

“International arbitration in investment disputes” case study of Egypt

Case study of
Egypt

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Abstract

Purpose – This theme will be addressed through main points: Special Nature of Investment Disputes and its methods of peaceful settlement. International legal framework governing Arbitration in investment disputes: A. Multilateral legal framework. B. Bilateral legal framework/Investment promotion and protection agreements/Types of arbitration in investment disputes. The Egyptian experience in investment disputes arbitration. The National legal framework. Egypt on the map of investment disputes in the world. A case study. Conclusion: Results related to the legal framework regulating investment disputes in Egypt. Results related to The arbitration cases against Egypt.

Design/methodology/approach – The researcher investigates the subject of international arbitration in investment disputes in the framework of voluntary theory, which is based on the premise that the satisfaction of people who are addressing the international legal norm is the basis of the same rule. In other words, the basis of international law is based on the satisfaction of the State and other international legal persons Both, and then express or implied consent.

Findings – Despite the availability of domestic and regional arbitration mechanisms in Egypt represented by a large number of cases.

Research limitations/implications – The theme for the study primarily on Egypt and the international arbitration of investment disputes, through theoretical and practical study of disputes arbitration which Egypt is a party defendant in which to focus on what was issued in which the provisions of the International Center for Settlement of Investment Disputes, in an attempt to find out the reasons for the verdicts image released it, where it came mostly against Egypt, and whether these judgments against them in investment disputes due to reasons related to the legal framework of the arbitration process, or for reasons of bodies of arbitration issued by those provisions, or to the defense, which represents the Egyptian party, or to the circumstances Economic and political (which represents the investment climate).

Originality/value – The proposed solutions to improve the conditions and factors surrounding the arbitration disputes that Egypt is waging against foreign investors, whether they are initially alleged or accused of drafting agreements and contracts, through amending the relevant legislation and laws, selecting arbitration bodies and defense bodies.

Keywords Egypt, Investment, Foreign direct investment, (ICSID), International arbitration, Investment disputes

Paper type Research paper



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Introduction

The study deals with the Egyptian experience in the field of international arbitration in investment disputes as part of a broader regional and international framework which is increasingly being used for international arbitration as a mechanism for settling disputes between the investor and the host country by answering the following main questions: Is the legal framework governing the settlement of investment disputes at various levels a major reason for the increasing number of investment claims filed against Egypt before the International Center for Settlement of Investment Disputes (ICSID) of the World Bank? Does this framework require amendments that would reduce the number of such claims or investors resorting to arbitration as a mechanism? Are there other reasons related to the nature of these actions and the economic activities that fall within them, and the Egyptian side's dealings with those cases in terms of defenses filed and other actions?

This theme will be addressed through the following main points:

- (1) Special Nature of Investment Disputes and its methods of peaceful settlement.
- (2) International legal framework governing Arbitration in investment disputes:
 - multilateral legal framework; and
 - bilateral legal framework/Investment promotion and protection agreements.
- (3) Types of arbitration in investment disputes.
- (4) The Egyptian experience in investment disputes arbitration.
 - the national legal framework;
 - Egypt on the map of investment disputes in the world; and
 - a case study.
- (5) Conclusion:
 - results related to the legal framework regulating investment disputes in Egypt; and
 - results related to the arbitration cases against Egypt.

The research approach

The researcher uses the two approaches, first, *legal approach*, which was based mainly on regulating international relations within a formal framework. This approach was aimed at re-shaping and regulating international relations according to legal standards and standards. It also means studying and analyzing international treaties and conventions, the subject of international legislation and the topic of international responsibility. Second, *Descriptive research*, which aimed at casting light on current issues or problems through a process of data collection that enables them to describe the situation more completely than was possible without employing this method, Descriptive studies are closely associated with observational studies, but also Case studies and surveys can also be specified as popular data collection methods used with descriptive studies

Special nature of investment disputes and its methods of peaceful settlement

Investment Disputes (Investor-State disputes) can be defined as the kind of dispute which arises between the two parties of the investment contract, the country hosting the investment and the foreign investor (a national of another state) as a result of a violations made by one of the parties concerning the rights of the other party or breach of the obligations stipulated in the investment contract, for example, prematurely terminating the

contract, or making any unilateral action by one of the parties, mainly the state such as expropriation, seizure, confiscation and nationalization, leading to serious damages to the other party. These actions require compensating the harmed party for the damages and loss it incurred on the investor due to those violations. Investment contracts establish some sort of legal relationship between the contracting parties. Some believe that the international character characterizes this relationship, since one of its elements is foreign. The legal relationship is defined as the one that exists between one subject and another, determined by a rule of law (Salacuse, 2007).

The difficulty and sharpness of the problems raised by investment contracts result from inequality in the legal positions of the parties to these contracts, and the nature of Disputing Parties. These contracts are concluded between two unequal parties: the host country on the one hand, the state, and a national of another state on the other hand, the foreign investor. The state, as a subject of public internal law, enjoys sovereign authorities not enjoyed by the private foreign subject contracting with it, generally considered as subject of private law (El Hadad, 1996).

The object of Investor-State disputes is often related to the sovereignty of the state in terms of the existence of the investment project on its territory, and in terms of the law applicable to the dispute. So the question which arises here is how a sovereign state would be subject to law other than its law on its territory while it has the supreme authority in legislating and enacting of laws and regulations in all matters in relation to everything on its territory (Kassem, 2015).

Investor-State disputes arise between two subjects which differ in their legal status and hence create a plenty of problems, for example the applicable law in case these disputes arise. Moreover, these disputes arise from investments contracts which include clauses with special nature, for example, the stabilization clauses, sacredness of contracts and incorporation of the domestic law in the investment contracts and marginalization of the domestic laws. The inclusion of these clauses in the investment contracts curb or force states to abandon a part of their sovereignty to attract the foreign investor due to the scarcity of resources in these states.

There are variety of instruments for peaceful settlement as well as disputes related to investment, including negotiation, commissions of inquiry, mediation, conciliation and good offices and arbitration.

