

International Investment Arbitration in Africa: 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 Africa 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.

In 2015, economic growth in sub-Saharan African was severely weakened as African economies experienced the slowest growth rate since the 1998 global financial crisis. According to the IMF, the regional economy suffered primarily because of decreasing commodity prices and less accommodating global financial conditions.

Over the past decade, China's growing economy produced many benefits for Africa as Chinese businesses travelled the globe in search of cheap commodities. China's increasing demand for raw materials, particularly in the energy, minerals, and oil sectors, resulted in a massive increase in African trade and export volumes. Recent shifts in China's growth model, however, have resulted in significant slowdowns for African economies. African economies will need to adapt as global commodity prices are predicted to remain weak for the foreseeable future.

Despite Africa's weak economic performance, the number of investment arbitrations filed in 2015 remained in line with previous years and continue to be focused on the oil, gas and mining, and electric power industries.

Countries in the region have concluded at least 1,404 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions), of which 864 are currently in force.

Continental Africa comprises 54 countries, ranging from its largest economies, Nigeria and South Africa, to its smallest, Comoros and São Tomé and Príncipe.

For questions about international investment arbitration, please contact a member of our International Arbitration Team, or the authors of this review:

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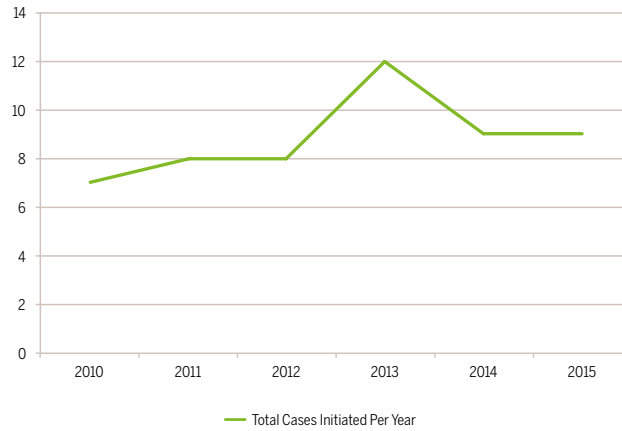
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Investment Arbitration in the Region¹

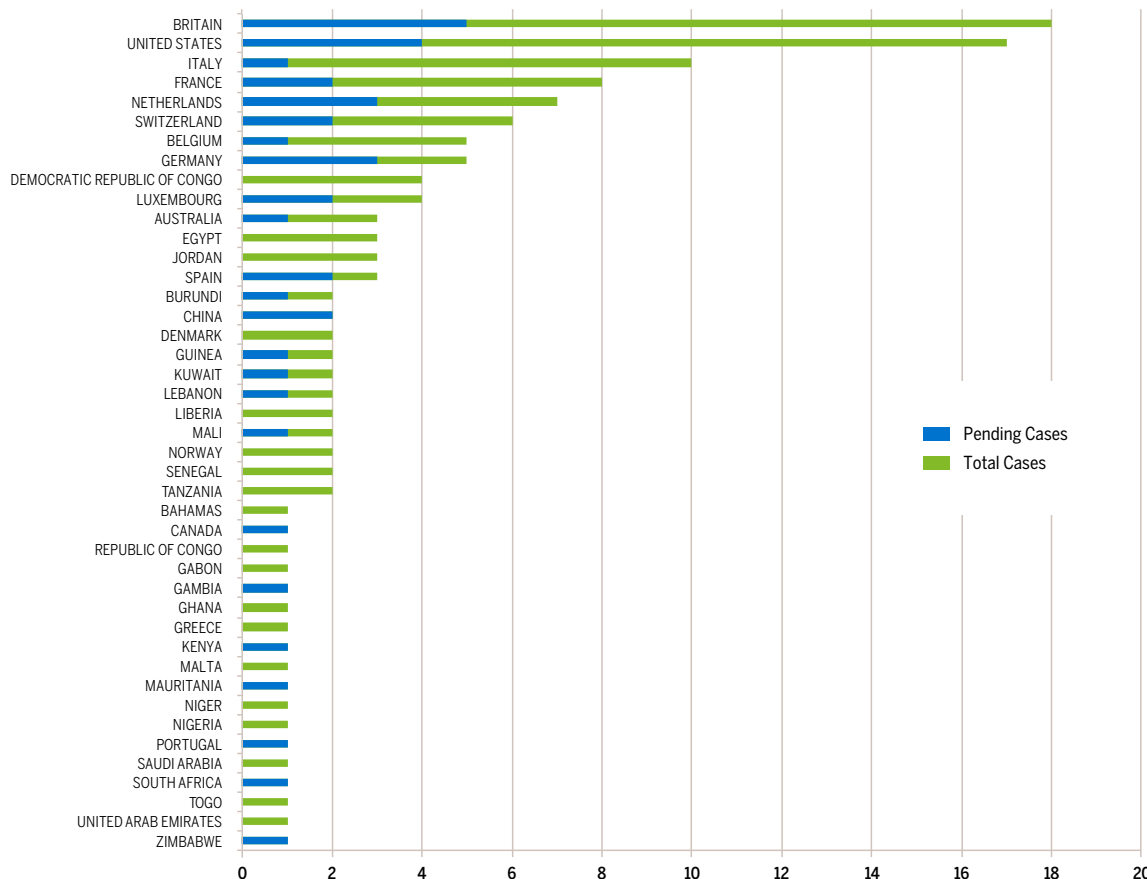
Nine new claims were initiated in 2015, bringing the total number of ICSID cases involving African parties as claimant investors, respondent States or both to 121. Including the nine new cases registered, 34 cases were pending in 2015.

