

**PCA CASE No. 2014-15  
IN THE MATTER OF AN ARBITRATION  
UNDER THE UNCITRAL ARBITRATION RULES 1976  
("UNCITRAL RULES")  
AND  
SHAREHOLDERS AGREEMENT RELATING TO INA-INDUSTRIJA NAFTE  
D.D DATED 17 JULY 2003 AS AMENDED ON 30 JANUARY 2009  
("SHAREHOLDERS AGREEMENT" OR "SHA")**

**-between-**

**THE REPUBLIC OF CROATIA**

**(the "Claimant" or "Croatia" or "GOC")**

**-and-**

**MOL HUNGARIAN OIL AND GAS PLC.**

**(the "Respondent", "MOL", and together with the Claimant, the  
"Parties")**

---

**FINAL AWARD**

---

*Tribunal*

Neil Kaplan CBE QC SBS (Presiding Arbitrator)  
Professor Jakša Barbić  
Professor Jan Paulsson

*Administrative Secretary to the Tribunal*  
Dr Lucille Kanté

*Registry*  
Permanent Court of Arbitration  
**23 December 2016**

**TABLE OF CONTENTS**

I. THE PARTIES ..... 5

    A. Claimant ..... 5

    B. Respondent ..... 5

II. THE TRIBUNAL ..... 5

III. ADMINISTRATIVE SECRETARY ..... 6

IV. THE ARBITRATION AGREEMENT AND APPLICABLE LAW ..... 7

V. OBLIGATIONS UNDER THE FASHA ..... 9

VI. PROCEDURAL HISTORY ..... 9

VII. GENERAL BACKGROUND ..... 10

VIII. REASONING AND DECISION ON MERITS ..... 28

    A. Introduction ..... 28

    B. Corruption – General ..... 32

    C. Standard and Burden of Proof ..... 36

        (a) What Level of Certainty Is Required to Conclude that Corruption is  
Established? ..... 37

        (b) Who Bears the Burden of Proof? ..... 44

        (c) What Evidence is Relevant? ..... 45

            i. The Evidence Related to the Money Trail and the Issue of Adverse  
Inferences ..... 45

            ii. The Sanader Trial ..... 47

            iii. The Missing Witnesses ..... 48

            iv. Mr Hürlimann’s Testimony ..... 49

            v. Are the Austrian Files Admissible? ..... 50

    D. Croatia’s Prima Facie Case on Corruption ..... 61

        (a) Robert Ježić and the Money Trail ..... 61

            i. Mr Ježić’s Background Relationship with INA, MOL and the  
Government ..... 61

            ii. The Two Conversations with Dr Sanader in Late 2008 Early 2009. 63

iii. The Meeting at the Prime Minister’s Office on 26 May 2009.....	64
iv. The 19 October 2009 Marcellino Restaurant Meeting .....	67
v. The Trip to Milan and Zürich in October 2009.....	69
(b) Other Relevant Evidence in Purported Support of Mr Ježić’s Story.	70
i. The Consultancy Agreements Between [1Co] , [3Co] and [2Co] and the Premium Payments .....	70
ii. The Negotiations of the FASHA, the GMA and the Share Swap ....	80
a. Events Prior to the Start of the Negotiations .....	81
b. Dr Sanader’s Role in the Negotiations .....	82
c. The Decision of the Competition Agency (the “Agency”) Regarding INA’s Change of Control .....	89
E. MOL’s Response to Croatia’s Case on Bribery .....	92
(a) Mr Ježić’s Lack of Credibility .....	92
i. Mr Ježić’s Personal Interest in Blaming Dr Sanader.....	92
ii. Mr Ježić’s Inconsistencies .....	94
(b) The D-A Project.....	99
F. Absence of Crucial Croatia’s Witnesses .....	102
G. Conclusions on the Allegations of Bribery .....	105
H. Is the FASHA Null and Void Under Croatian Corporate Law?.....	109
(a) Applicable Provisions and Jurisdiction of the Tribunal .....	113
(b) MOL’s Alleged Right to Veto the Management Board’s Decisions	115
(c) The Limitation of the Management Board’s Members’ Prerogatives .....	118
(d) Management Board’s Members’ Right to Information and Attendance at the Executive Board’s Meetings .....	128
(e) The Role of the President of the Management Board.....	132
(f) Conclusions.....	135
I. Croatia’s Claim Based on Breaches of the SHA .....	136

J. Conclusions on Claims .....	153
IX. Costs .....	153
X. Dispositive .....	162



## I. THE PARTIES

### A. Claimant

1. The Claimant in this arbitration is the Republic of Croatia (the “**Claimant**” or “**Croatia**” or “**GoC**”), acting for present purposes through the Ministry of Economy, Ulica grada Vukovara 78, 10000 Zagreb, Croatia.
2. The Claimant is represented by Luka S. Misić, Stephan Anway, David Alexander, Rostislav Pekař, David Alexander, Stephan Adell, Lenka Abelovská and Eva Cibulková of Squire Patton Boggs LLP, 30 Rockefeller Plaza, New York, NY 10112, USA.

### B. Respondent

3. The Respondent is MOL Hungarian Oil and Gas Company Plc (the “**Respondent**” or “**MOL**”), a company incorporated in Hungary and located at H-1117 Budapest, Oktober huszonharmadika u. 18, Hungary. It is the largest oil and gas company in Hungary.
4. The Respondent is jointly represented by Arif H. Ali, Alexandre de Gramont, David Alexander, Erica Franzetti, Dániel Dózsa, Erin Yates, Michael Losco, Harsh Sancheti and David Attanasio of Dechert LLP, 1900 K Street, NW, Washington, DC 20006-1110, USA; Ted Posner of Weil, Gotshal & Manges LLP 1300 Eye Street, NW, Suite 900, Washington, DC 20005, USA; and Michael O’Kane, Peter FitzGerald, Franziska Christen and Sarah Cotterill of Peters & Peters, 15 Fetter Lane London EC4A 1BW, UK.

## II. THE TRIBUNAL

5. Pursuant to paragraph 15.2 of the Shareholders Agreement (“**SHA**”), the Tribunal consists of a panel of three arbitrators appointed in accordance with the UNCITRAL Rules.

6. Professor Emeritus Jakša Barbić was nominated by the Claimant pursuant to Article 7 of the UNCITRAL Rules on 17 January 2014. Professor Barbić's contact details are as follows:

**Professor Jakša Barbić**

[ ]

7. Professor Jan Paulsson was nominated by the Respondent pursuant to Article 7 of the UNCITRAL Rules on 19 February 2014. Professor Paulsson's contact details are as follows:

**Professor Jan Paulsson**

University of Miami School of Law  
1311 Miller Drive  
Coral Gables, Florida 33146  
USA

8. Mr Neil Kaplan CBE QC SBS was jointly appointed Presiding Arbitrator pursuant to Article 7 of the UNCITRAL Rules on 3 April 2014. Mr Kaplan's contact details are as follows:

**Mr Neil Kaplan QC CBE SBS**

Arbitration Chambers Hong Kong  
Chinachem Hollywood Centre,  
Suite 803, 1 Hollywood Road,  
Central, Hong Kong

**III. ADMINISTRATIVE SECRETARY**

9. On 21 March 2015, the Parties appointed Dr Lucille Kante as Administrative Secretary to the Tribunal. Dr Lucille Kante's address is as follows:

**Dr Lucille Kante**

Arbitration Chambers Hong Kong  
Chinachem Hollywood Centre  
Suite 803, 1 Hollywood Road,  
Central, Hong Kong

#### **IV. THE ARBITRATION AGREEMENT AND APPLICABLE LAW**

10. This arbitration arises out of and in relation to a Shareholders Agreement (“SHA”) dated 17 July 2003.
11. The SHA provides, in relevant parts, as follows:

*“15.2. Dispute Resolution*

*All Disputes which may arise between the Parties out of or in relation to or in connection with this Agreement which are not settled as provided in Clause 15.1 shall be finally settled by arbitration in accordance with UNCITRAL. The number of arbitrators in accordance with the said rules shall be three. One arbitrator shall be appointed by each Party and the two arbitrators so appointed will agree on the third arbitrator, who shall act as the chairman of the arbitral tribunal. The language of the arbitral proceedings shall be English or such alternate language as the Parties may agree. The place of arbitration shall be Geneva, Switzerland. Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into in any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder.*

*(...)*

*29. Governing Law*

*This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of Republic of Croatia”.*

12. On 30 January 2009, the Parties entered into two other agreements. The first was the Gas Master Agreement (“**GMA**”) which provides in relevant parts as follows:

*“4.8.2. Submission to Jurisdiction*

*4.8.2.1. The dispute resolution procedures set forth in this Clause 4.8 shall, as between the Parties, be the binding and exclusive means to resolve all disputes. Either Party may invoke the procedures by providing written notice of any dispute to the other Party. Within 20 Business Days after such notice is given, the Parties shall attempt to resolve the dispute through negotiations at a meeting in Zagreb, which shall be attended by representatives of each Party having decision-making authority as well as by management-level personnel of each of the Parties who have not previously been directly engaged in directing or responding to the dispute.*

*4.8.3.2. All disputes which may arise between the Parties out of or in relation to or in connection with this Agreement which are not settled as provided in Clause 4.8.2.1 shall be finally settled by arbitration in accordance with UNCITRAL. The number of arbitrators appointed in accordance with the said rules shall be three. One arbitrator shall be appointed by each Party and the two arbitrators so appointed will agree on the third arbitrator, who shall act as the chairman of the arbitral tribunal. The language of the arbitral proceedings shall be English or such alternate language as the Parties may agree. The place of arbitration shall be Geneva, Switzerland. Awards rendered in any arbitration hereunder shall be final and conclusive and judgement thereon may be entered into in any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder.”*

## V. OBLIGATIONS UNDER THE FASHA

13. Also on 30 January 2009, the Parties entered into the First Amendment to the Shareholders Agreement (“**FASHA**”). Croatia says that the FASHA was procured by a bribe paid to the then Prime Minister Dr Ivo Sanader, and seeks a declaration that it is therefore null and void. Croatia also contends that the FASHA should also be declared null and void because it contains the following unlawful corporate governance provisions:

*“Executive Directors and Executive Board*

*7.5.1. Executive Directors, including the Chief Executive Officer, will be appointed by the Management Board and shall be responsible for day-to-day operation of each business and function (“Executive Directors”). The Management Board members shall not be Executive Directors at the same time.*

*7.5.2. The key selection criteria for the appointment of the Executive Directors shall be the relevant business expertise and knowledge. Their tasks and responsibilities will be regulated and controlled by the Management Board.*

*7.5.3. Executive Directors shall form an Executive Board. The Executive Board will be headed by the Chief Executive Officer.*

*7.5.4 The Management Board shall issue the Rules of Procedure of the Executive Board, which in any case can not hurt the fulfilment of the Management Board's obligation with respect to the necessary prior approval of the Supervisory Board in case of Reserved Matters.”*

## VI. PROCEDURAL HISTORY

14. The procedural history is a matter of record. A detailed account, including a full list of witness statements, reply witness statements, and expert reports, is contained in Appendix 1 to this Award which should be read with, and forms part of, this Award.

