

# The Scramble for Africa Continues

## Impacts of Investor-State Dispute Settlement on African Countries

By: Iza Camarillo and Sarah Stevens

For decades, multinational corporations from wealthy nations have drained millions of dollars from African taxpayers through a secretive pseudo-court system known as Investor-State Dispute Settlement (ISDS). This mechanism has been used to attack vital public health, environmental, land, and other public interest policies, undermining the development goals and sovereignty of African countries.<sup>1</sup>

### **The Rise in Corporate Attacks on Africa**

Since 1993, African governments have been the target of 171 ISDS claims, overwhelmingly from investors headquartered in the Global North.<sup>2</sup> Over 80% of these cases were filed after 2010, and that number is significantly increasing, reflecting a historic rise in disputes.<sup>3</sup> Egypt, Libya, and Algeria are targeted by nearly half of all claims.<sup>4</sup> While the disputes span a wide range of sectors, they are predominantly concentrated on construction, mining, and manufacturing industries.<sup>5</sup>

Of those 171 cases, 131 have been resolved, settled, or dismissed, and 40 are still pending.<sup>6</sup>

Among the resolved cases, 59 either ruled in favor of the investor or were settled in their favor, meaning 45% of the cases resulted in some kind of investor win. In contrast, 49 cases were decided in favor of the state, accounting for only 37% of the outcomes. The remaining cases were either discontinued or resolved without assigning liability to either party. Nevertheless, even in cases where African states “won,” they still had to pay millions of dollars in tribunal costs and legal defense fees, underscoring the significant financial burden of these disputes.<sup>7</sup>

### **What Is Investor-State Dispute Settlement?**

ISDS is a provision embedded in free trade and investment agreements that empowers multinational corporations and billionaires to sue governments over public interest policies and win compensation from taxpayers.

In total, African states have been ordered to pay over \$5.7 billion to corporations, with an additional \$19.5 billion still at stake in ongoing cases.<sup>8</sup> However, due to the lack of publicly available information for many disputes, the actual amounts paid and sought are likely significantly higher.<sup>9</sup>

More than 70% of the corporations that have launched ISDS lawsuits against African nations are based in Australia, Europe, and the United States. European investors account for 32% of all ISDS cases against African countries.<sup>10</sup>

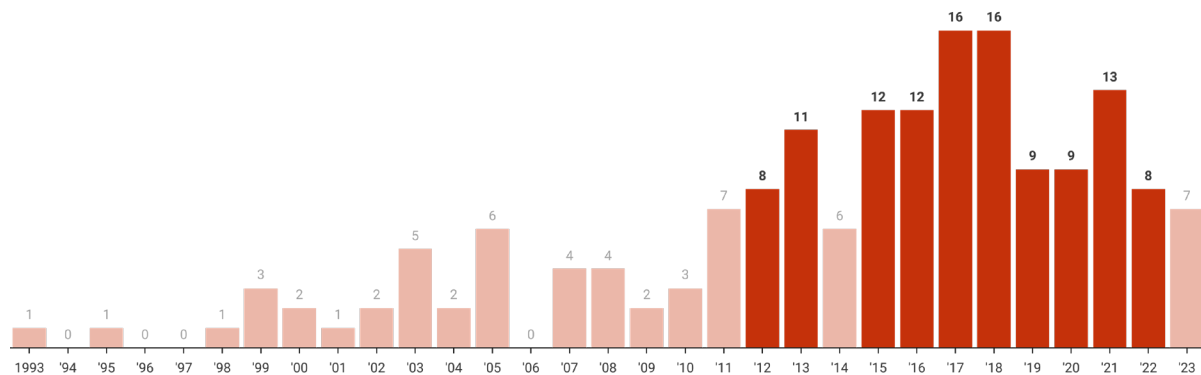
Notably, many of these nations were former colonizers of African territories, including Belgium, Italy, France, Germany, the Netherlands, Portugal, Spain, and the United Kingdom. Since the inception of ISDS, **40% of all cases filed by investors from these countries have targeted the very territories their country once colonized.**<sup>11</sup> Each flag on the map to the right represents an instance of a corporation challenging a former colony of its home country.



