

Investor–state Disputes with Egypt: Dispute Settlement and the Role of the ICSID as Arbitration Tribunal

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Owing to several issues in the litigation system, such as jurisdictional issues of the home government, and to offer aggrieved foreign investors an opportunity to redress the wrongs committed by a host state, the International Centre on the Settlement of Investment Dispute (ICSID) was established. It took time for it to become a globally popular instrument of international investor–state dispute settlement, particularly because it had to settle issues related to the norms vested in bilateral investment treaties (BITs). This research study first examines the circumstances led to the setting up of the ICSID, before discussing the jurisdictional issues as well as those of fairness and transparency in the role of the ICSID as an international arbitration body. The study was carried out in the context of investor–Egypt disputes and this article cites a few case where the ICSID failed to offer redress due to jurisdictional norms instrumental in the investor–Egypt disputes, which even the domestic laws and local remedies could not tackle. The results of the study have implications for the impact of the ICSID on developing nations and will open up new avenues of discussion and critical debate about the role of the ICSID as an international dispute-settlement agency.

Key words: ICSID, investor–state dispute, arbitration, investment, tribunal.

Introduction

Until the first half of the twentieth century, the applicable law for settling investor–state disputes was too conventional and related to customary international law applicable to all types of disputes. There was no treaty or any international agreement to govern foreign investments. Whenever there was any violation of the trade agreement, the host state would apply its laws or manipulate a few international laws in such a manner that the foreign investors were forced to follow the local remedies rather than move to an international platform for the settlement of investor–state disputes. In all such cases, the host state offered very few options to the aggrieved foreign investor when a dispute arose. However, as the number of disputes grew, a formal, semi-structured, ad hoc system started to take shape to settle investment–state disputes.

This dispute-settlement system can be studied in three stages: (1) settling the dispute through the diplomatic intervention of the home government; (2) seeking redress in the local courts of the host state; and (3) setting up a Claim Commission (Dodge, 2006; Franck, 2005; Kauschal, 2009). However, none of these options proved fruitful and long lasting in most investment disputes, nor did they offer any redress to the foreign investors.

Diplomatic protection

Diplomatic protection is one of the traditional means of recourse used by foreign investors if harmed by the host state through an act or omission. In the course of exercising the diplomatic protection, the state may employ a number of mechanisms, including but not limited to consular action, negotiation, mediation, severance of diplomatic relations, economic pressure and, where necessary, the use of force (James, 2002). Regardless of the mechanism, the state would decide to use the application of diplomatic protection only after all the other mechanisms of protection had failed. Before invoking diplomatic protection, the aggrieved foreign investor was required to prove that all local remedies available in the host state had been exhausted (Dodge, 2006; Theodor, 2008). In addition, the aggrieved foreign investor was required to prove that they had remained a citizen of the espousing state at the time of the injury up to the time when the claim was presented (ILC, 2000).

The use of diplomatic protection in investment disputes was also very ineffective, as it involved many practical difficulties. First, whenever an aggrieved investor asked the home state to espouse the dispute, it would become a dispute of the foreign state concerned, to which the investor belonged. The investor would immediately lose control over the dispute and the state

concerned could also decide not to pursue it any further for diplomatic reasons (Andrea, 2005). Second, since the home state exercised exclusive control over the claims of its nationals in international spheres, and also had the mandate to settle, waive or pursue claims by agreement with the foreign state, the home state could use its discretion to discontinue the dispute at any time (Amerasinghe, 2005). Third, when the home state pursued the claim and also secured an award in such cases, it would still have the discretion not to compensate the investor from the proceeds of the award.

Another shortcoming of using diplomatic protection as a measure was that the home state may take a decision to pursue a claim against the host state, but it was not an assurance that the matter would be referred to an international body. An international adjudication process may begin only when the host state has given its consent, as it has to exercise its privilege to plead sovereign immunity from prosecution, which may not take place at all if the consent has not been given to move an international adjudication body (Dodge, 2006). Finally, if diplomatic protection were not handled carefully, it could disrupt the international relations with the host state, which may result in protracted disputes. Hence, owing to these obstacles, diplomatic protection failed to gain popularity in investor–state disputes and made the need for the proliferation of the current arbitration system more pressing (Dozler & Chreuer, 2008).

The Host State Court: Local Remedies

Under the customary international law, before instituting any claim in an international forum/court, an injured party must first exhaust all local remedies available (Amerasinghe, 2005). In the event of an investment dispute, therefore, a foreign investor was first required to seek a remedy at the local level with the host state court. For instance, in the *Norwegian Loans Case* (2016) it was reiterated that

It is important to obtain the ruling of the local courts with regard to the issues of fact and law involved, before the international aspects are dealt with by an international tribunal. It is also important that the respondent State which is being charged with breach of international law should have an opportunity to rectify the position through its own tribunals.

