



# **CORRUPTION**

## **LEGAL RISKS ON INVESTMENT**



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# **CORRUPTION**

- White Collar Crime
- Transnational Organized Crime
- technological advancement and globalization
- relating to a broad variety of crimes
- damages International Business
- occurs in the criminal justice chain
- leads to the obstruction of criminal proceedings

### **preamble of UNCAC :**

- Concerned about **the seriousness of problems and threats posed by corruption** to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,
- Concerned also about the **links between corruption and other forms of crime in particular organized crime and economic crime, including money-laundering,**
- 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,

### **preamble of OECD Convention:**

- bribery is a **widespread phenomenon in international business transactions**, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;
- achieving progress in this field **requires not only efforts on a national level but also multilateral co-operation**, monitoring and follow-up

Efforts on the eradication of corruption in Indonesia are still confronted with tough challenges, though, presently, these determined attempts to curb fraudulent acts have gained extensive support from the government, the corporate sector and NGOs.

The Indonesian Business Links (IBL), with national and multinational corporations members operating in the country and representing a wide range of industries, through its Business Ethics Program, has been continuously and consistently promoting anti-corruption, anti-bribery, and anti-gratification.

The objectives of the Collective Action in Fighting Corruption are:

- To create awareness among business and society on risks related to unethical conduct in business practice;
- To create a level playing field among companies and their stakeholders in Indonesia;
- To foster collective action to avoid corruption through the signing of the integrity pact;
- To increase the impact and credibility of individual company member's actions;
- To protect vulnerable individual players through an alliance of like-minded organizations; and
- To encourage real implementation.

