998, its Executive Regulations 1307 of 1998, and the Egyptian Parliament deliberations, prior to its enactment indicates the following positive tendencies:

- (1) Egyptian policymakers and legislators are aware of the fact that sustainable economic development of Egypt requires policies, laws, regulations, and a continual process of improvement of the implementation of a procurement régime to foster international linkages with global commercial suppliers.<sup>53</sup> This will lead to procuring the best available technologies, technical know-how, and goods necessary for creating efficiency and productivity, and differentiation of the Egyptian products. The three aforementioned ingredients are necessary for developing an export oriented economy;
- (2) The Egyptian Procurement Law is inspired by the UNCITRAL Model Law on Procurement of Goods and Construction (adopted in Vienna in 1993), the World Bank's Model Laws of Procurement of Supply and Installation of Plant and Equipment, published in November 1997, Procurement of Works, published in May 1993, and Procurement of Goods, published in January 1995,<sup>54</sup> and the WTO Agreement on Government Procurement which Egypt had not yet signed.<sup>55</sup>

<sup>52</sup> See Egypt and the United States, *supra*, n. 1, at 5–6.

<sup>53</sup> See American Chamber of Commerce in Egypt, *supra*, n. 48, at 11.

<sup>54</sup> See Stovall, *supra*, n. 20, at 131–132.

<sup>55</sup> *Id.*

This apparent influence of shaping the Egyptian procurement régime to meet acceptable international standards, should give positive signals to foreign investors and commercial suppliers of the presence of a mechanism which will assure fairness, impartiality, transparency, efficiency and accountability in the Egyptian procurement régime;

- (3) The Egyptian Procurement Law has penalised corrupt practices in the form of fraud and bribery. Article 29 states that: "The contracting agency may declare the contract null and void and retain the final deposit if (a) the contractor has used fraud or manipulation in dealing with the contracting agency, or (b) the contractor has been involved itself or through a third party, directly or indirectly, in bribing an official of a department governed by this law, or the contractor is bankrupt or insolvent. In the event of fraud, manipulation or bribery, the contractors shall be removed from the register of contractors and suppliers and may not be re-entered unless the charge was invalid, the party is found innocent, or the reason for removal no longer exists".<sup>56</sup>

#### CONCLUSION

This article concludes with the following reform proposals to improve the implementation of the Egyptian procurement to make it more open, responsive, accountable and action oriented.

- (1) The Egyptian procurement ought to follow the WTO Model Law of not containing a definition of government procurement.<sup>57</sup> This will make the law more inclusive of procurement of private or joint stock companies in which the Egyptian Government owns shares of less than 51 per cent. This measure can be applied to all newly privatised corporations in which the Government still owns small shares;
- (2) Local government entities should be allowed to procure their equipment, goods and works from the best source available, whether it is local or international, according to their own local assessment of all costs and benefits, to bring the best technologies available internationally to rural development projects aimed at satisfying basic needs (food, housing, education and health care).

The newly-created Ministry of International Trade can play a very significant role in searching and identifying the best international suppliers;

- (3) Partnerships between international suppliers and local Egyptian suppliers can benefit both parties. Local Egyptian commercial firms can provide support, including just in time supply support to reduce the risk of maintaining large inventory infrastructure by international commercial

<sup>56</sup> *Id.*

<sup>57</sup> See Hackman *et al.*, *supra*, n. 24, at 177.

- suppliers. On the other hand, international suppliers can help upgrade the local technologies through a local supplier development training program;
- (4) The Egyptian Government opting for a more liberal implementation of its Procurement Law should be accompanied by measures of decentralising decision making. Officials at the lower levels of authority in the Egyptian procurement bureaucracy should be allowed to make decisions for most of the relevant issues of improving the system and should have control over their implementation. Financial incentives to lower level officials should be awarded for their efforts of continuously improving and simplifying the procurement process (rather than only generating more revenues for the Egyptian treasury) to meet the expectations of potential suppliers from all over the world;
  - (5) Finally, this article argues that Egypt ought to use its leadership position in the Arab League, and the Arab Bar Association to prepare a uniform Arab procurement law, to give members of the Arab League more bargaining power *vis-à-vis* large commercial suppliers from other economics blocks, such as the EU, NAFTA, EFTA, and the Pacific Rim.