Red Flags or Other Indicators of Corruption in International Arbitration

Document of the Task Force 'Addressing Issues of Corruption in International Arbitration' of the ICC Commission on Arbitration and ADR

This Document of the ICC Commission on Arbitration and ADR entitled 'Red Flags or Other Indicators of Corruption in International Arbitration' (hereafter 'Red Flags Document') reflects part of the ongoing work of the ICC Task Force 'Addressing Issues of Corruption in International Arbitration' (the 'Task Force'), which is led by Co-Chairs Sophie Nappert, José Ricardo Feris and Vladimir Khvalei, as well as by Caline Mouawad, Melanie van Leeuwen, Carita Wallgren-Lindholm and Dr Hélène van Lith on behalf of the Commission's Steering Committee. The Task Force works closely with the ICC Corporate Responsibility and Anti-Corruption Commission and the International Bar Association (IBA).

Within the Task Force, a specific track led by Lucinda Low, Abdulhay Sayed, Xavier Andrade and Patrick Baeten focused on the issues of 'red flags or other indicators' which is reflected in this Document. This 'Red Flags Document' will be an integral part of the Report of the Task Force, which will consist of a general part supplemented by separate annexes on specific issues of corruption in international arbitration, including the 'Burden and Standard of Proof', 'Issues related to Arbitrators', 'Parallel Proceedings' and 'Red Flags or Other Indicators and the Use of Artificial Intelligence'.

While these issues, such as the standard and burden of proof in relation to allegations of corruption, obviously intersect with the issue of red flags, they will not be addressed in the Red Flags Document beyond noting the points of intersection.

The Red Flags Document provides for detailed guidance on the identification and assessment of corruption in arbitration proceedings, frequently called for by the arbitration and anti-corruption community, including corporate users of ICC Dispute Resolution Services, (ICC) arbitral tribunals, arbitration practitioners, and anti-corruption and compliance officers. Its purpose is to promote understanding of what red flags or other indicators are, their use, and their limits as a tool in establishing a corrupt practice. By introducing a three-step methodology for evaluating potential or asserted red flags, the Document constitutes an innovative approach to address issues of corruption in international arbitration.

Executive summary

The purpose of this Commission Document ('Document') is to identify, examine and assess the use and relevance of 'red flags' of corruption (also referred to as 'indicators of corruption') in the context of international arbitration. The Document intends to assist arbitral tribunals, set-aside, annulment, and enforcement judges, and arbitral institutions when they are alerted by red flags of corruption in the facts of an arbitration, i.e. when allegations of corruption are raised, either affirmatively or as a defence by parties to a dispute that has been submitted to arbitration, or when the arbitral tribunal, *sua sponte*, develops concerns about possible corruption.

After examining the genesis of the red flag concept, the Document suggests defining a 'red flag' as any fact or circumstance that indicates a potential risk of corruption, most often bribery involving a public official. It highlights the importance of identifying the specific legal elements of the corrupt practice at issue and to examine the relationship between the asserted red flags and the legal elements of the corrupt practice.

The Document identifies two categories of red flags:

- **General red flags** relate to the immutable contextual characteristics of the country, geography, or government administration in question, as well as the business sector.
- **Specific red flags** relate to facts or circumstances pertaining to the counterparty, to the proposed transaction, the relationship or payment (where a third party is involved), or the transaction itself.

A crucial question for arbitral tribunals is how to respond to and, consequently, how to assess any asserted or presented red flags, particularly in terms of whether they constitute evidence of a corrupt practice. This Document seeks to elucidate and clarify from a methodological perspective how to approach such matters. It is crucial to recognise that red flags require validation, further assessment in evidentiary terms, and ultimately linkage to the specific legal elements of the corrupt practice in question. Rather than possessing a probative force of their own, red flags can lead to a finding of corruption only with additional reasoning.

In this vein, this Document proposes a three-step methodology for evaluating potential or asserted red flags which can be summarised as follows:

Step 1. Identifying the potential/asserted red flags. This step involves determining which facts, factors, or circumstances are relevant to the specific corrupt practice at issue (either as alleged or as they appear).

Step 2. Validating or confirming (or negating) the red flags. This step determines whether the alleged red flags are factually supported. It also assesses the strength of the red flag. This entails considering the totality of the relevant facts and circumstances, including the evidence of red flags, contrary indicators, or 'green' flags, as well as mitigating measures or circumstances. It also involves identifying the available fact-finding tools to assemble this picture.

Step 3. Assessing red flags from the perspective of the law on evidence. From an evidentiary perspective, the document noted that red flags may lead to circumstantial evidence, while in other instances they may represent or lead to direct evidence.

The Document then maps how red flags impact procedural questions such as the admissibility of allegations of corruption, the admissibility of new evidence, the shifting of the burden of proof, and the application of the proper standard of proof.

It then examines red flags from the perspective of the legal duties of arbitrators, and recommends that, in cases involving red flags of corruption, arbitrators should strive to achieve a proper balance in the discharge of their duties. In particular, they must resolve the dispute submitted before them by the parties and must do their best to ensure that the award rendered is enforceable. This implies that the arbitrator must not divert the process and resources to unnecessary investigations that may create an unjustified burden on the parties or, in some cases, violate due process. The arbitrator must apply the law, including mandatory rules. Finally, the arbitrator must maintain impartiality in decision-making and avoid becoming biased in favor of one party, despite the existence of corruption.

The Document concludes with a discussion of the role of corporate compliance measures. Drawing on the distinction between *ex ante* and *ex post* risk analysis, the Document notes that while red flags play a role in both contexts, the objective of the *ex post* risk analysis, as conducted by an arbitrator, is to determine whether a corrupt practice has in fact occurred, and not whether there is a risk that it may occur. While it is useful to consider the preventive measures taken by a company *ex ante*, the judgments ultimately made in the preventive context are unlikely to determinative in the *ex post* (arbitration) context.

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Introduction

In recent years, allegations of corruption have arisen with increasing frequency in arbitral proceedings, both commercial and investor-state. They can arise (i) as part of an affirmative claim, (ii) as a defence to jurisdiction or admissibility of a claim, and (iii) sometimes in other contexts.[1] The inherently clandestine nature of most acts of corruption and the lack of compulsory tools (such as subpoena power) available to arbitrators may be argued to limit the evidence that is available to the arbitral tribunal to evaluate the allegations or suspicions, including any evidence that would demonstrate whether an improper payment has in fact been made. It is in this context that 'red flags', sometimes called 'indicators', or 'risk indicators', have been increasingly put forward by parties to a dispute as relevant to or even constituting 'circumstantial evidence' that is determinative of the corruption issue.

This Document will use the term 'red flags' to encompass the range of expression of corruption risk indicators, whether as red flags, indicators, indices (as in *faisceau d'indices*), or other similar terms. The purpose of this Document is to promote understanding of what these red flags or indicators are, and their uses and limits as a tool in establishing a corrupt practice. It will also explain the concept of 'green' flags and other shades of indicators that may be put forward in this context.

Although red flags are sometimes equated with 'circumstantial evidence', this Document starts from the position that they are simply *indicators* of corruption risk, which like any other fact, need to be confirmed or validated before their probative value in relation to the corrupt practice can be considered, and then considered in their totality for their evidentiary implications.[2] While the ultimate assessment of a corrupt practice may focus on circumstantial evidence, that evidence is best seen as the result of this assessment process rather than the input. The Document thus sets forth an analytic framework for the assessment of red flags and consideration of their implications, including in evidentiary terms.

Some may argue that corruption issues are not sufficiently different from any other issue to be decided by an arbitral tribunal and that the issue does not therefore justify a specific approach to the assessment of red flags. Others may argue that an assessment of whether a corrupt practice has occurred should be left to the arbitral tribunal's 'gut feeling' and that any attempt at a methodology will unduly constrain decision-making. Still others may question whether criminal law concepts are being improperly imported into civil disputes. Finally, there may be fears that any methodology will discourage a finding of corruption and therefore inhibit the fight against it.

However, none of these concerns should discourage arbitrators from testing the utility of the approach described in this Document. Corruption does in fact give rise to distinct challenges – not because its proof may ultimately rest primarily on circumstantial evidence, but because its under-the-table characteristics have given rise to resort to red flags as a proposed additional tool to ascertain corruption. Precisely because red flags are often being put forward as circumstantial evidence of corruption, it is critical for arbitrators to understand the various typologies of red flags and the considerations that may come into play when determining whether in a particular case they are valid elements of proof and to what extent.

On whether corruption issues should be decided by reference to a 'gut feeling' or a reasoned process, this Document starts from the premise that arbitrators are generally entrusted with the task of deciding disputes on the basis of applicable law, and that corruption issues should be subjected to the same analytic rigour as any other factual and legal issue.

The Document also starts from the assumption that the standard to be applied is a civil rather than a criminal standard of proof, and should not import concepts from criminal law (such as *mens rea*) that are not relevant in the civil context. While red flags have their roots in criminal law, that does not mean they have no potential application in a civil context – as their increasingly frequent invocation in arbitration demonstrates. Part of the assessment of the probative value of red flags (Section 1.3 'The probative value of red flags') relates to their relevance to the applicable legal standard for the corrupt practice at issue in the arbitration and to whether the alleged misconduct involves a contract *of corruption* or a contract (or investment) *resulting*

1 For instance, in relation to damages, set-aside, annulment or enforcement actions, or procedural issues such as those discussed in Section 3 'The procedural effect of red flags'.

2 This is consistent with the view taken by a number of arbitral tribunals. See e.g. *Union Fenosa Gas v. Arab Republic of Egypt,* ICSID Case No. ARB/14/4, Award, 31 Aug. 2018 (hereinafter, *Union Fenosa v. Egypt)*, paras. 7.73, 7.113 ('even the reddest of red flags does not suffice without proof of corruption before the tribunal').

from corruption.[3] As briefly discussed in Section 1.2.2 'Red flags resonate with the legal elements of corruption', such distinction may have implications for the types of red flags that would be relevant.

The question of what impact a methodology may have on the fight against corruption appears to be a false dilemma. The purpose of a methodology is not to make a determination of whether a corrupt practice has occurred easier or harder; but to make that determination more analytically sound and therefore fairer and more defensible, thereby furthering the rule of law and contributing to the consistency and predictability of the system.

This Document is prepared with both commercial and investor-state disputes in mind. It addresses both public and private sector corruption, albeit with a greater focus on the former since red flags have been developed in the public sector context. The methodology outlined in this Document is not a 'one size fits all'. Not only is there a range of potential corrupt practices and contexts in which the issue arises, but there is no exclusive list of red flags. A determination whether a corrupt practice has occurred is a highly fact-specific exercise, and different red flags will be relevant in different contexts.

In **Section 1** of this Document, the definition of red flags, their characteristics, role, and typologies, and their use in methodological terms as a fact-finding tool, will be examined in detail. **Section 2** will discuss, through a suggested three-step methodology, the use and limits of red flags both to identify a corruption risk and to consider their evidentiary character. **Section 3** will then address the procedural effects of red flags when they arise in arbitral, enforcement and set-aside proceedings. **Section 4** will examine the role and responsibilities of the arbitral tribunal in relation to red flags, particularly but not exclusively in relation to a so-called 'tacit' case of corruption. **Section 5** will principally consider two new and emerging areas in relation to red flag analysis: first, the relevance of preventive measures by companies (in the form of corporate compliance measures) and their relationship to so-called 'green flags'; and second, the role of data analytics and, in particular, artificial intelligence ('AI') as both a source of red flags and a tool for detection. An **Annex entitled 'References'** lists key resources, such as international conventions, selected national rules, good practice and country rankings.

3 The consequences may differ depending on whether the issue arises in commercial or investment arbitration, and whether, in the case of a contract, whether it is considered to be a '*contract providing for corruption*' or a '*contract whose consent has been undermined by an act of corruption*' (in the terms set forth in Art. 8 of the Council of Europe 'Civil Law Convention Against Corruption', E.T.S. No. 174 (adopted on 4 Nov.1999, entered into force on 1 Nov. 2003).

1. Definitions, characteristics, role, and typologies of red flags

Before turning to red flags, it is important to highlight that although claims or defences may be framed in terms of 'corruption', the term 'red flag' is more of an umbrella or catch-all concept than a legal term. The UN Convention Against Corruption (2003), for example, a global international instrument that has attracted wide adherence from States, identifies more than a dozen distinct types of corrupt practices in its Part I, some but not all of which are subject to mandatory criminalisation. Other regional conventions take a similar approach.[4]

In contrast, the OECD Anti-Bribery Convention (1997) ('Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions') is focused principally on bribery (from the 'active' or 'supply' side) and a limited number of secondary or closely connected offenses.

Typically, the first task of an arbitral tribunal will therefore be to define with greater specificity and in terms of the governing law (which may, of course, include international as well as national norms) the precise nature of the alleged or suspected corrupt practice. In many – if not most – cases, this is likely to be bribery, but other corrupt practices, such as trading in influence, may also be alleged. The typification of the conduct at issue will indicate the elements of the corrupt practice to be established, with implications for the red flags that may be relevant.[5]

For example, the OECD Anti-Bribery Convention's definition of 'transnational bribery' drawing heavily on the U.S. Foreign Corrupt Practices Act (1977),[6] focuses on the following elements: the intentional offering, promising or giving of any undue pecuniary or other advantage – whether directly or through intermediaries, to a foreign public official – in order for that official or for a third party to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[7]

4 See the Annex – 'References', '1. Principal international conventions'.

5 Some types of corrupt practices, such as bribery, are widely condemned by countries, while others (such as trading in influence and even transnational bribery) have a lower degree of international consensus. One indicator of the degree of consensus is whether criminalisation of the particular practice is made mandatory by an international anti-corruption treaty, or subject to a lesser degree of obligation (such as 'consider'). The degree of consensus around a particular practice may also have implications for whether it reflects international public policy.

6 The FCPA was the first transnational anti-bribery statute to be enacted by a country.

7 See OECD Anti-Bribery Convention, Art. 1(1).

As this definition makes clear, this is a *quid pro quo* concept in which the briber seeks to receive something in return for the bribe in the form of official action or inaction, rather than simply giving a gift or gratuity. It is also a standard that applies to indirect ('through intermediaries') as well as direct bribery. As discussed in below,[8] the concept of 'red flags' in the corruption arena has its roots in norms prohibiting indirect bribery, although the concept has been extended to direct bribery, especially in the context of procurement and other major government licenses and approvals.

1.1 Red flags – Definition, origins, legal status and relevant civil applications

A red flag in the context of allegations of corruption is any fact or circumstance that indicates a potential risk that a corrupt practice, most often bribery involving a public official, has occurred.[9] The concept is also used in other regulatory compliance contexts, such as trade controls and anti-money laundering, but this Document is focused solely on their use in the context of potential corruption.

1.1.1 Origins: the U.S. Foreign Corrupt Practices Act ('FCPA')

Red flags in the anti-corruption context have their origins in the third-party liability standard of the FCPA, the first transnational bribery legislation to be enacted by any country in the late 1970s.[10] The FCPA criminalised the bribery of foreign public officials and certain other categories of recipients[11] for a business purpose, in terms similar to those set out 20 years later in the OECD Anti-Bribery Convention.[12]

Both direct and indirect bribery (i.e. bribery effected directly by individuals or through corporate personnel, as well as through intermediaries) were prohibited.

Rather than simply prohibiting indirect bribery, the FCPA (as originally enacted) contained a provision proscribing payments to 'any person' while having 'reason to know' that that person would pass on the payment in whole or in part to a foreign official or other covered recipient. This 'reason to know' standard was criticised as inappropriate for a criminal statute – since it potentially could be triggered by mere negligence – and in 1988 was changed to a 'knowledge' standard. As the statutory definition made clear, this standard could be triggered not just by positive knowledge but by willful ignorance, or 'head in the sand' behaviour.

Although the FCPA says nothing about red flags, the concept was put forth by U.S. enforcement authorities soon after the FCPA's enactment, and retained when the statute was later modified. It remains a viable enforcement concept, as reflected in the Resource Guide to the U.S. Foreign Corrupt Practices Act ('FCPA Resource Guide'), issued by the two U.S. government agencies that enforce the statute, the Department of Justice and the Securities and Exchange Commission and last updated in 2020.

In origin, therefore, the concept of red flags is tied to the issue of indirect bribery – the potential for corruption of a public official through a third party, such as an agent, consultant, representative, broker, partner, or others. In fact, a high percentage of bribery cases prosecuted by national authorities involve such third parties, sometimes referred to as 'intermediaries', and it is considered a central area for preventive risk management.[13] There is no limit to the types of third-party relationships that can give rise to such risks and no requirement that the third party be formally empowered to act on the principal's behalf.

1.1.2 Red flags at the international level

International anti-corruption treaties began to be adopted in the late 1990s, first on a regional basis,[14] then in the OECD for capital-exporting countries in the late 1990s,[15] and finally culminating in a global convention of the United Nations, the Convention Against Corruption ('UNCAC'), in 2023. Today, most

8 See Section 1.1.1 'Origins: the U.S. Foreign Corrupt Practices Act ('FCPA')'

9 Many bribery statutes today also apply to private sector bribery, or separate legislation covering bribery in the private sector may exist.

10 The FCPA was enacted in 1977, and became effective in 1978, in the wake of revelations of overseas bribery of public officials by many U.S. companies, first detected in the investigation of the Watergate scandal. It has been amended twice: once in 1988; and the second time in 1998, in connection with U.S. ratification of the OECD Anti-Bribery Convention.

11 These include political parties, party officials, and candidates for political office, as well as anyone "acting in an official capacity" on behalf of a government. Officials of public international organizations, such as the World Bank and the United Nations, are also covered.

12 However, the OECD Anti-Bribery Convention is narrower than the FCPA in that it does not apply to bribery involving political parties, party officials, or candidates for political office. See M. Pieth, L.A. Low, N. Bonucci, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2d ed. 2013), Ch. 1.

13 As discussed further in Section 2.2.1 '*Ex ante* assessment' and more extensively in Section 5.1 'New and emerging issues', red flags have become a key tool in the preventive, or *ex ante*, context, as companies seek to mitigate potential corruption risks associated with the engagement of third parties; they are also considered in the *ex post* context in connection with the analysis that must be performed under the FCPA's 'knowledge' liability standard for indirect bribery.

14 The Inter-American Convention Against Corruption (1996), later expanding to the EU and Africa, see Annex 'References', '1. Principal international conventions'.

15 OCDE Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) ('OECD Anti-Bribery Convention').

countries are party to at least one of these conventions, and a significant number participate in multiple conventions. The scope of these conventions ranges from quite focused (in the case of the OECD Anti-Bribery Convention), to comprehensive (in the case of UNCAC). Although some of these instruments contain provisions relevant to civil disputes,[16] there is only one instrument focused exclusively on civil law, the Council of Europe 'Civil Law Convention Against Corruption'.

None of these anti-corruption treaties contain provisions on red flags, however. Virtually all such treaties require the criminalisation of public sector bribery in the domestic sphere, and several require it (at least from the supply or active side) in the transnational sphere.[17] However, the proscription is typically framed as a prohibition on bribery, whether direct or indirect, without any special provisions for third-party liability such as those found in the US FCPA. Nonetheless, the concept of 'red flags' has found its way into soft law instruments, generally as signaling bribery ('pass-through') risks by a third party in relation to a public official. ICC, for instance, devotes significant attention to red flags in its guidance document 'ICC Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises'.[18]

The basic concept first articulated in the FCPA context, and later embraced internationally, was that red flags, while not constituting proof of corruption – and this point is key – were indicators of a potential risk of public official bribery, and therefore ignoring them could lead to liability for 'head in the sand' behaviour.[19] This concept has had profound implications for corporate compliance practices, both domestically and internationally, which is reflected in the 'good practice' guidance issued by the OECD on internal controls, ethics and compliance in 2009, and in multiple other guidance documents.[20] Today, responsible companies are expected:

1. To take steps prior to engaging a third party to do risk-based due diligence on that third party.
2. If the engagement goes forward, to take appropriate steps to mitigate any bribery or corruption risks (i.e. red flags) identified using contractual and other tools (such as training, audits, etc.).
3. To maintain continuous oversight and monitoring of the third party's activities during the course of contract performance and respond appropriately to any red flags that arise during such performance.