## VII. GENERAL BACKGROUND

15. This case is of grave importance to the Parties. Croatia seeks to set aside as null and void certain agreements entered into with MOL which relate to INA Industrija Nafta d.d. (“**INA**”) the former monopolistic government owned energy supplier in Croatia. Croatia alleges that its own former Prime Minister, Dr Sanader, agreed to accept a bribe of EUR 10 million from MOL’s managing director, Mr Zsolt Hernádi. The bribe, so Croatia asserts, was intended to facilitate the passage of amendments to the SHA that were detrimental to Croatia but beneficial to MOL. Since none of this money was ever received into any account in the name of Dr Sanader, Croatia relies on inferences and on the testimony of a witness whose account is vehemently denied by MOL and by Dr Sanader.
16. Mr Hernádi has been judicially acquitted of bribery in Hungary but has declined to face charges in Croatia. Dr Sanader was originally convicted of bribery but his conviction was set aside by the Constitutional Court on 24 July 2015<sup>1</sup> and he is facing re-trial after having been incarcerated for four years. The putative conduit for the bribe, Mr Robert Ježić, has never been charged in connection with this allegation. He has admitted that an entity owned by him received EUR five million said to have been the first tranche of the alleged bribe<sup>2</sup>, and moreover that, despite having agreed under oath to return the money to Croatia, he has not done so and is apparently not being pursued by Croatia on this account.
17. This Tribunal will have to decide whether, applying Croatian law, it is persuaded that the bribe was offered and accepted as alleged. If it finds the bribe took place, it will have to decide whether the amendment agreements should be set aside and then, if so satisfied, embark on the damages phase of this arbitration to assess Croatia’s true loss. As

---

<sup>1</sup> CLA-0131, 2015-07-24, Croatian Constitutional Court Decision (CR).

<sup>2</sup> Robert Ježić’s WS, attachment A, statement to USKOK, para. 6, p. 4; R-104, Attachment C, trial testimony of Robert Ježić, para. 9, p. 4.

stated above, Croatia relies on alleged breaches of Croatian Corporate Law as an additional ground to set aside the amendment agreements. Croatia also claims damages for MOL's alleged breaches of the SHA and the Cooperation Agreement.

18. The complexity of this dispute is significantly exacerbated not only by the sheer number of protagonists involved, but also by the refusal to appear of several of important witnesses. Pursuant to Procedural Order No 1, the Parties provided an agreed Dramatis Personae to the Tribunal before the main hearing. This joint document is attached as Appendix 2. It should be read with and forms part of this Award. To facilitate the reading of this Award, the names and roles of some of the main characters are recorded as follows, in alphabetical order:

Name	Role
<b>Zoltán Áldott</b>  (Witness)	President of the Management Board of INA (Apr. 2010 – present).  Current member of Executive Board of MOL. Member of the Supervisory Board of INA (Oct. 2003 – Apr. 2010).
<b>Vedran Duvnjak</b>  (Witness)	Member of the Government Commission that negotiated the amendments to the 2003 INA Shareholders Agreement with MOL. Appointed President of the Croatian Privatization Fund (18 Feb. 2008). Former assistant to the Croatian Minister of Finance, in the Financial Systems Department, Insurance Unit. (Nov. 2006 – Feb. 2008).
<b>[X]</b>  (Declined to attend)	<b>[Description of Non-Party Witness]</b>

	[Description of Non-Party Witness]
[Y]  (Declined to attend)	[Description of Non-Party Witness]
<b>Zsolt Hernádi</b>  (Witness)	Chairman of the Board of Directors and Chief Executive Officer of MOL (June 2001 – present). Member of the Board of Directors of OTP Bank Plc. (Apr. 2011 – present).
<b>Ferenc Horváth</b>  (Witness)	Executive Vice President of Downstream of MOL since 2011. Joined MOL in 1998 as Head of Liquefied Petroleum Gas Sales. Commercial Director of MOL from 2001. Vice President of Refining and Marketing of MOL from 2003.
<b>Stephan Edgar Hürlimann</b>  (Reluctant Witness)	Robert Ježić's long-term tax advisor. Partner in Wenger & Vieli AG. Director of [1Co] Shipping AG and representative of the beneficial owners of [1Co] Shipping AG.
<b>Robert Ježić</b>  (Witness)	Croatian businessman currently residing in Switzerland. Beneficial owner of 10% of [1Co] & Shipping AG and 100% of [4Co] Holding AG.



[B]  (Not called)	[Description of Non-Party Witness]
<b>Josip Petrović</b>  (Witness)	Consultant to MOL (14 Feb. 2011 – present). Former senior member of the HDZ Party. Former INA Board Member nominated by Croatia (Jun. 2008 – 10 Feb. 2011).
[A]  (Not called)	[Description of Non-Party Witness]
<b>Dr Ivo Sanader</b>  (Witness)	Prime Minister of Croatia (23 Dec. 2003 – 1 Jul. 2009).
[Z]  (Declined to attend)	[Description of Non-Party Witness]

19. The genesis of this dispute was the privatisation of INA, a state-owned energy company incorporated in Croatia and founded in 1964. The government of Croatia became the main shareholder of INA in 1990. Thirteen years later, and upon Croatia's initiative, MOL – the most significant oil and gas company in Hungary – entered into INA's capital

and bought 25% plus one share in INA for USD 505 million. By doing so, MOL became INA's 'strategic investor'.

20. This operation was enabled by the INA Privatization Act passed in 2002.<sup>3</sup> Croatia was required to privatize INA in order to apply for EU membership, which it did on 21 February 2003. The accession process properly speaking lasted no less than 10 years, although the prospect of membership had previously been under discussion for a decade and a half.<sup>4</sup>
21. On 17 July 2003, MOL and Croatia entered into the SHA,<sup>5</sup> which provided a legal framework to the Parties' long-term relationship. The Parties also signed a Share Sale and Purchase Agreement<sup>6</sup> and MOL entered into a Co-Operation Agreement with INA.<sup>7</sup>
22. Pursuant to the SHA, INA's corporate governance was composed of a Supervisory Board, a Management Board, and a General Assembly. This "two-tier management system"<sup>8</sup> allowed the majority shareholder, Croatia at that time, to maintain management control over INA. The Claimant now insists that this provision was essential to Croatia.
23. It is impossible to sketch an accurate picture of this case without mentioning broad features of the political context in Croatia at the relevant time. Dr Sanader, a member of the Croatian Democratic Union ("**HDZ**"), became Prime Minister on 23 December 2003. He supported the privatization process and made it known in strong public statements.<sup>9</sup>

---

<sup>3</sup> R-130.

<sup>4</sup> Dr Sanader confirmed that this issue was mentioned in the HDZ's first programme: Hearing transcript, 15 April 2016, p. 8, lines 18-19.

<sup>5</sup> C-0001, 2003-07-17 INA MOL Shareholders Agreement.

<sup>6</sup> Exh. C-0005, 2003-07-17 INA MOL Share Sale and Purchase Agreement.

<sup>7</sup> C-0006, 2003-07-17 INA MOL Cooperation Agreement Relating to INA.

<sup>8</sup> Notice of Arbitration, p. 6.

<sup>9</sup> R-078.

24. The primary allegation in this case is that Dr Sanader was induced by a EUR 10 million bribe offered by MOL's CEO Mr Hernádi to use his influence to cause Croatia to enter into certain amendment agreements, the effect of which, it is alleged, was to give management control of INA to MOL. The conduit for the alleged bribe was Robert Ježić, a prominent businessman with whom Dr Sanader was well acquainted. The only direct evidence of the alleged bribe are the statements of Mr Ježić. The Tribunal will return at length to the roles of these two key protagonists.
25. In October 2005, when Croatia had already commenced negotiations with the European Union ("EU") regarding its accession, the Government decided to sell 7% of INA shares to the War Veterans Fund.<sup>10</sup> The process of the privatization of INA continued for a few years<sup>11</sup> and Croatia progressively gave up its majority shareholding in INA. Moreover, in March 2007, Croatia passed the Gas Market Act, which aimed to effect the liberalisation of the domestic gas market.
26. In early 2008, when Croatia decided to constitute a commission to discuss the amendment of the SHA with MOL, Croatia's stake in INA had been reduced to 44%.<sup>12</sup>
27. [A], the then-Minister of Economy, represented the government in a proposed share-swap with MOL. The purpose of these discussions was for MOL to obtain a majority of INA shares and for Croatia to become the "*third largest shareholder of MOL with 6.5% and the right to nominate one member of MOL's board.*"<sup>13</sup> This point was essential for both sides. Mr Hernádi and [A] started the

---

<sup>10</sup> Spiller – 019, PTS - 019 INA 2008 Annual Report, p. 84.

<sup>11</sup> For instance, Croatia made available 17% of INA shares in a public offering on 1 Dec. 2006 (Spiller – 019, p. 84-85), then it sold 7% to INA's employees in fall 2007 (Spiller – 019, p. 85).

<sup>12</sup> Spiller – 019, PTS - 019 INA 2008 Annual Report, p. 84.

<sup>13</sup> Corrected Reply, para 106, p. 37; Fodor-005, Project Bluebird Draft Term Sheet.

negotiations on this issue in early 2008, in parallel with the Croatian Commission's work on the amendment of the SHA.

