

# Egypt liable over jailing of businessman

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Iron ore on a conveyer machine (Credit: Shutterstock/Andriy Solovyov)

A Finnish businessman has been awarded US\$115 million in a third party funded treaty claim against Egypt over the loss of his iron and steel business and his imprisonment – as the state applies to a Dutch court to set the award aside.

An UNCITRAL tribunal chaired by German academic **Rüdiger Wolfrum** issued the award in favour of Mohamed Abdel Raouf Bahgat in December – finding that Egypt had effectively ended the investor's commercial operations in the country.

Wolfrum was joined on the panel by Yale Law School professor **W Michael Reisman** and Swiss-Brazilian arbitrator **Laurent Lévy**, appointed by Bahgat and Egypt respectively. Lévy replaced the state's original appointee, Chilean **Francisco Orrego Vicuña**, following his death in 2018. The case was seated in The Hague and administered by the Permanent Court of Arbitration.

In its award, the panel rejected Egypt's further jurisdictional objections and found that the state's actions – including the three-year imprisonment of Bahgat – amounted to indirect expropriation and a breach of fair and equitable treatment.

It emerged yesterday that Egypt has filed a petition to set that award aside in the Hague District Court – where Bahgat has obtained ex parte confirmation of the award and is now pursuing enforcement.

Bahgat was represented in the arbitration by London-based public international law boutique Fietta, Canadian academic **Andrew Newcombe** and Essex Court barristers **Samuel Wordsworth QC** and **Peter**

**Webster.** Bahgat used various other counsel earlier in the case, including Saunders Law.

Egypt used Bredin Prat in Paris and its State Lawsuits Authority.

Bahgat's case was initially funded by Buttonwood Legal Capital, which went bankrupt in 2017, at which stage it was backed by Vannin Capital.

In 1997, Bahgat won a concession to mine iron ore in the Aswan region of southern Egypt and develop a related steel production facility. He set up two companies for the project, which then entered into an international consortium led by German manufacturer Mannesmann Demag.

According to Bahgat, the appointment of a new prime minister in Egypt following Hosni Mubarak's re-election as president in 1999 resulted in a change of attitude to the project. The following year, he was arrested on allegations he had failed to make a US\$30 million contractual payment to Mannesmann and was later sentenced to 15 years' hard labour.

Bahgat's conviction was overturned and he was released from prison in 2003. He was, however, subject to a travel ban for a further two years and continued to be subject to asset freezes until 2006.

Bahgat filed his UNCITRAL claim in 2011 under two successive bilateral investment treaties between Egypt and Finland, dated 1980 and 2004 respectively, as well as Egypt's Investment Law. He sought more than US\$200 million in damages for the loss of his concession and his other assets in the country.

The arbitration was bifurcated on jurisdiction, with Egypt arguing that Bahgat – who was born in Egypt and became a Finnish citizen in the 1970s – was not a Finnish investor at the time of the alleged treaty breaches.

The proceeding was suspended in 2013 while the question of Bahgat's nationality was addressed by the Finnish authorities. In 2016, Finland's Supreme Administrative Court ruled Bahgat had, as a matter of Finnish law, been a citizen of the country since 1971.

The tribunal issued a unanimous decision the following year [upholding jurisdiction](#) over Bahgat's claims, saying it did not have to rule on whether he also held Egyptian nationality (which Bahgat disputed) and that in any case the relevant treaties do not bar claims by dual nationals.

### **Further jurisdictional objections dismissed**

In its award, the tribunal dismissed Egypt's further jurisdictional objections – including arguments that its 1980 BIT with Finland only covers investments and not investors and that many of Bahgat's allegations in the arbitration concerned actions taken against him personally.

The tribunal said this argument was unconvincing as the success of investments also depends on how they are managed. Therefore measures that impact their management, such as Bahgat's imprisonment, could negatively affect the investment itself.

It further reasoned that the effectiveness of the investment protection system would be diminished if tribunals could only sanction actions taken against capital and property.

The panel ruled there was a close connection between Bahgat's arrest and other measures, which effectively ended the project.