Many corporate compliance programmes today require periodic updating of core due diligence. These compliance steps and programmes may be relevant as potential 'green flags'. It should be emphasised that while these standards are in place today, as international 'soft law' norms (and as standards in domestic transnational bribery legislation in a number of countries), their emergence is relatively recent. The FCPA stood for almost 20 years as the world's only transnational bribery statute and it was not until the adoption of the OECD Anti-Bribery Convention in 1997 that other capital-exporting countries began to enact similar legislation.

As further discussed in this Document,[21] preventive compliance expectations have tended to follow the adoption of 'transnational bribery legislation' or international anti-corruption instruments, unless the legislation adopted includes a compliance defence as part of its basic scheme.[22] When assessing historical conduct, therefore, arbitral tribunals should be careful not to impute compliance expectations to companies at times when such expectations had not yet become part of domestic law or enforcement expectations, or sufficiently ripened at the international level to be considered a good practice.

1.1.3 Application to the civil context

'Red flags' have been prominently featured in a number of arbitral decisions. One of the best known decision is *Metal-Tech v. Republic of Uzbekistan*,[23] in which the arbitral tribunal found that two contracts of the foreign investor with third parties were in effect contracts for corruption, and that the investment had been procured via bribery in violation of Uzbek law, resulting in a dismissal for lack of jurisdiction based on the

16 UN Convention Against Corruption (2003), Art. 34 'Consequences of acts of corruption' and Art. 35 'Compensation for damages'.

17 Not all instruments deal with private sector bribery, and for those that do, it is generally not treated on the same plane with public sector bribery. Most of the instruments contain provisions on other so-called 'acts of corruption' as well, sometimes requiring their criminalisation, and at other times requiring consideration of criminalisation or other steps.

18 This ICC guide aims to address the due diligence requirements and procedures and inspire Small and Medium size Enterprises (SMEs) to engage in due diligence by creating achievable and manageable due diligence goals. See also the 'ICC Rules on Combating Corruption' (2023).

19 See U.S. Department of Justice and Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practice Act (2nd Ed., 2020), at pp. 22-23.

20 See the Annex – 'References'.

21 See Section 5.1 'Role of corporate compliance measures' and the discussion under Section 2.3.2 'Step 2 – Confirming or validating an individual alleged red flag', 'ii) Specific red flags', '4.(Lack of) compliance measures'.

22 Such a provision is found e.g. in the UK Bribery Act 2010 (referenced there as 'adequate procedures').

23 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013.

requirement that the investment had to have been made 'in accordance with law'. This illustrates the cross-over of red flags from the criminal to the civil context.

The importation of red flags into civil disputes where corruption issues are present does not mean that criminal standards should be imported wholesale into the civil arena. State of mind (*mens rea*) elements of criminal offenses, for example, may not be relevant to the corrupt practice put at issue in a civil context. This will depend on the applicable law. One caveat, illustrated by the *Metal-Tech* decision, is important to note: international law instruments and other authorities distinguish between *contracts of corruption* and *contracts resulting from corruption*.[24] While the latter are voidable by the injured party, the former are void *ab initio*.

Assessing whether a contract is a *contract of corruption* involves a determination of the purpose of the contract as intended by the parties, which begins to approach a state of mind element. However, this should be an objective determination based on the facts and circumstances. Both red and green flags may be relevant in assessing the purpose. A different element must be considered when assessing contracts allegedly *resulting from corruption*, that being the element of causation. Red or green flags going to causation may also be relevant to that element.

1.2 Characteristics of red flags

Red flags are facts or circumstances that are tied to a certain type of corruption risk. They resonate with the 'constitutive legal elements' of a specific corrupt practice and are perceived as such when they are put forward in the form of an allegation by a party, or when they give rise to *sua sponte* suspicions by a decisionmaker in international arbitration.

1.2.1 Red flags are facts or circumstances tied to corruption risk

At their core, red flags reflect facts or circumstances, real or perceived, of relevance to a dispute involving a business contract or an investment, which an arbitral tribunal is constituted to adjudicate. Furthermore, red flags in the context of a dispute point to some kind of corruption risk considered in an *ex-post* context.[25]

Arbitrators are not vested with enforcement powers to prosecute corruption from the standpoint of criminal law. However, as discussed in Section 4 below, they are invested with the duty to enforce the civil law consequences set out in the rules prohibiting corruption. Red flags must be confronted when it is necessary to ensure that arbitral awards are not exposed to the risk of leaving questionable facts or circumstances in a transaction or investment in dispute unchecked or unsanctioned.

1.2.2 Red flags resonate with the legal elements of corruption

Issues of corruption as dealt with in international commercial and investment arbitration fall into specific types of offenses carefully defined by reference to their constitutive legal elements, as set out in international conventions, as well as in the relevant national laws.

Some arbitral tribunals consider that given that corruption is a matter of transnational public policy, there is little relevance to specific statutory rules setting forth the legal elements of corruption.[26] While this may be true, given that transnational public policy is a value-based concept and that there is a global consensus condemning corrupt practices, international instruments and the national laws reflecting this universal condemnation do contain such constitutive legal elements. Red flags arise as risk indicators because they are tied to the objective legal elements of a corrupt practice at issue, not only because they stir the repulsion of an arbitral tribunal by reference to transnational public policy, but because they resonate with legal rules that prohibit transnational corruption set out in international conventions and national statutory legislation.

The legal elements of the offense are the types of ultimate facts, iterated in the substantive rule that needs to be proven, to enable an adjudicator to make a determination that the relevant offense has been committed and from there to adjudge the consequences of such determination. Legal elements often vary from one legal instrument to the other, whether in international

24 Council of Europe, Civil Law Convention on Corruption, Art. 8; R. Kreindler, *Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements* (Hague Academy of International Law, 2013), Ch. 5.

25 See Section 2 'Methodological considerations', 2.2.2 '*Ex post* assessment'.

26 See e.g. *Exem Energy B.V. (The Netherlands) vs. Sociedade Nacional de Combustíveis de Angola, - Sonangol E.P. (The Republic of Angola)*, Netherlands Arbitration Institute, NAI 4687, Final Award, 23 July 2021, finding, without use of the technique of red flags, that a Share Purchase Agreement had been tainted by corruption because it has been made through the involvement of a daughter of the Angola President, who had been the chair of the respondent State entity that concluded the agreement. Para. 8.18 rules as follows: 'Furthermore, as the case law of the Supreme Court of the Netherlands makes clear, for the operation of Article 3:40 para. 1 of the Dutch Civil Code it is not required that a legal act has been concluded or performed in violation of a specific statutory rule, in particular a rule contained in the Dutch Criminal Code'.

conventions, or in domestic law.[27] They may also vary from the perspective of whether the offense is considered in the context of criminal or civil law.

Schematically, one is able to posit that there are two sets of legal elements of corruption offenses that are commonly used in national legislation, and international conventions,[28] and are relevant to international arbitration:

1. Acts of promising, offering, receiving, soliciting undue advantages directly, or using or exerting influence on or by a foreign public official in order to obtain, grant or retain a business advantage in the context of international commercial and investment contracts. This is the material element, commonly known in criminal law as *actus reus*.
2. An intent to corrupt, to bribe, to solicit a bribe or benefit directly; to use, offer or exert influence by or through intermediaries.

As discussed above, *mens rea* does not have the same application in the civil context as in the criminal context; rather, questions of purpose and causation ('*cause indirecte*' or '*intention réelle*' as understood in civil law) come into play. The element of intent is relevant in so far it underlies consent in contracts, whether one is speaking of a 'contract of corruption' or a 'contract procured by corruption'. The formation of contract is the product of a meeting of minds, expressed as reciprocal declarations, which are exterior manifestations of the consent, mutually communicated, and are as such provable. However, what marks arbitration cases dealing with corruption is an element that lies beneath the expressed consent, namely intent, and in particular the corrupt intent that is so often hidden behind benign contractual constructs.[29]

Red flags come into play when they resonate as risk indicators with one or more of the constitutive legal elements of the relevant corrupt practice. As such, red flags are 'only indicators that must be pursued to determine what evidence they yield'.[30] They help to bridge the evidentiary gap between the law and the facts in matters involving hidden corrupt practices. Having said this, it must be further stressed that red flags:

> do not warn about potential "corruption" in the general and generic sense; rather, proving particular forms of corruption requires methodical reference to the elements of the offense.[31]

It follows that red flags must begin by striking the chords of the legal elements of the relevant corrupt practice, thereby commanding further delving into the facts, through the rules of evidence, to ascertain based on the evidence ultimately adduced whether corruption in the specific form it is alleged or suspected to have taken place has occurred.

Red flags do not as such prove the suspected or alleged corrupt practice to which they allegedly relate. Each red flag identified is an indicator of *potential* risk, yet to be validated, assessed and its evidentiary implications considered. The suspected or alleged facts or circumstances become red flags because they resonate with the legal elements of the relevant offence and begin to strike some chords in the constitutive legal elements of a corrupt practice. They are thus closely wedded with the legal elements of the specific act of corruption at issue. Indeed, only the legal elements of the relevant corrupt practice are able to infuse 'redness' to what could otherwise appear to be banal facts in a given commercial or investment relationship. But as will be discussed further below, there are key intermediate steps to be addressed before an ultimate finding of a corrupt practice can be made, involving not only the identification and validation of the red flags, but their assessment in evidentiary terms.[32]

1.2.3 Red flags arise when they are alleged or suspected

Although they pertain to facts or circumstances, real or perceived, red flags effectively arise when they are *alleged* by one party in ongoing arbitral, enforcement or set-aside proceedings; or when they give rise to suspicions of a decision maker, be it an arbitral tribunal, an arbitral institution scrutinising an award, or an enforcement or set-aside judge. At this moment the fact or circumstance becomes a potential red flag.

27 Some leading international conventions, such as the OECD Anti-Bribery Convention, explicitly adopt a 'floor' approach to their requirements, such that States Parties have the discretion to enact national legislation that will be consistent with the Convention so long as it meets its minimum requirements. This approach contributes to the diversity of national legislation. And as noted earlier, there is greater consensus around some offenses at the international level than others (e.g. bribery versus trading in influence), as reflected in whether the obligation to enact implementing legislation is mandatory or subject to a lesser obligation.

28 See e.g. Annex – 'References': '1. Principal international conventions' and '2. Selected national legislation and guidance documents'.

29 A. Sayed, 'Duplicity in Corruption and Arbitration: Dealing with the Evidentiary Gap', in *International Arbitration and the Rule of Law: Contribution and Conformity*, A. Menaker (ed.), ICCA Congress Series, Vol. 19 (Wolters Kluwer, 2017) pp. 266-282, at p. 268.

30 L.A. Low, 'Dealing with Allegations of Corruption in International Arbitration', 113 *AJIL Unbound* (2019), p. 341.

31 A. Llamzon, 'Chapter 14: Arbitrating Corruption', in M.J. Moser, C. Bao (eds), in *Managing 'Belt and Road' Business Disputes: A Case Study of Legal Problems and Solutions* (Wolters Kluwer, 2021) pp. 285-314, at p. 299.

32 See Section 2 'Methodological considerations'.

At the outset, a red flag remains closely wedded to a party's allegation or the tribunal's suspicion. It then takes a life of its own in the course of the proceedings, as it is identified, validated, assessed and first considered in terms of evidence and ultimately in terms of whether it is a constitutive legal element of the corrupt practice at issue.

1.3 The probative value of red flags

As red flags typically do not establish evidence of any of the legal elements of a specific corrupt practice (although once validated they may resonate with them), they do not at the stage when first asserted possess a *probative force* of their own to prove such legal elements. Instead, they speak to the possibility or *potentiality*, and eventually may speak to the *likelihood* of one or more of the constitutive legal elements of the relevant corrupt practice:

i) When red flags are being *identified*, under Step 1,[33] they simply suggest a possibility or *potentiality* that one or more legal elements of the corrupt practice at issue might be implicated in some form.

ii) When red flags are *validated*, under Step 2,[34] they start to speak to the *likelihood* of one or more of the legal elements of the relevant corrupt practice. Red flags are no longer suggestive of a possibility of corruption; when validated they become indicators of a *likely* corrupt practice absent contravening facts or circumstances; in other words, they render the relevant legal elements of the offense *probable* in the facts. It should however be emphasised that when validated, red flags are yet to acquire *probative force*.

iii) When red flags are *assessed*, and then considered through the law of evidence, taking into account the totality of the available facts and circumstances of the case, under Step 3,[35] they may lead to factual findings, using a variety of evidentiary tools, that set the stage for a legal determination.

iv) On the basis of the evidence so assessed, red flags may ultimately be reflected in evidence having probative force, allowing a determination to be made on whether a specific corrupt practice has occurred.

It follows that when red flags arise, they cannot automatically lead to a finding that a specific corrupt practice has occurred. The *possibility* and the *likelihood* of corruption both imply that a decision maker in the context of international arbitration must examine red flags with an unbiased mind and with a view towards consideration of all relevant facts and circumstances. This means in turn that where red flags, after validation, assessment and consideration in evidentiary terms, do not emerge as evidencing a specific corrupt practice, an arbitrator must be ready to rule that such red flags have turned out to be 'false alerts', and that there is no room in the circumstances for a finding of corruption.[36] They should not be treated as presumptive, but must be considered in the context of the totality of the facts and circumstances, including any 'green' or even 'black' flags.[37]

1.4 The quantitative and qualitative characteristics of red flags

According to recent authorities,[38] red flags can have both qualitative characteristics and quantitative effects.

A high-quality – or strong or serious – red flag is one that renders one or several elements of a corrupt practice more likely (but still not presumptive). Subject to validation and assessment, and further consideration in evidentiary terms, a high-quality red flag does not only render more likely certain legal elements of a corrupt practice but might also emerge as evidence of a specific corrupt practice, under certain conditions. In other words, it can be said to have a strong probative value. This may be the case, for instance, where there is a high level of compensation to a third party coupled with a lack of proof of any legitimate services provided.[39]

Quantitatively, a collection of validated red flags – converging towards the probable existence of certain legal elements of a corrupt practice – allows a decision-maker to consider that in the full context (i.e. taking into account all the facts and circumstances and any contrary evidence, including 'green flags'), these

33 Section 2.3.1 'Step 1' below.

34 Section 2.3.2 'Step 2' below.

35 Section 2.3.3 'Step 3' below.

36 As ruled in *Union Fenosa Gas v. Egypt*, supra note 2, Award, para. 7.113: 'Even the reddest of red flags does not suffice without proof of corruption before the tribunal. Whilst it can be relatively easy to allege corruption, it is less easy to prove it, as observed by the arbitral tribunal in its award in the *Metal-Tech v. Republic of Uzbekistan*, supra note 23: 'Suspicion is not equivalent to proof. Unanswered queries may have innocent explanations, not amounting (in the absence of explanations) to proof of corruption'.

37 See Section 1.7 'Green (and other shades of) flags' below.

38 A. Llamzon, supra note 31, p. 296. *Metal-Tech Ltd. v. Republic of Uzbekistan*, supra note 23, at para. 293; *Union Fenosa Gas v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 Aug. 2018, paras. 7.91, 7.113; *Worley International Services Inc. v. Republic of Ecuador*, PCA Case No. 2019-15, Final Award, 22 Dec. 2023, para. 469, 475.

39 This has typically been the finding in *Metal-Tech Ltd. v. Republic of Uzbekistan*, supra note 23, at para. 351, where the arbitral tribunal concluded in respect of a consultancy contract that substantial payments were made with 'no meaningful documentary evidence of any services rendered'.

validated red flags taken together may constitute part of the evidence leading to a finding of corruption, but not as red flags *per se*.

1.5 Typologies and common types of red flags

It is accepted wisdom that there is no definitive list of red flags. *Any fact or circumstance* that suggests potential bribery or another form of corrupt practice can serve as a red flag. That has been the position under the FCPA, and the view has been carried forward into international instruments' treatment of the subject. That does not mean, however, that no *typologies* of red flags exist. There are two basic categories of red flags:

General red flags typically relate to contextual characteristics that are most often immutable: the country, geography or government administration in question, and the business sector (**1.5.1**).

Specific red flags typically relate to facts or circumstances relating to of the counterparty to the proposed transaction, relationship or payment (where a third party is involved), or to the transaction itself (**1.5.2**).

As will be discussed further below,[40] specific red flags are generally considered to constitute stronger indicators of corruption risk than general red flags; conversely, they are more susceptible to risk mitigation measures than general red flags. The Annex 'References' identifies various documents that contain lists of commonly identified red flags. Using the 'general' and 'specific' typology, and further subdividing the specific category into party or transaction-focused red flags, the following list represents the most commonly identified red flags in international guidance documents.

1.5.1 General red flags

Country (or particular government administration)

- The country (region/subregion/relevant geography) has a reputation for corruption.
- The government administration in power (for public sector bribery) has a reputation for corruption.

Industry

- The industry has a reputation for or track record of corruption, or has characteristics (such as high-value transactions, need for speed, etc.) that make it vulnerable to corruption.

1.5.2 Specific red flags

i) Party

Background or reputation

- The entity (private or public) or a key individual has a reputation for corrupt practices, or has a flawed background, including prosecutions, convictions, etc.
- The third party is a public official or was a public official very recently and would be trading on official knowledge.

How identified (e.g. recommendation of a public official)

- The third party was recommended by a public official with discretionary authority over the business opportunity in question (for public sector bribery), or a private actor with similar authority (for private sector bribery).

Relationships (e.g. with public officials)

- The third party has a close personal, business or family relationship with a public official, especially one with discretionary authority over the business opportunity being pursued.

Corporate structure/transparency

- The third party's corporate structure is not transparent, is a shell, or is layered and includes entities in jurisdictions known for a lack of transparency (e.g. offshore havens), is rumored to have government officials involved as a silent partner or via a proxy (*prestanombre*, or straw man), or the ultimate beneficial ownership is not clear.

Relevant experience and qualifications

- The third party does not possess the experience and qualifications that would normally be expected for the performance of the activity in question.
- The third party's primary qualification for the engagement is its influence over key decision-makers.

Location

- The third party does not reside in or have a significant business presence in the country where the customer or project is located.

Secrecy

- The third party insists on maintaining secrecy with respect to its identity, or does not provide information in response to due diligence requests.

40 See Section 1.5.2 'Specific red flags' below.

ii) Transaction

Nature of product or services

- The product or service to be supplied is illegal. The services to be supplied are vague in nature (or after the fact, are not documented), or consist primarily of the exertion of influence.
- The products to be supplied are not pertinent to the business in question.

Compensation

- The third party's compensation is excessive in relation to the value of the legitimate goods or services to be provided. A significant success fee is involved.
- A compensation increase (or advance of funds) is requested during the course of performance in suspicious circumstances.

Contractual and payment terms

- The third party refuses to agree to appropriate contractual anti-corruption safeguards in the engagement documents, including compliance with relevant anti-corruption laws, or they are not requested. The contractual terms are atypical for a contract of this general nature.
- The third party requests payments in cash, offshore (e.g in a haven jurisdiction where accounts are not easily traced), or to a party other than the contractual counterparty.

Timing

- The need for the third party arises just before or after a contract is to be awarded. A success fee or other significant compensation is payable upon the award of a contract.

Legality

- Hiring the third party for the type of contemplated activity is illegal. The transaction itself, or aspects of it, raise significant illegality issues.

Transparency

- Aspects of the counterparty or transaction are not transparent.

Procurement structure (if applicable)

- The transaction is a sole source procurement.
- An official intervenes in the award process.
- An official with influence over the selection process has a conflict of interest.
- The tender specifications appear to have been structured to favor a particular bidder.
- An unqualified company is allowed to tender or win an award.

Other features

- Pre-transaction: lack of due diligence with respect to acquired assets, or a failure to follow up on red flags that are revealed during the course of due diligence.
- Post-transaction: diversion of payments from an established account.
- Post-transaction: A key asset is quickly resold or 'flipped' following its acquisition for a significantly larger price.