28. The discussion concerning the amendment of the SHA was mainly focused on the new internal organisation of the company resulting from the change of control. The Parties quickly came to an agreement regarding the composition of INA's Supervisory and Management Boards, and the creation of an Executive Board. [A] also proposed that Croatia should purchase INA's gas storage and trading business from MOL.<sup>14</sup> Three days later, on 10 July 2008, MOL sent a draft term sheet to Croatia.<sup>15</sup>
29. On 14 July 2008, MOL made a voluntary public bid for INA shares<sup>16</sup> which had the automatic effect, in accordance with Croatian securities regulations, of suspending the negotiations between the Government and MOL in relation to the FASHA. Two months later, on 5 September 2008, MOL issued a public offer to the remaining shareholders of INA.
30. By 10 October 2008, after a long negotiation process with [B], the Head of the Veterans' Fund, MOL acquired the shares of the Veteran Fund and obtained 47.15% of INA shares. MOL thus became INA's largest shareholder. It has been alleged that Dr Sanader forced [B] to sell the shares. According to contemporaneous reports, however, when asked by the press she stated that the board's decision was unanimous and that it was "*the best decision*" considering the context.<sup>17</sup> The same month, the negotiations regarding the FASHA resumed and, on 31 October 2008, Dr Sanader and Mr[A] presented the terms of the FASHA and the GMA to the Government. Despite some initial hesitations, the Croatian Government unanimously

---

<sup>14</sup> R-158.

<sup>15</sup> Spiller-014, PTS – 014, Email re. FASHA Terms (10 07 2008).

<sup>16</sup> C-0053, 2008-07-14 MOL Press Release, MOL Intends to Launch a Public Offer for INA Shares.

<sup>17</sup> R-350, Croatian War Veterans' Fund To Sell 7.0% Stake in INA to Hungary's MOL.

approved the FASHA and GMA, and both were executed on 30 January 2009.<sup>18</sup>

31. At this point the narrative mutates from a typical privatisation process with contractual issues into an alleged political scandal. According to Mr Ježić, a prominent Croatian business man specialising in the energy sector, sometime at the end of 2008, Dr Sanader asked him whether he “*could arrange receipt of a larger amount of money which was supposed to be paid to him*”.<sup>19</sup> Croatia claims that this money was to come from Mr Hernádi, who was desperate to find a way to ensure that Dr Sanader would support MOL’s acquisition of INA.
32. Mr Ježić testified that he told Dr Sanader that he would see “*what can be done*”. Dr Sanader allegedly elaborated on his request a few months later, asked Mr Ježić to meet him at his office, and then explained that Mr Ježić “*should organize a receipt of the amount of EUR 10 million which was supposed to be paid to him for certain consultancy services and (...) that the payment was going to be made by MOL*”.<sup>20</sup> Mr Ježić further stated that he promised the former Prime Minister that he would speak “*with a person from Switzerland who could organize the same and who has my confidence*”.<sup>21</sup> Mr Ježić’s alleged plan was to ask his tax advisor Mr Hürlimann to help him transfer the money. Mr Hürlimann, a Swiss accountant, served as the director of [1Co], an entity belonging to Mr Ježić. According to Mr Ježić, Mr Hürlimann estimated that the operation (tax and handling fee) would cost approximately 20% of the total amount, but undertook in some unspecified way and magnitude to mitigate the costs of the transfer.
33. Mr Ježić averred that he was anxious that [1Co] should not carry the financial burden of these fees, and that he raised this issue with Mr

---

<sup>18</sup> C-002, 2009-01-30 INA MOL First Amendment to Shareholders Agreement, and C-004, *op. cit.*

<sup>19</sup> Robert Ježić’s WS, attachment A, *op.cit.*, p. 2.

<sup>20</sup> *Idem*, p. 2.

<sup>21</sup> *Idem*, p. 2.

Hürlimann. He then stated that he gave Dr Sanader the contact details of Mr Hürlimann so that the latter could first arrange for the payment of the fees before going forward with the transfer of EUR 10 million.<sup>22</sup> Dr Sanader allegedly passed the information on to Mr Hernádi. Mr Ježić reported that, at a later time, Mr Hürlimann informed him that he had been in touch with Mr [X], MOL's consultant, regarding the payment of the alleged bribe.

34. At the same time, the take-over process was continuing. MOL had to comply with the requirements set out by the Croatian Competition Authority ("AZTN"). Indeed, pursuant to Croatian law, INA's change of control effected a concentration, and therefore had to be notified to and approved by AZTN.
35. On 9 April 2009, AZTN issued a certificate confirming that the notification of the concentration was complete. AZTN also invited "*competitors and all other interested natural persons and legal entities to deliver to the Agency their opinion on the concentration (...) or rather its effect on market competition*".<sup>23</sup> A few days later, on 16 April 2009, the European Commission initiated the process of European law compliance in relation to INA's change of control. On 20 April, AZTN felt the need to issue a report analysing the INA-MOL concentration from a legal and economic perspective. On 23 April 2009, AZTN announced that it would carry out an assessment of the compliance of the INA-MOL concentration with Croatian law. This raised concerns with the Government and MOL's management. They were of sufficient importance that Mr Hernádi requested a meeting with Dr Sanader to discuss this issue.

---

<sup>22</sup> *Idem*, p. 3.

<sup>23</sup> Olgica Spevec's WS, attachement A, p. 3.

36. Notwithstanding these on-going compliance proceedings, the Government started implementing the GMA and took over INA's gas storage business on 30 April 2009.
37. The following month, the European Commission authorised MOL's takeover of INA.<sup>24</sup>
38. In the morning of 26 May 2009, Dr Sanader had two meetings back to back at his office in Zagreb. They have been the focus of extraordinary attention in this case, because the Tribunal is urged by the Claimant to conclude that taken together they provide crucial evidence of the alleged bribery. The first one was with Messrs Hernádi and Josip Petrović (a INA Board member at that time). Mr Hernádi wanted to warn Dr Sanader about the consequences of a potential refusal by AZTN to approve MOL's acquisition of INA's management control. The second meeting was with Mr Ježić. Mr Ježić reported that during that meeting he informed Dr Sanader that the alleged bribe payment had not arrived. According to Mr Ježić, Dr Sanader then immediately called Mr Petrović on his mobile phone and asked them both to return to his office. A brief discussion ensued while Mr Ježić was waiting in another room.
39. Whereas he did not witness their conversation, Mr Ježić testified that Dr Sanader immediately thereafter informed him that the transfer would *"be made in several instalments given the large amount of money. (...) The amount of 5 million euros was going to be paid very soon whereas the rest, the other 5 million, was going to be paid by the end of 2009"*. The Tribunal will come back to this account of this meeting when assessing the credibility of Mr Ježić's testimony.
40. Mr Ježić alleged that although he was only a minority shareholder of [1Co] at that time, he could secure the transfer of the money with the help of Mr Hürlimann. Indeed, a few days after this allegedly key meeting, two companies allegedly indirectly connected to MOL,

---

<sup>24</sup> R-023, 20134-11-00 Bluelight Report, para, 43.

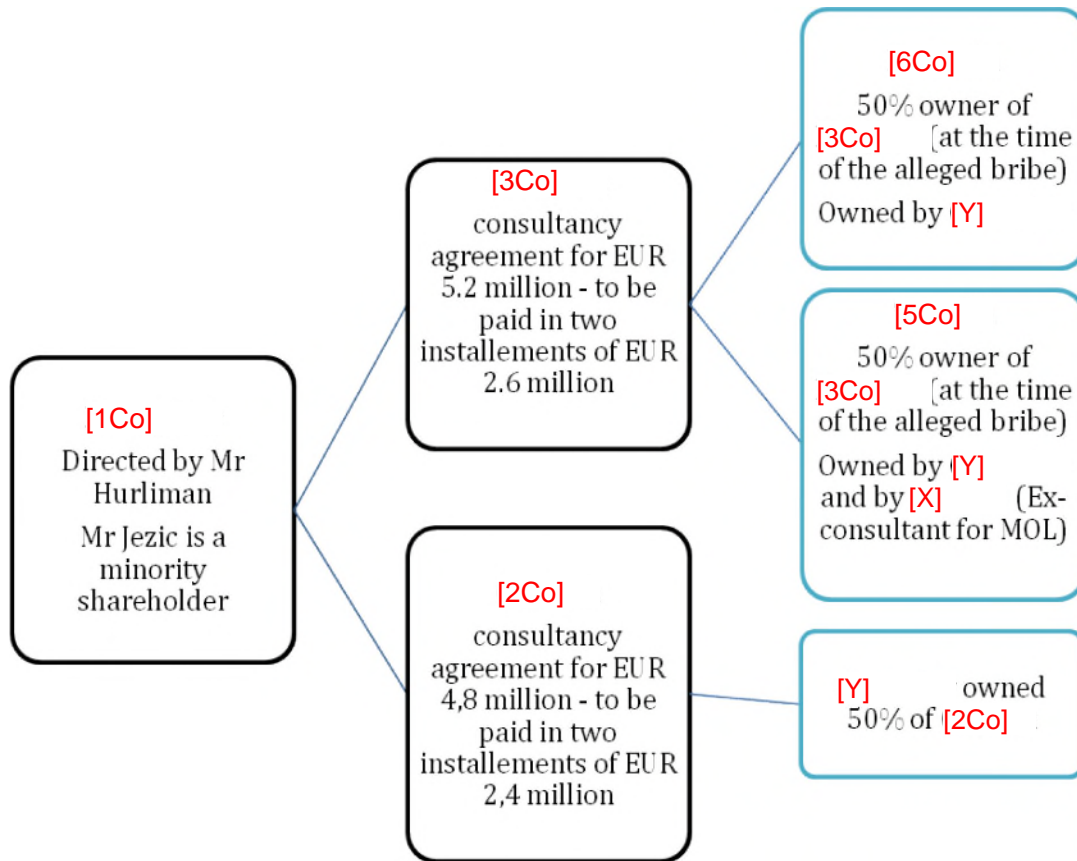
[2Co] and [3Co] entered into two consultancy agreements<sup>25</sup> with [1Co] [2Co] s contract with [1Co] amounted to EUR 4.8 million while [3Co] contract amounted to EUR 5.2 million. The purpose of these contracts was allegedly to cover up the bribe. For its part, MOL counters that whatever these transactions amounted to, they had nothing to do with Dr Sanader. MOL submits that they were selected post factum by Mr Ježić to construct a narrative of corruption which he offered to the Croatian prosecutors, who were avidly pursuing the even bigger fish of the former Prime Minister, in return for being released from detention and to escape his ultimate inculpation for unrelated business crimes.

41. For the sake of clarity, the Tribunal sets out the basic structure of the alleged cover-up as it was originally presented to the Tribunal at the beginning of this arbitration:

---

<sup>25</sup> Exh. C-0012, ([2Co] [1Co] Consultancy Agreement and Exh. C-0013, [3Co] [1Co] Consultancy Agreement.





