BRYAN CAVE

INTERNATIONAL ARBITRATION TEAM

International Investment Arbitration in Europe: Year in Review 2016

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 Europe 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 European economy entered its fourth year of recovery in 2016. Growth in the Eurozone reached 1.7% this year compared to 1.6% last year, and is expected to reach 1.9% in 2017, driven essentially by consumption.

The number of new investment arbitrations involving the region filed in 2016 decreased compared with 2015. Disputes are concentrated in the electric power and other energy industry. Of the numerous cases brought against Spain under the Energy Charter Treaty in the photovoltaic (solar) sector, a first award was rendered on January 22, 2016 in which Spain prevailed on the merits (*Charanne and Construction Investments v Kingdom of Spain*, SCC). The arbitral tribunal found that regulatory measures modifying the feed-in tariff regime for the photovoltaic sector in Spain did not amount to an indirect expropriation and did not violate the investors' legitimate expectations. Other industries that have given rise to significant numbers of disputes in the region include oil, gas and mining, and finance.

67 new ICSID disputes involving the region were registered in 2016. Roughly a quarter of new disputes filed in 2016 were intra-European cases, which is less than 2015 (where a third of new claims were intra-European). All of the new cases were brought pursuant to bilateral investment treaties.

European States have concluded 1,763 investment treaties currently in force (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions), one of which entered into force during the year. Six new investment treaties were signed in 2016.

For purposes of this review, Europe includes the countries of Western, Central and Eastern Europe. We do not include Russia or other countries of the Commonwealth of Independent States (CIS), which are addressed in our separate review of investment arbitration in that region.

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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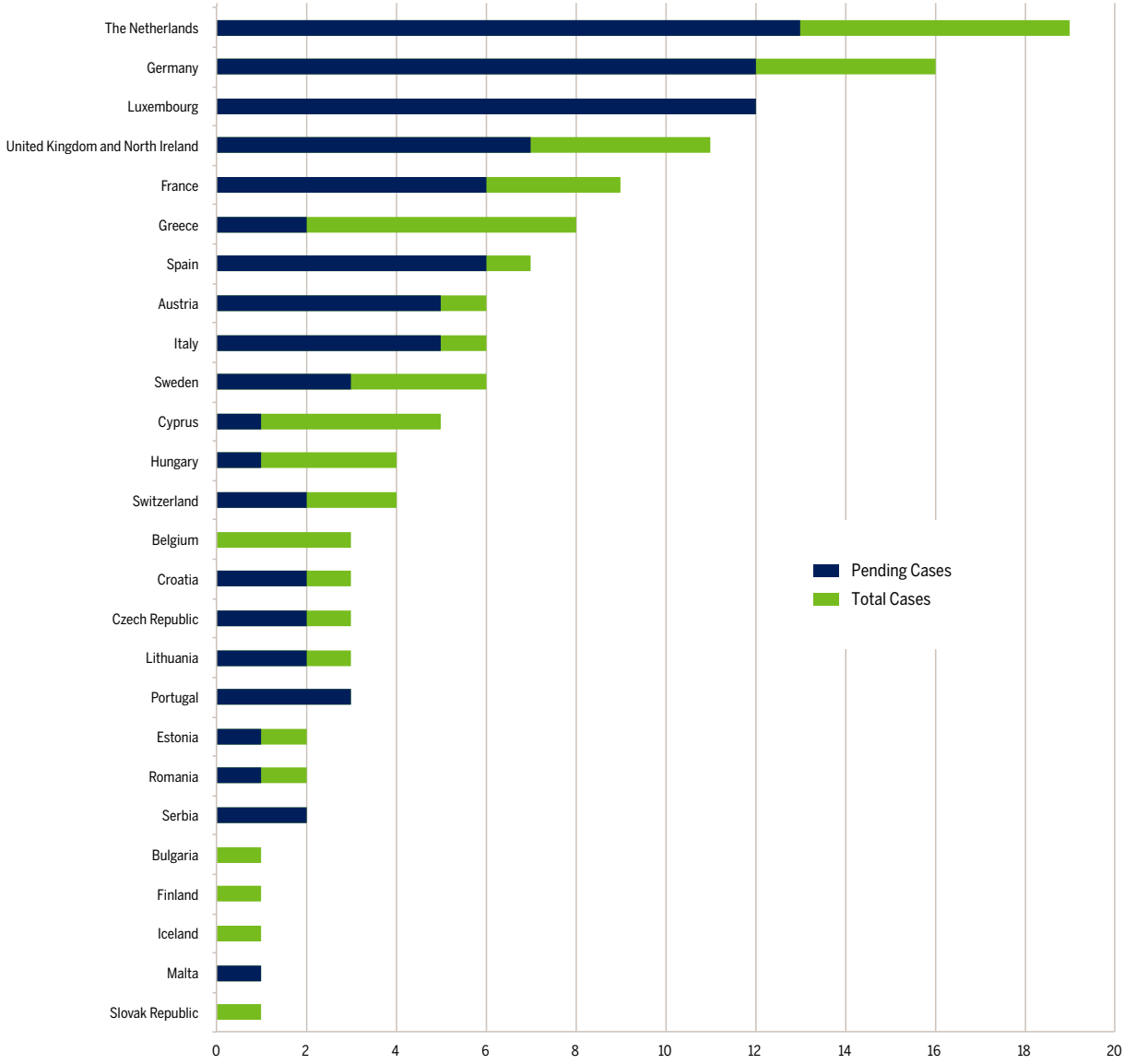
Investment Arbitration in the Region[1]