Although the above potential red flags are widely recognised in lists and literature, it should be emphasised that they are not exclusive. As noted at the outset, any fact or circumstance that suggests a risk of a possible corrupt practice should be considered a red flag and treated accordingly. As the above list makes plain, some red flags that are relevant in the governmental context may not be applicable in the private sector context, while others can be readily adapted to the private context. Specific red flags have been developed for transactions in particular industries (e.g. the natural resources sector), and particular types of transactions such as government and international development institution procurement.[41]

Red flags can arise at any time in the life cycle of a transaction: at the time of engagement, in the course of performance, or in the course of termination or windup. A counterparty whose structure or ownership raised no red flags at the outset of an engagement can undergo changes. Similarly, a compensation structure that was unremarkable at the outset can acquire elements of concern from requests for additional or changed terms

41 See e.g. Natural Resource Governance Institute, 'Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts' (6 April 2017); International Anti-Corruption Resource Centre, 'The Most Common Procurement Fraud Schemes and their Primary Red Flags' (https://iacrc.org/, 2024); World Bank Group 'Warning Signs of Fraud and Corruption in Procurement'.

as the matter progresses. General characteristics of the environment can also change, e.g. with the advent of a new government with a better (or worse) reputation for combating corruption. Finally, changes that occur in close temporal relation to key events (such as a tender decision) may present greater risks than changes that cannot be linked to such events.[42]

1.6. Sources of red flags

The sources of red flags can be (and are) extremely varied, but are important to identify and evaluate.

- **General red flags**. For *country* red flags, publicly available rankings such as the Transparency International's Corruption Perceptions Index ('CPI') or the World Justice Project's Rule of Law Index are commonly used, although widely criticised for their subjective, secondary character. *Industry or sectoral* red flags have been identified in studies done by the OECD, World Bank and others. Those studies often focus on the characteristics of the sector that make them prone to corruption.[43]
- **Specific red flags**. Specific red flags can have a wide range of sources. For a specific *party*, they can include public record information (e.g. investigation, prosecution, or conviction information), press reports, corporate record information, as well as source information from reference checks, due diligence reports, press reports, etc. For *transactions*, they may include specific transactional or contract characteristics (if a procurement, whether it is sole source), place or manner of payment details (e.g. a known tax or regulatory haven jurisdiction), competitor information, press or whistleblower information, or the like. Data analytics, with or without the use of artificial intelligence, may also be a source of red flags as discussed below.[44] The conduct or involvement of a third party, or of a government official with whom the company or third party is dealing, may also raise red flags. Although there is no limitation on the sources of red flags, the credibility of those sources can vary widely and needs to be assessed.

1.7. 'Green' (and other shades of) flags

Not all indicators relevant to a potential corrupt practice are negative in character. As commentators and arbitral tribunals have recognised, there may be facts or circumstances that suggest an absence of corruption – so-called 'green' flags.

Chief among these are facts or circumstances that indicate an effort to prevent or detect a corrupt practice, either generally or in a particular case. Corporate anti-corruption programmes have become much more commonplace in recent years.[45] While it may be difficult for an arbitral tribunal to assess the effectiveness of such a programme (simply having a paper programme is generally not viewed as effective), the compliance measures taken in a particular case will be more significant as a risk mitigation measure. Such measures could include, for example, whether:

(i) a company has performed due diligence on a third party;

(ii) the contract with a third party contains anti-corruption safeguards, and how robust those safeguards are;

(iii) there is evidence of the testing or oversight of their effectiveness (e.g. through audits);

(iv) the company has trained its personnel on specific policies or procedures; and

(v) the company participates in collective action initiatives to offset risks.

In addition, third-party verification, which may take the form of certification of compliance with programme standards, third-party audits, government investigations finding no corruption or resulting in a declination of prosecutions, or other relevant reviews, may be a source of green flags.

Some green flags may also be the converse of a red flag (e.g. a country or sector with a low reputation for corruption, local law that permits or mandates a particular payment, or transparency-focused measures). As with red flags, a distinction should be made in evaluating green flags between the general and the specific, with the general carrying less weight as a risk mitigator than a specific measure.

42 See Section 2.3.2 'Step 2 - Confirming or validating an individual alleged flag': '(i) General red flags – Country risk', '(iii) Specific red flags: Third-party background and qualifications', and '(iii) Cross-cutting considerations in assessing individual red flags'; and Section 2.3.3 'Step 3 –The overall assessment'.

43 See Annex – 'References': '4. Country rankings and selected industry initiatives'.

44 See Section 5.2 'Role of artificial intelligence in red flag generation and analysis'.

45 See Section 5.1 'Role of corporate compliance measures' for a more detailed discussion.

At least one arbitral tribunal has used the term 'black flags' to denote a neutral fact or circumstance, i.e. one that is neither risk indicating or risk mitigating.[46] 'Pink flags' have sometimes been referenced in the compliance context to denote weak risk indicators.

2. Methodological considerations

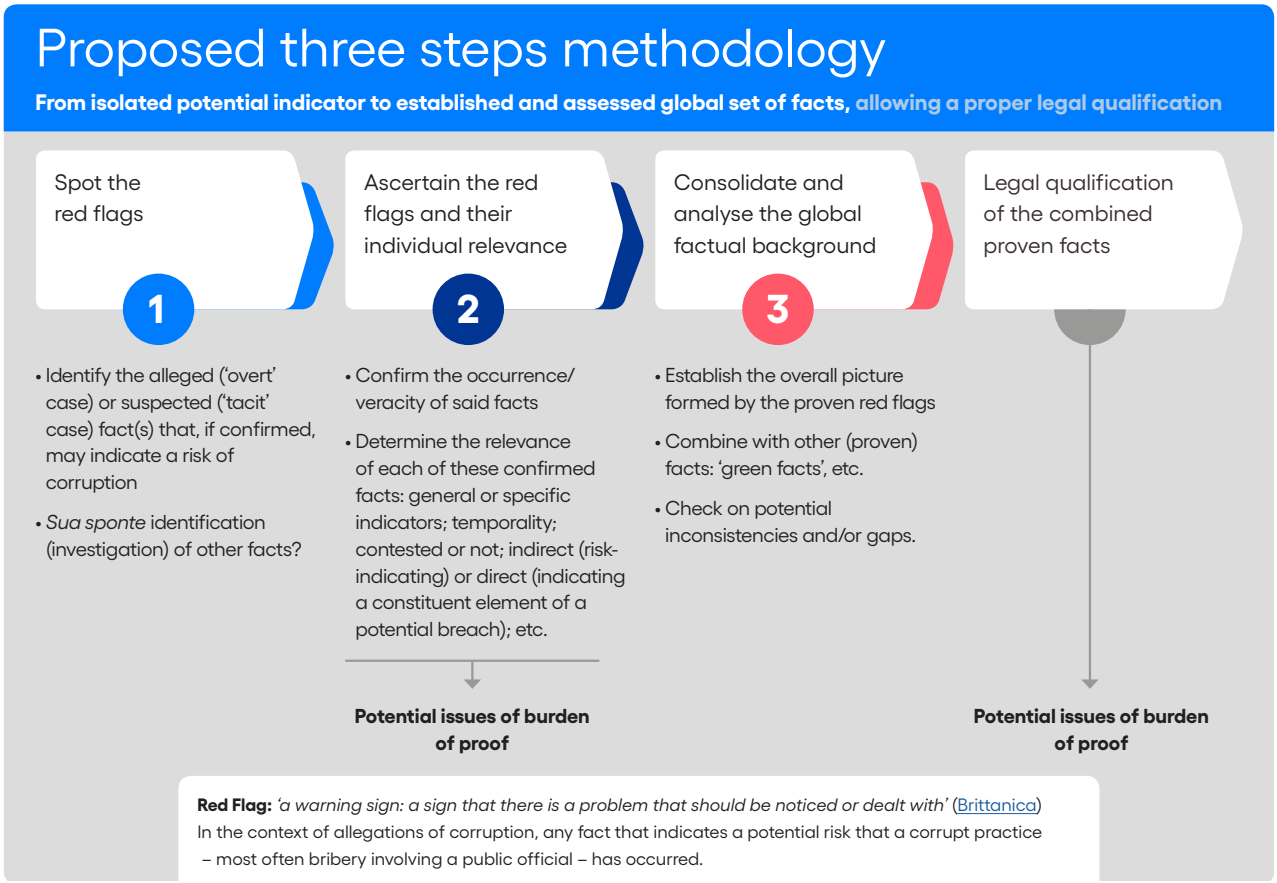
This section will discuss the use and limits of red flags both to identify whether a true corruption risk is presented and to weigh their evidentiary value, regardless of whether a corrupt practice has been alleged by the parties or the risk of such is raised by the arbitral tribunal *sua sponte*.

2.1 A three-step methodology

The evaluation of potential or asserted red flags can be broken into a three-step process:

1. **Identifying the potential/asserted red flags.** What facts, factors, or circumstances of relevance to the specific corrupt practice at issue (either as alleged or as appear) indicate the potential risk of that corrupt practice (or not) such that they should be examined further?
2. **Validating/confirming (or negating) individual red flags.** Are the individual red flags that have been alleged factually supported? What is the strength of each of the alleged red flags?
3. **The overall assessment.** What picture emerges from the totality of the relevant facts and circumstances, having considered the red flags, contrary indicators or 'green' flags, and other mitigating measures or circumstances? What fact-finding tools are available to assemble the picture?

46 *Union Fenosa Gas v. Egypt*, supra note 2, para. 7.114.



Only after this three-step process is complete is the matter ripe for considering the legal implications of the evidence that has been assembled starting with the asserted red flags, or risk indicators.[47]

2.2 *Ex ante* versus *ex post* assessments

Prior to discussing the three steps in risk assessment and factual development, it may be useful to highlight the two main contexts in which red flags are used – *ex ante* and *ex post* – and their key differences.

2.2.1. *Ex ante* assessment

Red flags have become a core tool in *ex ante* corruption risk analysis, especially in compliance policies and procedures relating to the engagement and supervision of third parties.[48] In that context, the use of red flags involves the following tasks:

- risk identification;
- risk management;
- decisions about net risk tolerance based on the information gathered during the due diligence process on potential prospective corruption risks; and
- decisions about the availability and effectiveness of the available risk management safeguards.

Companies bring varying degrees of risk tolerance to this process, and may have different preferred tools for risk management. They may also identify and rank risks differently. Sources may be soft (e.g. press reports of varying quality, reputational information gathered through a due diligence firm, references). Moreover, the quality and extent of the information that is available is often limited by what time and resources permit to be gathered, and credibility may be difficult to assess. In that context, red flags can (and often do) play an outsized role in decision-making.

Legal counsel may be asked to opine not on the substantive question of whether there is or could be a violation of law if the third party were to be engaged, but on the more procedurally-focused question of whether the principal has conducted sufficient due diligence about potential risks in relation to enforcement expectations, or what the investigative risk might be if there is a later allegation of misconduct on the part of the third party. Due diligence reports often focus on a wide range of legal issues, not just corruption, as well as financial and reputational risks, and it will be important for arbitral tribunals to focus on the relevant aspects of these broader reports.

2.2.2 *Ex post* assessment

Ex post, the question is not the likelihood that a corrupt practice will occur, but whether a specific corrupt practice has occurred, either directly or through an intermediary. This involves a different set of questions than at the preventive stage where perceived risk and risk appetite are the organising and determinative principles. In the *ex post* context, the core tasks are to consider the specific corrupt practice at issue as defined by applicable law, the evidence that is relevant to the elements of that alleged practice, and the standard of proof that will be needed to establish that it has occurred.[49]

Any use of red flags from a methodological standpoint must thus tie into the ultimate tasks of the arbitral tribunal, and start from the premise that red flags are not proof of any specific form of corruption, but only potential risk indicators that must be identified and carefully assessed for their strength and ultimate implications in light of all the facts and circumstances and in terms of evidence in relation to the corrupt practice at issue.

2.3 The three steps elaborated

With the above contextual framework in mind, and with a focus on the *ex post* context, the 'three steps-methodology' is described below.

2.3.1 Step 1 – Identifying a potential red flag

This step is effectively an issue-spotting exercise within the relevant normative construct. As noted earlier,[50] although there are recognised types of red flags, any fact or circumstance that suggests the risk that bribery or another specific type of corrupt practice may have occurred – whether through a third party or directly – can be a red flag. Red flags put forward by a party or identified by the arbitral tribunal on its own initiative may end up being considered for their risk implications.

47 As part of its work, the ICC Commission on Arbitration and ADR Task Force on 'Addressing Issues of Corruption in International Arbitration' has considered the issue of standard and burden of proof in corruption cases generally. This Document focuses on the narrower issue of red flags and is subject to any conclusion and recommendations the work of the Task Force will formulate.

48 On the 'Role of corporate compliance measures', see Section 5.1.

49 See Section 3.4 'Red flags and the standard of proof'.

50 See e.g. the list in Section 1.5 'Typologies and common types of red flags'.

The red flags that are relevant will likely depend on the context (a direct or an indirect payment issue) and the type of corrupt practice (public or private, involving bribery or other alleged misconduct) that is potentially implicated. These therefore need to be defined at the outset and the relevant elements identified.

2.3.2 Step 2 – Confirming or validating an individual alleged red flag

Once red flags (or potential red flags) have been identified, particularly those that are specific in character, the next and crucial step is to critically examine them to see whether they are confirmed or validated as a threshold matter and to what extent. Red flags should not be taken at face value, but must be examined, first individually, then collectively (see Step 3) to ascertain whether they are factually supported.

There can be many reasons why a red flag may not be validated. It may rest on a source that lacks credibility; an assumption that proves to be incorrect; a confusion of identities; an overstatement of relationships; a lack of information or misinformation; a lack of understanding of the business purpose or context; an overly broad or mistaken concept of corruption; or others. Or it may simply be inconclusive or limited in nature, or contradicted by other facts and circumstances.

Conversely, an examination may validate a potential red flag. The examination of the background of a third party may indicate a lack of qualifications for the task for which he or she has been engaged, or a compensation structure that is out of the ordinary and potentially excessive. Or there may be little evidence of the provision of legitimate services. Close relationships to key government officials may also be validated.[51] If so, the inquiry should at that point turn to determining the probative value of the indicator (Step 3).

The temporal consideration and the risk of hindsight bias are particularly important to highlight in relation to the issue of validation. Inevitably the arbitral tribunal will be reviewing red flags on an *ex post* basis not only after the conduct at issue has occurred, but perhaps even many years thereafter. While information that has become available subsequent to the conduct at issue can undoubtedly serve as a red flag or contribute to a red flag analysis, the arbitral tribunal must be careful not to fall into the seductive trap of hindsight – using information that has come to light subsequently to attribute knowledge, purpose, or expectations to parties at an earlier time without a sufficient basis for doing so.

The same is true for expectations regarding business practices, especially in relation to compliance and risk management, an area where global standards and practices have evolved relatively quickly in recent years. The lapse of time can also, of course, degrade the recollections of witnesses or the available documentation. The temporal consideration therefore requires particular care on the part of the arbitral tribunal in its evidentiary findings.

The arbitral tribunal may also have to evaluate the effects of other intervening changes or developments. For companies, for example, subsequent or prior mergers, acquisitions or other business combinations may limit the availability of personnel, records, and (in cases of successorship) can raise difficult questions of legal responsibility. Governments and their policies, practices and legislation, as well as personnel, change as well.

With these general comments, we turn to a discussion of the most commonly identified red flags and the specific questions they may typically raise in relation to validation. It is hoped that the discussion will provide helpful insights, not only with respect to the specific red flags discussed, but as regards the validation approaches that can be employed more generally. We begin with the general categories of red flags and then move to specific categories.

i) General red flags

1. Country risk. Although *general red flags* do not present the same range of validation challenges as *specific red flags*, they should still be examined critically at this stage.: What is the source? Is it credible? What is the basis of the conclusion? Is it temporally relevant? Is it sufficiently specific?

The temporal consideration may be particularly important in relation to country risk, as such risks can change materially over time with different government administrations (e.g. Indonesia was perceived as presenting higher and more centralised risks of corruption during the Suharto Presidency than in later years). As most country risk factors are based on rankings such as the Corruption Perceptions Index ('CPI') published by Transparency International (which is perception-based, rather than objective in nature), it is important for arbitral tribunals to recognise that perception is, in effect, only bias, and may not reflect the reality of the geography, let alone the reality of an individual case. This is particularly true for large countries, which may have very different regional variations. This discussion illustrates why this general red flag, if validated, is likely to be at most a weak risk

51 Additional examples are provided in the paragraphs below.

indicator (i.e. of limited probative value) in most cases. Like the general industry/sector risk red flag discussed below, it is relevant to both direct and indirect bribery.

Country or other geographical risk is not susceptible to mitigation *per se*. In the *ex ante* context, it may be used to signal a need for greater caution. Arbitral tribunals can therefore look for indicators of such caution as countervailing at least to some extent, for example: How did the company approach meetings with host government officials? Did it require the presence of at least two employees?

2. Industry/sector risk. A search for rankings, analyses or other sources discussing industry/sector risks related to corruption quickly reveals that, while there is a consensus that certain industries pose significant risks (defence, extractives, construction and engineering, and sometimes transport being the most commonly cited), there is no authoritative source for this general industry/sector risk, as there is for country risk, and opinions vary.[52]

The first question therefore is what is the asserted source? Is it credible? Does it apply in this case? Particularly if it is one that is not frequently identified as presenting a high risk, understanding the basis of the designation is important. Some sectors frequently identified as high risk, such as the extractive industries (oil and gas, mining, associated suppliers) are viewed as risky not just because of their industry characteristics, but also because of the geographies where they are forced to operate (those locales where the resources to be extracted are located). Thus, there can be overlap between the country risk factor and the industry or sector risk factor which should be recognised when assessing the totality of the red flags presented, in order to avoid what would otherwise be effectively double counting. Apart from geography, industries tend to be identified as risky by virtue of their structural characteristics in terms of how they interact with government (reliance on government procurement or key licenses/permits to operate, use of agents or other third parties, time pressures, size of contracts and the like). These structural issues are presented to a much greater extent in the public than in the private sector context, but there may be spillover into the private sector context, especially in relation to the supply chain downstream. In any event, like the general country factor discussed above, this risk factor is typically of limited relevance in an individual case.

As with the country risk factor, this red flag cannot be mitigated *per se*, but evidence of extra *ex ante* caution based on the recognition of the general risk presented by the industry may be relevant in an individual case.

ii) Specific red flags

1. Third-party background and qualifications. There are three dimensions to this potential red flag, which of course only comes into play only when a third party is involved.

The first dimension is purely objective. What information is available about the third party's background, reputation and qualifications? Does it come from credible sources? How much of the information about background and reputation, for example, is based on unconfirmed rumor and innuendo in the press or from due diligence sources? Who are the sources? Is the information consistent and relevant?

If the third party is a former government official, or a company in which a former government official, close family member or business associate has an interest, that is not the end of the investigation, just the beginning: What was the position? How long ago? What is its relevance to the business being pursued? Is the family member essentially a proxy for the government official or an independent actor? Is the close family member or close business associate really a close relative or associate? What is the relevance of the politically exposed person ('PEP') status?[53] How was the third party identified?

Regarding the third-party qualifications: How specific are the qualification requirements for the task at hand? Are they highly technical or specific in other ways, so that one would expect any legitimate candidate to have them? Or is there a range? How well does the proposed third party match these qualifications? What is the pool of available personnel in the country in question (if the issue concerns local personnel)? How clear are the qualification requirements for legitimate services? In the Alcatel corruption case a few years back, enforcement authorities flagged the fact that Alcatel's agents in Costa Rica had no telecommunications experience but were perfume salesmen. And when a third party is being hired primarily for influence, there is no question that the risk profile is elevated. But this is not *per se* an issue, and third parties may be engaged in legitimate transactions if their profile does not match what might be considered inappropriate.

52 See Annex – 'References': '4. Country rankings and selected industry initiatives'.

53 The concept of PEPs arises out of anti-money laundering norms. Although intended to encompass senior-level government officials, in practice the term is used much more loosely and sometimes inconsistently. See Financial Action Task Force 'FATF Guidance: Politically Exposed Persons' (Recommendations 12, 22).

The second dimension is temporal. What information was publicly or generally available at the time of the conduct at issue? Information of concern (e.g. investigations, charges, convictions, etc.) may only surface at a later date. It would not be appropriate to attribute that information back to the time of the engagement, although if the relationship is ongoing, it would serve to operate as a red flag at the time it did become available.

The third dimension is subjective. What was known to the party engaging the third party at the time of the engagement? And, as a corollary, what could have been known? Did the party engaging the third party have a compliance programme in place at the time to manage third party risks, including due diligence requirements? If so, was it followed? If not, was it required to do so by applicable law? Is there an indication that the party buried its head in the sand regarding the conduct of the third party, or conversely, did the party look into the issue in a way that was appropriate? Again here, arbitral tribunals must be careful not to apply hindsight, by applying standards of care that may not have been available to the principal at the time, or by imputing knowledge that may have only become available subsequently.

