



British Institute of
International and
Comparative Law

Corruption Allegations in International Arbitration



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Topics covered

Corruption in international investment agreements: old and new generation

Practice of investor-state tribunals

Trends in registration of corruption-related cases

Proving corruption

Who alleged corruption?

Did the tribunals consider corruption allegations?

Corruption allegations in investor-state contracts

Consequences of finding corruption

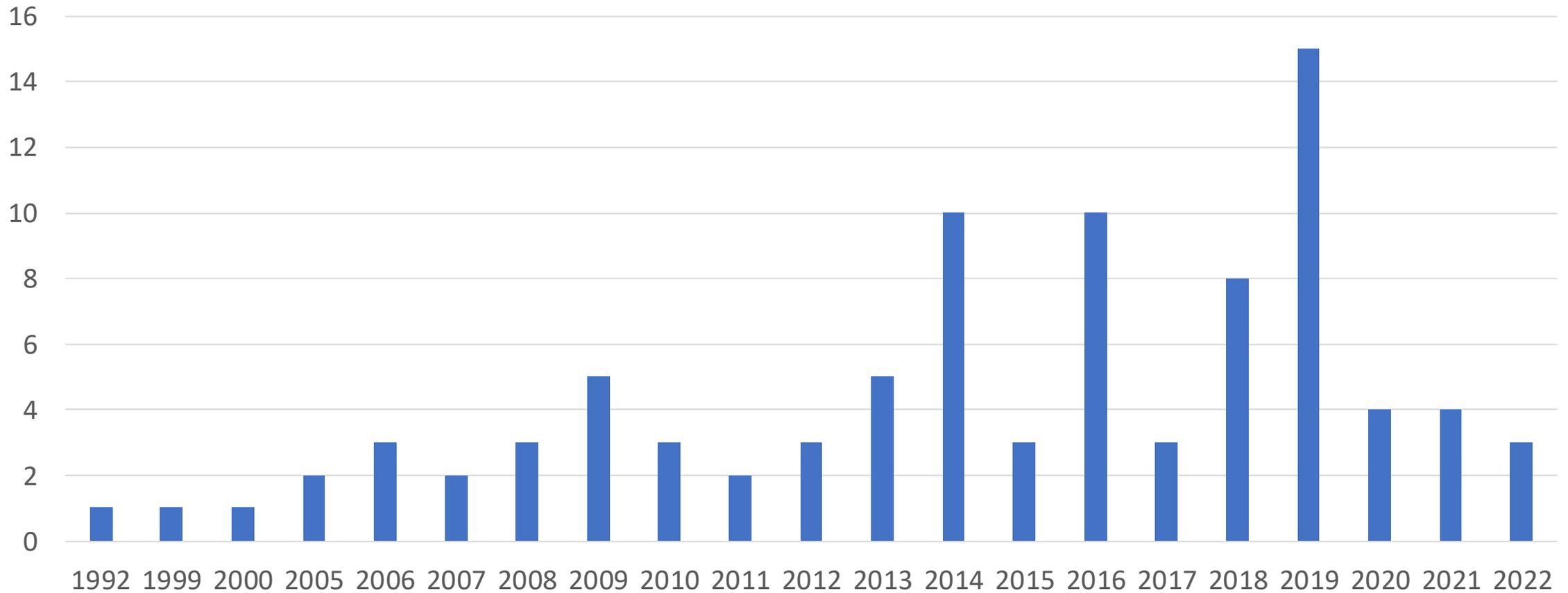
Policy and practical considerations

Balancing protection of investments and tackling corruption

Corruption has a devastating economic impact on economies contributing to a loss of tax revenue, institutional inefficiency, loss of public trust in public institutions and poverty

A balance must be struck between the need to provide an effective and efficient investor-State dispute resolution mechanism and the obligation of States, tribunals and investors to tackle corruption.

Number of corruption-related cases (by the year of rendered award/decision)



Main types of corruption-related requirements in IIAs

‘legality requirement’ with explicit references to corruption

‘Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.’

Japan – Uzbekistan BIT, 2008 (art. 9)

anti-corruption provisions as a part of corporate social responsibility

‘Each Party shall encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.’

