After 48 Years at ICSID (1972-2020): An Overview of the Status of Egypt in ICSID Arbitrations

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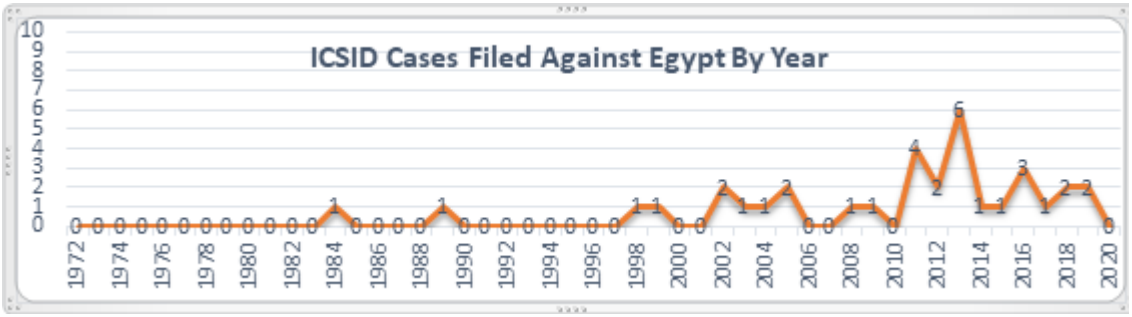
The motive for writing this blog post was conceived during my work as a member of the Technical Secretariat for the Ministerial Committee for Settlement of Investment Contracts Disputes, when I realized the need of both academics and practitioners for access to a reliable database of empirical analyses to support their work. This post is a contribution to that vast database of empirical research, which I hope can help statesmen and stateswomen, law firms, institutions, arbitrators and mediators involved in the field of investment dispute settlement achieve insightful views and determinations.

In what follows, I have tried to gather all relevant information from publicly accessible and available sources regarding most of the issues that can be analyzed empirically in relevance to all the ICSID cases involving Egypt. The results of this empirical analysis show interesting trends and I provide my personal insights on this empirical information.

This empirical analysis comes at a critical time for Egypt. In the last ten years, Egypt has encountered a steep increase in the number of disputes submitted to

the ICSID. Since the 2011 Egyptian revolution, 22 ICSID arbitrations were filed against Egypt, amounting to 65% of the total cases filed against Egypt since joining the ICSID Convention.



1. Basis of Consent for ICSID Jurisdiction and Its Impact

Egypt has concluded 98 Bilateral Investment Treaties (BITs), 63 of which (*i.e.* 65 %) refer to the ICSID Convention. As stated by UNCTAD, Egypt is considered among the top 10 signatories of BITs. According to the ICSID cases database, BITs concluded by Egypt are the most relied on basis for consent to establish ICSID jurisdiction. Interestingly, the Egyptian Investment Law was invoked in two ICSID cases based on Egyptian Investment Law which previously offered unilateral consent to ICSID jurisdiction (*i.e.* Manufacturers Hanover Trust Company v. Arab Republic of Egypt & General Authority for Investment and Free zones; and Southern Pacific Properties "Middle East" Limited v. Arab Republic of Egypt).

The number of the BITs referring to the ICSID Convention might justify why Egypt is, to date, ranked the fourth-most-frequent respondent state following Argentina (56 cases), Venezuela (49 cases) and Spain (39 cases). According to the ICSID cases database, up to March 2020, 34 cases were filed against Egypt (*i.e.* 4.6% of the total registered cases at ICSID), out of which, 26 cases were concluded by ICSID tribunals, with 15 awards rendered by ICSID tribunals.

However, the analysis identified that 32% of the cases filed were only invoking first-generation BITs, particularly, the Egypt/UK (1975) and Egypt/US (1982) BITs. The statistical analysis findings in the case of Egypt do not support the common perception that there is a correlation between the number of BITs concluded by a state and the number of investment claims it receives.

Since Egypt joined the ICSID Convention, the most frequent BIT invoked was

Egypt/US BIT with 6 cases, followed by the Egypt/UK BIT with 5 cases. The majority of investment disputes filed against Egypt, 17 cases (*i.e.* 50%), involved Western European countries. Meanwhile, 9 cases (*i.e.* 27%) involved parties from the Middle East, and 7 cases (*i.e.* 21%) involved parties from North America, including one case invoking the Egyptian Investment Law by an American investor.

