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Addressing Issues of Corruption in International Arbitration

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Parallel Corruption Proceedings

Introduction

1. This Supplementary Document ("Document") is intended to provide guidance on how parallel proceedings addressing issues of corruption may intersect with an international arbitration proceeding in which the same or related corruption issues arise.

2. The Document looks at the often intricate relationship between arbitration proceedings and related parallel proceedings. Eight key questions have been identified and the responses to these questions aim to offer guidance to arbitrators, legal counsel, and arbitral institutions in addressing parallel proceedings that involve issues of corruption.

3. The Document first defines parallel proceedings (**Section 1**), it then addresses the power of arbitral tribunals to stay proceedings in anticipation of parallel developments (**Section 2**), the effect of parallel proceedings on arbitration, especially regarding *res judicata* or issue estoppel (**Section 3**), and the admissibility of evidence obtained from parallel proceedings (**Section 4**).

4. The Document also addresses the response of arbitral tribunals to domestic judicial orders enjoining the stay of the arbitration due to parallel proceedings (**Section 5**). It then examines the role of the State in such scenarios, distinguishing between its duty to investigate corruption allegations and the risk of dilatory tactics (**Section 6**) and the balance between maintaining confidentiality in arbitration while parallel legal proceedings are ongoing (**Section 7**).

5. Finally, the Document explores the measures available to protect party representatives or witnesses from self-incrimination (**Section 8**).

1. What should be considered "Parallel Corruption Proceedings"?

6. "Parallel proceedings" refer to multiple legal processes occurring concurrently and involving the same subject matter. These proceedings may take place across different jurisdictions, forums, or legal systems, including the following:

   i) **Criminal proceedings.** Legal actions initiated by state or federal authorities to prosecute alleged breaches of criminal law. For example, in a corruption-related arbitration, there could be a parallel criminal investigation related to alleged bribery offences.

   ii) **Civil proceedings.** Legal actions between individuals or entities where the goal is a legal remedy, such as damages or specific performance. In a corruption context, there could be a parallel civil lawsuit seeking recovery of assets allegedly obtained through corrupt practices.

   iii) **Regulatory proceedings.** Investigations or enforcement actions by governmental agencies. For instance, in a corruption dispute that involves allegations of corruption, a parallel regulatory investigation could be initiated by a financial regulator, such as the US Securities and Exchange Commission, to assess potential violations of anti-corruption laws.

   iv) **Administrative proceedings.** Actions by government agencies or tribunals pertaining to their administrative oversight responsibilities. In a corruption-related matter, administrative processes could involve reviewing the awarding of a government contract that is alleged to have been tainted by corruption.

   v) **Parliamentary inquiries.** In some jurisdictions, parliamentary committees might review matters of public importance, including those involving alleged corruption, which could be the same allegations of corruption that are under consideration in an arbitration.

   vi) **Quasi-judicial proceedings.** Proceedings conducted by individuals or entities vested with statutory adjudicatory authority. Examples include disciplinary proceedings by professional regulatory bodies addressing allegations of corrupt conduct by their members or sanctions proceedings by international organisations, such as the World Bank.

7. Proceedings are considered "parallel" due to their simultaneous occurrence with the arbitration, involving similar or closely related legal issues or factual circumstances.

2. Do arbitral tribunals have the power to stay the arbitration proceedings and await the further development or outcome of Parallel Corruption Proceedings? If so, can/should they exercise their power? Which criteria should guide arbitral tribunals?

8. As a general principle, when a valid arbitration agreement is in place, the arbitral tribunal has jurisdiction over any dispute within the scope of the arbitration agreement. This principle stands true, even while recognising the authority of courts or bodies engaged in Parallel Corruption Proceedings.

9. *First*, the jurisdiction of these bodies typically does not overlap with that of an arbitral tribunal, given that arbitral tribunals lack the authority to adjudicate on criminal law matters.[1]

10. *Second*, and as required by standard practice and most arbitration rules,[2] an arbitral tribunal has the authority and the duty to exercise its jurisdiction and decide the dispute, and it should make every effort to do so expeditiously.

11. *Third*, the power to stay proceedings is within the inherent powers of arbitrators.[3]

12. So the pertinent inquiry unfolds in two parts: (i) whether arbitrators have an obligation to stay the arbitration proceedings in the presence of Parallel Corruption Proceedings; and if not (ii) under what circumstances should a tribunal stay the arbitration in favour of Parallel Corruption Proceedings.

13. It appears that in the majority of jurisdictions – both common and civil law – arbitrators are not legally obliged to stay proceedings.[4] However, a minority of countries, in some cases, impose an obligation on arbitrators to do so if the outcome of arbitration stands to be influenced by the findings of concurrent criminal proceedings.[5]

14. Turning to the examination of the circumstances warranting the exercise of discretion by an arbitral tribunal to stay proceedings, the answers to the Questionnaire to the ICC National Committees reveal a prevailing trend in civil law jurisdictions to proceed, irrespective of parallel court proceedings, and only to stay in exceptional cases.[6]

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1 See e.g. *Quiborax S.A., Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 Feb. 2010, para. 129 ("the exclusivity of the ICSID proceedings does not extend to criminal proceedings").

2 See e.g. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2026), Part III, at "I. Expeditious and Efficient Conduct of the Arbitration".

3 International Law Association Committee on International Commercial Arbitration, ""Report on Inherent and Implied Powers of Arbitral Tribunals – the 76th Conference in Washington" (2014), p. 14; L. Groselj, Luka "Stay of Arbitration Proceedings: Some Examples from Arbitral Practice", 36 *ASA Bulletin* (2018); Swiss Chambers' Arbitration Institution, Case No. 300273-2013, Procedural Order No. 15, 10 July 2015, *Claimant and Counter-Respondent v Respondent 1 and Counter-claimant, Respondent 2, Respondent 3*. Also, a review of the answers to the Questionnaire to the ICC National Committees confirms this finding. The Questionnaire is reproduced in the Annex, part F, of the ICC Commission Report "The Corruption Inquiry – Addressing Issues of Corruption in International Arbitration".

4 Among others, Austria, Brazil, Cameroon, Chile, China, Colombia, Czech Republic, Cyprus, Denmark, Finland, France (in international arbitrations), Germany, Greece, India, Kenya, the Netherlands, Nigeria, Peru, Poland, Portugal, Romania, Russian Federation, Sweden, Switzerland, United Arab Emirates. Similarly, in most common law jurisdictions such as Australia, Canada, Hong Kong (China), United Kingdom, and the United States the law does not impose a mandatory stay on arbitration proceedings due to parallel corruption-related judicial investigations.

5 This is the case in Luxembourg or Belgium, where it is generally accepted that the principle "*le criminel tient le civil en état*", applies in domestic arbitration. Art. 46 (Egypt), Art. 43 (UAE), Art. 37 (Saudi Arabia), Art. 46 (Oman) and Art. 43 (Jordan) of the respective arbitration acts stipulate: "If, in the course of arbitral proceeding, a matter outside the scope of the arbitral tribunal's jurisdiction arises, or if a document submitted to it is challenged for forgery and criminal proceedings in respect of that document or for any other criminal act have been instituted, the arbitral tribunal may continue reviewing the subject of the dispute if it deems that the adjudication on this matter, on the forgery of the document or on the other criminal act is not indispensable for issuing an award on the subject of the dispute. Otherwise, the tribunal shall decide the suspension of the proceedings until a final judgment is issued in this respect, and such decision entails the suspension of the time limit determined for rendering the arbitral award". In Morocco, if a parallel case is likely to influence the subject matter of the arbitration, the arbitrator should suspend proceedings, as case law appears to have expanded the statutory obligation of doing so in cases of document forgery to encompass all types of criminal investigations. Finally, in the case of Spain, the Spanish Constitutional Court clarified in its judgment 50/2022 of 4 April that although the existence of parallel criminal proceeding does not automatically imply a stay of the arbitration, the criteria set out in Art. 40 of the Spanish Civil Procedure Act to determine when it is appropriate to stay proceedings due to "*prejudicialidad penal*" is "perfectly transferable to arbitration proceedings" and, therefore, arbitrators are required to stay arbitral proceedings where a criminal proceeding is pending provided that said criminal judgment has a "decisive influence" in the outcome of the arbitration. The Spanish Constitutional Court held that while the principle of "*prejudicialidad penal*" is "a procedural matter of strict ordinary legality that falls within the jurisdiction of the arbitral tribunal" it is "not a matter of 'public policy'" [ibid. at p. 66390]. Consequently, in annulment proceedings, the lower court cannot review whether the arbitrator correctly applied the "*prejudicialidad penal*" principle but is limited to assessing whether the arbitrator's decision was properly reasoned. Therefore, if an arbitrator fails to consider whether— the proceedings should be stayed – without providing an analysis – based on the assumption that "*prejudicialidad penal*" does not apply to arbitration, the award may be vulnerable to annulment.

6 Questionnaire to ICC National Committees, supra note 3. Among others, Austria, Denmark, Finland, Germany, Guatemala, Lithuania, the Netherlands, Paraguay, Poland, Portugal, Russia, Sweden, or Switzerland. Particularly, in France, the French Cour de cassation confirmed in a landmark decision dated 25 Oct. 2005 that the principle according to which *"le criminel tient le civil en l'état"* i.e. "the criminal proceedings result in the stay of the civil proceedings" does not apply to arbitrators in international arbitration, even when the seat of the proceeding is in France. The principle does apply in domestic arbitration, however, a stay will only be ordered where the outcome of criminal proceedings is likely to have a direct and decisive influence on the resolution of the civil issues.

15. In common law countries, the general consensus reported in the questionnaires is that the threshold justifying a stay of proceedings is high when dealing with concurrent civil and criminal investigations or proceedings, and each case must be evaluated on its own merits.

16. Courts and arbitral tribunals seated in jurisdictions such as the US, Singapore, England, and Australia exercise this discretionary power. This high threshold also seems to be applied in international arbitrations.[7]

17. Arbitrators may consider several key factors when determining whether to grant a stay, many of which have been recognised by courts and should similarly guide arbitral tribunals.[8] Such factors are referred to in paragraphs 18 to 23 below.

18. **1. Connection between the Parallel Corruption Proceedings and the arbitral dispute**

    i) Are the corruption allegations directly linked to the subject matter of the arbitration?

    ii) Would the outcome of the criminal case have a material impact on the arbitration (e.g. determining contract validity, fraudulent inducement, or bribery)?

    iii) May Parallel Corruption Proceedings determine facts essential to the arbitration?

    iv) English courts apply a "related criminal proceedings" test to assess overlapping factual or legal issues[9] – should a similar approach be applied?

19. **2. Stage of the Parallel Corruption Proceedings and alternative measures available to the arbitral tribunal**

    i) Are the Parallel Corruption Proceedings in their early stages with an uncertain outcome? If so, a stay may cause undue delay.[10]

    ii) Have the Parallel Corruption Proceedings progressed significantly, with an outcome expected soon? If so, waiting may prevent inconsistent findings and provide relevant evidence.

    iii) Could the arbitral tribunal bifurcate the proceedings to isolate issues related to corruption allegations while allowing other claims to proceed? If so, the risks of unnecessary delays (and dilatory tactics) may be reduced while permitting the tribunal to address corruption allegations separately.

    iv) Could the arbitral tribunal order interim measures to protect the parties' rights while the criminal case is ongoing? If so, interim measures may allow the arbitration to proceed without unnecessary delay, while safeguarding the position of the party seeking a stay. Courts in Australia have, for example, used this approach by issuing orders that allow a claimant to apply for a freezing order to preserve its position.

