On corruption in international arbitration: Exploring the topic through the lens of the *MOL v. Croatia* saga

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Abstract

With the MOL v. Croatia arbitration saga finally concluding in 2022, an opportunity has arisen to revisit the topic of corruption which to this day remains rather divisive. The two arbitral proceedings that involved MOL and Croatia had at their core the allegation of corruption, namely that two contractual arrangements between the two parties had been procured by MOL bribing the then Croatian Prime Minister Ivo Sanader. Besides the two arbitral proceedings, criminal proceedings were initiated in Croatia that culminated in guilty verdicts for Ivo Sanader as well as the Chairman-CEO of MOL Zsolt Hernádi. This article starts by discussing the importance of adequately addressing corruption in international arbitration. To this end, the argument is put forth that, to the extent possible, arbitral tribunals ought to fine-tune their procedures in order to minimise the possibility of upholding a transaction or an arrangement that is plagued by corruption. Next, the article turns to the MOL v. Croatia saga. After providing a summary of the proceedings, the article explores the challenges that permeated Croatia's attempts to prove its allegation. The article concludes with the observation that the tribunals could have conducted the arbitral proceedings differently in recognition of the difficulties that arise in proving allegations of corruption as well as the negative impact that corruption exerts beyond the parties to the dispute.

1. Introduction

The long-lasting saga between MOL[1] (the Hungarian multinational oil company) and the Republic of Croatia was brought to an end in 2022. After two extensive arbitral proceedings as well as criminal proceedings before the Croatian courts, MOL emerged victorious. However, given the extremely long duration of the proceedings and the fact that MOL was awarded only a fraction of what it had initially sought to obtain, its victory may be described as a Pyrrhic one. At the core of this case lay the allegation of corruption.[2] More precisely, the allegation was that MOL had obtained the controlling stake in INA,[3] the Croatian multinational oil company, through the act of bribery.

Corruption remains a daunting topic in the realm of international arbitration, and with this in mind, the article at hand embarks on a twofold journey. It begins by making the case as to why it is pivotal to ensure that allegations of corruption are adequately addressed in arbitral proceedings. Then, the article shifts its focus to the MOL v. Croatia saga. Besides providing the historical overview of the arbitral as well as court proceedings involved in this saga, the article also analyses the difficulties and challenges that arose in Croatia's attempts to prove the bribery had taken place. The article ends with concluding observations.

2. The Importance of Adequately Addressing Corruption in International Arbitration

The primary aim of any arbitral proceedings, and consequently of any arbitral tribunal, is to dispose of the dispute for which the proceedings were initiated in the first place, and for which the arbitral tribunal was accordingly formed.[4] This is seen as a truism in the world of international arbitration. It stems from this well-established notion that there is little room in international arbitration for taking into account wider societal aims and concerns. Arbitration

[1] MOL Plc., Magyar Olaj- és Gázipari Részvénytársaság (English transl.: Hungarian Oil and Gas Public Limited Company)

[2] There is no universal definition of corruption. V. Pavić, 'Bribery and International Commercial Arbitration-the Role of Mandatory Rules and Public Policy' (2012) 43 Victoria University of Wellington Law Review 663. Citing A. Sayed: Corruption may be defined as "actions of transfer of money or anything of value to foreign public officials, either directly or indirectly, to obtain favorable public decisions in the course of international trade".

[3] INA-Industrija nafte, d.d. (English transl.: Oil industry)

[4] J. Kirchner and A. L. Marriott, 'International Arbitration in the Aftermath of Socialism – The Example of the Berlin Court of Arbitration' (1993) 10 Journal of International Arbitration 16. Citing W. J. Habscheid and E. Habscheid: "It would be irresponsible and inconsistent with the parties' intentions not to consider the purpose of international arbitration as an effective international means of dispute settlement […]". R. Breeze, 'Balancing Neutrality and Partiality in Arbitration: Discursive Tensions in Separate Opinions' (2016) 36 Text & Talk 363. "[T]he aim of arbitration is to reach a best-fit solution that is acceptable to the parties […]". J. A Buonocore, 'Inconvenient Truth: Second Circuit Breaches US International Arbitration Treaty Obligations with Forum Non Coveniens' (2015) 29 Temple International and Comparative Law Journal 51. "The goal of arbitration is to conduct high-stakes dispute resolution between multinational parties in a competent and efficient manner."

is, first and foremost, a private dispute resolution method, so the focus of the arbitrators is expected to be on the parties to the dispute, and on tackling the parties' claims and counterclaims. After all, the authority given to the arbitrators is the one bestowed upon them by the parties themselves through their consent that is manifested in the arbitration agreement.[5] Once the arbitral tribunal is in place, the arbitrators are under an obligation to put forth their best efforts to render an enforceable arbitral award.[6] In other words, the arbitrators should do their utmost to avoid issuing awards for reasons or on grounds which could later on be relied upon to have the award set aside or to resist enforcement. Crossing the boundaries of this narrow focus is something the arbitrators are neither expected nor encouraged to do. The question then becomes, in the context of corruption, why should arbitrators dedicate any special attention to this topic, or why should allegations of corruption warrant any special procedural rules, especially so if their foundations would be based on wider societal interests?

However, it ought to be noted that the arbitration world has collectively somewhat departed from the supposed truism that the aim of arbitral proceedings is to focus exclusively on the parties and on the resolution of their dispute, with this departure being particularly visible in the realm of investment arbitration. While initially there were only nuanced differences between investment arbitration and international commercial arbitration in terms of procedure, in recent years the differences have become more pronounced. For instance, submission of *amici curiae* has become the staple of arbitrations conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), the aim being to enable the voice of other stakeholders, besides the parties to the dispute, to be heard and potentially taken into account.[7]

Concrete steps have also been taken to bring more transparency into ICSID arbitrations, and thus somewhat relax the strict rules surrounding confidentiality.[8] For example, the ICSID Arbitration Rules also have an in-built mechanism to allow non-parties to attend and observe

[5] R. Moloo, 'Arbitrators Granting Antisuit Orders: When Should They and on What Authority?' (2009) 26 Journal of International Arbitration. "Arbitral tribunals derive their authority from the parties to the arbitration." A. T. von Mehren, 'Limitations on Part Choice of the Governing Law: Do They Exist for International Commercial Arbitration' (2001) 1 PLR 138. "[A]rbitrators derive their authority from the parties […]".

[6] M. Platte, 'An Arbitrator's Duty to Render Enforceable Awards,' (2003) 20 Journal of International Arbitration 307.

[7] ICSID Arbitration Rules, 2022 (ICSID Arbitration Rules 2022) https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf accessed on 18 June 2023; Rule 67, ICSID Arbitration Rules 2022. For a discission on implications of non-disputing parties' submissions, see E. Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 Berkeley Journal of International Law 200.

[8] G. J. Shaw, 'The 2022 ICSID Rules: A Leap Toward Greater Transparency in ICSID Arbitration' (2023) 38 ICSID Review-Foreign Investment Law Journal 54.

the hearings, as well as for the ICSID awards to be published.[9] The justification for this tectonic shift is, of course, in the very nature of investment arbitration. Given that one party is always a State (or its subdivision or agency), public interest is inevitably involved, which in and of itself is a valid argument in favour of more transparency and for enabling the voice of stakeholders other than the parties to be heard.[10]

When it comes to international commercial arbitration, given the absence of the pronounced public interest like the one in investment arbitration, steps towards considering interests of non-parties have not evolved in quite the same way.[11] That being said, even though the direct impact of proceedings in international commercial arbitration will generally be limited to the disputing parties – which will, more often than not, be individuals or corporate entities – this is not to say these proceedings exist in a vacuum without any wider societal implication.[12] Suffice to mention here that, over the course of years, the arbitrability pool has expanded significantly, and has come to encompass areas that initially were not deemed fit for arbitration.[13] A good example would be matters of antitrust or competition law whose relevance transcends the dispute between two parties.[14] Hence, it would not be an exaggeration to note that this increased power that arbitral tribunals have obtained ought to be accompanied by proportionately increased responsibility. After all, "great power comes with great responsibility".[15]

It ought to be noted, however, that wider societal aims are being taken into account in international commercial arbitration as well, but primarily in relation to arbitrators and arbitral institutions. A good example of this are the efforts of practically all major arbitral institutions

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[9] Rule 62, ICSID Arbitration Rules 2022; Rule 64: Publication of Documents Filed in the Proceeding, ICSID Arbitration Rules 2022; Rule 65, ICSID Arbitration Rules 2022.