Not only are there are examples of litigations in favour of local remedies, but there are several experts who have asserted the importance of exhausting local remedies before resorting to international adjudication (Paradell & Newcombe, 2009). Edwin (1944), for instance, submits



that the rule of exhaustion of local remedies is aimed at, among other things, relieving the home state of espousing claims that could be resolved at a lower level or that may be unfounded and frivolous. He believes that the rule of local remedies provides the sovereign state with an opportunity to resolve a dispute with aliens in its own regular way before it can be condemned at an international level.

Similarly, in Amerasinghe's (2005) opinion, the rule of local remedies aims to reduce the unwanted relation interference between the host state and the aliens. The rule does, however, have several advantages. The first is that the host state is given an opportunity to redress violations committed by local individuals or to rectify misconducts of its own low-level officials. Second, the rule of local remedies reduces the litigation costs as a dispute at the local court level can be settled for lower costs compared with international bodies. The third advantage is that it relieves the host state from unnecessary publicity involved in international adjudication (Amerasinghe, 2005).

However, the rule of local remedies ultimately proved more favourable to the host state and provided little assistance to aliens/foreign investors. There were a number of issues that worried foreign investors. In the local courts, for instance, foreign investors were concerned about the efficiency and impartiality of the local judges (Dozler & Chreuer, 2008). The foreign investors, who hailed from developed countries and invested in less-developed nations, always doubted that judges would be biased and felt they would protect the interest of the state as a gesture of loyalty to their home government. Moreover, investors were worried that local judges lacked expertise in the field of international investment law (Dozler & Chreuer, 2008). In such a situation, the home state's court was not a viable option as it lacked territorial jurisdiction over any dispute that originated in the host state. To sum up, the host state's courts were not actually considered a satisfactory option by foreign investors.

Claim Commission

Another option for resolving investment disputes was to formulate ad hoc claim commissions for the purposes of settling aliens' claims (Paradell & Newcombe, 2009). This mechanism was normally used in situations of national revolutions and any other circumstances that involved mass destruction, confiscation or nationalisation of aliens' property (Andrea, 2005). The home government would negotiate with the host state and enter into a treaty for the purposes of determining compensation to the injured aliens. These commissions became popular because they did not take any longer to determine whether the claimant whose home state was espousing the claim had a right to be compensated (Andrea, 2005).

The first claim commission of this kind was formed by the United States and United Kingdom on claims relating to the treatment of British and US nationals after the American Revolution. The treaty of Amity, Commerce and Navigation between Great Britain and the United States,



famously referred to as the Jay Treaty of 1794, introduced the claim commission system. Parties to the disputes were the states concerned, and states espoused the claims on behalf of their investors. The commission was very successful and rendered over 500 awards (Paradell & Newcombe, 2009). In more recent times, the foreign investors did not like this claim commission system because it lacked mandatory force. Besides, the commission could not be formed unless the states agreed, which was seen as a limitation of this system. Foreign investors thus depended on their respective states for the setting up of the dispute-settlement commission. As a result of these limitations, claim commissions were abandoned, which paved the way for an investment arbitration system. The decisions from these commissions were, however, very important for creating the early jurisprudence on the duty owed to aliens by the state.

BITs and ICSID

Despite the availability of arbitration options, the litigation system failed to give foreign investors an effective means of redress or compensation whenever they had a claim against the host state. These options also did not provide satisfactory protection of rights and privileges with regard to foreign investments. For this reason, an absence of an effective and well balanced dispute settlement system was always acutely felt (Salacuse, 1990). Ultimately, nations started signing bilateral investment treaties (BITs) as a new instrument to remedy a situation where there was an investment dispute.

Soon these BITs also required a monitoring body to manage and control their compliance. They needed an international body that could settle their disputes and hence the International Convention on the Settlement of Investment Dispute (ICSID) was formed by the executive directors of World Bank on 18 March 1965 and ratified by twenty nations on 14 October 1966 (ICSID, 2016). The nomination of the ICSID Convention to arbitrate in investment disputes between states and nationals of contracting states provided a new platform for resolving investment disputes (Schwebel, 2010). The Convention was expected to address the concerns in the traditional dispute-settlement mechanisms. It was hailed for being self-contained and a depoliticised forum. It promised to provide the most transparent dispute-settlement system available to foreign investors. In accordance with Article 53(1) of the ICSID Convention, the investor was entitled to institute the dispute without being required to exhaust local remedies.