2014 Canada – Côte d’Ivoire BIT (art 15(2))

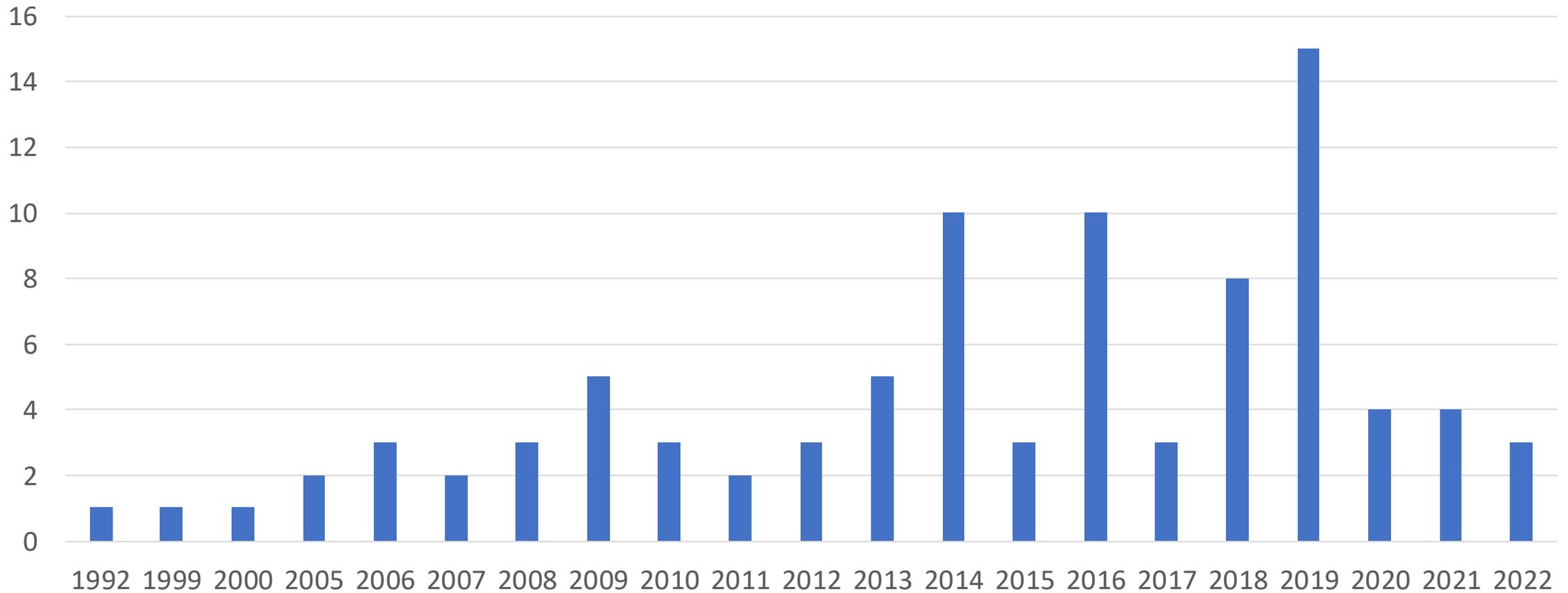
Corruption in IIAs and ISDS

references to specific anti- corruption treaties refer to anti-corruption obligations

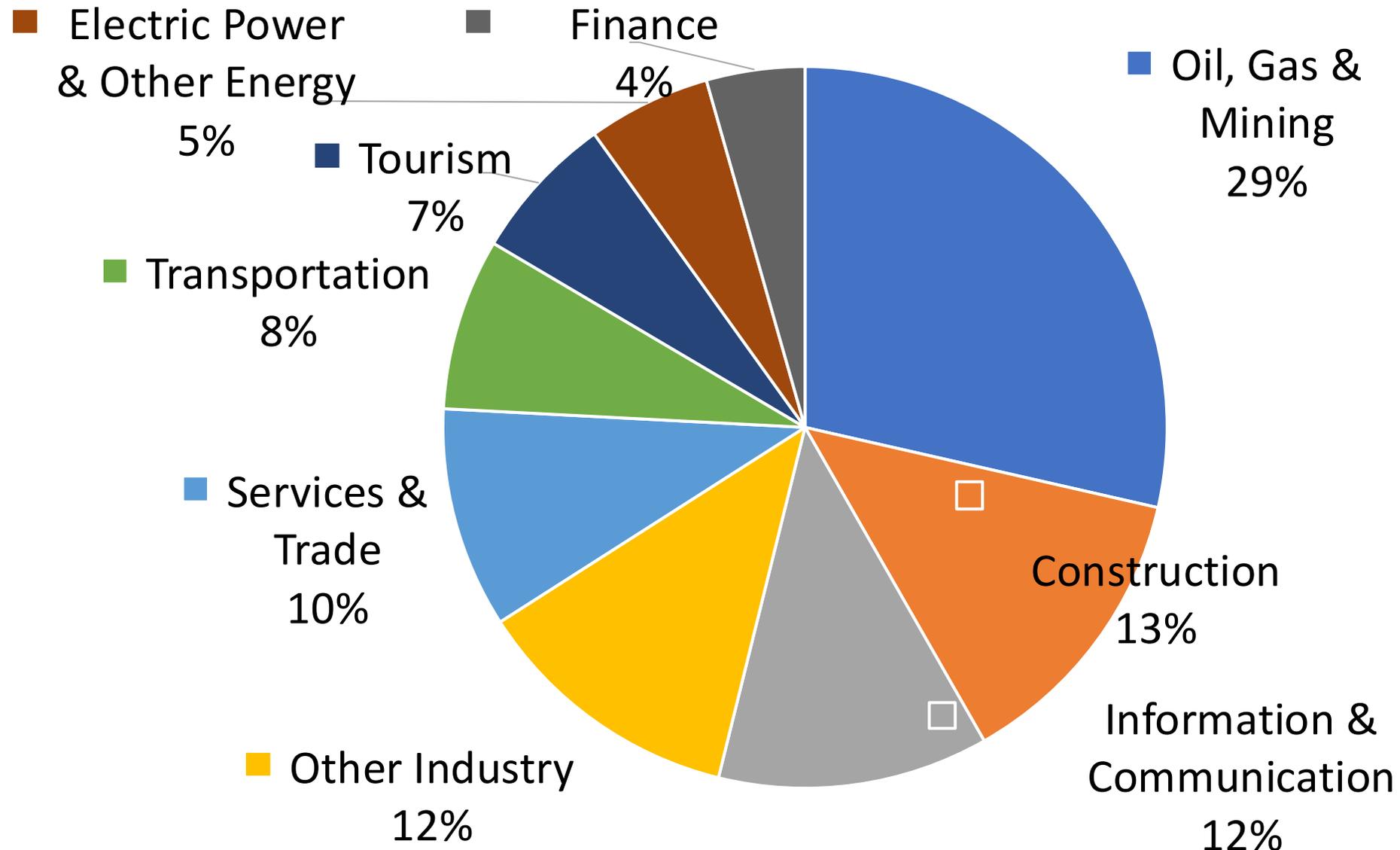
‘In accordance with their respective laws and regulations, each Contracting Party shall endeavour to ... uphold anticorruption practices in accordance with the United Nations Convention Against Corruption.’