[10] F. Dragusin, 'Transparency in ICSID Arbitration' (2019) 13 Romanian Arbitration Journal 41. "Because investment arbitration disputes always involve a State-party who is accountable to its citizens [footnote omitted] - hence investment disputes have a public interest feature - the concepts of confidentiality and transparency have evolved quite differently here, as compared to commercial arbitration".

[11] ibid.

[12] A. Poorooye and R. Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) 22 Harvard Negotiation Law Review 285. Arguments have been put forward as to how international commercial arbitration could benefit from more transparency. *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration* (International Chamber of Commerce (ICC) (2021) <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf>. The ICC International Court of Arbitration has taken steps to increase the transparency of arbitrations conducted under its auspices: "ICC awards and/or orders, as well as any dissenting and/or concurring opinions made as of 1 January 2019 ("ICC awards and related documents"), may be published […]".

[13] D. Geradin and E. Villano, 'Arbitrability of EU Competition Law-Based Claims: Where Do We Stand after the CDC Hydrogen Peroxide Case?' (2017) 40 World Competition 70. "Over the past decades, a general trend towards the expansion of the perimeter of arbitrability has emerged and competition law-based claims have not escaped that expansion".

[14] ibid.

[15] Well-known adage attributed to Uncle Ben in the Marvel Comics Spider-Man series.

to ensure better levels of diversity in the appointment of arbitrators.[16] In diverse societies, when their diverse composition is not reflected in certain sectors of the economy, this is seen as an adverse phenomenon capable of tearing up the very delicate social fabric that binds the members of that society together. For years, arbitration has been critiqued as a closed club of the "male, pale and stale".[17] Some have argued that the lack of gender and racial diversity undermines the very legitimacy of the decision-making process, creating "the perception of arbitration as an unfair and unbalanced process that is geared against "the little guy," particularly when that "little guy" is a woman and/or a member of a minority group".[18] To address these concerns, many arbitral institutions have sought to diversify their rosters and lists, and have taken steps to ensure more appointments in line with the desirable diversity outcomes.[19] These actions on the part of the arbitral institutions are, in essence, of the sort whereby wider societal interests are being taken into account - interests that do not necessarily concern or are indispensable for the concrete parties seeking arbitration services, and for their concrete dispute. If the wider societal aims may be considered on the side of the arbitrators and arbitral institutions, then it certainly makes sense that the same is done, where appropriate, during arbitral proceedings.

How does all this fit into the discussion on corruption? As we shall see later in the article, various proposals have been put forth as to how allegations of corruption ought to be approached by arbitral tribunals, especially in terms of burden and standard of proof. It is generally the case that, unless parties specify otherwise in the arbitration agreement (which they rarely do), the arbitral tribunal generally enjoys wide discretion in evidentiary matters.[20] So, the question then ensues as to what specific considerations the arbitral tribunal should take into account when deciding how to approach a corruption allegation. Should the focus be primarily on the positions of the parties? For instance, in setting the standard of proof, should

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[16] 'ICC Acts to Encourage Diversity in Selection of Arbitrators' (*International Chamber of Commerce*, 3 November 2022) <https://iccwbo.org/news-publications/news/icc-acts-to-encourage-diversity-in-selection-of-arbitrators/>. The ICC Court President Claudia Salomon noted as follows: "Arbitrator diversity in all forms is essential to the legitimacy of international arbitration by ensuring that the arbitrators represented in cases reflect the diversity – and values – of the global business community". 'LCIA Signs Diversity Pledge' (*London Court of International Arbitration*, 25 May 2016) <https://www.lcia.org/News/lcia-signs-diversity-pledge.aspx>; 'Arbitrators & Mediators: Roster Diversity, Equity & Inclusion' (*American Arbitration Association*, 2023) <https://www.adr.org/RosterDiversity>.

[17] L. C. Okocha, 'Diversity Problem in International Arbitration: Problems Caused by a Lack of Diversity, Reasons for Lack of Diversity and How It Be Fixed' (2021) 3 IJOCLLEP 158. "To use a well-worn metaphorical cliché that is packed with a lot of information, IA is decided by a cartel of 'pale, male and stale' professional arbitrators".

[18] S. R. Cole, 'Arbitrator Diversity: Can It Be Achieved?' (2020) 98 Washington University Law Review 972-973.

[19] ibid 971

[20] G. M. von Mehren and C. T. Salomon, 'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide' (2003) 20 Journal of International Arbitration 285; A. Tussupov, 'Evidence and Proof' [2022] Corruption and Fraud in Investment Arbitration: Procedural and Substantive Challenges 48.

the arbitral tribunal take into account that the allegation of corruption is a rather serious one, and that the consequences for the supposedly corrupt party would be severe? The severity of consequences may be used – which is often the case, as we shall see in the third part of this article – as a justification to set a high standard of proof. Conversely, challenges in proving corruption for the party making the allegation may be used as an argument gravitating in the opposite direction, i.e., that the standard of proof should not be set (too) high. Either way, if the arbitral tribunal, based on these considerations, ends up treating the allegations of corruption differently from other claims, it is doing that based on the implications that such allegations may have on the parties involved.

Can international arbitration be expected to cope adequately with corruption allegations without taking into account the bigger picture, i.e., without adding to the equation adverse implications that corruption has for societies at large? The answer is likely in the negative. In the ensuing sections, the arguments are put forth as to why it is pivotal for arbitral tribunals to approach the subject of corruption not merely by acknowledging the issues that it causes but also by ensuring that the manner in which the allegation of corruption is handled reflects this observation. International arbitration's growing consideration of social context when adjudicating disputes should be extended to cases involving issues of corruption. This means that arbitral proceedings should be fine-tuned in order to minimise the risk that corruption may go without consequences. In support of this position, at least three arguments can be offered: a) the severity of corruption's societal impact, b) deterrence consideration, and 3) protection of image and credibility of arbitration.

2.1 Corruption as Societal Cancer

Pope Francis once famously described corruption as a devastating cancer inflicting severe harm on the society.[21] In his address to the UN Security Council in 2018, the UN Secretary General António Guterres noted that corruption is not an exclusive problem of one particular group of countries or specific regions, but that it was a global phenomenon to which no country was immune.[22] He opined that "[c]orruption breeds disillusion with Government and governance and is often at the root of political dysfunction and social disunity," with potential to be a driver

[21] 'Corruption Is a Devastating Cancer Harming Society, Pope Says' [2019] *National Catholic Reporter* <https://www.ncronline.org/news/francis-comic-strip/francis-chronicles/corruption-devastating-cancer-harming-society-pope-says>.

[22] 'Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data' (*United Nations*, 10 September 2018) <https://press.un.org/en/2018/sc13493.doc.htm>.

of conflicts.[23] To illustrate the devasting impact of corruption on societies at large, Guterres reminded the World Economic Forum that the calculated global annual cost of corruption was $2.6 trillion.[24] This figure would constitute 5 per cent if measured against the global gross domestic product (GDP).[25] He also noted that the World Bank had estimated that businesses and individuals pay $1 trillion in bribes on an annual basis.[26]

The harmful effects of corruption are widely recognised by the scholarly community.[27] To this end, Hauser and Berenbeim offer a solid overview of the scholarly findings on the topic of corruption.[28] They note that corruption jeopardises political stability and brings into question democratic values.[29] Corruption comes hand in hand with organised crime and undermines trust in public institutions.[30] It creates adverse issues for society by contributing to poverty and causing erosion of public health.[31]

The economic impact of corruption is a particular concern given its relationship with market failure.[32] Likewise, corruption is regarded as an impediment to economic growth.[33] This consequence of corruption has notably come to the forefront following the transition of the former socialist countries to the market economy. In the early 1990s, the pervasive approach to ensuring economic growth of countries in development was enshrined in the Washington Consensus.[34] In pursuit of economic growth, many such countries chose, among other things, to resort to trade liberalisation and privatisation of state-owned enterprises.[35] Looking backwards from the present-day, it is clear now that this transition process has produced mixed results. Most of these countries still lag heavily behind their counterparts in Western Europe and North America. While there are various reasons for this under-development (after all, the Washington Consensus did receive a fair share of criticism),[36] some have observed that high levels of corruption were likely a significant contributing factor.[37]

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[23] ibid
[24] ibid
[25] ibid
[26] ibid
[27] C. Hauser and R. E. Berenbein, 'Anti-Corruption Education', *The SAGE Handbook of Responsible Management Learning and Education* (SAGE Publications 2020) 206.
[28] ibid
[29] ibid
[30] ibid
[31] ibid
[32] ibid
[33] ibid
[34] O. Azfar, Y. Lee and A. Swamy, 'The Causes and Consequences of Corruption' (2001) 573 The Annals of the American Academy of Political and Social Science 43-44.
[35] ibid
[36] For a detailed analysis of the topic, see N. Serra and J. E. Stiglitz, The Washington Consensus Reconsidered: Towards a New Global Governance (OUP Oxford 2008).
[37] Azfar, Lee and Swamy (n 34) 44.

