

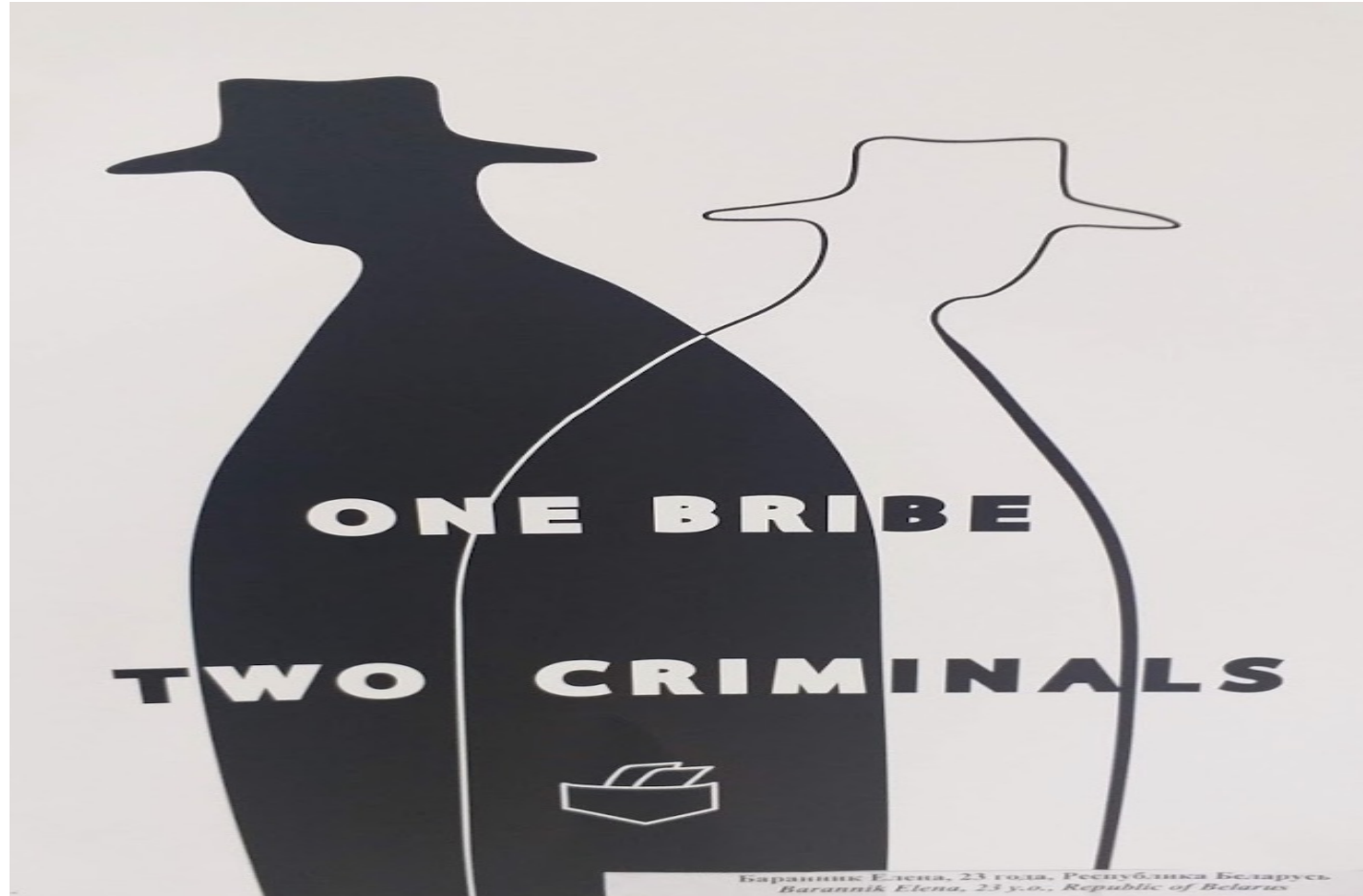


British Institute of
International and
Comparative Law

Evidence of Corruption in ISDS: Key Recent Trends