The nationalities of investors who have most frequently brought claims against African countries continue to be the United States, Britain and Italy. Canada, Portugal and Kenya saw their nationals bring investment claims against States in the region for the first time in 2015.

Total Cases Initiated Per Year



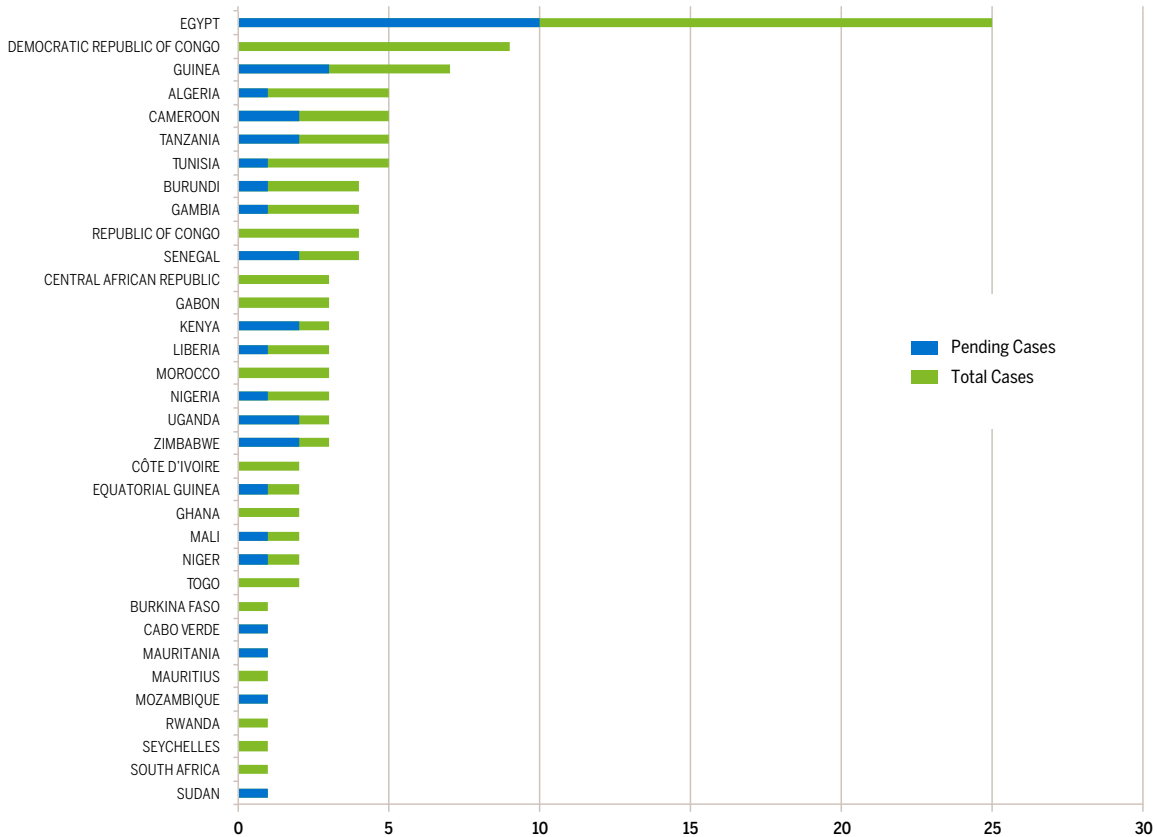
Top Nationalities of Investors with ICSID Arbitrations in Africa