More than 300 ICSID cases have involved parties from European countries as claimant investors, respondent States or both, with the first arbitration brought by an investor in the region – by Swiss and United States investors against Morocco – filed in 1972, and the first arbitration brought against a State in the region – by Swiss and Icelandic investors against Iceland – filed in 1983. Of those more than 300 cases, 148 were pending in 2016.

Of investment arbitrations involving European countries pending in 2016, investors from the Netherlands, United Kingdom, Luxembourg and Germany have brought the greatest number of claims. Claims brought by investors from these four countries constitute an important part of all pending European cases (41 percent). Historically, Italy Spain and Switzerland also featured among the most frequently represented home countries of investors in European cases.

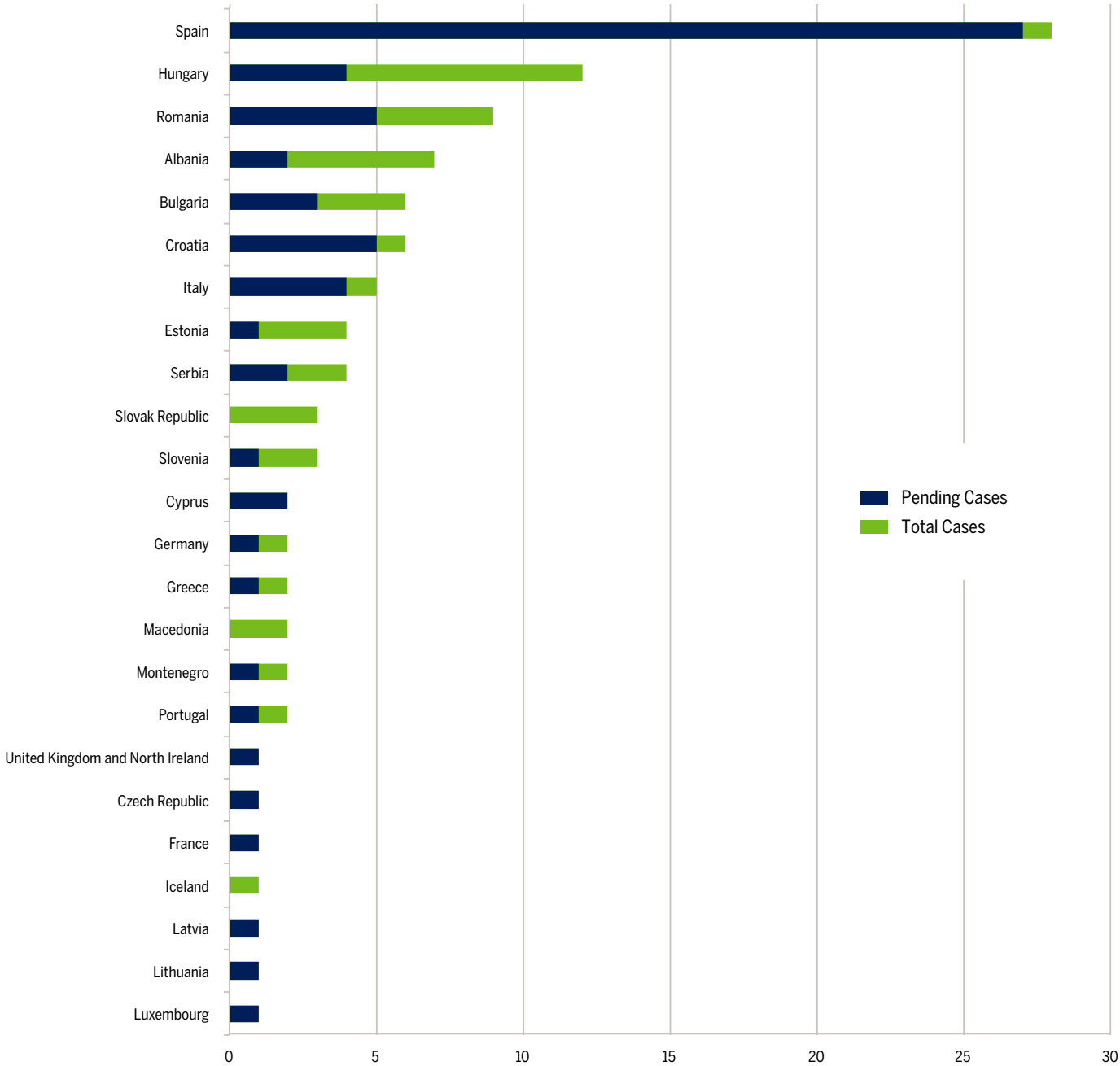
Top Nationalities of Investors with ICSID Arbitrations in Europe