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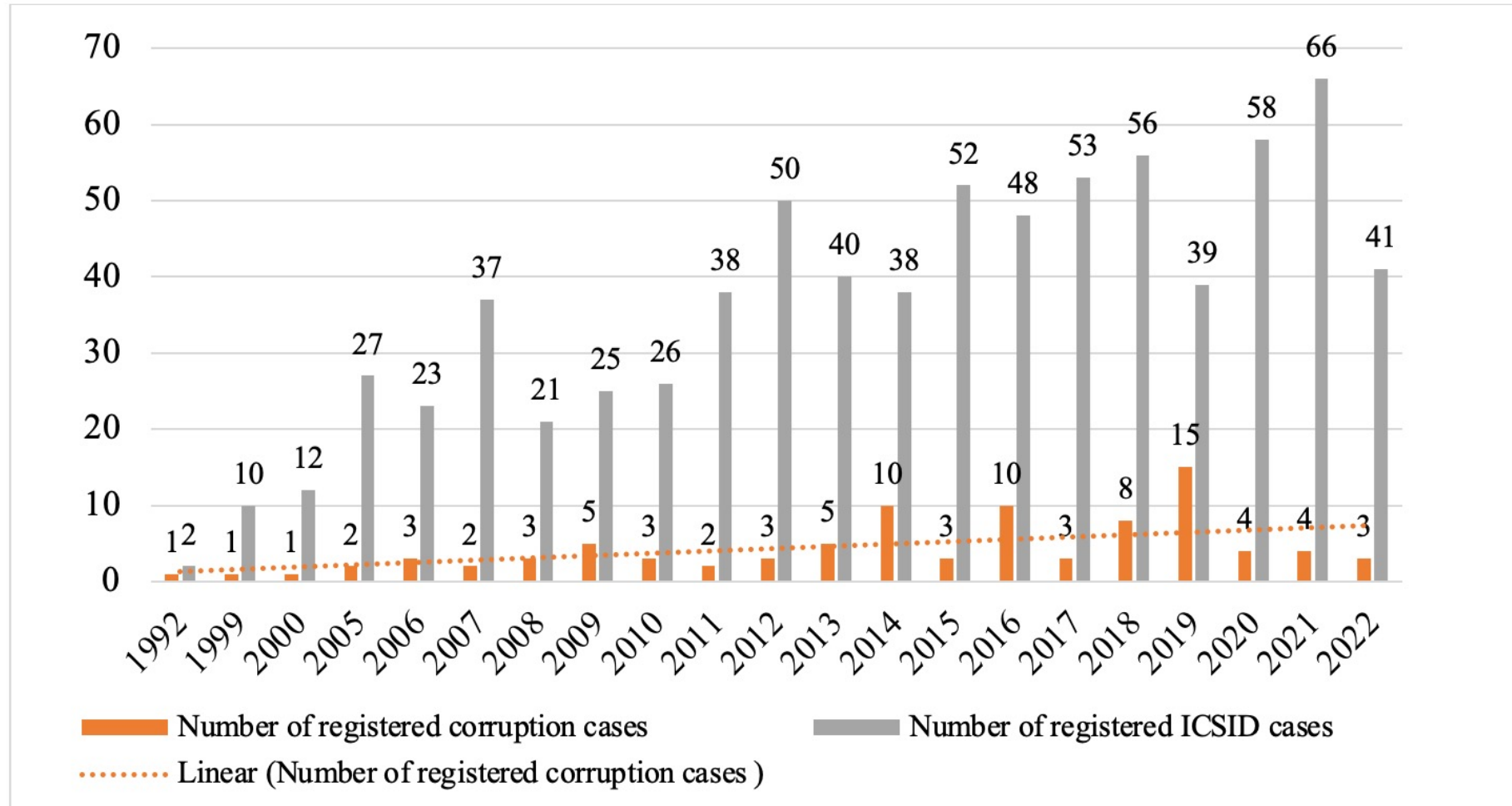
Topics to be covered