20. **3. Nature of Parallel Corruption Proceedings**

    i) What is the legal nature of the Parallel Corruption Proceedings? Are they:

    - judicial (criminal court proceedings)?
    - administrative or regulatory investigations?
    - quasi-judicial or parliamentary inquiries?

    ii) Has a law enforcement action been formally initiated?

    iii) Were the Parallel Corruption Proceedings triggered by a mere complaint, or do they stem from a prior formal investigation supported by credible evidence?

    iv) Would the outcome of the Parallel Corruption Proceedings be binding on the arbitral tribunal, or would it have merely advisory or evidentiary value?

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7 J. Feris, S. Torkomyan, Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration, *ICC Dispute Resolution Bulletin* (2019-3).

8 For an earlier discussion on these issues, and list of factors that may be considered, see S. Besson, Chapter 6 "Corruption and Arbitration" in D. Baizeau, R. Kreindler (eds), *Dossier XIII of the ICC Institute of World Business Law*, "Addressing Issues of Corruption in Commercial and Investment Arbitration", pp. 103-113.

9 L. Groselj, supra note 3; *Ad hoc* (UNCITRAL Rules), Procedural Order No. 3, 16 Nov. 2010, between E Holding (Claimant) and Z Ltd. (United Kingdom), First Respondent, Mr. A, Second Respondent, Mr. B, Third Respondent. See also J. Feris, S. Torkomyan, supra note 7.

10 J. Feris, S. Torkomyan, supra note 7.

21. **4. The "real danger" test (risk of prejudice to the defendant)**

    i) Would continuing arbitration seriously impair the party's ability to defend itself in the criminal trial or other Parallel Corruption Proceedings?[11]

    ii) Could the tribunal's findings contradict a future criminal judgment or other findings?

    iii) Would the stay protect a party representative or a witness against self-incrimination?[12]

22. **5. Balancing risks, procedural efficiency and fairness**

    i) Is there a risk that the Parallel Corruption Proceedings will undermine the integrity of the arbitration proceeding and the credibility of the arbitral tribunal?

    ii) Would granting a stay unfairly delay dispute resolution and prejudice a party?

    iii) Would denying a stay risk rendering an award unenforceable due to later corruption findings?

    iv) Would the outcome of the criminal trial produce evidence of relevance to the arbitral proceeding?

    v) If there is no stay, is there a risk that the award will not be enforceable if there is a subsequent finding of corruption?

23. **6. The aggrieved party's recourse in case of corruption findings**

    i) What are the aggrieved party's recourse options if corruption is established after the arbitral award is rendered?

    ii) Is an extraordinary revision of an arbitral award available at the seat when criminal conduct is established after the award is rendered? In jurisdictions such as Colombia, Peru, the Netherlands, Spain, and France, courts allow extraordinary applications to revise an award where subsequent evidence shows it was tainted by criminal acts or fabricated evidence.

    iii) Would a stay better preserve the parties' rights than a challenge to an award based on later corruption findings?

24. The likelihood of prejudice to the defendant's ability to defend themselves is particularly relevant in US, English, and Singaporean jurisprudence. In the Singaporean case of *Debenho v Envy Global* [2022] SGHC 7, the High Court adopted the "real danger" test when considering a stay of civil proceedings where one of the parties faces criminal exposure. The "real danger" test requires the court to determine whether there is a real danger of prejudice that will result in injustice in criminal proceedings if the civil proceedings proceed concurrently.[13] The Court emphasised that a mere possibility of prejudice is insufficient to warrant a stay, and that the real danger must be established on credible evidence, with the burden of proof being on the defendant. The Court further noted that the "real danger" test is a stringent threshold that must be met before a stay of civil proceedings would be granted and that the mere existence of parallel criminal proceedings does not automatically justify a stay of civil proceedings.

25. English courts follow the principle set out in *Akcine Bendrove Bankas Snoras v Vladimir Antonov* [2013] EWHC 131(Comm) and thus may also stay civil proceedings if there is a real risk of serious prejudice to the accused's right to a fair trial in the parallel criminal proceedings, which may lead to injustice. The court will consider the parties' conduct and whether any delay caused by staying the civil proceedings would result in undue prejudice to one party. The Akcine case provides helpful guidance for arbitrators.

26. In the US case *S.E.C. v Dresser Industries*,[14] the court acknowledged that simultaneous civil and criminal proceedings could present challenges, particularly concerning a defendant's Fifth Amendment rights against self-incrimination. The court noted that in such situations, staying the civil proceedings might be appropriate to prevent prejudice to the defendant's criminal defence. Similarly, in *Sterling Nat'l Bank v A-1 Hotels Int'l, Inc.*,[15] the court granted a stay of civil proceedings due to parallel criminal investigations, recognising the potential prejudice to the defendants' rights in the criminal case.

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11 In some jurisdictions, Parallel Corruption Proceedings do not necessarily involve a criminal trial. For example, under the U.S. Foreign Corrupt Practices Act, enforcement proceedings (which can be Parallel Corruption Proceedings) only rarely culminate in a criminal trial. In most cases, potential criminal violations are addressed directly by the U.S. Securities and Exchange Commission (SEC) and/or the Department of Justice (DOJ) through investigations and negotiations with the alleged perpetrator, typically represented by U.S. counsel and subject to applicable U.S. legal privilege rules. The questions raised above could equally apply to SEC/DOJ investigations, negotiations and the resulting enforcement penalties.

12 J. Woodland "Privilege Against Self-Incrimination in Civil Cases", 2(2) *YFLA Newsletter*, p. 3.

13 *Debenho Pte Ltd and another v Envy Global Trading Pte Ltd and another* [2022] SGHC 7, para. 35.

14 *S.E.C. v Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980).

15 *Sterling Nat'l Bank v A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573 (S.D.N.Y. 2001).

27. Therefore, it seems that in practice, a stay of arbitration in favour of criminal proceedings is generally rare,[16] and the threshold applied by tribunals to stay arbitral proceedings has been very high,[17] favouring the notion that, absent exceptional circumstances, an arbitral tribunal has the duty to decide the matter expeditiously without suspending the proceeding.[18]

28. When contemplating the use of their authority to stay arbitration proceedings in the face of Parallel Corruption Proceedings, arbitrators should adopt a meticulous approach, scrutinising all relevant factors. They must carefully assess the real legal and practical implications of the tribunal proceeding without regard to the Parallel Corruption Proceedings. In this context, the principles employed by courts handling concurrent civil and criminal investigations or proceedings can serve as valuable guidance for arbitral tribunals grappling with this intricate matter.

29. However, it is important to note that there is no unanimous agreement advocating for the application of a presumption in favour of the continuation of the proceedings by the arbitral tribunal.

30. Moreover, even if arbitrators decide not to suspend the arbitration proceedings, the existence of parallel criminal investigations often serves as a warning sign that the dispute before the arbitrators may be tainted by corruption-related issues. A decision to proceed with arbitration should not be misconstrued as disregarding potential corruption concerns. Instead, the tribunal may take appropriate steps to assess whether the underlying transaction was affected by corruption, including seeking the parties' submissions on the issue. Ignoring red flags indicative of corruption could expose the arbitral award to annulment risks at the seat of arbitration or hinder its enforcement under international conventions, as underscored by various judicial precedents.[19] On the other hand, it has been observed that the arbitral tribunal is not a public prosecutor and must be careful not to overstep its authority.

31. Arbitrators should be vigilant against tactical attempts by parties to abuse the process by requesting stays of arbitration under the pretext of parallel criminal proceedings as a deliberate delay strategy, which can undermine the efficiency and integrity of the arbitration. To prevent such abuse, tribunals should carefully assess whether the criminal proceedings are genuinely connected to the arbitration or are merely a strategic manoeuvre, and scrutinise the timing and motives behind the request. This is particularly so if the request arises at a critical stage or from a party with a history of delay tactics – and tribunals should evaluate the potential impact of a stay on the fairness and efficiency of the arbitration, especially when time-sensitive evidence is involved. By adopting a discerning approach, arbitrators can ensure that stays are granted only when justified while maintaining the integrity of the arbitral process.

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16 One notable but rare example of an arbitration being stayed in favour of criminal proceedings is *Indagro v Bauche*, a London-seated maritime arbitration. In this case, the sole arbitrator decided to stay the arbitration in favour of ongoing criminal proceedings in France, reasoning that key documents– on which the respondent, who had raised corruption allegations, sought to rely – were part of the French criminal case files and were subject to a secrecy order. This order would only be lifted if and when the French authorities decided to indict those under investigation. The arbitrator conditioned the stay on the respondent providing a bank guarantee, which the respondent complied with. However, after the respondent was liquidated and the bank guarantee was revoked, the arbitrator lifted the stay and proceeded with the arbitration. The final award dismissed the corruption allegations, citing the respondent's failure to maintain the bank guarantee, and ordered the respondent to pay the claimant US$1 million plus interest. In 2016, a French criminal court convicted the claimant and one of the respondent's employees for corruption. Subsequently, the Paris Court of Appeal refused enforcement of the arbitral award on public policy grounds, holding that the principle of *res judicata* required French civil courts to follow the rulings of the criminal court. This decision was later upheld by the French Court of Cassation (Cass. civ 1re, 13 Sep. 2017, *Société Indagro v société Ancienne Maison Marcel Bauch*).

17 See e.g. *Valeri Belokon v Kyrgyz Republic*, PCA Case No. AA518, Award, 24 Oct. 2014, paras 23–25 in which "the Tribunal decided … that no stay of proceedings was warranted but acknowledged that the Respondent was at liberty to resubmit a similar request in the future if 'there are concrete indications that the criminal proceedings are likely to provide imminent, specific, and relevant evidence.'"

18 S. Besson "Corruption and Arbitration: Impact of Criminal Investigations' Addressing Issues of Corruption in Commercial and Investment Arbitration", *Dossier of the ICC Institute of World Business Law* (2011) 103. See also J. Feris, S. Torkomyan, supra note 7.

19 In 2023, the English Commercial Court set aside the arbitral awards in the P&ID Nigeria case under section 68 of the English Arbitration Act 1996, on the grounds that they had been procured by fraud and were contrary to public policy. The arbitral tribunal had awarded US$6.6 billion plus interest to the claimant; however, the court found that the arbitral process had been tainted by three significant irregularities: (i) the deliberate concealment of bribery; (ii) continuous corrupt payments to keep a key witness cooperating with the claimant; and (iii) the claimant's "improper retention" of internal legal documents from Nigeria. The court further observed that the arbitral tribunal had taken a "very traditional" approach, limiting its review to the arguments put before it. In doing so, it questioned whether the tribunal "could and should have been more direct and interventionist in addressing potential corruption issues, reinforcing the expectation that arbitrators take a proactive role when red flags of fraud and corruption emerge during proceedings" (*Process and Industrial Developments Ltd. v The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Judgment of the High Court of Justice of England and Wales [2023] EWHC 2638, 23 Oct. 2023, para. 588). In 2022, the French Supreme Court set aside a US$15 billion UNCITRAL award in the Belokon v Kyrgyzstan on the basis that the award's enforcement would violate international public policy. The French Supreme Court confirmed the Paris Court of Appeal's finding that the tribunal had ignored "serious, precise, and concordant indicia" of money laundering, including irregularities in the bank acquisition process, the bank's operations (nature, structure and volume of transactions), and the relationship between the investor and the President of Kyrgyzstan. Notably, in the arbitration proceedings, the tribunal denied two requests by Kyrgyzstan to suspend the arbitral proceedings in light of investigations conducted by Kyrgyz domestic authorities against the claimant and his investment, and criminal investigations by New York authorities against Maxim Bakiev, the former President's son (*Belokon v Kyrgyzstan*, Cass. Civ 1st, 23 mars 2022, n° 17-17.981).