42. In order to understand the diagram set out above, it is necessary to explain some background. Yukos has been selling oil to MOL for many years but in 2001 decided to use [3Co] (Yukos' subsidiary) as its intermediary. The Tribunal was informed that this arrangement was a common procedure of Russian oil companies. MOL entered into different agreements with [3Co] regarding the supply of gasoil ultimately provided by Yukos. Slightly before the commencement in 2004 of Yukos' spectacular collapse, Mr [Y] a Russian billionaire, took over control of [3Co] with the help of Mr [X]. Then, in 2006 as Yukos gradually ceased its supply of gasoil to [3Co] Lukoil took over and became [3Co] supplier. Lukoil was

also represented by Mr [X] .<sup>26</sup> Despite these structural changes, MOL always maintained its contractual relationship with [3Co] . It is alleged by Croatia that this business structure facilitated the cover-up of the bribe by MOL; it is Croatia's case that [3Co] was actually a slush fund that MOL fed with payments in Euros – the so-called premium payments – and that MOL used these monies to bribe Dr Sanader.

43. On 9 June 2009, AZTN approved the transfer of INA's management control to MOL subject to the condition that, *inter alia*, INA sell Crobenz d.d. – one of INA's retail and wholesale businesses – to a non-INA and non-MOL related entity. Pursuant to European law, AZTN was required to select the condition(s) it deemed appropriate among the list of measures suggested by the acquirer, i.e. MOL.
44. Shortly after the release of AZTN's decision, Dr Sanader contacted Olgica Spevec, who was the Chair of AZTN. He was allegedly upset and asked for an explanation of the conditional approval issued by the AZTN. He asked Ms Spevec to come to his office, which she did. She was accompanied by a member of the Council. The Deputy Prime Minister [A] as well as members of his team attended the meeting. They discussed the content of the decision at length, but AZTN maintained its decision despite the Government's complaints. The Tribunal will return to the details of this meeting below.
45. On 10 June 2009, MOL took over management control of INA. The following week, [1Co] received EUR 2.6 million and EUR 2.4 million, respectively from [3Co] and [2Co] .<sup>27</sup>

---

<sup>26</sup> Zsolt Hernádi's first WS, para. 75-76.

<sup>27</sup> The money was received by [1Co] on 17 and 18 June 2009; Exh. C-0014, [3Co] Deposit Confirmation, and C-0015, [2Co] Deposit Confirmation. Evidence in the record shows that Mr Ježić recapitalised [1Co] and [4Co] a few days after the transfer. MOL claims that he has probably used the alleged bribe money to do so, Robert Quick's expert report, p. 70, para. 214; Quick exhibit 37 ([4Co] capital increase documents 24.06.2009), appendix D, document 39; Quick exhibit 38 ([1Co] capital increase), appendix D, document 40.

46. On 1 July 2009, Dr Sanader announced his resignation as Prime Minister. On the same day, the deadline for the Government to purchase INA's trading and gas company lapsed. MOL sent a first notice of breach two days later.
47. On 27 September 2009, [1Co] issued a loan to [4Co] for EUR 4,567,608.
48. In the following weeks, Mr Hernádi and Dr Sanader met twice at the Marcellino Restaurant. The first time was on 5 October, and the second time on 19 October. At the second meeting, Mr Ježić joined them in order to discuss INA's ethane recovery plant at Ivanićgrad. A third meeting occurred between Mr Hernádi and Dr Sanader in Budapest but without the attendance of Mr Ježić.
49. On 20 October 2009, Dr Sanader and Mr Ježić used a jet aircraft provided by [4Co] to go to Milan and attend a soccer match.<sup>28</sup> The following day they went to Zürich. Although the dates of these two trips are agreed between the Parties,<sup>29</sup> the content of Dr Sanader's and Mr Ježić's interactions is in sharp dispute. For his part, Mr Ježić testified that during this trip to Milan, he informed Dr Sanader that he would no longer be involved in the transfer of the second instalment. Mr Ježić explained that this decision was prompted by the fact that Dr Sanader had resigned from office and, as a result, Mr Ježić was no longer concerned about any kind of retaliation from him.<sup>30</sup> According to Mr Ježić, Dr Sanader "*reacted quite calmly*" and asked him to go to Zürich to see Dr Sanader's brother [N]. They did so the next day. Mr Ježić further reported that the three of them met at the Baur au Lac Hotel in Zürich. At this meeting, the two Sanader brothers discussed the transfer of the second instalment. Mr Ježić's involvement in the alleged bribe allegedly ended after this trip.

---

<sup>28</sup> CLA-0002, Sanader Judgement Translation, at 185.

<sup>29</sup> Joint Statement of Non-Contentious Facts, p. 8.

<sup>30</sup> Robert Ježić's WS, attachment A, p. 4.

50. Meanwhile, Croatian authorities began to investigate various matters involving former Prime Minister Sanader and some of his closest associates and friends.
51. On 30 October 2009, Mr [A] resigned as Deputy Prime Minister. At the same time, the rumour of a possible political comeback by Dr Sanader spread in Croatia.
52. On 20 November 2009, USKOK<sup>31</sup> started to investigate whether the FASHA and GMA “*were detrimental to Croatia*”. However, on 21 November, [B] informed MOL that the draft FAGMA was accepted.
53. On 16 December 2009, despite the fact that [3Co] and [2Co] terminated their contracts with [1Co], the Government approved the FAGMA and the amendment was ratified.
54. In 2010, Dr Sanader’s political destiny took a decisive turn. After announcing his return to politics on 3 January 2010, the HDZ expelled him at the end of a nine-hour meeting organised by [B] with the party leadership.
55. On 18 March 2010, the Croatian Parliament formed an Investigative Committee for establishing the facts in relation to the privatization of INA and all agreements signed by the government and INA. Two weeks later, Mr [A] was arrested in relation to the Podravka matter.<sup>32</sup>
56. In April and June 2010, upon USKOK’s request, Mr Hernádi was interviewed as a witness in Hungary regarding the Podravka

---

<sup>31</sup> Croatian State Prosecutor’s Office for the Suppression of Organized Crime and Corruption.

<sup>32</sup> Dr Sanader and [A] have been indicted in this case, which involves Podravka, a major Croatian food supplier. MOL has also played a role in this case by facilitating a EUR 34 million loan to Podravka from a Hungarian bank, OTP.

investigation. At approximately the same time, INA ceased providing [4Co] with ethane<sup>33</sup>.

57. In July 2010, [Z] ,<sup>34</sup> entered into an agreement with MOL for the provision of consulting services.<sup>35</sup> According to Croatia, [Z] played an active role in the implementation of the alleged bribe and MOL was prepared to pay him to secure his testimony. The Tribunal will accordingly consider the evidence of [Z] 's actions in due course.
58. In September 2010, Mr Ježić met Mr Hernádi in order to solve his issues with INA, namely [4Co] debt towards INA, but they failed to find an agreement.
59. On 9 December 2010, Dr Sanader's steep fall from grace continued with the loss of his immunity, and the consequent pursuit of investigations in multiple corruption cases. On the same day, Croatian authorities arrested Mr Ježić for his alleged role in the HEP-[4Co] case.<sup>36</sup> Dr Sanader was also arrested in Austria in relation to the same case.
60. It is of note that [1Co] issued another loan to [4Co] for EUR 4,431,351.41 while Mr Ježić was in pre-trial detention.
61. On 21 April 2011, Mr Ježić was released from investigative detention but returned to meet the Croatian prosecutors on 25 May to give evidence. Although they did not arrive together at the prosecutors' office, on the same day Mr Hürlimann also testified in support of Mr Ježić's evidence.
62. In June 2011, USKOK applied to the Hungarian authorities for authorisation to interview Mr Hernádi, but were given the answer that

---

<sup>33</sup> Cf. para 64.

<sup>34</sup> Dr Hernádi's [ ] at that time.

<sup>35</sup> C-223 to C-228, Austrian Investigative File.

<sup>36</sup> In this case, Dr Sanader is accused, *inter alia*, of having forced HEP to supply electricity to [4Co] at below-market rates in exchange for a bribe. This case is still pending.

such an interview would be *“injurious to the security of the Republic of Hungary”*, although the Hungarian authorities undertook to perform their own investigation. On 30 January 2012 and after having investigated the matter, they released a press communiqué stating that *“there was no criminal act committed in MOL’s interest és [sic] by its managers, thus the investigation was closed referring to the lack of any criminal act”*.<sup>37</sup>

63. On 27 June 2011, [1Co] and [4Co] merged retroactively to 1 January 2011. Curiously, a few days later both companies agreed to defer the repayment of [4Co] debt of EUR 4,431,351.41.<sup>38</sup>
64. [4Co] was also facing continuing difficulties with INA, which activated debentures against the company and froze its accounts. Later that year, INA stopped delivering ethane to [4Co].<sup>39</sup>
65. In July 2011, Dr Sanader was finally extradited to Croatia and questioned by USKOK. He was later indicted on corruption allegations in the INA-MOL case.
66. In September 2011, Mr Ježić gave his second witness statement to USKOK. Roughly at the same time, Mr [X] asked him to return the money which had been transferred to him in Switzerland.
67. Dr Sanader’s trial commenced on 17 November 2011. Mr Ježić testified twice. During his testimony, Mr Ježić promised under oath to return the money to Croatia within 30 days. However, when Ježić gave evidence before the Arbitral Tribunal some four years later, he confirmed that the money was still in [4Co] account.<sup>40</sup>

---

<sup>37</sup> R-009, p. 2.

<sup>38</sup> C-0029.

<sup>39</sup> Cf. para 56.

<sup>40</sup> Cross-Examination of Robert Ježić, Hearing Transcript, 3 May 2015, p. 26, lines 6-23.