2013 Guatemala–Trinidad and Tobago BIT (art 17)

Number of corruption-related cases (by the year of rendered award/decision)



Economic sector of cases involving corruption



Corruption in international investment agreements: old and new generation

The majority of international investment agreements currently contain no references to corruption. The analysis of the to the IIA Mapping Dataset suggests that only 43 out of 2,584 treaties mapped by UNCTAD IIA Navigator (less than 2%), mentioned corruption in the text of treaties outside their preambles.

Old generation IIAs

Contains no references to corruption

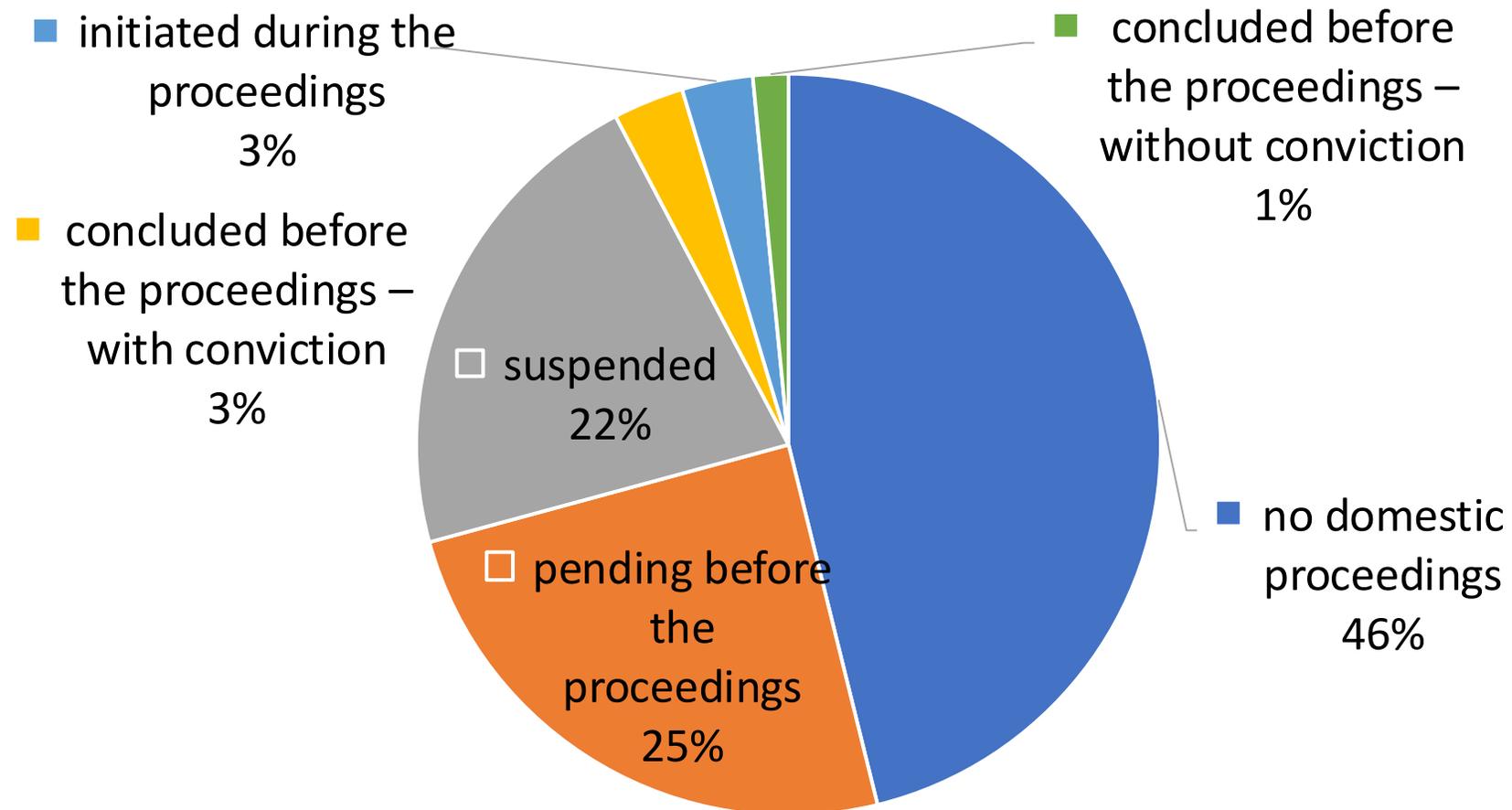
Broadly-formulated standards

New generation IIAs

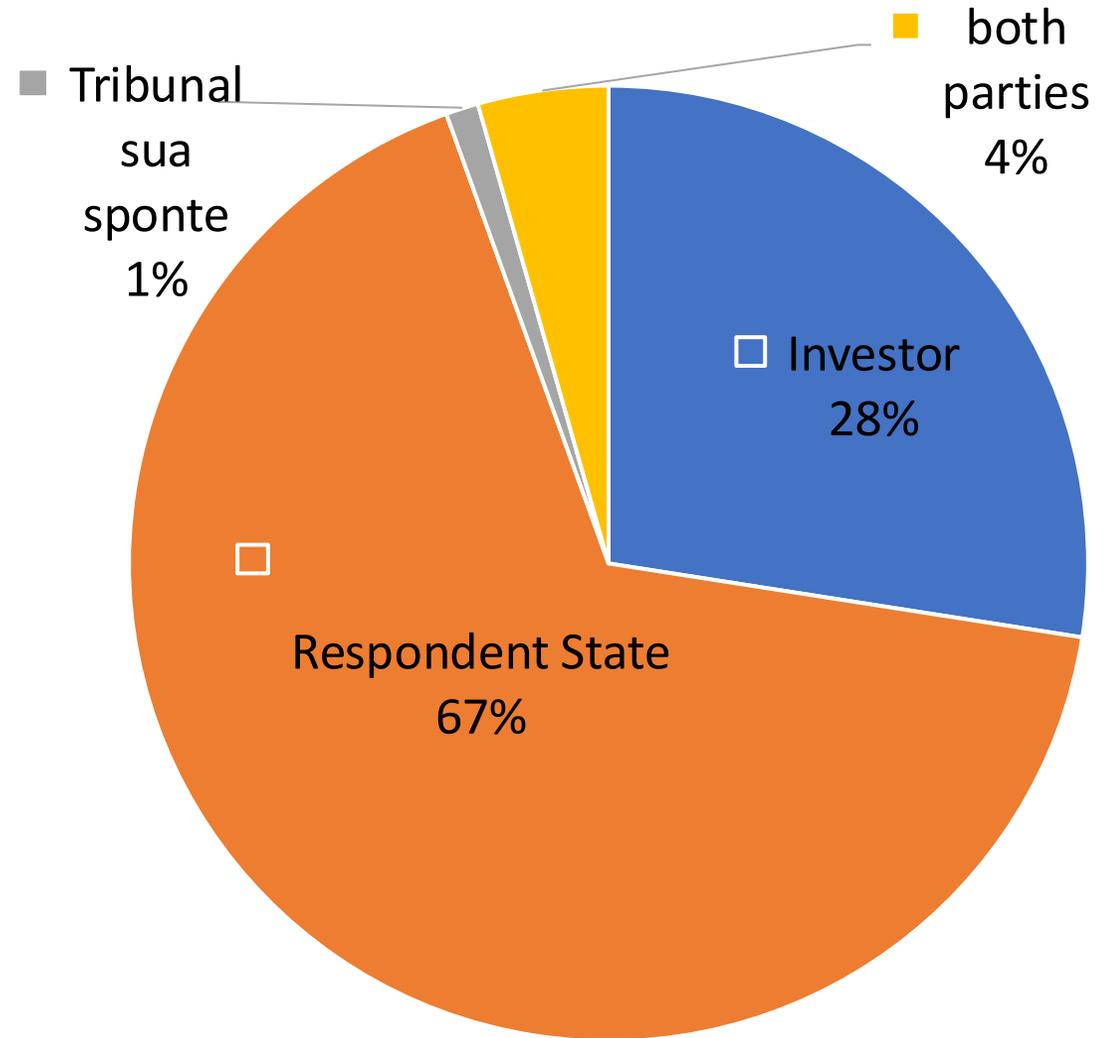
Non-investment obligations of States and Investors

Contain specific references to corruption instruments

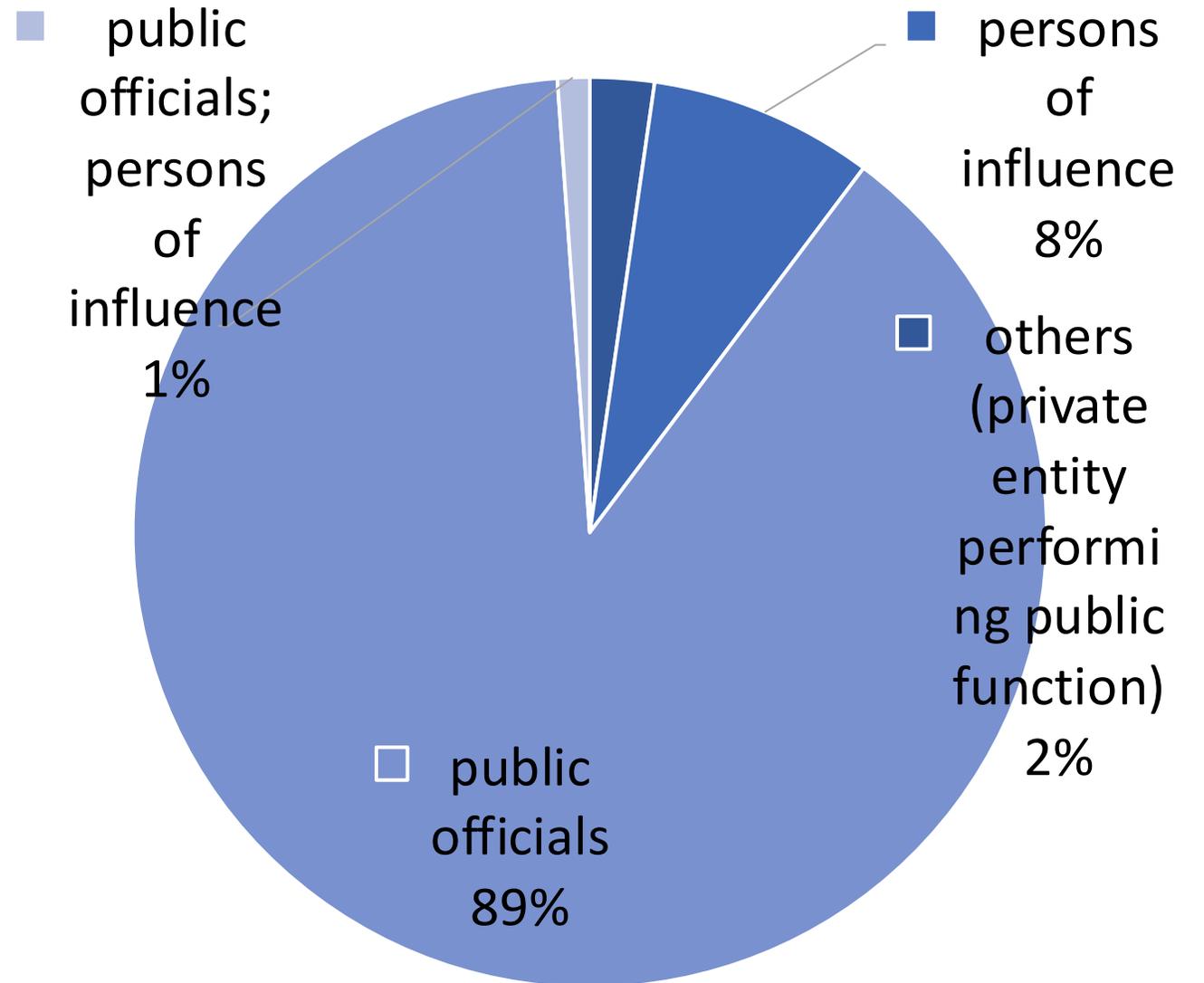
Initiation of domestic prosecution/investigation into alleged corruption by the respondent State



