

# International Investment Arbitration in Africa: Year in Review 2016

## INTERNATIONAL ARBITRATION TEAM

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*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.*

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Foreign direct investment (FDI) flows to Africa fell overall by 5 percent in 2016, according to the United Nations Conference on Trade and Development (UNCTAD). The decline, however, was not uniform across the continent. Egypt and Nigeria, for example, experienced an increase in FDI flows.

Similarly, the International Monetary Fund reported mixed economic growth patterns in Sub-Saharan Africa. While resource-intensive countries saw a downward trend, non-resource-intensive countries such as Côte d'Ivoire, Kenya, and Senegal experienced an upward momentum.

There has been a surge in investment from the Asia-Pacific region. As stated by Ernst & Young, in the first half of 2016, Asia-Pacific investors, particularly from China and Japan, were the largest contributors by both capital value and FDI jobs. Chinese-sourced FDI into Africa saw a dramatic increase over that six-month period compared to the first half of 2015. FDI projects from China were up a remarkable 209 percent, making the Asian powerhouse the third biggest investor in the continent (behind the United States and France).

Against the backdrop of Africa's mixed economic performance, the number of ICSID arbitrations filed in 2016 decreased from previous years. Newly-filed claims show less concentration in the oil, gas and mining, and electric power industries. The tourism industry saw two new cases while the construction, information and communication, oil, gas, and mining, and transportation industries each saw one case. An additional case was filed in the "other industry" category.

Countries on the continent have concluded at least 960 investment treaties (including bilateral investment treaties and other treaties containing investment-related provisions), of which 542 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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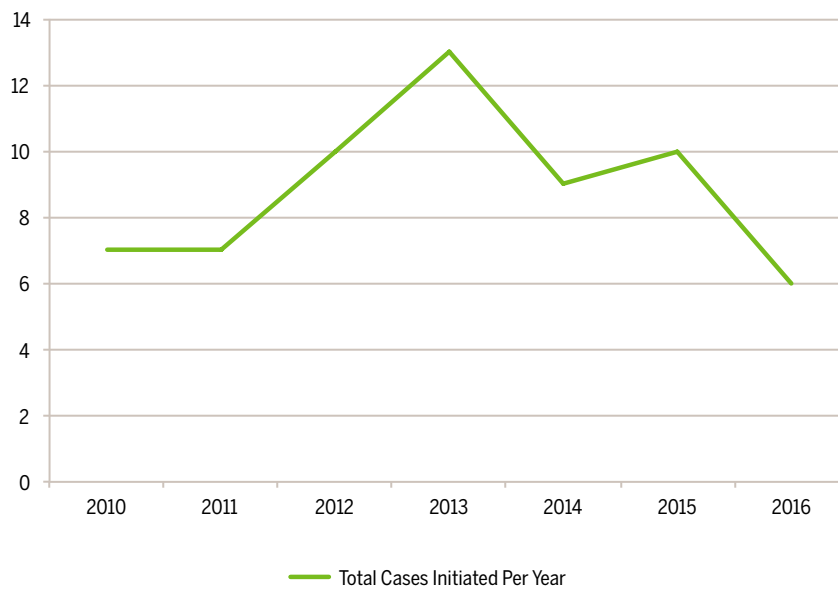
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## Investment Arbitration in the Region<sup>1</sup>

In total, 129 ICSID cases have involved African parties, mostly as respondent States. There have been 126 ICSID cases involving African parties as respondent States: the only African party is the respondent State in 93 cases while African parties are both the respondent State and claimant investors in 33 cases. There have been 36 cases involving African parties as claimant investors: as noted above, in 33 cases African parties are both claimant investors and the respondent State; in three cases the only African parties are the claimant investors.

Six claims were initiated against African States in 2016, three of which were brought by African claimant investors. Including the six new cases registered, 32 cases were pending at the end of 2016.