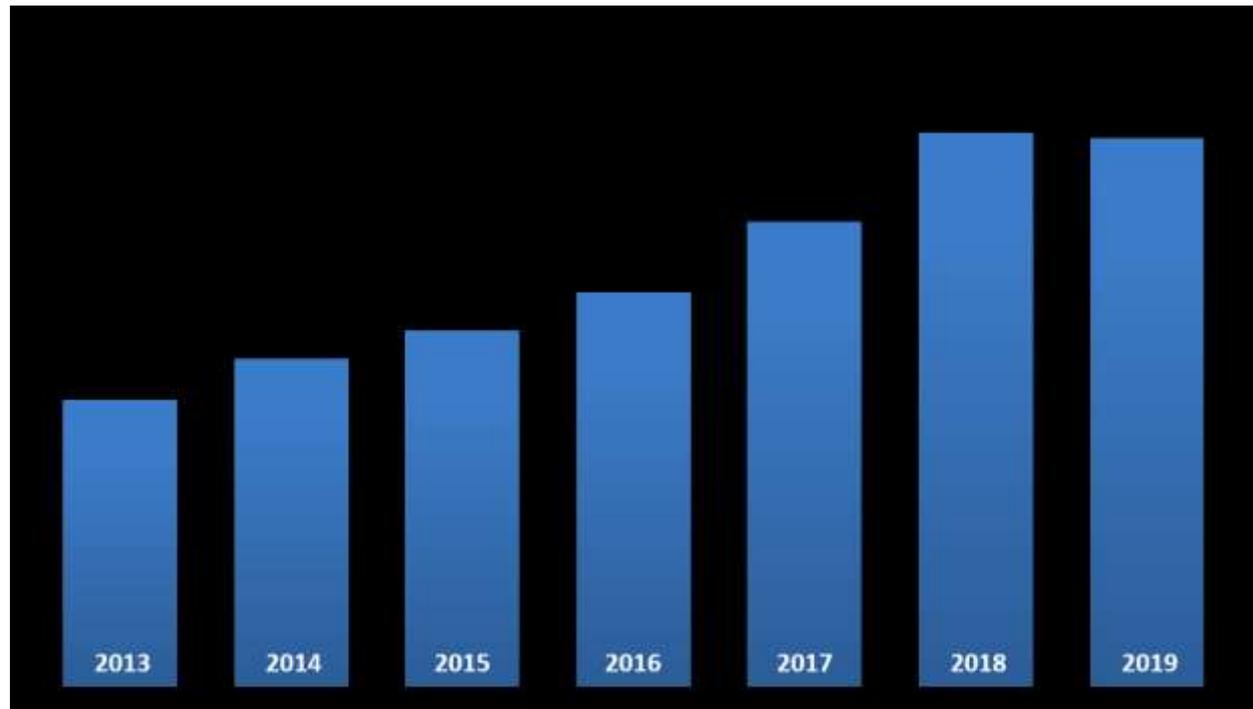
## COLLECTIVE ACTION AGAINST CORRUPTION

Business and Anti-Corruption  
Initiatives in ASEAN

*Profiles of selected business collective action models from Indonesia, Malaysia, the Philippines, and Thailand.*

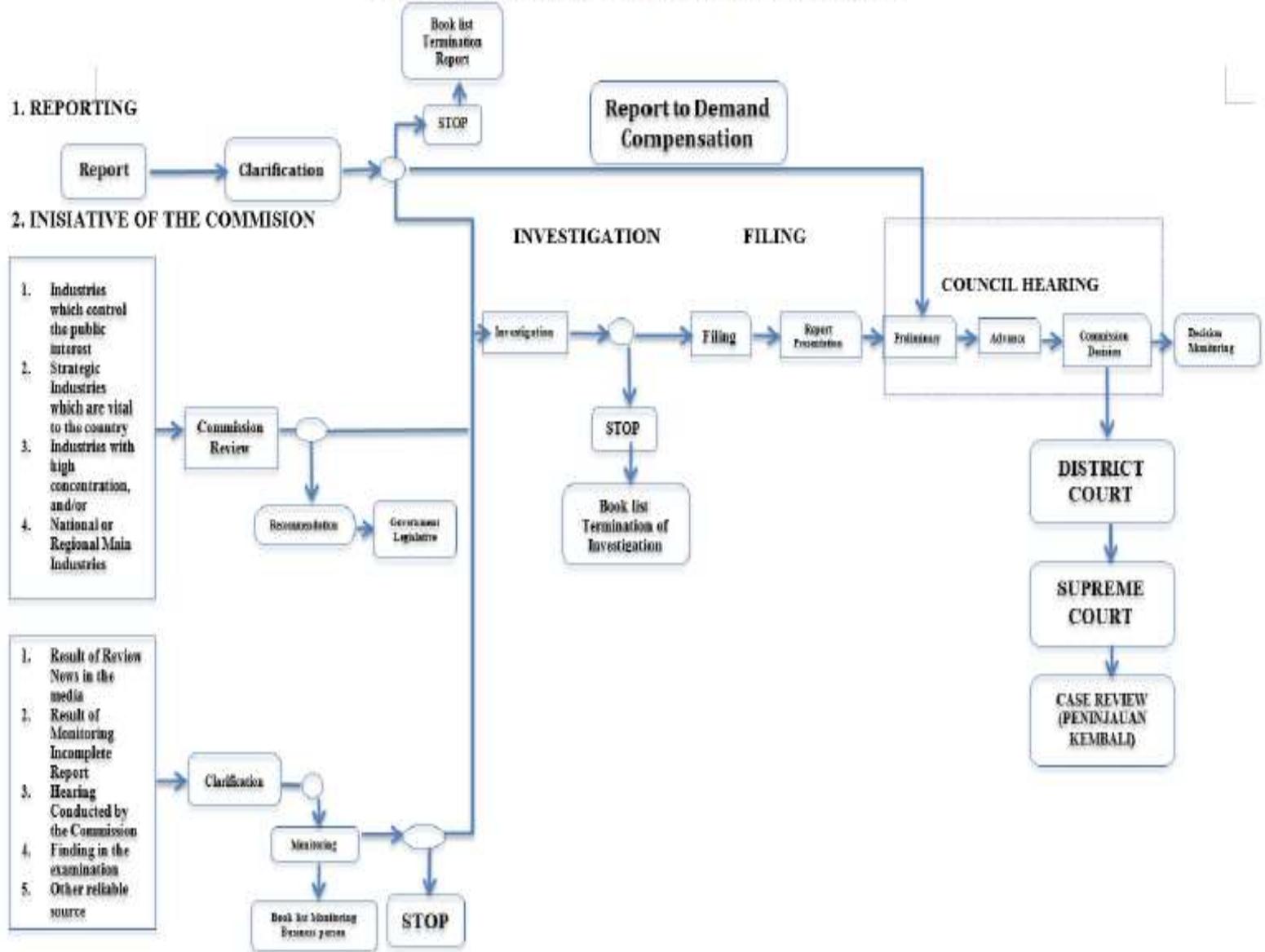
*This relevant assessments, frameworks and tools for business collective action against corruption*





