British Institute of International and Comparative Law

Allegations of Corruption in Investor-State Contracts and Arbitration

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Agenda

1. Introduction
2. What Makes Investor-State Contract Disputes Different: Comparing Contractual and Treaty Disputes
3. Analysis of Tribunal Practices
4. Proving Corruption in Investor-State Contracts and Red Flags
5. Tackling Corruption on Both Investor and State Sides
6. Due Diligence Approach
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The Case Of Nigeria v P&ID

- **Facts**: Nigeria and Process & Industrial Developments signed a contract for supply and processing of natural gas. P&ID claimed a breach of contract when Nigeria failed to fulfill its obligations. On 23 Oct 2023, the arbitration resulted in an award of $6.6bn in damages plus an interest at 7% to P&ID.
- Nigeria successfully challenged the award, alleging bribery and corruption by P&ID during contract formation and arbitration. The English court set aside the award (around 11bn including interest), citing corruption and public policy violations.
- **Implications**: The ruling shows the importance of investor-state contracts and has reputational consequences for Nigeria, especially in attracting foreign investment.

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

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

Tribunal Practice based on 91 Cases

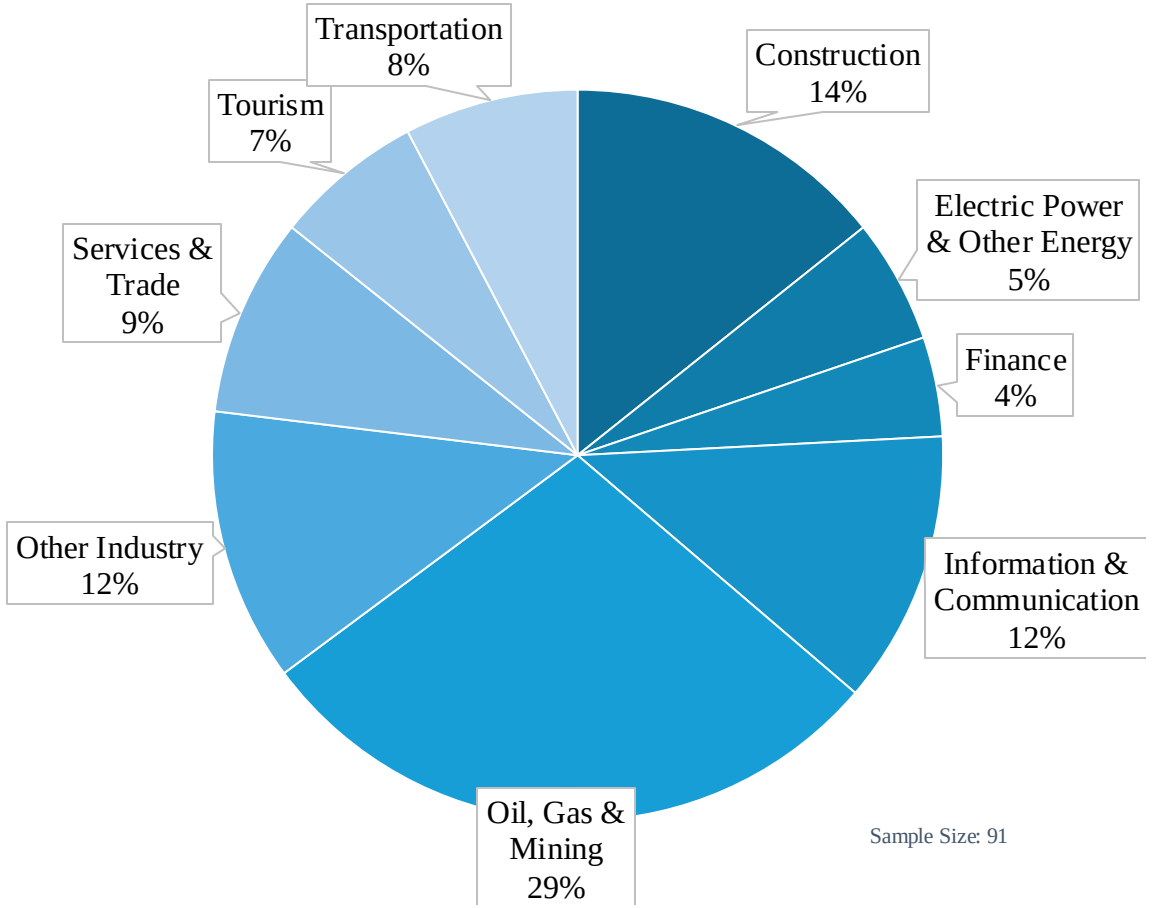
- Analysis of 91 investor-state dispute cases from 1992-2022 where corruption allegations were made
  - 72% of cases were based on treaties, 21% on contracts and 7% on domestic legislation; 51 under ICSID, 21 under UNCITRAL, 9 under ICC, and others; 19 arose from investor-state contracts
- Proving Corruption was challenging; in only two cases was corruption found; key challenges include:
  - establishing the burden and standard of proof for corruption
  - high evidentiary standards (e.g., clear and convincing evidence)
  - ensuring respondent States comply with international obligations
  - legal consequences for proven corruption remain unclear
- Tribunals often did not clarify the legal standards or laws applied to corruption allegations

