The recent boom in lawsuits against Africa
The most frequently sued African countries
Arbitration winners and losers
The African States that have lost the most cases
The costs of ISDS lawsuits
Investors’ nationality
Treaties invoked
Sectors affected by claims
The arbitration institutions

Graphs
Graph 1 – Numbers of claims against African countries per year
Graph 2 – Status of the ISDS cases against African countries
Graph 3 – African countries that have lost the most ISDS cases
Graph 4 - The 8 most expensive known awards or settlements
Graph 5 – Costs of investment arbitration for individual countries
Graph 6 – Home country and region of investors suing African States
Graph 7 - The top 10 sectors by number of claims

Authors: Bettina Müller and Cecilia Olivet
Editor: Fleachta Phelan

Published by Transnational Institute . Amsterdam, October 2019

The contents of this report may be quoted or reproduced for non-commercial purposes, provided that the source is properly cited.
AFRICAN STATES have been hit by a total of 106 KNOWN INVESTMENT TREATY ARBITRATION CLAIMS\(^1\).

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 today\(^2\). 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


1 0 0 0 1 3 2 2 1 2 4 0 2 2 4 4 2 3 6 8 10 10 11 11 8

2013 to 2018: an unprecedented boom of claims
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 parties.²

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

Graph 2

STATUS OF THE ISDS CASES AGAINST AFRICAN COUNTRIES

<table>
<thead>
<tr>
<th>CURRENT STATUS OF THE CASES</th>
<th>Pending</th>
<th>Discontinued</th>
<th>Decision in favour of the State</th>
<th>Decision in favour of the investor</th>
<th>Settlement between the parties</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>38</td>
<td>7</td>
<td>22</td>
<td>20</td>
<td>19</td>
<td></td>
<td>106</td>
</tr>
<tr>
<td>No result cases</td>
<td></td>
<td>Result benefiting the State 36%</td>
<td>Result benefiting the investor 64%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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.¹

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.²

**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.

<table>
<thead>
<tr>
<th>Graph 3</th>
<th>African countries that have lost the most ISDS cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Libya</td>
<td>Zimbabwe</td>
</tr>
<tr>
<td>CONCLUDED CASES</td>
<td>5</td>
</tr>
<tr>
<td>Award in favour of the investor</td>
<td>5 100%</td>
</tr>
<tr>
<td>Award in favour of the State</td>
<td>0 0%</td>
</tr>
<tr>
<td>Settled</td>
<td>-</td>
</tr>
</tbody>
</table>
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. 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 date. 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. It is also equivalent to the entire amount of development aid received by Ethiopia in 2018.

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.

Graph 4 The 8 most expensive known awards or settlements

<table>
<thead>
<tr>
<th>Award</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unión Fenosa vs Egypt</td>
<td>US$ 2 billion</td>
</tr>
<tr>
<td>Al-Kharafi and others vs. Libya</td>
<td>US$ 935 million</td>
</tr>
<tr>
<td>Maersk vs. Algeria</td>
<td>US$ 920 million (settlement)</td>
</tr>
<tr>
<td>Sorelec vs. Libya</td>
<td>US$ 452 million</td>
</tr>
<tr>
<td>Siag vs. Egypt</td>
<td>US$ 74.55 million</td>
</tr>
<tr>
<td>Von Petzold and others vs. Zimbabwe</td>
<td>US$ 64.9 million</td>
</tr>
<tr>
<td>Indorama vs. Egypt</td>
<td>US$ 54 million (settlement)</td>
</tr>
<tr>
<td>Cengiz vs. Libya</td>
<td>US$ 50 million</td>
</tr>
</tbody>
</table>
**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**

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.
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).

### 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 ISDS**.

In the claims filed against African countries, almost all investors cited alleged violations of BITs (100 cases). 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

- **Construction**: 25
- **Transport**: 10
- **Manufacturing**: 16
- **Mining and quarrying**: 14
- **Information and communication**: 9
- **Agriculture, forestry and fishing**: 8
- **Real estate**: 6
- **Water supply related activities, waste disposal, sewerage**: 6
- **Financial activities**: 5
- **Extraction of crude petroleum and natural gas**: 4

**Total**: 106
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](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.

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).


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.

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.

This amount is 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.


UNCTAD, Investment Dispute Settlement Navigator, [https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search](https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search)

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).


The Cairo Regional Centre for International Commercial Arbitration: [https://crcica.org/?AspxAutoDetectCookieSupport=1](https://crcica.org/?AspxAutoDetectCookieSupport=1)

Stockholm Chamber of Commerce: [https://sccinstitute.com/](https://sccinstitute.com/)
The Transnational Institute (TNI) is an international research and advocacy institute committed to building a just, democratic and sustainable planet. For more than 40 years, TNI has served as a unique nexus between social movements, engaged scholars and policy makers. www.tni.org