

International Investment Arbitration in the Middle East: Year in Review 2015

International investment arbitration – also known as investment treaty arbitration or investor-State arbitration – is a procedure whereby foreign investors may seek a binding adjudication of claims against host States that have either violated investment protection treaty obligations or, in some circumstances, breached their contractual commitments or their national foreign investment law. The countries of the Middle East are party to numerous bilateral and multilateral investment treaties which are intended to promote investment by ensuring fair treatment of foreign investors and which permit arbitration of investor claims before the International Centre for Settlement of Investment Disputes (ICSID) or similar fora.

The Middle East region includes both poor and rich countries and as a whole has a relatively fast growing economy. Certain parts of the Middle East have been severely impacted by ongoing and more recent armed conflicts resulting in socio-political instability. In addition, some countries in the region have economies based largely on the oil industry, and were thus marked by the fall in oil prices worldwide. These recent developments have impacted investment in and by Middle Eastern countries.

Countries in the region have concluded at least 632 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions), with just under 8 percent of the region's investment treaties being intraregional.

A total of 27 ICSID cases have involved Middle Eastern parties as either claimant investors, respondent states or both, with six cases (22 percent) being intraregional. The first arbitration brought against a Middle Eastern country was filed in 2001 by an Italian investor against the United Arab Emirates. The first exclusively intraregional arbitration was filed in 2005 by an Omani investor against Yemen. Of the 21 concluded arbitrations involving the region, six cases (just under 29 percent) have involved further proceedings seeking to annul the arbitral award and eight cases (38 percent) were settled or discontinued.

Of the 10 pending cases involving the region, five were brought in 2015 – a significant increase in the number of new filings from prior years. One ICSID award was rendered in 2015. Almost four years after the request of arbitration was filed, an ICSID tribunal dismissed claims brought by an investor from the United States against Oman under the free trade agreement between the two countries.

For purposes of this review, the Middle East comprises 14 countries: Bahrain, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, Turkey, United Arab Emirates and Yemen.¹

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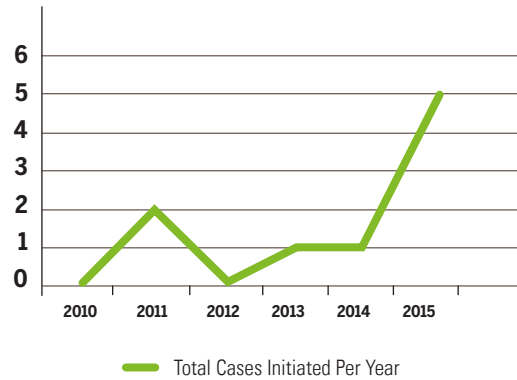
¹ All of these countries are signatories to the ICSID Convention except for Palestine.

Investment Arbitration in the Region²

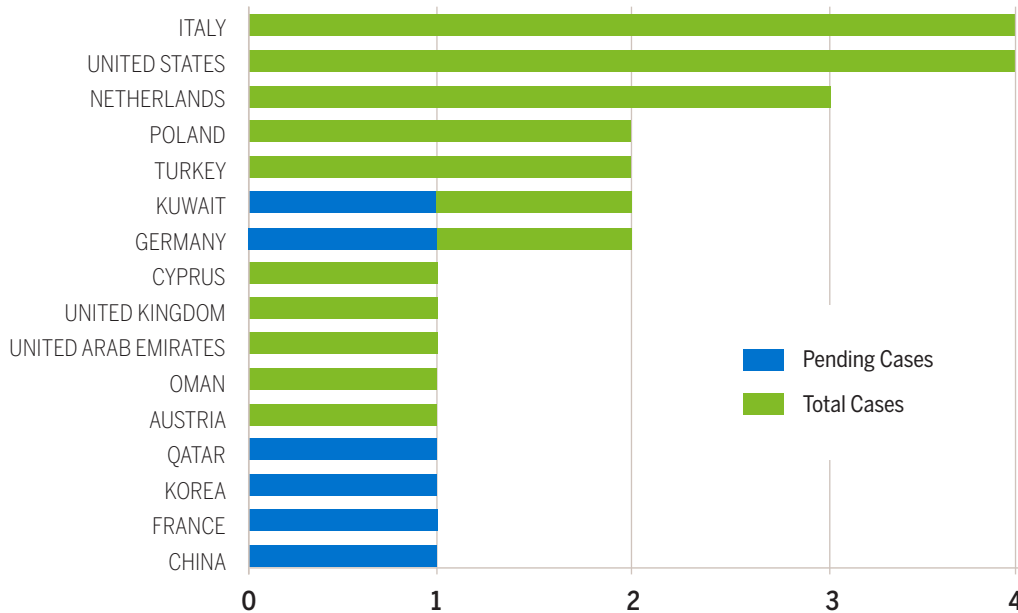
There was a significant increase in the number of new investment arbitrations in the Middle East in 2015 compared to the levels seen in previous years.