68. As mentioned above, the Hungarian prosecution continued during Dr Sanader's trial.<sup>41</sup> Mr [Y] and Mr [X] were also interviewed, but these proceedings did not lead anywhere as the Hungarian prosecutor decided to close the investigation in January 2012. On 26 May 2014, Mr Hernádi was acquitted in Hungarian private prosecution.<sup>42</sup>
69. On 20 November 2012, Dr Sanader was convicted by the Zagreb County Court of having agreed to receive a bribe in return for ensuring MOL's successful acquisition of control over INA and for his involvement in the Hypo Bank scandal. He was sentenced to (i) 7 and a half years in prison for having accepted a bribe; and (ii) 3 and a half years in prison for crimes related to the Hypo Bank case.
70. On 11 April 2013, MOL sent a notice of "non-compliance"<sup>43</sup> to Croatia concerning the implementation of the SHA, FASHA, GMA and FAGMA. On 24 July 2013, MOL reiterated its correspondence to Croatia and threatened to file a claim before an arbitral tribunal by September 2013 if no settlement was found.
71. On 4 July 2013, Croatia renewed its request for mutual legal assistance to Hungary with respect to its investigation of Mr Hernádi.<sup>44</sup> This second attempt also failed, and Croatia issued a detention order and an Interpol warrant against him on 1 October 2013.<sup>45</sup>
72. On 25 October 2013, MOL initiated ICSID proceedings under the Energy Charter Treaty, followed a few months later by Croatia's request for this UNCITRAL arbitration.
73. Since the commencement of this arbitration, Dr Sanader's fortunes have evolved. First, on 3 April 2014, the Croatian Supreme Court

---

<sup>41</sup> R-009 and C-0094, Resolution of the Hungarian COI Terminating the Investigation.

<sup>42</sup> CLA-0028 ; Hernádi, Merits Hearing Day 3 at 62-63.

<sup>43</sup> C-0205, MOL Letter to Croatia re. Non-Compliance with FASHA and GMA.

<sup>44</sup> R-125.

<sup>45</sup> CLA-0012, Reuters.

upheld Dr Sanader's conviction while Mr Hernádi was acquitted in the Hungarian private prosecution brought by the wife of a close colleague.

74. Second, on 24 July 2015, the Croatian Constitutional Court overturned Dr Sanader's conviction and ordered a retrial. It should be observed that the decision of the Constitutional Court ruled upon certain legal issues in relation to Dr Sanader's human rights as opposed to the consideration of his guilt.
75. Dr Sanader was released from prison on 25 November 2015 during the currency of the substantive hearing of this arbitration in The Hague. His case in Croatia has now been joined to Mr Hernádi's. Dr Sanader is thus awaiting a retrial but prior thereto has spent 4 years in prison in solitary confinement. He was granted bail and was thus able to travel to London and give evidence before this Tribunal in April 2016.

## **VIII. REASONING AND DECISION ON MERITS**

### **A. Introduction**

76. At the outset, the Tribunal observes with satisfaction that this case has been excellently and fully presented by both sides. The Tribunal appreciates the courtesy afforded to the Tribunal by both sides' Counsel and most of the witnesses. The record is substantial. The numerous submissions are extremely detailed. Many points were put and recorded in the 15 days of oral testimony and oral submissions, but even so in many respects they were but the tip of the iceberg of the thorough and clearly organized written record.
77. In these circumstances, it would be impossible for the Tribunal to refer to each submission made without transforming this Award into a document of unmanageable length. The Tribunal has dealt in this Award with all the points it considers necessary for the determination of the issues before it all the while assuring the Parties that all contentions have been considered with care even if not specifically mentioned in this Award.



78. This case is multi-faceted. At one level it concerns issues of management control of INA, the former State-owned monopolistic gas provider in Croatia. It involves issues of Croatian corporate law. At another level it revolves around differences between the two main political parties in Croatia.
79. As said, it also raises an issue of alleged corruption at the highest level of government, having had a direct impact on affairs of State. Woven into all of this are issues of the supply of substantial quantities of Russian gas essential for the Croatian economy, initially involving internationally well known entities such as Yukos, Lukoil, and Russneft.

***Croatia's Case on Bribery***

80. When this case started, Croatia based its allegation of corruption on three principal strands of evidence.
81. Firstly, it relied upon the fact that Dr Sanader had been convicted of bribery by the Zagreb County Court and the conviction had been upheld by the Court of Appeal. Although Croatia did not submit that this Tribunal was bound by that conviction and, indeed, there was no challenge to the expert reports from Judge Schwebel and Professor Reisman to the contrary effect, Croatia submitted that the conviction was nevertheless a factor which this Tribunal should take into account.
82. Secondly, Croatia relied upon the evidence of Mr Ježić, who had given statements to USKOK, had given evidence at the trial of Dr Sanader, and finally gave evidence before this Tribunal in May 2015. His evidence, says Croatia, establishes the bribery without any doubt.
83. The third strand of evidence was from Mr Hürlimann. The Tribunal thought originally that he was a lawyer, as he was a partner in the law firm of Wenger and Vieli, which is based in Zug. Mr Hürlimann, who had been involved in some of the transactions to be considered below and was certainly acting on behalf of Mr Ježić and his companies, gave

a voluntary statement to USKOK, which was placed before the Sanader trial court when Mr Hürlimann declined to attend the Sanader trial.

84. Mr Hürlimann's statement to USKOK was submitted as a witness statement in this arbitration. Mr Hürlimann's evidence was said to be important because he stated that when [X] came to see him to discuss the payment of the alleged bribe, [X] said he was acting on behalf of MOL and allegedly produced a card to that effect.
85. The evidence at the close of the evidential phase of this arbitration is markedly different to what it was when this arbitration commenced. Firstly, the Constitutional Court had set aside Dr Sanader's conviction and he is awaiting retrial. Therefore, Croatia cannot rely upon or otherwise invoke any conviction of Dr Sanader for bribery. Secondly, Mr Ježić has been cross-examined for some ten hours in this arbitration and the Tribunal will have to make up its mind what conclusions it should draw from his evidence. Thirdly, because Mr Hürlimann refused to answer any material questions either from the Tribunal or from Counsel for MOL, MOL submits that Mr Hürlimann's evidence should be excluded entirely from the Tribunal's consideration. If the Tribunal agrees with MOL in this respect, then the Tribunal will have to consider very carefully what evidence remains to implicate MOL.

***Mr Ježić***

86. The Tribunal has come to the view that there are three possible scenarios open to the Tribunal with regard to the evidence of Mr Ježić.
87. Scenario one would be that having heard the cross-examination and considered his evidence, the Tribunal is convinced that he is telling the truth. If that is the conclusion of the Tribunal, then Croatia's case is made out.
88. Scenario two would be the reverse. The Tribunal could conclude that the evidence of Mr Ježić was so contradictory, unlikely, and implausible

that it could give no credence whatsoever to Mr Ježić's evidence and thus the case would have to be dismissed.

89. Counsel for Croatia did attempt to argue that Croatia still had a case, even absent the evidence of Mr Ježić. The Tribunal finds this submission hard to accept and it is quite contrary to the way in which the case was presented. The Tribunal has some difficulty in seeing how Croatia could have pleaded this case absent the evidence of Mr Ježić.
90. Scenario three involves a possible finding by the Tribunal that even though there were inconsistencies in Mr Ježić's version and that part of his evidence is quite unsatisfactory, nevertheless the Tribunal could not confidently dismiss it. It would have in mind, of course, the Consultancy Agreements, the amounts of money and the dates of payments when coming to this conclusion. If this is the conclusion arrived at by the Tribunal, then it is necessary for the Tribunal to look at all the other evidence in the case and see whether Mr Ježić's version of events is corroborated by other evidence or, to put it differently, supported and made more likely by other evidence in the case. This enquiry would involve an examination of various payments – the so-called premium payments – made by MOL to H[3Co] which Croatia said was in effect a slush fund to pay the bribe. Further, if the Tribunal were to admit the so-called 'Austrian files'<sup>46</sup> then it will have to decide whether they corroborated Mr Ježić's version of events.
91. Having given this matter the most careful and anxious consideration, the Tribunal is minded to adopt scenario three. It will later in this award set out the inconsistencies and some of the improbabilities of Mr Ježić's story, but will in any event also look at the other evidence to see whether despite the considerable difficulties with his version, there is evidence that corroborates in a material way the evidence he has given,

---

<sup>46</sup> Documents received by USKOK from the Austrian Authorities under the international legal assistance scheme that were then transmitted to Croatia for use in these proceedings.

such that this Tribunal can rely upon it and find that Croatia's allegations of bribery have been made out.

**B. Corruption – General**

92. This Tribunal takes the allegation of corruption extremely seriously. There can be no doubt as to the gravity of corruption in the modern world. In the foreword to the United Nations Convention Against Corruption ("**UNCAC**"), Kofi Annan, the former Secretary General of the United Nations, stated:

*"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish".<sup>47</sup>*

93. As Vladimir Pavic has put it in '*Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy*':

*"The very notion of "bribery" (and "corruption") in international trade seems to provoke an almost unison condemnation. Legal commentators and judges alike have been resolute in labelling in as a vile, repugnant behaviour that tears the very fabric of society and the cross-border exchange of goods and services".<sup>48</sup>*

94. The Civil Law Convention on Corruption also emphasise the damage caused by corruption:

*"Emphasising that corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies."<sup>49</sup>*

---

<sup>47</sup> United Nations Convention Against Corruption, Foreword, iii.

<sup>48</sup> CLA-0116, Pavic, *Bribery and International Commercial Arbitration*, p. 3.

<sup>49</sup> CLA-0067, *European Civil Law Convention on Corruption*, p. 1.

95. It is thus generally accepted that corruption is a cancer that eats into the body politic. Many governments and international organisations have done much in recent years to attempt to stamp it out. Unfortunately it is endemic in certain parts of the world. Issues of corruption sometimes arise in international arbitration and arbitrators must be on their guard to ensure that they are not used as a mean of disguising this evil. But where in a case such as this the issue is raised fairly and squarely before the Tribunal it must not shirk its responsibilities. If this Tribunal finds corruption proved as alleged it will not hesitate to say so and subject MOL to all the consequences flowing therefrom. But, on the other hand, corruption has to be proved by evidence that convinces the Tribunal that the allegation has been made out. The Tribunal readily appreciates the enormous consequences that MOL and its officers will suffer if the allegation is established. It will not shrink from dismissing the allegation if it is not convinced by the evidence presented to it.
96. Corruption is made unlawful in Croatia by virtue of articles 293 and 294 of the Croatia Criminal Code (“CCC”):

“Article 293 –

*(1) An official person who solicits or accepts a gift or some other gain for himself or for another person, or who accepts a promise to be given a gift or some other gain in order to perform within the scope of his authority an official or other act which he should not perform, or to omit an official or other act which he should perform shall be punished by imprisonment for one to ten years.*

*(2) An official person who solicits or accepts a gift or some gain for himself or for another person or who accepts a promise to be given a gift or some other gain in order to perform within the scope of his authority an official or other act which he should perform, or to omit an official or other act which he should not perform, shall be punished by imprisonment for one to eight years.*

*(3) An official person who after the performance or omission of an official or other act referred to in paragraphs 1 and 2 of this Article solicits or accepts a gift or some other gain for himself or for another natural or legal person as a result of such performance or omission shall be punished by imprisonment up to one year.”<sup>50</sup>*

“ Article 294 –

*(1) Whoever gives or promises to give a gift or some other gain to an official person or another person in order to perform, within the scope of his official authority, an official or other act which he should not perform, or to omit an official or other act which he should otherwise perform, or whoever mediates in bribing an official or responsible person in such a way shall be punished by imprisonment for one to eight years.*

*(2) Whoever gives or promises to give a gift or some other gain to an official person or another person in order to perform, within the scope of his official authority, an official or other act which he should perform, or to omit an official or other act which he should not perform, or whoever mediates in bribing an official or responsible person in such a way, shall be punished by imprisonment for six months to five years.*

*(3) The court shall remit the punishment of the perpetrator of the criminal offense referred to in paragraphs 1 and 2 of this Article, provided that he gives the bribe on the request of an official person or responsible person and reports the offense before it is discovered or before he learns that the offense has been discovered.”<sup>51</sup>*

97. It follows from the above that Croatian law sets out three requirements allowing Croatian judges to identify bribery.

