

ICSID: Curious Facts

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"Research is formalized curiosity..." – Z. Hurston

In what follows I have tried to gather information from publicly available sources regarding some of the questions which have troubled my mind lately. It is hoped that the results would be of interest to the readers. For me, this proved to be one of my most exciting projects so far. The idea was conceived during my work in the IMCCA – Bulgaria (International Moot Court Competition Association) which unites past and present Ph. C. Jessup Moot Court participants (as well as participants from other moot courts) who share their love for International Law in a country where it is not lectured in-depth in universities. IMCCA and America for Bulgaria Foundation provide us with the necessary stimuli to learn more and to achieve more.

The information presented is subject to the caveat that not all ICSID awards are public or may have otherwise escaped my acquisition efforts. In this and any other regard, I would appreciate further supplement or corrections.

Which arbitrators have sat the most in ICSID cases?

(in alphabetical order, including cases which have been settled)

Alexandrov, Stanimir A.

Álvarez, Henri C.

Berg, Albert Jan van den

Berman, Franklin

Bernardini, Piero

Böckstiegel, Karl-Heinz

Brower, Charles N.

Crawford, James R.
Cremades, Bernardo M.
El-Kosheri, Ahmed Sadek
Fernández-Armesto, Juan
Fortier, L. Yves
Gaillard, Emmanuel
Griffith, Gavan
Guillaume, Gilbert
Hanotiau, Bernard
Kaufmann-Kohler, Gabrielle
Lalonde, Marc
Lowe, Vaughan
McLachlan, Campbell
McRae, Donald M.
Naón, Horacio A. Grigera
Oreamuno, Rodrigo
Paulsson, Jan
Stern, Brigitte
Tercier, Pierre
Thomas, J. Christopher
Veeder, V.V.
Vicuña, Francisco Orrego
Williams, David A.R.
Wobeser, Claus von

Who is the first woman to sit as an arbitrator in an ICSID case?

Mme Rosalyn Higgins in 1987, in the resubmitted *Amco case*.

It is noticeable that international arbitration remains a man-dominated profession.

Which is the Claimant which has filed the most applications?

Impregilo, S.p.A has appeared as Claimant in 5 cases so far (most of them discontinued):

Impregilo S.p.A and Rizzani De Eccher S.p.A. v. United Arab Emirates (ICSID Case No. ARB/01/1)

Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/02/2)

Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3)

Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17)

Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/08/14)

Which is the State appearing the most times as a Respondent?

(includes cases which have been settled or discontinued)

Argentina **49**

Venezuela **36**

Egypt **17**

Ecuador **12**

Congo **12**

Peru **11**

Ukraine **10**

Curious facts regarding the composition of some of the Tribunals

● All the initially appointed arbitrators in the cases *MTD v. Chile* (ICSID Case No. ARB/01/7), *Vannessa Ventures v. Venezuela* (ICSID Case No. ARB(AF)/04/6) and *Víctor Pey Casado v. Chile* (ICSID Case No. ARB/98/2) resigned.

● Two of the three arbitrators in the annulment proceedings in the cases of *MTD v. Chile* and *CMS v. Argentina* were the same which made the outcome of e.g. the later-in-time decision on stay of enforcement.

● The arbitrators in the *Malaysian Historical Salvors v. Malaysia* (ICSID Case No. ARB/05/10) annulment proceedings were all past and present Judges from the International Court of Justice.

● The arbitrators in the cases of *Pioneer v. Argentina* (ICSID Case No. ARB/03/12) and *Pan American v. Argentina* (ICSID Case No. ARB/03/13), and *Alcoa Minerals v. Jamaica* (ICSID Case No. ARB/74/2), *Kaiser Bauxite Company v. Jamaica* (ICSID Case No. ARB/74/3) and *Reynolds v. Jamaica* (ICSID Case No. ARB/74/4), respectively, were all the same.

Which law firms have served the most times in ICSID cases?

(in alphabetical order)

Arnold & Porter LLP

Freshfields Bruckhaus Deringer LLP

King & Spalding LLP

Latham & Watkins LLP
Shearman & Sterling LLP
Sidley Austin LLP
White & Case LLP

Which prominent scholars have served as party-representatives or counsels in ICSID cases?

Judge Stephen M. Schwebel
Prof. Dr. James R. Crawford
Prof. Christopher Greenwood
Prof. Alain Pellet
Prof. Philippe Sands, QC
Prof. Antonio Crivellaro

In which fields of economic activity most of the cases find their origin?

Hydrocarbon concessions, petroleum and oil exploration and production, gas supply and distribution **71**
Electric power generation, distribution and sale **39**
Mining concessions and mineral exploration **31**
Construction contracts, including real estate, dams, etc. **21**
Highway construction contracts **14**
Telecommunications **13**
Water services **12**

Which is the first ICSID award?