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

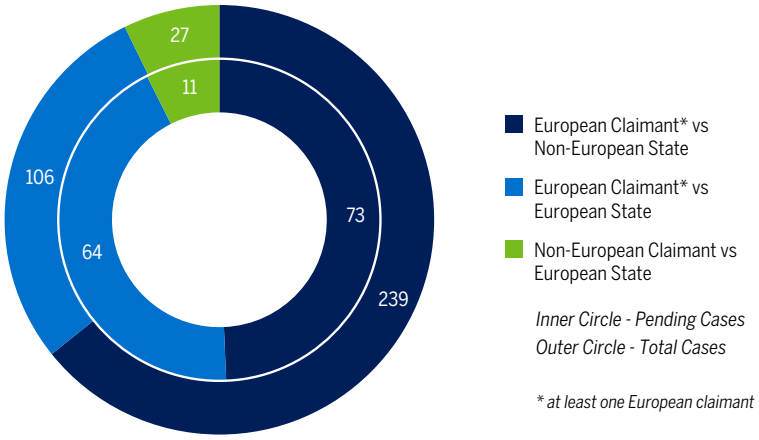
Spain has faced by far the most investment claims in Europe (28), followed by Hungary (12), Romania (9) and Albania (7). All but one of the arbitrations brought against Spain were pending as of the end of 2016. The number of arbitrations against Spain pending in 2016 was equal to that of Hungary, Bulgaria, Italy, Romania, Albania, Croatia, Cyprus, Estonia, France, and Germany combined.

European Countries Facing Investment Claims



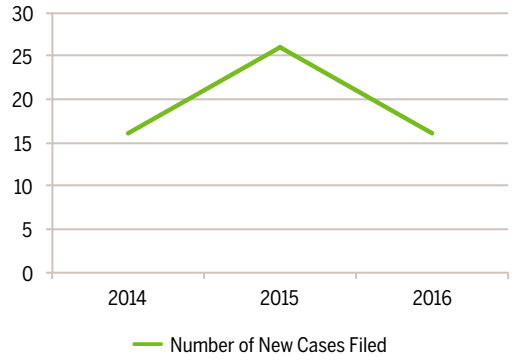
The majority of European claims (64 percent) have been brought by European investors against non-European States. Just under a third of cases (28 percent) have been brought by European investors against European States. It is comparatively rare for claims to have been brought by investors from outside the region against European States (less than 10 percent).