### ISDS CASES IN AFRICA

Over 80% of cases targeting African countries were filed after 2010, and that number is significantly increasing.

■ CASES PER YEAR



Source: UNCTAD Investment Policy Hub · Created with Datawrapper



## **Case Studies: Corporations vs. African States**

In **Union Fenosa v. Egypt**, a Spanish gas company filed a lawsuit after Egypt began prioritizing its domestic gas supplies to meet the needs of its citizens. The company argued that Egypt failed to provide them with “fair and equitable treatment.”<sup>12</sup> The tribunal agreed and ordered Egypt to pay the foreign investor over \$2 billion — making it the most expensive case against an African state to date — in addition to covering the claimant’s legal and arbitration costs.<sup>13</sup>

In **Veolia v. Egypt**, a French multinational corporation launched an ISDS case against Egypt in 2012, demanding at least \$110 million following Egypt’s post-revolution decision to raise the minimum wage. Although the tribunal ultimately ruled in favor of the state, Egypt was still forced to pay legal fees.<sup>14</sup>

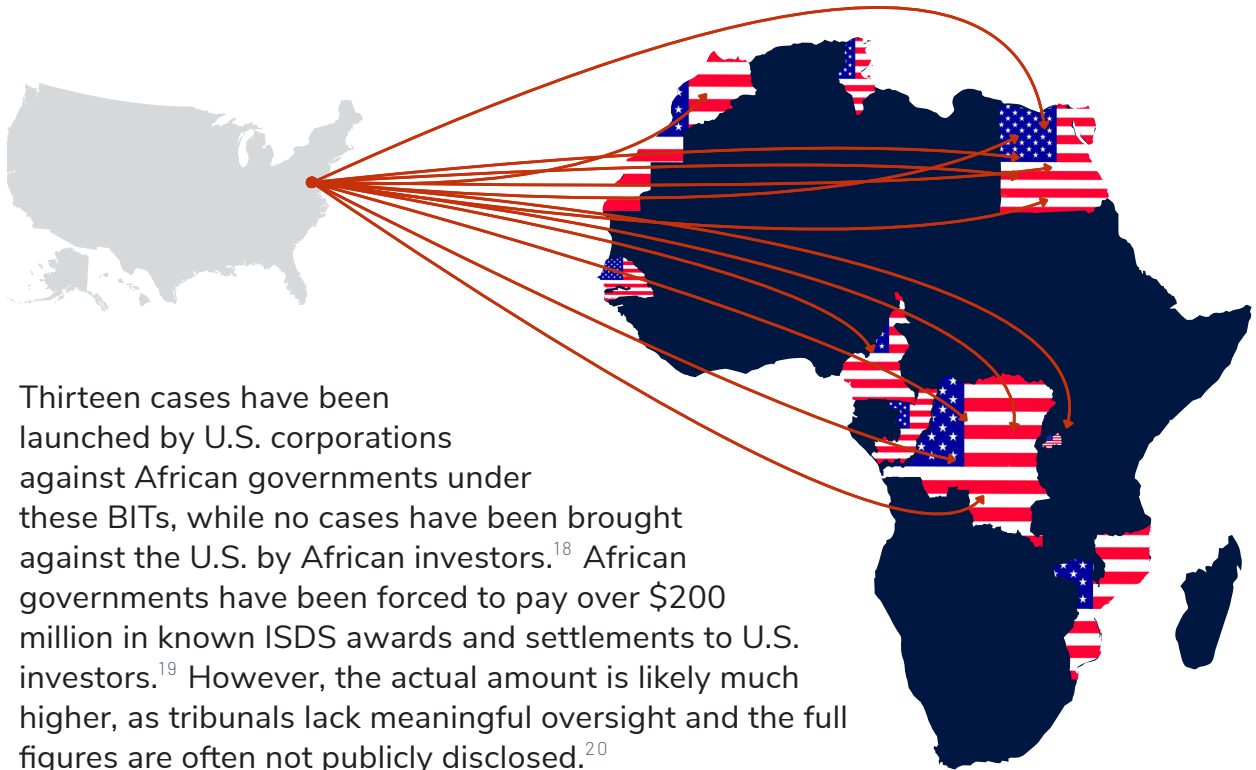
In **von Pezold v. Zimbabwe**, a Swiss-German family brought an ISDS case to the World Bank alleging “expropriation” of their farmland after the Zimbabwean government enacted a land reclamation policy. This policy aimed to reclaim valuable farmland from European foreigners and return it to displaced locals after Zimbabwe gained its independence from colonization in 1980.<sup>15</sup> The tribunal ultimately sided with the European family, ordering Zimbabwe to pay the family over \$64 million, along with an additional \$1 million in “moral damages.”<sup>16</sup>