Similarly, Article 25(1) of the ICSID Convention stated that the foreign investor no longer needed the assistance of the home state to sue the host state. The Convention granted the foreign investor the right to sue the host state directly. Article 27(1) of the Convention also barred the contracting state from using diplomatic protection, while Article 42 required the tribunals to apply the law chosen by the contracting parties or, where the parties did not make any choice, the tribunal was free to apply the host state law and principles of international law. The ICSID also facilitated the settlement of disputes involving a member state and a national of another

state that was not a member of the ICSID Convention through the additional facility rules (ICSID, 2016).

During its first 25 years of operation, the ICSID was not popular, and most disputes continued to be settled through the earlier existing traditional means. The ICSID registered its first case, *Holiday Inn v Morocco*, ICSID Case No. ARB/72/1, in 1972, six years after its establishment. By the end of the 1970s, only nine cases had been registered, but there was a slight increase in the 1980s, with 23 cases registered in that decade (Waibel & Wu, 2016). However, after the proliferation of BITs in the 1990s, the popularity of the ICSID dispute-settlement system increased tremendously (Kauschal, 2009). Up to the end of 2015, the ICSID had registered 549 cases under the ICSID Convention and Additional Facility Rules (UNCTAD, 2012).

Problem Statement

Like all other nations, Egypt had also entered into BITs and had continued to settle disputes through the local courts and domestic laws. But soon the international pressure grew and Egypt became involved in ICSID operations. Prior to 2016, Egypt was involved in 24 cases (ICSID, 2016). In Egypt, the ICSID gained popularity because Article 53(1) of the ICSID Convention made the tribunal award binding on all parties. If a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognised and enforced in the courts of any ICSID Member State as though it were a final judgment of that state's courts (ICSID Convention, Article 54(1)). The above provision of the ICSID supports the argument that the ICSID was established to protect the investment of foreign investors in Egypt as well. It was also felt that foreign investors looked to the ICSID as a saviour or a protector of their rights.

However, although BITs and the ICSID were seen as focusing on protecting foreign investors, there was little discussion of the obligations of the same investors. The reason was simple: BITs were designed by the Western world, on the American-European BITs models, for the purposes of assuring protection of Western investments abroad. It was obvious that the primary purpose of any BIT was to protect the foreign investor's interests (Beth, 2014). For this reason, many developing countries were initially apprehensive about BITs; however, with the collapse of the Soviet Union and a decline in the amount of monetary aid forthcoming from the World Bank (WB) and the International Monetary Fund (IMF), they were forced to sign the BITs in the expectation that foreign investment would boost their economies.

It therefore remained a well-known fact that the ICSID was not the appropriate mechanism for settling investor–state disputes, either globally or for investor–Egypt disputes specifically, as it operated more in favour of the foreign investor (Cosmas, 2014). This study examines the investor–Egypt disputes in order to ascertain the extent to which the ICSID succeeded in its objectives in Egypt.



The study focuses on two major flaws: the jurisdiction of ICSID, which is undefined and too arbitrary when it comes to developed nations or matters related to financial and economic aspects; and the nationalities of the arbitrators in all BIT disputes, particularly where Egypt was involved. It was felt that in major cases, presidents and chairmen of arbitral bodies were elected from developed countries, making up the majority of the industrialised nations in the ICSID. About 85 per cent of arbitrators came from developed countries (Cosmas, 2014), and they also acted as counsel for the same foreign investors; one can therefore say that the rule of law was not followed and indeed was often ignored. The evidence hints at a lack of transparency and a bias towards developed countries.

Hence there is a need to re-examine the international dispute settlement system, which ought to operate in accordance with the principles validated by the rule of law. There is a need for such a system that observes and ensures the independence of judiciary, free from any bias or favouritism.

Literature review

ICSID Jurisdiction

Article 25(1) of the Convention defines the jurisdiction of the ICSID to

extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre unless a party may withdraw its consent unilaterally (ICSID, 2016).

Article 25 (1) thus defines the jurisdiction of the ICSID but does not define investment, where the definition of investment is considered the main criterion for determining the jurisdiction of the ICSID.

The absence of the definition of investment has led to conflicting judgments of the ICSID (Anil, 2014). Moreover, some arbitration tribunals ruled that the jurisdiction of the ICSID was related to disputes over any investment (Carmen, 2016). Yet the same tribunals awarded opposite decisions about the same disputes. Grabowski (2014) also argues that the ICSID's jurisdiction extends to matters of international investment, but the organisation's charter never defines what actually qualifies as an investment. ICSID jurisdiction could therefore be expanded beyond what is granted by the organisation's founding documents, introducing uncertainty into the realm of international investment, which could stem the flow of capital (Grabowski, 2014).