Thus, given the all-encompassing impact of corruption on society, there is a straightforward case for why corruption ought to be adequately addressed in international arbitration. A contract that is procured through corruption, but that eventually is left standing by the arbitral tribunal because, for instance, the losing party simply failed to prove the corruption had taken place, is one drop of poison in a sea of poisonous substance. When this kind of a contract is recognised, arbitral tribunals fail to punish corrupt practices, which constitute criminal acts under many legal systems, and that in the world of international arbitration itself are considered to be in violation of public policy.[38] Of course, the expectation must be realistic; an argument here is not being made that every allegation of corruption must be accepted. Instead, what arbitral tribunals ought to do is to adjust the procedural aspects, within reason, in a way that minimises the possibility of a genuine act of corruption slipping under the radar.

2.2 Deterrence Consideration

In the international context, arbitration can no longer be considered as an alternative dispute resolution. Arbitration is a mainstream form of dispute resolution – it is the go-to tool to resolve disputes in the international context between commercial parties as well as between investors and states.[39] As such, arbitration will inevitably impact the behaviour of the parties whose

[38] Pavić (n 2) 662. "[C]orruption is contrary to the public policy and mandatory norms of - depending on the definition of bribery - many or all jurisdictions". M. Habazin, 'Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration' (2016) 18 Cardozo Journal of Conflict Resolution 806. "The tribunals have accepted the principle that corrupt acts are contrary to international public policy[…]".

[39] The data published in the annual reports by the leading arbitral institutions are a testament to the popularity of international arbitration in this day and age. 'Annual Report 2022' (International Centre for Settlement of Investment Disputes 2022) <https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf>. In the fiscal year 2022, ICSID administered a total of 346 ICSID cases and an additional 18 non-ICSID cases. For the sake of comparison, ICSID administered 195 ICISD cases and 6 non-ICSID cases in 2013. Percentage-wise, 2022 saw a 77.4 per cent increase in the number of ICISD cases and a 200 per cent increase in the number of non-ICSID cases compared to 2013. '2022 Casework Report' (London Court of International Arbitration 2023) <https://www.lcia.org/media/_download.aspx?MediaId=935>. The London Court of International Arbitration (LCIA) experienced an upward trend in the number of referrals for its services. Thus, in 2022, the LCIA received 293 arbitration referrals, while in 2013 the number stood at 236 (24.2 per cent increase). What is interesting is that in 2022, 88 per cent of parties arbitrating their disputes under the auspices of LCIA came from 90 different countries, and from outside of the United Kingdom. 'ICC Reaches Major Arbitration Milestone with 27,000th Case' (*International Chamber of Commerce*, 6 May 2022) <https://iccwbo.org/news-publications/news/icc-reaches-major-arbitration-milestone-with-27000th-case/>. In 2022, the ICC Court of International Arbitration registered its 27,000th case. 'Annual Report: 2021 Annual Reflections' (Hong Kong International Arbitration Centre) < https://www.hkiac.org/sites/default/files/annual_report/annual%20report%20-%202021.pdf>. The Hong Kong International Arbitration Centre (HKIAC) saw the submission of 277 arbitration cases. The total amount in dispute stood at approximately US$7 billion. A. B. Canyas, 'Setting Aside Arbitral Awards for Contradicting Public Policy According to the Turkish International Arbitration Act' (2021) 22 Global Jurist 157. "Arbitration has become the preferred way to settle international commercial disputes due to its objectivity, rapidness, and specialization". S. W. Schill and G. Vidigal, 'Cutting the Gordian Knot: Investment Dispute Settlement à La Carte' [2019] RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB) 13. "The currently predominant model

disputes it is expected to resolve. Just like courts have an effect on the behaviour of the parties through their case law (e.g., a court's interpretation and application of law, especially if consistent and stable across the judiciary, will guide the parties in their actions), the same holds true in relation to arbitration.[40]

At this stage, investment arbitration boasts an impressive body of case law. A good illustration of how investment arbitration impacts the behaviour of the parties is direct expropriation. Namely, under customary international law, a sovereign may dispossess an investor of their investment, but must ensure that the act is performed lawfully.[41] This will generally mean that the state must take the investment for a public purpose, must do so in a non-discriminatory manner, and must ensure adequate compensation is paid to the investor.[42]

The vast majority of Bilateral Investment Treaties (BITs) reflect the stance of customary international law, thus prohibiting unlawful expropriation.[43] Before proceeding to examine the lawfulness of the alleged expropriation, any arbitral tribunal would first need to determine its very existence. To this end, a distinction can be made between direct expropriation and indirect expropriation.[44] Direct expropriation, as the name suggests, involves direct taking of the investor's property, usually through a transfer of title or an outright seizure.[45] In comparison, indirect expropriation does not involve any such direct taking of the investment.[46] Instead, the state resorts to regulation and other kinds of measures to substantially deprive the investor of their investment without ever transferring the title or seizing the investment.[47] In this day and age, direct expropriation is a rarity.[48]

Assume, for example, that State A has a BIT with State B that provides for dispute resolution under the auspices of ICSID and prohibits unlawful expropriation. If either State A or State B engages in direct expropriation of the investment owned by the investor from the other contracting State, the investor will have an effective forum to seek redress for their grievances.

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for investment dispute settlement relies on investor-state arbitration to enforce the host state's obligations vis-à-vis foreign investors".

[40] Law and economics literature explores how arbitration may impact the behaviour of the parties, including any deterrence effect that it may produce. See D. Shieh, 'Unintended Side Effects: Arbitration and the Deterrence of Medical Error' (2014) 89 New York University Law Review 1806; See also C. R. Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 American Review of International Arbitration 451.

[41] *Expropriation - UNCTAD Series on Issues in International Investment Agreements II: A Sequel* (United Nations 2012) 1.

[42] ibid

[43] ibid 5

[44] ibid

[45] ibid 6-12

[46] ibid

[47] ibid

[48] ibid

Establishing the existence of direct expropriation is straightforward since usually convincing evidence will be available that a transfer of title or seizure of property had taken place. The investor then only needs to show that at least one element for lawful expropriation has not been met, and will come out victorious in arbitral proceedings. All this then acts as a strong deterrent for states not to engage in direct expropriation. In contrast, indirect expropriation is still frequently alleged in investment arbitration, and a finding that indirect expropriation had taken place is certainly not a rarity.[49] Unlike direct expropriation, proving the existence of indirect expropriation may be challenging, which certainly encourages the states to resort to latter as opposed to former.[50] All in all, what this example shows is that, the more probable the losing outcome of arbitration as a result of a particular course of party's conduct, the more likely it is that that party will not engage in that conduct. In other words, a deterrence effect is achieved.

The deterrence effect is not easy to measure in practice.[51] Still, assuming that states and investors are rational decision-makers, the logical conclusion is that they would adjust their behaviour in order to avoid undesirable consequences, unless there are benefits that would accrue to them that would outweigh those unwanted consequences. In the context of corruption, if the arbitration procedure is adapted to reduce the probability of corrupt practices going unpunished, there would be a heightened deterrent to engage in such practices. In other words, if parties to an arbitration knew in advance that there is a fair likelihood of corruption allegations being proved, that knowledge would act as an incentive for the parties not to engage in corrupt practices. With this, arbitration would be making a contribution to battling the societal cancer of corruption.

2.3 Protecting the Image and Credibility of International Arbitration

The world of arbitration has another reason to adequately address corruption; namely, avoiding developing a reputation that corruption has found safe haven in arbitration.[52] Some have argued that corruption is more likely to go unpunished in arbitral proceedings. If the same disputes were to be resolved by courts, the argument continues, corruption would not slip undetected.[53]

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[49] ibid; Ying Zhu, 'Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space' (2019) 60 Harvard International Law Journal 380. "Today, direct expropriation is relatively rare […]."

[50] ibid

[51] R. Shapira, 'Mandatory Arbitration and the Market for Reputation' (2019) 99 Boston University Law Review 876.

[52] V. Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts That Disguise Corruption' (2013) 24 ICC International Court of Arbitration Bulletin 15.

[53] ibid

This position may be a cause for additional concern in the context of investment arbitration, given its ongoing legitimacy crisis.[54] Given the effects of corruption on society, the arbitration community would not want a label of a dispute resolution mechanism that provides safe harbour for transactions or arrangements that have been procured through corruption or are designed to give an appearance of legality to unlawful transactions or arrangements. Such a label would inevitably bring into question arbitration's image and credibility, something that in the long-term would have the potential to jeopardise the very existence of arbitration, at least in the form as we know it today.