**“Indonesia has shown progressive achievement in the past years.”** Ease of Doing Business Index is an index made by the World Bank to rank ease of doing business in a country. The Government of Indonesia is committed to improving existing services and governance and continuously improving every priority indicator.

Figure 1: Indonesian Competition Law Procedure



Source: KPPU Regulations No. 1 of 2010, <http://www.kppu.go.id/id/peraturan/peraturan-kppu/>

## Private Dispute Proceeding

Plaintiff / Lawyer

Registration of The Law Suit to Distric Court

### Proceeding Process

- |                                |  |  |
|--------------------------------|--|--|
| 01. Mediation                  | 04. Respond to Counter Claim by Plaintiff                | 06. Written Exhibits & Witness Examination |
| 02. Claim by Plaintiff         | 05. Counter to the Respond of Counter Claim by Defendant | 07. File a Final Written Submission        |
| 03. Counter Claim by Defendant |  |  |

#### Legends



Binding



Appeal



Supreme Court's Order = Binding

ORDER

Appeal to High Court

Appeal to Supreme Court

Appeal to Judicial Review

Proceed

01. Appeal Statement by The Appellant
02. Contra Appeal Statement by The Respondent
03. Additional Written Exhibits if Necessary

01. Appeal Statement by The Appellant
02. Contra Appeal Statement by The Respondent
03. Additional Written Exhibits if Necessary

01. Novum (New Evidence)
02. Appeal Statement by The Appellant
03. Contra Appeal Statement by The Respondent

ORDER

ORDER\*

ORDER

EXECUTION

## Administrative Dispute Proceeding

Plaintiff / Lawyer

Registration of  
The Law Suit  
to Distric Court

Dismissal  
Process

### Proceeding Process

- |                                |  |  |
|--------------------------------|--|--|
| 01. Mediation                  | 04. Respond to Counter Claim by Plaintiff                | 06. Written Exhibits & Witness Examination |
| 02. Claim by Plaintiff         | 05. Counter to the Respond of Counter Claim by Defendant | 07. File a Final Written Submission        |
| 03. Counter Claim by Defendant |  |  |

#### Legends

01

Binding

02

Appeal

\*

Supreme Court's Order  
= Binding

ORDER

Appeal to  
High Court

Appeal to  
Supreme Court

Appeal to  
Judicial Review

Proceed

01. Appeal Statement by The Appellant
02. Contra Appeal Statement by The Respondent
03. Additional Written Exhibits if Necessary