Likewise, the ICSID's rules do not state the requirement of what constitutes a legal person, which further aggravates the issues of jurisdiction. Article 25(2) of the Convention does clearly



define a normal person for the sake of admitting a dispute. They must have the nationality of one of the contracting states and their citizenship may be fixed in two dates: first, the date on which the parties agreed to settle the dispute by arbitration; and second, the date of registration of the request for arbitration by the ICSID. This provision is often referred to when a question arises about the status of citizenship between these two dates, especially when the holder of the citizenship indulges in acts related to the dispute. These two dates, together with the period between them, are termed ‘critical dates’ (Schreuer, 2009).

Moreover, many member countries are economic entities in themselves, having economic dealings with foreign investors and considerable legal and/or financial independence from the state (Elvia, 2015). This issue is particularly significant in federal states such as Canada, the United States, Australia and Germany, where sub-national governments exercise internal jurisdiction in many areas of economic regulation. However, the issue is not confined to federal states. Regional and municipal governments in unitary states also exercise considerable power over local economic activity and can equally bring that state into conflict with its multilateral or bilateral treaty obligations. A question arises regarding whether this problem can lead to a lack of jurisdiction of the ICSID in considering the disputes of the entities that are parties to these disputes. There is a conflict in the provisions of the arbitration over this issue (Koster, 2016).

Arbitrators and their nationalities

Recent studies indicate that, out of the total number of all ICSID arbitrations, more than 75 per cent come from OECD countries and North America, while 85 per cent of the respondent states are part of the developing world (Anil, 2014; Gaukrodger & Gordon, 2012). The studies further reveal interesting facts about arbitrators and counsel – for instance, one group of 12 arbitrators has appeared consistently in more than 60 per cent of all cases filed by 45 states, and out of 263 ICSID cases, 12 arbitrators have appeared in 158 cases (Gaukrodger & Gordon, 2012; Van Harten, 2010). Some 50 per cent of arbitrators on the current ICSID roster have represented the tribunal as counsel for investors (Malatesta, 2013) and more than 50 per cent of investor–state arbitrators have acted as counsel for investors in other investor–state cases (Gaukrodger & Gordon, 2012).

Table 1 gives an evidence of cases that have been submitted before ICSID. It illustrates the cluster of arbitrators appointed by claimants and presidents by either two arbitrators or by the chairman of the Administrative Council of ICSID. There are a few names overlapping in both positions – for instance, Pierre Tercier is appointed as president in more than one case but the appointing authority is different in each case. Likewise, there are a few names of people who are arbitrators in a particular case, but hold the position of president in another.

Table 1: Arbitrators and presidents and their nationalities

Case/number	Arbitrator, name and nationality	President, name and nationality
1 <i>Ahmonseto, Inc. and others v Arab Republic of Egypt</i> (ICSID Case No. ARB/02/15)	Arbitrators: Ibrahim Fadlallah; (French) Appointed by the Claimant (s)	President: Pierre Tercier (Swiss) Appointed by two arbitrators
2 <i>Ampal-American Israel Corporation and others v Arab Republic of Egypt</i> (ICSID Case No. ARB/12/11)	Arbitrators: Francisco Orrego Vicuña (Chilean) Appointed by the Claimant(s)	President: L. Yves Fortier (Canadian) Appointed by two arbitrators
3 <i>Unión Fenosa Gas, S.A. v Arab Republic of Egypt</i> (ICSID Case No. ARB/14/4)	Arbitrators: J. William Rowley (British, Canadian) Appointed by the Claimant(s).	President: V.V. Veeder (British)
4 <i>Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt</i> (ICSID Case No. ARB/05/15)	Arbitrator: Michael C. Pryles (Australian) Appointed by the Claimant(s)	President: David A.R. Williams (New Zealand)
5 <i>Cementos La Union S.A. and Aridos Jativa S.L.U v Arab Republic of Egypt</i> (ICSID Case No. ARB/13/29)	Arbitrators: Charles N. Brower (US) Appointed by the Claimant(s)	President: Christer Söderlund (Swedish) Appointed by the Chairman of the Administrative Council of ICSID
6 <i>Champion Trading Company and Ameritrade International, Inc. v Arab Republic of Egypt</i> (ICSID Case No. ARB/02/9)	Arbitrators: L. Yves Fortier (Canadian) Appointed by the Claimant(s)	President: Robert Briner (Swiss)
7 <i>H&H Enterprises Investments, Inc. v Arab Republic of Egypt</i> (ICSID Case No. ARB/09/15)	Arbitrators: Veijo Heiskanen (Finnish) Appointed by the Claimant(s).	President: Bernardo M. Cremades (Spanish) Appointed by the Chairman of the Administrative Council of ICSID
8 <i>Helnan International Hotels A/S v Arab Republic of Egypt</i> (ICSID Case No. ARB/05/19)	Arbitrators: Michael J.A. Lee (British) Appointed by the Claimant(s)	President: Yves Derains (French)
9 <i>Malicorp Limited v Arab Republic of Egypt</i> (ICSID Case No. ARB/08/18)	Arbitrators: Luiz Olavo Baptista (Brazilian) Appointed by the Claimant(s).	President: Pierre Tercier (Swiss)
10 <i>Indorama International Finance Limited v Arab Republic of Egypt</i> (ICSID Case No. ARB/11/32)	President: Donald M. Mcrae (Canadian, New Zealander)	Arbitrators: Christoph H. Schreuer (Austrian) Appointed by the Claimant(s).