The methods of peaceful settlement of disputes fall into three categories: diplomatic, adjudicative, and institutional methods. *Diplomatic methods* involve attempts to settle disputes either by the parties themselves or with the help of other entities. *Adjudicative methods* involve the settlement of disputes by tribunals, either judicial or arbitral. Institutional methods involve the resort to either the United Nations or regional organizations for settlement of disputes (Hamza, 2017).

Diplomatic methods of dispute settlement.

Negotiation. Negotiation is a method by which people settle differences. It is a process by which compromise or agreement is reached while avoiding argument and dispute, but International practice of direct negotiation, although vast, has not always been conducive to clearly concluding results, and does not seem to allow for generalizations. Boczek defined Negotiation “[. . .] is a diplomatic procedure whereby representatives of states engage in discussing matters [. . .] between them [. . .] to clarify and reconcile their divergent positions and resolve the dispute” (Boczek, 2005b).

Mediation. Mediation is clearly a political method of settlement. In mediation a third-party, acceptable to both parties to the dispute, effects communication between the parties and participates actively in the process of negotiation by offering proposals for settlement[1].

Unlike an arbitrator, a mediator has no legal power to force acceptance of his or her decision but relies on persuasion to reach an agreement. Also called conciliation.

Conciliation. Conciliation is a process of settling a dispute by referring it to a specially constituted organ whose task is to elucidate the facts and suggest proposals for a settlement to the parties concerned, Boczek defined conciliation as:

[...] a diplomatic method of third-party peaceful settlement [...], whereby a dispute is referred by the parties, with their consent, to a permanent or *ad hoc* commission, [...] whose task is impartially to examine the dispute and to prepare a report with the suggestion of a concrete proposal. (Boczek, 2005a)

Adjudicative methods of dispute settlement. Adjudicative methods of dispute settlement consist of two types of procedures, arbitration and judicial settlement[2].

Arbitration. Arbitration is a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award.

The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award a decision to be issued after a hearing at which both parties have an opportunity to be heard.

Arbitration is a well-established and widely used means to end disputes. It is one of several kinds of Alternative Dispute Resolution, which provide parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award, and then participate in a hearing at which both sides can present evidence and testimony. The arbitrator's decision is usually final, and courts rarely reexamine it[3].

Judicial settlement. Judicial settlement is a settlement of dispute between States by an international tribunal in accordance with the rules of International Law. The international character of the tribunal is in both its organization and its jurisdiction.

International tribunals include permanent tribunals, such as the International Court of Justice (ICJ), the international Tribunal for the law of the Sea (ITLOS), the European court of Justice, the European Court of Human Rights and the Inter-American Court of Human rights, and include *ad hoc* tribunals, such as the United Nations tribunal in Libya. The ICJ is the most important international tribunal, because of its both prestige and jurisdiction. It is the principal judicial organ of the United Nations[4].

Advantages and disadvantages of arbitration as methods of peaceful settlement[5].

Advantages.

- Disputes which are taken to arbitration can be resolved faster than Judicial settlement methods like state court, in federal court or International Court.
- Arbitrations take quite a bit less time than a lawsuit in district court, they will end up being less expensive than a case that goes to trial.
- Specialized decision-makers: judges will often know very little about certain types of cases. This will often make it difficult for the attorney to effectively present the case.
- Arbitration will provide more privacy to the parties than litigation. The arbitration dispute itself and the terms of any award frequently remain confidential.
- A great benefit of arbitration is that the parties can select their arbitrators, both under the party appointed system and the list system.

- Arbitration is a flexible process which permits parties to organize procedures, and schedule hearings and deadlines to meet their objectives and convenience.

Institutional methods of dispute settlement. Institutional methods of dispute settlement involve the resort to international organizations for settlement of international disputes. These methods have come into existence with the creation of the international organizations. The most eminent organizations, which provide mechanisms for settling dispute between their member States, are the United Nations and the regional organizations, such as the European Union, the Organization of American States, the Arab league and the African Union.

International legal framework governing arbitration in investment disputes

It is therefore not possible to study international arbitration as a mechanism for the settlement of disputes in theory and their application to the Egyptian reality independently of the legal framework governing this mechanism, We found that it is a multi-level framework and can be divided the external legal framework of the arbitration mechanism, which in turn includes two levels, one multilateral, including the international, regional and bilateral levels, we will focus on international multilateral legal framework and bilateral investment agreements.

Multilateral legal framework. In this section, the focus will be on three agreements that formed the international framework for arbitration as a mechanism and are related in one way or another to the investment disputes against Egypt in different international bodies.

First: Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 New York Convention: The most important milestone in the development of international commercial arbitration was the 1958 New York Convention. It was adopted by the United Nations Conference on International Commercial Arbitration convened by the Economic and Social Council of the United Nations[6].

The New York Convention applies “to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal”, and the awards may be issued by special arbitrators or by permanent arbitral bodies.

The Convention consists of 16 articles. The main objective of this Convention is as follows: First, to provide common legislative standards on the recognition of arbitration agreements. Second, Recognition and enforcement of foreign arbitral awards. Third: To ensure that there is no distinction between domestic and foreign arbitral awards by not imposing any more stringent conditions than on the recognition of local arbitral awards. These conditions also include the imposition of any fees or charges[7].

Egypt acceded to the Convention on 9 May 1959 and entered into force on 7 June 1959[8].

Second, UNCITRAL Rules and Recommendations of the United Nations Conference on International Commercial Arbitration, held in New York from 20 May to 10 June 1958 and subsequent United Nations Commission on Trade Law work adopted.

The UNCITRAL Rules means the United Nations Commission on International Trade Law arbitration rules adopted by General Assembly resolution 31/12/1976.

When it created UNCITRAL in 1966, the General Assembly of the United Nations recognized that “divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade” and expressed the view that, through the Commission, the United Nations

could play “a more active role toward reducing or removing legal obstacles to the flow of international trade”[9].

UNCITRAL Rules have been drafted and drafted in their current form following extensive consultations with arbitral institutions and international commercial arbitration centers. A series of amendments and revisions have been made to these rules since they have been adopted to date. The aim of these amendments is as reflected in the resolution, Of UNCITRAL 2010 stated that the widespread application of these rules, which had been previously adopted under different circumstances, encompassed a wide range of disputes, required a revision of those rules to bring them in line with current international trade practices and to cope with changes that had occurred over three decades to enhance the efficiency of arbitration procedures in those rules (United Nations, 1994).