32. Arbitrators should be vigilant against attempts by parties to exert external influence, including through parallel proceedings strategically initiated to pressure or delay arbitration. Just as judicial independence is fundamental to ensuring impartiality in national courts, arbitral tribunals must uphold their own independence by identifying and resisting undue influence and adjudicating disputes solely based on justice, equity, and the merits of the case. The integrity of the arbitration process depends on arbitrators maintaining firm control over procedural decisions, preventing the misuse of parallel proceedings as a tool for obstruction, and ensuring that arbitration remains an efficient, neutral, and independent forum for dispute resolution.

3. Do reports or decisions rendered in Parallel Corruption Proceedings have *res judicata* or issue estoppel effect on arbitration?

33. Upon initial examination, one might assume that decisions from Parallel Corruption Proceedings will necessarily have *res judicata* or issue estoppel effect in the context of arbitration. But case law, literature, and the responses of the ICC National Committees present a more nuanced answer.[20]

34. The common law and civil law systems across various countries have adopted different approaches to applying *res judicata* and issue estoppel. As a result, the effect of *res judicata* and issue estoppel varies by country.[21] Given these differences, it is not possible to neatly summarise transnational rules on *res judicata* and issue estoppel effect.

35. Further, given that Parallel Corruption Proceedings in the sense considered in this Working Document may not involve the same parties, or identical issues as those considered in an arbitration, the strict conditions which would apply in domestic law for applying *res judicata* or issue estoppel are unlikely to exist, even in cases where an arbitral tribunal might wish to rely on decisions from such proceedings. *Res judicata*, in its strict sense, would not apply to criminal convictions. Indeed, because of the differences between domestic courts and international tribunals, final decisions in Parallel Corruption Proceedings are sometimes referred to as having "conclusive and preclusive effect".[22]

36. In deciding whether a decision in Parallel Corruption Proceedings has conclusive or preclusive effect, an arbitral tribunal may first consider the applicable law. Although it might be thought that the applicable law should be the procedural law governing the conduct of the arbitration – typically the law of the seat of the tribunal – it has also been suggested that transnational rules should apply.[23] As the decision in Parallel Corruption Proceedings may be given in a different jurisdiction to that of the arbitral tribunal, more than one procedural law may be relevant.[24]

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20 G. Born, "Chapter 27: Preclusion, *Lis Pendens* and *Stare Decisis* in International Arbitration" (updated Aug. 2022) in *International Commercial Arbitration* (Kluwer Law International, 3rd ed.) Part III at 27.02 [A], which states: "In principle, national court judgments … should have the same preclusive effect in arbitral proceedings as in national court litigation". For a review of the recent literature, see R. Gupta, "*Res judicata* in International Arbitration: Choice of Law, Competence and Jurisdictional Court Decisions", 16 *Asian Int'l Arb. J.* 193 (2020). See also *Mustill & Boyd: Commercial and Investor State Arbitration*, Chapter 15, "Arbitration Awards: Finality and *Res judicata*" (Butterworth Lexis Nexis, 3rd ed., 2024). See also answers to the Questionnaire to the ICC National Committees, supra note 3,

21 For a comprehensive review of key jurisdictions, see IBA Report on *Res Judicata* in International Arbitration (Feb. 2025).

22 F. De Ly, A. Sheppard, ILA Final Report on *Res Judicata* and Arbitration, *Arb. Int. 25(1)* (2009), p. 67. That report suggested that the international character of arbitration "should not be reduced to domestic notions regarding *res judicata* that are valid in a domestic setting but are hardly appropriate in an international context".

23 For a detailed analysis of this issue, see G. Bermann, Chapter 54: *Res Judicata* in International Arbitration, in *Cambridge Compendium of Commercial and Investment Arbitration* (Cambridge University Press, 2023), where Prof. Bermann draws a distinction between *lex arbitri* and *res judicata* rules of the law of the place of arbitration. In N. Voser, J. Raneda, "Recent Developments on the Doctrine of *Res judicata* in International Arbitration on a Swiss Perspective: A Call for a Harmonized Solution" 33(4) *ASA Bulletin*, pp. 742-779, the authors suggest that "arbitral tribunals seated in Switzerland should use their procedural discretion and develop autonomous rules which are more generally recognized and …. Promote harmonized principles of *res judicata* better designed for international arbitration". See also L. Radicati di Brozolo, F. Ponzano, "How to Assess the *Res judicata* Effects of International Arbitral Awards: Giving Concreteness to an Autonomous Approach," 40(4) *Arb. Int.* (2024) and the IBA Report on *Res Judicata* in International Arbitration (2025) which recommends that the IBA Arbitration Committee develop a soft law instrument with uniform guidelines on *res judicata* for international commercial arbitration. That report also notes that: "The parties' agreement on the *res judicata* standard can be contained in the arbitration agreement, in any applicable arbitration rules, or in other instruments such as terms of reference or in the Procedural Order No. 1. A rare example of the exercise of party autonomy in the regulation of *res judicata* is Art. 26.8 of the LCIA Rules, incorporated by reference in arbitration agreements providing for LCIA arbitration. Art. 26.8 provides that "[e]very award (including reasons for such award) shall be final and binding on the parties." It has been noted that the phrase in brackets, which has no parallel in the rules of other arbitration institutions, has likely been inspired by the English notion of issue estoppel and thus precludes the application to LCIA awards of the strictest conception of *res judicata*, which limits the effects of the prior award to its dispositive". See also P. Wilinski, "Practical Insights on *Res judicata* of an Arbitration Award" (Kluwer Practical Insights on Arbitral Procedure, June 2025).

24 For example, in Swiss Law, a pre-condition of *res judicata* effect is that the foreign decision or award is recognisable in Switzerland. Regard must then be had to the *res judicata* effect of an arbitral award under the procedural law of the country where the award is rendered, and then to Swiss rules on *res judicata*, which will prevail if the foreign rules on *res judicata* are broader. This principle is described in the commentary as the "controlled extension of effects" or "controlled transfer of a foreign award's effects." See decision of the Swiss Federal Tribunal DFT 141 III 229 of 29 May 2015 (the "US law firm" decision) – which did not involve corruption and the commentary in B. Berger, "No Force of *Res judicata* for an Award's Underlying Reasoning", 33(3) *ASA Bulletin* (2015) pp. 642-657, and N. Zaugg "Objective Scope of *Res judicata* of Arbitral Rules: Is There Room for Discretion?", 35(2) *ASA Bulletin* (2017) pp. 319-333. Different rules apply to parallel proceedings in Switzerland.

37. Where the decision in a Parallel Corruption Proceeding is given in the same jurisdiction as the arbitration, it will generally impact subsequent arbitration proceedings. For example, if a party is convicted in a domestic court for bribery or fraud related to a contract containing an arbitration clause, the arbitral tribunal must decide if the applicable law requires the tribunal to accept and apply the domestic court finding. This decision depends on the nature of the finding,[25] the nature of the court or other body making the decision, the relevant rules, and the applicable law. In some jurisdictions, the applicable law may require the tribunal to accept such decision in parallel proceedings. Equally, failure to apply this rule may form the basis of a public policy defence to enforcement. When the decision in question arises from an administrative or regulatory proceeding, or an inquiry, the arbitral tribunal's obligation to accept it may be less than in the case of a criminal conviction.

38. Nevertheless, even in cases where criminal or other decisions do not necessarily carry *res judicata* or preclusive effect and there is no requirement to apply the decision reached in the parallel proceedings, an arbitral tribunal might determine that it has persuasive effect, particularly if it bears a direct connection to the arbitration's subject matter.[26] This may be understood as a two-step test: first, whether the arbitral tribunal is obliged to follow the decision (mandatory effect); and if not, secondly, the extent to which the arbitral tribunal should ascribe persuasive value to such decision (a matter of discretion).

39. In this sense, the arbitral tribunal should have the ability to consider the factual nature of the decision and apply it if appropriate. An arbitral tribunal considering a decision in criminal proceedings will, at the very least, wish to carefully assess the relevance of that decision to the dispute before it and consider submissions from the parties so as not to risk rendering an award that could be set aside or not enforced on public policy grounds. A number of further factors may influence the arbitral tribunal in its consideration as to whether a decision in Parallel Corruption Proceedings has persuasive effect, as follows:

i) At a level of theory, an arbitral tribunal is likely to have particular regard to findings in Parallel Corruption Proceedings in the seat of the arbitration, as the risk of setting aside must be higher if such findings are ignored.

ii) Not only should an arbitral tribunal consider the nature of the findings in Parallel Corruption Proceedings, but also the manner in which the proceedings were conducted. For example, were they conducted in accordance with due process? Did the party against whom an adverse finding was made provide evidence in the Parallel Corruption Proceedings, or was the decision rendered in *absentia*?[27]

iii) What was the nature of the evidence underlying the findings in the Parallel Corruption Proceedings, and how were the burden and standard of proof addressed?

iv) Finally, the nature of the Parallel Corruption Proceedings may be relevant. There may be qualitative differences between a conviction, a prosecution, a civil suit action, an agreed settlement,[28] and an inquiry. The arbitral tribunal should therefore assess the specific nature of the Parallel Corruption Proceedings before determining how, and to what extent, they impact the arbitral process.

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25 In most cases, at least, a conviction is likely to be more significant than an acquittal.

26 In *Metal-Tech Ltd. v Republic of Uzbekistan* (ICSID Case No. ARB/10/3), the tribunal concluded it lacked jurisdiction due to the investment being tainted by corruption. In its analysis, the tribunal considered a domestic criminal investigation and ongoing proceedings as one of multiple factors. The tribunal assessed the "entire evidentiary record", including domestic investigations and proceedings, to determine that Uzbekistan had established corruption. Similarly, negative domestic findings may significantly undermine corruption defences in arbitration by casting doubt on the credibility and evidentiary basis of corruption allegations. In *EDF (Services) Limited v Romania* (ICSID Case No. ARB/05/13), EDF alleged that Romanian state officials solicited a bribe, and upon EDF's refusal, the state unlawfully retaliated. The tribunal noted that the Romanian National Anticorruption Directorate had investigated EDF's bribery claims and twice dismissed them as unsubstantiated. These conclusions were upheld by Romanian criminal courts, which affirmed that the bribery allegations were groundless. Given these adverse domestic findings and the tribunal's assessment that the claimant's witness testimony regarding the alleged corruption was "of doubtful value", the tribunal concluded that EDF failed to establish its bribery allegation. In *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Company Limited (BAPEX) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla)* (ICSID Case Nos ARB/10/11 and ARB/10/18), the tribunal addressed corruption allegations against Niko Resources. The tribunal noted that investigations into these allegations had "not led to any trial, let alone conviction" for corruption, and that "other regulatory investigations appear[ed] to remain outstanding". Considering the prolonged duration of these investigations and the absence of any resulting trial or conviction, the tribunal found that these factors weighed against a finding of corruption. Consequently, the tribunal rejected the corruption allegations.

27 See the decision of the *Cour d'appel* de Paris in *Société Egyptian Sponge Iron & Steel Co. S.A.E. (ESISCO) c/ société Danieli & C. Officine Meccaniche S.P.A* ([2024/02], *Cour d'appel* de Paris (Pôle 5 – Ch. 16), 5 dec. 2023, where Egyptian criminal judgments had been rendered in absentia, and where an expert report on which those judgments were based was not adduced in evidence in the arbitration. See para. 40 and following of the decision. See also the decision of the *Cour d'appel* de Paris in *Groupement Santullo*, Chambre commerciale internationale (Pôle 5 – Ch. 16), 5 Apr. 2022, *Groupement Santullo-Sericom Gabon v Gabonese Republic*, para. 81 and following, where the *Cour d'appel* found that it could not take the admissions of corruption into account, having regard to the circumstances under which those admissions were made.

28 There may be due process issues in connection with negotiated resolutions, where there is no "decision" as such but a settlement, often with stipulated facts. See e.g. OECD (2019), Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention and International Guidelines for Non-Trial Resolutions of Foreign Bribery Cases.