2. Corporate structure and the use of anonymous shell companies and offshore entities. Because corruption is associated with secrecy and a lack of transparency, non-transparent corporate structures can be a significant red flag. These issues may present themselves in the context of a third-party engagement, or in relation to the recipient of a direct payment.

The questions at the validation stage are: How transparent is the corporate structure? Can the ultimate beneficial owner(s) of the entity(ies) involved be identified? Is the corporate structure multi-layered or does it have other features that suggest it was designed to prevent the detection of the interests involved and to conceal the flow of funds ('layering')? Does the structure feature anonymous shell companies or entities organised in recognised offshore havens? Of course, not every entity located in a haven jurisdiction has an improper purpose, and the issue of purpose will need to be examined further to determine whether it really is a red flag in the particular context.

Arbitral tribunals should be aware that there is a trend in a number of countries to require the disclosure of beneficial ownership at the time a business entity is formed and to maintain that information in a register that is available at least to law enforcement authorities and sometimes to the public. Absent such definitive information, questions about beneficial ownership may have to be answered in a more subjective and less definitive way (e.g. through due diligence inquiries).

Temporal considerations are also relevant to this red flag: Was the structure in question in place at the relevant time or times? Has it changed? In the public corruption context, the concern is for ownership by government officials, their family members, or close business associates. In the private corruption context, the concern is whether a beneficiary is one who has provided legitimate value in the form of goods, services, financing or technology.

Other indicia of non-transparent conduct can also be a red flag and the arbitral tribunal will need to consider in the validation process whether the evidence suggests that there is a legitimate explanation for the conduct (e.g. a requirement to maintain the confidentiality of transaction documents may be motivated by legitimate interests and considerations; hiding the role of a third party where it would not normally be hidden, on the other hand, could be a red flag).

3. Transaction features. The red flags that can be raised in this category range from *very specific elements* (e.g. payment in cash, or to an offshore account, or to counterparty other than the one specified in the contractual documentation) that can be red flags for an intended pass-through by an intermediary), or *specific provisions* (e.g. contractual provisions calling for the use of influence, vagueness in the services being provided, secrecy provisions discussed above, etc.) that raise questions about their purpose, to more *generalised assertions* that the transaction is atypical of the genre, the region, the time frame, etc.[54] The more general the assertion, and the more individualised the transaction, the more difficult it will typically be to validate the asserted red flag. The key question is always whether there is a legitimate purpose for these provisions.

Many red flag lists identify as a red flag the refusal of a third party to agree to anti-corruption provisions in a transaction document. However, this scenario has become less frequent as international anti-corruption standards have grown. Third parties have become more aware in recent years of the importance that many companies given to anti-corruption compliance, and understand that a refusal to provide appropriate written assurances in this area will be problematic for, and potentially even fatal to, their engagement. However, where such issues do arise, it is sometimes because the proposed assurances are overly broad or poorly drafted

54 The frequently raised issue of 'excessive compensation to a third party', is discussed separately in the paragraph 'Special issues with so-called 'excessive' compensation; benchmarking and comparables' below due to its frequency and importance.

(e.g. parties that are not subject to a domestic law, such as the FCPA, may be reluctant to provide an assurance that binds them to comply with the FCPA, as opposed to a more general worded standard not to engage in improper conduct). While this category of red flag, as the above discussion shows, is often presented in the context of an intermediary transaction, it can also be presented in a direct payment scenario.

4. (Lack of) compliance measures. As noted above, when a lack of compliance measures is asserted as a red flag, several threshold questions should be considered. First and foremost, were such measures required of the party in question at the time the conduct occurred?

As noted at the outset, the transnational bribery legislation of many countries is recent, and only some contain requirements for compliance measures, or recognise compliance as a defence. The FCPA does not as a matter of law (but treats effective compliance as a mitigator under its enforcement policies), while the UK Bribery Act (2010) has a defence to the strict corporate liability otherwise applicable under Section 7 for so-called 'adequate procedures'. This is therefore a matter of national law; international law makes it a good practice but does not require it. Companies may be subject to more than one national law in this area by virtue of their nationality and where they do business. They may also take steps to go beyond the requirements of national law as a matter of corporate policy.

Compliance measures may be programmatic in nature, but even in the absence of an overall programme, risk mitigation measures may be taken on a case-by-case basis. While the existence of an overall programme (or certifications of that programme, e.g. through ISO 37001 or other standards) may be seen as reflecting a commitment to corporate responsibility, the ultimate assessment should focus on the measures taken in the individual case. If a company has internal programmatic requirements, and they were not followed or even circumvented, that can be an indicator of improper purpose, or it can be a function of oversight or a lack of resources. Conversely, if a company follows its internal programme requirements and took appropriate steps to identify and manage risks, even though such preventive measures may not preclude an ultimate determination that it engaged in a corrupt practice, such efforts may represent a 'green flag', at least to some extent.[55]

5. Local law issues. Alleged red flags involving local law can take various forms. Where third-party relationships are concerned, they may relate to the legality of the relationship (e.g. if local law restricts the hiring of agents in certain sectors, or prohibits lobbying activities), or to regulated aspects of the relationship (e.g. the need to register an agent or lobbyist). Or they may relate to the underlying business that is being pursued, or specific aspects of that business (e.g. a company may seek to establish a project in an area that is protected from development, or for which only certain types of investors are eligible, or specific permitting, licensing or regulatory requirements apply).

Non-compliance with local law can be a peripheral or a central issue in terms of its relevance as a red flag, depending on the nature of the non-compliance and the type of corruption involved. Timing can also be an issue: non-compliance with a key requirement at the time an investment is made may have a different impact (in particular in investment disputes where compliance with local law is a condition for investment protection) than non-compliance during the course of operations. The nature of the non-compliance is also potentially relevant: a corrupt practice in the securing of a foundational licence or permit (i.e. one on which the business is premised) may be very different from a minor regulatory breach in the course of operations.

At the validation stage, the main questions are whether a breach of local law at the time of the conduct has been established by sufficiently clear and credible evidence, and whether the breach was intended by parties as such at the time (as this may go to the question whether the relationship had a corrupt purpose). Conversely, advice from counsel at the time as to legality, particularly if contemporaneously documented, may not only negate a corrupt state of mind, but may also reflect compliance efforts (a 'green flag').

6. Special issues with so-called 'excessive' compensation, benchmarking and comparables. Excessive compensation is considered to be one of the strongest indicators of potential corruption, especially in third-party contracts. But 'excessive' is, as its name implies, a relative term. Compensation may be high in absolute terms but not excessive in the context of the industry, the business at issue, the work to be performed, the risks involved, or other legitimate factors. The more complex and customised the transaction and the more significant the business, the more difficult it will be for an arbitral tribunal to determine whether the compensation is truly excessive. Benchmarking analysis and comparable transactions, if available, have a role to play in this area. Some of the questions to be considered when assessing whether compensation is excessive are:

(i) Is this a standardised transaction where 'typical' or 'normal' compensation can be determined?

55 See Section 5.1 below 'Role of corporate compliance measures'.

(ii) If so, can suitable benchmarks, or comparable transactions, be identified?

(iii) Are they comparable in time?

(iv) Are they comparable in terms of other features?

(v) Even if the transaction in question is not a standardised transaction in an industry, does the actor in question have a standardised approach to which this transaction can be compared?

(vi) Was the compensation benchmarked at the time of the transaction? What was the result?

(vii) What legitimate factors could influence the size of the compensation in this case?

(viii) Timing;

(ix) Size of overall transaction;

(x) Risk;

(xi) Performance requirements;

(xii) Leverage;

(xiii) Other (e.g. special qualities, 'first mover' status,[56] etc.).

The complexity of these issues may lead to experts being asked to opine on comparability, or to answer the question of excessiveness. Whether or not compensation is considered 'excessive' is ultimately a question of judgment and not a simple fact, and will be highly contextual.

Success fees present a particular challenge. They are common in some industries, and generally not unlawful. However, where success is dependent on discretionary government action, such fees are recognised to present elevated risk of pass-throughs. Depending on the context, such fees may represent a red flag in and of themselves. In particular if they are linked to discretionary government decisions involving key assets – such as a concession or key license or operating permit – the existence of a success fee may incentivise a third party to engage in improper conduct. The larger the fee, the greater the incentive.

7. Legitimacy of services. Closely related to the issue of excessive compensation in third-party services contracts is the scope and legitimacy of the services to be provided, i.e.:

- Does the contract provide for specific services to be provided or is it vague?
- Are there specific deliverables?
- Is there proof that legitimate services were provided if that is the nature of the contract?
- And what of the contract that involves lobbying or the leveraging of connections and influence, where it is question not of whether, but of how those activities are carried out?

Although it may be difficult to assign a specific value to particular services, it may be possible to evaluate whether compensation is substantially disproportionate to the legitimate services that can be identified. However, care must be taken to avoid biases towards specific models (e.g. while a time-cost model may be easiest to evaluate, it does not mean that all services are or need to be provided on that model, or that any services not provided on that model are to be viewed as being at increased risk).

The foregoing is by no means an exhaustive treatment of the types of specific red flags that may arise. It does, however, illustrate the types of specific questions that may be helpful to validate and assess the relevance of some of the most common red flags, taking into account potentially mitigating circumstances. Some further cross-cutting observations on the weighing of individual red flags are set out below.

iii) Cross-cutting considerations in assessing individual red flags

As noted earlier, general red flags – even if validated – by their nature tend to shed little light on the ultimate question to be determined by the arbitral tribunal (i.e. whether the alleged corrupt practice(s) occurred in the individual case). They carry therefore inherently less weight than party- or transaction-specific red flags that have been validated. In considering the weight, or seriousness, to be accorded specific red flags, judgments will need to be made by the arbitral tribunal about the credibility of the source of the red flags, the clarity with which they are established, any mitigating measures that have been taken and the extent to which those affect the assessment of the red flag, and other relevant circumstances. Some companies or commentators reflect this variability by referring to flags as 'pink' or possessing varying degrees of redness. 'Green' flags may also be presented alongside the red flags, or perhaps more frequently, as part of the overall picture (as discussed in Step 3 below).

1. Relevance of investigation or prosecution by national authorities. One issue that arbitral tribunals have had to deal with more frequently in recent years is the relevance of investigation or prosecution, or more often the lack thereof, by the countries whose interests are

56 This could, for example, be someone who first recognises a market opportunity and acts to capitalise on it, someone who is a pioneer and therefore takes greater risk.

involved in the matter, which may involve the home countries of the claimant and respondent, as well as third countries. This issue is particularly relevant in cases of alleged corruption of government officials, where the respondent State or State-owned enterprise has raised a corruption defence. Such investigation is desirable for several reasons:

1. Many international anti-corruption instruments oblige states to take steps to investigate and prosecute such conduct.
2. Such investigations may assist the fact-finding of the arbitral tribunal.
3. Such investigations provide comfort that the corruption defence is serious and not simply a tactical measure taken to benefit the arbitration.

Of course, there may be reasons why investigation and/or prosecution could not take place – one being temporal, i.e. the facts giving rise to suspicions of corruption were not known at the relevant time(s). However, where the allegations have existed and been known since the conduct took place and the host state has taken no steps to investigate, these circumstances may be considered by an arbitral tribunal as bearing on the credibility of the allegations.[57]

Where prosecutions have occurred, the arbitral tribunal must be cautious in assessing the findings and conclusions. In a number of jurisdictions where enforcement is the most active (including the U.S.), companies tend to reach negotiated resolutions with prosecuting authorities rather than litigate the matter. These resolutions may be accompanied by stipulated facts, in which case, absent evidence of coercion or a lack of due process, there should be no issue with their acceptance by the arbitral tribunal as established facts at least where they involve a party to the dispute (although given their negotiated nature, such agreements, even if approved by a court, may not reflect a criminal standard of proof). These facts may constitute red flags or direct evidence of a corrupt practice.

Where the stipulated or determined facts involve persons who are not parties to the investigation but a party to the dispute that has been submitted to arbitration (i.e. they were not agreed to by the party against whom they are now being asserted) giving them direct effect would seem to raise issues of due process. Accordingly, the better approach may be to consider such stipulated facts as 'red flags' and to seek to validate them as any other red flag, giving them collateral effect. Arbitral tribunals will also need to consider whether and to what extent such facts correlate with the elements of the corrupt practice at issue, as 'corruption' cases can proceed on many legal bases.

There are currently no international tribunals specifically established to adjudicate corruption claims, although some have called for the creation of an international anti-corruption court. Decisions are rendered by national authorities applying domestic laws, including extraterritorial transnational bribery laws.[58] In the absence of the *ne bis in idem* rule at the international level, today's anti-corruption prosecutions are often multi-jurisdictional, involving multiple authorities, different national norms and sometimes different parties to the conduct than the ones involved in the civil dispute.

2. Stay of arbitral proceedings. The issue of stay of proceedings by arbitral tribunals in favor of domestic investigations or prosecutions is discussed below in Section 4.3 'Course of actions available to arbitrators', '4.3.2 ' Potential external tools'.

3. Data protection and state secrets. As arbitral tribunals will be well aware, data protection regimes are proliferating in many jurisdictions. State secrets laws are also becoming more common. Blocking statutes, some long standing, others more recent, may also arise in corruption cases. Such laws can impede or prevent the movement of data, including personal data and commercially sensitive economic data, from one jurisdiction to another. They can, for example, affect the ability of a company to conduct due diligence on a counterparty. They may provide an explanation as to why certain information is not available, thereby negating a red flag, but as with anything, their invocation as a shield and a reason for non-disclosure needs to be carefully considered.

4. Economic sanctions and trade controls – imposed at the national level, at the regional (e.g. by the EU) or at the international level (e.g. by the UN Security Council) – restrict dealings with certain persons, both natural and legal persons. Except for the so-called Global Magnitsky ('Glo-Mag') sanctions imposed by the U.S., and any similar sanctions of other countries, they are typically imposed for national security or foreign policy reasons rather than because the sanctioned person engaged

57 In its award in the case of *Union Fenosa Gas v. Egypt*, supra note 2, the arbitral tribunal found the lack of prosecution of either the government or the private parties against whom Egypt had raised a corruption defence relevant (para. 7.111).

58 The World Bank and certain other international financial institutions have adopted rules prohibiting fraud, corruption and other forms of misconduct in the projects and transactions they finance in whole or in part, and contravention of those rules can lead to sanctions including a permanent loss of eligibility to participate in such projects and transactions. These institutions apply their own definitions of corruption, not national law. See International Financial Institutions Anti-Corruption Task Force, Uniform Framework For Preventing And Combating Fraud And Corruption (2006).

in corrupt practices. However, sanctions are being increasingly used by authorities as a tool to combat corrupt conduct. There may also be sanctions imposed on persons for conduct (e.g. drug trafficking or terrorist activity) which, because of its underlying illegality, may be more likely to be associated with corrupt practices. Thus, while most sanctions would not necessarily serve as a red flag for corruption, some sanctions might. It is therefore important to consider the reason for the sanction designation. However, a sanction designation alone will typically not function as a corruption red flag.

iv) Concluding observations on general principles relating to red flag validation

As the discussion of specific types of red flags above indicates, the assessment that must ultimately be made of the asserted red flags will be very specific to the facts and circumstances involved, as well as to their sources. Three general principles are:

1. Red flags, even if validated, only represent risk indicators, and are not tantamount to proof of a corrupt practice.
2. Red flags should not be taken at face value, but must be confirmed as relevant to the corrupt practice at issue and carefully validated, especially when they are being used not as an *ex ante* risk management tool, but as an *ex post* tool to support an allegation of corruption.
3. Red flags are not all of equal significance, even if validated.

2.3.3 Step 3 – The overall assessment

Having validated the alleged or suspected red flags and considered their relevance on an individual basis, the third step in the factual methodology is to assess the red flags as a whole, and consider their implications and other relevant facts and circumstances.

At the outset, this may involve consideration of the relative seriousness, or probative value, of the individual red flags – i.e. their strength in terms of the allegation of corrupt practices as determined in the second step, and their assessment in full context, including in relation to each other. As noted, general indicators, such as the country or sector will often have only limited probative value. On the other hand, the probative value of party- or transaction-specific indicators will be highly fact-specific and context-dependent. There may be contrary indicators on the same overall issue (e.g. 'green flags' discussed in Section 1.7 above) or on other relevant aspects that may be stronger or inconsistent, or even neutral indicators. Mitigation may also have been achieved, either partially or completely, by specific measures taken by a party, such as contractual or other safeguards, or by other circumstances.

While the probative value of each red flags and the totality of the circumstances must thus be considered, it is important to emphasise that this should not be a process of simply aggregating red flags to support a conclusion that a corrupt practice has occurred. Transactions can feature multiple red flags and still not be improper. Conversely, a corrupt practice can have taken place without the appearance of multiple red flags (or perhaps even any red flags). Nonetheless, the red flags that have been validated and their probative value assessed should be considered in relation to each other, along with any green flags or contrary indicators, as well as risk mitigation measures, for their likely significance on an overall basis.

Some arbitral tribunals have used a 'connect the dots' methodology,[59] or endorsed the doctrine of '*faisceau d'élements graves, précis et concordants*'. As discussed below (Section 2.5 'Consideration in evidentiary terms'), these exercises tend to look at the consistency of the picture presented by the red flags, the strength of the red flags, and the existence and credibility of alternative scenarios. It is not always as clear as it could be from the decisions of arbitral tribunals to date how this exercise translates into evidentiary findings, given that the identification of red flags is often conflated with evidentiary considerations. Most red flags will lead to circumstantial evidence, others may represent or lead to direct evidence. As discussed below,[60] it is widely accepted that corrupt practices can be proven by circumstantial evidence. However, there is still a leap to be made from the identification, validation and assessment of mere risk indicators to evidence – even if only circumstantial – which is sufficient to support a legal conclusion that the elements of a corrupt practice have been met.

In the vast majority of cases an arbitral tribunal will be considering a business transaction or relationship (or multiple relationships or transactions) that is legitimate on its face, and trying to weigh whether such relationship or transaction has a proper or an improper purpose. It is particularly important at this stage, therefore, that arbitral tribunals take into account

59 *Methanex v. United States*, UNCITRAL, Final Award on Jurisdiction and Merits (3 Aug. 2005), at pt. III, ch. B; *Union Fenosa Gas* v. *Egypt*, supra note 2, Award, para. 7.114: 'with a case dependent upon circumstantial evidence (as in the present case), it is often a question of joining up the dots; but there have first to be dots in the evidence adduced before the tribunal. In this case, so the Tribunal decides, there are insufficient dots; and the red flags are outnumbered by neutral black flags'.

60 See Section 2.5 'Consideration in evidentiary terms'.

green flags, mitigation measures, neutral factors, and alternative scenarios, when assessing the collective import of the red flags in evidentiary terms.

The use of chronologies and *temporal correlation* warrant particular comment at this point. Chronologies can be an important tool in anti-corruption analysis for highlighting potential connections between events and pinpointing key time periods for further assessment. Events that are close in time may be more likely to be to be causally related than are very distant in time. But temporal correlation is not causation, and chronologies are therefore just another tool in the assessment process. Of course, temporal correlation can also be red flags.

For example, an intermediary is brought in to help pursue an opportunity shortly before a key decision is made. If there is also evidence that a key official recommended that intermediary, these two red flags together can be significant risk indicators, unless the engagement can be explained on legitimate grounds (e.g. the intermediary possesses unique and necessary technical expertise). But care must be taken not to overread the implications of the temporal correlation.

Some have argued that *presumptions* should be applied to a bundle of red flags. Given the apparent validity of the transactions and relationships in which they arise, it is difficult to see how presumptions can reasonably be applied to red flags, which are at most risk indicators. This does not mean there needs to be a 'smoking gun', or evidence of an actual corrupt payment, for an arbitral tribunal to find bribery. That information is rarely available. But conversely, given the likely draconian consequences of finding that a corrupt practice has occurred, neither should the fact that corruption typically occurs under the table serve to justify the dilution or abandonment of evidentiary standards. Of course, if the legal standard applies a presumption to certain findings of fact, that will control; but the point is that the red flags, as mere *risk indicators*, should not themselves be the basis of such presumptions.

Others have argued for similar results by *burden shifting* once a *prima facie* case is made. But if a *prima facie* case is based primarily on red flags, this should not be sufficient to shift the burden, even if shifting were warranted, as red flags are simply risk indicators.[61] While presumptions and burden shifting on the basis of red flags alone do not appear to be a tool that arbitral tribunals should use, arbitral tribunals have numerous tools that can be brought to bear in the process of fact-finding in relation to these issues.