Interestingly, Egypt was successfully granted 10 requests for bifurcation of jurisdictional issues by ICSID tribunals; however, it only prevailed in 3 claims for lack of jurisdiction and 2 claims were dismissed partially for lack of jurisdiction. Compared to Algeria, the most analogous example to the case of Egypt at the ICSID in the MENA region, we find that Algeria prevailed in all the awards rendered in its ICSID disputes for lack of jurisdiction (*i.e.* 3 cases were dismissed for lack of jurisdiction, 2 cases were settled and 3 cases are pending).

The impact of invoking BITs against Egypt 22 times in the aftermath of the Egyptian revolution could have tempted Egyptian policymakers to follow the example of Bolivia, Ecuador and Venezuela in disengaging from the whole ISDS system by withdrawing from the ICSID Convention or the BITs. Despite the high probability of paying large-sums to claimant investors after the flotation of the Egyptian pound in 2011, however, Egypt was committed to respect its treaty obligations. It is noteworthy to consider the IMF loan agreement concluded by Egypt in 2016 as an important factor for compelling Egypt to continue in the ISDS system, as Egypt was avoiding any potential implications jeopardizing the loan agreement such as a large investment arbitration award or an indication that Egypt is denouncing its treaty obligations.

It is evident now that BITs were negotiated without any knowledge for its future consequences and implications. At the time of concluding this large number of BITs, Egypt’s motive was to attract more investments and it was unlikely to assume that these terms and measures would be interpreted in such a way allowing investors to bring this high number of claims before the ICSID. As a consequence, Egyptian policymakers became more cautious when negotiating new BITs to avoid potential arbitrations. This was evident in the latest BIT concluded by Egypt in 2014 (Egypt/Mauritius BIT), which required referring disputes to domestic administrative procedures before resorting to investment arbitration.

It is important to emphasize that only 13, out of 22 cases filed after 2011, were directly or indirectly involved with the ramifications of the Egyptian revolution. The

remaining 9 cases were related to disputes accumulated from a decade. As noted in an earlier Kluwer Arbitration Blog post, the timing of the so called Arab Spring was tempting for some investors to the exploitation of such events by bringing meritless claims as a tactical mechanism for obtaining amicable settlements.

As of March 2020, there are 9 pending cases filed against Egypt. It is difficult to foresee whether there will be an increase in ICSID cases in the future.

2. The Breadth of Claims, Outcome of Cases and Their Impact

A. Breadth of Claims

i. Measures Challenged

In most of the disputes decided by arbitral tribunals, investors have most frequently brought claims challenging the following measures allegedly taken by Egypt:

Direct/indirect expropriation 78%,
Fair and equitable treatment 71%,
Full protection and security 64%,
Denial of justice 50%,
Most favored nation treatment 28%,
Discriminatory measures 21%,
Minimum standard of treatment 14%,
Breach of contracts 7%,
National treatment 7%, and
Umbrella clauses 7%.

The statistical analysis identified that direct and indirect expropriation was the most frequent treaty standard mentioned in Egypt's BITs (*i.e.* in 94 BITs) which correlates with the number of expropriation claims brought against Egypt. Additionally, the other treaty standards related to expropriation such as FET and full protection and security correlate with the number of expropriation claims brought against Egypt.

ii. Economic Sectors

Egypt was a respondent in various economic sectors, with the most frequent cases (*i.e.* 7 cases, 20%) filed in the oil, gas and mining sector, among which is the largest sum awarded against Egypt to date. The tourism sector closely follows, with 6 cases (*i.e.* 17%).

Noteworthy is that cases in the oil, gas and mining sector steeply increased over the past ten years with 6 cases (*i.e.* 86% of cases in this sector) filed since 2011. Notwithstanding that the oil, gas and mining sector was the most affected by investment and commercial arbitrations following the 2011 revolution. Egypt in a quite short period showed clear signs of turning into a new direction by settling some of the major energy disputes and introducing major reforms in the energy sector, thus gaining confidence of foreign investors. These steps were indispensable following the major natural gas discovery of Zohr field in the Mediterranean in 2015, paving the way for promoting Egypt as an energy hub in the Mediterranean area.

iii. Claims Amounts

The total amount of claims registered against Egypt amounted to approximately $ 22.760 billion. Interestingly, the total amount of claims registered against Egypt after 2011 amounted to $ 21.638 Billion. This total is high because one of the registered disputes amounts to $ 15 billion.