*Zimbabwe war veterans protest outside of the gate of a white-owned farm. Photo: Associated Press, 2000*

## ISDS Between the United States and Africa

The United States has ISDS provisions embedded in bilateral investment treaties (BITs) with Cameroon, the Democratic Republic of the Congo (DRC), the Republic of the Congo, Egypt, Morocco, Mozambique, Rwanda, Senegal, and Tunisia.<sup>17</sup>



Thirteen cases have been launched by U.S. corporations against African governments under these BITs, while no cases have been brought against the U.S. by African investors.<sup>18</sup> African governments have been forced to pay over \$200 million in known ISDS awards and settlements to U.S. investors.<sup>19</sup> However, the actual amount is likely much higher, as tribunals lack meaningful oversight and the full figures are often not publicly disclosed.<sup>20</sup>

ISDS litigation can pose challenges to improving labor standards, fair wages, and workplace safety, especially in the mining sector.<sup>21</sup> ISDS also disproportionately affects vulnerable populations by excluding their direct participation and frequently dismissing amicus briefs. This is especially detrimental to Indigenous communities, who are often on the frontlines of extractive corporate projects.<sup>22</sup>

ISDS also stagnates and limits government actions to address environmental concerns. A report by the Columbia Center for Sustainable Investment highlights the connection between ISDS and the fossil fuel sector in Mozambique, emphasizing how oil corporations can leverage ISDS to stifle the transition to renewable energy. The report also notes the potential chilling effect on domestic policies, deterring governments from pursuing progressive environmental initiatives.<sup>23</sup>



The environmental damage caused by foreign direct investment in Africa is alarming. The DRC supplies most of the world's cobalt, a critical component in electric vehicle batteries. However, the mining practices used to extract cobalt are incredibly dangerous to workers and devastating to the environment, causing poisonous runoff, releasing toxic fumes, and damaging the surrounding land.<sup>24</sup>

If African governments implement policies that delay or deny permits for mining projects based on environmental concerns or requirements to obtain community-based free, prior, and informed consent (FPIC), billionaires and multinational corporations can use ISDS to demand billions in compensation. Additionally, any government action aimed at remediating the environmental harms caused by mining could be challenged by investors through ISDS, potentially costing governments millions in legal representation and billions in awards for “damages.”<sup>25</sup>

**As the U.S. seeks to strengthen sustainable and just supply chains with African countries, particularly in critical minerals, eliminating ISDS should be a top priority.**

With the growing global demand for electric vehicles, the race for Africa's minerals — including cobalt, manganese, and graphite — will expose African communities and the environment to severe harm unless robust environmental, labor, and human rights standards are rigorously implemented and enforced.<sup>26</sup>

## **Rolling Back ISDS in Africa**

It's important to recognize that ISDS is a product of neocolonial power imbalances. The first ISDS treaty was signed between the Netherlands and Indonesia, a former Dutch colony that had just recently gained its independence. Newly independent states had little leverage to refuse ISDS provisions in such treaties, as they were often subjected to economic pressure by Western institutions at the time.<sup>27</sup>

Several African nations have already worked to scale back or fully eliminate ISDS from existing investment agreements. After Italian investors used ISDS to challenge South Africa's post-apartheid racial justice policies,<sup>28</sup> the South African government reviewed its existing ISDS-enforced bilateral investment treaties with several countries and decided to terminate them.<sup>29</sup> Similarly, Tanzania notably terminated an ISDS-enforced bilateral investment treaty, in part to reduce challenges by multinational corporations levied at the country's efforts to establish sovereignty over its natural resources.<sup>30</sup>