Claims are more commonly brought by European investors against non-European States. In 2016, almost 40 percent fewer intraregional cases – i.e., cases brought by European investors against European States – were initiated than in the previous year.

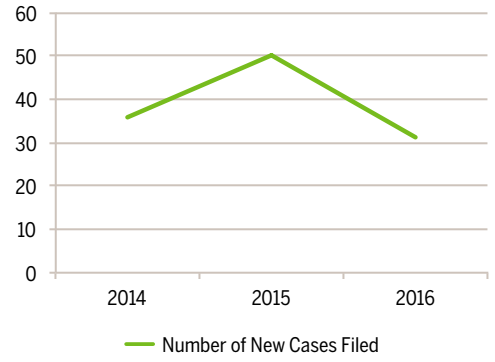


Cases Initiated Per Year

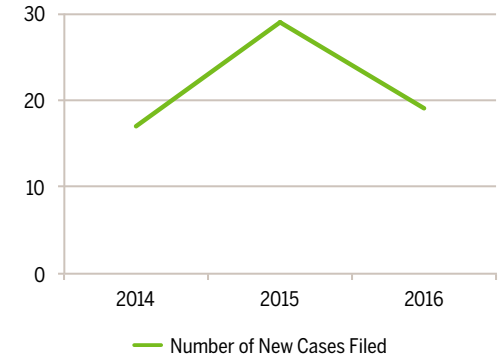
European Claimant* vs European Respondent



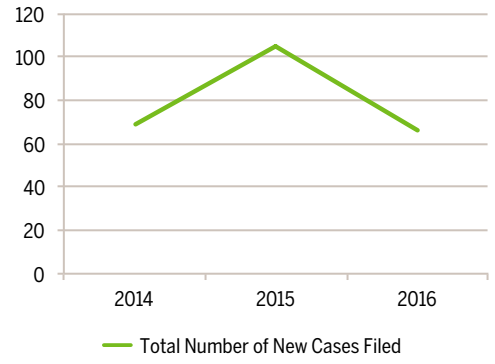
European Claimant* vs Non-European Respondent