The revision of those rules in a manner acceptable to the world’s nations in all their legal, social and economic systems can contribute greatly to the establishment of harmonious economic relations, as well as the strengthening of the rule of law and the establishment of a harmonized legal framework for the settlement of international trade disputes fairly and efficiently (United Nations, 2011).

Third: Washington Convention for the Settlement of Investment Disputes between States and Citizens of Other States 1965:

This agreement came within the framework of the World Bank’s attempt to establish rules regulating arbitration procedures in the light of the difficulties it faced in arbitration as a mechanism for settling disputes. A multilateral agreement was drafted in accordance with the provisions of its articles settling disputes arising between foreign investors and their host countries (United Nations Commission on International Trade Law, 2013). On March 18, 1965 in Washington and entered into force on October 14, 1966. It was signed by more than 160 countries[10].

The Convention consists of 75 articles divided into ten sections. In its Preamble, the Convention emphasizes the importance of international investment in economic development and the potential for disputes related to this investment between its host countries and investors. This requires the provision of means of conciliation and international arbitration.

Bilateral legal framework/investment promotion and protection agreements. The Bilateral agreements are a result of the tendency of the countries exporting investments to protect their investments, especially in the newly independent developing countries, which refused to protect them.

Egypt has signed a large number of investment promotion and protection agreements with most of the countries in the world. These agreements formed the basic reference for the majority of companies that resorted to international arbitration:

- The investment agreements signed between Egypt and the rest of the world explicitly stipulate the definition of investment as the material aspect that is protected under the agreement through the investment process carried out by the investor using this investment.
- These agreements are expressly defined by those who apply to them or those who benefit from the benefits they include, namely, the foreign investor.
- These agreements specify the scope of the application of the Convention and the geographical scope of the application of the Convention.
- These agreements also provide for a specific period. This framework shall represent the period of time in which the Convention shall enter into force and the entry into

force of the signed Convention shall come into force after certain procedures have been fulfilled and the expiry of the period as provided for in that Convention.

- All these bilateral agreements clearly define the mechanisms for settling disputes that may arise from disputes between the parties to the Convention or between the signatory State and investors who hold the nationality of the other signatory State. These agreements provide for friendly means of settlement of such disputes, usually in conciliation, mediation and arbitration, while some of these agreements provide for the principle of amicable settlement of the dispute without limitation.

Types of arbitration in investment disputes

In international business, a party contemplating concluding an arbitration agreement in a contract for the resolution of disputes or differences may be faced with a choice of the various types of arbitrations which can be conducted under either self-administered *ad hoc* or institutional rules or procedures.

Institutional arbitration

An institutional arbitration is one in which a specialized institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process.

Advantages of institutional arbitration. For those who can afford institutional arbitration, the most important advantages are^[11]:

- the availability of pre-established rules and procedures which ensure the arbitration proceedings begin in a timely manner;
- administrative assistance from the institution, which will provide a secretariat or court of arbitration;
- a list of qualified arbitrators to choose from;
- assistance in encouraging reluctant parties to proceed with arbitration; and
- an established format with a proven record.

Some of the most important arbitration institutions^[12]

- International Chamber of Commerce (ICC) – Paris.
- Swiss Chambers' Arbitration Institution (SCAI) – Geneva.
- London Court of International Arbitration (LCIA) – London.
- Arbitration Institute of the Stockholm Chamber of Commerce.
- Stockholm – Singapore International Arbitration Centre (SIAC) – Singapore.
- International Centre for Settlement of Investment Disputes (ICSID) – Washington.
- D.C. – Court of Arbitration for Sport (CAS) – Lausanne.

Ad hoc arbitration

An *ad hoc* arbitration is one which is not administered by an institution such as the ICC, LCIA, DIAC or DIFC. The parties will therefore have to determine all aspects of the

arbitration themselves – for example, the number of arbitrators, appointing those arbitrators, the applicable law and the procedure for conducting the arbitration.

Provided the parties approach the arbitration with cooperation, *ad hoc* proceedings have the potential to be more flexible, faster and cheaper than institutional proceedings. The absence of administrative fees alone provides an excellent incentive to use the *ad hoc* procedure[13].

The arbitration agreement, whether reached before or after a dispute has arisen, may simply state that “disputes between parties will be arbitrated”. It is infinitely preferable at least to specify the place or “seat” of the arbitration as well since this will have a significant impact on several vital issues such as the procedural laws governing the arbitration and the enforceability of the award. If the parties cannot agree on the detail all unresolved problems and questions relating to the implementation of the arbitration – for example, how the tribunal will be appointed or how the proceedings will be conducted – will be determined by the “seat” or location of the arbitration. However, this approach will only work if the seat of the arbitration has an established arbitration law.

Ad hoc proceedings need not be kept entirely separate from institutional arbitration. Often, appointing a qualified arbitrator can lead to the parties agreeing to designate an institutional provider as the appointing authority. Additionally, the parties may decide to engage an institutional provider to administer the arbitration at any time.

Ad hoc arbitration – advantages[14]

- *ad hoc* arbitration is less expensive than institutional arbitration;
- no administration fees;
- total flexibility and adaptability (tailor made);
- control of the process, Parties and arbitrators are, in principle, in control of the proceeding;
- in *ad hoc* arbitrations, the parties will have to agree the scale of remuneration; and
- with the arbitral panel and agree fees directly with the arbitral tribunal.

The Egyptian experience in investment disputes arbitration

The existence of a regulated legal framework for investment in any State contributes to the creation of the necessary environment for the foreign investor through national laws, which ensure that the return is adequate for its investments and guarantees foreign capital protection against sources and other damages that may be caused to it at any time.

It also guarantees neutrality and objectivity in the consideration of disputes that may arise between Egypt and foreign investors as a result of investing these funds.

The national legal framework

Through its experience at the international and regional levels, Egypt has sought to benefit from this experience by changing in its legislative frameworks and laws to allow the foreign investor the opportunity to resort to international arbitration to present the dispute that may arise between it and the host country. This gives investors some reassurance in view of their fears of national litigation systems, as well as the length of the proceedings.