On 29 November 2024, over 40 civil society organizations and advocacy groups adopted the Entebbe Declaration in Uganda, presenting an African-led vision to reform global investment frameworks. The Declaration calls for sustainable, human rights-centered investment policies, the replacement of ISDS with equitable regional



dispute mechanisms, and prioritization of renewable energy, local value addition, and environmental protection to align with climate and development goals.<sup>31</sup>

**The United States has historically been one of the strongest proponents of ISDS, making it imperative for the United States to now lead the charge in dismantling this unfair system.**

Bipartisan opposition to ISDS has triggered a seismic shift, with two subsequent Republican and Democratic administrations opposed to ISDS.<sup>32</sup> Policymakers have several strategies at their disposal to address this issue. The U.S. can collaborate with African trading partners to mutually terminate existing BITs and neutralize any sunset clauses within them, or withdraw consent to arbitration through the BITs. Either option can be pursued unilaterally or in partnership with trade partners, paving the way for more equitable trade relations.<sup>33</sup>

## Endnotes

<sup>1</sup> Public Citizen, “It’s Time to Exit ISDS: 200+ Labor, Environment, and Other Civil Society Groups Urge Biden to Eliminate Extreme Corporate Powers From Existing Trade Pacts,” November 2, 2023. Available at: <https://www.citizen.org/news/its-time-to-exit-isds-200-labor-environment-and-other-civil-society-groups-urge-biden-to-eliminate-extreme-corporate-powers-from-existing-trade-pacts/>

<sup>2</sup> As of October 2024, the following pending cases have been launched against African nations: Algeria (13), Benin (1), Burundi (4), Cabo Verde (1), Cameroon (3), Democratic Republic of the Congo (4), Republic of the Congo (3), Egypt (46), Equatorial Guinea (2), Ethiopia (5), Gabon (3), The Gambia (2), Ghana (3), Kenya (1), Lesotho (2), Libya (22), Madagascar (4), Mauritius (4), Morocco (9), Mozambique (3), Nigeria (5), Rwanda (1), Senegal (6), Sierra Leone (1), South Africa (1), Sudan (2), United Republic of Tanzania (13), Tunisia (3), Uganda (1), and Zimbabwe (3). This data was obtained from the UNCTAD Investment Policy Hub on December 5, 2024, available at: <https://investmentpolicy.unctad.org/>.

<sup>3</sup> This data was obtained from the UNCTAD Investment Policy Hub on December 5, 2024, available at: <https://investmentpolicy.unctad.org/>.

<sup>4</sup> Egypt (46), Libya (22), Algeria (13) = 81 out of 171 or 47% of all cases. Per the UNCTAD Investment Policy Hub, visited on Dec. 5, 2024: <https://investmentpolicy.unctad.org/>

<sup>5</sup> Bettine Müller, Cecilia Olivet, “Impacts of Investment Arbitration against African States: ISDS in Numbers,” Transnational Institute, October 8, 2019. Available at: <https://www.tni.org/en/publication/impacts-of-investment-arbitration-against-african-states>

<sup>6</sup> This data was obtained from the UNCTAD Investment Policy Hub on Dec. 5, 2024, available at: <https://investmentpolicy.unctad.org/>.

<sup>7</sup> This data was obtained from the UNCTAD Investment Policy Hub on Dec. 5, 2024, available at: <https://investmentpolicy.unctad.org/>.

