

Investing in Renewable Energies

*A guide to investment treaty protections
available to investors in the Arab Republic of
Egypt*

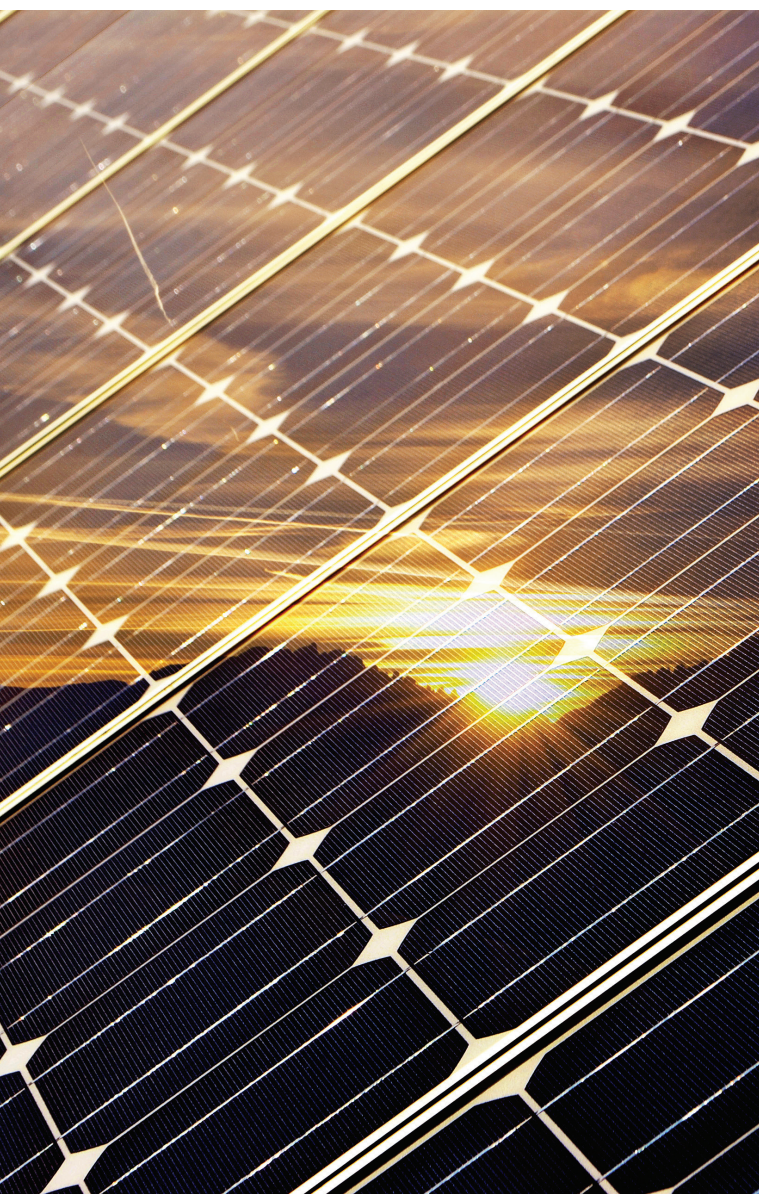


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Investing in Renewable Energies in the Arab Republic of Egypt

The Arab Republic of Egypt (“Egypt”)’s interest in renewable energies has been growing since the 1970s, when such alternative energies were first contemplated and developed. Since the formulation of a renewable energy strategy as an integral part of national energy planning in Egypt in the 1980s, renewable energies have consistently been on the Government’s agenda, for the purpose of ensuring energy security and supply, as well as contributing to environmental sustainability.



The Government is keen to attract external investment and is mindful of the need for foreign investors to protect what may be substantial investments in Egypt’s renewables strategy. Investor protection is the topic of this briefing note.

Egypt’s energy strategy

Egypt’s current energy strategy is targeted at satisfying 20% of the electric energy demand from renewable energy resources by the year 2020. The strategy is based on the diversification of energy resources. All sources of renewable energy are therefore encouraged, although wind and solar power form the current focus.

To achieve the Government’s objective of increasing the role of renewables in the domestic energy mix, the Government is encouraging private sector projects, in addition to implementing State-run initiatives, led by the New & Renewable Energy Authority (or “NREA”).

The resulting policy has involved the Egyptian Electricity Transmission Company (the “EETC”) issuing tenders internationally for projects to build, own and operate energy farms and to sell electricity on the basis of prices agreed between the EETC and the investor, as well as the application of a feed-in-tariff system.

Other incentives have also been offered by Egypt to reduce risk. These include the possibility of signing long-term power purchase agreements, the option of receiving the selling price for energy generated from renewable energy projects in foreign currency (in addition to a portion covering operation and maintenance costs in local currency), the guarantee of all financial obligations entered into by the EETC by the Central Bank of Egypt, and certain fiscal advantages or exemptions.