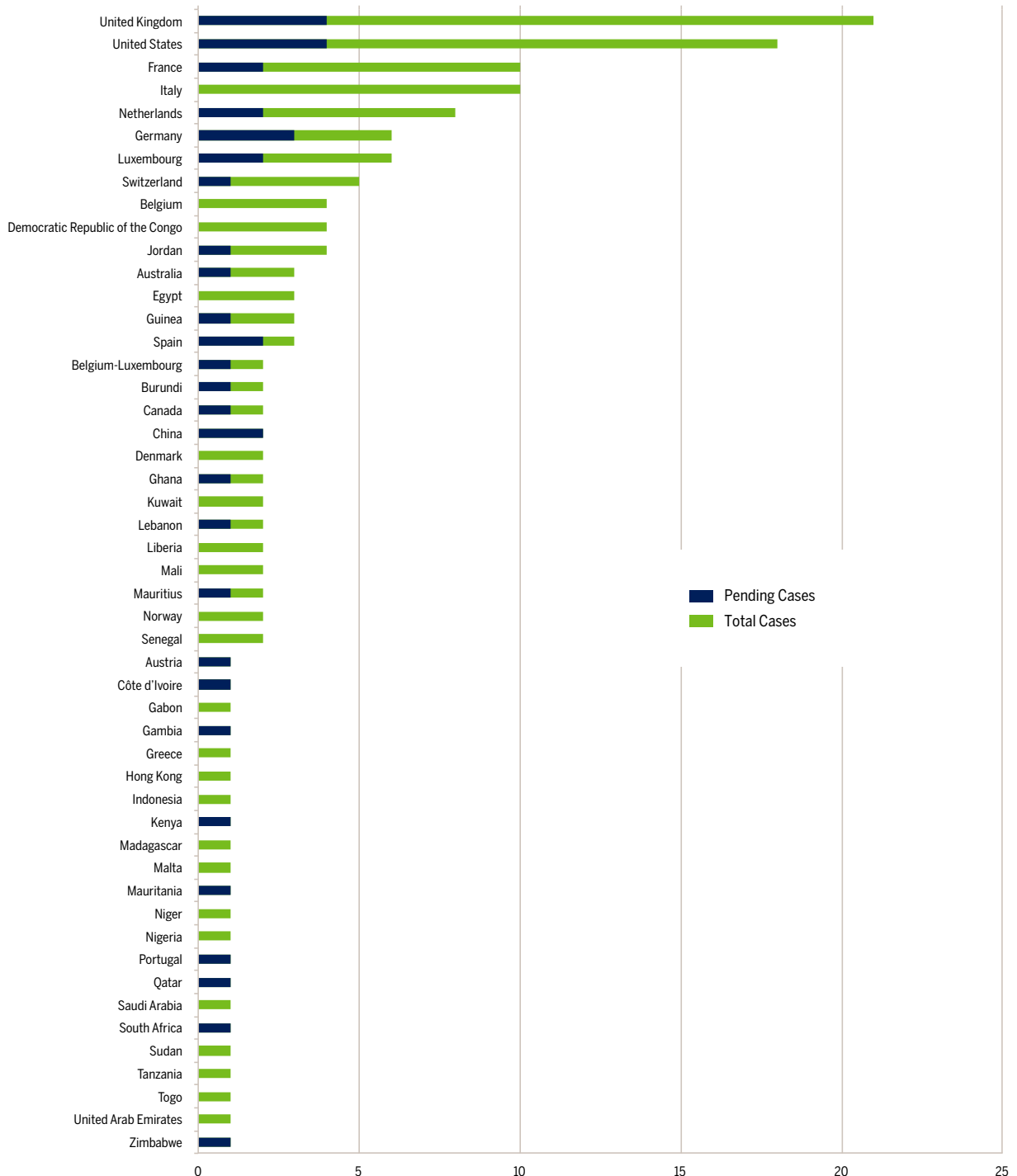
**Total Cases Initiated Per Year**



<sup>1</sup> This review considers only investment arbitrations brought under the auspices of ICSID, which constitute the majority of investment arbitrations.