---

<sup>50</sup> C-LEX-024, Criminal Code, p.3.

<sup>51</sup> *Ibid*, p. 4.

98. First, the alleged briber must have promised or given a gift or any other gain. Second, the alleged gift or gain must be intended for an official person. Third, the gift or gain must be given or promised in exchange for the performance of an act within the scope of the person's authority that the person should not perform.

99. In short, Croatia considers that these three requirements are all fulfilled in this case:

*“MOL promised Sanader EUR 10 million and paid him EUR 5 million. (...)*

*Sanader was the Prime Minister of Croatia and thus an official person. (...)*

*Sanader was bribed to influence the Government's decision to enter into the 2009 Agreements”.*

100. It is worth noting that the Constitutional Court quashed the lower court's decision on the basis that the second requirement was not adequately considered. It held that the lower court failed to set out the reasons allowing it to conclude that Prime Minister Sanader was indeed an official person.

101. The Constitutional Court expressly referred to the definition of “public official” contained in the UNCAC which reads as follows:

*“‘Public official’ shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority”.*

102. The Constitutional Court also explained that whereas it is essential to specify why it is considered that the person who allegedly received the bribe is an official person, it is not required to assess whether the official person has indeed exercised any influence in exchange for the money

received or promised. The proof that the official person has accepted the bribe is sufficient under Croatian law.

103. The civil consequence of the bribe is foreseen in two articles of the Croatian Obligation Act (“**COA**”). A contract obtained through bribery is null *“regardless of whether it is favourable, less favourable, unfavourable, extremely unfavourable, detrimental or neutral to the Republic of Croatia (...).”*<sup>52</sup>

104. Article 322 reads as follows:

*“A contract that is contrary to the Constitution of the Republic of Croatia, the mandatory provisions or the morals of the society shall be null unless the objective of the violated rule refers to some other legal effect or the law provides otherwise for such particular case.”*<sup>53</sup>

Article 273 (2) provides:

*“However, if an impermissible motive substantially influenced the decision of a contracting party to enter into the contract and if the other contracting party knew or ought to have known about the existence of such a motive, the contract shall have no effect.”*<sup>54</sup>

105. The Tribunal will apply these provisions to assess whether the SHA and GMA were obtained through bribery.

### C. **Standard and Burden of Proof**

106. Assessing the truth of a bribe allegation is a difficult task and the Tribunal fully appreciates as a matter of realism that transactions of such a nature are unlikely to be well documented. The Tribunal has given consideration to the comments of a number of other international tribunals invoked by the Parties because of their consideration of

---

<sup>52</sup> CLA – 131, Constitutional Court Decision, para. 417.

<sup>53</sup> C-LEX-8, Civil Obligations Act (selected articles), art. 322.

<sup>54</sup> C-LEX-8, Civil Obligations Act (selected articles), art. 273.



similar allegations. The Tribunal therefore turns to the questions relating to the adequacy of evidence required to sustain such allegations.

**(a) What Level of Certainty Is Required to Conclude that Corruption is Established?**

107. As far as Croatian law is concerned, article 221a of the Croatian Civil Procedure Act (“CCPA”) confirms that the Tribunal is required to reach certainty, or at least “*a high degree of probabilities*”, when deciding on allegations of bribery. Croatian law does not provide a precise definition of ‘certainty’. Thus, Professor Baretić and Professor Tepeš (Croatia’s experts on Croatian law) stated 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*”.<sup>55</sup>
108. Croatia further relies on two decisions of the Croatian Supreme Court.<sup>56</sup> Neither of these decisions involves issues of corruption. Indeed, the first decision dated 15 October 2014 deals with the causation of damage resulting from an explosion at the claimant’s house. As for the second decision dated 29 October 2014, it relates to the termination of a fixed-term work contract. However, in both decisions the Supreme Court provided general guidance as to the standard of proof applicable under Croatian law.
109. The Supreme Court emphasised that:

*“Considering the particular disputable moments in the factual complex of this case (...) it is never possible, with respect to establishing the facts, to reach the level of complete certainty but only the level (in the best case) of a high degree of probability.”*<sup>57</sup>

---

<sup>55</sup> Baretić’s and Tepeš’ Reply Witness Statement, para. 172.

<sup>56</sup> CLA-152, Croatia Supreme Court Decision of 15 October 2014 and CLA-153, Croatia Supreme Court Decision of 29 October 2014.

<sup>57</sup>*Ibid*, p. 4 and CLA-153, p. 4.

110. Those two decisions have caused Croatia to submit that the Tribunal is not required to apply a high standard of certainty, especially in a case where the factual matrix is particularly complex.
111. Also relying on the CCPA, MOL requests the Tribunal to reach a particular degree of certainty when ruling on this case. However, MOL's interpretation of Croatian procedural law is different from Croatia's. MOL considers that under Croatian law, the Tribunal is required to apply a high standard of certainty, or rather a high degree of probability, because of the seriousness of the allegations made in this case. MOL invites the Tribunal to adopt its position, as it allegedly is the common practice in international arbitration when it comes to corruption: "*arbitral tribunals uniformly employ a high standard of proof for allegations of corruption.*"<sup>58</sup>
112. As far as international law is concerned, Croatia relies heavily on two well-known cases, namely, *Metal-Tech v. Uzbekistan*<sup>59</sup> and *World Duty Free Company Ltd. V Kenya*.<sup>60</sup> Croatia invites the Tribunal to use the guidance provided in these two cases when approaching the issue of bribery.
113. These two cases further support Croatia's position that the Tribunal should apply a "*reasonable certainty*" standard.
114. In the *Metal-Tech* case, just like in the *World Duty Free* case, the Tribunal considered that it did not need to "*resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments*". Rather, in both cases the tribunals accepted that, considering the difficult task before them, they were only required to reach "*reasonable certainty (...) through*

---

<sup>58</sup> MOL's Post-Hearing Brief Volume I, para. 23, p. 12.

<sup>59</sup> CLA-143, *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 Oct. 2013).

<sup>60</sup> CLA-127, *World Duty Free Company Ltd. v Kenya*, ICSID Case No. ARB/00/7, Award (4 Oct. 2006).

*circumstantial evidence*”<sup>61</sup> as to whether corruption could be established.

115. It is generally accepted that in civil cases the balance of probabilities is an appropriate standard of proof. It is important to consider that although an adverse finding against MOL in relation to the corruption allegation would have severe financial and reputational consequences, it would not lead to the incarceration or fine of any individual.
116. Nevertheless, the fact remains that international tribunals and scholars have made diverging pronouncements with respect to the burden of proof to be applied to allegations of corruption. It may well be that the various approaches and analyses, although diverse in their conceptualization of the problem (and the nomenclature used), would not often – if ever -- lead to different outcomes. Given the centrality of the allegations of corruption in this case, and the exceptional public interest they have generated, the Tribunal feels it appropriate to state its broad understanding of precedents and commentary, and to clarify its own path to the resolution of this case.
117. Some international tribunals have reasoned that the seriousness of allegations of corruption should lead to a heightened standard of proof, often referred to as “clear and convincing”. Others have declined to depart from the ordinary “balance of probabilities” standard. One commentator, while generally accepting the traditional test, suggests that that the “more likely than not” or “balance of probabilities” standard needs to be applied flexibly by arbitral tribunals when dealing with allegations of corruption, and to follow a two-step approach: first, looking at the “balance” of the evidence before them; and second, when appropriate, relying on inference to fill the gap; “where an inference is a reasonable conclusion to draw from the known or assumed facts, Tribunals should be willing to draw the inference to determine allegations of illegality as they would any other allegation—indeed

---

<sup>61</sup> CLA-143, *ibid*, para 243.

more so given the often deliberately concealed nature of an illegality...” and not content themselves with “a mere mechanical comparison of probabilities independently of any belief in its reality”.<sup>62</sup>

118. In sum, no consensus has as yet emerged as to how to reconcile these conceptual approaches in theory. The difficulty of the subject is likely to be related to the general legal presumption of good faith. In civil actions for negligence or breach of contract, there is no presumption that a defendant has complied with an agreement or has conducted himself with due care. True enough, the plaintiff has the burden of proof, but a mere preponderance of the evidence, meaning only "more likely than not", will suffice. But if the particular claim being made involves an accusation of bad faith – such as misrepresentation or wilful endangerment -- the presumption of good faith means that the starting point is, in effect, a presumed preponderance *against* the claim. How could evidence that shows that an allegation is more likely true than false overcome a presumption that the allegation *is not true*, unless one is prepared to take the unacceptable step of disregarding the presumption of good faith? (A defendant does not have to prove the absence of breach or the absence of negligence, so if the presumption of good faith is to mean anything it must surely put the defendant in an *even better* position.)
119. This is, one may plausibly surmise, why it is often said that proof of "serious" allegations require something more than a preponderance of the evidence. The quantification of that "something more", however, is elusive. To say that something more means 67% certainty, or to give any such number, is fatuous. Even the notion of preponderance cannot seriously be thought of as 51%; law cases are not scientific activities where absolute truth is thought of as a litre or a kilo, and the judge or arbitrator records the weight or volume of evidence with the effect that

---

<sup>62</sup> Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25(1) ICSID Rev-FILJ 47 (2010).

a total of 501 centilitres or grammes justifies the conclusion that something is "*true enough*".