61 See Section 3.3 'Red flags and burden of proof'.

2.4 Tools for assessing red flags, individually and/or collectively, and for making factual findings

The tools available to arbitral tribunals in considering where red flags lead in terms of evidence are generally not limited to the corruption arena. Fact-finding tools include:

(i) **Adverse inferences.** Adverse inferences may be and are judiciously taken where a party properly charged with knowledge of a matter, and presumably in control of relevant records, fails to produce information the arbitral tribunal deems relevant (e.g. documentation of services rendered by a third party; payment information showing place of payment). Of course, the lapse of time, changes in corporate ownership, and intervening events, among others, may provide reasons why such inferences should not be taken.

(ii) **Expert opinions.** Expert opinions may be put forward in relation to the methodology to be used, the import of particular red flags, the compliance expectations that would have been reasonable or appropriate for the time and parties in question, and other relevant issues. As with any other area, it will fall to the arbitral tribunal to assess the value of such opinions.

(iii) **Tribunal inquiries.** Some arbitral tribunals have used their inherent authority over the proceedings to pursue lines of inquiry based on red flags that appeared to them, even in the absence of corruption issues having been raised by the parties. The arbitral tribunal's authority in this regard may depend on the specific rules governing the proceedings, but the facts resulting from such inquiries can be highly relevant to the ultimate findings in the case.[62] It may even be argued that it is part of the duty of the tribunal to make such inquiries when presented with red flags.[63]

(iv) **External findings.** Findings of other tribunals, or enforcement authorities conducting investigations may, where relevant contribute to the overall picture. The evidence adduced in such proceedings, if available, may be particularly relevant, although for the reasons expressed earlier,[64] it may be most relevant where the same party is involved.

62 See *Metal-Tech Ltd. v. Republic of Uzbekistan*, supra note 23.

63 For further discussion, see Section 4 'Role and responsibilities of the arbitral tribunal in relation to red flags'.

64 See Section 2.3.2 'Step 2', at 'iii) Cross-cutting considerations in assessing individual red flags'

(v) **Estoppel and waiver.** General principles of estoppel and waiver may also be invoked in appropriate circumstances to influence a factual finding. Under these principles, a party's prior conduct may preclude it from denying certain facts, or the party may be deemed by prior positions to have waived the right to deny certain facts.[65]

(vi) **Admissions.** Admissions of corrupt practices are relatively rare, but are occasionally made.[66] Admissions of more peripheral facts that contribute to an understanding of the overall picture are a more frequent phenomenon.

(vii) **Artificial intelligence processes.** Artificial intelligence represents a new frontier in this context. In the future, arbitral tribunals may be confronted with the outcome of AI operations as reflective of certain facts, probabilities, or possibilities.[67]

2.5 Consideration in evidentiary terms

This final step in the methodology described in Section 2.3 above also requires that the facts and circumstances to be considered in terms of evidence, as it is only on the basis of factual findings, and not mere risk indicators (and in particular the ultimate facts relevant to an alleged corrupt practice), that a determination can be made as to whether improper conduct has in fact occurred.

As discussed earlier, some arbitral tribunals have been able to see in the convergence of a collection of red flags, a basis for an inference of corruption.[68] They have done so using the technique of circumstantial evidence. Circumstantial reasoning purports to prove circumstances surrounding a particular fact (that is necessary to prove a legal element of the relevant act of corruption) but is unable to establish that fact without a certain inference.[69] In the case of circumstantial reasoning, the totality of the facts and circumstances presented in relation to the issue raised by the red flags makes the finding of a corrupt practice inevitable.

Some arbitral tribunals have regarded red flags as '*indices*' concurring towards a finding of corruption. French case law looks for a '*faisceau d'indices suffisamment graves, précis et concordants*'[70] (i.e. a collection of indices sufficiently serious, precise and concordant) when assessing the totality of the evidence. Although the '*faisceau d'indices*' analysis is used in a general fashion by French courts, it can be useful to guide circumstantial reasoning that relies on (validated) red flags.

(i) ***'Indices graves'*** could reflect a number of validated red flags, which directly speak to one or more material legal elements of corruption. For example, the conclusion of a contract or settlement agreement whose terms are manifestly damaging to a State, or the involvement of a son or daughter of a head of state in a transaction that is manifestly to the detriment of that State, speak to the likelihood that an undue advantage passing to *public officials* has permitted such settlement or transaction to occur. While such '*indices*' cannot themselves lead to an inference of corruption, absent proof of intentions, they appear so closely connected with the material legal element of corruption that they can be regarded as '*graves*'.

(ii) ***'Indices précis'*** reflect the probative value of red flags which have not only been validated but have been shown to be specifically relevant to the ultimate issues, thereby acquiring strength (e.g. the remuneration of a consultant in a percentage of the value of an investment or government procurement contract is increasingly unusual). While it may not be enough to assert that such remuneration is unusual in general terms, if it is shown to be unusual in the context of the particular transaction/industry and no legitimate explanation is provided for it, then it may be said to have become '*précis*'.

(iii) While the '*graves*' and '*précis*' elements refer to the individual quality of each red flag, the ***'concordant'*** element refers to the inter-play of a collection of validated red flags and, in particular, their ability to be convergent, so as to allow a finding of corruption. It is clear that a collection of validated general red flags cannot be regarded as '*indices*' that allow an inference of corruption. While '*indices*' drawn from validated general red flags, however '*concordants*', cannot alone lead to an inference of corruption, '*indices*' drawn from validated specific red flags can qualify as '*concordants*'. Validated general red flags

65 These principles may or may not be a bar to a set-aside court's consideration of the issues. See *Etat de Libye vs. SA Société Orléanaise d'éléctricité et de chauffage* électrique – *SORELEC,* Paris Court of Appeal, No. 18/02568, Judgment, 17 Nov. 2020, pp. 7-9 (even if a party knowingly failed to raise the defence of corruption in the arbitration, the reviewing court will not be precluded from reviewing the award's conformity with international public order).

66 E.g. in *World Duty Free Company Limited v. the Republic of Kenya*, Award, ICSID Case No. Arb/00/7.

67 See Section 5.2 'Role of artificial intelligence in red flags generation and analysis'.

68 The first precedent is ICC Case 8891, in *Journal de Droit International*, 2000, No. 4, p. 1076, at p. 1082.

69 A. Sayed, *Corruption in International Trade Commercial Arbitration* (Kluwer Law International, 2004), at p. 94.

70 See e.g the latest line of case law: *SA Alstom Transport SA vs. Société Alstom Network UK Ltd*, Cour d'appel de Paris, 28 May 2019; *Etat de Libye vs. Sorelec*, supra note 65.

may have a supporting role, but there could be no substitute to '*indices*' drawn from validated specific red flags. Such '*indices*' must, however, not be contradictory. A decision maker would need to satisfy herself that all, or at least substantial parts of the relevant '*indices*', are converging towards an inference of corruption. If 'green' flags are part of the evidence, or the '*indices*' are ambiguous or debated, there is room to question what '*indices*' are of sufficiently serious and precise that they potentially tip the scales in favour of a finding of a corrupt practice.

In the previous example in Section 2.3 above, an intermediary was found to have received an unusually high fee expressed as a percentage, and it was posited that this could constitute a finding of an '*indice grave*' and '*précis*'. Such a finding on this aspect alone cannot lead to establishing a corrupt practice, but may be sufficient in the light of other findings emanating from the red flag analysis. This may include general red flags such as the country risk, but more important are findings from other specific red flags, for example, attaching to the consultant's low or inexistent qualifications, absence of proof of legitimate services, or other features surrounding the engagement, and the absence of credible explanations for the absence of such.

In some jurisdictions, the engagement of an intermediary due to his influence will not be improper unless it can be shown to be linked to the receipt of an undue advantage. In others, the breadth of trading-in-influence legislation may make such arrangements illegal. Even if the latter circumstances are present, however, that may not mean that a contract procured with the involvement of that intermediary was a contract resulting from corruption. Further evidence would be needed to show the causation, or linkage, between the intermediary relationship and the securing of the contract. This illustrates the importance of ensuring that the evidentiary findings are correlated to the specific elements of the misconduct that is sought to be established.

In summary, the three-step process may be useful in analysing asserted red flags in a structured and objective fashion in relation to the corrupt practice at issue.

3. The procedural effects of red flags

The practice of international commercial and investment arbitration shows that the need to examine and assess red flags, when they are raised, produces procedural effects in the arbitration and in set-aside or enforcement proceedings, and may trigger admissibility issues in relation to the corruption allegations. (**3.1**); the admissibility of new evidence (**3.2**); the shifting of the burden of proof (**3.3**); and the application of the proper standard of proof (**3.4**).

3.1 Effects of red flags on the admissibility of a corruption allegation

3.1.1 Red flags as a tacit case of corruption

There may be instances where a corrupt practice may not be explicitly alleged; however red flags could be identified by a party as part of a tacit case of alleged corruption. Because of insufficiency of evidence, or because of other considerations (political repercussions or otherwise), a party may raise a defence against a claim of non-performance of a contract, citing red flags relevant to corruption, but without making an explicit case.

When a party raises a tacit case of alleged corruption through red flags, it generally hopes that it will be picked up by an arbitral tribunal, or a set-aside or enforcement judge, thereby leading to a finding of a corrupt practice. Such a finding would obviously defeat the other party's breach of contract case and would somehow shield the alleging party from performance. Arbitral tribunals and set-aside or enforcement courts have dealt with this situation in different ways.[71] In the absence of an overt and manifest case of bribery in arbitration, general red flags are unlikely to trigger, alone, further examination by a tribunal.[72] However, in conjunction with specific red flags, they are more likely to trigger a further examination by the arbitral tribunal. Section 4 examines the duties of arbitral tribunals in this regard.

71 Cases in which corruption was explicitly argued include ICC Case No. 13914, Final Award (2008), excerpted in *ICC Int'l Ct. of Arb. Bull* 77 (Special Supp. 2013) (after pointing to several red flags, highlighting a lack of transparency in the Claimant's expenses and accounting records, payments by the Claimant to officials of a key state-owned enterprise without any credible explanation therefor, among others, establishing clear and convincing evidence of bribery); ICC Case No. 12290 (2005), excerpted in *Collection of ICC Arbitral Awards*, 2008-2011, (J. Arnaldez, Y. Derains, D. Hascher (eds.) (Wolters Kluwer, 2013), p. 831 (use of presumptions based on indicators); *Methanex v. United States*, supra note 59 ('connect the dots').

72 In the *Sorelec* case, supra note 65, Libya did not make a case of corruption during the arbitral proceedings. However, before the Paris Court of Appeal, Libya relied on the fact that the events

3.1.2 Red flags in support of an overt corruption case

If a party makes an overt case of corruption in the course of arbitral proceedings, there generally is no issue of admissibility for an allegation of corruption. A party has the burden to prove its case, and the arbitral tribunal must allow the parties to fully plead their respective positions.

However, the timing of such allegations can raise questions as to their validity, especially when they are raised very late in the proceedings. If the allegation are based on newly discovered evidence, then the question of the timing of their assertion is answered. If not, greater caution on the part of the arbitral tribunal may be warranted.[73]

While a tacit case of bribery is unlikely to succeed in obtaining a reopening of the case,[74] courts have differed when red flags are raised for the first time before an enforcement or set-aside judge as part of an overt case of corruption (and implicate public policy). In the *Alstom* case, in which Alstom was resisting the payment of a consultant's fees and for the first time made an overt corruption defence before the enforcement judges, the London Commercial Court refused to reopen the case, even where general and specific red flags had been cited as being indicators of corruption.[75] In contrast, the Paris Court of Appeal agreed to reopen the case, ordered that additional evidence be adduced, and further ordered that the parties should provide submissions in respect of the red flags identified.[76] The Paris Court did so as the respondent made explicit for the first time its corruption case before the court, supported by red flags.

happened in Libya that was known for its poor record on corruption, which should have amounted to an '*indice*' and triggered the attention of the court.

73 See e.g. *Union Fenosa Gas v. Egypt*, supra note 2, at paras. 7.53, 7.112.

74 Swiss Federal Tribunal, Case No. 4A_136/2016, 3 Nov. 2016. The tribunal speaks of 'implicit case' of corruption, through red flags, raised before the arbitral tribunal.

75 See e.g. *Alexander Brothers v. Alstom* [2020] EWHC 1584 (Comm), paras. 150, 165. The Court did not find that there had been 'special circumstances' which would cause injustice, allowing the Court to reopen the case, even when allegations of corruption were made citing red flags. Such red flags included insufficient proof of services, accounting errors, international control weaknesses, and most importantly access to confidential documents as part of the government bidding process, to which the consultant could not legitimately have had access.

76 This was not the end of the saga in the French courts: The Supreme Court held that the Court of Appeal had misconstrued the evidence, and remanded the case for further proceedings,Paris Court of Appeal, decision on 28 May 2019 (n°16/11182), discussed in Ch. Jarrosson, 'La dénaturation : tendon d'Achille d'un contrôle étendu de la sentence en cas d'allégation de corruption ?, note sous Cass. civ. 1re, 29 sept. 2021', *Revue de l'Arbitrage*, 2021, Issue 3, pp. 691 – 693; also in L. Stefani, 'New Developments in France on the Alstom Saga: The French Supreme Court Overrules the Paris Court of Appeals Decision to Deny Enforcement of the Arbitral Award on the Grounds of Corruption' (Kluwer Arb. Blog, 18 Dec. 2021).

3.2 Effects of red flags on the admissibility of evidence

If, in the course of the arbitration proceedings a party raises red flags that resonate with some of the legal elements of an alleged corrupt practice, no admissibility issue is susceptible to arise. However, an issue of admissibility of evidence may arise when a party makes extensive document production requests (**3.2.1**) or seeks admission of new evidence as part of a late allegation of corruption based on red flags (**3.2.2**).

3.2.1 Red flags as cause for extensive document production requests

In the presence of qualitatively strong red flags, arbitral tribunals tend to subject the matter to heightened scrutiny. This leads them to grant more extensive document requests. Arbitral tribunals also tend to be more relaxed on issues of relevance and/or materiality of evidence.[77]

While a tribunal keeps its total discretionary power to regulate the process of document production, arbitral tribunals tend to allow limited-scale 'fishing' expeditions and to allow at the same time the production of exculpatory documentary evidence from the other side, if available; all being useful for a full and proper assessment of the available red flags.

3.2.2 Red flags as cause for late admission of new evidence in arbitration proceedings

Because, in an arbitration, a party may hesitate to put forward startling allegations of corruption (which may implicate not only the other party but its own employees or agents), and because corruption is rarely manifested in direct evidence, parties take time to make a case for corruption. It may happen that, at the start of a dispute, a party begins entertaining suspicions that bribery or another corrupt practice may have tainted a particular contract or investment; however, it refrains from making a case, absent sufficient evidence.

On remand, the Versailles Court of Appeal found insufficient proof to support Alstom's corruption defence and rejected its challenge to the enforcement order, ending the case. See 'Arbitration between Alstom & ABL: the Versailles Court of Appeal confirms the exequatur on 14 March 2023'(https://navacelle.law/, 29 mars 2023). Although that case ultimately failed on the facts, the underlying principle guiding the Court of Appeals decision remains in place.

77 See e.g *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, paras. 550-553, where the tribunal acceded to an extensive additional document request related to the financial aspect of the share purchase, and undertook itself 'to examine for relevancy the documents requested by Respondent (despite a lack of apparent relevancy or materiality)'.

Raising red flags alone, absent a clear allegation of corruption, is unlikely to succeed. However, raising red flags with an underlying allegation of a corrupt practice and linking it to one or more of its legal elements, even at a late stage in the proceedings, is more likely to succeed.

Even if the proceedings are well advanced, it would be less difficult in these circumstances for an arbitral tribunal to grant leave for further submissions to argue about the implications of the red flags raised. Indeed, the arbitral tribunal itself may direct inquiries to the parties using its *ex officio* powers, as in the *Metal-Tech v. Republic of Uzbekistan* case.[78]

However, where the proceedings have been closed to render an award, it would be more difficult for a tribunal to grant a request to re-open the proceedings. This is so because, after the parties have rested their respective cases, it would be abusive to seek to reopen the proceedings without serious cause (e.g. it is difficult to see how general red flags, even if coupled with a clear allegation of corruption, could constitute a serious ground for the reopening of the proceedings). However, where the allegations relate to specific red flags suggesting some form of *quid pro quo*, a tribunal must be prepared to re-open the case, even if an award is imminent.

Some arbitral tribunals have done so without hesitation, while ensuring that the parties are afforded sufficient due process guarantees to make their respective cases on the import of alleged red flags.[79] Other arbitral tribunals have not been willing to do so, with the consequence that the parties have been tempted to carry forward their debate over the alleged red flags before enforcement and set-aside courts, which has produced contradictory findings.[80]

Allowing reasonable consideration of alleged red flags, even those raised late in the proceedings, may have the effect of minimising the probability of parties raising them before set-aside and enforcement courts. Where specific red flags are raised at a late stage in the arbitral proceedings, in the context of a serious allegation of corruption, and where they appear tied with one or more of the legal elements of an alleged corrupt practice, it would be appropriate to reopen the case, and let them be properly and sufficiently debated for the benefit of a reasoned award.

3.2.3 Red flags as cause for admission of new evidence by an enforcement or set-aside judge

Courts have differed as to whether facts could be reconsidered in enforcement and set-aside proceedings, when public policy is implicated, at the expense of the finality of arbitral awards. This obviously has repercussions as to whether new evidence to corroborate red flags pertaining to suspected corruption could be declared admissible by such courts. Courts have generally been reluctant to admit such new evidence in enforcement or set-aside proceedings, as judicial control of awards must defer to awards on the matters of fact.[81]

However, the jurisprudence of the Paris Court of Appeal takes a different position by admitting reconsideration of the facts when there are allegations of corruption, implicating the French conception of 'international public policy'.[82] In the *Alstom case*, the Paris Court even ordered the parties to provide additional evidence in relation to some '*indices*' raised in the context of an allegation of corruption made for the first time before the enforcement court.[83]

This is not the place to comment on what degree of judicial control is appropriate in the enforcement and set-aside context when allegations of corruption are proffered. The specific issue dealt with here is whether, if red flags are raised, they are sufficient to warrant admission of new evidence in enforcement and set-aside proceedings. It is clear that if allegations of corruption are based on general red flags, it is unlikely that they could be a sound motive for admitting new evidence. However, where red flags are specific and

78 *Metal-Tech v. Republic of Uzbekistan*, supra note 23, at paras. 86-87.

79 See e.g *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. Arb/12/1, Decision on Respondent's Application to Dismiss the Claims, 10 Nov. 2017, para. 233: 'The Tribunal considers that in view of the seriousness of at least some of the allegations raised by Respondent and the fact that Respondent has advanced ten witnesses that testify to having paid or accepted bribes in connection with the Reko Diq project, there are indeed '*special circumstances*' that justify to hear Respondent's objections to jurisdiction and admissibility despite the fact that they have been raised only at a very late stage of the proceedings'.

80 This has been the case, e.g. in *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. and Others, in Bulletin de l'Association Suisse de l'Arbitrage*, 1995, p. 301, at p. 342; giving rise to contradictory judgments from the UK and Swiss court: *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. And Others*, [1998] 2 Lloyd's Law Reports, 111; *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. and Others* [1999] 2 Lloyd's Law Reports, 65; *Jugoimport-SPDR Holding Co. Ltd. and Others v. Westacre Investment Inc.*, Swiss *Tribunal fédéral*, 30 Dec. 1994, in *Bulletin de l'Association Suisse de l'Arbitrage*, 1995, p. 217.

81 This has been the constant jurisprudence of the Swiss and to some extent UK courts.

82 For a critical review of the position of the Paris Court of Appeal, see Ch. Jarrosson, 'La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences ', *Rev. de l'Arbitrage*, 2022, Issue 4, pp. 1251 – 1286; see also S. Lemaire, 'La preuve de la corruption', *Rev. de l'Arbitrage*, 2020, No. 1, pp. 185-205; and P. Mayer, 'Corruption and Arbitration: Recent Developments in French Case Law', *ICC Dispute Resolution Bulletin*, issue 2022-2.