11 <i>Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt</i> (ICSID Case No. ARB/04/13)	President: Gabrielle Kaufmann-Kohler (Swiss)	Arbitrators: Pierre Mayer (French) Appointed by the Claimant(s)
12 <i>Joy Mining Machinery Limited v Arab Republic of Egypt</i> (ICSID Case No. ARB/03/11)	Arbitrators: William Laurence Craig (US) Appointed by the Claimant(s)	President: Francisco Orrego Vicuña (Chilean)
13 <i>Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt</i> (ICSID Case No. ARB/99/6)	Arbitrators: Piero Bernardini (Italian) Appointed by the Claimant(s)	President: Karl-Heinz Böckstiegel (German)
14 <i>National Gas S.A.E. v Arab Republic of Egypt</i> (ICSID Case No. ARB/11/7)	Arbitrators: L. Yves Fortier (Canadian) Appointed by the Claimant(s)	President: V.V. Veeder (British)
15 <i>Ossama Al Sharif v Arab Republic of Egypt</i> (ICSID Case No. ARB/13/3)	Arbitrators: Stephen M. Schwebel (US) Appointed by the Claimant(s)	President: Pierre Tercier (Swiss) Appointed by the Chairman of the Administrative Council of ICSID
16 <i>Ossama Al Sharif v Arab Republic of Egypt</i> (ICSID Case No. ARB/13/4)	Arbitrators: Daniel M. Price (US) Appointed by the Claimant	President: Bernardo M. Cremades (Spanish) Appointed by the Chairman of the Administrative Council of ICSID
17 <i>Ossama Al Sharif v Arab Republic of Egypt</i> (ICSID Case No. ARB/13/5)	Arbitrators: Stephen M. Schwebel (U.S.) Appointed by the Claimant	President: Cecil W.M. Abraham (Malaysian) Appointed by the Chairman of the Administrative Council of ICSID

Source: ICSID Cases accessible at <https://icsid.worldbank.org/apps/icsidweb/cases>.

Table 1 shows that 19 presidents of arbitral bodies were selected from developed countries representing in 22 cases, or 82 per cent of total cases. In addition, in nine cases the presidents were appointed by the Chairman of the Administrative Council of ICSID. Six of them are from developed countries, while three presidents are from developing countries. The attendance of industrialised nations is hence double in these cases. It is notable that the arbitral body always consists of three members, one of whom is the president with the other two arbitrators appointed by the parties. The award is decided by two members in a case. Moreover, out of total number of arbitrators appointed by Claimants, 22 arbitrators belonged to developed countries, representing 23 of the above cases. This means that 41 members from developed countries were in a position to seize the opportunity to make an award decision compared with 26 members from developing countries.



The UNCTAD World Investment Report 2012 has raised the issue of impartiality and quality of arbitrators among other concerns related to investor–state disputes (UNCTAD 2012). The report refers to an ‘emergence of a club of individuals’ who serve as counsel in some cases and arbitrators in others, often receiving repeated appointments, ‘thereby raising concerns about potential conflict of interest’. It should be noted that arbitrators earn a professional fee in return for their services, so it is obvious that the greater the number of cases – whether acting as a counsel or an arbitrator – the higher the money earned. Hence it is patently clear that arbitrators would prefer to decide cases in favour of that party that is likely to reappoint them in future.

