

ISDS

in numbers

**IMPACTS
OF INVESTMENT
ARBITRATION AGAINST
AFRICAN STATES**

October 2019

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AFRICAN STATES have been hit by a total of **106 KNOWN INVESTMENT TREATY** **ARBITRATION CLAIMS¹.**

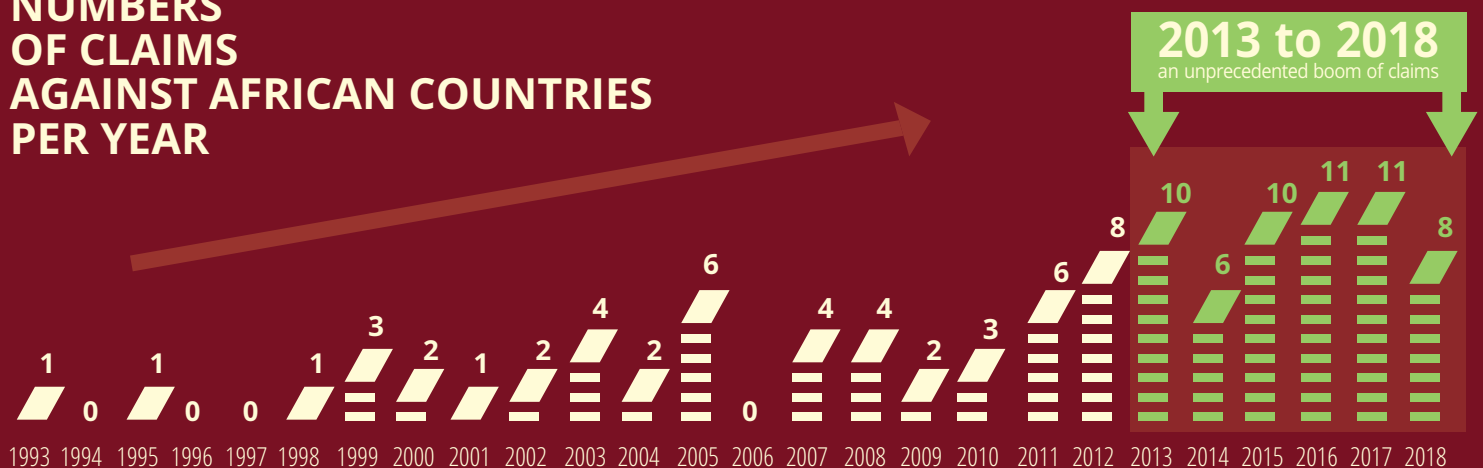
The number of investor-state dispute settlement cases has shot up across the world in the last twenty years, from a total of only 6 known treaty-based cases in 1995 to 942 known cases today². This represents 11% of all known investor-State disputes worldwide.

THE RECENT BOOM **IN LAWSUITS AGAINST AFRICA**

The first case targeting a State in Africa was brought in 1993 against the Democratic Republic of the Congo. Since then, the number of claims has been steadily rising. In particular, the largest amount of cases were initiated in 2016 and 2017.