In this regard, two main points are emphasized:

First, the laws governing investment. Which Egypt has adopted in succession since the signing of the 1958 New York Convention on the Recognition and Enforcement of Foreign

Arbitral Awards and the location of arbitration within these laws and the guarantees it provides to investors in exchange for Egypt's obligations as a host country for investment toward these investors.

Between 1953 and Egypt's signing of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which it signed on March 9, 1959, the laws governing investment are:

Law No. 55 of 1952 on the system of free zones on 2/12/1952.

Law 156 of 1953 on the investment of foreign capital in economic development projects on 2/4/1953 and amended by Law No. 475 of 1954.

These laws did not include any articles on arbitration as a mechanism for the settlement of disputes arising within them.

Even after Egypt signed the agreement, Law No. 2108 of 1960 on the investment of foreign capital was issued without any of its articles referring to the settlement of any disputes that may arise under this law, whether between the State and the investor or between investors. In 1971.

Law No. 65 of 1971 concerning the investment of money, Arab and free zones is a real beginning for Egypt to include arbitration as a mechanism for settling investment disputes between it and investors and the beginning of its commitment and then its commitment to accept international arbitration as a mechanism. This is evident in the articles of Law No. 2, 38, 39 and 40 and 41[15].

Such as Law No. 43 of 1974 issuing the Arab and Foreign Investment and Free Zones Law, the first investment laws approved by Egypt, and expressly provided for the presentation of investment disputes to the International Center for the Settlement of Investment Disputes. Article 8 of the law stipulates that "This law shall be in the manner agreed upon with the investor or within the framework of the agreements in force between the Arab Republic of Egypt and the Investor State or within the framework of the Agreement on the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has acceded under Law No. 90 1971 NH, which lays down the conditions.

Law No. 230 of 1989 on Investment and its amendments represents the affirmation of Egypt's continued commitment to international arbitration as a mechanism for settling investment disputes between investors. Article 55 of the law states that "To implement the provisions of this law in the manner agreed upon with investors and may be agreed between the parties concerned to settle these disputes under the agreements in force between the Arab Republic of Egypt and the State of the investor or within the framework of the Convention on the Settlement of Investment Disputes between States and citizens Other countries that acceded to the Arab Republic of Egypt Law No. 90 of 1971 [. . .] [16].

In spite of the termination of this law, Law No. 8 of 1997 on the issuance of the Investment Guarantees and Incentives Law also represents a continuation of Egypt's commitment to international arbitration as a mechanism for resolving investment disputes. Article 7 of the law stipulates that "investment disputes related to the implementation of the provisions of this law In the manner agreed upon with the investor. It may also be agreed between the parties concerned to settle these disputes within the framework of the agreements in force between the Arab Republic of Egypt and the Investor State or within the framework of the Convention for the Settlement of Disputes arising out of Investments between States and between States' In accordance with the provisions of the Arbitration Law in Commercial Articles promulgated by Law No. 27 of 1994, as well as the settlement of disputes referred to by arbitration before the Cairo Center Regional Center for International Commercial Arbitration".

The Law of Guarantees and Incentives No. 8 of 1997 was amended by Law No. 17 of 2015. One of the most important amendments was the amendment of Article 7 on the use of international arbitration, as well as the regulation of reconciliation with investors.

Although the amendments to the Law on Investment Guarantees and Incentives No. 8 of 1997 have not been passed for a long time, they were canceled on 1/6/2017 and replaced by the new Investment Law No. 72 of 2017 and its executive regulations. Investment and gradually addressed over four chapters, where the fifth section at the beginning of the settlement of any dispute between the investor and any one or more governmental bodies relating to capital or the interpretation of the provisions of this law or its application amicably without delay through negotiations between the parties to the conflict, Without prejudice to the right to litigation.

Second: Egyptian arbitration law. The Egyptian Arbitration Law promulgated by Law No. 27 of 1994 is an integrated development of Egypt's commitment to arbitration as a dispute resolution mechanism related to contracts of an economic nature, including investment. The law consists of 58 articles divided into seven sections.

The most prominent features of this law:

The law expressly defines in its article two what is commercial arbitration, which lists the forms of commercial disputes, where the origin of which is the existence of legal relationship of an economic character and the market of many examples and not limited to these disputes, including investment, exploration, extraction and land reclamation. This law also calls the term arbitration The parties to the conflict will voluntarily.

The Egyptian Arbitration Law included arbitration subject to the law of the parties where the parties are free to choose the law governing the arbitration agreement even if there is no link between the agreed law and the law governing the legal relationship in dispute. applied to the conflict (Al-Qalloubi, 2005).

The Egyptian legal framework is consistent with the New York Convention of 1958 on the availability of the two pillars of consent and writing. Writing is then a cornerstone of the arbitration agreement (Al-Qalloubi, 2005, p. 65).

The law defines four criteria on the basis of which international arbitration is considered.

The law sets out a number of conditions related to the arbitration agreement, the most prominent of which are:

- This Agreement shall be in writing or otherwise void.
- It is not permissible to agree on arbitration except for the natural or juridical person who has the right to dispose of his rights.
- The arbitration clause shall be regarded as an independent agreement from the other conditions of the contract. The invalidity, dissolution or termination of the contract shall not result in any effect on the arbitration clause it contains if that condition is in itself correct.

The law provides for a full chapter dealing with the arbitral tribunal where it gives the parties to the dispute the right to form their members from one arbitrator or more, provided that the number is fixed. This section deals with the conditions of selecting the arbitrators and their nationalities and controls in case of disagreement between the parties to the dispute of arbitrators.

The law expressly provides for the role of the judiciary and distinguishes between the first two cases in matters referred by the law to the Egyptian judiciary and the jurisdiction of the court that is originally competent to hear the dispute. The second is that when the dispute is international, whether the arbitration is inside or outside Egypt, the court gives

the court many powers during the various stages of arbitration, whether from the beginning of the dispute and presented to arbitration or during the course of the proceedings or even after the issuance of the judgment and implementation.