Egypt had also argued that the 1980 BIT did not offer protection to indirect investments such as Bahgat's. The tribunal concluded, however, that wording in the BIT referring to the protection of shares and other kinds of interest in companies would not make sense if indirect investment was excluded.

### **Egypt liable for indirect expropriation**

The tribunal ruled that various actions by Egypt led to the effective end of all commercial activities of Bahgat's two companies.

Those measures included Bahgat's arrest, which deprived the companies of their CEO; the removal of documents from the companies' offices, which affected their ability to operate; freezing orders issued against the companies; and the closure of their offices and the removal of staff from the project site.

Turning to the legitimacy of those measures, the tribunal said that while it was not in a position to decide on whether Egyptian authorities had ulterior motives, Bahgat had been arrested before the period he was given to clarify the issue of the Mannesmann payment had expired. This, it said, cast a shadow over the criminal proceedings.

A state's actions must be justified and meet international standards of due process, the tribunal said – noting that the Egyptian prosecutor objected to lifting the freezing order against Bahgat and his companies even after the Finnish businessman was acquitted.

Even if the measures taken against Bahgat had a legitimate purpose, the tribunal ruled that they were not proportional and constituted an indirect expropriation.

The tribunal held Egypt liable for this expropriation under the 1980 BIT, ruling that the relevant expropriatory actions had taken place before the 2004 BIT came into force.

The reasoning on the expropriation findings under the BITs was reached by majority.

Having found Egypt liable for indirect expropriation under the 1980 BIT, the tribunal ruled that similar claims brought under Egypt's Investment Law were moot and there was no need to consider them.

### **Tribunal finds FET breaches but dismisses moral damages claim**

The tribunal also found that Egypt's actions breached the fair and equitable treatment (FET) standards of both the 1980 and 2004 treaties.

In its analysis of claims under the 1980 treaty, the panel ruled that the criminal proceedings against Bahgat and his companies were not guided by the principle of fair trial and constituted a denial of justice. A review by Egypt's Supreme State Security Court had revealed that Bahgat's arrest and detention were without cause, arbitrary and in bad faith.

The Egyptian prosecutor had also disregarded evidence that Bahgat had paid Mannesmann, said the tribunal.

Although Bahgat was released from prison in 2003, the tribunal also found Egypt had breached the FET standard of the 2004 BIT. This was based on the travel ban against him – which continued until 2005 – and the ongoing freezes against Bahgat's, his family's and his companies' bank accounts and assets, which continued until 2006.

It awarded US\$4 million in damages for the breach of the FET standard under the treaties.

However, the tribunal rejected a claim by Bahgat for US\$5 million in moral damages based on his imprisonment and other treatment by the state under the 1980 BIT.

The tribunal ruled that, while the protection of human rights has become an increasingly dominant consideration of international relations and that the events of the dispute may have warranted compensation on this basis, there was no wording in the BIT concerning moral damages.

It dismissed the claim on this basis, adding that it did not have any doubt that Bahgat's imprisonment and sentencing to forced labour were disproportionately harsh and degrading.

It awarded US\$40 million in damages for the expropriation, equating to the amount invested by Bahgat. The tribunal decided on the value of his investment by majority.

### **Success fees cause controversy in quantum calculation**

In total, the tribunal awarded Bahgat US\$44 million in damages plus compound interest from the date of expropriation in 2000, meaning the award is currently worth US\$115 million. It is accruing interest at

US\$400,000 a month.

It awarded Bahgat around US\$8.7 million in legal costs, representing 90% of the total he incurred. This included a US\$1 million success fee due to Fietta and a US\$500,000 success fee due to Saunders.

Egypt had protested the inclusion of success fees as a legal cost, but the tribunal said that such fees have become common in international disputes and not considering them as legal costs would deprive parties of obtaining adequate representation.

Bahgat has also argued that his funding fees should be included as legal costs. Egypt said the total funding costs due to Bahgat's two funders since 2011 could amount to up to €80 million, which it described as utterly irresponsible and outrageous.

The state highlighted that, in contrast, its total legal costs were less than €2 million.

The tribunal declined to consider the question of whether funding costs equate to legal costs, but used its discretion under UNCITRAL rules to decide that they should be borne in this case by Bahgat.