40. According to the ICC National Committees' responses, the impact of Parallel Corruption Proceedings varies widely. In Egypt, Art. 269 of the Law of Criminal Procedure provides that the *res judicata* effect of criminal court judgments is binding on proceedings of civil nature (either arbitrations or judicial proceedings) in that country. Consequently, the arbitral tribunal may await the decision of the competent State courts/ authorities before rendering an award. In the UAE, Art. 43 of the Arbitration Law stipulates that if a criminal incident related to the dispute arises during the arbitration, the arbitral tribunal may continue with the proceedings unless it deems that the resolution of the criminal matter is essential for deciding the dispute.[29] Conversely, in many countries, including the USA, India, England, Nigeria, Brazil, Colombia, and Peru, there is no rule which requires an arbitral tribunal to suspend its functions pending the conclusion of criminal proceedings. In the Netherlands, criminal verdicts are not deemed to have a binding effect on the arbitral tribunal.

41. A clear distinction arises between the approach to *res judicata* in civil law and common law jurisdictions. As one commentator noted, "many civil law jurisdictions attach *res judicata* effect only to the dispositif of a judgment or award and not to the reasoning on which the judgment or award was based".[30] In contrast, common law jurisdictions recognise not only the principle of *res judicata* – whereby a "judicial judgment accepting or rejecting a particular 'claim' is binding upon the parties to the proceedings that produce the judgment"[31] but also a separate concept of issue estoppel[32] (or collateral estoppel[33]). Under this doctrine, a party is prevented from re-litigating against another party "an issue of fact or law that was previously contested and decided in a litigation" between those parties.[34] Regardless of the applicable procedural law, the strict national law requirements for *res judicata* or collateral estoppel may not necessarily apply in arbitration, particularly given the nature of the Parallel Corruption Proceedings at issue. As set out above, Parallel Corruption Proceedings as considered in this Working Document are unlikely to involve identical parties, claims and legal issues. In arbitrations where a decision has been rendered in Parallel Corruption Proceedings, the arbitral tribunal must not only assess the applicable law and determine whether it is obliged to consider the decision, but also evaluate the potential risk of annulment or enforcement challenges if the parallel decision is not given due effect.

42. In some jurisdictions, the tribunal's failure to take into account a criminal conviction may have serious consequences. Although an earlier commentator suggested that rules concerning *res judicata* effect of court decisions were not rules of international public policy,[35] more recent decisions suggest that, at least in the context of criminal convictions, this may not be so. In *Indagro v Bauche*,[36] the French Cour de Cassation upheld the *Cour d'Appel* refusal to enforce a foreign award where a French criminal court had found claimant guilty of corruption in relation to the contract subject matter of the arbitral award.[37] Equally, Swiss

29 Although there is no specific requirement in China to suspend arbitration proceedings in favour of criminal proceedings, the principle of "criminal first, civil later" guides civil legal proceedings.

30 G. Bermann, supra note 23. However, the IBA Report on *Res Judicata* in International Arbitration suggests that in at least some civil law countries, this principle is not strictly applied.

31 G. Born, supra note 20, at 27.02 [A][1].

32 As described in English law.

33 As described in US Federal law.

34 See G. Born, supra note 20, at 27.02 [A][1]. See also C. Söderlun, "*Lis Pendens*, *Res judicata* and the Issue of Parallel Proceedings", 22(4) *J. Int. Arb.* 301-322 (2005), who draws a distinction between continental civil law systems and common law systems as follows: "In the context of *res judicata*, it is important to underline a feature of continental civil law systems different to the common law systems – that they do not attach *res judicata* effect to the adjudicatory bodies' conclusions in respect of specific issues or legal premises but only to the dispositive part of the judgment. In other words, if one and the same issue arises in another action, although between the same parties, the judge or arbitrator in the subsequent litigation will be at liberty to revisit the issue and conceivably arrive at a different conclusion. This principle is opposed to the concepts of collateral estoppel (USA) or issue estoppel (English law), which attach the force of *res judicata* also to legal issues and legal premises. The thinking behind the continental law approach is that the importance of a legal action and a specific issue figuring in that action could differ widely in relation to another legal action, meaning that a party might not invest so much effort in one particular issue in the first litigation because of its relative insignificance while the situation could be radically different in a subsequent action".

35 Ph. Fouchard, E. Gaillard, B. Goldman, *International Commercial Arbitration* (Kluwer Law International, 1999), para. 1662. There appears to be no case law directly on this point from England. For a case where the English Courts considered the balance between the interests of finality against public policy, see *Alexander Brothers Ltd. v Alstom* [2020] EWHC 1584 (Comm). Other decisions related to this issue are *PAO Tatneft v Ukraine* [2020] EWHC 1361 (Comm) and *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 (Comm).

36 *Société Indagro v Société Ancienne Maison Marcel Blauche*, Paris Court of Appeal, 14 June 2001, No. 1999/23454, *Tradigrain*; Cour de cassation, 1 civ., 13 Sep. 2017, No. 16-25657 and No. 16-26445.

37 For a detailed review of this decision, see A.M Lacoste "Corruption as a Bar to Award Enforcement in France", 36(1) *ASA Bulletin* (2018), pp. 31-52, where the author states that the case provides guidance on the "way in which the court would apply the principle of *res judicata* of a criminal decision in the context of their review of arbitral awards". For further commentary in relation to the French Courts' approach to foreign criminal judgments, see J. Spinelli, E.Ruby, "The Evolution of the French Approach to Corruption in International Arbitration". In China, the Courts have set aside domestic arbitration awards or refused to enforce them because the arbitral tribunal did not properly consider the decision of the criminal courts. See Case numbered (2019) Liaoning 03 Civil Special 17, Anshan Intermediate People's Court of Liaoning Province, and Case numbered (2020) Jing 04 Civil Special 183, Beijing No. 4 Intermediate People's Court.

Courts have treated *res judicata* as a principle of public policy, requiring arbitral tribunals to give effect to foreign judgments and awards.[38] In the US, some courts have followed this approach, whereas others have held that "an arbitral tribunal's failure to accord preclusive effect to prior decisions is not grounds to vacate or annul an award".[39]

43. In investment treaty arbitration, arbitral tribunals may not abide by decisions issued in Parallel Corruption Proceedings, particularly where those proceedings are those of domestic courts or administrative authorities[40] of the State involved in the arbitration. In this respect, a majority view holds that investment arbitration tribunals are not bound by criminal court decisions because they operate on a different level.[41]

44. Also, investment arbitration tribunals may consider that the application of the *res judicata* principle is not relevant because the finding is a matter of evidence rather than the applicable law.[42]

45. In practical terms, arbitral tribunals should carefully assess the applicable law at the seat, together with the nature, provenance, and evidentiary basis of decisions arising from Parallel Corruption Proceedings, and determine the weight to be accorded to them. This assessment should extend beyond formal questions of *res judicata* or issue estoppel and consider any engaged public policy concerns, with a view not only to ensuring procedural fairness but also to protecting the enforceability of the resulting award.

4. How and with what precautions is it admissible to adduce in arbitration proceedings evidence obtained in Parallel Corruption Proceedings?

46. In addition to considering whether findings in Parallel Corruption Proceedings have preclusive or persuasive effect, tribunals will sometimes consider the evidence stemming from domestic or international criminal investigations related to alleged corrupt acts pertinent to the arbitration. The approach to such evidence varies, with tribunals carefully considering its relevance, authenticity, and the manner in which it was obtained.

47. It is a widely recognised principle that arbitrators possess broad discretion in assessing the admissibility of evidence.[43] However, the inclusion or exclusion of evidence obtained in Parallel Corruption Proceedings presents a complex challenge, requiring a careful balance between competing legal principles and due process rights. These include the right to be heard (encompassing the right to present evidence), the right to equal treatment and equality of arms,[44] respect for confidentiality and privilege obligations, and the duty of the arbitrators to ensure fairness in the arbitral process. While parallel proceedings may produce evidence that is highly relevant to a party's case, such evidence may also be subject to legal, procedural, or ethical constraints.

48. Concerns regarding admissibility of evidence obtained from a Parallel Corruption Proceeding should not be assumed by the tribunal on its own initiative; an admissibility analysis is warranted when a party formally objects to the admission of such evidence.

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38 See G. Born, supra note 20, at 27.02[A][1], the "*US Law Firm*" decision and the discussion and cases noted (in note 282). However, there appears to be no reported case in Switzerland where the courts either set aside or refused to enforce an award on the basis that the arbitral tribunal failed to consider the findings of a criminal court.

39 See G. Born, supra note 20, at 27.02[A][1], discussion and cases noted (notes 283, 284).

40 See *EDF v Argentina*, Award, 11 June 2012 discussed in *Schreuer's Commentary on the ICSID Convention* (Cambridge University Press, 3rd ed., Vol. I), at 26.247; and *Repsol v Petroecuador*, Decision on Annulment (8 Jan. 2007) discussed in *Schreuer's Commentary on the ICSID Convention* Vol. II, at 52.10. See also *Inceysa Vallisoletana v El Salvador* (ICSID Case No. ARB/03/26), where the tribunal held that state parties' findings as to the legality of investment are not determinative. This is for the tribunal to determine, and domestic court findings are not *res judicata* for the purposes of determining jurisdiction. See also *Karkey Karadeniz Elektrik Uretim A.S. v Pakistan* (ICSID Case No. ARBII3/1, para. 544); *Croatia v MOL Hungarian Oil and Gas PLC* (PCA Case No. 2014-15), *Amco Asia Corp. and Others v Republic of Indonesia*, ICSID Case No. ARB/81/1, *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, and *Ipek Inv Ltd. v Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 (Decision on Provisional Measures).

41 C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration* (Oxford, 2nd ed., 2017), para. 4.11. In *Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia* (ICSID Case No. ARB/16/6), Colombia invoked pending domestic criminal corruption proceedings as part of its defence. The tribunal acknowledged that findings from domestic criminal proceedings "must be considered" when evaluating evidence of corruption. However, it emphasised that such findings do not preclude tribunals from reaching a different conclusion regarding corruption, noting that domestic proceedings and arbitrations operate in "different legal spheres" and are subject to "diverging standards of proof" (paras. 673-674).

42 See *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, Decision on the admissibility of the Respondent's third objection to jurisdiction and admissibility of Claimants' claims, ICSID Case No. ARB/10/13; *Hytro S.r.l. and others v Republic of Albania*, Order on provisional measures, ICSID Case No. ARB/15/28; Sergei Viktorovich Pugachev v The Russian Federation, Interim Award, 1976 Rules of the United Nations Commission on International Trade Law, 7 July 2017.

43 See LCIA Arbitration Rules (2020), Art. 22.1(vi); SCC Arbitration Rules (2023), Art. 31(1); IBA Rules on the Taking of Evidence in International Arbitration (2020), Art. 9.

44 A. Godhe, "Chapter 5: Exclusionary Rules of Evidence in International Arbitration", in P. Schöldström, Ch. Danielsson (eds), *Stockholm Arbitration Yearbook 2024*, Vol. 6, pp. 80-85.

49. To determine whether evidence from Parallel Corruption Proceedings should be admitted or excluded, the tribunal must *first* assess whether its submission aligns with the arbitration agreement and any applicable rules governing the admissibility of evidence in the specific arbitration. This includes, where agreed by the parties, the IBA Rules on the Taking of Evidence.

50. *Secondly*, the arbitral tribunal must evaluate whether the evidence was obtained legally under the applicable laws. It should consider whether the evidence originates from publicly available sources (such as court judgments, public reports, or government statements), in which case its use is generally permissible. Conversely, if the evidence was obtained through confidential or privileged means (i.e. protected government investigations or privileged legal communications), its admissibility may be subject to challenge by the opposing party.