Who makes the allegation of corruption? (91 cases)



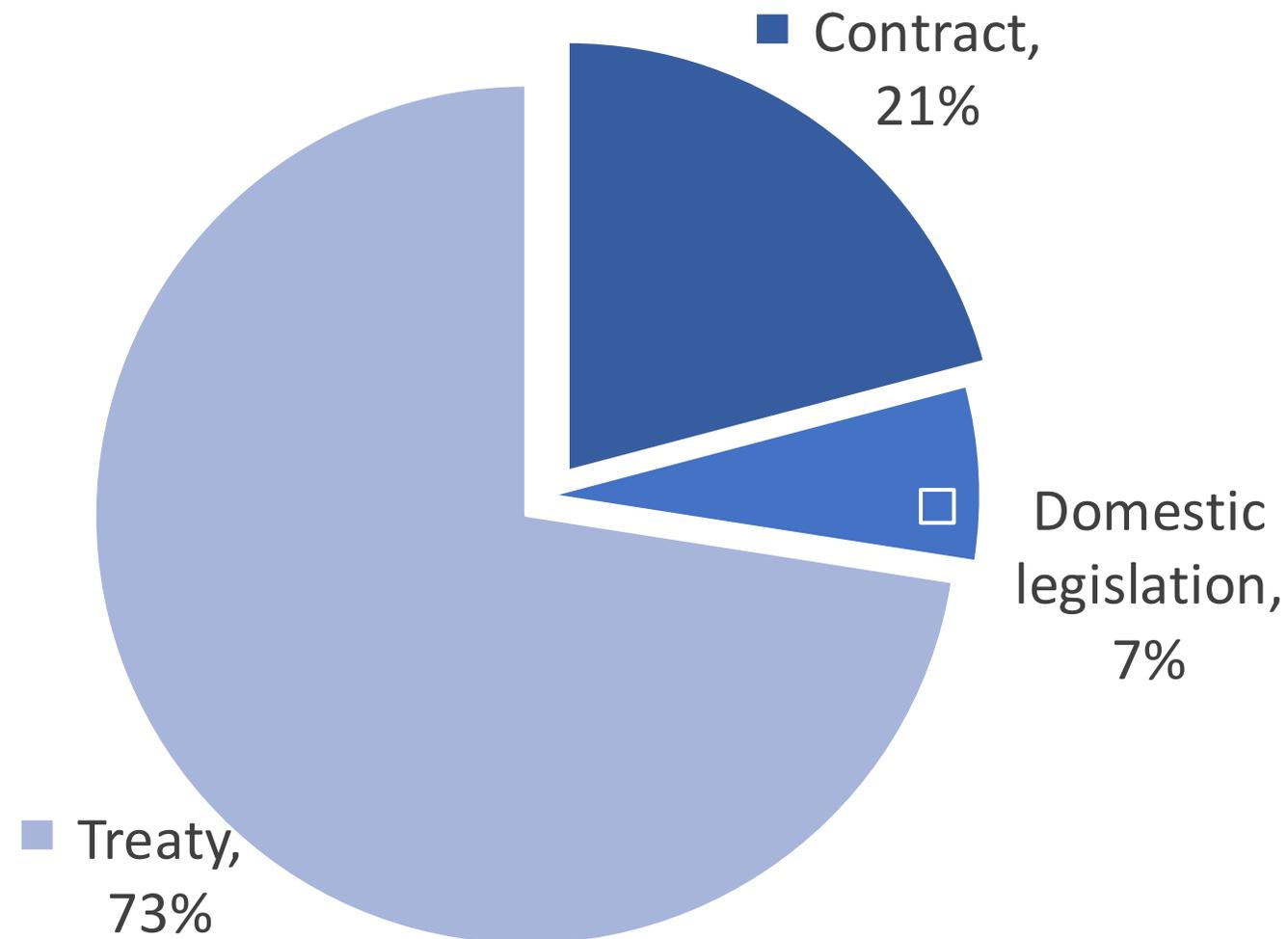
Perpetrators in the State by category



Tribunals rarely
find corruption

Only in seven out of 91
awards, analyzed for the
purposes of this study, where
corruption was alleged, did
the tribunals find that
corruption was proven.