Naturally, putting forth an argument that it is pivotal to tackle corruption adequately in international arbitration is one thing, but actually finding correct measures to achieve this is something that is far more challenging. The MOL v. Croatia saga represents an excellent illustration of many of the difficulties and obstacles that lay on that road, and the next part of this article provides a historical overview of the case.

3. Historical Overview of the Dispute Between MOL and Croatia

3.1 Privatisation and Overtaking of INA by MOL

In order to pinpoint the catalyst for the dispute between MOL and Croatia, one needs to go back in time to the beginning of 2000s when the process of privatisation of INA began.[55] In 2002, the Croatian Parliament adopted the 'Law on the Privatisation of INA', and its Article 4 laid out the underlying process of the privatisation.[56] The categories of future shareholders were determined as well as the minimum, maximum or exact percentage of shares that would be sold or transferred to each shareholder category.[57] As per Article 4, exactly 7 per cent of shares were

[54] S. Li and W. Shen, 'Legitimacy Crisis and the ISDS Reform in a Political Economy Context.' (2022) 15 Journal of East Asia & International Law 31.

[55] R. Frydman and A. Rapaczynski, 'Privatization in Eastern Europe: Is the State Whithering Away?' [1993] Finance & Development 10. Privatisation "should be understood as a transfer of assets from the state to the private sector, accompanied by a radical reallocation of available productive resources, restructuring of the existing institutional setting in which production takes place, and the introduction of new methods of corporate governance, freed from the most noxious kinds of political interference"; Ž. Ivanković, 'Hrvatska privatizacija kao inicijalna aproprijacija' (2015) 5 Političke perspektive 68; M. Antić, 'Quasi-Experimental Approach to the Economic Development of Croatia: Were Yugoslavia and Socialism Better?' (2022) 5 Tragovi: časopis za srpske i hrvatske teme 134-135. In the second half of the 1990s, after Croatia gained independence, the process of privatisation went into full swing. At the beginning of 2000s, the privatisation of large state enterprises such as INA began. Just like in other post-socialist countries, the rationale for large-scale privatisation was that it would contribute to the development of market economy and strengthen democracy. However, in hindsight, many have opined that the privatisation process in Croatia failed to fulfil the initial expectations.

[56] Zakon o privatizaciji INA - Industrije nafte d.d. (Narodne novine, NN 32/2002)

[57] ibid

to be transferred to 'branitelji' and members of their families[58] while a maximum of 7 per cent of shares were to be sold to then current and former INA employees.[59] Up to 25 per cent plus 1 shares were to be sold to the strategic investor while the Croatian state was to keep 25 per cent plus 1 shares.[60] At least 15 per cent of shares were to be sold through public offering.[61]

The privatisation process was conducted in stages. Thus, in 2003, MOL became the strategic investor in INA as it purchased 25 per cent plus 1 shares.[62] In 2005, 7 per cent of INA's total shares were transferred to 'branitelji' while 2006 saw the public offering of 15 per cent of INA's shares targeting Croatian nationals.[63] In 2007, 7 per cent of INA's shares were sold to the company's then current and former employees, meaning that the Croatian state was no longer INA's majority shareholder.[64] MOL, aiming to increase its shareholding in INA, decided to conduct its own offering in 2008 in order to purchase the shares sold or transferred by Croatia up to that point to other shareholders, e.g., to 'branitelji' or to current and former employees.[65] This resulted in MOL increasing its shares in INA to 47,16 per cent and eventually becoming the company's largest shareholder.[66]

In 2009, the amendments to the INA Shareholder Agreement (SHA) were made, with the number of Supervisory Board members being increased from seven to nine.[67] As per the amendments, five members were to be nominated by MOL, three were to be nominated by the Government of Croatia, while the ninth member was to be chosen by the workers' representatives.[68] As for the management board, it was to comprise six members in total, with three nominations coming from the Government of Croatia and three from MOL.[69] However, MOL was to be the one to nominate the President of the Management Board.[70] These amendments to the SHA gave MOL the effective control over the company.

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[58] The word 'branitelji' translates into English as 'defenders', and refers to war veterans in Croatia from the 1991-1995 period.
[59] ibid
[60] ibid
[61] ibid
[62] N. Čučković, K. Jurlin and V. Vučković, 'Privatisation of the Oil and Gas Industry in Croatia and SEE: Assessment Of Impacts', *Challenges of Europe: Growth and Competitiveness - Reversing the Trends (9th International Conference)* (Faculty of Economics, University of Split 2011) 164.
[63] ibid
[64] ibid
[65] ibid
[66] ibid
[67] 'Republic of Croatia Represented by the Government of the Republic of Croatia and MOL Hungarian Oil and Gas Public Limited Company - First Amendment to the Shareholder Agreement Relating to INA Industrija Nafte D.D.' 12.
[68] ibid
[69] ibid 13
[70] ibid

Later that same year, the amendments to the SHA were followed by the Gas Master Agreement (GMA). As per the GMA, INA's gas business (including both gas storage and gas trading) was to be separated and unbundled from INA's other business ventures, and then sold to the Government of Croatia or to an entity owned or designated by the Government.[71] MOL was particularly insistent on this since INA's gas business was loss-making, and was having an adverse impact on INA's overall profitability.

The majority of the privatisation process of INA was carried out under the Croatian Government headed by *Hrvatska demokratska zajednica* (HDZ)[72] and the Prime Minister Sanader.

3.2 Croatian Criminal Trial of the Century

The privatisation process of INA became more political in 2010 when *Socijaldemokratska partija Hrvatske* (SDP),[73] Croatia's largest opposition party, began questioning the arrangement the Croatian Government had made with MOL, and in particular the amendments made to the SHA as well as the obligations the Government had taken upon itself under the GMA.[74] The opposition voiced its concern regarding the transparency of the arrangements as well as whether they reflected Croatia's national interests.[75]

In 2011, *Ured za suzbijanje korupcije i organiziranog kriminaliteta* (USKOK)[76] confirmed they were conducting an investigation against the then current Prime Minister Sanader on suspicion he had abused his power and accepted a bribe.[77] Additionally, USKOK confirmed they were conducting an investigation against Zsolt Hernádi (Chairman-CEO of MOL) on suspicion he had bribed Sanader in order to ensure the conclusion of the amendments to the SHA as well as the GMA.[78]

Upon confirmation of the indictment against Sanader, the County Court in Zagreb proceeded with the trial. The applicable law to Sanader's case, in force in Croatia at that time, was the

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[71] 'Republic of Croatia Represented by the Government of the Republic of Croatia and MOL Hungarian Oil and Gas Public Limited Company - Gas Master Agreement' 5-12.
[72] HDZ is an acronym for 'Hrvatska demokratska zajednica', and it translates into English as 'Croatian Democratic Community'. It is the country's largest and most dominant political party, and has been in power for most of the time since 1990.
[73] SDP is an acronym for 'Socijaldemokratska partija', and it translates into English as 'Social Democratic Party'.
[74] 'Dvogodišnjica Plenkovićeve najave otkupa dionica Ine od MOL-a' *poslovni.hr* <https://www.poslovni.hr/hrvatska/dvogodisnjica-plenkoviceve-najave-otkupa-dionica-ine-od-mol-a-348370>.
[75] ibid
[76] USKOK is an acronym for 'Ured za suzbijanje korupcije i organiziranog kriminaliteta', generally translated into English as 'Croatian State Prosecutor's Office for the Suppression of Organised Crime and Corruption'.
[77] Z. Đurđević, 'Nedostatni i irelevantni ustavni razlozi za ukidanje kaznenih presuda po ustavnoj tužbi bivšeg Predsjednika Vlade RH u predmetu" INA MOL"(Odluka Ustavnog suda RH U-III-4149/2014)' (2018) 25 Hrvatski ljetopis za kaznene znanosti i praksu 263.
[78] ibid

Criminal Code of Croatia from 1997 (KZ 1997).[79] Its Article 347(1) defined the act of acceptance of bribery as follows:

> An official or responsible person who solicits or accepts a gift or some other benefit, or accepts the promise of a gift or some other gain for performing within the scope of his authority an official or other act which he should not perform, or for omitting an official or other act which he should perform, shall be punished by imprisonment for one year to eight years.