Non-European Claimant vs European Respondent/State



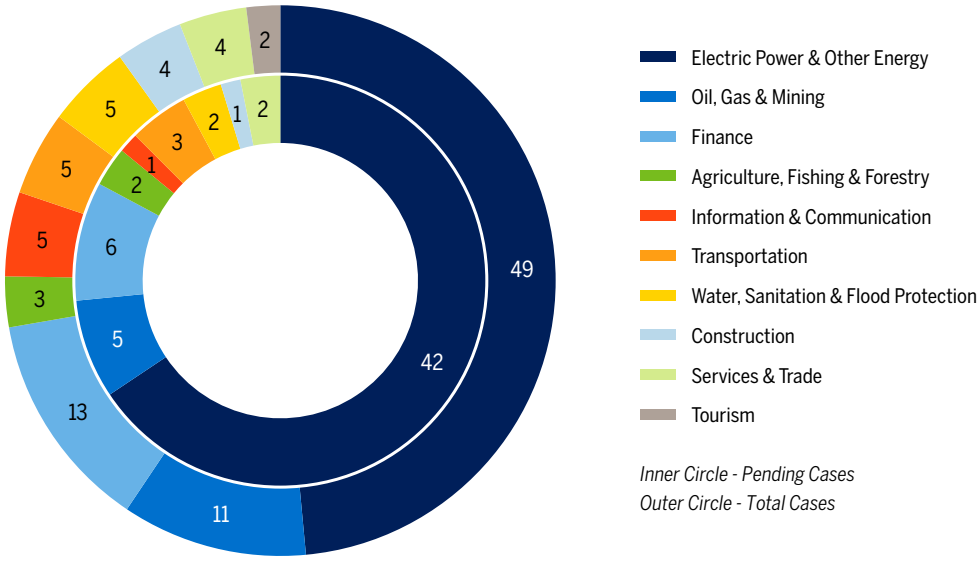
Total Number of New Cases Filed



** at least one European claimant*

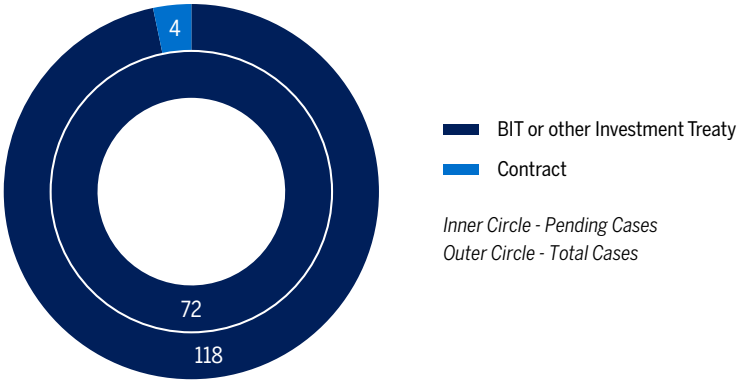
Historically, investment disputes against European States have arisen most frequently in the electric power and other energy, oil, gas and mining, and finance industries. Of the claims pending in 2016, disputes in the electric power and other energy industry outnumbered disputes in the nearest contender industry (oil, gas and mining) by almost ten.

Investment Cases by Industry



The basis for arbitral jurisdiction in most cases against European States (97 percent) has been an investment treaty (typically a bilateral investment treaty). Investment contracts have been invoked as the basis for arbitral jurisdiction in very few cases (3 percent). To date, no investor has invoked a national investment law as the basis for arbitral jurisdiction.

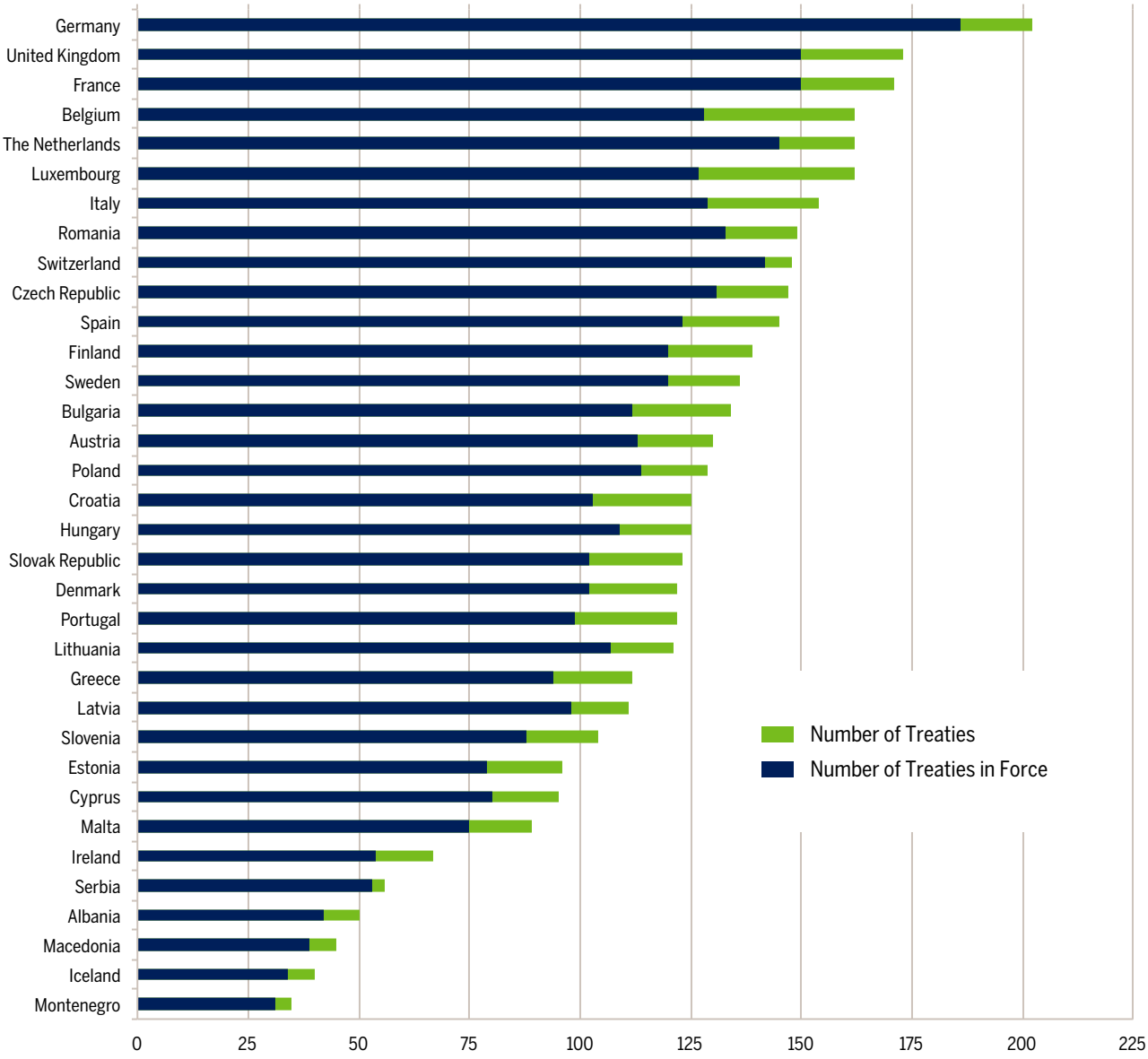
Instrument Invoked to Establish ICSID Jurisdiction