<sup>8</sup> This data was obtained from the UNCTAD Investment Policy Hub on December 5, 2024, available at: <https://investmentpolicy.unctad.org/>. Some of the data is additionally pulled from case documents found in Itlaw to fill in the gaps for awards not listed on the UNCTAD database. Itlaw’s case resources are available at: <https://www.italaw.com/>



<sup>9</sup> Lea Di Salvatore, Lorenzo Cotula, Anirudh Nanda, and Chloe Yuqing Wang, “Investor-state dispute settlements: a hidden handbrake on climate action,” *IIED*, November 2023. Available at: <https://www.iied.org/21971iied>

<sup>10</sup> This includes investors from Australia (1), Austria (1), Belgium (7), Luxembourg (8), Canada (3), Denmark (3), Finland (2), France (15), Germany (8), Italy (15), Greece (1), the Netherlands (14), Poland (1), Portugal (2), Russia (1), Spain (5), Sweden(2), Switzerland (7), the United Kingdom (17), and the United States of America (13). Some claims involve multiple investors from different countries. This data was obtained from the UNCTAD Investment Policy Hub on December 5, 2024, available at: <https://investmentpolicy.unctad.org/>. This data was obtained from the UNCTAD Investment Policy Hub, available at: <https://investmentpolicy.unctad.org/>. Some of the data was additionally obtained from case documents found in Italaw to fill in for awards not listed on the UNCTAD database. Italaw’s case resources are available at: <https://www.italaw.com/>.

<sup>11</sup> This data encompasses cases filed by investors from Belgium, Italy, France, Germany, the Netherlands, Portugal, Spain, and the United Kingdom against territories previously under their colonial rule. The case data was sourced from the UNCTAD Investment Policy Hub on December 5, 2024, available at: <https://investmentpolicy.unctad.org/>.

<sup>12</sup> *Union Fenosa v. Egypt*, ICSID Case No. ARB/14/4, Award (August 31, 2018) at para. 2.3. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10061.pdf>

<sup>13</sup> *Union Fenosa v. Egypt*, ICSID Case No. ARB/14/4, Award (August 31, 2018) at paras. 13.8 and 13.12 Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10061.pdf>

<sup>14</sup> “The Worst of the Worst Egregious Corporate Attacks on Public Interest Policies,” Public Citizen’s Global Trade Watch, p. 6-7, visited on March 7, 2024. Available at: <https://gtwaction.org/wp-content/uploads/2023/12/ISDS-Egregious-Cases.pdf>

<sup>15</sup> Jacob Greenberg, “ICSID tribunal orders Zimbabwe to return expropriated farms,” *Investment Treaty News*, May 16, 2016. Available at: <https://www.iisd.org/itn/en/2016/05/16/icsid-tribunal-orders-zimbabwe-to-return-expropriated-farms-bernhard-von-pezold-and-others-v-zimbabwe-icsid-case-no-arb-10-15-jacob-greenberg/>

<sup>16</sup> *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (July 28, 2015) at para 925. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw7095\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf)

<sup>17</sup> United States Bilateral Investment Treaties, visited on Dec. 6, 2024. Available at: <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/>

<sup>18</sup> This data was obtained from the UNCTAD Investment Policy Hub on Dec. 5, 2024, available at: <https://investmentpolicy.unctad.org/>.

<sup>19</sup> This data was obtained from the UNCTAD Investment Policy Hub on Dec. 5, 2024, available at: <https://investmentpolicy.unctad.org/>.

<sup>20</sup> Lea Di Salvatore, Lorenzo Cotula, Anirudh Nanda, and Chloe Yuqing Wang, “Investor-state dispute settlements: a hidden handbrake on climate action,” *IIED*, Nov. 2023. Available at: <https://www.iied.org/21971iied>

<sup>21</sup> “The Worst of the Worst: Egregious Corporate Attacks on Public Interest Policies,” *Public Citizen*. Visited on Nov. 5, 2024: <https://gtwaction.org/egregious-isds-cases/> and see generally: *Veolia v. Egypt*, ICSID Case No. ARB/12/15, Award, May 25, 2018. Available at: <https://www.italaw.com/sites/default/files/case-documents/18040.pdf>

<sup>22</sup> Iza Camarillo, “The Corporate Colonization of Latin America: How Investor-State Dispute Settlement (ISDS) Harms Indigenous Communities” *Public Citizen*, June 2024. Available at: <https://gtwaction.org/isds-impacts-on-indigenous-peoples/>