The law affirms in the various articles the will of the parties and their dispute, beginning with the agreement to resort to arbitration before or after the outbreak of the dispute through their agreement on the selection of the arbitral tribunal as well as the agreement on the arbitral proceedings and the applicable law), as well as the place of arbitration both inside and outside Egypt. Consent shall extend to the choice of the language of arbitration.

The law recognizes that the arbitration provisions issued in accordance with this law cannot be appealed against any of the methods of appeal stipulated in the Civil and Commercial Procedures Law. However, it is permissible to file an action for nullification of the ruling in certain cases defined by the law.

Although the law has set out a full chapter (Chapter VII) on the validity of the decisions of the arbitrators issued and implemented, and stressed that these provisions are enforceable, but they set conditions for the issuance of order to implement the provision.

Egypt on the map of investment disputes in the world

In this section, we will focus on the Egypt investment disputes before the International Center for Settlement of Investment Disputes (ICSID) by locating Egypt on the map of investment disputes in the world.

The cases before the International Center for the Settlement of Investment Disputes (ICSID) are focused on the fact that it is one of the first specialized bodies in the examination of disputes arising from investments.

The map of arbitration disputes until the end of 2015 indicates a continuing trend toward the filing of claims for investment disputes by investors toward countries or vice versa (Figure 1).

As evidenced by the graph, there are increasing cases registered before the Center on investment disputes, either arbitration or other services provided by the Center of mediation or conciliation or other services, where the cases rose from one case in 1972 to a maximum in 2012 to reach 50 cases in general. Although it fell to 40 during 2013 and to 38 cases in 2014, but it remains high reflecting the continued trend toward resorting to the Center for Settlement of Investment Disputes or to obtain mediation and conciliation services and other services related to the settlement of investment disputes, In 2015 to 52.

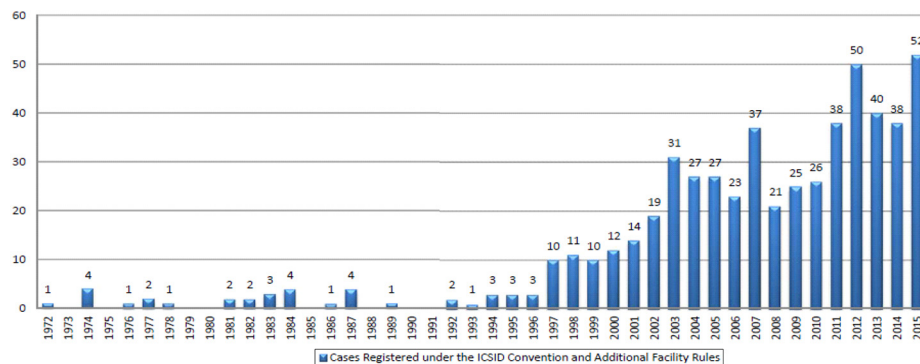


Figure 1.
Total number of
ICSID cases
registered, by
calendar year

As for the geographical distribution of the countries against which the arbitration claims are filed, we find that the Middle East region includes North African countries against which there are fewer cases compared to other regions of the world, where the countries of South America and the countries of East and Central Asia in the top with 25 per cent each, (Africa) by 16 per cent and is ranked third in the Middle East by 10 per cent of the total cases filed before the Center.

Egypt still holds the largest share of the number of arbitration cases filed against it before the International Center for Settlement of Investment Disputes (ICSID), whether or not a final judgment is pending, as the number of cases against Egypt is still more than three or three times the second largest Arab or African Country Followed immediately.

Egypt, according to the 2012 UNCTAD report, is among the top ten countries in the world with arbitration cases ranked seventh in the world with 27 cases and third in a study conducted by a number of specialists and researchers at Quir Aspiration.

The following chart shows the total number of claims filed until the end of 2015 compared to 2015 only, and the location of Egypt compared to other countries (Figure 2).

Egypt, according to the International Center for Settlement of Investment Disputes (ICSID), is among the first four countries to be sued by the International Center for Settlement of Investment Disputes (ICSID) between 2011 and 2013.

Egypt remains the same, according to the data of the various international institutions within the top ten countries in the world in terms of the number of investment disputes filed with the Center, and that its ranking varies from year to year. Egypt continues to hold the largest share of the total number of lawsuits against countries in the Middle East and North Africa.

According to the data, by the end of 2017, Egypt had filed 30 arbitration cases against 22 cases in which judgments had been issued or had been settled while 8 of them were still under arbitration. Most of these cases were filed after the revolution of 25 January 2011, Just.

Arbitration cases brought against Egypt before the ICSID can be divided between cases in which a judgment has been handed down and others still under arbitration.

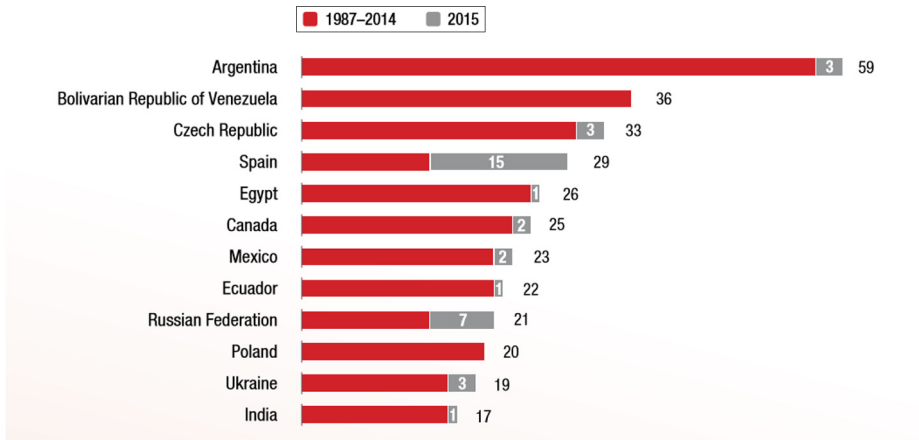


Figure 2. Source: Investor-state dispute settlement: review of developments in 2015, United Nations conference on trade and development, June 2016, p. 3

A statement of the arbitral proceedings brought against Egypt before the International Center for the Settlement of Investment Disputes (ICSID) in which it was ruled (Table I).