83 *SA Alstom Transport SA vs. Société Alstom Network UK Ltd*, Cour d'appel de Paris, 28 May 2019.

seem to be pointing to a risk of a corrupt practice on the facts, it remains a matter of judicial discretion to admit new evidence in respect thereof. This obviously depends on the domestic judicial policy with respect to the degree of scrutiny of awards in enforcement or set-aside proceedings.

In this context, red flags would be looked at, not from the prism of the risk of a corrupt practice alone, but from the prism of whether the tribunal that issued the award that is about to be recognised and enforced may have overlooked red flags relevant to such offense. An enforcement or set-aside judge looks thus at a different kind of risk, and generally balances between the cost of refraining from entertaining new evidence based on specific red flags, in the enforcement or set-aside stage and the cost of admitting new evidence in the narrow context identified above. Such judge might consider that if new red flags are not fully probed, even in enforcement or set-aside proceedings, they are likely to remain, and the case may return to the same court for *revision* of the award, in the event parallel or subsequent criminal findings establish that a corrupt practice has occurred.[84]

Conversely, if it is apparent to the enforcement or set-aside judge that the arbitral tribunal has given full and careful consideration to the red flags raised in the course of issuing its award, given the highly factual nature of such red flags, it would not seem appropriate for that judge to reconsider them. Although red flags function as such because of their resonance with the legal elements of corrupt practices, their content is inherently factual and circumstantial. Their proper use, as explained above, involves their validation, overall assessment and consideration in evidentiary terms, prior to the application of the relevant legal standard to the findings that emerge.

For an enforcement or set-aside judge, therefore, the decision is not simply to reconsider the red flags as such, but to justify the embarking on a full factual and evidentiary reassessment.[85]

3.3 Red flags and the burden of proof

3.3.1 The burden of proof remains with the party making the corruption allegation

The burden of proof is the obligation incumbent on the alleging party to produce the quantum of evidence needed in support of its case (the standard of proof).[86] The burden of persuasion may be somewhat different inasmuch as it represents a burden to persuade a trier of fact of a party's case on a particular issue.[87]

When red flags are raised as part of an allegation of a specific corrupt practice, the arbitral practice is unanimous that the burden of proof remains with the party making the allegation.

However, since some red flags purport to indicate a lack of evidence from which a tribunal is called to draw an inference that a corrupt practice has occurred (e.g. lack of proof of services, or lack of application of compliance checks), the question has arisen as to whether this must lead a tribunal to shift the burden of proof to the other side. Arbitral practice is generally unanimous in maintaining the burden of proof with the party raising red flags in the context of a corruption allegation. Therefore, the alleging party cannot simply raise red flags and then choose to rest. It must pursue its case to meet the relevant standard of proof and thereby persuade the decision maker of its case.

3.3.2 Shifting the burden of proof or reverse burden of proof

There are, however, instances where arbitral tribunals decide to shift the burden of proof (sometimes referred to as the 'burden of persuasion' or 'burden of production') on a particular issue to the other side, in order to allow the other party to present evidence to prevent the drawing of an adverse inference of corruption initially suggested by the red flag. In general, this appears warranted where a red flag points to an aberrant situation relating to facts that should be known to a party (e.g. the total absence of a consultant's services in the evidence, despite a high remuneration).[88]

84 In the *Brunner Sociedad, Frontier AG vs. Thomson CSF,* ICC Case 7664, the Swiss *Tribunal fédéral* had confirmed the award, which found that there had been no corruption intended or pursued through a consultancy agreement (*Thomson CSF v. Frontier AG and Brunner Sociedad, Tribunal fédéral*, 28 Jan. 1997, *ASA Bulletin* 1998, p. 118). However, following subsequent criminal findings to the contrary in France, the case returned to the *Tribunal fédéral Suisse* for an action for revision. The *Tribunal fédéral* ordered that the award must be revised in a manner consistent with the criminal findings (*Thomson CSF v. Frontier AG and Brunner Sociedad, Tribunal fédéral*, Case 4A_596/2008, 6/10/2009).

85 Of course, if the argument is that the arbitral tribunal has misapplied the law in relation to the allegation of corruption, then (depending on the standard of review of such matters) a different exercise is implied.

86 As part of its work, the ICC Commission on Arbitration and ADR Task Force on 'Addressing Issues of Corruption in International Arbitration' has considered the issue of standard and burden of proof in corruption cases generally. This Document focuses on the narrower issue of red flags and is subject to any conclusion and recommendations the work of the Task Force will formulate.

87 See generally A. Menaker, 'Chapter 5: Proving Corruption in International 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. 77–102, at p. 81.

88 See e.g. ICC Case 12990, *ICC Bulletin Special Supplement – Tackling Corruption in Arbitration*, Vol. 24, 2013, p. 52, at p. 54, para. 256.

Other arbitral tribunals have called the shifting of the burden of proof, a 'reverse burden of proof'.[89] In particular, where a party makes an allegation of corruption, the burden of proof should rest with that party if it simply cites red flags that point to positive acts or intentions of corruption. However, if that party seeks to draw inferences from red flags having to do with lack of specific actions taken that are within the knowledge or control of the other party (e.g. lack of services or lack of *ex ante* corruption risk analysis), then it would be normal for the other party's case, though being responsive or rebuttal in nature, to be also an affirmative one.

In defence, the other side would be expected to rebut these red flags by asserting that legitimate services were in fact provided, or that due diligence measures were in fact taken. In so doing, that party makes an affirmative case, in support of which it should be in a position to adduce the relevant evidence. In this particular case, a decision maker in international arbitration may need to expect that the burden of proof in relation to this issue lies with that party. From the perspective of the corruption allegation, whether it is called 'shifting' or 'reversing' the burden of proof matters little, as long as all means are used to allow the evidence in respect of the asserted corrupt practice to be properly considered.

There are specific red flags, which if validated, are more probative of the existence of key elements of a corrupt practice (e.g. consultant fees expressed in what has been determined to be a high percentage). In these situations, arbitral tribunals maintain the burden of proof on the party alleging a corrupt practice, but may request that the party against whom a red flag is addressed to come forward with an explanation. A burden of persuasion or production would thus lie on that party to provide evidence as to why the red flag being asserted against it does not support a finding of an element of the asserted corrupt practice. A decisionmaker in international arbitration keeps its discretionary power to appreciate the evidence and explanations provided.

89 See e.g. *Alexander Brothers v. Alstom* [2020] EWHC 1584, para. 40 discussing the way in which the award (which is not published) dealt with red flags raised without an allegation of corruption.

3.4 Red flags and the standard of proof

A long debate has ensued over the issue of what standard of proof to apply when there is a suspicion or an allegation of corruption in international arbitration. The debate has been influenced by the diversity of legal cultures that are usually brought to bear in a typical international arbitration proceeding, and by the connection that corruption has with the criminal law.[90]

As part of its work, the ICC Commission on Arbitration and ADR Task Force on 'Addressing Issues of Corruption in International Arbitration' has considered the issue of standard and burden of proof in corruption cases generally. This Document focuses on the narrower issue of red flags and is subject to any conclusion and recommendations the work of the Task Force will formulate.

The work of the Task Force has generally been alternating between two main standards of proof: **a heightened standard of proof**, requiring 'clear and convincing' evidence, that is short of the U.S. 'beyond reasonable doubt' test proper to criminal matters;[91] and **a low standard of proof**, commonly referred to as 'preponderance of the evidence' or 'balance of probabilities'.[92] Arbitrators with a civil law background will sometimes search their own '*conviction intime*' when looking at the totality of evidence before them.[93] 'Reasonable certainty' – an intermediate standard found in areas such as quantum – has also occasionally been used.

More specifically related to red flags, decisionmakers in international arbitration have frequently questioned their effect on where to place the cursor of the standard of proof.

(i) For some arbitral tribunals, red flags have had the effect of lowering the standard of proof toward a test that is less than 'clear and convincing'.

90 For a summary of the debate, see e.g. V. Khvalei, 'Standards of Proof for Allegations of Corruption in International Arbitration' in D. Baizeau, R. Kreindler (eds), supra note 87, pp. 69-76.

91 See e.g. *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009. para. 221; ICC Case 13384, *ICC Bulletin Special Supplement – Tackling Corruption in Arbitration*, Vol. 24, 2013, p. 62, at p. 64, para. 67.

92 For a review, see e.g. A. Menaker, supra note 87.

93 Id. at p. 83.

(ii) One tribunal suggested that the cursor should be placed a little higher than the 'balance of probabilities' test, but lesser than the 'clear and convincing test'.[94]

(iii) Other arbitral tribunals have not decided a clear standard in presence of red flags in support of an allegation of a corrupt practice.

(iv) While keeping in mind both the higher standard of 'clear and convincing' as well as the lower standard of 'balance of probabilities', one arbitral tribunal ruled that if an allegation of corruption and the red flags mobilised in its support failed to establish the lower standard, it would not be possible for such red flags to satisfy the higher standard.[95]

There is a close relationship between red flags and the standard of proof to be applied. While there is a growing trend in arbitral practice to move away from the rigidity of high standards of proof',[96] the debate on the appropriate standard of proof to apply can be enriched by a proper assessment of the type, quality and quantity of red flags that are at stake in a case. In particular, the issue of where to place the cursor in a given case depends on the answers to the following questions:

(i) how abundant (quantitative) or specific (qualitative) the validated red flags are;

(ii) whether they point to a *quid pro quo*; and

(iii) whether they are capable of crystallising into '*indices graves, précis, et concordants*', by operation of the technique of circumstantial evidence discussed above.[97]

However, many would argue that the consequences of a finding that a corrupt practice has occurred must also be considered in determining this issue. The admonition that 'the more startling'[98] the charge, the higher the standard should be, has been invoked in the context of allegations of corruption, which may result in a finding of a lack of jurisdiction over a claim or its non-admissibility, among others. While a fuller discussion of the consequences is beyond the scope of this document, the issue should be noted.

4. Role and responsibilities of the arbitral tribunal in relation to red flags

The previous sections have touched on this issue, which however deserves full attention given the debate on the subject and the many open questions. As part of its work, the ICC Commission on Arbitration and ADR Task Force on 'Addressing Issues of Corruption in International Arbitration' has considered the issue of the duties of the arbitrators in corruption cases generally. This Document focuses on the narrower issue of red flags and is subject to any conclusion and recommendations the work of the Task Force will formulate.

The term 'duty' has two related connotations: what we are obliged to do because it is our legal responsibility (legal connotation), and because it is the right thing to do (moral connotation).[99] Given the nature of this Document, the discussion will only refer to the legal connotation, but doing so on the assumption that there is no doubt that arbitrators must act on an ethical basis, particularly in matters with a high moral component such as corruption.

The duties of arbitrators facing allegations or suspicions of corruption based on asserted red flags have been intensely debated in recent years. Efforts have focused on the question *what* arbitrators should do under these circumstances. There are, however, complementary questions that help us understand the complexity of the subject, for example:

- Are arbitrators allowed to do nothing or to be indifferent in the face of red flags?
- Do they have to justify their inaction?
- Does an unjustified inaction generate any legal consequences or responsibility?
- Is the fight against corruption relevant to the arbitration system in the long run?

94 *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB (AF)/12/6, Award, 6 Aug. 2019, considering a red flag in the form of an order to stop an EY audit in relation to gambling and casino investment in Laos. The arbitral tribunal reasoned as follows, at para. 110: 'In the Tribunal's view there need not be 'clear and convincing evidence' of every element of every allegation of corruption, but such 'clear and convincing evidence' as exists must point clearly to corruption. An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although of course proof beyond a reasonable doubt would be conclusive. This approach reflects the general proposition that the graver the charge, the more confidence there must be in the evidence relied on'.

95 See e.g. *The Republic of Croatia v. MOL Hungarian Oil and Gas Plc*, PCA Case 2014-15, Final Award 23 Dec. 2016, para. 125: 'None of the ultimately residual conceptual difficulties, however, needs to be resolved in this case if the Tribunal finds that the allegations of corruption fail even under a traditional balance-of-probabilities'.

96 A. Llamzon, supra note 31, at p. 295.

97 See Section 2.5 below

98 M. Hunter, 'Modern Trends in the Presentation of Evidence in International Commercial Arbitration', *Ius Arbitale Internationale, Essays in Honor of Hans Smit, The American Review of International Arbitration*, 1992, Vol. III, pp. 204-213, p. 211.

99 Cambridge Dictionary, definition of 'duty': 'something that you have to do because it is part of your job, or something that you feel is the right thing to do'.

Existing literature has also focused on differentiating the duties of arbitrators when allegations of corruption *are made by the parties* versus when arbitrators act *sua sponte* based on a tacit case or their perception of red flags. The development of the law in recent years sheds some light on what to do in these two scenarios by emphasising the role of the applicable law and the notion of transnational public policy, which could help to reconcile the different approaches of the two schools of thought explained below.

4.1 Two views on the duties of arbitrators

The duties of arbitrators, in general, are set out in a broad and complex spectrum of sources, including the arbitration agreement, the law applicable to the arbitration agreement, the law applicable to the merits, the *lex arbitri*, the rules of arbitration institutions, the law of the country of enforcement of the award, and the international conventions on the fight against corruption, among others. However, going back to a timeless debate, the duties and prerogatives of arbitrators in relation to corruption seem to have a connection with the theories on the *nature of arbitration*, i.e. jurisdictional (**4.1.1**) or contractual. (**4.1.2**).

Without suggesting a rule, the powers of arbitrators to carry out investigations *sua sponte* appear to be broader in places where the jurisdictional theory prevails, according to which the role of arbitrators is equivalent to that of the judges with few exceptions and nuances. In contrast, in jurisdictions where the contractual theory predominates, the applicable law may be more restrictive since the role of arbitrators is limited to solving specific contractual disputes, leaving the duty to investigate acts of corruption to judges and other public servants. The implications of these two views are briefly explained below.

4.1.1 The jurisdictional approach

The supporters of the jurisdictional approach suggest that arbitrators exercise a quasi-judicial[100] function, which is not subordinated to the will of the parties,[101] and that they must ensure compliance with the international legal order and the rule of law.[102] This responsibility would be associated with the growth of arbitration as an alternative to the ordinary justice, which requires arbitrators to observe the individuals' fundamental rights.[103] Under this approach, if courts make efforts to fight corruption, arbitrators must do the same given the public responsibility they have assumed.[104] As a consequence, investigations into acts of corruption are no different from those related to other types of illegality of the underling contract, which are normally covered by the arbitration agreement and which, therefore, the arbitrators have the power (and the duty) to investigate.[105]

This jurisdictional approach has been adopted by a number of arbitral tribunals, e.g. in the cases of *World Duty Free v. Kenya*,[106] *Metal-Tech v. Republic of Uzbekistan*,[107] and ICC No. 1110,[108] in which the arbitrators recognised their duty to safeguard the public

100 J.D.M. Lew, *Applicable Law in International Commercial Arbitration*, Oceana, 1978, para. 66: 'It follows that the arbitrator, like the judge, draws his power and authority from the local law; hence the arbitrator is considered to closely resemble the judge…'.

101 UK Supreme Court, *Jivraj v. Hashwani* [2011] UKSC 40 (27 July 2011), para. 40: 'Although an arbitrator may be providing services … and he of course receives fees for his work, and although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties … He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services …'.

102 C.A. Rogers, 'The Vocation of the International Arbitrator', 20 *Am. U. Int'l L. Rev*. 958, 963, 2005; M. Hwang, K. Lim, 'Corruption in Arbitration – Law and Reality', 8(1) *Asian Int'l Arb. J* (2012) 1, 20.

103 L. Neuberger, 'Arbitration and Rule of Law, Address Before the Chartered Institute of Arbitrators Centenary Celebration', 20 March 2015, para. 8: 'over the past forty years national legislation and international conventions have famously given arbitrators ever increasing freedom and power by restricting interference by the courts with arbitrators' procedures and awards. Any increase in freedom or power carries a concomitant increase in responsibility, and an increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights'.

104 D. Baizeau, T. Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption *Sua Sponte*', in A. Menaker (ed.), supra note 29, at p. 25: 'From a moral and political perspective, it has been submitted that arbitrators have a "public responsibility to the administration of justice", which goes hand in hand with the autonomy accorded to them by national courts; that states and companies alike today are making efforts to eliminate corruption, and arbitrators can and should best support those efforts by being proactive; and that, since ineffective judiciaries are a root cause of the tenacity of corruption, the interests of the international arbitration community itself are served by actively assisting in anti-corruption efforts, rather than being seen as weak and complicit in corruption'.

105 R. Kreindler, supra note 24, at p. 252.

106 *World Duty Free Company Limited v. the Republic of Kenya*, supra note 66, para. 142: 'bribery is contrary … to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld'; and para. 181: 'The answer, as regards public policy, is that the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world'.

107 *Metal-Tech v. Republic of Uzbekistan*, supra note 23, at para. 389: '[T]he Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law…'.

108 ICC Case No. 1110, Award, Gunnar Lagergren, published in *Arb. Int'l* 1994, p. 291: 'it cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators'.

interest and the rule of law beyond their contractual duties or the rules under which they were appointed. On jurisdictional issues, it is recommended to address commercial and investment disputes separately:

- **In commercial disputes**, given the presumption of separability of the arbitration clause, arbitrators tend to declare themselves competent even if there are claims of illegality of the underlying contract (e.g. in *Fiona Trust v. Privalov*,[109] the House of Lords clarified that an allegation that a contract was procured by bribery affects only the main contract, and not necessarily the arbitration agreement).
- **In investment arbitration**, where consent is based on a treaty, different issues arise, in particular whether corruption can vitiate the parties' consent to arbitration when the treaty requires investors to make their investments in accordance with the laws of the host state. Arbitral tribunals have tended to consider the legality of an investment to be a condition of investment treaties, in some cases even where the instruments do not contain an express legality clause. For example, arbitral tribunals in *Phoenix v. Czech Republic*,[110] *SAUR v. Argentina*,[111] *Hamester v. Ghana*,[112] and *Inceysa v. El Salvador*[113] held that states had not offered access to arbitration for investments not made in good faith or in violation of the laws of the host state; investments made illegally fall outside the consent given by the parties.[114]

4.1.2 The contractual approach

The proponents of the contractual approach consider that the main role of arbitrators is to enforce the contract, not to be the guardians of public order. Consequently, it is not for arbitrators to assume the role and investigative powers of judges and prosecutors.[115] Therefore, arbitrators would not have a duty to investigate acts of corruption, particularly when the parties have not alleged them.[116] This position has been endorsed by some arbitral tribunals, e.g. in *SPP v. Egypt*,[117] *Azurix v. Argentina*,[118] *African Holding v.*

109 *Fiona Trust & Holding Corporation v. Privalov* [2007] UKH 70, para. 17: 'The principle of separability... means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the arbitration agreement'.

110 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, para. 106: 'In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance'.

111 *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para. 308: 'Il entend que la finalité du système d'arbitrage d'investissement consiste à protéger uniquement les investissements licites et *bona fide*. Le fait que l'APRI entre la France et l'Argentine mentionne ou non l'exigence que l'investisseur agisse conformément à la législation interne ne constitue pas un facteur pertinent. La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu'un État offre le bénéfice de la protection par un arbitrage d'investissement si l'investisseur, pour obtenir cette protection, a agit à l'encontre du droit'.

112 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, Award, 18 June 2010, para. 123: 'An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitute a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law'.

113 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award, 2 Aug. 2006, para. 207: 'Based on the foregoing arguments, this Arbitral Tribunal considers that the consent granted by Spain and El Salvador in the BIT is limited to investments made in accordance with the laws of the host State of the investment. Consequently, this Tribunal decides that the disputes that arise from an investment made illegally are outside the consent granted by the parties and, consequently, are not subject to the jurisdiction of the Centre, and that this Tribunal is not competent to resolve them, for failure to meet the requirements of Article 25 of the Convention and those of the BIT'.

114 Issues may arise as to whether the illegality clause covers all forms and types of illegality or is restricted to more serious types of misconduct; temporal issues may also arise as to conduct that post-dates an investment. These issues are beyond the scope of this Document.

115 A. Mourre, 'Chapter 11 – Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal', Part II Substantive Rules on Arbitrability, in L. Mistelis and S.L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer, 2009), pp. 207, 229: 'Arbitrators should act with great caution when introducing in the arbitral debate elements which were not included in the parties' submissions. Although there is no doubt that arbitrators should be sensitive to states' legitimate interests, they should not turn themselves into investigators, policemen or prosecutors. As opposed to the state judges, the primary role of an arbitrator is to enforce the contract, and not to defend public policy. It is submitted, as a consequence, that an arbitrator has no duty to investigate possible breaches of criminal law of which there is no evidence at all and which were not raised by the parties in their submissions'.