Legal instruments used for consent to arbitration



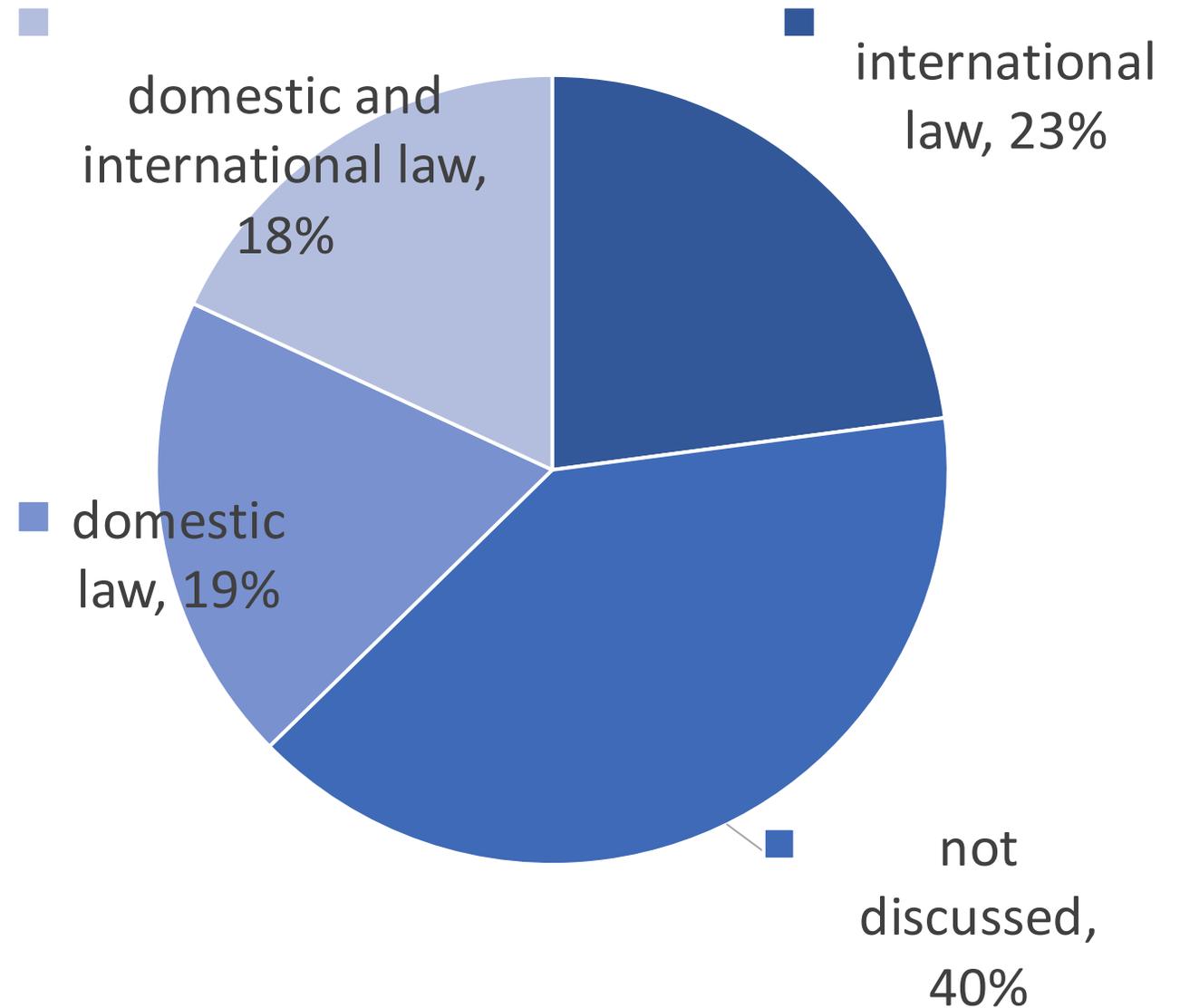
Applicable legal instruments

Of 91 cases with available data, most commonly referenced international anti-corruption instruments are **UNCAC** (17 cases) and **OECD Anti-Bribery Convention** (9 cases). Tribunals also relied upon **regional instruments with anti-corruption provisions** (10 awards).

The regional instruments include: the Organization of American States Inter-American Convention against Corruption, Council of Europe Civil Law Convention on Corruption, Council of Europe Criminal Law Convention Against Corruption and Southern African Development Community Protocol Against Corruption.

Most tribunals did not engage in analysis of any specific anticorruption provisions, be they from domestic or international law.