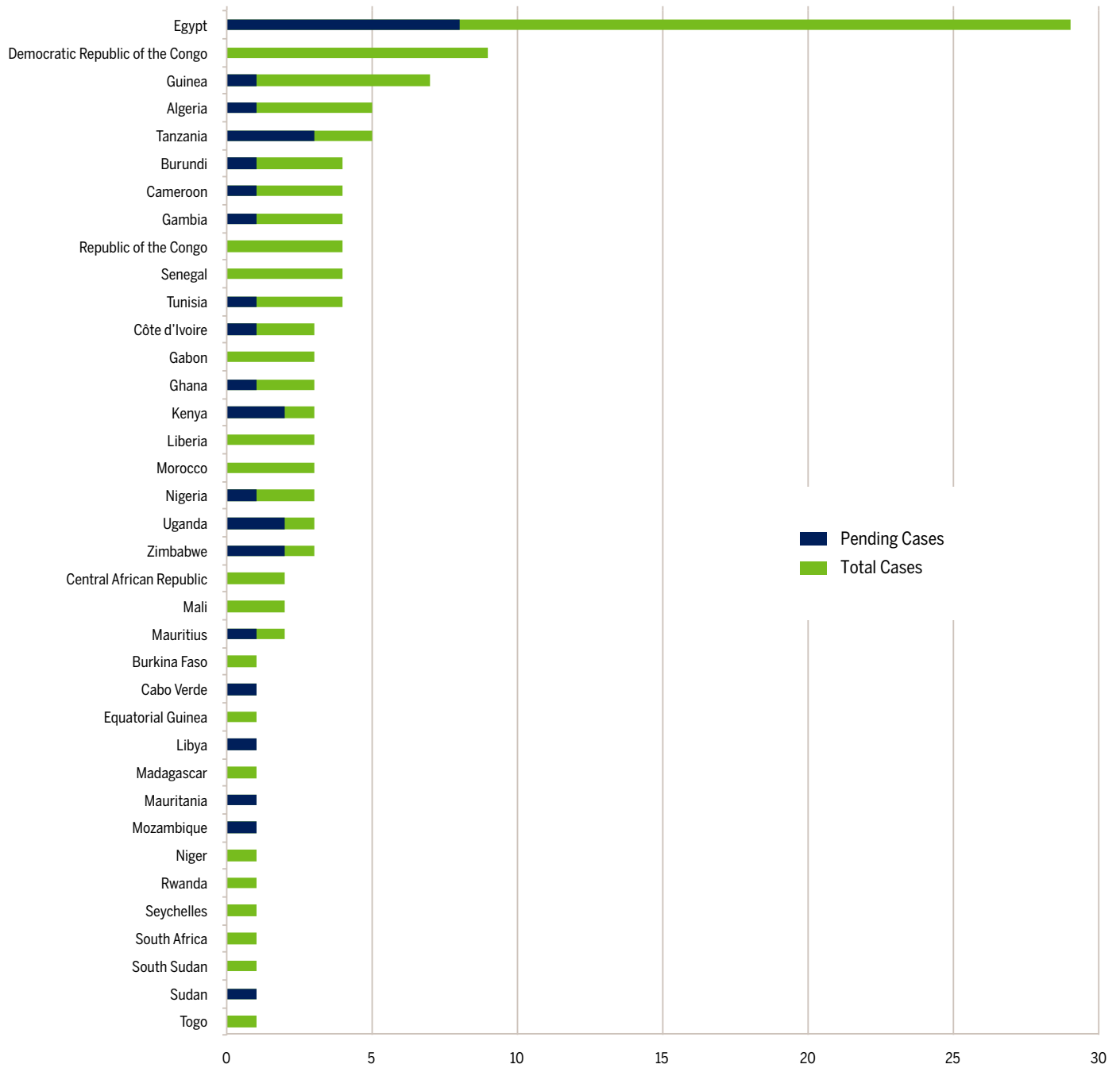
The nationalities of investors who have most frequently brought claims against African countries continue to be the United Kingdom, the United States, France, and Italy. Côte d'Ivoire and Qatar saw their nationals bring investment claims against States in the region for the first time in 2016.

**Top Nationalities of Investors with ICSID Arbitrations in Africa**



Egypt, the Democratic Republic of the Congo, Guinea, Algeria, and Tanzania remain the countries in the region that have faced the most investment arbitration claims.

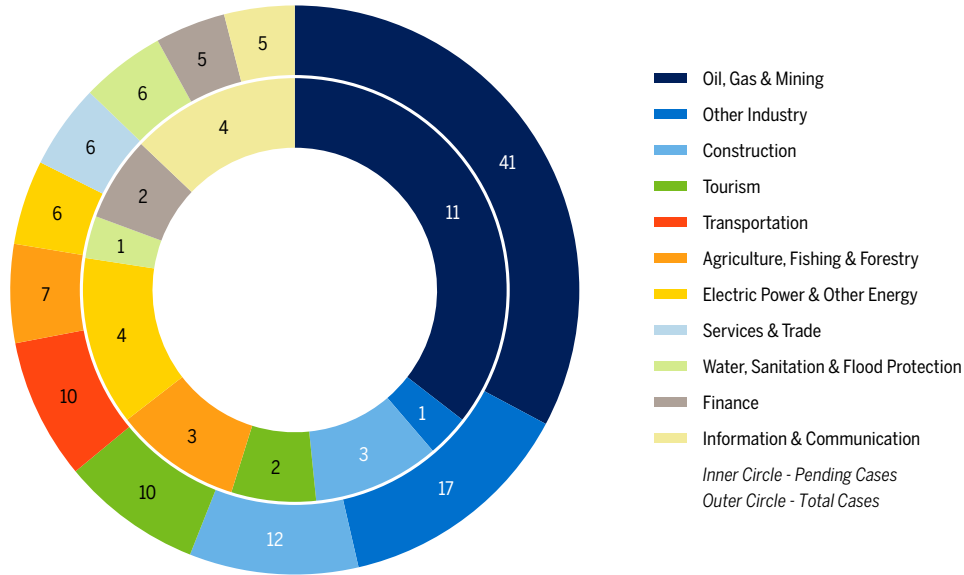
### African Countries Facing Investment Claims