51. *Thirdly*, the arbitral tribunal should assess whether such evidence is *prima facie* relevant to the case and material to its outcome. A party seeking admission of such evidence must demonstrate that it is likely to be pertinent to the case or has a clear connection to a key issue in dispute.[45] Relevance is established by showing that the evidence is essential for the party to meet its burden of proof.[46]

52. The arbitral tribunal must also assess whether adducing evidence from Parallel Corruption Proceedings would result in a breach of confidentiality or privilege obligations. This requires analysing whether a confidentiality obligation applies to the evidence in question and, if so, to what extent. If such an obligation exists, the tribunal must determine whether the parties, counsel or arbitrators may be relieved of their duty of confidentiality or whether measures can be implemented to protect the confidentiality.[47] When dealing with evidence produced in Parallel Corruption Proceedings, tribunals may consider issuing confidentiality orders to limit access to sensitive evidence and prevent disclosure beyond the arbitration.

53. Another key consideration is whether admitting or excluding the evidence would violate fundamental principles of arbitration, such as equality of arms, efficiency, fairness and right to be heard, amongst others. The issue of violation of equality of arms was highlighted in *Republic of Kyrgyzstan v Mr. Valeriy Belokon*, where the Paris Court of Appeals excluded evidence obtained during a criminal investigation on the grounds that Mr Belokon was denied access to the complete criminal file. The court reasoned that, to uphold the principles of loyalty of proceedings and the equality of arms, it was necessary to ensure access to the criminal file in order to prevent the selective or misleading presentation of evidence.[48]

54. A similar approach was taken in *UAB Vilniaus Energija and Veolia & Vilniaus Energija v Vilniaus šilumos tinklai and Vilnius City Municipality*, where the Tribunal ruled that wiretap transcripts could not be admitted as evidence because neither the tribunal nor the claimants had access to the corresponding audio and video recordings to verify their accuracy.[49] The tribunal found that admitting such evidence without the ability to assess its authenticity would "violate Claimants' right to be heard, including Claimants' right to challenge the content of the evidence produced".[50] Moreover, the tribunal held that if claimants were unable to refute or contest a critical argument advanced by respondents, this would not only breach the adversarial principle but also infringe upon claimants fundamental right of defence.[51]

55. As illustrated in these cases, a party opposing the introduction of evidence obtained in Parallel Corruption Proceedings may face significant procedural disadvantages, particularly if it was not a party to those proceedings and, as a result, lacked the opportunity to challenge the evidence.[52]

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45 Ibid.

46 Ibid. For further discussion on the burden of proof, reference is made to the ICC Commission Supplementary Document *Burden and Standard of Proof of Corruption*. If the evidence from Parallel Corruption Proceedings fails to meet the threshold of relevance and materiality, the tribunal may decide against its admission.

47 See Section 7 below.

48 *Republic of Kyrgyzstan v Mr. Valeriy Belokon*, Paris Court of Appeal, 21 Feb. 2017, No. 15/01650, p. 10. It appears that French Courts will place particular emphasis on safeguards where material from criminal files are relied upon. Where the opposing party is unable to test the authenticity of such materials, arbitrators should take appropriate steps to ensure fairness, and in particular should clearly articulate the evidentiary weight accorded to such materials.

49 *UAB Vilniaus Energija. and Veolia & Vilniaus Energija v Vilniaus šilumos tinklai (Lithuania) and Vilnius City Municipality* (Final Award), SCC Case No. 2016/183, 30 Nov. 2023, Public Source Awards, Kluwer Law International, para. 106.

50 Ibid.

51 Ibid.

52 Similarly, in *Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia* (ICSID Case No. ARB/16/6, Decision on Annulment, 22 Sep. 2021), the tribunal excluded certain documents from the record, emphasising the obligation to arbitrate fairly and in good faith, as well as the principle of equality of arms. The documents in question had been seized from the claimant by Colombia's Antitrust Agency during a preliminary antitrust investigation. The

56. This includes the inability to cross-examine witnesses, confirm the authenticity of the evidence, and assess the full context in which the evidence was produced. It also applies to witnesses in the criminal investigation who are called to testify in arbitration, in which case their statements could influence or be influenced by the ongoing criminal process, raising concerns of procedural fairness.

57. The introduction of such evidence under these circumstances risks violating core principles of procedural fairness. While due process – particularly procedural fairness and equality of arms – serves as the minimum standard that must be upheld, tribunals should also take into account other considerations (such as procedural economy and the observance of international public policy) when exercising their discretion on whether to admit or exclude evidence from parallel proceedings.

58. Nevertheless, tribunals may implement procedural safeguards that balance the competing interests at play, ensuring that one party has the opportunity to present its case while affording the opposing party the means to verify the authenticity and reliability of the evidence. For instance, in the case of wiretap transcripts obtained from a criminal investigation, tribunals may require the party seeking to introduce such transcripts to provide both the tribunal and the opposing party access to the corresponding audio and video recordings. This would allow for an independent assessment of their accuracy, ensuring that their admission does not infringe upon the adversarial principle or the fundamental right of defence.

59. For instance, in *MOL v Croatia*,[53] the Croatian government alleged that MOL had acquired a controlling interest in INA through bribery of the former Croatian Prime Minister.[54] The arbitral tribunal examined evidence from Croatian criminal proceedings but ultimately ruled in favour of MOL, citing insufficient proof of corruption.

60. In determining whether to admit such evidence, tribunals must strike a balance between these practical and procedural hurdles and the fundamental right of the party seeking to introduce the evidence to fully present its case. This assessment should consider whether reasonable accommodation, such as procedural orders or confidentiality protections, can mitigate potential challenges while preserving the fairness and efficiency of the arbitration.

61. Allowing evidence obtained in Parallel Corruption Proceedings to be used in arbitration may create a deterrent for parties to engage in the arbitration process in good faith. If parties believe that they can obtain an advantage by engaging in Parallel Corruption Proceedings and leveraging evidence obtained therein, they may be less likely to engage in the arbitration with a genuine attempt to resolve the dispute.

62. Addressing the admissibility of evidence obtained from a parallel proceeding is inherently a case-specific determination, requiring tribunals to assess each situation individually. Given their broad evidentiary discretion, tribunals – while bound by their procedural duties – may assess whether such evidence meets the relevance and materiality threshold, complies with confidentiality and privilege obligations, and does not violate fundamental principles such as procedural fairness, equality of arms, and the right to be heard.

63. By a careful balance of these considerations, tribunals are not limited to the binary choice of either admitting or excluding evidence. Instead, tribunals may allow evidence to be given while implementing procedural safeguards, including issuing confidentiality orders, requiring access to underlying materials to verify their authenticity, requiring redactions to documents, allowing evidence to be given by way of rebuttal, or weighing the evidence appropriately, in particular by taking into account the parties' ability to challenge its authenticity.

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tribunal held that a State cannot exploit its sovereign administrative powers to compel the production of evidence from an investor in a regulatory proceeding and subsequently introduce that evidence in an investment arbitration to its own advantage. Such conduct was found to be inconsistent with fundamental principles of procedural fairness, including the duty to arbitrate in good faith and the necessity of ensuring a level playing field between the parties (See

53 For a detailed analysis of this case, see B. Prastalo, "On Corruption in International Arbitration," 8(1) *European Investment Law and Arbitration Review* (2023), pp. 73-104.

54 *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* (ICSID Case No. ARB/13/32).

5. What should arbitral tribunals do in the face of domestic judicial orders ordering the stay of the arbitration due to Parallel Corruption Proceedings?

64. Until recently, there was little evidence suggesting that anti-arbitration injunctions were common.[55] However, in some jurisdictions, failure to comply with a judicial order constitutes a criminal offence, and a failure by the members of a tribunal to comply with such order may expose them to criminal investigations and personal liability.[56]

65. Nonetheless, when confronted with a domestic judicial order to stay an arbitration due to Parallel Corruption Proceedings, the arbitral tribunal should first assess the validity of the arbitration agreement and then determine whether the judicial decision is binding upon it. In doing so, the arbitral tribunal must reach its own decision by applying both the principle of *kompetenz-kompetenz* and the principle of non-automatic stay of parallel arbitration proceedings.

66. When deciding whether to stay or proceed with the arbitration, the tribunal must:

- ensure that international law is observed;
- consider the applicable national law; and
- consider the judicial order enjoining the arbitration to determine whether there is any connection between the parallel proceedings and the dispute before the arbitral tribunal.

67. Art. II(3) of the 1958 New York Convention[57] states that, where there is a valid arbitration clause, the courts of Contracting States will require the parties to resolve their disputes by arbitration. It is only where a court finds that the arbitration agreement is "null and void, inoperative or incapable of being performed" that a court may decline to refer the matter to arbitration. The principle of *kompetenz-kompetenz* mandates that the tribunal, not a court of a Contracting State, should at least in the first instance decide whether an arbitration agreement is valid or not.[58] This dichotomy gives rise to the controversy surrounding anti-arbitration injunctions, which are perceived as a direct contravention to the *kompetenz-kompetenz* principle.[59]

68. Regarding the applicable national law, the ICC National Committees' questionnaires reveal that most jurisdictions provide no special guidance on the matter.[60]

69. A domestic judicial order staying an arbitration is not self-executing and does not, in itself, paralyse the arbitral tribunal or the institution under whose auspices the arbitration is conducted. In common law jurisdictions, such orders are typically directed at the parties to the arbitration, rather than the arbitral tribunal itself. Where the arbitral tribunal members consider that a stay order violates the applicable law or international public order, they may instruct the requesting party to withdraw its application or proceed with the arbitration notwithstanding the order. Making such a decision involves various considerations, such as identifying the party with legal standing to challenge

55 According to the answers to the Questionnaire to the ICC National Committees, supra note 3, there are no known cases of Courts staying arbitral proceedings in order to allow parallel corruption proceedings take their course in England, Switzerland, UAE, or the USA.

56 For more recent examples, see the orders issued by the Russian Courts in respect of the *Energy Charter Case Wintershall Dea v Russian Federation* and the order of the *Delhi High Court in Engineering Products India Ltd. v MSA Global LLC (Oman)* decision of 25 July 2025. See also *Poland v LC Corp, Amsterdam* Court of Appeal, 22 April 2025.

57 It reads as follows: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

58 See e.g. Arts 16(3) and 34 of the UNCITRAL Model Law which envisage domestic court involvement in these issues. See the discussion of the English Court of Appeal in *UniCredit Bank GmbH v RusChemAlliance LLC* [2025] EWCA Civ 99, where the Russian Courts made an order affecting the grant of an anti-suit injunction, which the English Courts had granted in favour of ICC arbitration in Paris.

59 Courts in certain civil law countries have expressed the opinion that a number of nations tend to allow anti-arbitration injunctions, which has the effect of frustrating the international arbitration system protecting domestic entities as a form of legal protectionism. See République et Canton de Genève, Tribunal De Première Instance [Court of First Instance] 2 May 2005, Case No. C/1043/2005-15SP (Switz.), available at 23 A.S.A. (Bull. 739) and Subramanian, Sairam, "Anti-Arbitration Injunctions and Their Compatibility with the New York Convention and the Indian Law of Arbitration: Future Directions for Indian Law and Policy", 34 *Arb. Int.* (2018), pp. 185, 200. However, common law jurisdictions adopt a more flexible approach. In the United Kingdom, the position has evolved from granting such injunctions strictly in accordance with the English arbitration statute to recognising exceptional circumstances as a basis for restraining arbitration proceedings (*Weissfisch v Julius* [2006] EWCA (Civ) 218 (Eng.)). More recently, the Court of Appeal of England and Wales affirmed that English courts have jurisdiction to issue anti-arbitration injunctions against foreign-seated arbitrations when the proceedings are deemed vexatious and oppressive (*Sabbagh v Khoury* [2019] EWCA (Civ) 1219 (Eng.)). In the United States, the Supreme Court held that "the question 'who has the primary power to decide arbitrability" – i.e. whether a valid arbitration agreement exists– depends on whether the parties agreed to submit that arbitrability question to arbitration. If they did, courts must defer to the arbitrator's decision; if not, the court must decide the issue independently (First Options of *Chicago v Kaplan*, 514 U.S. 938,942 (U.S. S.Ct. 1995), p. 943).