Law applied by tribunals to corruption allegations



Proving corruption

Corruption allegations require a high evidentiary standard for substantiation before a tribunal that is frequently ill-equipped to deal with it

Investigation of corruption might prove burdensome, outside of the arbitrators' competence and accentuate their lack of coercive powers

Consequences of finding corruption

- 1) Rule that corruption has not been proven
- 2) Ignore allegations of corruption
- 3) Deny jurisdiction or rule that the claim is inadmissible thus allocating the negative consequences of corruption offences to the investor
- 4) Impose negative consequences of corruption both on the State and the investor by declaring the investor's claim inadmissible but also ordering the State to reimburse some of the investor's legal costs
- 5) Come up with more creative approaches, such as urging the state to make a donation to a UN anti-corruption fund

Contract- vs Treaty-Based Disputes

Investor-State Contract Disputes



Based on private contracts between a foreign investor and the host states; contracts delineate the rights and obligations, as well as the arbitral jurisdiction

Investment Treaty Disputes



Arise from obligations under treaties (e.g., BIT or ECT); protections include fair treatment, non-discrimination, and expropriation

Way forward

- Neither States nor investors should benefit from corrupt activities
- IIAs should reflect anti-corruption obligations and reference relevant treaties (e.g., UNCAC)
- Where UNCAC is a part of applicable law, adjudicators should examine substantiated corruption allegations, promptly report alleged corruption offences to relevant authorities in accordance with applicable law
- Where appropriate, defer to domestic corruption investigations and await the conclusion of the investigations
- Measures to formulate corruption due diligence mechanisms (both for States and investors)
- Manual for arbitrators and judges on handling corruption allegations in ISDS.

Contract- vs Treaty-Based Disputes

	Contractual Disputes	Treaty-Based Disputes
Governing Law	Governed by the law specified in the contract (domestic, international, or a combination)	Governed by international investment law, treaty provisions, and sometimes customary international law
Scope of Claims	Limited to contract terms, e.g., breach of agreement or unmet obligations	Broader protections, e.g., unfair treatment, expropriation without compensation, or national treatment violations
Enforcement Mechanisms	Awards enforced under mechanisms in the contract and conventions like the New York Convention	Awards often benefit from the ICSID Convention, not only the New York Convention
Role of State	State acts as a commercial party, defending rights under the agreement	State's actions are evaluated as sovereign conduct under international law

Economic Sectors of Disputes

Figure 2. All disputes

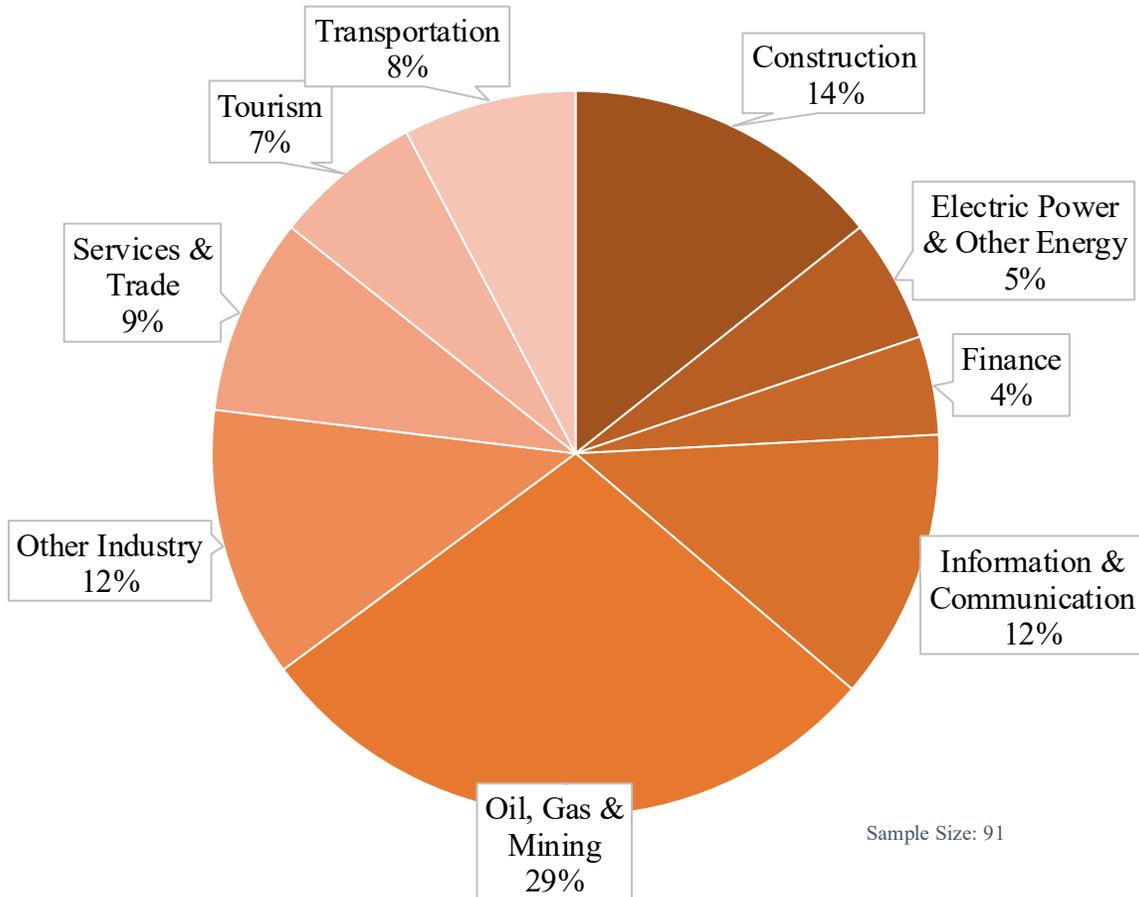
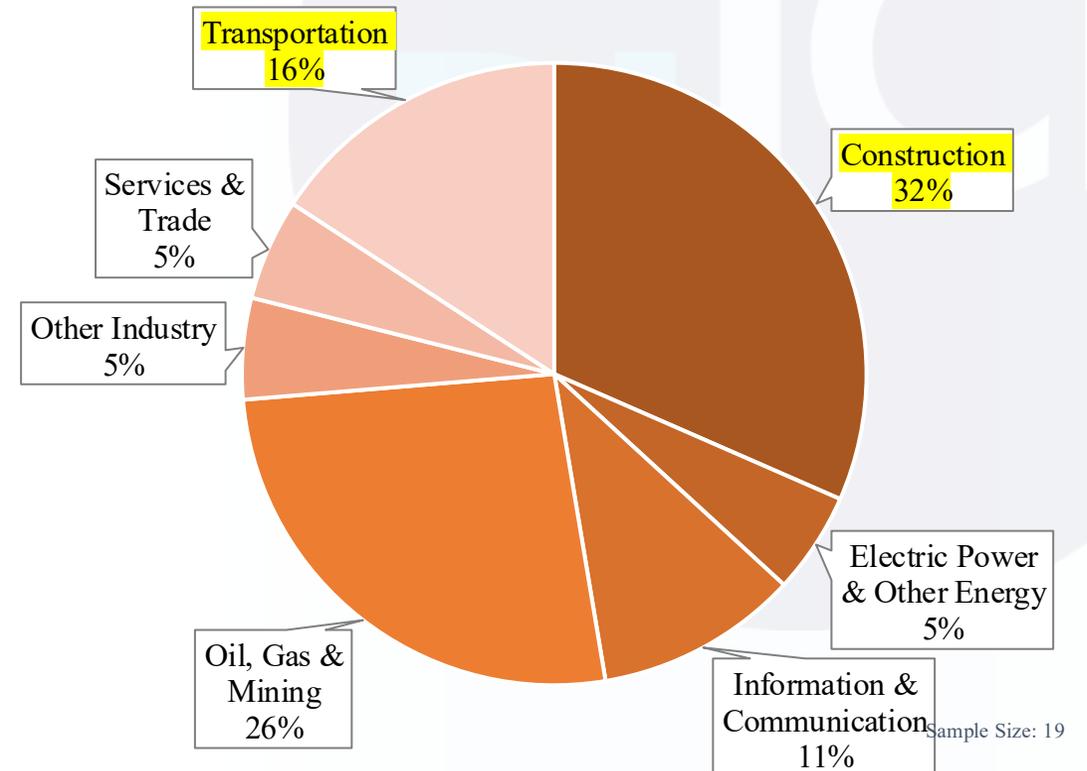