- Corruption in ISDS – general trends
- Success with proving corruption in ISDS – more generally and in recent years
- Burden of proof
- Standard of proof
- Red flags – prevalence, including in recent years
- Actual red flags used by tribunals

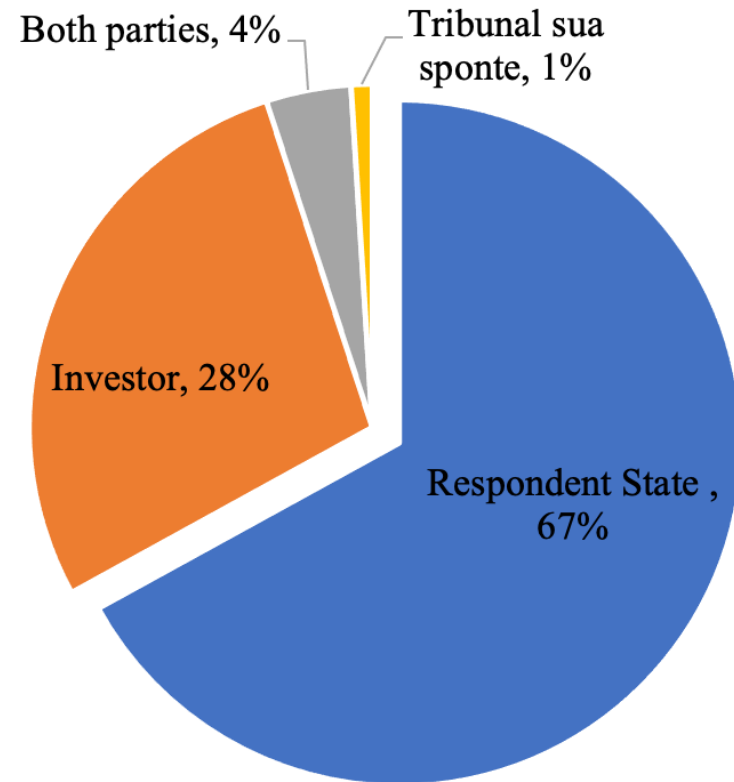
Corruption and ISDS dataset

- 91 cases (ICSID, UNCITRAL, ICSID AF, and other rules)
- Decided between 1992 and 2022
- Corruption allegations were made and/or discussed by the tribunal
- Publicly available awards and decisions

The number of ISDS cases involving corruption over time



Who raised the corruption allegation?