60 However, Art. 103 of the Guatemalan Law on State Contracts (Decree No. 57-92, Ley de Contrataciones del Estado) provides that arbitrations be stayed pending the criminal proceedings. Similar provision can be found in Malayan and Luxemburgish laws, Luxembourg, where all proceedings are suspended.

the judicial order, determining who bears the costs of a challenge, understanding the role of the arbitral institution, and evaluating the potential impact on the tribunal's independence.

70. The arbitral tribunal must also consider the connection with the Parallel Corruption Proceeding. Even though the decision as to whether the arbitration must be stayed is made by the arbitral tribunal, such a decision needs to fulfil the legal requirements referenced in Section III of this Report, since it can be challenged by any of the parties. In addition, it should be noted that judicial orders preventing the admission of certain evidence may be issued.

71. If the judicial order is foreign, and not from the courts of the seat of the arbitration, the tribunal must first consider whether the foreign judicial order is enforceable against the tribunal, and if not, against the parties to the arbitration. In this context, common law courts may be reluctant to issue orders staying arbitrations outside their jurisdiction. In addition, consideration must be given to whether the domestic court ("the torpedo court") had jurisdiction under its own rules to restrain a foreign arbitration.[61] In other words, how does a domestic tribunal purport to exercise jurisdiction, according to its rules of private international law, in respect of a foreign arbitral tribunal? In *Sabbagh v Khoury*[62] the English Court of Appeal found that an English court may restrain parties from pursuing a foreign arbitration on grounds of an exclusive jurisdiction clause, and in exceptional circumstances to prevent vexatious or oppressive conduct. However, the Court stated that:

> "[90] … it is clear from the principles of international arbitration embodied in the New York Convention and from the English authorities that the court must show great caution and restraint before granting such an injunction. …
>
> [110] An anti-arbitration injunction involves an interference with a different principle, namely the fundamental principle of international arbitration that courts should uphold, and therefore not interfere with, arbitration agreements. Where it is clear that the dispute is within the terms of a valid arbitration agreement, then the courts should not interfere. When the converse is true … the court may grant an anti-arbitration injunction but only if the circumstances of the case require it. Save perhaps in the case of exclusive jurisdiction agreements, the grant of an anti-arbitration remains an exceptional step.
>
> [111] Where the validity or scope of an arbitration agreement is in issue, it may be a difficult question whether the English court should seek to determine the issue. As earlier mentioned, *kompetenz-kompetenz* is an important principle of international arbitration law. It is implicit in an arbitration agreement that the parties agree that the tribunal may rule on its own substantive jurisdiction, including issues as to the validity of the arbitration agreement and the matters within the scope of the agreement …. It is therefore an exceptional course for the English court to decide these issues in relation to an agreement for a foreign-seated arbitration."

72. In investment arbitrations, excessive intervention of national courts may lead to an abuse of the process. Commentators have observed that – outside traditional arbitration jurisdictions – there is a trend towards the issuance of anti-arbitration injunctions, particularly where a State or State-owned entity is involved.[63] Such orders have been issued by courts in Indonesia,[64] Belize,[65] Argentina[66] and Pakistan.[67] As a matter of international law, it may be thought that a State that has consented to an arbitral process cannot invoke its own courts to interfere with that process. Investment arbitration tribunals have proceeded to issue awards notwithstanding orders against them. In this context, the Caribbean Court of Justice stated that the approach to modern arbitration agreements contained in investment treaties is for the court to support, as far as possible, the bargain for international arbitration.[68]

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61 For a detailed review of the jurisdictional issues that arise for a "torpedo court" in an EU context, see A. Dickenson, E. Lein, *The Brussels I Regulation Recast* (Oxford University Press, 2015), paras. 2.48-2.52.

62 [2019] EWCA Civ 1219.

63 N. Blackaby, C. Partasides, A. Redfern, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2023, 7th ed.), para. 7.56. "Interim relief in respect of parallel proceedings".

64 See *Himpurna California Energy Ltd. (Bermuda) v Republic of Indonesia* (2000) XXV YBCA 11.

65 Although reversed by the Caribbean Court of Appeal, B*ritish Caribbean Bank Ltd. v AG for Belize* (2013) CCJ 4(AJ).

66 *National Grid v Argentina*, Decision of the Fourth Chamber of the Camera Contencioso-Administrativo Federal, 20 July 2007.

67 *Société Générale de Surveillance SA (SGS) v Islamic Republic of Pakistan*, Pakistan Supreme Court, 2 July 2002.

68 See *British Caribbean Bank*, supra note 65, paras. 37-38.

73. When tribunals face orders from domestic courts enjoining the arbitration, a practical checklist for the arbitral tribunal includes the considerations referred to in paragraphs 74 to 82 below:

74. **1. Verify the authenticity and jurisdiction of the order**

- **Authenticity.** Ensure that the judicial order is authentic and has been properly issued by a competent authority.
- **Jurisdiction.** Ascertain the manner in which the issuing court has asserted that it has jurisdiction over the parties.

75. **2. Analyse the legal basis of the order**

- **Grounds for the order.** Determine the legal grounds upon which the judicial order is based. Understand the relevant legal provisions and precedents in the jurisdiction of the issuing court.
- **Compatibility with arbitration agreement.** Assess whether the judicial order conflicts with the terms of the arbitration agreement and the governing arbitration rules.

76. **3. Evaluate the impact on arbitration proceedings**

- **Scope and effect.** Evaluate the scope of the order and its direct impact on the arbitration proceedings, including the likely consequences of non-compliance. Determine whether the order necessitates a complete stay or only affects certain aspects of the proceedings.
- **Timeliness.** Consider the timing of the order in relation to the arbitration timeline. Assess how the order might affect the progress and efficiency of the arbitration.

77. **4. Consider principles of arbitral independence**

- **Autonomy of arbitral tribunal.** Uphold the principle of arbitral independence by ensuring that the tribunal maintains its autonomy in decision-making. Where appropriate, be wary of undue influence from external judicial orders.
- **Competence-competence principle.** Apply the competence-competence principle, considering that its scope and application may vary across jurisdictions. In general, this principle allows the tribunal to rule on its own jurisdiction, including any challenges to the arbitration agreement.

78. **5. Assess fairness and due process**

- **Equality of parties.** Ensure that both parties are treated equally and have the opportunity to present their arguments regarding the judicial order.
- **Right to a fair hearing.** Uphold the parties' right to a fair hearing by allowing sufficient time and procedural fairness to address the implications of the judicial order.

79. **6. Balance finality and judicial cooperation**

- **Finality of arbitration.** Consider the importance of finality in arbitration and the potential disruption caused by judicial interference. Strive to reach a decision that preserves the finality and integrity of the arbitration process.
- **Judicial cooperation.** Where appropriate, seek cooperation with the issuing court to clarify the order's intent and explore possible resolutions that respect both judicial and arbitral processes.

80. **7. Document and justify decisions**

- **Record deliberations.** While respecting the confidentiality of deliberations, document the tribunal's rationale for any decisions made in response to the judicial order. Ensure transparency in the decision-making process.
- **Justify actions.** Provide a clear and reasoned justification for any actions taken, whether to comply with, modify, or disregard the judicial order.

81. **8. Monitor developments and adapt accordingly**

- **Ongoing monitoring.** Through contact with the parties, continuously monitor developments in the parallel criminal proceedings and any related judicial orders. Be prepared to adapt the arbitration process as necessary.

82. **9. Flexibility**

- **Maintain flexibility** to adjust procedural timelines and measures in response to evolving circumstances while safeguarding the arbitration's integrity.

6. In cases involving the State as a party, how does a tribunal distinguish a State's duty to investigate allegations of corruption from possible dilatory or other tactics on the part of that State?

83. In arbitrations involving a State party, it is crucial that tribunals manage cases carefully to take into account potential public policy and state sovereignty concerns. This circumspect approach extends to consideration of parallel proceedings addressing bribery and corruption that could impact the arbitration.

84. In the field of public international law, it is widely agreed that corruption is against international/transnational public policy. This principle is evident in many International Centre for Settlement of Investment Disputes awards. For example, in *Getma International et al v The Republic of Guinea*, the tribunal stated in its award that:

> "the ICSID system can only protect legal investments carried out in good faith, and not those obtained by fraud."[69]

The principle is also stated in many international treaties, including the United Nations Convention Against Corruption,[70] and in bilateral investment treaties that exclude corrupt investments.

85. Further, investor-state arbitration procedures generally include measures to try to safeguard the dispute resolution process from corruption, which could compromise any resulting award. While the circumstances of such arbitrations are specific and differ from general commercial arbitration, in which States also participate, a review of aspects of investor-state cases and practice may prove beneficial for international commercial arbitration practitioners. In particular, in determining whether to consider Parallel Corruption Proceedings, an arbitral tribunal may have concerns regarding the nature and timing of such proceedings and whether they constitute dilatory or other tactics.

86. In arbitration proceedings involving a State party, a tribunal has a duty to consider allegations of corruption and related findings by State agencies, and to determine how those matters impact the arbitration. Based on their review, a tribunal may determine that it lacks jurisdiction to determine matters that are tainted by corruption, or it may dismiss the claim(s).

87. A State's ruling on corruption may influence a tribunal's decision. A central question in the tribunal's analysis is how tribunals should consider a State's response to corruption allegations, including failures to investigate, particularly considering that in various international treaties, including the UN Convention Against Corruption, States have assumed a duty to investigate actions of corruption. Where a State's determination regarding corruption is deemed unreliable, or where credible allegations of corruption have not been investigated, a tribunal that has established its jurisdiction will typically assess corruption indicators and reach its own conclusion.

88. Theoretically, a State's power to investigate corruption allegations could influence the tribunal's jurisdiction and delay the resolution of the dispute. Tribunals should, therefore, examine the background to State actions in relation to corruption and how they relate to the dispute in order to identify any lack of good faith.

89. An ICSID award, *Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia*,[71] and the related Decision on Annulment,[72] looked at the impact of State agencies' inaction on a tribunal's jurisdiction. In that case, there were no allegations that a State investigation was deliberately delayed. The tribunal examined a large payment for a small piece of land to determine if it indicated corruption. It ruled on several grounds that the payment was not corrupt, noting that Colombian prosecutors and courts had not started an investigation.[73]

90. In subsequent proceedings in which one of the grounds for annulment was the tribunal's alleged failure to take into account allegations of corruption, the reviewing court noted that no formal corruption investigation or proceeding had been formally initiated by the Colombian authorities. In particular, it observed that;

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69 Getma International et al v The Republic of Guinea, Award, ICSID No. ARB/11/29, para. 110, free translation, original in French: "le système CIRDI ne peut protéger que les investissements légaux et réalisés de bonne foi, et non pas ceux obtenus par fraude".

70 Effective 14 Dec. 2005.

71 Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia ("Glencore"), Award, ICSID Case No. ARB/16/6.

72 *Glencore*, Decision on Annulment, ICSID Case No. ARB/16/6.

73 *Glencore*, Award, paras 737-738.