116 T. Giovannini, 'Chapter 8: Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?', in D. Baizeau, B. Ehle (eds.), *Stories from the Hearing Room: Experience from Arbitral Practice. Essays in Honour of Michael E. Schneider* (Wolters Kluwer, 2015) pp. 59, 68 (citing A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration paras. 3-28, 1999): 'It is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption when none is alleged'.

117 *SPP v. Egypt*, Award, ICSID Case No. ARB/84/3, para. 132: 'Thus, the allegations concerning irregular contacts and connections are not supported by the evidence in the record and are based on suppositions, guilt by association and what the Respondent describes as '*commencement de preuve*'. On such grounds, it is simply not possible to reach the findings of fact and conclusions requested by the Respondent'.

118 *Azurix v. Argentina*, Award, ICSID Case No. ARB/01/12, para: 56: 'The Tribunal was informed by Argentina that an investigation of this matter had been initiated by the office of the Procurador del Tesoro. During the hearing on the merits, and as a reaction to insinuations of corruption during the examination by Argentina of a witness presented by Argentina, counsel for the Claimant asked the witness whether to his knowledge there had been any corruption in connection with the award of the Concession. The

Congo,[119] *EDF v. Romania*,[120] *Himpurna California Energy v. PLN*,[121] ICC No. 6497,[122] and ICC No. 7047,[123] in which the arbitrators dismissed corruption allegations because there was insufficient evidence in the record without having conducted *sua sponte* additional investigations.

It must be clarified that not all these cases are comparable. In some of them, in fact, accusations of corruption were vague and not firmly pursued by the parties. A common criticism to this position is that acts of corruption are usually not easy to prove, so requiring conclusive evidence might not be realistic.[124]

Although these two schools of thought at first sight look incompatible, the development of the law in recent years could help in reconciling them: today there is no doubt that legislators, arbitral institutions, and parties to arbitrations have provided arbitral tribunals with greater investigative powers than in the past, without exceeding the limits of the arbitration agreement and the law. Respect for these limits is achieved by complying with the duties explained below.

4.2 Essential duties of arbitrators

In cases involving allegations or red flags of corruption, arbitrators should make every effort to find a proper balance in the performance of some essential – and sometimes conflicting – duties. Four of the arbitrators' duties are set out below.

1 - Arbitrators must resolve the dispute submitted to them by the parties. Such duty implies not diverting the process and resources to unnecessary investigations that can create an unjustified burden on the parties or in some cases violate due process. Therefore, arbitrators should avoid initiating *ex officio* investigations in cases where there is no clear justification to do so, such as when the parties' allegations are vague, immaterial, or clearly made in bad faith with the aim of tainting the counterparty's case in the arbitrators' mind. When determining whether it should engage in investigations *sua sponte* investigations, the arbitral tribunal can be guided by the red flags and validation process (Section 2.3.2 'Step 2: Confirming or validating an individual alleged red flag').

2 - Arbitrators must apply the law including mandatory rules. Indeed, the legal elements of the relevant acts of corruption, which require the identification of red flags, are set out in statutory rules that are labelled as mandatory. Importantly, arbitrators also have at their disposal the principles of the transnational public order, under which there is little doubt today that corruption is condemned.[125] This premise is important because if it is assumed that corruption violates transnational public order, there would be no reason to disregard mandatory rules.[126] In this context, there seems to be little doubt that

witness replied that he was not aware of any improper conduct, and the Procurador General present at the hearing confirmed that the investigation was continuing but that no evidence of improper conduct had surfaced. No further information has been transmitted to the Tribunal'.

119 *African Holding Company of America v. Congo*, ICSID Case No. ARB/05/21, para. 52: 'Le Tribunal est disposé à considérer toute pratique de corruption comme une affaire très grave, mais exigerait une preuve irréfutable de cette pratique, telle que celles qui résulteraient de poursuites criminelles dans les pays où la corruption constitue une infraction pénale. En revanche, si PwC s'était rendue compte dans son examen des comptes que les contrats auraient pu avoir été accordés à SAFRICAS à des prix dépassant les prix du marché, il est fort probable que les montants déterminés comme étant dus par la RDC auraient été réduits à due conséquence'.

120 *EDF Services Limited v. Romania*, Award, ICSID Case No. ARB/05/13, para. 221: 'In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing'.

121 *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listruk Negara,* Award, 4 May 1999, para. 118, reported in *Mealey's International Arbitration Report*, Vol. 14, 12/99: 'The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality … The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption … But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have been unscrupulous justify the arbitrary designation of a particular investor as a scapegoat'.

122 ICC Award No. 6497, *ICCA Yearbook Com. Arb.* 1999, para. 73: 'The demonstration of the bribery nature of the agreement has to be made by the Party alleging the existence of bribes (hereafter the "alleging party"). A civil court, and in particular an arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth. A civil court has to hear the allegations and the proofs offered by the parties. The "alleging Party" has the burden of the proof. If its demonstration is not convincing, the tribunal should reject its argument, even if the tribunal has some doubts about the possible bribery nature of the agreements'.

123 ICC Award No. 7047, *ASA Bull.*, 1995, para. 342: 'The word "bribery" is clear and mistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate …'.

124 S. Nappert, 'International Arbitration as a Tool of Global Governance: The Use (and Abuse) of Discretion', 2017, p. 15 *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation Get access Arrow,* E. Brousseau, J.-M.Glachant, J. Sgard (eds.) (OUP, 2019). 'In contrast to past pronouncements by other tribunals that corruption must be proven by no less than 'substantiated facts and conclusive evidence' (making it in practice near-impossible to prove) …'.

125 See generally, P. Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International, 1987).

126 C.F. Concepción, 'Combating Corruption and Fraud from an International Arbitration Perspective', *Arbitraje*, Vol. IX, n° 1, 2016, pp. 369–396, at p. 387: 'Before determining whether a party has

transnational public order mandates arbitrators and judges to have zero tolerance for corruption. This can be deduced from the proliferation of international treaties, local laws, and guidelines of international organisations on the fight against corruption. In the words of the United Nations:

> Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.[127]

This position was adopted by the arbitral tribunal in *World Duty Free v. Kenya*:

> In light of domestic laws and international conventions relating to corruption … this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.[128]

While recognising the need for arbitral tribunals to retain a margin of discretion in its conduct of the proceedings, this strongly suggests that where red flags are identified, they should not remain unchecked.[129]

3 - Arbitrators must do their best to ensure that the award they render is enforceable.[130] This duty has two practical implications in the context of this work: arbitrators must verify that the award does not violate the public order so it can be enforced, but they cannot act *ultra petita/vires* by resolving matters not submitted by the parties to arbitration.

On the one hand, arbitrators must verify that the award does not violate the public order so it can be enforced.[131] An award that enforces a contract tainted by corruption risks being denied recognition and enforcement on public policy grounds,[132] as in the *Soleimany v. Soleimany* case,[133] in which an English court refused enforcement of an award upholding a joint venture contract for smuggling carpets out of Iran which contravened English public order; and in *Kyrgyzstan v. Belokon*,[134] in which an UNCITRAL award was annulled for violating the international public order for referring to a contract used for money laundering. Equally important is the position holding that awards which disregard red flags can be declared unenforceable. Due regard to transnational public policy appears therefore key in this perspective.

Since the notion of transnational public order is deemed to be a consolidation of the public policies of most countries, an award that contravenes transnational public order is also likely to contravene the public order of the country of enforcement. In general, it appears that corruption and public order grounds are receiving increasing attention from courts in the context of

engaged in a corrupt or fraudulent act, the tribunal must determine the applicable law for the dispute. As previously discussed, however, transnational public policy may be available to simplify this analysis'.

127 Preamble, UN Convention Against Corruption (2003).

128 *World Duty Free Company Limited v. the Republic of Kenya*, supra note 66, at para. 157.

129 See also V. Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption', *ICC Bulletin Special Supplement 2013: Tackling Corruption in Arbitration*.

130 See Art. 42, ICC Arbitration Rules: 'In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'. See also C. Nairac, M. Thadikkaran, E. Aleynikova, 'Public Policy and the Enforceability Of Arbitral Awards' including 'Extracts from ICC Arbitral Awards on Considerations of Public Policy and Enforceability', *ICC Dispute Resolution Bulletin*, 2016-1.

131 G. Born, *International Commercial Arbitration* (Third Edition, Kluwer Law International, 2021), 'Chapter 19: Choice of Substantive Law in International Arbitration' (Updated February 2024) (footnotes omitted): 'Nevertheless, as already suggested, arbitrators are obliged, by the adjudicative character of their mandate, to consider and apply mandatory laws and public policies, even when this is contrary to the terms of the parties' choice-of-law or other agreement. The essence of the arbitrators' mandate is to render a decision through an adjudicative process that rests on the application of legal rules. It is a vital precondition to the fulfillment of this mandate that the arbitrators consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to applicable mandatory law and public policy.'

132 B.M. Cremades, D.J.A. Cairns, 'Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud' in K. Karsten, A. Berkeley (eds.), *Arbitration – Money Laundering, Corruption and Fraud* (Dossiers of the ICC Institute of World Business Law, 2003), at p. 86: 'The position today is that the international arbitrator has a clear duty to address issues of bribery, money laundering or serious fraud whenever they arise in the arbitration and whatever the wishes of the parties and to record its legal and factual conclusions in its award. This is the only course available to protect the enforceability of the award and the integrity of the institution of international commercial arbitration'; C.F. Concepción, supra note 126, at p. 377: 'If the tribunal's decision is not mindful of transnational public policy and consequently delivers an unenforceable award, then it renders the arbitral proceeding pointless and undermines international commercial arbitration as the preferred dispute resolution for foreign parties. It is thus imperative that tribunals examine transnational public policy in reaching their decisions'.

133 *Soleimany V. Soleimany*, [1998] 3 WLR 811.

134 *Kyrghyzstan V. Belokon*, Cour d'appel Paris, 21 Feb. 2017, at p. 8: 'Considérant que la prohibition du blanchiment est au nombre des principes dont l'ordre juridique français ne saurait souffrir la violation même dans un contexte international; qu'elle relève, par conséquent de l'ordre public international'. At p. 15 : 'Considérant que la reconnaissance ou l'exécution de la sentence entreprise, qui aurait pour effet de faire bénéficier M. Belokon du produit d'activités délictueuses, viole de manière manifeste, effective et concrète l'ordre public international; qu'il convient donc de prononcer l'annulation sollicitée'. For a recent critical review of the position of the Paris Court of Appeal, see Ch. Jarrosson, S. Lemaire, P. Mayer, supra note 82.

recognition and enforcement or setting-aside of arbitral awards. However, courts must be cautious in interpreting the public order defence.

For the reasons set out in Section 2 'Methodological considerations' and Section 3 'The procedural effects of red flags', the mere existence or allegation of red flags in an arbitration should not justify conducting a *de novo* review of the dispute, denying the recognition or enforcement of an award, or setting aside the award, unless the court concludes, after a thorough analysis, that:

- (i) new evidence justifies reopening the factual inquiry; or
- (ii) the arbitrators ignored the red flags and therefore arguably buried their heads in the sand regarding the risk of corruption without sufficient justification; and
- the omission (ii) and the failure (i) to consider the new allegations and potential new evidence arising therefrom led or would lead the arbitrators to render an award that upholds an illegal contract that, by virtue of its illegality, contravenes public order.

On the other hand, arbitrators cannot act ultra petita/vires by resolving matters not submitted by the parties to arbitration. However, in practice the risk of an award being set aside because the tribunal investigated red flags pertaining to acts of alleged corruption seems limited as the arbitral tribunal would not act *ultra petita* simply by conducting such investigations, but by granting the parties more than they have claimed.[135] In any event, in order to guarantee their right to due process, arbitrators must give the parties sufficient opportunity to comment on the findings of any *sua sponte* investigation or on any matter of law raised *ex officio*.[136]

4 - Arbitrators, despite findings of corruption, must remain impartial in their decision-making and avoid becoming biased against one of the parties.

4.3 Course of actions available to arbitrators

To ensure a right balance between the above-mentioned duties, arbitrators can use a number of tools, available within (**4.3.1**) and outside (**4.3.2**) the arbitration process, to identify facts relevant to alleged acts of corruption.

4.3.1 Tools within the arbitral process

Investigating facts. When corruption is alleged by one of the parties, there is no discussion that arbitrators should analyse the relevant facts, as they would do in connection with any other allegation, including the assessment of any red flags that may be raised.[137] However, things get complicated when neither party alleges it and the tribunal feels the need, often on the basis of red flags presented, perhaps tacitly by a party to investigate it *sua sponte*,[138] for example, by requesting *ex officio* the disclosure of information that is not on the record, asking for additional witness statements, appointing experts, or requesting the help of the courts for that purpose.

Arbitrators willing to use these extraordinary powers will face complex questions such as:

- How should they address any red flags that have been identified?
- What is the relationship between red flags and the ultimate proof of corruption?
- At what point do they have a duty to investigate?
- How far can they go in that investigation and when should they stop?
- What tools do they have to conduct an investigation?
- How can they ensure their impartiality during the investigation?

These complex questions (discussed in Sections 2 'Methodological considerations' and Section 3 'The procedural effects of red flags'), among others, indicate that this is an area where prudence must be the guiding principle. As noted above, either when acts of corruption are alleged by the parties or when arbitrators act *sua*

135 Ph. Fouchard, E. Gaillard, B. Goldman, *International Commercial Arbitration* (Wolters Kluwer, 1999) p. 941: 'The arbitrators will also fail to comply with their brief by ruling ultra petita or, in other terms, by ruling on claims not made by the parties... the fact that arbitrators may have based their decision on allegations or arguments which were not put forward by the parties does not amount to a failure to comply with their brief. They only fail to comply with their brief where they grant one of the parties more than it actually sought in its claims'; G. Born, supra note 131, at 2608-2609: 'An arbitral tribunal does not exceed its authority under Article 34(2)(a)(iii) by relying on arguments or authorities not raised by the parties to support their claims. Doubts about the scope of the parties' submissions are resolved in most legal systems in favor of encompassing matters decided by the arbitrators. Put differently, a considerable measure of judicial deference is accorded the arbitrators' interpretation of the scope of their mandate under the parties'.

136 *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All E.R. (Comm.) 315 (Q.B.): 'Where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcee has not been given any reasonable opportunity to present its case in relation to the results of such investigations'.

137 B.M. Cremades, D.J.A. Cairns, supra note 132, at p. 79; M. Hwang S.C., K. Lim, supra note 102, at pp. 6-9.

138 See Section 4 'Role and responsibilities of the arbitral tribunal in relation to red flags' above.

sponte, they must abide by the limits of the applicable law. In this context, there are jurisdictions that openly allow arbitrators to conduct *ex officio* investigations, such as the French,[139] Swiss,[140] English[141] and US laws,[142] while others remain silent on the matter.

In addition, it must be emphasised that, at the institutional rules level, there is a clear trend to allow arbitrators to conduct *sua sponte* investigations on any matter (without corruption being an exception), as is the case under the rules of the ICC,[143] ICSID,[144] ICDR,[145] LCIA,[146] UNCITRAL,[147] and SIAC,[148] as well as under the International Bar Association Rules on Evidence.[149] Institutional rules play a crucial role in international arbitration, not only due to their frequent use but also because of their gap-filling effect. Therefore, it is possible to conclude that if arbitrators were to undertake a *sua sponte* investigation into acts of corruption, they would have the support of the main arbitral institutions' rules.

Draw adverse inferences. As discussed in Section 2.4 'Tools for assessing red flags, individually and/or collectively, and for making factual findings', another useful tool for arbitrators in cases involving corruption is drawing adverse inferences against parties that refuse to produce evidence ordered by the tribunal.[150] Cases such as ICC No. 3916,[151] *Europe Cement Investment & Trade S.A. v. Turkey*,[152] and *Metal-Tech v. Republic of Uzbekistan*,[153] among others, illustrate the effectiveness of this tool.

139 Code of Procédure Civile, Art. 1467: 'Le tribunal arbitral procède aux actes d'instruction nécessaires à moins que les parties ne l'autorisent à commettre l'un de ses membres. Le tribunal arbitral peut entendre toute personne. Cette audition a lieu sans prestation de serment. Si une partie détient un élément de preuve, le tribunal arbitral peut lui enjoindre de le produire selon les modalités qu'il détermine et au besoin à peine d'astreinte'.

140 Art. 184, Swiss Federal Statute on Private International Law: '[T]he arbitral tribunal shall itself conduct the taking of evidence'.

141 Section 34(1), English Arbitration Act: 'it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of parties to agree any matter'; Section 34(2): 'Procedural and evidential matters include … (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law'.

142 Federal Arbitration Act, 9 U.S. Code Sect. 7: 'The arbitrators … may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case'.

143 Art. 25(4), ICC Arbitration Rules: 'At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence'.

144 Art. 43, ICSID Convention: 'Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate'.

145 Art. 20(4), ICDR International Arbitration Rules: 'At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties agree otherwise in writing, the tribunal shall apply Article 21'.

146 Art. 22.1, LCIA Arbitration Rules: 'The Arbitral Tribunal shall have the power, upon the application of any party or…upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute; (iv) to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal'.

147 Art. 27(3), UNCITRAL Arbitration Rules: 'At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine'.

148 Art. 27, SIAC Arbitration Rules: 'Additional Powers of the Tribunal: … the Tribunal shall have the power to: … c. conduct such enquiries as may appear to the Tribunal to be necessary or expedient… f. order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome'.

149 IBA Rules on the Taking of Evidence in International Arbitration, Art. 3(10): 'At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organization'. Art. 4(10): 'At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered'.

150 IBA Rules on the Taking of Evidence in International Arbitration, Art. 9 'Admissibility and Assessment of Evidence': (6) 'If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party'; '(7) If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party'.

151 S. Jarvin, Y. Derains, ICC Case No. 3916, in *Collection of ICC Arbitral Awards 1974-1985*, (Wolters Kluwer, 1994), pp. 507-511.

152 *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 Aug. 2009: 'It could have produced the share certificates that it claimed it owned … But, it never produced any documents. This contributes to the inference that the originals of the documents copied in its Memorial and on which its claim was based either were never in the Claimant's possession or would not stand forensic analysis, in which case the claim that Europe Cement had shares … at the relevant time was fraudulent'.

153 *Metal-Tech v. Republic of Uzbekistan*, supra note 23, paras. 216, 218: 'Several elements in the December 2000 Contract attract the Tribunal's attention: … the obligations provided in the…Contract appear to be nothing more than a smokescreen – neither MPC, nor Messrs Sultanov or Mikhailov were qualified to fulfill the obligations assumed through in the contract… the Claimant was unable to show that any services were actually rendered in return for the payments… the Tribunal has found that none of the documents on which the Claimant relies … convincingly show that the Consultants rendered any legitimate services at the time of establishment of the Claimant's investment… For all these reasons, the Tribunal comes to the conclusion that the December 2000 Contract cannot be regarded as a genuine agreement and must be deemed a sham designed to conceal the true nature of the relationship among the parties to it'.

4.3.2 Potential external tools[154]

1. Notify state authorities. Arbitrators may consider external sources of fact-finding as well. An issue that has generated debate is whether or not arbitrators who have found indicators of corruption (after red flags have been confirmed and may be deemed to be sufficiently serious to create concerns of possible corruption[155]), are obliged to report to the authorities in charge of prosecuting them (e.g. prosecutors, criminal judges, etc.).

On the one hand, some suggest that arbitrators must ensure the confidentiality of the arbitral process, which is an essential feature of arbitration, and making such a disclosure would violate confidentiality. On the other hand, other authors consider that arbitrators should notify acts of corruption to the competent authorities, not only to be consistent with the application of the transnational public order,[156] but to avoid incurring in responsibility as an accomplice or auxiliary to a crime, especially when a local law mandates such disclosure.

While this debate is not yet settled, there is an initial consensus that such disclosure requires an express rule[157] or court order[158] obliging the arbitral tribunal to do so for public interest reasons.[159] In any case, as this work refers mainly to the treatment of red flags, it is evident that red flags would not have to be disclosed under any circumstances, unless:

- they have been validated and evidence of acts of corruption have been found from their examination (see Section 2.3 'The three steps elaborated'); and/or
- there is a rule requiring arbitrators to make such a disclosure, as in national rules under anti-money laundering laws requiring suspicious activity reporting if applicable.