ICSID and Investor–Egypt Disputes

Previous studies (Elfakharani et al., 2016; Shany, 2005; Stieglitz, 2007) have revealed ample evidence that ICSID was not the appropriate system for investor–Egypt disputes settlement. For example, Shany (2005) asserts that ICSID cases on relations between contract and treaty claims have created considerable confusion in the world of investment law because it is not clear whether BITs cover contract performance claims directly or authorise international arbitration tribunals to review them. Similarly, the relationship between jurisdictional clauses governing contract and treaty claims and the judicial proceedings that they entail is also uncertain (Shany, 2005) In addition, a few of the terms of the ICSID Convention are so vague that they cause a great deal of confusion in global investment law. This ambiguity is also seen in the interpretation of regulations, particularly those concerning the delimitation of the competence of entities on settlement disputes, which may result in an expansion of the number of disputes (Stieglitz, 2007). The question arises of whether the ICSID as a forum has sufficient transparency with regard to in resolving disputes between the investors and the host state to convince developing countries such as Egypt that the ICSID’s rules are appropriate for them (Elfakharani et al, 2016).

In this section, a few cases where Egypt is the respondent state in the ICSID’s arbitration tribunals are cited to prove Egypt’s claims that the ICSID has no jurisdiction to settle the disputes concerned, but this demand was never paid heed to. It was also felt that decisions in these cases, which mainly dealt with jurisdictional issues, were taken to determine Egypt’s claims of its jurisdictional rights.

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Case No. ARB/84/3)

Southern Pacific Properties, Middle East (SPP(ME)) requested that the ICSID establish an arbitration tribunal to determine that Egypt had undertaken obligations and incurred duties in respect to SPP(ME) according to the terms of Law No. 43 of 1974. The allegation in this case was based on Egyptian national legislation. Egypt had been rejected to the jurisdiction of the ICSID based on that evidence of the jurisdiction of the ICSID requiring approval from both

parties to undergo ICSID arbitration (ICSID, 2016). The tribunal acted against Egypt and decided: (a) to reject the objections to its jurisdiction raised by the respondent alleging that Article 26 of the ICSID Convention, as well as the pursuit by the claimants of alternative remedies bar the claim in the present case; (b) to reject the objection to its jurisdiction raised by the respondent alleging the withdrawal from the claimant of the benefits of Law No. 43; (c) to reject the objection to its jurisdiction raised by the respondent contending that the provisions of Article 8 of Law No. 43 did not apply to this investment dispute; and (d) to stay the present proceedings on the respondent's remaining objections to the ICSID's jurisdiction until the proceedings in the French courts had finally resolved the question of whether the parties agreed to submit their dispute to the jurisdiction of the International Chamber of Commerce (ICSID 2016.)

Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt (ICSID Case No. ARB/04/13)

In this second case, relating to the Belgium-Luxembourg Economic Union (BLEU)–Egypt BIT 1999, Egypt claimed a lack of jurisdiction of the ICSID in view of this issue under the following arguments: (1) The BIT of 2002 is '[in]applicable to disputes having arisen prior to its entry into force' and could not become the basis of jurisdiction of this tribunal for a dispute more than 10 years old. (2) The Claimants contended that the judgment of the Administrative Court of Ismaïlia rendered on 22 May 2003 was artificial, whereas, the other party argued that the dispute under appeal before this tribunal is the same dispute that was decided by the Court of Ismaïlia. (3) The 1977 BIT had expired in its entirety on 24 May 2002. (d) The Respondent's consent to ICSID jurisdiction under the 1977 BIT had lapsed before initiating the present proceedings on 23 December 2003. However, whether or not the 2002 BIT was in force, it did bring into notice the expiration of the 1977 BIT. (e) It was difficult for the claimants to rely on any purported 'continuity of protection by the two BITs', given that the dispute fell outside the scope of the *ration materiel* of the 1977 BIT. (f) The current dispute was not between a state and an investor, but rather between an investor and their contractual counterpart, which was also a legal entity distinct from the state.

Based on these arguments, Egypt (the respondent) invited the Tribunal to:

- decline jurisdiction to adjudicate all the claims raised against it by the claimants
- direct the claimants to jointly and severally reimburse all the costs that the Respondent would have incurred in response of their spurious action, including the legal costs and the amounts remitted to the ICSID in the present arbitration as in the case *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) (ICSID, 2016).

However, the decision of the tribunal stated that, ‘The Arbitral Tribunal of ICSID has jurisdiction over the dispute submitted to it in this arbitration’ (ICSID 2016). The award was based on the interpretation of Article 25; however, as discussed above, this Article does not have crucial interpretations. Moreover, the decision was also again based on non-specific criteria.