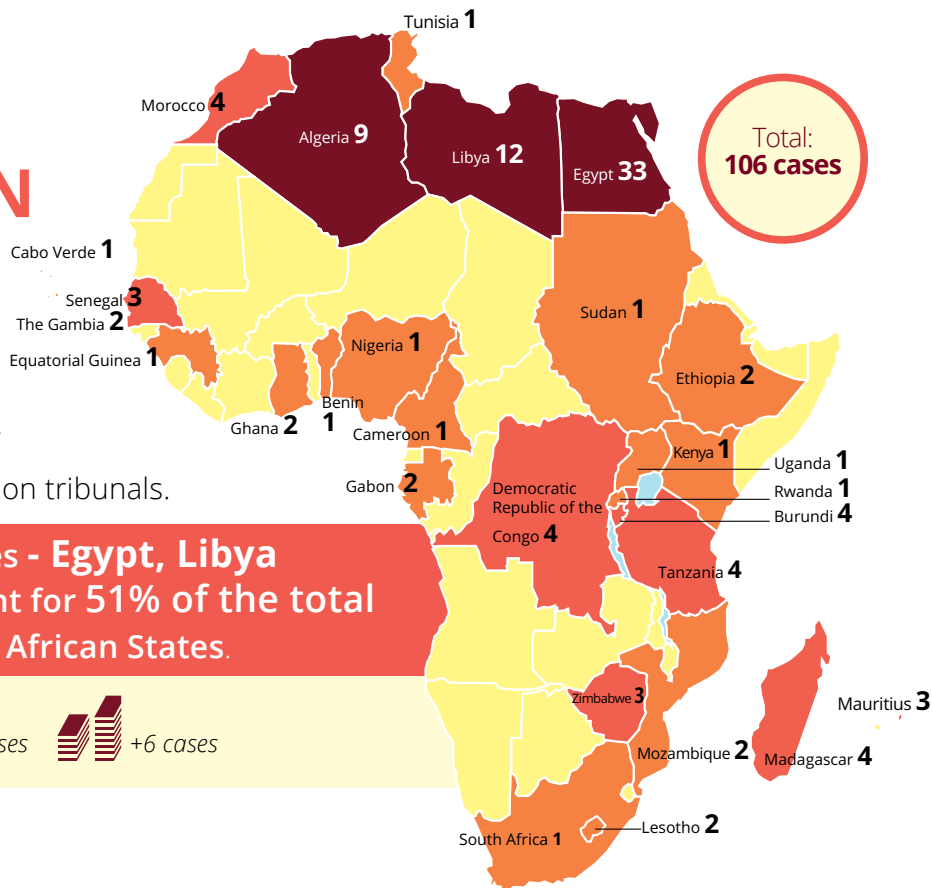
Between 2013 and 2018, there has been an **unprecedented boom** of claims against African countries. During these last six years, they received more claims than the previous 20 years combined.

Graph 1
NUMBERS
OF CLAIMS
AGAINST AFRICAN COUNTRIES
PER YEAR



THE MOST FREQUENTLY SUED AFRICAN COUNTRIES

So far, 28 African countries - roughly 50% of the countries in the region - have been sued by investors at international arbitration tribunals.



However, just three countries - **Egypt, Libya and Algeria** - alone account for 51% of the total number of claims against African States.

ARBITRATION WINNERS AND LOSERS

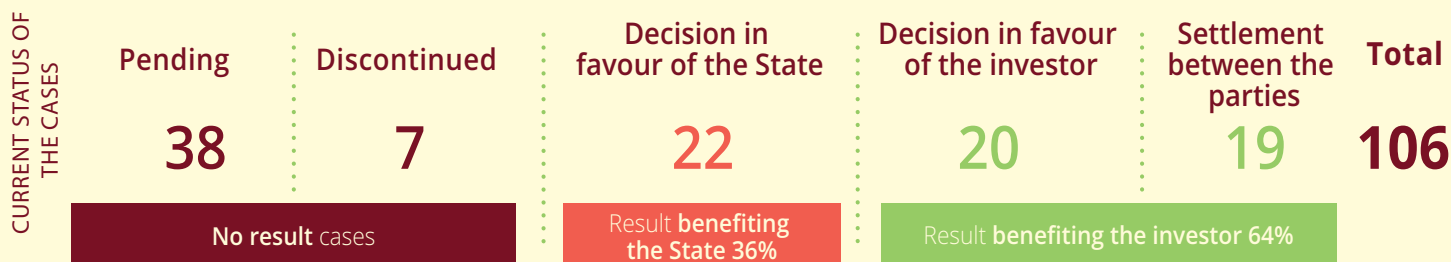
States have been the main losers in investment arbitration cases.

The interests of investors have been upheld in 64% of the cases, based on our assessment of the 61 cases against African countries that ended either in a decision of the Tribunal or a settlement between the parties³.

Meanwhile, one third of the total lawsuits are still pending resolution.

Graph 2

STATUS OF THE ISDS CASES AGAINST AFRICAN COUNTRIES



It is important to bear in mind that **in the international arbitration system States never win**, because they cannot initiate a lawsuit against the investor. Moreover, in most cases States will almost invariably lose, because even if the tribunal rules in favour of the State, they will still have to pay millions of dollars to lawyers for the defence and arbitration costs. Investment lawyers may charge up to US\$1,000 per hour and arbitrators up to US\$3,000 a day. For example, in the case H & H Enterprises Investments vs. Egypt, which concerned a hotel management and operation contract, even though the tribunal declined jurisdiction and dismissed the claimants' allegations, it still ordered Egypt to bear its own legal and arbitration costs. These amounted to more than US\$1.5 million.⁴