Proceed

01. Appeal Statement by The Appellant
02. Contra Appeal Statement by The Respondent
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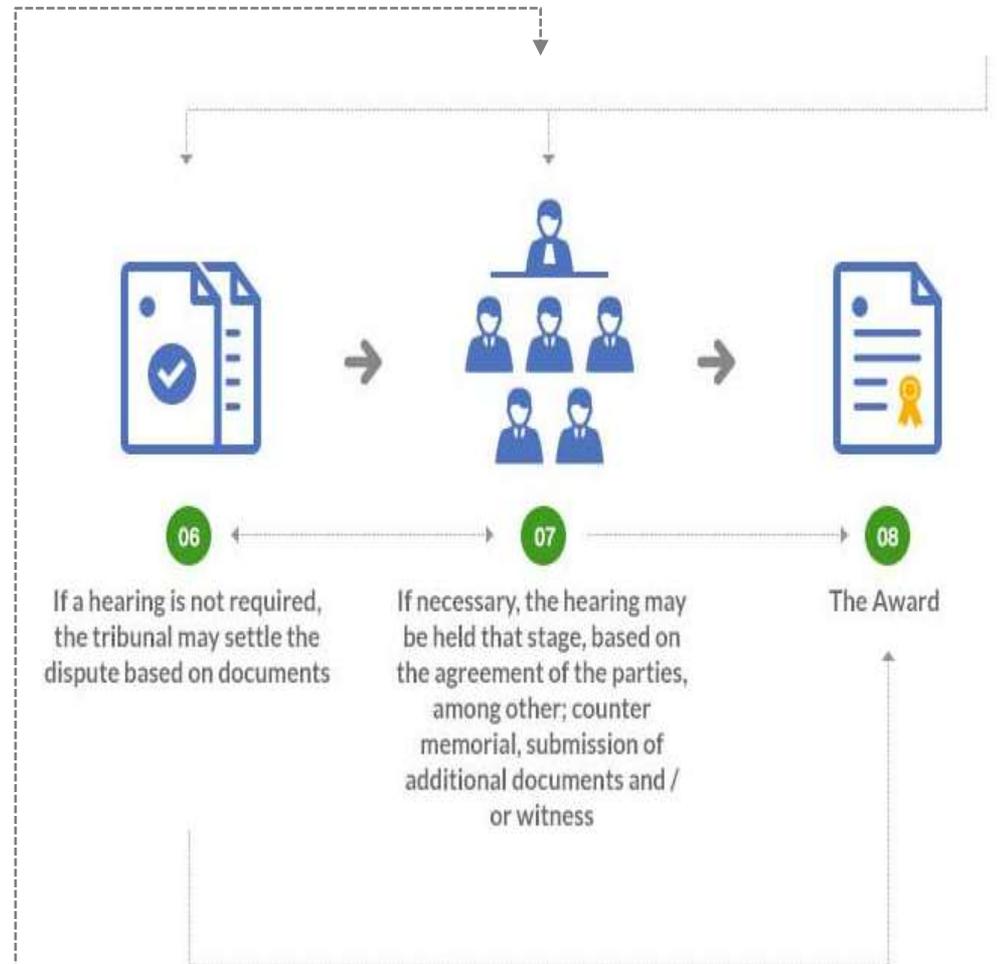
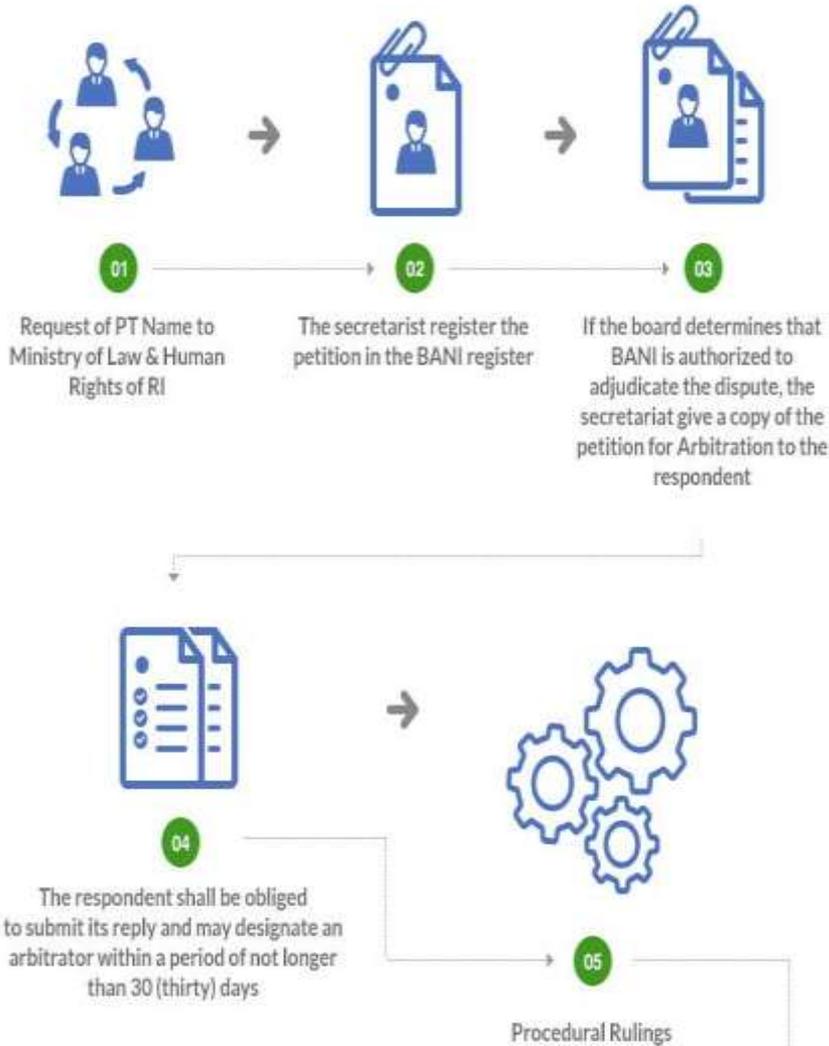
ORDER