Claims against Middle Eastern countries have been made most frequently by investors from Italy and the United States with four claims brought by each country’s nationals against countries from the region. The Netherlands is in third place with three claims by its nationals.

Cases Initiated Per Year



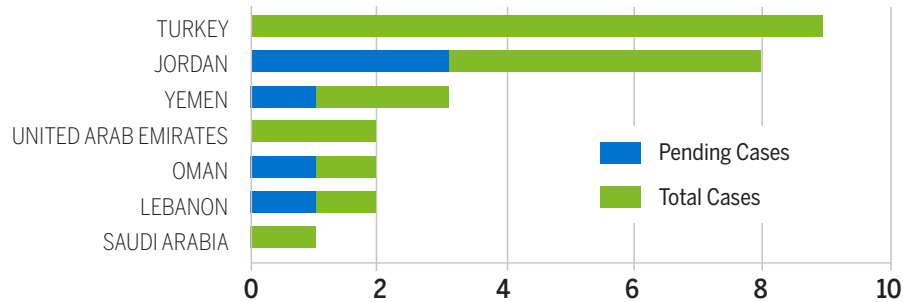
Top Nationalities of Investors with ICSID Arbitrations in the Middle East



The country in the region that has faced the highest number of investment claims is Turkey with nine of the region’s 27 claims (33 percent). Jordan follows closely behind with eight claims against it (just under 30 percent). The other countries in the region against which investment claims have been brought are Yemen with three claims (11 percent); Lebanon, Oman and the United Arab Emirates with two claims each (just over 7 percent per country); and Saudi Arabia with one claim (just under 4 percent).

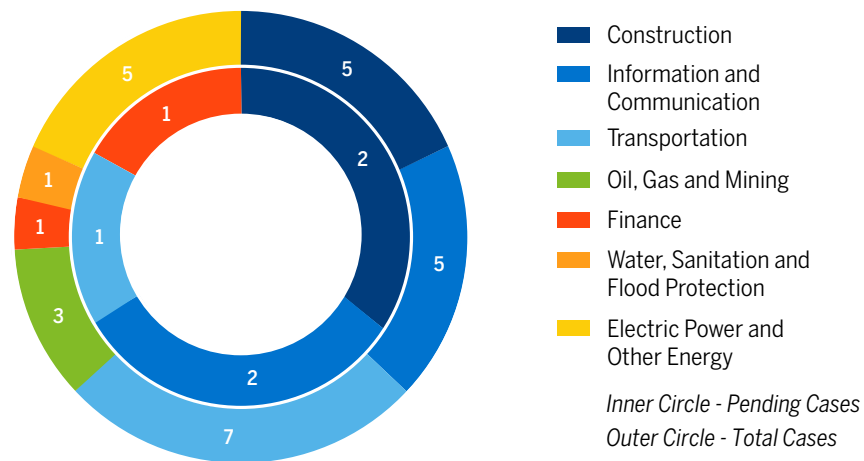
² This review considers only investment arbitrations brought under the auspices of ICSID, which constitute the majority of investment arbitrations.