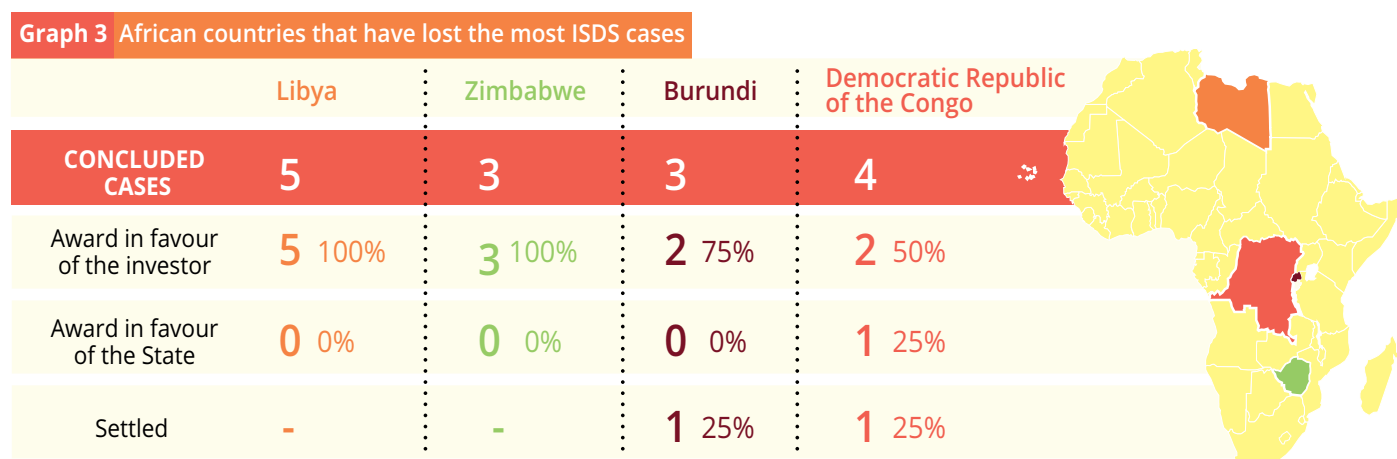
Furthermore, States are in some cases ordered to also cover the legal costs of the investors. In a case initiated by Unión Fenosa, Egypt paid its lawyers more than US\$1.5 million but, since the country lost the claim, they were also ordered to pay the legal and arbitration costs of the company, which amounted to US\$10.7 million.⁵

THE AFRICAN STATES THAT HAVE LOST THE MOST CASES

If we assess the results of arbitration rulings by country, we can see that **Libya, Zimbabwe and Burundi have been particularly damaged by the results of ISDS lawsuits**: there is a significant **imbalance in favour of the investors in the rulings** in cases against these countries.

Examining Libya's experience, we can see that in all five cases when a tribunal ruled, it favoured the investor. The same applies to Burundi and Zimbabwe, where arbitrators decided three cases against each State, and all rulings favoured the investors.

In the case of the Democratic Republic of Congo (DRC), out of the four lawsuits taken against the country, arbitrators decided the investors were right on two occasions, and the DRC settled a third case.



THE COSTS OF ISDS LAWSUITS

The costs of investment lawsuits run into millions and billions of US dollars and have the potential to bring the public budgets of most African countries to breaking point.

AMOUNTS CLAIMED BY INVESTORS

Total claims against African States since 1993 add up to **US\$55.5 billion**.⁶ However, since we only know the amount claimed by the investor in a little more than half of all the cases (54.7%), it is safe to say that the actual requested sum could be double this figure.

In 36 claims investors demanded at least US\$100 million. On 10 occasions, the claims climbed to US\$1 billion or more. Both Algeria and Egypt have received claims for US\$15 billion each.