Outcomes in corruption-related cases

- 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

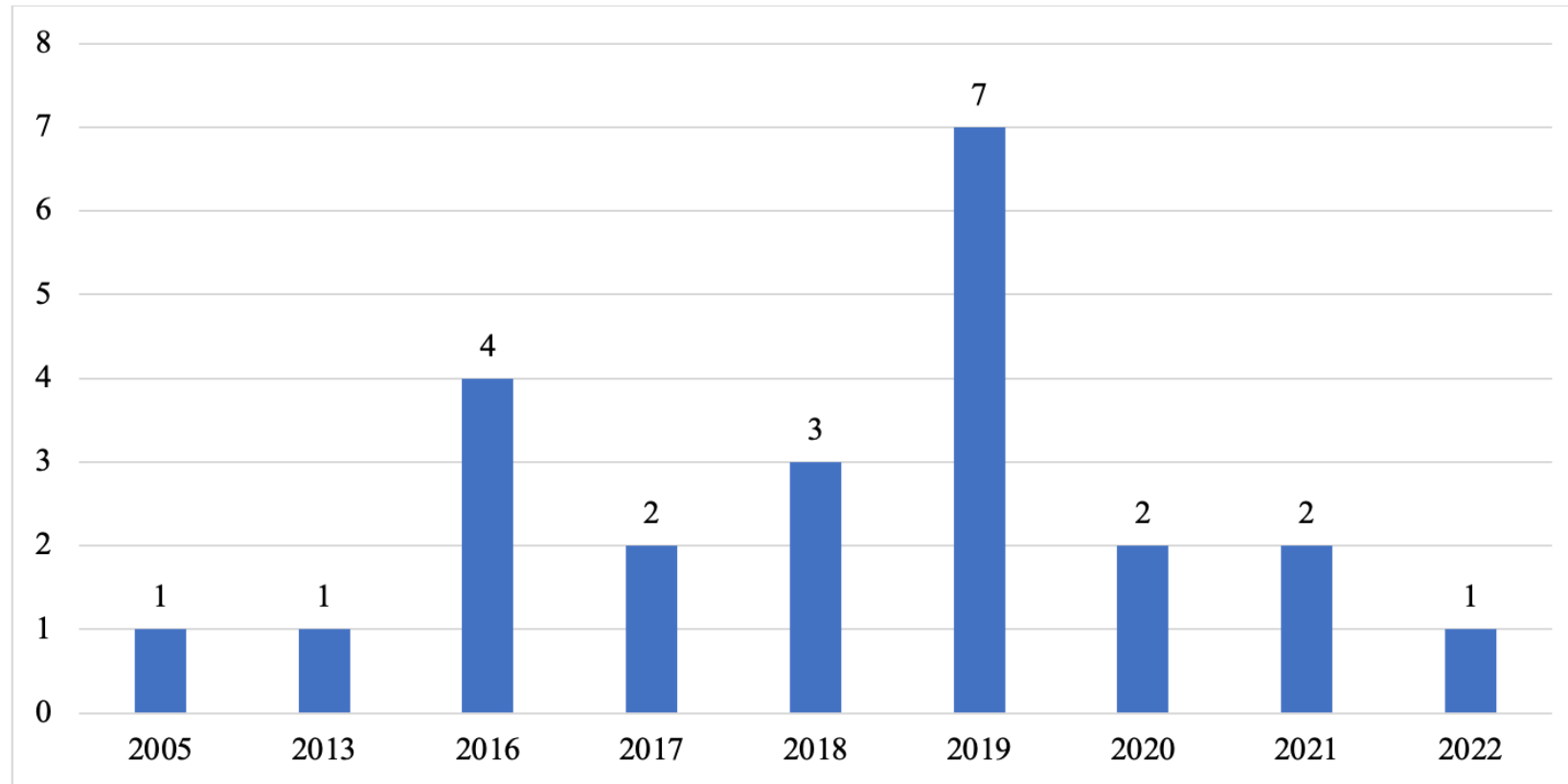
Corruption is hard to prove

- 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.
- In other words, in approximately 92% of all cases, corruption has not been proven.

Most frequently applied standards of proof of corruption

Standard of proof	No of cases
clear and convincing	9
reasonable certainty	6
balance of probabilities	6
preponderance of evidence	3
circumstantial evidence	3

Application of red flags over time



Red flags most commonly used by tribunals

1. Party's breach of procedural laws in the establishment and operation of the investment, bad faith conduct of the party towards its other obligations - taxation, production of documents, billing, money laundering or fraud;
2. Unusual circumstances of the procurement of the investment – speed and timing of the transaction, extent of due diligence, purchase price or conflicts of interest;
3. A history of widespread corruption in the respondent state;
4. Third party receives disproportionate compensation for its services or the compensation is based on a success fee or bonus;
5. Evidence of the third party using its position in favour of the investor to influence key decision-makers responsible for the investment.

Key trends in recent cases

- Tribunals are more willing to use the red flag analysis
- Tribunals more likely to find corruption – 4 out of 7 cases where corruption was proven were decided between 2019 and 2022
- Tribunals pay more attention to the fact that both the investor and the state should bear responsibility for corruption
- Tribunals are more willing to examine corruption *sue sponte*.