120. Although it is difficult to escape subjective appreciation, that does not lead ineluctably to arbitrariness. Searching for something more than preponderance but less than the "*beyond a reasonable doubt*" formulation of criminal law, modern common law courts have referred to the standard of "*comfortable satisfaction*", notably used by the highest court of Australia in 1938 in a case known as *Briginshaw v. Briginshaw*,<sup>63</sup> which involved allegations of adultery. There, Dixon J. stated: "*The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis for inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion.*"

121. Lawyers of the civil law tradition seemingly strive for a very similar degree of certainty when they refer to their "*conviction intime*". As the ICC arbitrators put it in the much-discussed *Westacre* case,<sup>64</sup>

*"[I]f the claimant's claim is based on the contract is to be voided by the defense of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere suspicion by any member of the arbitral tribunal...is entirely insufficient to form such a conviction of the Arbitral Tribunal."*

122. This "inner conviction" standard has been often used in sports arbitration when cheating or corruption is alleged. In many awards, arbitrators of the Court of Arbitration for Sport in Lausanne have invoked the "personal conviction" or "comfortable satisfaction"

---

<sup>63</sup> *Briginshaw v. Briginshaw*, [1938] HCA 34.

<sup>64</sup> *Westacre v. Jugoinport*, ICC Case No. 7147 (1994); Award, 28 February 1994, ASA Bulletin, Vol.13(1995).

standard. Thus, in *FK Pobeda et al. v. UEFA*,<sup>65</sup> the arbitrators held as follows:

*"Taking into account the nature of the conduct in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities, the Panel is of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts 'to the comfortable satisfaction of the court having in mind the seriousness of the allegation which is made'."*

123. It might be said against the notion of a heightened standard, such as requiring "*clear and convincing*" evidence, or a subjective "*comfortable satisfaction*", that it leads to unpredictability. Some decision-makers may consider that they are not "*convinced*" or "*satisfied*" with respect to a particularly grave accusation unless it is proved beyond reasonable doubt. If they apply that standard, it would be false to insist – as is generally thought – that the standard, while "*heightened*", nevertheless is less exacting than that of criminal law. One might therefore retain the "*preponderance*" approach, while bearing in mind the proposition, as one ICSID Tribunal put it, that "the graver the charge, the more confidence there must be in the evidence relied on", although this does not "*necessarily entail a higher standard of proof*".<sup>66</sup> Some may nevertheless object that whatever the words used, this must still amount to an elusively stricter standard.
124. From the expressions used in the Croatian court decisions put before this Tribunal, which in translation are rendered in paragraphs 212 and 213 of Croatia's Post-Hearing brief as "*a high degree of probability*", it

---

<sup>65</sup> CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanec Zdraveski v. UEFA* (15 April 2010) para 85.

<sup>66</sup> *Libananco Holdings v. Republic of Turkey*, ICSID Case No. ARB/06/8 (2 September 2011), para 125.

seems clear that there is judicial acceptance of the proposition that the test in matters of corruption should be somewhere between the simple balance of probabilities and absolute certainty – while recognising that the latter is unobtainable in human affairs. At the same time, there seems to be an undeniable consensus of judges and arbitrators that mere suspicion is never enough.

125. None of the ultimately residual conceptual difficulties, however, needs to be resolved in this case if the Tribunal finds that the allegations of corruption fail even under a traditional balance-of-probabilities approach. In any event, it seems from the decisions referred to above that Croatian courts also apply a test which is more onerous than the balance of probabilities but not as onerous as beyond reasonable doubt; this seems inherent in the expression they have used: “*a high degree of probability*”. It clearly focuses on something between the balance of probabilities and absolute certainty whilst at the same time recognizing that the latter is unobtainable. Of course one must be conscious of semantics when dealing with this important issue but another way of looking at the matter is for the Tribunal to ask itself whether on the evidence it has heard, read, and seen it is convinced that the bribe took place as alleged by Croatia, which can hardly complain if the Tribunal adopts the standard which Croatia itself puts forward, in the first paragraph (203) of Volume II of its Post-Hearing Brief, entirely devoted to the burden of proof, as follows: “the question is whether corruption was established with reasonable certainty”. This is a matter of persuasion, and it may well be that for most minds becoming persuaded of something requires more than accepting that it is more likely than not. In any event, if the test of reasonable certainty is not satisfied, no “*heightened*” standard, however understood, would have been met either. To adapt the common French expression: *qui ne peut pas le moins, ne peut pas le plus* (‘if you can’t do the easier thing, you can’t do the harder’). This is the approach the Tribunal will take: are the allegations of corruption supported by evidence that produce reasonable certainty?

(b) **Who Bears the Burden of Proof?**

126. Croatia asserts that the Tribunal, if it followed the *Metal-Tech* case, would be justified in going so far as to shift the burden of proof to MOL. Yet the circumstances of the *Metal-Tech* case were different and this undoubtedly explains why the tribunal in that case shifted the burden of proof. The briber in that case was actually the claimant, and the tribunal's "*reasonable certainty*" was based on the testimony from the claimant's CEO himself who admitted having paid USD 4 million to consultants at the time of the investment. The tribunal gave the claimant the opportunity to provide evidence of the services supposedly rendered in exchange for these monies, but none was produced. In the absence of an alternative explanation of the claimant's own payment, the tribunal was persuaded of its unlawfulness. In other words, this was very clearly a contextually specific instance of shifting the burden of proof.
127. In this case, by contrast, Croatia's allegations rest upon the testimony of Mr Ježić, who was the alleged intermediary between MOL and Dr Sanader. Furthermore, nothing seems to support Croatia's assertion that, under Croatian law, the Tribunal can shift the burden of proof to MOL.
128. The Tribunal will consider later in this Award whether it could rely solely on the evidence of Mr Ježić to establish the bribe. If not, the Tribunal must examine all the other admissible evidence that Croatia contends supports or corroborates Mr Ježić's testimony. The burden of establishing this at all times remains with Croatia.



(c) **What Evidence is Relevant?**

i. **The Evidence Related to the Money Trail and the Issue of Adverse Inferences**

129. The evidence establishing the money trail is the first thing that the Tribunal needs to analyse. Croatia's case is that there was an actual payment, not just a promise; if it thought a promise could have been proved, it would presumably have sought to do so. The picture drawn by the evidence in the record might not be complete or accurate. However, to be convincing the money trail must lead the Tribunal from the alleged briber, Mr Hernádi, to the alleged recipient of the money, Dr Sanader. Once it is established that a payment passed from the briber to the corrupt official, the Tribunal will consider the services provided in exchange for it.
130. Croatia has attempted to shed light on the financial structure that supported the alleged bribe in order to prove its case. Bearing in mind the difficulty of proving allegations of corruption, Croatia invited the Tribunal to draw adverse inferences "*in two common circumstances: (i) where a party has refused to produce evidence that is reasonably within its possession or control and (ii) where a party has failed to respond to a prima facie case put on by the other party. (...) These adverse inferences may then be used to establish that a party has met its burden of proof*".<sup>67</sup> This approach must then lead the Tribunal to conclude that "*the situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation.*"<sup>68</sup>

---

<sup>67</sup> Croatia's corrected Reply, p. 18, para. 46.

<sup>68</sup> RLA-29, Cheng, General Principles of Law as Applied by Courts and Tribunals, at 325.

131. In international arbitration it is widely accepted that tribunals are required to “*be proactive*” and demand that the Parties provide “*all evidentiary elements in their possession*”.<sup>69</sup> In the *Metal-Tech* case for instance, the claimant failed to provide the evidence required by the tribunal to prove that legitimate services had been performed, and the tribunal drew adverse inferences from this lack of explanation. In the case at hand, the Tribunal agrees that if a party had failed to disclose evidence regarding the money trail, adverse inferences might be drawn.
132. However, the Tribunal has received thousands of pages of exhibits. Some, but far from all of them, were relevant to the issues at stake. The abundance of immaterial evidence can sometimes be as disappointing as the lack of it. Although the Tribunal is satisfied that both Parties made their best efforts to provide as much evidence as they possibly could, a grey area remains.
133. For this reason, the Tribunal has had to look very carefully at the many witness statements provided by both Parties – no less than 15. And yet some of the most important witnesses, i.e. those who were supposedly directly involved in the alleged bribe, either refused to give evidence or were unable to testify when the main hearing took place. The Tribunal made its best efforts to invite these witnesses to testify and both Parties jointly supported these attempts. The Tribunal even requested judicial assistance in Switzerland (from the *Tribunal de première instance* of Geneva) to secure the testimony of Mr Hürlimann. Thanks to these initiatives, Dr Sanader, Mr Petrović, and Mr Hürlimann finally appeared before the Tribunal in special sessions some six months after the substantive hearing.
134. Considering the above, the Tribunal can only conclude that contrary to what happened in the *Metal-Tech* case, neither Croatia nor MOL “*has*

---

<sup>69</sup> CLA-128, Hwang & Lim, *Corruption in Arbitration—Law and Reality* ¶¶ 44-45.

*refused to produce evidence that is reasonably within its possession or control*". No adverse inferences can be drawn on this basis.

135. Thus, the Tribunal's discussion will rather deal with the issues as to whether Croatia has established a plausible *prima facie* case regarding the bribe and whether MOL has failed to respond to it.

ii. **The Sanader Trial**

136. 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 [K] .

137. 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.

138. 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 [K] 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. He certainly indicated that if the Chairman of a Tribunal is the same, namely himself, "*then transcripts on the presentation of evidence may be read out without the consent of parties*". It is regrettable that the Judge decided to discuss these issues in the public domain. It is a fair inference from what the Judge said in his interview that he was minded to make the same decision as before if he presided over the retrial.

139. It results from the above that the Tribunal will consider the testimony and findings collected at the Sanader trial with the utmost caution. When ruling on this case, the Tribunal will favour the evidence directly introduced by the Parties in this arbitration rather than second-hand evidence from the Sanader trial.

**iii. The Missing Witnesses**

140. An unusual feature of this case has been the number of important missing witnesses. As noted and as will become apparent later, the names of Mr [X], Mr [Y], Mr Petrović, Mr [Z], Dr Sanader and Mr Hürlimann feature heavily in the narrative yet none of these individuals attended the substantive hearing in The Hague to give evidence before the Tribunal.