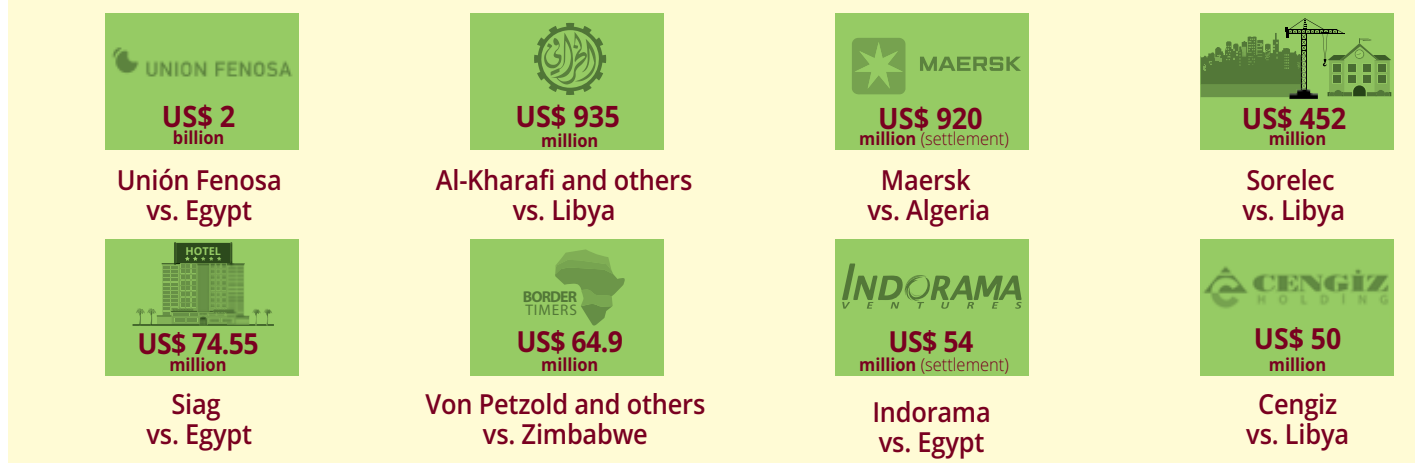
AMOUNTS STATES HAVE BEEN ORDERED OR AGREED TO PAY TO INVESTORS

African States have been ordered (by the arbitrators) **or agreed** (as a result of a settlement) **to pay investors US\$4.6 billion** to date⁷. The amounts paid in one third of the cases remain unknown, so this number is likely to, in fact, be much higher. However, this figure alone is equivalent to almost three times the GDP of The Gambia or twice the GDP of the Central African Republic in 2018.⁸ It is also equivalent to the entire amount of development aid received by Ethiopia in 2018.⁹

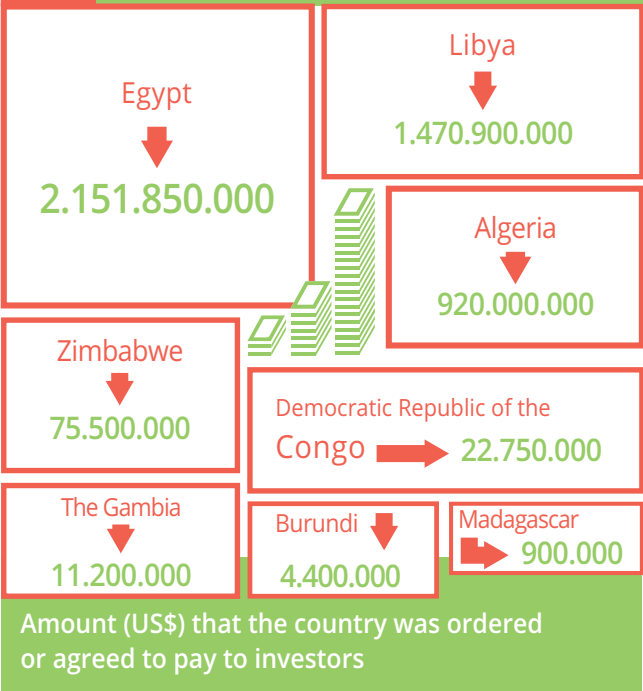
The **highest amount ever paid by an African country** as a result of a single claim was the **US\$2 billion** paid by Egypt to Unión Fenosa.

Unión Fenosa vs Egypt Unión Fenosa Gas, a Spanish-Italian joint venture, brought a US\$3.2 billion claim before an ICSID tribunal after the State-owned Egyptian Natural Gas Holding Company (EGAS) cut off its gas supplies in the wake of the Arab Spring, citing energy shortages in the domestic market.¹⁰

Graph 4 The 8 most expensive known awards or settlements



Graph 5 Costs of investment arbitration for individual countries



COSTS FOR INDIVIDUAL COUNTRIES

Egypt, the country which has experienced the highest number of claims, has so far been ordered or agreed to pay investors US\$2.1 billion. Next in terms of magnitude of awards is Libya, with an amount of US\$1.4 billion and then Algeria with US\$920 million. These amounts are, however, in fact likely to be much higher than the stated figures above, since information on amounts is only available in a small proportion of cases.