The cases listed in this table are divided between cases in which a judgment was issued in favor of Egypt, and other cases in which a judgment was issued in favor of the investor and some of these cases are discussed in detail.

The cases in the table also include the cases in which the arbitration has been suspended after informing the Center of the settlement of the dispute between the parties through negotiations between them. Accordingly, the arbitral tribunal has issued a decision to discontinue the proceedings and some of the cases resolved by negotiation will be dealt with in detail at the end of this section.

A statement of the proceedings against Egypt before the International Center for the Settlement of Investment Disputes and is still under arbitration (Table II).

A case study

Waguih Elie George Siag and Clorinda Vecchi VS the Arab republic of Egypt (ICSID Case No. ARB/05/15).

Summary of facts about case study:

This case involves an investment dispute between (Claimants, Waguih Elie George Siag and Clorinda Vecchi, and Respondent), the Arab Republic of Egypt (“Egypt”)[17], they filed with the International Centre for Settlement of Investment Disputes a Request for Arbitration directed against Egypt On 26 May 2005[18].

According to the Request, in 1989 the Egyptian Ministry of Tourism sold a parcel of property on the Gulf of Aqaba to a company called Siag Touristic Investments and Hotels Management Company (“Siag Touristic”), which is owned principally by the Claimants. Siag Touristic is an Egyptian joint stock company. The purpose of the sale was to permit Siag Touristic to develop a tourist resort on the property. Development commenced on the property. However, in 1996 the property was confiscated by the Egyptian Government. Although the Claimants obtained relief from the Egyptian courts, this was ignored by the Egyptian Government[19].

The Claimant (Siag – Clorinda) according to the request seeks a declaration that the Respondent (Egypt) has violated the BIT, international law and Egyptian law, compensation for all damages suffered, costs and an award of compound interest.

Article 25(1) of the ICSID Convention and decide on the jurisdiction of the Centre:

Under Rule 41 of the ICSID Arbitration Rules the Tribunal is required to decide the Respondent’s objection that the present dispute “is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal”. The Claimants contend that the Tribunal’s jurisdiction is established under two instruments referred to at the outset of this Decision: (a) the BIT and (b) the ICSID Convention.

Egypt’s objection to jurisdiction of tribunal based on three reasons.

Siag’s nationality. Egypt argued that Siag remained an Egyptian national and accordingly failed the negative nationality requirement of Article 25(2)(a) of the ICSID Convention. The Tribunal was therefore without jurisdiction[20].

Egypt noted that the Tribunal had found in its Decision on Jurisdiction that, pursuant to Article 10(3) of the Egyptian nationality law, Siag had been required to state his intention to retain his Egyptian nationality within one year of gaining permission from Egypt to obtain Lebanese nationality. As Siag did not state such an intention within the relevant time, the Tribunal held that he had lost his Egyptian nationality.

Egypt filed its Counter-Memorial on the merits on October 12, 2007 expert opinion of Professor Smit which accompanied it, also addressed Egypt’s Lebanese nationality

Judgment	The convention on which the dispute was based	Case data case no.	The company/ investor/plaintiff and his nationality
The proceedings were suspended in accordance with Article 43/1 of the Center's Rules on 5/12/2016	Investment Protection Agreement between Egypt and Luxembourg in 1999	ARB/15/47	Arcelor Mittal Luxembourg
18 April 2017. The Court issued a procedural order to discontinue the proceedings under article 44 of the Arbitration Rules	Investment Protection Agreement between Egypt and Germany 2005	ARB/13/37	Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Helmut Jungbluth Italian
3 August 2016. The Court issued a procedural order to discontinue the proceedings in accordance with Rule 43 (1) of the Arbitration Rules of the Center	Investment Protection Agreement between Egypt and Italy in 1989	ARB/13/23	
The proceedings were suspended in accordance with Article 43/1 of the Center's Rules on 27/5/2015	Investment Protection Agreement between Egypt and Jordan 1996	ARB/13/4	Osama AI Sharif Jordanian
The proceedings were suspended in accordance with Article 43/1 of the Center's Rules on 3/6/2015	Investment Protection Agreement between Egypt and Jordan 1996	ARB/13/5	Osama AI Sharif Jordanian
The proceedings were suspended in accordance with Article 43/1 of the Center's Rules on 2/6/2015	Investment Protection Agreement between Egypt and Jordan 1996	ARB/13/3	Osama AI Sharif Jordanian
The proceedings were suspended in accordance with Article 43/1 of the Center's Rules on 2/6/2015	Investment Protection Agreement between Egypt and Britain 1975	ARB/11/32	Indorama International Finance Limited
The proceedings were suspended in accordance with Article 44 of the Center's Rules on 10/9/2015	Investment Protection Agreement between Egypt and UAE	ARB/11/16	Hussain Sagwani Damac Park Avenue for Real Estate Development S.A.E Damac Gamsha Bay for Development S.A.E National Gas S.A.E
The judgment was rendered on 3/4/2014 to close the case in accordance with article 38/1 of the arbitration rules	Investment Protection Agreement between Egypt and UAE	ARB/11/7	
The proceedings were suspended in accordance with Article 43/1 of the Center's Rules on 11/11/2016	Investment Protection Agreement between Egypt and Kuwait	ARB/11/6	Bawabet AL Kuwait Holding Company

*(continued)***Table I.**

A statement of the arbitral proceedings brought against Egypt before the International Center for the Settlement of Investment Disputes (ICSID) in which it was ruled