B. Outcome of Cases and Their Impact

The awards in the majority of cases have been rendered in favor of Egypt, with 7 cases dismissed on merits, 3 claims dismissed for lack of jurisdiction and 5 cases upheld in favor of the investors. The total amount of awards upheld in favor of the investors amounts to approximately $ 2.125 billions (*i.e.* 9.3% of the total amount of claims). It is noteworthy that Egypt has only lost cases from Western European countries.

To avoid significant potential financial awards, Egypt successfully concluded 14 settlements during the period 1992–2020 (*i.e.* 56% of the total concluded cases). It

is worth noting that Egypt concluded 11 of the settlements (*i.e.* 78%) during the period 2014–2020, following the establishment of the Committee for the Settlement of Investment Contracts Disputes as an alternative out-of-court forum to amicably settle investment disputes. Interestingly, 9 of the cases (*i.e.* 69%) were discontinued according to article 43(1) ICSID Arbitration Rules, based on the request of both parties.

These findings might differ from pro-state critiques that argue that arbitral tribunals are deferential to respondent states, resulting in bias against developing states and the ISDS system. On the other hand, this outcome demonstrates that there is no relationship between a respondent state's development status and the outcome in investment arbitration. However, if we count the number of cases upheld and the settlements concluded as a win in favor of foreign investors, we will conclude that claimant-investors are the frequent winners in investment arbitrations.

3. Tribunals

A. Appointment of Presidents

There is no clear relationship between the diversity of nationalities among the members of tribunals and the quality of their decision making. After analyzing the appointments made by Egypt and its counterparties, we can establish a certain pattern of appointing Western European arbitrators.

The parties and co-arbitrators appointed 17 presiding arbitrators, while the rest of the 14 appointments were made by the ICSID Administrative Council. There is a tendency within parties and co-arbitrators to appoint Western European arbitrators for the most part (19 president appointments). On the contrary, appointments made by the ICSID Administrative Council tend to be more diverse, as it is best placed to ensure greater diversity in nationalities across tribunals.

Interestingly, the analysis identified that in the 7 cases awarded in favor of Egypt on the merits the presiding arbitrator and the arbitrator appointed by Egypt were from the same jurisdictional system. This shows the importance of jurisprudential homogeneity as a key element when considering the choice of arbitrators by the parties and co-arbitrators.

B. Appointment of Arbitrators

Arbitrator selection is undoubtedly one of the most important stages in an arbitration. It is hard to define a certain pattern for choosing arbitrators. However, the most frequent factors might be the ideology of the arbitrator, the legal convictions and stances, his/her previous decisions and experience in given economic sectors. Unsurprisingly, when focusing on the appointments made by claimants, I found a modest statistical correlation with pro-investor arbitrators.

C. Appointment by Region

Most appointments came from Western Europe (16 appointments), North America (6 appointments), South America (2 appointments), South-East Asia (2 appointments) and Middle East (2 appointments). Surprisingly, there were no appointments from Africa or Eastern Europe. These findings assert the lack of diversity in the appointments made by parties and co-arbitrators, and proves the existence of a pattern in appointing Western European and North American arbitrators.

D. Nationality of Arbitrators

Twenty-nine different nationalities have been represented in cases involving Egypt. Arbitrators appointed by Egypt have most frequently come from France (11 times), the United States (4 times) and Great Britain (4 times). In contrast, most of the appointments made by the claimants came from the United States (9 appointments). From the statistical data, we can infer that Egypt tends to choose French arbitrators due to their civil law background. Interestingly, claimants did the opposite by choosing most of the arbitrators from a common law background. Surprisingly, in the case of Egypt, British arbitrators didn’t prevail. Interestingly, Egypt once appointed an Egyptian arbitrator.

The analysis of the appointments made by claimants also shows interesting insights into the common players in the pool of international arbitrators, which is still dominated by pro-investor arbitrators. On closer inspection, it is evident that a

certain list of arbitrators are frequently chosen to arbitrate in most of the cases involving Egypt.

Conclusion

This post focused on the status of Egypt in ICSID based on an analysis of the available data in an attempt to encourage national practitioners to do the same regarding their countries and to make this information publicly available. It is highly recommended that the ICSID website and other relevant websites publish more detailed information based on statistical data for each country.

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