Middle Eastern Countries Facing Investment Claims



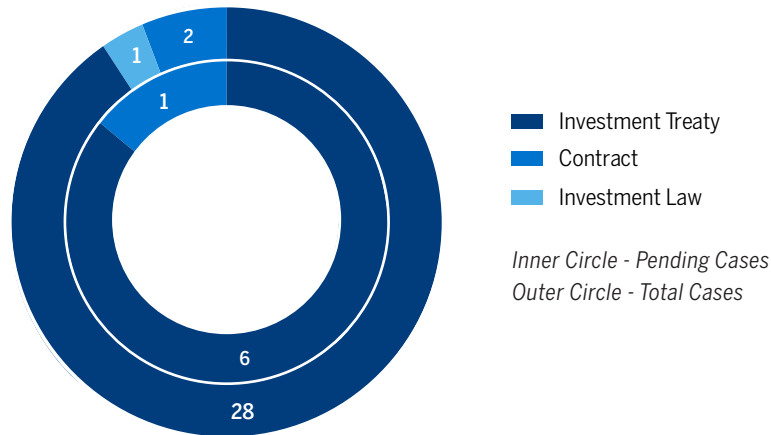
Historically, investment disputes against Middle Eastern countries have arisen most frequently in four industries – transportation, construction, information and communication, and electric power and other energy. One case in each of these industries, save for electric power and other energy, arose in 2015. The two other cases initiated in 2015 arose in the oil, gas and mining, and finance sectors.

Investment Cases by Industry



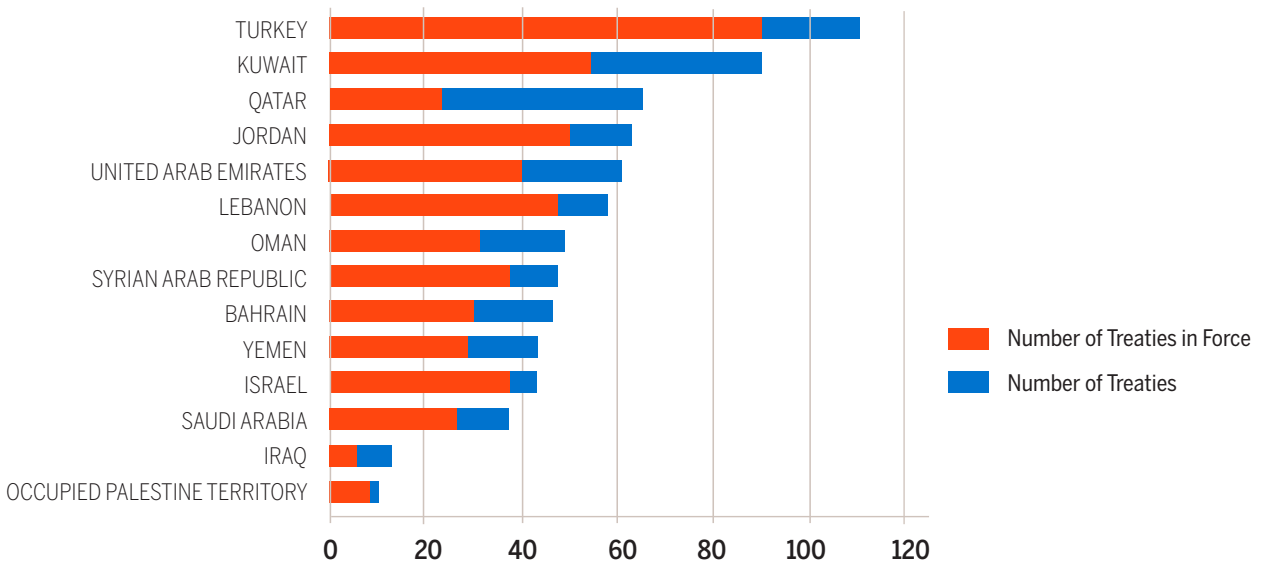
The basis for arbitral jurisdiction in cases against Middle Eastern countries has most often been an investment treaty and this continued to be the case in 2015. Claims have also been made pursuant to national investment laws and, in only one instance, a contract.