The County Court in Zagreb eventually found all the factual elements of the case to satisfy the definition of bribery in Article 347(1) of the KZ 1997.[80] Since Sanader was the Prime Minister of Croatia during the period when the alleged acceptance of bribery took place, he was to be deemed as an *official* in the sense of Article 347(1) of the KZ 1997.[81] The County Court then found that Sanader accepted the bribe at the beginning of 2008 when he entered into an arrangement with Hernádi.[82] As per this arrangement, the middleman was to be Croatian businessman Robert Ježić and a Swiss registered company Xenoplast & Shipping AG that Ježić co-owned. This company was to receive €10 million from two Cyprus registered companies. Eventually, two payments to Xenoplast & Shipping AG were made by the Cyprus registered companies amounting to €5 million in total. The remainder of the agreed sum was never transferred owing to the fact that the contract for the provision of advisory and other services between Xenoplast & Shipping AG and the Cypriot companies was terminated.

The County Court also found that the requirement of Article 347(1) of the KZ 1997 that the act in question be such that the official should not perform it had been satisfied.[83] More precisely, the County Court determined that Sanader had used his authority and influence as Croatia's Prime Minister and the leader of the country's largest political party to ensure the conclusion of the amendments to the SHA as well as the GMA.[84] The County Court held that Sanader should not have pursued these contractual arrangements as they harmed Croatia's national interests.[85] The County Court found Sanader guilty and sentenced him to 10 years in

[79] ibid 266-267
[80] ibid
[81] ibid
[82] ibid
[83] ibid
[84] ibid
[85] ibid

prison.[86] On its way to the verdict, the County Court publicly read 149 documents and other written materials, viewed the interrogation video of the suspect and took the testimony of 41 witnesses, with then the Court of Appeal confirming the verdict.[87]

Eventually, in 2014, the case reached the Supreme Court of Croatia which confirmed the verdict, but decided to reduce Sanader's sentence to 8 years and 6 months in prison.[88] Then, the Constitutional Court of Croatia took on the case. In a rather controversial and heavily criticised decision, the Constitutional Court set aside the verdict of the County Court of Zagreb and ordered retrial. The Constitutional Court, among other things, noted that the verdict violated the Defendant's right to a reasoned decision as it failed to put forward reasons why the Prime Minister was to be deemed *official* in the sense of Article 347(1) of the KZ 1997.[89] Moreover, the Constitutional Court found there to be a violation of the right to a fair trial.[90] This resulted from the fact that the County Court engaged in a determination as to whether the contractual arrangements concluded between the Croatian Government and MOL went against the country's national interests, which was in turn used to prove Sanader's individual guilt.[91] With this approach, the Constitutional Court held that the lines became blurred between the Defendant's criminal liability and the political accountability of the Croatian Government.[92]

After retrial, Sanader was again handed a guilty verdict and was sentenced to 6 years in prison.[93] This time around, both the Supreme Court and the Constitutional Court confirmed the verdict. As for Hernádi, owing to the fact that the Hungarian authorities refused to extradite him to Croatia, he was tried *in absentia* before the Croatian Courts and was found guilty for bribing Sanader.[94]

3.3 Arbitration Under the UNCITRAL Rules

In 2013, MOL initiated arbitral proceedings before the ICSID, claiming that Croatia's actions resulted in the violation of the Energy Charter Treaty (ECT).[95] As a response, Croatia started arbitration proceedings in 2014 under the SHA. Albeit started later in time, the latter arbitral

[86] ibid 265 This was an aggregate sentence that applied to another criminal offense committed by Sanader - abuse of position.
[87] ibid
[88] ibid
[89] ibid 268-269
[90] ibid
[91] ibid
[92] ibid
[93] Judgement No. I Kž-Us 76/2020-15, Supreme Court of Croatia 1.
[94] ibid
[95] The Energy Charter Treaty, 1994 (ECT) https://www.energychartertreaty.org/treaty/energy-charter-treaty/ accessed on 18 June 2023.

proceedings will be summarised first in the present article since they resulted in a final award much sooner, i.e., in 2016.[96] The former proceedings yielded a final award only in 2022, and will be discussed in the next section.

The dispute resolution clause in the SHA stated that all disputes between the parties would be resolved through arbitration under the UNCITRAL Arbitration Rules ('UNCITRAL Rules'), with Geneva, Switzerland as the seat. Moreover, the SHA contained a choice of law clause in favour of Croatian law. At the heart of these proceedings was Croatia's claim that the amendments to the SHA had been procured through corruption. The consequence of this, as per Croatia, was that the amendments had to be declared null and void.

To support its position, Croatia relied on three strands of evidence. Firstly, Croatia relied on the fact that Sanader had been convicted for the acceptance of bribe by the County Court in Zagreb, and it argued that this ought to be a factor for the arbitral tribunal to consider. Secondly, Croatia relied on its crucial witness – the middleman Ježić – who had given evidence both before the County Court in Zagreb and also before the arbitral tribunal. And thirdly, Croatia backed its position by relying on the evidence provided by Stephan Hürlimann who acted on behalf of Ježić and his companies, and was involved in the transactions supposedly tainted by bribery. To counter Croatia's position, MOL sought to discredit Croatia's crown witness Ježić. More precisely, MOL attacked Ježić's credibility, arguing that he simply could not be seen as a reliable witness.

The arbitral tribunal noted that the burden of proof was on Croatia given the fact that Croatia was the party making the allegation of corruption. As for the standard of proof, the tribunal applied the 'reasonable certainty' standard, one that on the spectrum is to be found somewhere above the 'balance of probabilities' but below the 'beyond reasonable doubt' standard. In other words, in order to prove its case, Croatia was required to present evidence that would convince the arbitral tribunal that the bribery took place with reasonable certainty. Because the arbitral tribunal was "quite satisfied that no judge or tribunal seeing or reading Mr Ježić's evidence would come to any other conclusion but that he was a wholly unreliable witness",[97] in the end Croatia fell short of proving its allegations. The main reason why the arbitral tribunal came to this conclusion was because it identified numerous implausibilities in Ježić's recollection of events, with Ježić significantly changing the narrative compared to the statements he had

[96] *The Republic of Croatia v. MOL Hungarian Oil and Gas PLC.*, PCA Case No. 2014-15, Final Award, 23 December 2016, https://www.italaw.com/sites/default/files/case-documents/italaw94016.pdf accessed on 18 June 2023.
[97] ibid para 329

initially given to USKOK in Croatia. The arbitral tribunal posed a series of questions to pinpoint how the pieces of Ježić's testimony did not fit into a coherent puzzle and how the courses of action that Ježić had taken in many situations lacked convincing explanation or motive. To illustrate, the arbitral tribunal, among many other things, asked itself the following:

> When Dr Sanader allegedly first mentioned the receipt of a large amount of money, why did Mr Ježić fail to ask for more details? Why did he fail to make any enquiries and rather disregarded his Prime Minister's request? How can Mr Ježić seriously say that he did not take his own Prime Minister's request seriously?[98]

As for Croatia's attempt to rely on the verdict of the County Court in Zagreb, the arbitral tribunal noted that this was not possible given the fact that, at that time, the Constitutional Court had set aside Sanader's conviction. In other words, there was no guilty verdict that Croatia could have relied upon since the trial would have to be started anew. Croatia did not fare any better with evidence coming from Hürlimann "because Mr Hurlimann refused to answer any material questions either from the Tribunal or from Counsel for MOL."[99] As a result, the arbitral tribunal decided not to give significance to his testimony.

With Croatia failing to prove corruption, the amendments to the SHA were left standing.

3.4 ICSID Arbitration

The ICSID tribunal[100] faced many of the same difficulties and challenges that the arbitral tribunal conducting the proceedings under the UNCITRAL Rules had faced. Again, the issue of corruption was central to the proceedings:

> [T]he allegation of corruption came to form the central core of the argument before the Tribunal over the extended period of time described above. As the Respondent puts the argument in its Post-Hearing Brief, this is the 'one question the Tribunal must answer to determine the outcome of the dispute.' [footnote omitted] It should also be remarked that the allegation was, at the same time, one of the main issues

[98] ibid
[99] ibid para 85
[100] *MOL Hungarian Oil and Gas PLC. v. Republic of Croatia*, ICSID Case No. ARB/13/32, Award, 5 July 2022, https://www.italaw.com/sites/default/files/case-documents/italaw170969.pdf accessed on 18 June 2023. Initially, the parties agreed not to have the award published. However, after MOL moved to enforce the award in the United States, the award found itself in the public domain. This section summarises the award.

> submitted to the UNCITRAL tribunal in the parallel arbitration, and it constituted, it goes without saying, the whole *raison d'etre* of the Croatian criminal proceedings mentioned above.[101]

The Claimant, which in the case at hand was MOL, asked the arbitral tribunal to grant an order requiring the Respondent to "cease all harassment of MOL and INA and their respective officials, including ... pursuing legal proceedings based on false evidence […]".[102] Moreover, MOL alleged that Croatia's actions were in violation of Article 10(1) of the ECT, which provides as follows:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

Croatia built its defence around the issue of corruption. Namely, Croatia alleged that the supposed instance of corruption ought to lead the arbitral tribunal to decline jurisdiction, or alternatively, to find the claims put forward by the Claimant inadmissible.