¹ This review considers only investment arbitrations brought under the auspices of ICSID, which constitute the majority of investment arbitrations in the region.

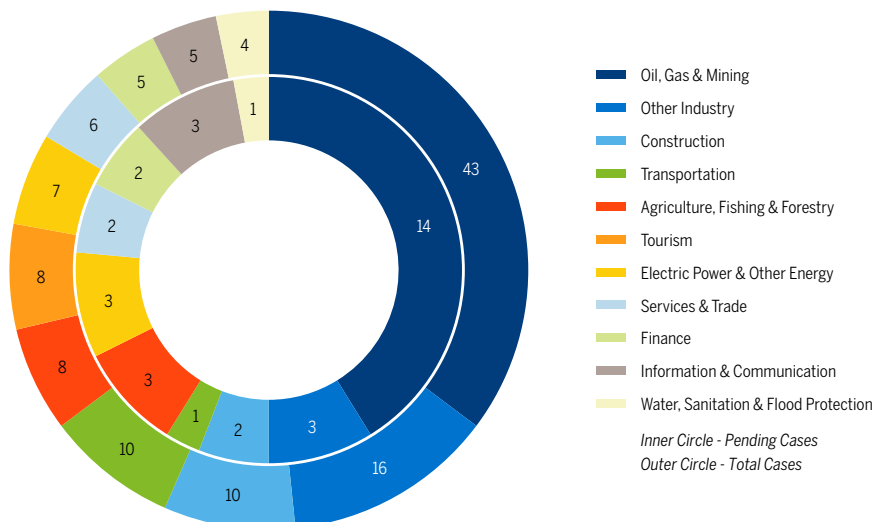
Egypt, the Democratic Republic of Congo, Guinea and Algeria remain the countries in the region that have faced the most investment claims. Cabo Verde faced its first investment claim in 2015.

African Countries Facing Investment Claims



Of the nine new cases filed in 2015, three involve the oil, gas and mining industry and two are in the electric power and other energy sector. Of the disputes pending in 2015, 41 percent involve the oil, gas and mining industry.

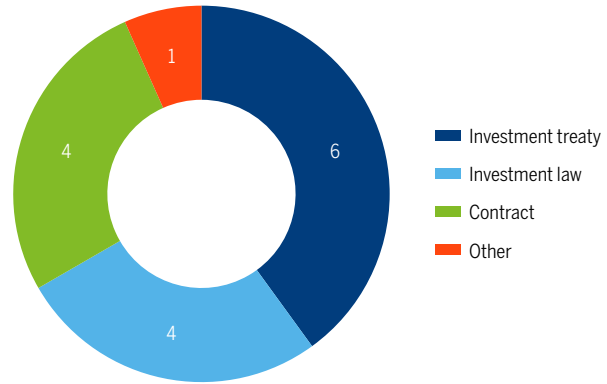
Investment Cases by Industry



Claimants often rely on multiple bases for jurisdiction. For the claims brought in 2015, investment treaties were the most common basis for jurisdiction.