56 arbitrations were concluded in 2016, 12 of which (21 percent) involved annulment proceedings (a further annulment proceeding was commenced in 2015 in respect of an earlier concluded arbitration). 15 out of these 56 cases (27 percent) were settled or discontinued.

More than 50 percent of the approximately 3,500 investment treaties currently in existence worldwide involve European States. Germany has signed the most investment treaties, followed by the United Kingdom, France and the Netherlands.

Investment Treaties Involving European States



Of the 1,763 international investment agreements signed by European States currently in force, 448 are treaties signed between or among only European States. One treaty with investment provisions came into force in 2016 (between the EU and Ukraine).

Six treaties with investment provisions involving the region were signed in 2016. Three bilateral investment treaties were concluded between Austria and Kyrgyzstan, Slovakia and Iran, and Hungary and Cambodia. At the regional level, treaties were inked between the EU and Canada, the European Free Trade Association and Georgia, and the EU and the Southern African Development Community.

Other Developments in 2016

- ICSID began the process of reviewing and amending its rules and regulations in an attempt to improve the efficiency of proceedings. A public consultation exercise is expected this coming year.
- The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which was signed in September 2014, has not yet entered into force. CETA will ultimately replace the eight existing bilateral investment agreements between individual EU Member States and Canada. On February 15, 2017, the European Parliament voted in favor of CETA, thereby concluding the ratification process of this deal at the EU level. The second stage will now involve the parliaments of each EU country. Only once each national parliament approves the agreement will CETA come into force.
- The controversy over treaty-based claims brought by EU investors against EU States continues. In March 2015, the European Commission ordered Romania not to comply with the US$250 million ICSID award rendered in 2013 in Micula v. Romania (ICSID Case No. ARB/05/20) whereby Romania was found in violation of the fair and equitable treatment obligation under the Sweden-Romania bilateral investment treaty for Romania's withdrawal of economic incentives following its accession to the EU in 2004. A decision by an ICSID ad hoc committee was issued on February 26, 2016, rejecting Romania's application to annul the award.
- In June 2016, 51.9% of the British electorate voted by referendum in favor of leaving the EU, setting the UK on an entirely new course in law. Negotiation regarding the UK's new relationship with the EU is expected to take some time. Many practitioners have suggested that international arbitration is relatively safe from the legal uncertainty created by Brexit and that Brexit will have no immediate impact on English arbitration law and procedure, explaining that arbitration agreements which designate England as the seat, and arbitration awards made in England, will be enforceable in the same way that they always have been, whether in English, EU Member State or foreign courts. These issues are and remain governed by the New York Convention on the Recognition and Enforcement of Foreign Awards, even within the EU. However, other practitioners have argued that London's decline as a financial center and the general uncertainty resulting from Brexit may lead to a decline in London-seated arbitration in the long term.
- The result of the U.S. presidential election in November 2016 created uncertainty for future treaty-making activity between Europe and the United States, notably the negotiation of the Transatlantic Trade and Investment Partnership Agreement ("TTIP") between the EU and the United States, including the proposal for the creation of a standing investment court to hear investorState disputes. It seems unlikely that this trade and investment agreement will be concluded during the administration of President Donald J. Trump.

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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