> "the fact remains that a public prosecutor, possessed of documents which Colombia maintains constitute clear evidence of corruption, has not even opened a formal investigation into the company accused of that corruption eight months after it came into possession of those documents."[74]

The tribunal's determination that a finding of corruption could not be supported on the facts was upheld in the annulment proceedings.[75]

91. When addressing whether an arbitration is impacted by parallel State proceedings, tribunals should check if a State is deliberately delaying a related corruption case. While tribunals do not have the resources of a State available to them, they are not constrained by State bureaucracy or local politics and can often come to a view on whether there has been corruption more quickly than a State, regardless of whether any delay in concluding a State-initiated investigation into corruption is deliberate. It is also notable that in a few civil law jurisdictions, local law may require that arbitral proceedings are stayed pending conclusion of a related corruption matter by state authorities.[76] While this is unlikely to apply in the context of most institutional investor-state arbitrations, it is a potential issue in commercial arbitration particularly if it is in the State's interest to delay a finding in order to impact the viability of a related arbitration in which the State is a respondent.

92. There is little case law regarding deliberate delays by State agencies in investigating corruption allegations related to investor-state disputes. In *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, the tribunal was not addressing deliberate delay but found that the state's allegations regarding corruption were "essentially unsubstantiated", and that:

> "it is not appropriate for a Party to make such serious allegations of corruption and then not only fail to support it with credible evidence but to withhold from the opposing party documents which shed significant light on the conduct of the individual (Mr. Masibo) at the center of the bribery allegations."

For these reasons, the tribunal decided to apply a monetary sanction to the state by partially declining its claims for costs. This rationale has also been endorsed by several practitioners when addressing issues of corruption in investment arbitration.[77]

93. More generally, allegations of corruption may be made for the first time during proceedings involving States. In *Tethyan Copper Company PTY Limited v Islamic Republic of Pakistan*,[78] an ICSID case in which the Respondent State alleged corruption against the Claimant and filed to dismiss the claims against it, the tribunal reviewed the Respondent's submissions, added the parties' evidence into the record, and dismissed the application noting that the Respondent had not:

> "established any of its individual allegations of corruption that would be attributable to Claimant and that could have become relevant as potential contributory fault in the quantum phase."

94. Similarly, in circumstances where the State has not investigated a potential incidence of corruption, it may be incumbent on the tribunal to do so in the course of the proceedings. In *World Duty Free Company Limited v Republic of Kenya*,[79] an ICSID tribunal considered whether a claim for expropriation against Kenya was sustainable when the contractual rights to a concession had been obtained with the payment of a bribe by the investor, which was unknown to the Respondent at the time of the arbitration. After considering a variety of issues, including public policy, the tribunal dismissed the claims.

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74 *Glencore*, Decision on Annulment, para. 367. See also *Getma and Niko Resources v People's Republic of Bangladesh*, *Bangladesh Petroleum Exploration & Production Co. Ltd.* and *Bangladesh Oil Gas and Mineral Co.* ICSID Case Nos ARB/10/11 and ARB/10/18.

75 See the discussion of this issue in A.H. Ali, B.T. Howes, K.-C. Chan, "Corruption Allegations and the Evolution of International Arbitral Procedures", Chapter 25, *The Law and Practice of International Arbitration*, *Essays in Honour of John Fellas* (Juris, 2026), referring to the decisions in *Getma v Guinea* ICSID Case No. ARB/11/29 and *Niko Resources v Bangladesh* ICSID Case Nos ARB/10/11 and ARB /10/18 where notwithstanding the corruption defence put forward in the arbitrations, there had been no trials or convictions in the States' criminal justice systems.

76 See answers to the Questionnaire to the ICC National Committees, supra note 3, Question 3 regarding parallel proceedings, which for the most part do not address investor-state arbitration.

77 See e.g. S. Besson, "Chapter 6: Corruption and Arbitration", in D. Baizeau, R. Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Dossiers of the ICC Institute of World Business Law, Vol. 13, 2015), pp. 103-113. R. Moloo, C. Lamm, H. Pham, "Fraud and Corruption in International Arbitration," in M.Á. Fernández-Ballesteros, D. Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (Wolters Kluwer; La Ley, 2010), pp. 699-731. R. Dolzer; C. Schreuer (eds), *Principles of International Investment Law* (Oxford University Press, 2nd ed. 2012), p. 299.

78 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019.

79 *World Duty Free Company Limited v Republic of Kenya*, Award, ICSID Case No. ARB/00/7.

7. How to balance confidentiality obligations in the arbitration with parallel court, criminal, or administrative proceedings?

95. Although there is a growing trend towards transparency, particularly in investment arbitration, confidentiality is perceived to be fundamental to arbitration proceedings and one of its main advantages.[80] Thus, one must deal with confidentiality questions carefully. However, there is no clear consensus across jurisdictions (and institutional arbitration rules) on the existence and scope of this duty, including with respect to parallel proceedings. For example, in *Webb v Lewis Silkin LLP*,[81] the court noted the inconsistencies in applying the confidentiality principle. It ultimately concluded that a party may rely on confidential matters arising from an arbitration when bringing other proceedings:

> "where it is reasonably necessary to do so to protect … legitimate claims, such as to make claims against third parties."

96. Confidentiality questions often arise when dealing with corruption claims and parallel civil, criminal, or administrative proceedings. In such cases, practitioners must balance the confidentiality duty, if any, against other obligations derived from such parallel proceedings. For instance, the meaning and construction of confidentiality must be defined, particularly under the law of the forum. Additionally, a significant number of the ICC National Committees reported that confidentiality obligations are generally of contractual nature. [82] An obligation of confidentiality may not exist under the applicable law of the relevant arbitration rules but may be found in the procedural orders or the arbitration agreement itself. The lack of clarity over the meaning, scope and application of confidentiality often complicates upholding such requirements.

Having to balance confidentiality obligations with other obligations from parallel proceedings presents further complications.

97. Generally, confidentiality is defined as an obligation "not to disclose information shared within the process such as evidence or hearing transcripts and recordings".[83] The traditional construction of confidentiality is based on the existence of an implied duty of confidentiality[84] (which is not absolute)[85] according to the parties' agreed understanding.[86] Widely applicable international norms (i.e. the "UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)", "Inter-American Convention on International Arbitration" and "European Convention on Human Rights") are silent on the confidentiality of arbitral proceedings.

98. Confidentiality duties in international arbitration are generally defined by the law governing the arbitration agreement – whether explicitly or impliedly – and the law of the seat of the arbitration (i.e. regarding issues of confidentiality of arbitral hearings and proceedings).[87]

99. The UNCITRAL Model Law and other arbitration legislation are also silent on the subject of confidentiality of the arbitral process.[88] This is true, for example, of Swiss, English, Japanese and Chinese arbitral law. Nonetheless, a number of jurisdictions have included confidentiality obligations when adopting the Model Law (i.e. New Zealand, Spain, and Hong Kong (China)).[89] In the absence of express inclusion of confidentiality duties in arbitrations, national courts have taken different approaches as to the existence of implied confidentiality obligations and their scope.[90]

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80 N. Blackaby, C. Partasides, A. Redfern, supra note 63, at para. 2.179.

81 *Sarah Lynette Webb v Lewis Silkin LLP* [2015] EWHC 687 (Ch).

82 See answers to the Questionnaire to the ICC National Committees, supra note 3.

83 J.P. Gomez-Moreno, "Confidentiality and the Legitimacy in International Commercial Arbitration", 16(3) *Revista Româna de Arbitraj* (2023), pp. 15-42.

84 N. Blackaby, C. Partasides, A. Redfern, supra note 63, at para. 2.183.

85 *John Forster Emmott v Michael Wilson & Partners Ltd*, EWCA civ (2008), 12 March 2008: "Although there has plainly been a move to greater privacy …, the obligations of privacy are however not absolute. A clear instance is the right of a party to provide information about the arbitration which it is compelled by law to provide, such as to a regulator or in annual accounts".

86 See J.P. Gomez-Moreno, supra note 83.

87 G. Born, *International Arbitration: Law and Practice* (Kluwer Law International, 3rd ed., 2021), Chapter 10.

88 Ibid.

89 Ibid.

90 Ibid.

100. Several arbitral institutions have included confidentiality obligations in their rules.[91] Some have set confidentiality as the "default setting" of the arbitration, which may be waived by consent of the parties.[92] Others have imposed confidentiality duties on arbitrators and arbitral institutions, empowering them to do so.[93] Yet others have authorised arbitrators to issue confidentiality orders tailored to the circumstances of the relevant case.[94] None of the reviewed rules addresses the treatment of confidentiality in the context of parallel proceedings.

101. Where the agreement to arbitrate does not provide for confidentiality, not every jurisdiction presumes that the arbitration is confidential. Therefore, a case-by-case analysis must be performed based on the applicable law (i.e. that of the seat) to determine whether a confidentiality obligation exists and, if so, to what extent.

102. Unlike commercial arbitration, investor-state arbitration is significantly more transparent and less confidential.[95] Investment arbitration users have promoted transparency as some of them consider that neither the ICSID Convention nor the ICSID arbitration Rules prevent disclosure, while some others argue that the confidentiality duty in these cases is undesirable as it would deprive the public knowledge concerning government affairs.[96] ICSID tribunals have repeatedly held that there is no general obligation of confidentiality in ICSID arbitrations,[97] and no general rule of transparency is provided for in ICSID rules.[98]

103. Notwithstanding the transparency trend, some ICSID tribunals have expressed reservations on disclosure during the course of arbitration proceedings. Specifically, they have identified reasons for issuing restrictions on the disclosure of investment arbitral proceedings and documents, such as the non-aggravation of the dispute.[99]

104. In any case, in the various scenarios where disclosure is required due to parallel proceedings, arbitrators must weigh the impact of preserving confidentiality against lifting it. Such scenarios might include where:

- A party may wish to rely on a determination of law or fact for its *res judicata* effect or influence in a parallel proceeding;
- Disclosure of documents and information shared in the arbitration is ordered in Parallel Corruption Proceedings; or
- An arbitrator is under a duty to report any finding of criminal conduct, such as corrupt acts.

105. Certainly, the importance of preserving confidentiality weighs differently in treaty-based arbitrations than in those derived from a private agreement.

106. As explained below, depending on the law of the seat of arbitration, arbitrators may be under a duty to report any findings regarding corruption claims.[100]

91 See J.P. Gomez-Moreno, supra note 83.

92 Swiss Rules of International Arbitration (2021), Art. 44. See also SIAC Rules (2016), Art. 39; and LCIA Arbitration Rules (2020), Art. 30.

93 AAA Commercial Arbitration Rules and Mediation Procedures, Art. 45. See also SCC Arbitration Rules (2023), Art. 3 and Appendix I, Art. 9.

94 G. Born, supra note 87. See also ICC Arbitration Rules (2026), Art 23(3).

95 Id.

96 See J.P. Gomez-Moreno, supra note 83.

97 G. Born, supra note 87.

98 See, however, the detailed rules in ICSID Arbitration Rules (2022), Chapter X.

99 *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 Sep. 2006, paras 134-142.

100 See the ICC Commission Report *The Corruption Inquiry*, section 3.1 "What do arbitral tribunals do when faced with a positive finding of corruption? What are the arbitral tribunal's duties and options?".