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

The third case was very complicated, and had long analytics. In the light of this case, the respondent (Egypt) pointed out that the claimants did not satisfy the personae and material requirements of Article 25(1) and (2) of the ICSID Convention. The respondents submitted the argument that the claimant (Siag) was born as an Egyptian national on 12 March 1962, and that he, along with other family members, had been running the family businesses, which included the Siag Touristic business, since his father’s death in 1987. Incidentally, Siag Touristic signed a conditional sale contract with the Touristic Development Authority, a government body, in 1993 in order to develop a large piece of land in the southern area of Tab into a tourist resort, after forming another company called Siag Taba. In accordance with Article 25 of the ICSID Convention, it was an undisputed requirement that the investor in ICSID proceedings should possess a positive or a negative nationality. The respondent further argued that in order to determine whether an investor was a national of an ICSID contracting state and not a national of the host state, a reference to the domestic law of the state whose nationality was at issue should be made (ICSID, 2016). There was no suggestion that the claimant had acquired Italian nationality through fraudulent means or purposefully created as an expedient to bring these claims before the ICSID (ICSID, 2016).

However, the Tribunal took a decision on this Jurisdiction issue, dated 11 April 2008, that the present dispute was within the jurisdiction of the ICSID and the competence of the Tribunal. Specifically speaking, the Tribunal:

1. finds and declares that on all relevant occasions Mr Siag was not an Egyptian national;
2. finds and declares that Egypt’s objection to jurisdiction based on Mr Siag’s alleged Egyptian nationality and all of its related contentions about his alleged disqualifying dual nationality have failed and are hereby dismissed;
3. finds and declares that Egypt’s objection to jurisdiction concerning Mr Siag’s alleged fraud or other misconduct in relation to his acquisition of Lebanese nationality has failed and is hereby dismissed.
4. finds and declares that Egypt’s objection to jurisdiction based on Mr Siag’s alleged bankruptcy has failed and is hereby dismissed (ICSID 2016).

The decision taken regarding Egypt's defense is quoted below:

The Tribunal finds and declares that:

1. Egypt's defense that the Claimants may not oppose their Italian nationalities fails and is dismissed;
2. Egypt's defense based on Mr Siag's alleged bankruptcy fails and is hereby dismissed;
3. Egypt's defense that the Claimants are stopped from denying their Egyptian nationality fails and are dismissed;
4. Egypt's defense challenging the standing of Mrs Vecchi's estate fails and is dismissed.

For all the foregoing reasons and rejecting all submissions on the contrary the Tribunal thus makes this decision that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal.

Wena Hotels Ltd v Arab Republic of Egypt (ICSID Case No. ARB/98/4)

The fourth case involving Egypt dealt with the issue of expropriation and was concerned with the seizure by Egyptian officials of the Nile Hotel in Cairo and the Luxor Hotel (collectively, the 'Hotels') in Luxor on 1 April 1991. The Hotels were being operated by the Wena Group under two lease and development agreements, into which it had entered in 1989 and 1990 respectively, with the Hotels' owner, the Egyptian Hotels Company (EHC). EHC was a public sector company wholly owned by the Egyptian government as stated in the case of *Wena Hotels Ltd v Arab Republic of Egypt, Investment Policy, United Nations*. The award found that Egypt's actions amounted to an 'expropriation without prompt, adequate and effective compensation' in violation of Article 5 of the IPPA (ICSID, 2016). However, the arbitral tribunal of ICSID described the alleged violation of Egypt as an expropriation of the investment. It is the view of this article, though, that such a characterisation is inaccurate and incongruous. It is out of place to call non-implementation of the contract for the rental or lease of the hotel 'expropriation': while blocking the lessor under the tenancy law from enjoying the benefits of leasing could be a violation of the lease, in the case of a property investment, it should not amount to expropriation.

Noticeably, this award was interpreted as declaring, by way of interpretation of the Award, that the term 'expropriation' used in the Award in connection with the awarding of damages and interest to Wena is to be understood as meaning that the expropriation constituted a total and permanent deprivation of Wena's fundamental rights of ownership – that is, its rights to make use of its investments under the Luxor Lease and to enjoy the benefits of such investments in accordance with such (ICSID, 2016). Notably, such an interpretation demonstrates that the Arbitration Tribunal of the ICSID has given itself the right to define the concept of 'expropriation', which has always been surrounded by controversy in international law (Upreti, 2016).