Instrument Invoked to Establish ICSID Jurisdiction



Investment Treaties Involving Middle Eastern Countries

Approximately 18 percent of the just over 3,500 investment treaties currently in existence involve Middle Eastern countries. Turkey, Kuwait and Qatar have signed the most investment treaties, and Turkey has the greatest number in force. Turkey has faced nine ICSID arbitration cases whereas neither Kuwait nor Qatar has ever faced any ICSID arbitration claim despite being signatories to the ICSID Convention since 1978 and 2010 respectively. Jordan, the United Arab Emirates and Lebanon, which are the next most active treaty makers in the region, have all faced ICSID claims.



Of the 632 investment treaties signed by Middle Eastern countries, approximately 8 percent of treaties signed by Middle Eastern countries are intraregional treaties, whereas 22 percent of ICSID cases involving the region are intraregional cases.

The United States has signed 20 investment treaties with Middle Eastern countries, only three of which permit investor-State arbitration (the treaties between the United States and Turkey, Bahrain and Jordan).

Four investment treaties involving the region were signed in 2015, three of which were bilateral investment treaties. These were signed between (i) Mauritius and the United Arab Emirates, (ii) Japan and Oman and (iii) China and Turkey.

Other Developments in 2015

- ▶ Palestine acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on January 2, 2015, thereby becoming the 154th State party to the Convention. The Convention came into force for Palestine on April 2, 2015.
- ▶ Iraq signed and ratified the ICSID Convention on November 17, 2015. The ICSID Convention came into force for Iraq on December 17, 2015.
- ▶ The preparatory process for launching negotiations of a Deep and Comprehensive Free Trade Area between the European Union (EU) and Jordan has been ongoing since 2011.
- ▶ Signature of the Euro-Mediterranean Association Agreement between the EU and Syrian Arab Republic is on hold.
- ▶ We have seen increased interest from investors in the possibility of bringing claims under regional investment treaties such as the Unified Agreement for the Investment of Arab Capital in the Arab States and the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organisation of the Islamic Conference.

Critical Times to Consult Counsel

INVESTORS:

- ▶ At the outset – when structuring an investment and negotiating project contracts
- ▶ As soon as difficulties arise – when facing operational, regulatory or other issues in the host country
- ▶ In discussions with the host country – when trying to resolve difficulties amicably
- ▶ Before commencing a claim – when deciding whether and how to make a claim against the host country
- ▶ In post-award proceedings – when seeking to collect on an award or reach a settlement with the host country
- ▶ In getting the business relationship back on track – when moving forward in the wake of a dispute

STATES:

- ▶ At the outset – when negotiating and drafting investment treaties and national investment laws
- ▶ In the pre-investment process – when inviting and accepting foreign investment
- ▶ In the investment phase – when negotiating project contracts
- ▶ As soon as notice of a dispute is given – when consulting with an investor about a potential investment arbitration claim
- ▶ Upon receipt of a claim – when formulating an arbitral strategy in the initial stages of a dispute
- ▶ In implementing or challenging an award – when considering next steps after the arbitration concludes

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Recognized by *Global Arbitration Review* in its GAR 100, our team features many practitioners who serve as both counsel and arbitrator and draws on the full range of subject-matter and industry experience across the firm, including in construction, energy, finance, manufacturing, mining and natural resources, pharmaceuticals, technology, telecommunications, tourism, transportation and many other sectors. Combining the common law and civil law traditions, members of our team are admitted to practice in many jurisdictions across the globe and speak a variety of languages. In addition, we work with an established network of local counsel in places where we do not have a direct presence, ensuring our strong market knowledge and quality of service on matters worldwide.

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