The Award rendered on August 29, 1977 in the case of *Adriano Gardella S.p.A. v. Côte d'Ivoire* (ICSID Case No. ARB/74/1).

What is the highest award amount so far?

The highest award amount of US\$ 1,769,625,000 was awarded in the case of *Occidental v. Ecuador* (ICSID Case No. ARB/06/11) Award of October 5, 2012.

What is the lowest award amount so far?

It seems that the lowest award amount of US\$ 460,000 (as principal) was awarded in *Asian Agricultural Products Ltd. v. Sri Lanka* (ICSID Case No. ARB/87/3) Award of

June 27, 1990.

How much does an ICSID case cost in terms of legal costs?

The information below was intended to bring light to the question how much does an ICSID case cost in terms of legal representation. The information provided must be retained with caution since legal costs depend, among others, on the duration and the complexity of the case. Moreover, many awards are not publicly available and most Tribunals order that each party bears its own costs of legal representation without mentioning the sums.

Here are some examples of the practice of ICSID Tribunals:

- In *CDC v. Seychelles* (ICSID Case No. ARB/02/14) Award of December 17, 2003, Seychelles were ordered to pay the Claimant the sum of £ 100,000 representing legal fees.

- In *Pantechniki v. Albania* (ICSID Case No. ARB/07/21) Award of July 30, 2009, the cost claims of the parties were among the lowest – EUR 154,523 and EUR 269,657, respectively.

- In *Telenor Mobile v. Hungary* (ICSID Case No. ARB/04/15) Award of September 13, 2006, the Counsel for Hungary demanded the reimbursement of US\$ 1,249,340.29.

- In *Siag v. Egypt* (ICSID Case No. ARB/05/15) Award of June 1, 2009, Egypt was ordered to pay the the sum of USD 6,000,000 in legal costs.

- In *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1) Award of December 7, 2011, the Claimant had to pay 60% of the Respondent's legal fees in the amount of EUR 6,053,443.78.

- The Tribunal in *Cementownia Nowa Huta S.A. v. Turkey* (ICSID Case No. ARB(AF)/06/2) Award of September 17, 2009 found that:

“the Respondent's legal fees and expenses are not unreasonable having regard to the course of these proceedings and that, therefore, the Claimant is to bear such costs in the amount of USD 4,904,822.06.” (para. 178)

- In *Kardassopoulos & Fuchs v. Georgia* (ICSID Case Nos. ARB/05/18 and

ARB/07/15) Award of March 3, 2010, the Respondent was liable to pay the Claimants their costs for the proceedings in the total amount of US\$ 7,942,297.

● In *ADC v. Hungary* (ICSID Case No. ARB/03/16) Award of October 2, 2006, the Claimant demanded US\$ 7,623,693 in respect of the Claimants' costs and expenses. The Tribunal found

"no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party." (para. 533)

See also *Abaclat et al. v. Argentina* (ICSID Case No. ARB/07/5) at para. 682.

● The Tribunal in *Gemplus & Talsud v. United Mexican States* (ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4) Award of June 16, 2010 recognized that:

"It is well-known that legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state's billing practices with its legal representatives are different and partly, as here, where there is more than one claimant bringing claims under more than one treaty." (para. 17-25)

Which is the most invoked BIT?

From the information available it may be concluded that this is the Argentina - U.S. Bilateral Investment Treaty which was relied upon, *inter alia*, in the following cases:

CMS v. Argentina (ICSID Case No. ARB/01/8)

Azurix Corp. v. Argentina (ICSID Case No. ARB/01/12)

Continental Casualty Company v. Argentina (ICSID Case No. ARB/03/9)

Pan American Energy LLC and BP Argentina Exploration Company v. Argentina (ICSID Case No. ARB/03/13)

Enron v. Argentina (ICSID Case No. ARB/01/3)

LG&E v. Argentina (ICSID Case No. ARB/02/1)

Sempra v. Argentina (ICSID Case No. ARB/02/16)

AES Corporation v. Argentina (ICSID Case No. ARB/02/17)

El Paso Energy v. Argentina (ICSID Case No. ARB/03/15)

How long does an ICSID case take?

Approximately 3.6 years. See Sinclair, A., *ICSID Arbitration: how long does it take?*, 4:5 GAR J. (2009), available here .

Which is the shortest merits award (in terms of length)?

CDC v. Seychelles (ICSID Case No. ARB/02/14) Award of December 17, 2003 – 23 pages.

Which is the longest merits award (in terms of length)?