When it came to MOL's allegations regarding Article 10(1) of the ECT, the Hungarian multinational company relied on the fair and equitable treatment standard, the non-impairment guarantee as well as the promise to honour commitments entered into with the investor (or investment). MOL was of the view that several actions by or on behalf of Croatia resulted in the violation of ECT, including…

[101] ibid para 499
[102] ibid para 502

> 1) various measures which had the intention or effect of preventing the Claimant acquiring a controlling equity stake in INA (the "Equity Claim");
> 2) various measures to do with the liberalization of the Croatian gas market, including the unbundling of INA's gas trading business, the reorganizing of gas storage, and the management of gas market prices and royalty rates (the "Gas Market Claim");
> 3) […][103]

In terms of burden of proof, as regards the allegation of corruption, the ICSID tribunal essentially followed the maxim *semper necessitas probandi incumbit ei qui agit*. In other words, the side making an assertion was required to prove its veracity by satisfying the relevant standard of proof. It was thus on Croatia to prove…

> […] that a bribe was (i) offered to Dr Sanader, (ii) by MOL or knowingly on its behalf, and (iii) was accepted by Dr Sanader, (iv) for the purpose of influencing, (v) and did so influence, the conclusion and implementation by the Government of Croatia of the [amendment of the SHA] and the GMA.[104]

Focussing on the seriousness of allegation and the severity of consequences that would stem from a finding of corruption, the ICSID tribunal opined that a stricter standard of proof was warranted. Thus, the ICSID tribunal set the threshold appreciably higher than the balance of probabilities, but presumably falling short of reaching the beyond reasonable doubt standard. Like the UNCITRAL arbitration, the key witness in the ICSID proceedings was also Ježić. Echoing the sentiment of the UNCITRAL tribunal, the ICSID tribunal found that Ježić was not a trustworthy witness, and as a result, deemed that the evidence that Croatia put forth was not enough to satisfy the heightened burden of proof. Consequently, Croatia's objection to jurisdiction and admissibility were rejected, with the ICSID tribunal finding that it has jurisdiction over most of the claims put forth by MOL. Again, the ICSID tribunal found that Ježić's testimony lacked credibility. For instance, the ICSID tribunal asked itself the following:

[103] ibid para 573
[104] Ibid para 504

> Why should Dr Sanader choose to put, not only his whole political career, but even his personal welfare, hostage in the hands of someone with whom he had dealings, but who was by common agreement neither a confidant nor a close personal friend?[105]

As far as Article 10(1) of the ECT claims were concerned, the ICSID tribunal referred colloquially to MOL's claim that Croatia had failed to set in motion the liberalisation of the gas market and to take over INA's gas business as "sin of omission". Indeed, the ICISD tribunal referred to MOL's Article 10(1) ECT claim regarding the Gas Market Measures (GMMs) as Croatia's "sin of commission". Focussing on the former, the ICSID Tribunal found that the "deliberate failures on the Respondent's part constitute[d] a breach of the guarantee of fair and equitable treatment of protected investments laid down in Article 10(1) of the ECT".[106]

When it came to the latter, the ICSID tribunal found that Croatia was in breach of the fair and equitable treatment standard as well as the non-impairment guarantee. The GMMs, adopted in 2014, "nominated Hrvatska elektroprivreda d.d. ("HEP"), a state-owned power company, to assume until 31 March 2017 the role that had previously been held by INA's subsidiary, PP, as the entity which was to sell gas to public service suppliers for use by households".[107] Moreover, the Measures set the price and quantities at which INA was required to sell gas to HEP as well as the price at which HEP could then further on sell to suppliers of households. All this caused INA substantial losses, and the ICSID tribunal awarded MOL $183.94 million in compensation, which was still a far cry from approximately $1.1 billion that MOL sought to obtain.

4 Challenges in Tackling the Corruption Conundrum – Some Highlights from the MOL v. Croatia Saga

The battle between MOL and Croatia brings back to the forefront many of the usual issues and topics that are generally discussed in connection with corruption in international arbitration. We shall focus on four selected issues here. First, the case is a textbook illustration of the fact that corruption is extremely difficult to prove in arbitration. Second, it also showcases why the debate on burden and standard of proof remains a heated one, with the practical result that there is no uniformity in approach amongst the arbitral tribunals. Third, this saga illustrates the difficulties that may arise with the availability of evidence. Fourth, it confirms the notion that

[105] ibid 538
[106] ibid 630
[107] ibid 414

arbitral tribunals are in no way bound by the decisions of national criminal courts when the very same allegation of corruption arises before both fora. Last but not least, the case also raises cultural considerations as well as the importance of ensuring more diversity in the pool of arbitrators.

4.1 Corruption is Notoriously Difficult to Prove

In what is now a landmark ICSID case - *World Duty Free Co. Ltd. v. The Republic of Kenya* – proving corruption was quite straightforward.[108] The peculiarity of this case lay in the fact that there was a direct admission by the Claimant's owner that he had bribed the Kenyan President.[109] Judging by the transcript of his witness statement, the Claimant's owner seemed to have believed he was simply honouring the Kenyan custom of giving a "personal donation" to the Kenyan President to ensure the business arrangement for his company.[110] As a result of this stunning admission, the arbitral tribunal barred the Claimant from proceeding with the claim.[111]

The *World Duty Free* case is an exception rather than the rule, and one that may never again repeat itself. Direct admissions of corruption are rare. Instead, when corrupt dealings take place, those involved are generally very careful not to leave any trace or evidence behind.[112] Instead, they will tend to ensure that the only persons present are those who are partaking in the corrupt arrangement. Thus, no testimony will generally be available from persons who have not participated in the act of corruption in some way. As for the written evidence, parties will generally ensure that there is no written evidence or any other recorded trace of corruption. Further, parties will often use written contracts to make a corrupt act appear legal.

In both the ICSID and UNCITRAL arbitral proceedings between MOL and Croatia, the key witness was the middleman Ježić, and to a lesser extent Hürlimann, both of whom were allegedly deeply involved in enabling bribery to materialise. In a sense, this case was also somewhat atypical because, as already noted, the sides giving and accepting the bribery payment as well as those facilitating it will generally not come forward and confess to corruption. In the case at hand, however, the party who was supposedly facilitating the corrupt

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[108] *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 https://www.italaw.com/sites/default/files/case-documents/italaw15005.pdf accessed on 18 June 2023; C. Partasides, 'Proving Corruption in International Arbitration: A Balanced Standard for the Real World' (2010) 25 ICSID Review 49-51.
[109] ibid
[110] ibid
[111] ibid
[112] Partasides (n 112) 51.

arrangement (Ježić) gave testimony. Eventually, the matter between MOL and Croatia to a large extent depended on whether Ježić could be deemed as a trustworthy witness, which, naturally, entailed some inherent risks.

The question of whether the former Croatian Prime Minister Sanader had accepted the bribe from MOL's Chairman-CEO Hernádi was largely a factual one. In other words, it had to be demonstrated to the two arbitral tribunals that certain events had taken place that, in their sum, would constitute the acts of receiving and giving bribery. The tribunals had to be convinced of this against the background of the standard of proof they had set. This, however, was be easier said than done. When the key witness is someone like Ježić, a supposed middleman and someone who seems to be of dubious character, the danger exists that the resulting testimony will be inconsistent. Given the reputational blow that the finding of corruption may have on those involved, a person such as Ježić will inevitably have an incentive to distort facts in order to safeguard their reputation, as much as that is possible in the circumstances. Thus, in spite of the fact that the most relevant matter that they end up revealing – i.e., that the corrupt act took place, to which they were privy – may actually be true, the veracity of it may be brought into question by the implausabilities and inconsistencies that permeate their overall story. If this is indeed the case, the arbitral tribunal may then be left with somewhat of a hot potato in their hands – a witness statement or testimony that has more holes in it than Swiss cheese, making it difficult, if not impossible, for the tribunal to find that the corruption had taken place.

4.2 The Never-Ending Debate on Burden and Standard of Proof

Who bears the burden of proof in corruption cases in arbitral proceedings? What standard of proof must be satisfied in order for the arbitral tribunal to find the corruption had taken place? These questions continue to provoke a divisive debate in the world of international arbitration.