Of the six original proceedings filed in 2016, the tourism industry saw two new cases while construction; information and communication; oil, gas, and mining; and transportation each saw one case. An additional case was filed in the “other industry” category.

Historically, the majority of ICSID cases were in the oil, gas, and mining industry. Finance and the information and communication sectors have had the fewest cases.

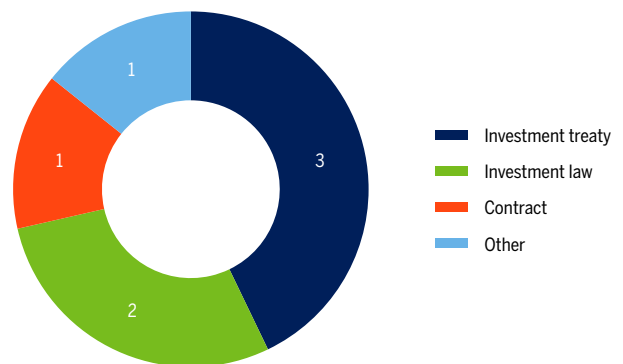
### Investment Cases Against African Respondents by Industry



Claimant investors often rely on multiple bases for jurisdiction. For the claims brought in 2016, investment treaties were the most common basis for jurisdiction, which is consistent with the historical trend. At least one case invoked more than one basis for jurisdiction.

In 2016, 14 original ICSID proceedings were resolved, eight by discontinuances and six by awards. In addition, two annulment proceedings ended in 2016, one by decision and one by discontinuance.

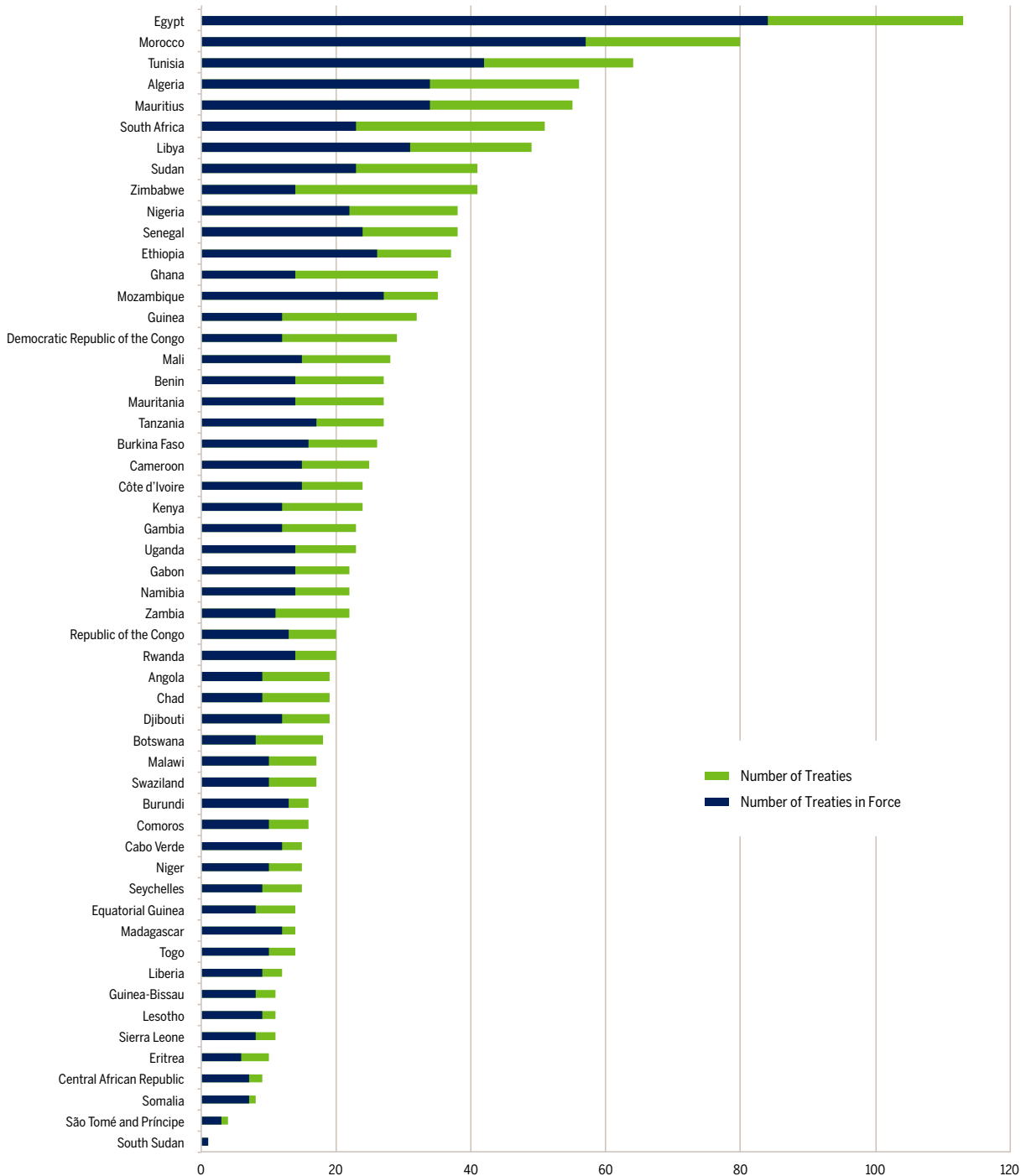
### Instrument Invoked to Establish ICSID Jurisdiction