ORDER\*

ORDER

EXECUTION

## Arbitral Procedure of The Indonesia National Board of Arbitration



# Indonesian Anti-Corruption Law

## Principal Regulations:

- Law No. 31 of 1999 on the Eradication of Criminal Act of Corruption as amended by Law No. 20 of 2001 (“**Anti-Corruption Law**”);
- Law No. 11 of 1980 on the Criminal Act of Bribery (“**Anti-Bribery Law**”) – old legislation on Anti-Bribery act;
- Law No. 30 of 2002 on the Commission for the Eradication of Corruption (“**KPK Law**”)– which outlines the specific duties and authority of the Corruption Eradication Commission;
- Law No. 8 of 2010 on the Prevention and Eradication of the Criminal Act of Money Laundering (“**Anti-Money Laundering Law**”) – trends in Indonesia show that corruption criminal acts are often followed by Money Laundering criminal acts.

## Relevant Authorities for Anti-Corruption Investigation:

- KPK;
- The Public Prosecutor Office/Kejaksaan;
- The Indonesian Police Office/Kepolisian; and
- Supported by the Indonesian Financial Transaction Reports and Analysis Centre (“**PPATK**”).

# Indonesian Anti-Corruption Law – Cont'd

## Various Forms of Corruption offences in Indonesia

- Losses to State finances (articles 2 and 3 of the Anti-Corruption Law);
- Bribery and Gratuities (Anti-Bribery Law and articles 5, 6 ,11, 12, and 13 of the Anti-Corruption Law);
- Act of cheating (*perbuatan curang*) (article 7 of the Anti- Corruption Law);
- Embezzlement by abusing power (article 8 of the Anti-Corruption Law);
- Extortion by public servants (article 12 (e), and (f) of the Anti- Corruption Law);
- Conflict of Interest in a procurement process (article 12 (i) of the Anti-Corruption Law).