Judgment	The convention on which the dispute was based	Case data case no.	The company/ investor/plaintiff and his nationality
The judgment was issued on 6/5/2014	Investment Protection Agreement between Egypt and the United States of America 1986	ARB/09/15	H&H Enterprises Investments Inc
Sentencing on 7/2/2011	Investment Protection Agreement between Egypt and Britain 1975	ARB/08/18	Malicorp Limite
The judgment was issued on 3/7/2008	Investment Protection Agreement between Egypt and Denmark	ARB/05/19	Helnan International Hotels A/S
The judgment was issued on 1/6/2009	Investment Protection Agreement between Egypt and Italy 1989	ARB/05/15	Waguih Elie George Siag & Clorinda Vecchi
The verdict was issued on 6/11/2008	Investment Protection Agreement between Egypt and Luxembourg in 1999	ARB/04/13	Jan de Nul N.V.& Dredging International N.V
The judgment was issued on 6/8/2004	Investment Protection Agreement between Egypt and Britain 1975	ARB/03/11	Joy Mining Machinery Limited
The judgment was issued on 18/6/2007	Investment Protection Agreement between Egypt and the United States 1982	ARB/02/15	Ahmonseto Inc and Others
The verdict was issued on 27/10/2006	Investment Protection Agreement between Egypt and the United States 1982	ARB/02/9	Champion Trading Company and Amirtrade International Inc
12/4/2002	Investment Protection Agreement between Egypt and Greece 1993	ARB/99/6	Middle East Cement Shipping and Handling Co S.A
Sentencing in favor of the company	Investment Protection Agreement between Egypt and Britain 1975	ARB/98/4	Wena Hotels Limited
	Egyptian Investment Law	ARB/89/1	Manufacturers Hanover Trust Company
The judgment was issued on 20 May 1992	Egyptian Investment Law	ARB/84/3	South Pacific Properties (Middle East) Limited

Note: International investment agreements concluded by MENA countries issue 3/2006, pp. 32-33, web site: www.oecd.org/mena/competitiveness/
Source: ICSID website available at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail.aspx?CaseNo=ARB/16/2>

Table I.

objection. Egypt submitted that Professor Smit's opinion made it clear that Siag had never properly shed his Egyptian nationality when he "supposedly took on Lebanese nationality[21].

Siag was born in Egypt on March 12, 1962 to Egyptian parents. He was, therefore, an Egyptian national from birth. On March 5, 1990 the Egyptian Minister of Interior issued his Decree No. 1353 of 1990 acknowledging Siag's prior acquisition of Lebanese nationality and

Table II.

A statement of the proceedings against Egypt before the International Center for the Settlement of Investment Disputes and is still under arbitration

Investor state	The law/convention on which the dispute was based	Plaintiff
Holland	Bilateral Investment Agreement between Egypt and the Netherlands 1996	Future Pipe International Pipe manufacturing company
United State	Bilateral Investment Agreement between Egypt and the United States 1986	LP Egypt Holdings I Fund III Egypt OMLP Egypt Holdings The field of construction and construction
USA	Bilateral Investment Agreement between Egypt and the United States 1986, and the Egyptian Investment Law No. 8 of 1997	Champion Holding Company and others Cotton processing and trade
Qatar	Bilateral Investment Agreement between Egypt and Qatar 1999	Al Jazeera
Spain	Bilateral Investment Agreement between Egypt and Spain 1992	Cementos La Union S.A Aridos Jativa
Spain	Bilateral Investment Agreement between Egypt and Spain 1992	Unión Fenosa Gas, S.A Spain's Union Fenosa Gas Company Natural gas liquefaction
USA/Germany	The bilateral investment agreement between Egypt and the United States 1986, and the bilateral agreement between Egypt and Germany 2005	Ampal-American Israel Corporation and others Mining/exporting natural gas
France	Bilateral Investment Agreement between Egypt and France 1974	Veolia Propreté company Water and Sanitation

Source: ICSID website available at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail>

granting him permission to maintain his Egyptian nationality, but he lost his Egyptian nationality because do not notify the Egyptian Interior Ministry within the period of one year of the desire to retain Egyptian nationality Siag acquired Italian nationality on May 3, 1993 on the basis of his marriage to an Italian citizen.

Siag's bankruptcy. Egypt filed a notification and application concerning objection to the center subject matter jurisdiction, Egypt discovered that Waguih Siag had been declared bankrupt on 16 January 1999 as a result of a debt of 23,545.16 Egyptian Pounds.

Egypt contended that, under Egyptian bankruptcy law Siag, from the date he became bankrupt in 1999, could no longer validly agree to arbitrate any dispute relating to any asset forming part of the bankruptcy estate. Egypt argued that at the time the Request for Arbitration was lodged in 2005 Siag therefore lacked the capacity to arbitrate the dispute. Siag also lacked capacity to maintain the present arbitration[22].

After long discussions, the Tribunal finds that Egypt has not demonstrated that Siag was bankrupt at times relevant to the jurisdiction of the Tribunal under the ICSID Convention.

Existence of an "investment". On the subject of its objections to jurisdiction, Egypt submitted that although the term investment has a broad definition it is not without limitations and should be determined on a case-by-case basis, also the purpose of the ICSID Convention is to afford a higher level of protection to foreign investors.

At the date, Egypt and Italy concluded the BIT on 2 March 1989, and at the date of entering into the sale contract on 4 January 1989 the Claimants were Egyptian nationals. The two companies, Siag Touristic and Siag Taba were established under Egyptian laws.

From their inception, the economic activities of the Claimants were devoid of any foreign element.

Word of tribunal about jurisdiction. The Claimants have succeeded on the merits and Egypt's objections to the jurisdiction of the Tribunal were rejected in their totality, both at the jurisdictional phase and during the Tribunal's consideration of the merits:

- finds and declares that at all relevant times Siag was not an Egyptian national;
- finds and declares that Egypt's objection to jurisdiction based on Siag's alleged Egyptian nationality and all of its related contentions about his alleged disqualifying dual nationality fail and are hereby dismissed;
- finds and declares that Egypt's objection to jurisdiction concerning Siag's alleged fraud or other misconduct in relation to his acquisition of Lebanese nationality fails and is hereby dismissed; and
- finds and declares that Egypt's objection to jurisdiction based on Siag's alleged bankruptcy fails and is hereby dismissed.

Applicable law. Second step after discussing the parties, the Tribunal decided that the applicable law is the bilateral agreement between Egypt and Italy

The claimant's requests. The Tribunal finds that the evidence clearly establishes that Egypt has unlawfully expropriated Claimants' investment, in breach of Article 5(1)(ii) of the BIT; that Egypt failed to provide full protection to Claimants' investment, in breach of Article 4(1) of the BIT; that Egypt failed to ensure the fair and equitable treatment of Claimants' investment, in breach of Article 2(2) of the BIT; and that Egypt allowed Claimants' investment to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT[23].