Investor protection

Given the above, there are compelling reasons why a renewables investor would consider new or additional investment in Egypt at this time. Accordingly, it is prudent, as with any investment, to ensure that such investment takes full advantage of the available protections provided to encourage and facilitate foreign investment.

These international investment protection instruments can reduce the political and business risk that may be associated with such investments.

This guide summarises some key forms of investment protection offered by Egypt under both international and domestic instruments.



International investment instruments

Bilateral investment treaties (“BITs”) and multilateral investment treaties (“MITs”) are international agreements between two or more States pursuant to which each State agrees to provide certain levels of protection to investments made by investors from the other State(s). Investment treaties are intended to encourage and promote foreign direct investment by entities from one State into the other State.

As detailed below, these treaties provide certain protections to qualifying investors and investments, and entitle qualifying investors to enforce those protections against the State directly.

Egypt has entered into over 100 BITs, but almost one third of these are not in force. Further, of those that are in force, almost 20 are not publicly available, which makes it difficult for potential investors to assess the quality of protection which they may provide. However, Egypt has entered into BITs that are both in force and publicly available with Albania, Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium and Luxembourg, Bosnia and Herzegovina, Bulgaria, Canada, China, Comoros, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, India, Indonesia, Italy, Japan, Jordan, Kazakhstan, Latvia,

Lebanon, Malaysia, Morocco, the Netherlands, Occupied Palestinian Territory, Oman, Poland, Portugal, Qatar, Republic of Korea, Romania, the Russian Federation, Singapore, Slovakia, Spain, Sri Lanka, Sweden, Switzerland, Syria, Thailand, Turkey, Turkmenistan, Ukraine, the United Arab Emirates (“UAE”), the United Kingdom, the United States and Vietnam.

Egypt has also entered into a number of MITs and free trade agreements. These include the Unified Agreement for the Investment of Arab Capital in the Arab States, which provides both substantive investment protections and recourse to international arbitration. However, Egypt is not a signatory of the Energy Charter Treaty (or “ECT”), perhaps the best known MIT within the renewables sphere. Egypt is an Observer to the Energy Charter Conference. Observer status can be a step towards accession of the ECT itself – as with Jordan, currently an Observer, which indicated in February 2015 that it intended to accede to the ECT. However, Observer status does not itself engage the international investment protection provisions of the ECT.

Protections under international investment instruments

Common protections provided by the investment treaties entered into by Egypt include obligations on the State “hosting” an investment (here Egypt), to:

- compensate foreign investors in the event of expropriation or nationalisation of their investment
- provide fair and equitable treatment to foreign investors
- provide full protection and security to foreign investors and their investments
- ensure that treatment of foreign investors is no less favourable than that provided to national investors
- provide “most favoured nation” treatment, whereby investors of one State are to receive treatment no less favourable than that accorded by another State to investors of any third State
- in treaties containing a so-called “umbrella clause”, to observe specific undertakings and potentially contractual commitments made to foreign investors.

Given that each investment treaty has been negotiated individually between Egypt and the other contracting State(s), the precise content of these treaties and the protections within them will vary. For example, the wording of the above protections differs between treaties, and some Egyptian BITs include express carve-outs in relation to the host State’s ability to enact certain measures undertaken by States for environmental reasons, or for purposes of public order, security, public health or morality.

Qualifying for protection under international investment instruments

The above protections are available to qualifying “investors” in relation to qualifying “investments”. These two terms are generally defined expressly, and broadly, in investment treaties entered into by Egypt.

In relation to “investments”, an investment has generally been defined as “any” or “every” kind of assets, and has been expressed to include movable and immovable property and any related property rights; various types of interests in companies such as shares, stocks, bonds, debentures; claims to money and claims under a contract having a financial value; intellectual property rights; and business concessions which are rights conferred by law or under contracts.

In relation to “investors”, under the broadest of Egypt’s investment treaties, any legal persons established in accordance with the law of the other contracting State, or natural persons with the nationality of the other contracting State, will be classed as qualifying (foreign) investors. Many of Egypt’s BITs are however less broad, and incorporate additional requirements in order for companies to qualify as a protected investor: for example, a requirement that the investor’s “real economic activities” are based in the home State.

Any entity wishing to make an investment within Egypt and rely on protections under investment instruments should check not only whether there is a relevant treaty between Egypt and its home country, but whether the proposed investment and its structure would qualify for protection given the terms of the relevant treaty. In addition, a very small number of BITs to which Egypt is a party require the host State to approve investments in order to benefit from protection thereunder.