Figure 3. Contract-based disputes



Proving Corruption and Red Flags

- Corruption often conducted in secret, leaving little direct evidence
 - Tribunals often use a “connecting the dots” approach, inferring corruption from available evidence, but this is rarely sufficient to substantiate allegations
- Tribunals use circumstantial evidence, particularly ‘red flags’, to prove corruption allegations
- Red flags are not a legal standard but serve as indicators of potential misconduct
- UNCAC guidance on Red Flags:
 - Off-the-books accounts
 - Unidentified transactions
 - Non-existent expenditures
 - Use of false documents
 - Premature destruction of bookkeeping records
- Tribunals may consider systemic issues like widespread corruption in the host state or the investor’s history of corruption

Tackling Corruption: Supply and Demand

Supply Side (Investors)

- Risk of tribunals declining jurisdiction or deeming claims inadmissible
- Evidence access constraints, less likely to raise corruption allegations
- Misuse of corporate restructuring to evade responsibility
- The need for transparency in beneficial ownership and due diligence



Demand Side (Host States)

- Corruption used as a defense to dismiss claims or deny jurisdiction
- Better access to evidence via domestic investigations and law enforcement
- Paradoxical incentives: States may allege corruption by their officials without pursuing investigations
- Recommendations
 - Greater reliance on domestic laws which have wider coercive powers
 - Where appropriate, tribunals should order provisional measures or stay arbitration pending domestic proceedings
 - Application of UNCAC to promote legal certainty and consistency

Due Diligence Approach

- Corporate-wide, transnational risk management strategies (inspired by HRDD)
- Guidance from U.S. Foreign Corrupt Practices Act (1977) and UK bribery Act due diligence for foreign consultants, agents, and partners
- Churchill Mining v. Indonesia:
 - Tribunal dismissed claims due to investors' failure to conduct due diligence on local partners' forgery activities
 - Highlights the role of 'willful blindness' in assessing claims
- Concrete Due Diligence Measures
 - Internal/external audits and transparent practices
 - Adopt codes of conduct and closely monitor intermediaries
 - Focus on high-risk sectors, suspicious transactions, and entities with corruption history
- Benefits of a Due Diligence Approach
 - Mitigate corruption risks and facilitate compliance with international law
 - Provides evidence in disputes, potentially shifting the burden of proof

Guidance for Arbitrators

Impact on Arbitration Decisions



- Consider proven corruption in jurisdiction, merits, and legal cost allocation.
- Impose proportionate and dissuasive consequences for corruption.
- Provide effective compensation to victims (e.g., for direct and indirect losses).

Need for Comprehensive Guidance



- Develop anti-corruption guidelines for ISDS arbitrators, addressing legal standards, good practices, and technical solutions.
- Include these guidelines in the upcoming ICSID/UNCITRAL Code of Conduct for arbitrators.

Staying in
touch

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