Main point in the word of tribunal[24]:

For the following reasons:

- All of Egypt's defenses on the merits have been dismissed.
- Egypt was responsible for greatly increasing the costs of these proceedings.
- Claimants should be compensated for their reasonable legal fees and related expenses in respect of both the original jurisdictional phase and subsequent phases.
- The Tribunal agrees that "it is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof.
- Tribunal has also noted that Egypt has made a number of unsuccessful jurisdictional objections, some of which were filed late in the course of proceedings and which represented in modified form issues which had already been decided by the Tribunal.

The word of Tribunal:

- Egypt is liable to Claimants for unlawfully expropriating Claimants' investment, consisting of the Property and the Project, in breach of Article 5(1)(ii) of the BIT.
- Egypt is liable to Claimants for failing to provide full protection to Claimants' investment, consisting of the Property and the Project, in breach of Article 4(1) of the BIT.
- Egypt is liable to Claimants for failing to ensure the fair and equitable treatment of Claimants' investment, consisting of the Property and the Project, in breach of Article 2(2) of the BIT.

- Egypt is liable to Claimants for allowing Claimants' investment, consisting of the Property and the Project, to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT.
- The Claimants are entitled to recover from Egypt the total sum of USD 74,550,794.75 in compensation for its actions in breach of the BIT.

Conclusion

Results related to the legal framework regulating investment disputes in Egypt

- Multiplicity of advantages provided by different legal frameworks governing the arbitration process, which benefit Egypt as other countries of the world and provide the reassurance that the investor needs to make his decision to invest.
- The arbitration rules adopted over the years from 1958 until now at different levels internationally and regionally are an advantage that cannot be ignored in an attempt to avoid the settlement of international disputes in the fields of investment in accordance with the national laws of the States parties to these disputes.
- The basis in the various frameworks governing the arbitral mechanism and the previous reference to its recognition of the right of the parties to the dispute to agree and freely decide what they want with respect to arbitral proceedings followed in the course of arbitral proceedings, the selection of arbitrators and agreement on applicable law and other matters relating to the subject matter of arbitration, any other procedure shall be used only if such agreement is not possible. All these rights are subject to the rights of the parties to the dispute to submit their claims, defenses and rights to payment after the jurisdiction of the arbitral tribunal.
- The various legal frameworks emphasize the necessity of arbitral decisions, and therefore the refusal to recognize or not to implement such decisions. The only way to challenge these decisions is to cancel the award at the request of the party against whom the decision is made. Represent evidence that the competent court may rely on to issue a judgment on the annulment of the award.

Finally, the legal framework governing investment in Egypt, both at the level of the national laws governing investment and the different clients. The laws regulating investment in Egypt, first and foremost the investment law, as adopted by the laws regulating investment in the sixties of the last century and ending with Law No. 72 of 2017 Which was adopted at the end of May 2017 and started on June 1 of the same year. These laws included a set of guarantees and incentives granted to foreign investors, the violation of any of which is justified by the investor to object and claim his rights in Which has already occurred in a number of previous cases dealt with in detail, and these laws have gradually allowed various investors to resort to arbitration as a mechanism for resolving disputes arising from investment, especially after Egypt signed the Convention established for the International Center for Settlement of Investment Disputes, The organization in this regard in the successive laws and the previous work, which turned out to be some of the law applicable in some cases established, these laws are plagued by many shortcomings that are linked in part to the subject of drafting and others imbalance The balance between the rights guaranteed by the various investment laws for foreign investors and the obligations of investors toward the host country and the consequent breach of these obligations.

Results related to the arbitration cases against Egypt

- The arbitration cases that were filed with the Center in economic terms related to sectors of vital importance in the Egyptian economy, for example tourism sector, which received the largest number of cases filed, agricultural sector and the activities of infrastructure and construction received.
- Investors' decision to arbitration in these cases led to the cessation of vital projects whose completion was supposed to contribute to the national economy. Many of them were associated with large projects in terms of investment volume or the nature of the targeted projects (new or existing infrastructure or large industrial projects, Tourism activities have been associated with huge projects for the development of hotels, land and resorts in a sector that plays a vital role as a source of national income in Egypt.
- Investment Law No. 72 of 2017, limited to the settlement of investment disputes on the three committees formed in accordance with the provisions of the law, as well as resort to the judiciary and delete the reference to the use of the arbitration mechanism with a compromise on the friendly methods and negotiations between the parties only, although this reflects the attempt of those who Investment Management Reducing investors' recourse to international arbitration as a mechanism for settling investment disputes. The text of the Investment Law on the investor's right to resort to international arbitration means accepting Egypt to international specialized agencies to arbitrate as a mechanism without the need for prior agreement with investors. However, investment officials have overlooked a very important point that the amendment of the Investment Law as the most important part of the legislative framework governing investment in Egypt is bilateral agreements to ensure and protect mutual investments. Which Egypt signed more than 100 agreements with its counterparts from other countries, in which Egypt guarantees investors belonging to these countries the right to resort to international arbitration in investment disputes, and with the fact that these agreements are the support of more than 70 per cent of the cases before the International Center for Settlement of Investment Disputes, which means that it does not stand when amending the investment law and delete the arbitration clauses as a mechanism for settling disputes with investors, and I require a broader view of the legislative framework governing investment as different as we discussed in Chapter I, International and regional bilateral and multilateral agreements, as well as the internal framework of investment law, arbitration law, commercial law and other laws relating to investor transactions within Egypt, which requires a greater effort and a broader vision to achieve the desired change.
- The investment guarantees and protection agreements signed between Egypt and a large number of countries in the world have placed successive Egyptian governments with a large number of obligations that would give the investor a lot of rights in return for less obligations. In this regard, the rights of Egyptian investors in the countries signed with these agreements, and because Egypt is a country mainly seeking to attract foreign investment, it currently needs more to legalize and put an officer to ensure that these rights are in place and not abused by investors.

Notes

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