- <sup>23</sup> “In addition, multiple stabilization clauses in the analyzed contracts lock the operations into specific legal and fiscal regimes for the duration of the contracts. Stabilization clauses protect investments from unexpected regulatory changes or new fiscal rules. If a host state does introduce such changes, stabilization clauses allow investors to demand measures or compensation that would ensure their same profitability absent such changes. These clauses thus exacerbate the limits to – and chilling effect on – states’ public interest regulation.” Lea Di Salvatore, Julia Gubessi, “Billion Dollar Exposure: investor-state dispute settlement in Mozambique’s fossil fuel sector,” Columbia Center on Sustainable Investment, February 13, 2024. Available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/Mozambique-ISDS.pdf>
- <sup>24</sup> Iza Camarillo and Sarah Stevens, “Trade and Critical Minerals: The Deadly Cost of Cobalt Mining in the Congo,” Public Citizen, October 2024. Available at: <https://gtwaction.org/the-deadly-cost-of-cobalt-mining-in-the-congo/>
- <sup>25</sup> Iza Camarillo, “The Corporate Colonization of Latin America: How Investor-State Dispute Settlement (ISDS) Harms Indigenous Communities” Public Citizen, June 2024. Available at: <https://gtwaction.org/isds-impacts-on-indigenous-peoples/>
- <sup>26</sup> Iza Camarillo and Sarah Stevens, “Trade and Critical Minerals: The Deadly Cost of Cobalt Mining in the Congo,” Public Citizen, October 2024. Available at: <https://gtwaction.org/the-deadly-cost-of-cobalt-mining-in-the-congo/> and “FACT SHEET: Biden-Harris Administration Announces New Private and Public Sector Investments for Affordable Electric Vehicles,” April 17, 2023. Available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/17/fact-sheet-biden-harris-administration-announces-new-private-and-public-sector-investments-for-affordable-electric-vehicles/>
- <sup>27</sup> Gus Van Harten, “The Trouble with Foreign Investor Protection,” Oxford Academic, pp. 14-33, December 17, 2020. Available at: <https://doi.org/10.1093/oso/9780198866213.003.0002>.
- <sup>28</sup> Piero Foresti, Laura de Carli, & Others v The Republic of South Africa, ICSID Case No. Arb(AF)/07/01, Award August 4, 2010 at para. 69. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf>
- <sup>29</sup> Ginevra Le Moli, “Intruders in a Balancing Act: Black Economic Empowerment, Transnational Justice, and Investment Arbitration Tribunals,” International Journal of Transitional Justice, Vol 15(1), pp. 7-25. May 18, 2021. Available at: <https://doi.org/10.1093/ijtj/ijaa026>
- <sup>30</sup> Luke Eric Peterson, “As Tanzania Seeks to Overhaul Mining Regime, the Government Reportedly Moves to Terminate a Bilateral Investment Treaty That Was Up for Renewal,” IA Reporter, October 8, 2018. Available at: <https://www.iareporter.com/articles/as-tanzania-seeks-to-overhaul-mining-regime-the-government-reportedly-moves-to-terminate-a-bilateral-investment-treaty-that-was-up-for-renewal/>
- <sup>31</sup> Bart-Jaap Verbeek, “Civil society organisations push for transformative global investment rules: The Entebbe Declaration calls for justice and sustainability in global investment governance,” SOMO, December 9, 2024. Available at: <https://www.somo.nl/civil-society-organisations-push-for-transformative-global-investment-rules/>
- <sup>32</sup> “Press Release: 300+ Democratic and Republican State Legislators From 48 States Urge Biden to End ISDS,” Public Citizen, August 5, 2024. Available at: <https://www.citizen.org/news/press-release-300-democratic-and-republican-state-legislators-from-48-states-urge-biden-to-end-isds/>
- <sup>33</sup> Ladan Mehranvar, with Martin Dietrich Brauch, Achyuth Anil, Anna-Sophie Kloppe, Lucas Clover Alcolea, and Madeleine Songy, “Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions,” New York: Columbia Center on Sustainable Investment (CCSI), October 2024. Available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/ccsi-breaking-free-investment-treaties.pdf>