To sum up, these four cases exemplify that the ICSID and its annulment committees went through a judicialisation process, signifying that they had obtained a domestic court-like features, enabling them to have an impact on the attitude of both the country and individuals instead of just focusing on specific dispute resolution. Further, the recent decisions of the ICSID annulment committees again expressed interest in engaging in an outstanding substantive review of the tribunal's award, a matter that generates a renewed sense that the annulment committees are still distracted regarding the appropriate role of annulment in the ICSID arbitration system. These distractions have grave repercussions because they ultimately result in making decisions that are inconsistent at the level of annulment in the ICSID arbitration system, thereby adding to the stratum of disjointed decisions accomplished by the tribunal. Such inconsistent decisions have the tendency to ultimately compromise or jeopardise the legitimacy of the ICSID arbitration regime as a judicial body towards shaping the character of prospective host states and individuals (Dohyun, 2011).

Results and Findings

Since its establishment, the ICSID has brought down judgments on a number of cases relating to Egyptian arbitrations, especially for foreigners plying their trade in the country. In this context, a survey was carried out and respondents were asked whether the decisions of Egypt and many other nations globally were contingent upon the ICSID as the main international body to address investment disputes. When asked how they found the awards of ICSID, the responses from arbitrators revealed that many of the ICSID's awards – particularly towards Egypt as a respondent state – were controversial. Incidentally, most of these awards were based on unclear rules, such as Articles 25, 26 and 36, particularly the Articles related to jurisdictions. It was revealed that many investors viewed this mechanism as the first option to resolve their cases.

The respondents were also asked whether they could justify depending upon the ICSID as a suitable settlement mechanism. There were mixed responses to this question. One of the respondents answered that the ICSID was not the optimal way to resolve the disputes between Egypt and foreign investors; however, the ICSID has a high regulatory facility, and professional cadres with a great deal of professionalism. Despite this, there was still doubt about the clarity of the criteria of the provisions of the ICSID. In addition, the respondent also stated that Cairo Regional Centre for International Commercial Arbitration had the ability to settle the special investor–Egypt disputes. In line with this, a few other respondents stated that the ICSID was not the appropriate means to settle the Egyptian disputes with the foreign investors; however, it should not be forgotten that the ICSID was established by the biggest investor in the world, the World Bank (WB), so resorting to the ICSID to settle the disputes between developing countries and global investors was unsuitable.

The rules of ICSID's Convention do not allow any ratification by states in such a manner that an arbitral tribunal of the ICSID becomes the full authority to consider the dispute (ICSID,

2016). However, the rules state that there must be written consent before the submission of the dispute to the ICSID (ICSID, 2016). This means that the arbitration is based on satisfaction between the parties of the dispute. Nevertheless, in recent years the interpretation of satisfaction set forth in Article 25 of the Convention has been expanded by the body of arbitration of ICSID (ICSID, 2016). Notably, these arbitral bodies have entered into a settlement to determine their jurisdiction just by the existence of the text that refers to arbitration in the national legislation of the host state or in a signed BIT by the contracting countries, without the written consent requirement for considering the dispute, such as *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3). Therefore, there are instances of conflict in applying the rules of the ICSID's convention (Bashir & Fakhri, 2016).

Conclusion

This research has studied the quality of legal rules of the ICSID and its standards. It has also demonstrated the deficiencies in the criteria used for of these rules. The influence of these deficiencies on the attendance of Egypt before the ICSID arbitration tribunal has also been studied. Finally, the arbitrators and the problem of conflict of interests and transparency have been discussed. This short study has delved into the different dispute-settlement mechanisms, examining the strengths and weaknesses of each dispute and its settlement. The local means of dispute settlement were investigated and generally found to be preferable to those of the host nation. In this study, these alternative opportunities to settle claims and disputes amicably within an investor's sovereign territory without the interference of international tribunal have also been presented. These mechanisms include diplomatic protection, claim commissions and the host state's court system.

The rules and regulations of the ICSID are problematic because they are non-specific. Critically, the lack of clear and concise definitions of what constitute investments and the scope of the ICSID pose a challenge. These non-specific standards have contributed to an increase in the number of legal challenges against Egypt in ICSID arbitration tribunals. The ICSID involvement in arbitration tribunals is based on mutual acceptance by both parties. The non-specific standards pre-date Egypt's objection. Cases in point include *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (Case No. ARB/84/3). The Tribunal ruled against Egypt's claim regarding the ICSID's jurisdiction in the matter. It noted that its jurisdiction emanated from Article 26 of the ICSID Convention. It further ruled that Article 8 of Egyptian Law No. 43 did not apply to the matter. The ICSID Convention does not define nationality; therefore, in instances where a host country is in dispute with an investor with multiple nationalities, the principles of international law come into play, further contradicting the challenge. There is thus a significant need for a specification of the criteria utilized by the ICSID to simplify the arbitration mechanism.



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