2. Stay of arbitral proceedings.[160] Although unusual, where state authorities are conducting a parallel investigation into an act of corruption, arbitrators may consider staying the proceedings until the investigation is complete, particularly if the investigation is necessary to solve the case.[161] In considering whether to do so, the tribunal must balance the costs of potential delay versus the benefit that may result from the national investigative processes.

Determine whether national authorities are investigating. In any event, in investor-state cases in particular, it may be useful for arbitral tribunals to inquire the state making a corruption allegation as to the status of any present or past investigations, particularly in relation to the state's knowledge of potential corruption issues. Law enforcement authorities are typically reluctant to share information about ongoing investigations, for fear of tipping off potential targets or compromising sources, but the arbitral tribunal may request the submission of such information

154 As part of its work, the ICC Commission on Arbitration and ADR Task Force on 'Addressing Issues of Corruption in International Arbitration' has considered the issue of parallel proceedings in corruption cases generally. This Document focuses on the narrower issue of red flags and is subject to any conclusion and recommendations the work of the Task Force will formulate.

155 See Section 2.3 'The three steps elaborated'.

156 See e.g. T. Martin: 'International arbitration and corruption: an evolving standard', *TDM* 2 (2004): 'The arbitrator may assume that he only needs to address the particular interests of the parties in the arbitration and need not be concerned with international public policy. That may no longer be the case in the area of corruption. Given the ratification of these corruption treaties, it is clearly the international rule of law that bribing government officials is illegal and those charges with the administration of justice, including international arbitrators, have the responsibility to ensure that such laws are applied properly'.

157 See e.g. B.M. Cremades, D.J.A. Cairns, supra note 132, at p. 85: 'Such duty [to notify state authorities] could only arise from express legislation in a jurisdiction to which the arbitral tribunal, or some of its members, were subject.'; M. Hwang, K. Lim, supra note 102, at para. 102: 'Any duty of disclosure can only arise from national legislation to which the tribunal members are subject. Such duty overrides any express or implied obligation of confidentiality. For instance, anti-money laundering regulations (which often work hand-in-hand with anti-corruption legislation) may impose on arbitrators an obligation to report his or her reasonable suspicions of a party's corrupt activities, and exempt them from liability for any breach of confidentiality obligations'; D. Baizeau, T. Hayes, supra note 104, at p. 236: 'As things stand, there is no evident duty to report corruption that can be gleaned from institutional rules, published arbitral awards, national laws or jurisprudence. Subject to the applicable laws of the seat, arbitrators should therefore not feel obliged to report suspicions of corruption'.

158 Such an order could appear, for example, by applying Art. 23G(1)(a), Australian International Arbitration Act: 'A court may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings in circumstances other than those mentioned in section 23D if: (a) the court is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed'; or Art. 14E(2)(a), New Zealand Arbitration Act: 'The High Court may make an order under subsection (1) only if – (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed …'.

159 See e.g. the Czech Criminal Code (Section 368, Act. No. 40/2009 Coll.; the obligation in Spain to report specific criminal offences including those associated with, respectively, direct bribery or corruption activities, applies to 'any person', including arbitrators. Similar provisions were reported also in the Netherlands, Poland, Tanzania (Section 39(1), Prevention and Combating of Corruption Act, [Cap 329 R.E 2019] provides that: 'Every person who is or becomes aware of the commission of or the intention by another person to commit an offence under this Act shall be required to give information to the Bureau'). In England and Wales, arbitrators could be under an obligation to report any conduct which falls outside the ordinary conduct of dispute resolution, for example, if the arbitrator knows or suspects that there is no genuine dispute and the claim is a sham brought to launder the proceeds of a crime.

160 The subject of 'parallel proceedings' is studied separately within the ICC Commission on Arbitration and ADR Task Force on 'Addressing Issues of Corruption in International Arbitration'.

161 See e.g. *Société Générale de Surveillances v. Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, para. 175; L.A. Low, 'Dealing with Allegations of Corruption in International Arbitration', *AJIL Unbound*, Vol. 113, 2019, p. 344.

in a confidential manner if it deems it necessary to evaluate the circumstances surrounding a corruption allegation. In this regard, it is relevant to note that under the aforementioned international anti-corruption conventions, states have undertaken a range of duties to prevent, detect and remediate corrupt practices, in both the public and the private sector. While it does not fall to an arbitral tribunal to enforce those obligations, just as the tribunal may inquire as to the measures taken by a private party to prevent or detect corruption, including by responding to red flags, so it may inquire as to the measures taken by the public administration in furtherance of treaty commitments. Obviously, such steps fall to the discretion of the arbitral tribunal as it deems necessary or appropriate in its assessment of an individual case.

5. New and emerging issues

This final Section 5 examines the growing role of corporate compliance measures preventing corruption and their relevance to arbitral disputes involving corruption allegations (**5.1**), and the role of artificial intelligence (**5.2**).

5.1 Role of corporate compliance measures

Having an anti-corruption compliance programme has become mainstream, at least for large-size companies operating internationally.[162] The international legal framework for combating corruption requires holding legal persons liable for corrupt practices. Additionally, some of the instruments expressly require or incentivise the adoption by businesses of 'anti-bribery and corruption compliance programmes'.

The first inter-governmental anti-corruption guidance for businesses for instance, the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009) recommends that:

> Companies should consider, inter alia, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery (…).

The main internationally recognised business instruments on anti-bribery all largely include the same basic anti-corruption and compliance elements.[163] Developing an anti-bribery and corruption compliance programme is one of those fundamental elements.[164]

This has been reinforced by national legislation (most with an extra-territorial reach) – all of them imposing or incentivising anti-bribery and corruption compliance programmes, either directly or indirectly.

Whereas the FCPA does not mention explicitly anti-bribery and corruption compliance programmes, the Department of Justice and the Securities and Exchange Commission Resource Guide to the U.S. Foreign Corrupt Practices Act (2020) ('FCPA Resource Guide') states at p. 56 :

> In a global marketplace, an effective compliance program reinforces a company's internal controls and is essential to detecting and preventing FCPA violations.

The U.S. Sentencing Guidelines, on the other hand, are far more explicit and not only detail what should be 'an effective compliance and ethics program' but 'offer incentives to organisations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organisation may self-police its own conduct through an effective compliance and ethics program'.[165] The Department of Justice, the Department of Commerce and the State Department have all published guidance on anti-bribery and corruption compliance programmes.[166]

The UK Bribery Act (2010) provides in its section 7(2) that 'adequate procedures designed to prevent' acts of bribery constitute a full defence for a 'commercial organization' which, otherwise, would be guilty of an offence because acts of bribery committed by an 'associated person'. Section 9 states that:

> The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing.

162 See e.g. S. Bruce, 'Chapter 1: Evolving Expectations on Business Responsibilities for the Environment'; D. Cassel, 'Chapter 2: The 'hardening' and 'broadening' of Norms on Business and Human Rights', *Navigating the New Contents of International Public Policy - Compliance in Environment and Human Rights* (Dossiers XXI, ICC Institute of World Business Law, 2023).

163 OECD, UN Office on Drugs and Crime ('UNODC'), and World Bank, Anti-Corruption Ethics and Compliance Handbook for Business (2013).

164 Id. pp. 18-23.

165 U.S. Sentencing Commission Guidelines Manual 2018, Introductory Commentary to Chapter 8 and § 8B2.1(a)(2).

166 FCPA Resource Guide, at p. 67.

The 'Bribery Act 2010 guidance',[167] provides that those procedures should be informed by six (not prescriptive) principles related to: (i) proportionate procedures, (ii) top-level commitment, (iii) risk assessment, (iv) due diligence, (v) communication and training, and (vi) monitoring and review.

In France, the 'Loi Sapin II' requires major corporations to take the appropriate actions to prevent and detect corruption ('les mesures destinées à prévenir et à détecter la commission, en France ou à l'étranger, de faits de corruption').[168] It is provided that such 'dispositif anticorruption' should be articulated based on three pillars: (i) a clear commitment from top management; (ii) a thorough risk mapping; and (iii) a robust risk management programme aiming at preventing, detecting and remediating corruption.[169]

An anti-bribery and corruption compliance programme is relevant to the use of red flags in international commercial and investor-state arbitration in at least two respects:

- Some of its constituent elements – especially in relation to the risks associated with third parties – make an extensive use of red flags (albeit in an *ex ante* context);[170]
- The existence, design, implementation, and enforcement of the anti-bribery and corruption compliance programmes (or the lack thereof) can constitute a green or a red flag in itself.

There is a developing international consensus on compliance best practices. The classical 'building blocks' of a state-of-the-art anti-bribery and corruption compliance programmes are:

(i) support and commitment from senior management for the prevention of corruption;

(ii) an anti-corruption programme;

(iii) the oversight thereof;

(iv) a clear, visible and accessible policy prohibiting corruption;

(v) detailed policies for particular risk areas;

(vi) the application of the anticorruption programme to business partners;

(vii) internal controls and record keeping;

(viii) communication and training;

(ix) promoting and incentivising ethics and compliance;

(x) means for seeking guidance, detecting and reporting violations;

(xi) how to address violations; and

(xii) periodic reviews and evaluations of the anti-corruption programme.[171]

Some of those constituent elements make an extensive use of red flags to help prevent or help detect acts of corruption.

The risk mapping which should form the very basis of an efficient and effective anti-bribery and corruption compliance programmes clearly builds upon the detection – in a preventive way, *ex ante* – of red flags, as illustrated for example by the lists provided by the UK Bribery Act Guidance (2010),[172] and by the 'Recommandations de l'Agence Française Anticorruption ('AFA') (2021).[173]

Due diligence reports on partners, suppliers, clients, etc. do also rely heavily on the identification of red flags.[174] For example, in the context of M&A, the due diligence process is an in-depth analysis of a target company or asset. Its purpose is to identify strengths and weaknesses, risks and opportunities, as well as key

167 A non-statutory 'quick start' version is also available: The Bribery Act 2010 - Quick start guide (publishing.service.gov.uk).

168 'Loi n° 2016-1691 du 9 déc. 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique', Art. 17-I.

169 'Avis du 4 décembre 2020 relatif aux recommandations de l'Agence française anticorruption destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêts, de détournement de fonds publics et de favoritisme', at pp. 4-5. Courtesy translation in English: 'Notice on the French Anti-Corruption Agency Guidelines to help Public and Private Sector Entities to Prevent and Detect Bribery, Influence Peddling, Extortion by Public Officials, Illegal Taking of Interest, Misappropriation of Public Funds and Favouritism'.

170 It should be noted that, whereas red flags used in an *ex ante* versus *ex post* context both pursue a risk identification purpose, what one tries to achieve by them is fundamentally different (see Section 2.2.1). In an *ex ante* context, red flags are indicators which hint at the (increased) possibility that corruption may occur in the future; the existence of such indicators may lead a company, for example, not to contract with this specific counterpart or under these specific terms, or in that particular sector or country. The purpose is to avoid corruption. In an *ex post* context – an audit into past behaviour, or an assessment of the validity of a contract under arbitration – red flags also hint at a potential risk, but with aim of correcting a potential past corrupt practice and its contractual or other consequences. The purpose here is to 'sanction' corruption.

171 See Annex 1 'Comparison Table of Business Guidance Instruments on Anti-Bribery' in OECD, UN Office on Drugs and Crime ('UNODC'), and World Bank Anti-Corruption Ethics and Compliance Handbook for Business, at pp. 77-119.

172 UK Bribery Act Guidance (2010), at p. 26.

173 *Recommandations de l'AFA*, at para. 136.

174 See e.g. 'FCPA Resource Guide', at pp. 62-65; 'Recommandations de l'AFA', paras. 220, 221, 223, 228 and 230.

value drivers. The results of the due diligence are used to determine the purchase price, draft the purchase agreement, conduct negotiations, and form the basis for integration plans. Some findings of the due diligence however can also lead to the termination of the transaction, in case specific deal breakers are identified and cannot be mitigated.[175] Such findings – in fact, indicators of a potential risk that cannot be mitigated to the buyer's satisfaction – are commonly referred to as 'red flags'. The same is obviously true for internal controls and audits.[176]

Today, the absence of an anti-bribery and corruption compliance programme (in disregard of international and national recommendations), a poorly designed programme, or one that is not implemented seriously and enforced fairly, also constitute red flags.[177] As indicated above, several elements must, however, be taken into account: e.g. the criticality of this red flag depends on whether having a well-calibrated anti-bribery and corruption compliance programme is simply a good practice or a requirement in the relevant jurisdiction at the relevant time. It should also be noted that such red flags can relate not only to the party who allegedly engaged in corruption but also to the party that engaged in corruption (e.g. when it has an anti-bribery and corruption compliance programme in place, but has not implemented it seriously).

Conversely, as noted earlier,[178] the existence of a preventive programme and its implementation in a particular case can serve as a green flag, indicating that proper risk mitigation measures have been taken. However, as noted above in the discussion of *ex ante* versus *ex post* risk analysis, while red flags play a role in both contexts, the objective of the risk analysis exercise is different in the two contexts. *Ex ante* processes consider the risk of improper conduct occurring, whereas *ex post* the issues is whether such conduct has in fact occurred. While it is useful to consider what preventive measures have been taken, judgments ultimately made in the preventive context (e.g. not to do business with a particular party or in a particular place at a particular time) are unlikely to be determinative in the *ex post* context.

175 *See* https://merger-strategy.com/due-diligence-meaning/.

176 E.g. 'Recommandations de l'AFA', para. 298.

177 For a hypothetical yet telling example, see 'FCPA Resource Guide', p. 65; comp. 'Recommandations de l'AFA', para. 223: 'Le fait que le tiers ne communique pas sur la mise en place d'un tel dispositif [de conformité anticorruption] et ne le documente pas peut être considéré comme un point de vigilance'.

178 See Section 2.2 above.

5.2 Role of artificial intelligence in red flag generation and analysis

Effective management of corruption and fraud risks depends on the entities' ability to extract meaning from data through analysis, tools and techniques.[179] Clearly, building on the data available in, and to, the company is an essential part of an effective anti-bribery and corruption compliance programme. Because this data needs to be gathered, systematised and analysed, and as the amount of data can be gigantic, the use of artificial intelligence ('AI') makes a lot of sense. Both the U.S. Department of Justice and the OECD have alluded to this, respectively in 2020[180] and 2018.[181] Neither of these guidance documents states that all companies must adopt AI. Taken together, however, they strongly indicate that companies must be prepared to demonstrate that they can and do draw on all relevant data within their organization to effectively manage their compliance programmes.[182]

Even if very few private sector companies seem to use machine learning products and services specific to anti-corruption, a certain number of developments indicate that there may be genuine value in using AI for anti-corruption purposes[183]: at least a certain number of companies have already developed and deployed machine learning solutions in direct support of their anti-bribery and corruption compliance programmes; non-governmental organisations have touted the use of AI for anti-corruption purposes; academic studies have demonstrated the utility of AI in analysing public data to make predictive judgments related to corruption; and anti-corruption advocacy organisations and investigative journalists have made effective use of AI.[184] Still, the use of AI in this context is in its very early days.

As machine learning's great strength is in efficiently reviewing and finding associations between data in very large datasets to improve identifying, monitoring, and acting on higher-risk transactions and relationships,

179 OECD, 'Analytics for Integrity. Data-Driven Approaches for Enhancing Corruption and Fraud Risk Assessment' (2019), p. 27. See also 'Corruption risk management and audit' in Anti-Corruption and Integrity Outlook (2024), p. 27.

180 Criminal Division, U.S. Department of Justice, 'Evaluation of Corporate Compliance Programs' (updated March 2023), at pp. 5-6: 'Confidential Reporting Structure and Investigation Process'.

181 Organisation for Economic Co-operation and Development, OECD 'Due Diligence Guidance for Responsible Business Conduct' (2018), at pp. 82- 84: 'Track Implementation and Results'.

182 Coalition for Integrity, 'Using Machine Learning for Anti-Corruption Risk and Compliance' (2021), at pp. 2-3.

183 AI having been dubbed as 'the next frontier in anti-corruption': A. Petheram, I. Nti Asare, 'From Open Data to Artificial Intelligence: the Next Frontier in Anti-Corruption' (https://oxfordinsights.com, 27 July 2018).

184 'Using Machine Learning for Anti-Corruption Risk and Compliance', supra note 182, at pp. 6-10.

both for general compliance oversight (preventive) and for internal investigations (preventive and corrective),[185] its most straightforward benefit lies in the areas where companies search for red flags: risk mapping, due diligence and monitoring (internal control, audit, etc.).[186] It saves human resources by taking over key tasks of pre-screening large datasets, analysing it to enable detecting, predicting, and reporting risks, suspicions or clear-cut cases of crimes.[187] It allows clustering of similar data, helping identify high risk suppliers in specific countries or businesses, so-called politically exposed people, dubious customers and so forth. It also detects anomalies (e.g. payments of unusual size or frequency). Finally, it can be used both to prevent and to detect inappropriate conduct.

As such, in arbitration, red flags 'generated' by AI do give rise to identical questions as red flags identified by more classical means (have they been legitimately obtained or not, what is their probative value, etc.), with a twist:

(i) Red flags generated via AI do suffer the limits of the tool itself; class imbalance in the data set, overfitting, underfitting and bias are the most common ones.[188]

(ii) One can doubt arbitrators, and counsel and parties today have the required skills to interpret and understand the data to detect flaws and bias, especially when these are embedded in the design of the algorithm itself. Expert testimony may become critical in these matters.

(iii) The issue is particularly sensitive when AI generated red flags are used by one party to make its case against the other party and when the arbitrators' decision as to their probative value may well affect the enforceability of the award. In this context, the very design choices of the technology and algorithm will have an impact, especially the trade-off made between the need to avoid 'false positives' (wrongly classifying facts as corruption) and 'false negatives' (leaving actual corrupt cases undetected or unaccounted for).

As the use of AI in anti-corruption and in arbitration is still in its early days, these questions are, to the largest extent, uncharted territory – and request further in-depth research.

185 Id. at p. 13.

186 See Section 5.1 'Role of corporate compliance measures'.

187 N. Köbis, C. Starke, I. Rahwan, 'Artificial Intelligence as an Anti-Corruption Tool (AI-ACT) – Potential and Pitfalls for Top-down and Bottom-up Approaches', at p. 6.

188 'Using Machine Learning for Anti-Corruption Risk and Compliance', supra note 182, at pp. 28-36.

Annex – References

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- 'United Nations Convention against Corruption' ('UCAC') (adopted in 2003, entered into force in 2005).
- Organization of American States, 'Inter-American Convention Against Corruption' (adopted in 1997, entered into force in 1997).
- Council of Europe, 'Criminal Law Convention on Corruption' (adopted in 1999, entered into force in 2002), and 'Additional Protocol to the Criminal Law Convention on Corruption' (adopted in 2003, entered into force in 2005).
- Council of Europe, 'Civil Law Convention on Corruption' (adopted in 1999, entered into force in 2003).
- European Union, 'Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union' (adopted in 1997, entered into force in 2005).
- African Union, 'Convention on Preventing and Combating Corruption' (adopted in 2003, entered into force in 2006).

2. Selected national legislation and guidance documents

i) France

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- Agence française anticorruption, 'Avis du 4 décembre 2020 relatif aux recommandations de l'Agence française anticorruption destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêts, de détournement de fonds publics et de favoritisme'.

- Courtesy translation in English: 'Notice on the French Anti-Corruption Agency Guidelines to help Public and Private Sector Entities to Prevent and Detect Bribery, Influence Peddling, Extortion by Public Officials, Illegal Taking of Interest, Misappropriation of Public Funds and Favouritism'.

ii) United Kingdom

- Bribery Act 2010
- Bribery Act Guidance: 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)' and 'Quick start guide'.

iii) United States

- U.S. Department of Justice, Criminal Division, Foreign Corrupt Practices Act ('FCPA') (1977), paras. 78dd-1 (prohibiting corrupt practices by 'issuers'), dd-2 (prohibiting corrupt practices by 'domestic concerns') and dd-3 (prohibiting corrupt practices by 'any persons').
- U.S. Department of Justice and Securities and Exchange Commission, 'Resource Guide to the U.S. Foreign Corrupt Practices Act' (2nd ed., 2020).

3. International good practice standards and guidance for businesses

- ICC 'Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises' (2016).
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