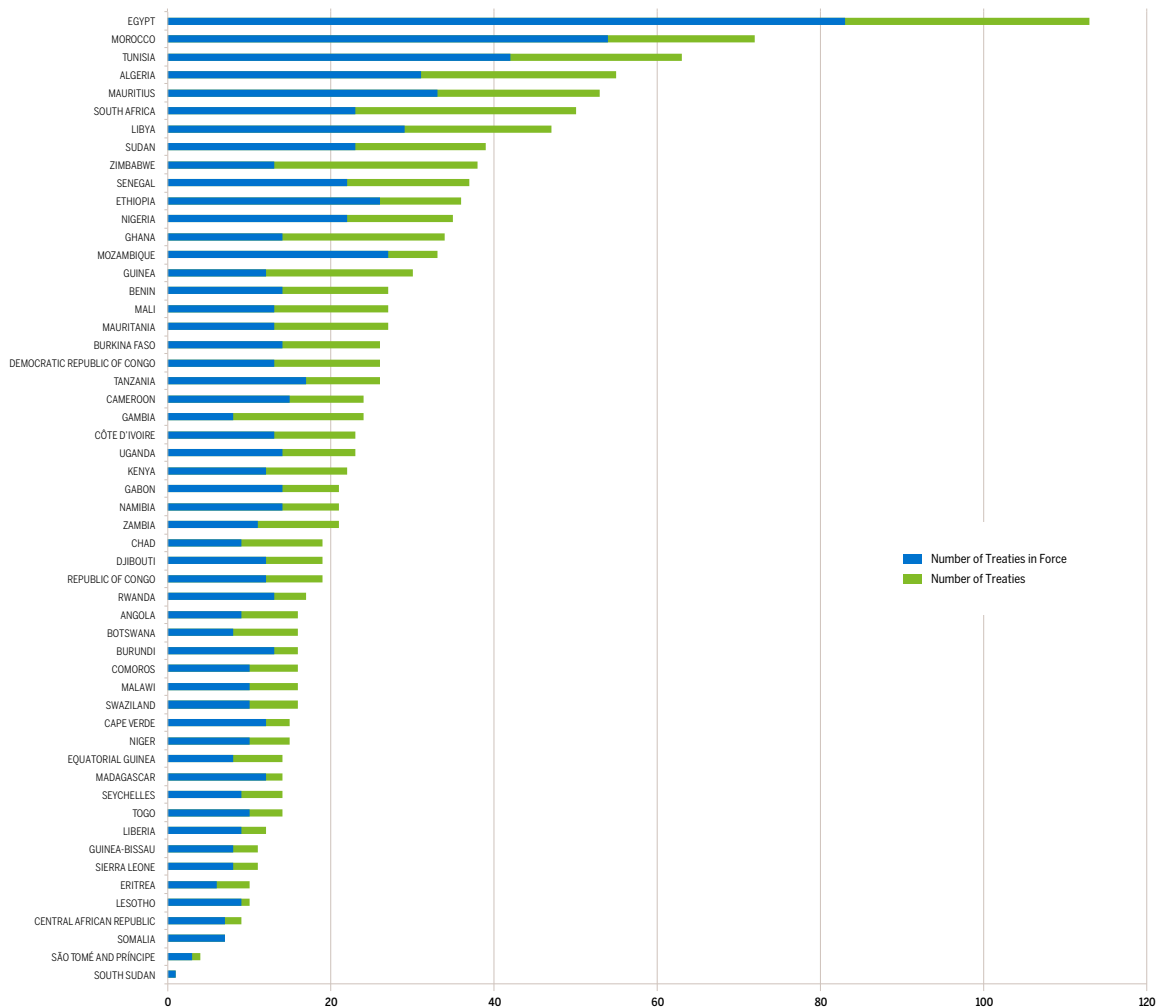
In 2015, eight proceedings were resolved by discontinuances and four by awards. Additionally, there were four annulment proceedings commenced involving African nations.

Instrument Invoked to Establish ICSID Jurisdiction



Investment Treaties Involving African Countries

Of the approximately 3,500 investment treaties currently in existence, more than a third involve African signatories. Egypt has concluded the most investment treaties, followed by Morocco and Tunisia.