Tribunal Practice based on 91 Cases

- 33% of claims exceeded $1 billion; mega-disputes are more common in contract-based cases compared to treaty-based cases
- Respondent States are always developing states: 11 of 19 cases involve Sub-Saharan African states
  - Explanation: Fewer international agreements, reliance on direct contracts with arbitration clauses
- Private arbitral institutions used (ICC most common; ICSID rules applied in only 2 cases)
- Corruption allegations raised by respondent states in all but 2 cases; breach of contractual protections dominated disputes
- Oil, gas/mining and construction dominate (5 cases each, out of 19 cases total)

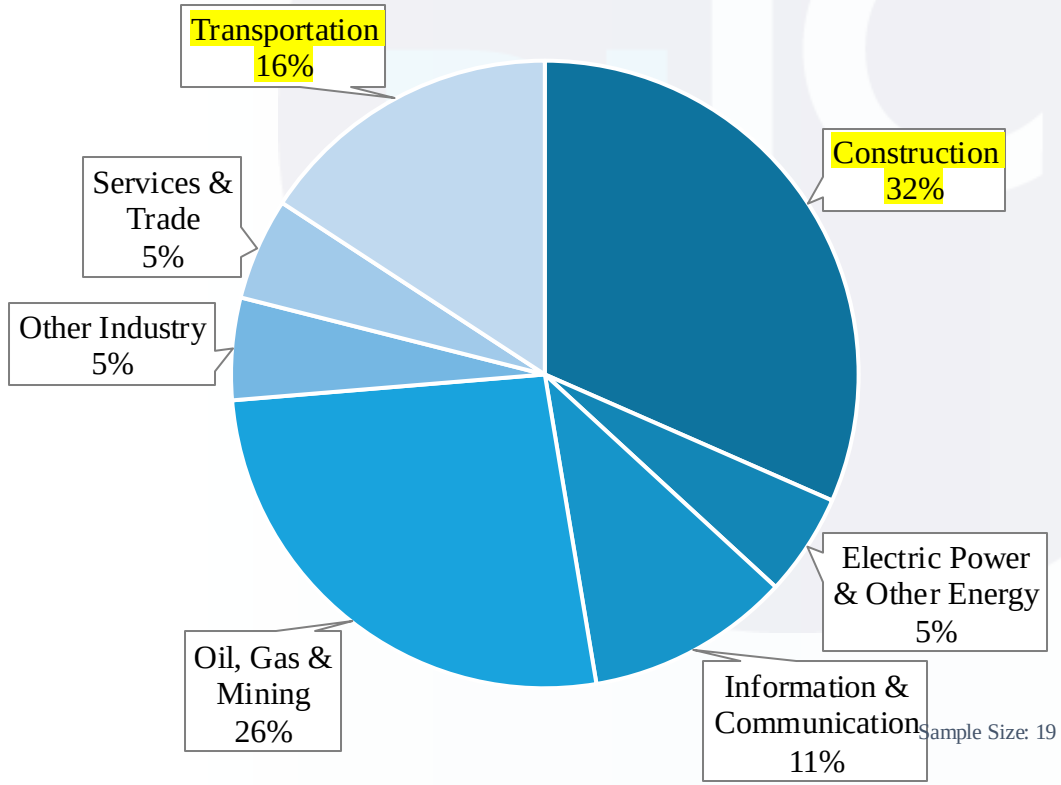
Economic Sectors of Disputes

Figure 2. All disputes



Sample Size: 91

Figure 3. Contract-based disputes



Sample Size: 19

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.

Guidance for Arbitrators

Red Flags to Consider

- History of corruption in the investor or its sector
- Widespread corruption in the respondent state
- Presence of domestic corruption investigations
- Unusual procurement conditions (e.g., timing, due diligence, conflicts of interest)
- Breaches of procedural laws or bad faith conduct by a party
- Unqualified or over-compensated third-party agents
- Payment via third countries, special purpose vehicles, or in cash
- Close relationships between civil servants and the investor

Broader Measures to Combat Corruption

- Address allegations raised by parties or raise them *sua sponte*
- Analyze corruption allegations when sufficient evidence is available
- Cooperate with domestic anti-corruption agencies to gather evidence
- Grant provisional measures or stay proceedings pending investigations
- Examine corruption red flags promptly

Questions?

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