The dominant approach seems to be to place the burden of proof squarely on the side alleging corruption.[113] There have been suggestions that the appropriate way to deal with a corruption allegation is to shift the burden of proof to the other side, requiring them to produce evidence to the contrary, i.e., that the transaction or arrangement had been carried out lawfully.[114] Karen Mills suggested the following:

> Because of the near impossibility to "prove" corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to

[113] Tussupov (n 20) 51.
[114] Partasides (n 112) 51.

> shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met.[115]

Constantine Partasides opined that "plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation".[116] Some have advocated the use of the so-called red flags.[117] This would allow the party alleging the corruption to rely on circumstantial evidence which, if accepted by the tribunal, may then shift the burden of proof to the other party.[118] The latter would then be required to produce evidence rebutting the allegation of corruption, and the failure to do so may result in the arbitral tribunal drawing adverse inferences.[119] As noted in the previous part, in both the UNCITRAL and ICSID proceedings, the arbitral tribunals placed the burden of proof squarely on the party making the allegation, i.e., on Croatia.

In terms of the standard of proof, the arbitral tribunals' approaches have been far from uniform. They have perceived the standard of proof as a spectrum ranging from balance of probabilities to beyond reasonable doubt, and anywhere and anything in-between.[120] The difficulty was, and continues to be, finding the right point on that spectrum. Many arbitral tribunals will ask that clear and convincing evidence be presented in order to prove that corruption has taken place, or that a high standard of proof be satisfied.[121] This standard of proof is closer to the beyond reasonable doubt standard. Some arbitral tribunals have favoured using mere balance of probabilities.[122] Some have resorted to the comfortable satisfaction standard.[123]

In the two arbitral proceedings involving MOL and Croatia, the arbitral tribunals contributed to the already existing disarray of differing approaches. The UNCITRAL tribunal opted for the standard that on the spectrum surpasses the mere balance of probabilities, referring to the reasonable certainty standard and noting that the standard of proof "is a matter of persuasion, and it may well be that for most minds becoming persuaded of something requires more than

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[115] ibid 52-53; K. Mills, 'Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto' (2003) 295.
[116] ibid 63
[117] See P. Schilling de Carvalho and M. Della Valle, 'Corruption Allegations in Arbitration: Burden and Standard of Proof, Red Flags, and a Proposal for Systematization' (2022) 39 Journal of International Arbitration 817.
[118] ibid
[119] ibid
[120] A. Bishara, 'The Standard of Proof for Corruption in International Arbitration' (2019) 16 Manchester Journal of International Economic Law 441.
[121] ibid 456-457
[122] ibid 458
[123] ibid 453

accepting that it is more likely than not". In making its choice, the UNCITRAL tribunal was influenced by the position of the Croatian Civil Procedure Act and the case law of the Croatian courts, with the standard of proof generally required in civil cases being high degree of probabilities. However, the tribunal did hear two experts on Croatian law who opined that the tribunal "has full freedom as to the choice of a particular piece of evidence, as to the method of proof presentation and as to the assessment of evidentiary value". When it comes to the ICSID tribunal, as noted in the previous part of this article, the standard of proof was set higher than the balance of probabilities, which that tribunal justified by reference to the severity of the allegations and the consequences if the allegation is proven.

While both the UNCITRAL tribunal and the ICSID tribunal did acknowledge the problems that corruption causes and how it is difficult to prove, this was not reflected in the arbitral procedures they adopted. Given the level of discretion that arbitral tribunals enjoy in evidentiary matters, both of these tribunals had the power to ensure these considerations were reflected in the burden and standard of proof. It is clear that neither tribunal altered their procedures in order to minimise the possibility of parties avoiding punishment for corruption. As Partasides eloquently put it, "whilst the standard of proof should not be relaxed for allegations of corruption, by the same token it need not be made more severe".[124] Simply sticking to the balance of probabilities standard would already mean that the tribunals are taking steps in the direction of fine-tuning the arbitral procedure to the peculiarities of corruption allegations. If the consideration that consequences stemming from a finding of corruption serve to push the standard of proof somewhere above the balance of probabilities, the sheer difficulty of proving the corruption allegation and the overall impact of corruption on societies at large should then act as a counterweight which encourages adopting a more relaxed approach to the standard of proof.

4.3 Availability of Relevant Evidence

As noted previously, the evidence available to corroborate allegations of corruption will often be scarce. Additional hurdles may arise if witnesses decline to appear before the arbitral tribunal. For example, in the MOL v. Croatia saga, the unfortunate state of affairs was that the same instance of bribery was alleged in three different proceedings, but in the end, the evidence presented before the three decision-making authorities was vastly different. In essence, some

[124] Partasides (n 112) 57.

witnesses that had appeared before the Croatian courts and gave testimony refused to appear before the arbitral tribunals. The ICSID tribunal observed as follows:

> Each of these three courts or tribunals has been presented with extensive witness evidence on this central element in the case before it. However, the cast of witnesses appearing before the three fora, while overlapping in certain respects, has been far from identical. That has in turn given rise in the present proceedings to awkward problems of evidence and proof, with which the Parties have struggled but which they have not entirely overcome, leaving in their wake troubling issues for the Tribunal to resolve in arriving at this Award.

4.4 Parallel Proceedings

In corruption cases, it is certainly not rare to see parallel proceedings unfold. The pattern is all too familiar, and was followed to the letter in the MOL v. Croatia saga. The criminal proceedings get instigated before national courts since corrupt practices generally constitute criminal acts. At the same time, if a contract is supposedly procured through corruption, and if that contract contains an arbitration clause, the question then becomes whether that contract is null and void. The authority with the power to make this decision would be the arbitral tribunal constituted under the said arbitration clause. By the same token, if an investment is supposedly procured through corruption, and if there is an applicable BIT that gives the investor the option to resort to arbitration (or there is a contract between the investor and the State containing an arbitration clause), the fate of the investment may well have to be decided through arbitration. In the end, the decisive factor for both the national courts and the arbitral tribunals will be the same – the determination whether the corrupt act had indeed taken place or not. In other words, parallel proceedings ensue whereby different authorities are called upon to decide the same legal issue.

A question has arisen as to whether arbitral tribunals should be bound by the determination of the national criminal courts. The answer to this question has become quite settled. The arbitral tribunals are in no way required to abide by the decisions of national criminal courts.[125]

[125] Decision of the Constitutional Court of the Republic of Croatia No. U-Iii-4149/2014 of 24 July 2015 (Summary, English version), https://sljeme.usud.hr/Usud/Praksaw.nsf/C12570D30061CE54C1257E8F00464B23/%24FILE/SUMMARY%20OF%20DECISION%20No.%20U-III-4149-2014%20of%2024%20July%202015.pdf accessed on 18 June 2023; T. Kendra and A. Bonini, 'Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?' (2014) 31 Journal of International Arbitration 450. The authors noted that, "[i]n principle, the outcome of criminal proceedings is entirely separate to the arbitration and will not determine the tribunal's decision".

They are not required to treat the matter as *res judicata*.[126] Instead, they will treat it as one of the facts of the case, and may consider the courts' decisions at a stage when the evidence is assessed.[127] This stance was even echoed by the Croatian Constitutional Court:

> Decisions by national courts, including those by the Constitutional Court, cannot in general have an impact on arbitration proceedings initiated or conducted by the Republic of Croatia in the field of international commercial law. It is a general principle that arbitral tribunals are not bound by final judgments of national courts, or decisions issued by national constitutional courts, because such judgments and decisions are regarded as facts by arbitral tribunals. Such tribunals examine matters in the case before them on their own.[128]

This position seems as the only tenable one. For matters that are arbitrable, parties are free to conclude an arbitration agreement, and thus remove those matters from the decision-making powers of the courts. If the arbitral tribunals were required to decide matters entrusted to them by the parties in the same vein that those matters were decided by the national criminal courts, this would undermine arbitration as an autonomous dispute resolution method.[129] The arbitrators should be given the opportunity to make their own determinations, and not to simply parrot what seems to be the position of some national court. These considerations get augmented in the context of investment arbitration. After all, the very purpose of investment arbitration is to provide a neutral forum outside of the purview of the host State.[130] Having the arbitral tribunal be bound by a particular decision of the host State's court would be counter-intuitive to this basic purpose of investment arbitration.