African nations were involved in signing six new investment treaties in 2015. Mauritius was the region's most active treaty maker, entering treaties with countries both within the region (Zambia) and outside the region (the United Arab Emirates). Brazil was the region's most active treaty partner, inking treaties with two African countries, Angola and Mozambique, with which it has a shared colonial history and common language, as well as with Malawi.

Countries	Type of Treaty	Date Signed
Angola-Brazil	Cooperation and Facilitation Investment Agreement	April 1, 2015
Burkina Faso-Canada	Bilateral Investment Treaty	April 20, 2015
Malawi-Brazil	Cooperation and Facilitation Investment Agreement	June 25, 2015
Mauritius-United Arab Emirates	Bilateral Investment Treaty	September 20, 2015
Mauritius-Zambia	Bilateral Investment Treaty	July 14, 2015
Mozambique-Brazil	Cooperation and Facilitation Investment Agreement	March 30, 2015

Other Developments in 2015

- ▶ The Cour Commune de Justice et d'Arbitrage (CCJA), the court created by the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (the Organisation for the Harmonization of Commercial Law in Africa or OHADA), which includes 17 African states, issued two decisions in 2015 that point in different directions – one appears to promote arbitration, while the other might weaken arbitration in the OHADA region.
 - The first decision upheld the arbitral process by declining to annul an arbitral award granted to a Cameroonian corporation against the Cameroonian National Oil Company. Although the arbitrators had calculated damages using a method that neither party had argued, the CCJA held that the arbitrators had acted within their discretion. The CCJA also held that the award was not subject to annulment even though it was decided after the deadline set by the arbitral institution. The decision set a high bar for annulment of arbitral awards within the OHADA region and indicated the CCJA's continuing support for arbitration.
 - The second decision annulled an award on the ground that the arbitrators had entered into separate fee agreements with the parties to the arbitration. The CCJA stated that the tribunal had deliberately overstepped the OHADA arbitration rules by entering into separate agreements which exceeded the fee limits set by the CCJA. In response, the three arbitrators involved wrote an open letter to the legal community condemning the CCJA decision. The decision likely will result in parties staying within the CCJA's fee limits, but may result in fewer qualified arbitrators serving in the OHADA region.

- ▶ On December 13, 2015, South Africa's President Jacob Zuma signed the Protection of Investment Act into law. The new legislation effectively replaces the investment protection granted to foreign investors under defunct bilateral investment treaties. Between 2012 and 2013, South Africa permitted numerous bilateral investment treaties to expire, including treaties with Germany, Spain, Belgium and Switzerland. Europe currently accounts for 75 percent of all foreign direct investment in South Africa. The act provides that all investors, both local and foreign, will be treated equally under the law and are entitled to property rights under Section 25 of the Constitution, among other substantive protections. The act reserves the Government's right to regulate and take measures to redress historical, social and economic inequalities and injustices. It provides that disputes must be addressed domestically before the Government may consent to international arbitration, thereby removing the guarantee of international arbitration traditionally found in the country's bilateral investment treaties. Some critics of the act believe that it will decrease foreign investment and result in increased unemployment.
- ▶ The China Africa Joint Arbitration Centre (CAJAC) was established in Johannesburg, South Africa to resolve commercial disputes between Chinese and African parties. Numerous institutions came together to create the CAJAC, including the Arbitration Foundation of Southern Africa (AFSA), the Africa ADR, the Association of Arbitrators of Southern Africa and the Shanghai International Trade Arbitration Centre. The CAJAC is expected to rival the China International Economic and Trade Arbitration Commission (CIETAC), which is located outside of the continent, and the Mauritius Centre for International Arbitration (MIAC), which was created as an arbitral center for Asian and African parties.

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

About Our Team

Bryan Cave's **International Arbitration Team** provides a comprehensive service to clients around the world embracing all aspects of international dispute resolution. With offices in the most popular seats of arbitration, including London, Paris, Hong Kong, Singapore and New York, we handle a broad range of matters, including international commercial and investment arbitration, public international law and complex commercial litigation, for a wide variety of business, financial, institutional and individual clients, including publicly-held multinational corporations, large and mid-sized privately-held companies, partnerships and emerging enterprises. We also advise sovereign clients with regard to their particular complex legal, regulatory and commercial challenges.

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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