The arbitral tribunal resorted to international law and investment case law to establish the legal consequences of forgery. It conducted a large review of cases and concluded that, depending on the circumstances of each case, fraud could affect the tribunal's jurisdiction (as in *Phoenix v. Czech Republic*, *Inceysa v. El Salvador* and *Europe Cement v. Turkey*), could affect the admissibility of the claim (as in *Plama v. Bulgaria*) or could be addressed in the merits (as in *Cementownia v. Turkey*, *Malicorp v. Egypt* and *Minnotte v. Poland*). Relying on *Venezuela Holdings v. Venezuela*, *Phoenix v. Czech Republic*, *Europe Cement v. Turkey* and *Hamester v. Ghana*, the tribunal reasoned that fraudulent behaviour configures abuse of right (or, under certain circumstances, abuse of process), which is contrary to the principle of good faith, because an investor cannot benefit from treaty protection when her underlying conduct is deemed improper

The arbitral tribunal *WDF v. Kenya* and *Metal-Tech v. Uzbekistan*, have been held as contrary to international public policy. Following that train of thought, it reasoned that “claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy”

# Al-Warraq vs Indonesia (2012) On UNCITRAL

Award dated 15 December 2014

The Tribunal refers to the Brattle Report<sup>2°8</sup>, which identified six types of fraud in which the Claimant was engaged. These are as follows:

- Uneconomical Swap - with his own entity
- Use of Bank Century Assets to Obtain Private Loan:
- Failure to Obtain Loans and Return Collateral:
- Failure to Honour the AM4:
- Replacing Valuable Assets For Trash:
- Failure to Pay Interest on Securities Held for Bank Century

The Tribunal concludes from the above that the Claimant failed to uphold the Indonesian laws and regulations.

The Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement.

The Tribunal is of the view that the doctrine of "clean hands" renders the Claimant's claim inadmissible. The Tribunal refers to the decision of Lord Mansfield in *Holman v Johnson* (1775) which states:

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted".

## Al-Warraq vs Indonesia (2012) On UNCITRAL – Cont'd

the Tribunal finds that moral damages are generally awarded only if illegal action was motivated or maliciously induced (see for instance *Inmaris v. Ukraine* ICSID Case No: ARB/08/8 - Award of 1.3.2012 para 428; see also in a later award the *Rompetrol Group v. Romania* ICSID Case No: ARB/06/3 - Award dated 6.5.2013:

"The Claimant asserts in its Post-Hearing submissions that "moral damages cover non-pecuniary injury for which monetary value cannot be mathematically assessed and ... must be determined by the tribunal with a certain amount of discretion." This would conform to the approach taken by the only two IC'SID tribunals that have hitherto awarded moral damages. A leading commentary draws as its conclusion from the cases that tribunals seem to enjoy "an almost absolute discretion in the matter of determining the amount of moral damages. " The very fact, however, that this alternative claim for damages is both notional and widely discretionary prompts a considerable degree of caution on the part of the present Tribunal in facing the proposition that compensable 'moral' damage can be suffered by a corporate investor.



ICSID Case No. ARB/12/14 and 12/40  
**Churchill Mining PLC and Planet Mining Pty Ltd**  
**vs**  
**Republic of Indonesia**  
Award dated 6 December 2016

**The Claimants' lack of diligence**

**520. Second, one would expect an investor aware of the risks of investing in a certain environment to be particularly diligent in investigating the circumstances of its investment. Yet, the Claimants did not engage in proper due diligence in their dealings with their partners.**

**519. Third, because the environment was risky and because the chosen business partner showed no record of proven reliability, one would expect the investor to exercise a heightened degree of diligence. This is so in particular in respect of the supervision of the licensing process, since the mining licenses form the indispensable basis of a successful investment. However, the record shows that the Claimants' supervision of the licensing process was deficient in several aspects.**

## ICSID Case No. ARB/12/14 and 12/40 – Cont'd

528 In conclusion, the Tribunal cannot but hold that all the claims before it are inadmissible. ... which demonstrate **that the claims are based on documents forged to implement a fraud aimed at obtaining mining rights.** ..... As a result, the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the Treaties and are, consequently, deemed inadmissible.

529. The inadmissibility applies to all the claims raised in this arbitration, because the entire EKCP project is an illegal enterprise affected by multiple forgeries and all claims relate to the EKCP. This is further supported by the Claimants' lack of diligence in carrying out their investment

*Thank you !*