Another strong argument against the arbitral tribunals being bound by the decisions of national criminal courts is the possibility of biased decision-making on the part of the latter. This was something that was of particular concern to the UNCITRAL tribunal:

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[126] ibid.
[127] Kendra and Bonini (n 129) 452. Noting that "[d]omestic criminal proceedings may however produce evidence that can be assessed by the tribunal".
[128] Decision of the Constitutional Court of the Republic of Croatia (n 129) 9.
[129] The extent of arbitration's autonomous nature vis-à-vis national courts and national legal systems remains a topic of the debate. See R. Michaels, "Is Arbitration Autonomous?" in C. L. Lim (ed), *The Cambridge Companion to International Arbitration* (Cambridge University Press 2021) 115-137. However, it would be difficult to dispute that arbitrators ought to have autonomy to decide matters entrusted to them by the parties, and to do so based on their own independent reasoning, so long as the matters in question are arbitrable.
[130] T. Meshel, 'The Use and Misuse of the Corruption Defence in International Investment Arbitration' (2013) 30 Journal of International Arbitration 271.

> The Tribunal must approach the evidence in the Sanader trial with considerable caution. No transcript of that trials available, only a précis of each witness's oral testimony recorded by Judge.
>
> That leads to two concerns. Firstly, what the Judge recorded was the summary of what he presented as his perception of what the witnesses said. Dr Sanader in his testimony to this Tribunal recognized that this was a difficult task for the Judge and that inevitably there were inaccuracies. Dr Sanader told the Tribunal that he recalled about 15 occasions where he felt it necessary to challenge the Judge's summary.
>
> Furthermore, the Tribunal cannot ignore the Judge's obvious bias at the trial. The Tribunal needs not say anything about this save to point out that after a retrial had been ordered by the Constitutional Court, Judge sought to reserve the case to himself and gave two interviews to the press, the first on 29 July 2015, and the other on 2 August 2015, which made it quite clear that he disagreed with the decision of the Constitutional Court and intended to hear the retrial himself.[131]

Nevertheless, one must admit that the national criminal courts do possess certain advantages over arbitral tribunals. They will generally be the most proximate forum in relation to the corruption case. More precisely, when the corrupt act is arranged and carried out within a particular jurisdiction, most evidence and most witnesses will likely be within that jurisdiction. When this proximity is coupled with the coercive powers that the courts have, this makes them exceptionally well-positioned to investigate matters of corruption.[132] This was noticeable in the MOL v. Croatia saga as well, with the UNCITRAL tribunal noting that "[a]n unusual feature of this case has been the number of important missing witnesses."[133]

4.5 Cultural Considerations and Lack of Diversity Amongst Arbitrators

Perhaps cultural considerations and diversity in international arbitration would not be the first notions to come the reader's mind in relation to the MOL v. Croatia saga. However, when one

[131] *The Republic of Croatia v. MOL Hungarian Oil and Gas PLC.* (n 96) para 136-138.
[132] Chinmayee Pendse and Prakruti Joshi, 'To Be or Not to Be-The Conundrum of Arbitrability of Corruption and Subsequent Enforcement' (2017) 9 Law Review, Government Law College 41.
[133] *The Republic of Croatia v. MOL Hungarian Oil and Gas PLC.* (n 96) para 140.

scratches the surface of this topic, one will find that the narrative on culture and diversity that has been pervasive in international arbitration in recent years finds its relevance here as well.

Whilst corruption is widespread, not all countries across the world experience it in the same way. First of all, corruption is not of equal intensity everywhere. Transparency International's Corruption Perception Index (CPI) is a good illustration of this.[134] It ranks countries based on the perceived levels of corruption in the public sector. The final ranking is generated based on the score assigned to every state on a scale 0-100, with 0 denoting 'highly corrupt' and 100 'very clean.'[135] Countries that have fared best in the 2022 CPI are Denmark, New Zealand and Finland, with respective scores 90, 87 and 87.[136] The lowest three spots were assigned to Somalia, South Sudan and Syria, with their scores being 12, 13 and 13.[137] As for Croatia and Hungary, the former ranked 57th with a score of 50, and Hungary was placed 77th with a score of 42.[138]

Besides having different levels of corruption, countries differ in terms of where and how corrupt practices occur. For example, not all parts of the public and private sector are affected by corruption in the same way. Corruption, for instance, may be more pronounced in certain parts of the public sector, while other parts may be relatively unaffected. Moreover, how corrupt arrangements are concluded, and who will be privy to them will also differ from country to country, with these variations generally stemming from cultural differences.[139]

As noted earlier in the article, proving corruption will generally entail convincing the arbitral tribunal of the existence of facts which may be difficult to prove. This, of course, must be done against the background of the applicable standard of proof. Because cultural specificities will play a role in terms of how and where corruption takes place within a given society or even region, a concrete understanding of the relevant cultural characteristics becomes a desirable trait of an arbitrator. The way for arbitration community to ensure that the arbitrators will have a genuine understanding of the cultural considerations behind corruption is to work on improving the level of diversity of arbitrators. For example, if the manifestations of corruption are relatively homogenous in one region, then a case that involves a state or a party from that region will benefit from having an arbitrator from that specific region. That arbitrator will bring

[134] 'Corruption Perception Index' (*Transparency International*, 2022) <https://www.transparency.org/en/cpi/2022>.
[135] ibid
[136] ibid
[137] ibid
[138] ibid
[139] On how the cultural context may be relevant for the topic of corruption, see M. V. Achim, 'Cultural Dimension of Corruption: A Cross-Country Survey' (2016) 22 International Advances in Economic Research 333; A. Barr and D. Serra, 'Culture and Corruption' [2006] Centre for the Study of African Economies: University of Oxford.

proper understanding of the context and culture of that region, something that may in the end prove indispensable.

In the arbitral proceedings between MOL and Croatia, the key witness Ježić was discredited based on what the UNCITRAL tribunal saw as implausibilities in his testimony, and what the ICSID tribunal deemed as improbabilities. From a general perspective, implausibility or improbability in the eyes of one person may be something that is nothing out of the ordinary in the eyes of the other. By the same token, the alleged fact that Sanader had entrusted the whole bribery arrangement to a person with whom he had prior dealings, but who was neither a confidant nor a close friend, may for some be improbability, but for some may be a kind of conduct that would not even raise an eyebrow. After all, the Croatian courts, even after the retrial, have come to the conclusion that the bribery arrangement had taken place. The arbitral tribunals, however, found that Croatia did not manage to prove its allegations. Would there be any room to argue that lack of diversity amongst arbitrators played a role in this outcome?

The likely answer is in the negative. If one examines the composition of both the UNCITRAL and ICSID arbitral tribunals, one will find the vast majority of arbitrators did in fact come from the highly developed Western countries.[140] It is also notable that these arbitrators are some of the best known and renowned names in international arbitration. The ICSID tribunal comprised Sir Franklin Berman as the presiding arbitrator, and Professor William W. Park and Professor Brigitte Stern as arbitrators. As for the UNCITRAL tribunal, the presiding arbitrator was Neil Kaplan, while the remaining two members of the panel were Professor Jan Paulsson and Professor Jakša Barbić. Given that Professor Barbić is Croatian, has an impressive biography and that he is held in very high esteem in his home country,[141] it would be safe to conclude that, if the cultural context held any relevance during the UNCITRAL proceedings, there was someone on the panel who could appropriately shed light on it. While the same observation cannot be made in relation to the ICSID proceedings, the ICSID tribunal did pay close attention to the findings of the UNCITRAL tribunal where it found appropriate. And of course, the two tribunals did reach the same conclusion as regards the corruption allegation.

[140] International arbitration in general has been criticised for the fact that the majority of appointed arbitrators come from the highly developed Western countries, with this topic forming the part of the broader diversity debate. See A. Braghetta, 'Diversity and Regionalism in International Commercial Arbitration' (2015) 46 Victoria University of Wellington Law Review 1256.

[141] 'Barbić Jakša, Akademik' (*Hrvatska akademija znanosti i umjetnosti*, 2014-2021) <https://www.info.hazu.hr/clanovi/barbic-jaksa/>.

5. Conclusion

Corruption remains one of the most talked about topics in the realm of international arbitration. There is still no consensus as to how the issue ought to be approached by arbitral tribunals. This is particularly evident in terms of the burden and standard of proof. This article has argued that international arbitration ought to pursue a general approach of fine-tuning its procedure, to the extent possible, so as to minimise the possibility of corruption going unrecognised. To support this stance, the article focussed on the adverse impact of corruption on societies at large, the potential to achieve the deterrence effect as well as the need to protect the image and credibility of international arbitration.

The focus of the article then shifted to the MOL v. Croatia saga. After providing a historical overview of the different proceedings, the article highlighted some of the major challenges faced by Croatia in proving the allegation of corruption. When assessed against the proposition that arbitral tribunals ought to fine-tune the procedure to correspond to the seriousness and intrinsic characteristic of corruption, the arbitral tribunals in both the UNCITRAL and ICSID proceedings still had plenty of room for improvement towards satisfying this broad standard, particularly in relation to the applicable standard of proof.