107. With respect to the confidentiality obligations hereby analysed, most of the ICC National Committees reported that confidentiality duties are generally applicable to arbitrators, parties or counsel[101] who, in certain jurisdictions,[102] are relieved from such duties when: (i) disclosure is required by law, regulatory body or court order;[103] (ii) there are allegations of corruption that are under investigation in a parallel proceeding;[104] or (iii) the parties agree to lift the confidentiality duty.[105]

108. The Dominican, Panamanian and Czech[106] ICC National Committees reported that, in principle, confidentiality obligations apply only to arbitrators and (in the case of the Dominican Republic) are not expressly limited either by law or arbitral rules commonly used.[107] The Ecuadorian, Malaysian and Czech ICC National Committees reported that arbitrators' confidentiality does not prevent arbitrators from complying with reporting obligations[108] or with a judicial order (from a parallel proceeding) to disclose information.[109] ICC Mexico reported that testimony coming from counsel or any other individual with a duty to preserve confidentiality (i.e. arbitrators) will be inadmissible.[110] However, they may be relieved of their confidentiality obligation by the person interested in their preservation of confidentiality (i.e. by the client in the case of counsel). Some national courts provide measures to protect confidential information that has been taken from an arbitration procedure.[111] Further, some jurisdictions must observe the principle of publicity with respect to investment arbitrations.[112]

109. Interestingly, neither national laws nor arbitral rules establish confidentiality obligations within a procedure for the investigation of corruption. The consensus among the ICC National Committees when dealing with parallel proceedings is that arbitrators are relieved from their confidentiality duty when they are required to report corruption or when a court investigating the alleged corruption requests information shared within the arbitration procedure. Exceptions, however, may occur when the judge or the State authority presiding over the corruption investigation may decide to keep the information disclosed under seal. But such prerogative falls outside the jurisdiction of the arbitral tribunal.

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101 In most jurisdictions confidentiality obligations are only applicable when parties so agree, for example: Norway, Denmark, Slovenia, and Sweden. For the approach of the UK courts, see *Emmott v Michael Wilson and Partners* [2008] EWCA Civ 184, and cases such as *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft MBH* [2012] EWHC 3837 (Comm). For more detail see *Halsbury's Laws of England, Arbitration* (Vol. 2, 2023), at 2. "Arbitration under Part 1 of the Arbitration Act 1996", 669 "Implicit duty of confidentiality and privacy in arbitrations".

102 United States, Denmark, Spanish, Philippines, Bangladesh and Tanzanian laws do not relieve or limit confidentiality obligations applicable to arbitrators, parties, or counsel where there are allegations of corruption. In Austria, there are no statutory provisions limiting contractual (or statutory) confidentiality obligations of arbitrators. In Norway, the Norwegian Arbitration Act (para. 5) for counsel and lawyers acting as arbitrators provides for a confidentiality obligation which is not generally relieved or limited where there are allegations of corruption that must be investigated. For a discussion of the position in France, see D. Chilstein, "Droit pénal et arbitrage", *Rev arb.* (2009), para. 42.

103 Such is the case of: (a) Bahamas according to §19 (d)(ii) of the Bahamas Arbitration Act (2009); (b) Some Canadian provinces. The afore according to the ICC National Committees' answers to the Questionnaire, supra note 3; (c) Haiti where court orders prevails over confidentiality obligations in an arbitral proceeding; (d) Peru where confidentiality governs in principle, but a Judge may request information, and, in this case, it is justified to be able to provide information; (e) Spain, where the confidentiality of arbitration may be lifted by a duly reasoned court order issued in the context of criminal proceedings; (f) Czech Republic, if authorities involved in criminal investigation request a district court to replace the confidentiality agreement with the release of the arbitrator from his/her duty of confidentiality; (g) France noting that a search warrant or a seizure order from a Court is required to relieve the parties from the confidentiality duty; (h) Portugal (see Art. 30(5) of the Portuguese Arbitration Law); (i) Switzerland only with respect to arbitrators; (j) England; (k) Iraq; (l) Lebanon; (m) Palestine; (n) Tajikistan; (o) Australia if disclosure is compelled by law; (p) Japan; and (q) Taiwan.

104 That is true in Brazil, some Canadian provinces, Cyprus, Nigeria, China, Jordan, Ukraine, and Singapore. The afore according to the ICC National Committees' answers to the Questionnaire, supra note 3.

105 Such is the case of Czech Republic and Netherlands when parties, in the first, place agreed on the confidentiality of the arbitration procedure and, thereafter, expressly agreed to relieve the parties from such duty. In the Netherlands and Ukraine is not a practice to lift the confidentiality duty. According to Russian law, parties may agree to lift the confidentiality duty.

106 See para. 6(1), Czech Arbitration Act.

107 Such is the case of Dominican Republic, according to the ICC National Committees' answers to the Questionnaire, supra note 3.

108 In Ecuador, even when parties have agreed on confidentiality, the arbitrator could be obligated to report a crime under Ecuadorian law (i.e. corruption acts). In Czech Republic, see para. 368 of Act. No. 40/2009 Coll.

109 Under Ecuadorian law, if a competent authority requests the arbitral tribunal to provide relevant information regarding corruption activity, arbitrators must comply with such petition.

110 Mexican National Code of Civil Procedures, Art. 362.

111 Such is the case of Brazil whereby, as a rule, said information is protected under seal by court order in accordance with section 189(IV) of the Brazilian Civil Procedure Code. Although there are some rulings by the São Paulo State Court of Appeals suggesting that section 189, IV, of the Brazilian Civil Procedure Code is unconstitutional. See Appeal No. 1031861-80.2020.8.26.0100, decided on 30 June 2021; and Interlocutory Appeal No. 2263639-76.2020.8.26.0000, decided on 2 March 2021. However, it is worth noting that the matter is yet to be addressed by the Brazilian Supreme Court and/or the Superior Court of Justice, which have historically been friendly towards arbitration. The afore according to the National Committees answers to the Questionnaire, supra note 3.

112 Such is the case of Brazil. See para. 3 of section. 2 of the Brazilian Arbitration Act.

110. When dealing with document production requests of documents produced in local proceedings and/or when faced with orders from local authorities to disclose documents and information shared in the arbitration, the arbitral tribunals may consider issuing a confidentiality order. In drafting such an order, the arbitral tribunal may take into account the following key considerations:

- clearly defining the scope of confidentiality specifying whether it includes all documents produced in the proceeding (arbitral or parallel) or only specific categories;
- determining crystal-clear criteria for designating documents as confidential (such as trade secrets, sensitive financial information, proprietary data, etc.);
- directing the parties to mark documents in accordance with the aforementioned criteria;[113]
- drafting rules governing the identification and handling of confidential information;[114] and/or
- determining rules for the redaction of documents.

111. Considering that each jurisdiction regulates the confidentiality of the arbitral proceedings differently, especially with respect to parallel proceedings, there is no "one size fits all" formula for balancing confidentiality obligations against obligations derived from parallel proceedings. Absent such formula, key considerations for balancing obligations include considering whether:

- a confidentiality obligation exists (either express or implied);
- disclosure is mandatory;
- the law applicable to the arbitration agreement (or that of the seat) relieves an arbitrator from its confidentiality duty; and
- such disclosure would aggravate the dispute.
- the materiality and relevance of the arbitration to the Parallel Corruption Proceeding; or
- the materiality and relevance of the Parallel Corruption Proceeding to the arbitration.

8. What measures may be taken in arbitration proceedings to protect a party representative or a witness against self-incrimination?

112. The right to avoid self-incrimination must be prioritised over the pursuit of truth in arbitration proceedings,[115] without unduly expanding that right. This consideration emerges from the confluence of three factors:

i) **The right against self-incrimination** is found in Art. 14(3)(g) of the International Covenant on Civil and Political Rights and Art. 67(1)(g) of the Rome Statute on the International Criminal Court, making it nearly a universal human right.[116] It protects the individual's fundamental rights and maintains the integrity of concurrent criminal proceedings. Insofar as it reflects international public policy,[117] upholding the protection against self-incrimination may also serve the enforceability of the arbitral award.

ii) **This right is also incorporated into national laws.** For instance, as set out in *Keating v Office of Thrift Supervision*, a factor considered by US courts is the extent to which the defendant's Fifth Amendment rights are implicated with a view to protecting the defendant's constitutional rights against self-incrimination.[118] England and Singapore recognise this right under common law.[119] The precise scope of the principle may vary from one jurisdiction to another, but it is found across the globe.

iii) **The right to avoid self-incrimination inherently contradicts the need for truth and efficient arbitration.** A Swiss arbitrator suggested balancing parties' conflicting interests and prioritising efficient proceedings if in doubt.[120] This perspective underscores the necessity of clearly defining the boundaries of the right in order to prevent undue interference with the arbitration.

113 In *Ethyl Corporation v Canada* (NAFTA/UNCITRAL, 1999), the confidentiality order required the parties to mark documents as "Confidential Business Information" and to respect the confidentiality of documents so marked.

114 Ibid., where the tribunal issued an order (additional to the confidentiality order) governing the identification and handling of confidential information.

115 R. Mosk, T. Ginsburg, "Evidentiary Privileges in International Arbitration" 50 *International & Comparative Law Quarterly* (2001), pp. 345 ff., 381.

116 Art. 14.3(g) states that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees … not to be compelled to testify against himself or to confess guilt". Art. 67(1)(g) provides that: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [g] Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence".

117 See R. Mosk, T. Ginsburg, supra note 115, at 380.

118 *Keating v Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995).

119 *Debenho Pte Ltd and another v Envy Global Trading Pte Ltd and another* [2022] SGHC 7, para. 37.

120 L. Groselj, supra note 3; Swiss Chambers' Arbitration Institution, Case No. 300273-2013, Procedural Order No. 15 dated 10 July 2015, *Claimant and Counter-Respondent v Respondent 1 and Counterclaimant, Respondent 2, Respondent 3.*

113. The precise scope of this protection involves several steps:

- Identifying the applicable law: this would normally be the law which has the most significant relationship with the evidence in question.[121] In the case of parallel criminal proceedings, that would be the law of those criminal proceedings.
- Determining the acts of criminal procedure that trigger the protection: actual criminal proceedings, a criminal investigation, a police investigation, etc.
- Identifying who benefits from the protection: only individuals or also legal entities?
- Determining the substantive scope of the protection: is it limited to statements that constitute an admission of guilt, or is it broader?[122]
- Determining how "compelled" testimonies will be treated in the criminal proceedings: will they be admissible or not?[123]
- Establishing the conditions under which the protection can be waived, including whether certain statements can imply a waiver.

114. In the course of an incidental proceeding devoted to these issues, it may be necessary to allow the party representative or witness concerned to be assisted by legal counsel different from those of the parties to the arbitration.

115. If the protection applies, the tribunal must decide on the legal implications of a person choosing to remain silent, notably, whether the tribunal may draw adverse inferences from the silence,[124] or whether drawing adverse inferences is incompatible with the very protection from self-incrimination.[125]

116. The applicable legal regime may allow a party representative or witness to remain silent on some but not all the evidence requested. In that case, it will be necessary to adopt a procedural decision setting out the process by which the evidence, either documentary or oral, will be gathered and privileged information will be preserved. Mirroring the methods of the criminal courts or authorities in the parallel proceeding will minimise the risk of infringing on the protection as it is conceived in the parallel proceeding.

117. In general, arbitral tribunals should prioritise proportionate and tailored procedural measures capable of accommodating the privilege while preserving the efficiency and integrity of the arbitral process. In rare cases, the arbitral tribunal may consider staying the arbitral proceeding pending the criminal proceeding, especially if the criminal trial is imminent.[126] In deciding whether to stay the proceeding, the tribunal may also consider whether the outcome of the criminal trial may produce evidence of relevance to the arbitral proceeding.

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121 R. Mosk, T. Ginsburg, supra note 115, at 367, 370.

122 J. Parker, N. Barnard, Self-Incrimination Protection and Procedure in International Cases (*Financier Worldwide*. Feb 2020).

123 Ibid.

124 R. Mosk, T. Ginsburg, supra note 115, at 349. For further review of these issues, see the Report of the IBA Task Force on Privilege in International Arbitration – Report on Uniform Guidelines on Privilege in International Arbitration: Annex 7 – Privilege against Self-incrimination (2024).

125 See A. Brundage, "The Adaptation of Judicial Procedures to the Arbitral Process", 5 *San Diego Law Review* (1968), p. 21.

126 J. Woodland, supra note 12.