INVESTORS' NATIONALITY

Graph 6



Source: Own calculation based on data from UNCTAD

European investors initiated the majority of the lawsuits against African countries, accounting for 70% of all cases. Investors from the United States have initiated lawsuits 12 times. **European and US investors combined account for more than 80% of the total ISDS cases against African countries.**

Though few in number, there are also some disputes between African countries themselves. Among these, South Africa stands out with 3 claims against other African States.



TREATIES INVOKED

African countries have signed **937 Bilateral Investment Treaties** (of which 521 are in force) with countries inside and outside Africa. **Most of these deals include ISDS¹¹.**

In the claims filed against African countries, almost all investors cited alleged violations of BITs (100 cases)¹². In two cases the investors invoked the Investment Protocol of the South African Development Community (SADC) and in another two the Organisation of Islamic Cooperation (OIC) Agreement on Promotion, Protection and Guarantee of Investments. One claim was also based on the Arab Investment Protocol and one on a free trade agreement (between Morocco and the USA).

SECTORS AFFECTED BY CLAIMS

African countries have experienced a growing number of claims filed against them, especially in the **construction sector**, which **accounts for 23.6% of all lawsuits**. Two thirds of these claims were filed after 2011. Manufacturing and the mining sector are also heavily affected by claims.

Graph 7 The top 10 sectors by number of claims



THE ARBITRATION INSTITUTIONS

Even though there are many arbitration centres around the world where investment-related disputes can be resolved, **74.5%** of all known claims against Africa were conducted under the auspices of the **World Bank's International Centre for Settlement of Investment Disputes, ICSID** (used 79 times in the region). For example, 31 of the 33 claims against Egypt were filed at ICSID. Some disputes have also been resolved at the Permanent Court of Arbitration (PCA) in The Hague, the Netherlands (11 cases) and the International Chamber of Commerce (ICC) (9 cases).

INSTITUTION SUPERVISING THE CASE	ICSID	PCA	ICC ¹³	CRCICA ¹⁴	SCC ¹⁵
Number of cases	79	11	9	1	1
No information or no supervising institution	5			Total 106	

NOTES

1. The data presented in this report is updated until January 2019. The analysis was undertaken using the UNCTAD database of all known investment treaty lawsuits against African countries. <http://investmentpolicyhub.unctad.org/ISDS>
2. <http://investmentpolicyhub.unctad.org/ISDS> Because the system is opaque and not transparent, we cannot assume that information is in the public domain about all cases.
3. When the case concludes with a settlement between the parties, it is usually because the state has agreed either to pay compensation or bow to the investor's demands (e.g. to roll back regulation).
4. H & H Enterprises Investments, Inc. v. Arab Republic of Egypt (ICSID Case No. ARB/09/15). Excerpts of the Award of May 6, 2014. <https://www.italaw.com/sites/default/files/case-documents/italaw7979.pdf>
5. Final award: Unión Fenosa vs. The Arab Republic of Egypt <https://www.italaw.com/sites/default/files/case-documents/italaw10061.pdf>
6. This amount is based on the sum of the 58 cases in which the amount claimed by the company is known. Due to the lack of transparency around ISDS and opaqueness of the system, we only have this information in a little more than half of all the cases (54.7%) - it is safe to say that the actual requested sum could be double the figure quoted.
7. This amount is calculated based on the sum of the 25 cases in which the amount the State was ordered or agreed to pay is known. The amounts paid by the investor are not known in 14 other cases.
8. GDP. World Bank https://data.worldbank.org/indicator/ny.gdp.mktp.cd?name_desc=true&view=map
9. Development aid at a glance. Statistics by region. OECD: <https://www.oecd.org/dac/financing-sustainable-development/development-finance-data/Africa-Development-Aid-at-a-Glance-2018.pdf>
10. Egypt liable for curtailing gas supplies. GAR News, September 2018. <https://globalarbitrationreview.com/article/1173690/egypt-liable-for-curtailling-gas-supplies>
11. UNCTAD, Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search>
12. The claims are based on the treaties signed between countries. These may be free trade agreements (FTAs) with a chapter on investment protection, or specific investment protection agreements (bilateral investment treaties or BITs).
13. International Chamber of Commerce (ICC): <https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/>
14. The Cairo Regional Centre for International Commercial Arbitration: <https://crica.org/?AspxAutoDetectCookieSupport=1>
15. Stockholm Chamber of Commerce: <https://sccinstitute.com/>



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