Dispute resolution provisions

Importantly, the vast majority of Egyptian investment treaties currently in force and listed above give a foreign investor direct dispute resolution rights against the State, including international arbitration. This is an important protection in itself as it allows an investor to seek to enforce the investment-related protections provided under the applicable treaty, if attempts to resolve a dispute through negotiation fail.

Specifically, Egypt's BITs generally provide for investment treaty arbitrations to be conducted, at the choice of the investor, under a number of different arbitration rules, including the rules of the International Centre for the Settlement of Investment Disputes ("ICSID", a member of the World Bank Group).

Egypt became a Contracting State of the ICSID Convention in 1972, thereby giving it, and qualifying investors, access to the facilities provided by ICSID in the context of the resolution of investor-State disputes. ICSID contracting States agree to enforce and uphold international arbitral awards in accordance with the ICSID Convention. In addition, Egypt has been a signatory to the New York Convention on the Enforcement of Foreign Arbitral Awards since 1959.



Domestic investment laws

As at the date of writing (March 2015), Egypt has in place a national law addressing investments in certain sectors, including those made by foreign investors, namely the "Investment Incentives and Guarantees Law No. 8 of 1997" (the "1997 Law"). The 1997 Law dates from the Mubarak regime, and there are conflicting views amongst Egyptian lawyers and legal scholars regarding the status of a new investment law and how this new law does or may interact with earlier law. This uncertainty in relation to Egypt's domestic investment laws makes it all the more prudent for investors to ensure that they and their investment qualify for protection under one or more international treaties.

Key provisions of the 1997 Law include: a guarantee against nationalisation, confiscation, sequestration and expropriation; freedom from administrative attachment; the absence of intervention by administrative authorities in pricing and profit determination; the right to own land; the right to maintain foreign currency bank accounts; and the right to repatriate capital.

The express scope of application of the 1997 Law is limited to the activity fields listed in its Article 1, which does not include energy as a general area of activity. It is possible that renewables projects may fall within other named categories (for example, the "reclamation and cultivation of barren or desert land" or "infrastructure including... electricity"), bringing these into the scope of the law.

The 1997 Law does not itself stipulate a dispute resolution mechanism for investor-State disputes arising in connection with it. However, the law provides for the resolution of disputes "in the manner agreed upon with the investor", and further states that "the parties concerned may also agree to settle such disputes within the framework of the agreements in force between the Arab Republic of Egypt and the country of the investor", within the framework of the ICSID Convention, according to the local Egyptian arbitration law (Law No. 27/1994), or through arbitration before the Cairo Regional Centre for International Commercial Arbitration.



How can Eversheds help you?

Eversheds has one of the world's leading investment arbitration practices, which draws significantly on our long-standing and pre-eminent public international law expertise.

Our specialists can advise you as to whether your investment(s) or proposed investment(s) in Egypt would qualify for protection under an international investment treaty, and if not, what can be done to rectify this. In appropriate cases, we can also provide a detailed analysis as to which jurisdiction or jurisdictions would provide the most effective forms of investment protection, so as to allow you to consider this issue as part of your overall business and investment-structuring strategy. If an investor wishes to take advantage of the protections of investment treaties, it is critical to consider these issues before a dispute develops in order to ensure that relevant protections are deemed to apply.

Eversheds is one of the few law firms with in-depth experience of advising both investors and host States, and we are therefore sensitive to the concerns that may arise from both perspectives. We regularly advise on structuring investments to maximise BIT protection, but also advise States on the negotiation and drafting of investment treaties; and act for both investors and States at all stages of investment treaty disputes. This dual perspective allows us to provide you with balanced and nuanced advice, allowing you to maximise the investment protections available, but also assess any applicable investment risk accurately.

In 2015, Global Arbitration Review ranked us in the world's top 15 arbitration practices worldwide. A testimonial in the same review praised us as "one of the strongest international arbitration groups of the moment". Our team is regularly listed by Chambers and Legal 500 as a top-tier practice for public international law.

Our renewables practice spans across the spectrum of clean energy technologies, but our primary focus is currently on solar and wind projects. We have specific and extensive experience of energy sector disputes, acting regularly in complex international commercial and investment arbitrations relating to the energy sector. We work closely with our market-leading Clean Energy and Sustainability team to provide renewables clients with a service tailored to the needs and complexities of the sector and their specific investment, and (where applicable) integrated into their ongoing transaction.

Contacts

If you are an investor who has invested in renewables energies in Egypt, or who is seeking to do so, and you would like to hear more about how your venture could benefit from protection and how Eversheds could help you make the connection between investment and international investment protection, please contact:



Michelle Davies

Partner

Head of Clean Energy and Sustainability

Direct: +44 292 047 7553

michelledavies@eversheds.com



Will Thomas

Partner

Head of International Arbitration

Direct: +33 1 55 73 41 15

williamthomas@eversheds.com





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