Of the approximately 3,500 investment treaties worldwide, more than one quarter (960) involve African signatories. A majority of investment treaties concluded by countries on the continent are currently in force.

Egypt has concluded the most investment treaties, followed by Morocco and Tunisia.

### Investment Treaties Involving African Countries



The United States has signed 26 investment treaties with African countries. Of these, 22 are in force. Nine of the treaties between the United States and African countries permit investor-State arbitration (the bilateral investment treaties between the United States and Cameroon, the Democratic Republic of the Congo, Egypt, Morocco, Mozambique, Republic of the Congo, Rwanda, Tunisia, and Senegal, respectively).

African nations were involved in signing 11 new bilateral investment treaties in 2016. Rwanda, Nigeria, and Morocco were the region's most active treaty makers, entering treaties with countries both within the region (Nigeria and Rwanda, each with Morocco) and outside it (Morocco with the Russian Federation, Nigeria with Singapore, and Rwanda with Turkey). Turkey was the region's most active treaty partner, inking treaties with four African countries, Côte d'Ivoire, Ghana, Somalia, and Rwanda.

### Investment Treaties Concluded in 2016

Countries	Type of Treaty	Date Signed
Ethiopia-United Arab Emirates	Bilateral Investment Treaty	February 23, 2016
Côte d'Ivoire-Turkey	Bilateral Investment Treaty	February 29, 2016
Ghana-Turkey	Bilateral Investment Treaty	March 1, 2016
Morocco-The Russian Federation	Bilateral Investment Treaty	March 15, 2016
Somalia-Turkey	Bilateral Investment Treaty	June 1, 2016
Mozambique-Singapore	Bilateral Investment Treaty	August 24, 2016
Kenya-Japan	Bilateral Investment Treaty	August 28, 2016
Rwanda-Morocco	Bilateral Investment Treaty	October 19, 2016
Rwanda-Turkey	Bilateral Investment Treaty	November 3, 2016
Nigeria-Singapore	Bilateral Investment Treaty	November 4, 2016
Nigeria-Morocco	Bilateral Investment Treaty	December 3, 2016

## Other Developments in 2016

- In April 2016, the International Arbitration Bill was introduced in South Africa’s Parliament. Based on the UNCITRAL Model Law on International Commercial Arbitration, the legislation would replace South Africa’s current international commercial arbitration law. The bill includes a confidentiality provision indicating that absent compelling reasons for a private hearing, if an arbitration proceeding involves a public body as a party, that proceeding will be held in public. The bill also provides a right to defer the dispute to conciliation at any time. Measures allowing for recognition and enforcement of foreign arbitral awards are also included.
- In 2016, ICSID reported that four ICSID Contracting States from the continent made designations to ICSID Panels—Mauritius, Morocco, Seychelles, and Somalia.
- In November 2016, ICSID announced that it had begun the process of revising its rules and regulations. The public consultation process will open in 2017. Revisions to ICSID’s rules and regulations were last completed in 2006.

## 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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