Gemplus & Talsud v. United Mexican States (ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4) Award of June 16, 2010 – 382 pages

Are there claims filed by a State against an investor?

Gabon v. Société Serete S.A. (ICSID Case No. ARB/76/1)

The basis of jurisdiction was a contract. The case was eventually settled.

Romania's counterclaim in *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1) was admitted on the basis of the umbrella clause found in Article Article 2(6) of the Romania-Greece BIT. (Award of December 7, 2011, para. 781)

Which cases may be called landmark cases?

While it may be said that every decision and award rendered by an ICSID Tribunal (or committee) contains interesting findings of law, among them the following may be mentioned as particularly interesting:

● *Santa Elena v. Costa Rica* (ICSID Case No. ARB/96/1) Final award of February 17, 2000, on the compound interest. Up until this point, most of the ICSID Tribunals denied awarding compound interest relying on a citation from Marjorie Whiteman in her book *Damages in International Law* vol. III (1943) at p. 1997:

“[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable.”

This is, among other things, evidence of the influence a scholar can have on

international law.

- *Maffezini v. Spain* (ICSID Case No. ARB/97/7) Award of November 9, 2000, as to attribution of State responsibility.
- *Salini v. Morocco* (ICSID Case No. ARB/00/4) Decision on Jurisdiction of July 23, 2001, regarding the so-called Salini test for the notion of investment.
- *Vivendi v. Argentina* (ICSID Case No. ARB/97/3) First Annulment, Decision on Annulment dated July 3, 2002, as to the relation between treaty and contract.
- *SGS v. Pakistan* (ICSID Case No. ARB/01/13) Decision of the Tribunal on objections to jurisdiction of August 6, 2003 and *SGS v. Philippines* (ICSID Case No. ARB/02/6) Decision of the Tribunal on objections to jurisdiction of January 29, 2004, with regard to the so-called umbrella clause.
- *ADC v. Hungary* (ICSID Case No. ARB/03/16) Award of October 2, 2006, in relation to valuation in cases of unlawful expropriation.
- *Phoenix Action v. the Czech Republic* (ICSID Case No. ARB/06/5) Award of April 15, 2009, as to *bona fide* investments.
- *Abaclat et al. v. Argentina* (ICSID Case No. ARB/07/5) Decision on jurisdiction and admissibility August 4, 2011, regarding admissibility of mass claims of 60,000 Claimants (the total number of whom at the time of initiation of the arbitration exceeded 180,000) mostly natural persons of Italian nationality relating to bonds issued by Argentina.

Which States have refused to comply with ICSID awards or have considerably obstructed compliance?

Argentina is well known for its interpretation of Articles 53 and 54, i.e. that the successful Claimant's recourse to enforcement in its national courts is a pre-condition for payment of the award (See for e.g. *Enron v. Argentina* (ICSID Case No. ARB/01/3) Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, available here).

Which States have withdrawn from the ICSID Convention?

Bolivia, Ecuador and Venezuela.

Which States are not parties to the ICSID Convention?

Brazil and India are not among the 158 Members to the ICSID Convention.

Other curious facts

● After the award in the *RSM v. Grenada* (ICSID Case No. ARB/05/14) was rendered, RSM tried to sue Freshfields Bruckhaus Deringer LLP counsel for Grenada alleging that Freshfields conspired to violate the Racketeer Influenced and Corrupt Organizations Act by, for e.g., Jan Paulsson and Brian King being part of the conspiracy to bribe Grenada officials and deny RSM its licensing rights. RSM claimed the excess of US\$500 million in damages. The claim was dismissed. See US District Court for the District of Columbia, Civil Action No. 10-00457 available [here](#).

● Both the Claimant and the Respondent in the *Europe Cement Investment v. Turkey* (ICSID Case No. ARB(AF)/07/2) Award of August 13, 2009, ended up claiming that the Tribunal lacked jurisdiction. This is one of the Uzan family-related cases against Turkey. The Claimant wanted to discontinue the proceedings but the Respondent State disagreed. (See para. 139 of the Award)

Funniest quote from an ICSID award

“[H]appiness is multiple pipelines”

Mentioned in the case of *Kardassopoulos & Fuchs v. Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15) Award of March 3, 2010, para. 5, in relation to the Western Route which was of

“significant national and strategic importance for Georgia as a means of securing its sovereignty following the break up of the Soviet Union and deepening its ties to the West.” (para. 3)

Recommendations

The site of ICSID is informative and accessible. Still it may be improved by, for e.g., adding information as to the basis of the jurisdiction in the particular case, nationality of the Claimant, amount claimed, amount awarded, who represented the parties, which was the successful party, costs of the proceedings, etc.