### **Enforcement battle begins in the Hague**

Earlier this year, Bahgat successfully applied for an exequatur order in The Hague to confirm the award and has begun taking actions to enforce the award.

Meanwhile, Egypt applied on 30 March to set the award aside in The Hague, an application which became public today through the Dutch courts.

Egypt is using De Brauw Blackstone Westbroek in the Dutch court proceedings. Bahgat has instructed Van Doorne, while retaining Fietta as coordinating counsel.

The state argues in its set-aside bid that it was denied the right to be heard in relation to its argument on Bahgat's nationality, following the decision by the Finnish courts. Egypt insists that the businessman had been a dual Finnish-Egyptian national at all relevant times and therefore cannot benefit from treaty protection.

Ahead of its 2017 decision on jurisdiction, the tribunal ruled this argument had been raised four years too late and should be excluded.

Egypt argues that the tribunal lacked jurisdiction as it wrongly assumed that the treaties provide protection for dual nationals.

The state also says that the tribunal awarded US\$4 million in damages for FET breaches when this had not been sought by Bahgat – who it claims requested declaratory relief.

### **Reactions from counsel**

**Stephen Fietta QC**, the founder of Fietta, says that almost 20 years after Bahgat's imprisonment the award provides him with "some measure of justice and reparation." He says that the political motivations behind Egypt's conduct were "laid bare before the tribunal" – in particular the language of Egyptian Supreme State Security Court's own judgment acquitting Bahgat, "could hardly have been more scathing about Egypt's prior conduct."

While it is disappointing that Egypt is continuing to contest paying, Fietta says that "Bahgat and his funders are confident that he will soon recover on his hard-earned award and that this sorry chapter in the history of Egypt will finally come to a close."

Van Doorne partner **Rogier Schellaars** says the arbitral tribunal exercised striking diligence in its award and that, given this, the set-aside bid has a "very low chance of success" and "shouldn't be in the Dutch courts."

Bredin Prat and De Brauw were contacted for comment.

*Mohamed Abdel Raouf Bahgat v Egypt*

In the UNCITRAL arbitration (PCA Case No. 2012-07)

Tribunal

- **Rüdiger Wolfrum** (Germany) (president)
- **W Michael Reisman** (US) (appointed by Bahgat)
- **Laurent Lévy\*** (Switzerland/Brazil) (appointed by Egypt)

\*replaced **Francisco Orrego Vicuña** in 2018

Counsel to Bahgat

- Fietta (from late 2016)

Partners **Stephen Fietta QC** and **Jiries Saadeh**, senior associates **Oonagh Sands** and **Laura Rees-Evans** and associates **Zsófia Young** and **Fanny Sarnel** in London

- **Samuel Wordsworth QC** and **Peter Webster** of Essex Court Chambers
- **Andrew Newcombe** of University of Victoria

Counsel to Egypt

- Bredin Prat

Partners **Tim Portwood** and **Louis Christophe Delanoy** and associates **Veronika Korom\***, **Laura Fadlallah**, **Suhaib Al Ali** and **Khrystyna Kostiuszko** in Paris

\*no longer with the firm

- Egyptian State Lawsuits Authority

Experts to Bahgat

- FTI Consulting (on quantum)

**Noel Matthews** and **Leona Josifidis** in London

Experts to Egypt

- BDO (on quantum)

**Gervase MacGregor**, **Andrew Maclay\*** and **Andrew Fingerett\*** in London

\*have since left BDO

In the Dutch proceedings

Counsel to Bahgat

- Van Doorne

Partner **Rogier Schellaars** and lawyers **Judith van der Linden** and **Fleur Potter** in Amsterdam

- Fietta (as coordinating counsel)

Partners **Stephen Fietta** and **Jiries Saadeh**, senior associates **Oonagh Sands** and **Laura Rees-Evans** and associate **Fanny Sarnel** in London

Counsel to Egypt

- De Brauw Blackstone Westbroek

Partners **Martje Verhoeven-de Vries Lentsch** and **Bommel van der Bend** and associates **Mick Gerrits**, **Mira Smulders**, **Annette Scholten** and **Varvara Aryutina** in Amsterdam

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