141. The Tribunal took steps to attempt to secure the attendance of all of the above, dispatching several letters to all of them. Ultimately only Dr Sanader and Mr Petrović agreed to attend to give evidence several months after Dr Sanader's release. Mr [Y] simply ignored the Tribunal's correspondence. Mr [ ] through his attorney expressly refused to attend the main hearing held in The Hague in November 2015, and although Mr [X] was apparently willing to assist at first, he ultimately refused to testify. As for Mr Hürlimann, the Tribunal determined that it had no choice but to apply to the Geneva Court to compel his attendance at a special session. The Court granted the Tribunal's request on 24 February 2016 and Mr Hürlimann was examined by the Tribunal and MOL in Zürich on 27 May 2016. The Tribunal will revert to his testimony below.

142. The Tribunal has not had the advantage of hearing from or seeing Messrs [X] and [Y]. They both gave statements to USKOK and they both gave evidence at the Sanader trial. The normal approach with regard to a witness who has given a written statement but declined to attend for cross-examination is to give the statement such weight as the Tribunal thinks appropriate in all the circumstances of the case. The

Tribunal sees no reason to depart from this approach in the case of Messrs [X] and [Y]. However these statements will be considered with great care for all the reasons stated above.

**iv. Mr Hürlimann's Testimony**

143. Originally Mr Hürlimann declined to give evidence before this Tribunal. The Tribunal applied to the Geneva Court of First Instance for an order requiring him to attend. Such an order was granted. Mr Hürlimann wrote to the President of the Tribunal making it clear that he would not answer any questions on the ground that it might incriminate him. Nevertheless, the Tribunal called for his attendance and he did attend the hearing convened in Zürich on 27 May 2016.
144. Mr Hürlimann attempted to make a blanket refusal to answer any questions, but the Tribunal pressed him to answer some questions and he did respond to a few innocuous questions. However, he declined to recognize his signature on certain documents and to give any other evidence pursuant to questions from the Tribunal. He was then asked a long series of questions by Counsel for MOL which he comprehensively declined to answer. In order to save time, the remainder of Counsel's questions were reduced to writing and it was agreed by both sides that these were deemed to have been asked, but not answered on the grounds of alleged self-incrimination.
145. One thing that Mr Hürlimann did make clear was that he was not a qualified lawyer, but a tax consultant. He had been a partner in the Wenger law firm, but was now Of Counsel. He was accompanied to the hearing by Mr [ ], a partner in the Wenger law firm, who purported to act for Mr Hürlimann. However, as the Wenger law firm through Mr Hürlimann were involved in some of the transactions, the subject matter of this arbitration, it seemed unlikely that Mr [ ] was, as a member of the firm, in a position to give independent advice to Mr Hürlimann as to whether he should answer the Tribunal's questions.

146. In the light of the above, the Tribunal has decided that it would not be appropriate to attach any weight or significance to Mr Hürlimann's written statements. When a person qualified to exercise a regulated profession who is ordered by a court to appear before an international arbitral tribunal with respect to his or her professional activities refuses to answer any relevant questions on the ground that the answers might incriminate him, thus preventing the other party from cross-examining him, it would be grossly unfair to give his untested statement any weight or credence whatsoever. Furthermore the Tribunal is satisfied that Croatia's legal team must have known or suspected Mr Hürlimann's reluctance to give evidence before this Tribunal and regrets that this was not shared at the time with MOL's counsel and the Tribunal.

v. **Are the Austrian Files Admissible?**

***Background***

147. Immediately before the opening of the substantive hearing in The Hague in November 2015, MOL applied for an Order from the Tribunal declaring the Austrian files inadmissible. This application came extremely late in the proceedings and there was no way that the Tribunal could rule on the issue before the commencement of the hearing. Furthermore, it would have been most prejudicial to Croatia to consider the detailed application without having reasonable and sufficient time to prepare.
148. Accordingly, the Tribunal ruled that the Austrian files could be referred to *de bene esse* and that the Tribunal would rule on the issue in the final Award.
149. Detailed written submissions followed over the next few months culminating in the hearing in Zürich on 26 and 27 May 2016 at which Ms Lester QC appeared for MOL to make the submission in support of the application. Mr Anway made submissions in response on behalf of Croatia.

150. A chronology of the basic dates relating to the Austrian Files issues is set out in Appendix 3 to this Award.

***The Facts***

151. On 7 May 2014 USKOK asked the Austrian Ministry of Justice for relevant documents that might be used in the criminal trial of Mr Hernádi. The application was made State to State under the terms of the Council of Europe Convention on Mutual Assistance in Criminal Matters 1959 (the “COE Convention”). .
152. It is clear from the request that the documents were sought in relation to the criminal proceedings brought against Mr Hernádi in Croatia. He was charged with offering the bribe to Dr Sanader.
153. The request was granted. It has not been suggested that Croatia ever asked Austria whether these documents could be used for any other purpose save for the criminal proceedings against Mr Hernádi.
154. It appears that in mid-2015 USKOK passed these documents to Croatia’s arbitration team for use in this arbitration. The Tribunal well remembers the statement contained in Croatia’s August 2015 reply:

*“Austrian criminal authorities have delivered to Croatia a treasure-trove of new documents”.*

155. Miss Lester took the Tribunal to the COE Convention, emphasizing specific articles that she submitted made clear that the Convention deals solely with criminal matters.
156. In 1993 Austria and the former Yugoslavia entered into a bilateral Treaty dealing with assistance in criminal matters. Article 11.3, in particular, states:

*“The country receiving the request can retain records, documents or other goods that are necessary for criminal proceedings in that country for the duration of the case”.*

157. The Tribunal was also shown Croatia's response to a Council of Europe website in which Croatia underscored that:

*"The evidence obtained can be used only in the criminal proceedings from which it was requested/obtained and for purposes specified in a request".*

158. However, Croatia made the point that because Austria stated, as under the Convention it was entitled to do, that it did not want the documents returned, this somehow permitted Croatia to use the documents for other purposes.

159. Croatia argues that MOL is being over-technical because the Council of Europe Civil Law Convention on Corruption obliges Austria to allow Croatia to use the documents in proceedings that make corruption allegations. MOL's response is that this is a misreading of the Convention, which does not impose obligations to supply documents, but rather requires Convention States to make appropriate provision in their law for effective remedies for people who have suffered damage as a result of corruption. Thus, it is concerned with the remedy, not the evidence to prove corruption.

160. MOL also submits that the COE Convention and the bilateral Treaty prevent any collateral use of such documents obtained for criminal proceedings.

161. To counter this proposition Croatia relies on the expert testimony of Professor Zlata Đurđević who wrote in her third Expert Report:

*"Once documents are transferred from a requested State to a requesting State, the latter gets the ownership of them and can use them in accordance with its legal order for any purpose".<sup>70</sup>*

---

<sup>70</sup> Đurđević's Third Expert Report, p. 10, para. 28.



162. This argument is clearly based on the absence of any provision explicitly preventing collateral use of requested documents.

163. Mr Anway argued that even if Austria had requested the return of these documents:

*“They could be used for other purposes until that use was complete”.*

164. He relied on Professor Đurđević’s statement in paragraph 28 where she said:

*“When evidence is in the possession of a State, it is governed by that State’s internal legal order. Only if there is an international obligation such as a clause in the applicable MLA Treaty, (we saw there was none) can the requested State limit their use for other purposes”.<sup>71</sup>*

165. Professor Đurđević also helpfully reviewed state practice on this point and found no consistent approach. Therefore, Professor Đurđević concludes that in the absence of a *“consistent state practice and [no] common attitude to the limitation on use of evidence obtained by MLA”*,<sup>72</sup> the Tribunal should conclude that *“there is no doubt that the states may be bound by that principle only if it is provided for by the treaty provisions.”*<sup>73</sup> In other words, the Tribunal should consider that there is a presumption resulting from state practice that allows states to use as they wish evidence obtained through the mutual legal assistance channel.

166. The Tribunal believes that the safest course is to construe the Treaty in question rather than rely exclusively on state practice in this area. This is particularly true when such practice lacks consistency. Indeed, this lack of common attitude from State-parties indicates that there is

---

<sup>71</sup> *Ibid.*

<sup>72</sup> Đurđević’s Second Expert Report, p. 14, para. 29.

<sup>73</sup> *Ibid.*

no agreement between them as to the use of evidence obtained through mutual legal assistance.

167. Croatia, through Professor Đurđević, relies on Article 13.1 of the COE Convention which states:

*“A requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case”.*

168. The point being made here is that “*judicial authorities*” is wide enough to extend beyond criminal courts.

### ***Discussion***

169. It strikes the Tribunal as implausible that a Treaty dealing with mutual assistance in criminal matters can be construed, on the basis of Article 13.1, as being wide enough to permit collateral use when there is no express article to that effect. In the Tribunal’s opinion, this Article does not assist Croatia’s submissions.

170. Nor is the Tribunal persuaded by the argument that because Austria did not require the documents to be returned, it agreed that they could be used for other than the stated purpose. There is all the difference in the world between producing documents for a specific and limited purpose and not being required to return them after use for that very purpose.

171. Neither is the Tribunal impressed with Croatia’s reliance on the Civil Law Convention on Corruption. Croatia misreads the Convention when it argues that the Convention obliges Austria to allow Croatia to use these documents in proceedings that make corruption allegations. The Tribunal agrees with MOL as construing the Convention as imposing an obligation on contracting States to make provision in their law for remedies for those who have suffered damage as a result of corruption.

In any event, the request was not made under this particular Convention.

172. The Tribunal cannot accept Professor Đurđević's opinion that once documents had been transferred to a requesting State, the latter can use them for any purpose. This argument, of course adopted by Mr Anway on behalf of Croatia, cannot be right because it devalues the whole request process. It is contrary to the terms of the Convention itself.
173. The Tribunal is satisfied that the terms upon which Austria made available this file to the Croatia prosecution authorities was for use exclusively in criminal proceedings in Croatia against Mr Hernardi. Nothing in the treaties invoked permit collateral use. If collateral use was to be permitted, then the Tribunal would expect it to be stated in the clearest possible manner. The use of such documents has very wide implications. States must know that when they provide such documents to requesting States, they will be used only for the purpose requested. What would be the purpose of stating a purpose if it could be ignored with impunity? Furthermore, Croatia itself sets out in the public questionnaire its practice in this matter and any reader was entitled to assume that this representation was reliable.
174. MOL also raised issues relating to the law of data protection. The Tribunal need not go into this interesting issue because it is satisfied that MOL succeeds on the basis of the terms of the specific request and those of the relevant treaties on the topic.
175. Unfortunately, MOL's submission goes on to argue that the document could not be considered because they were obtained and used in bad faith. This allegation has engendered a lot of unnecessary heat between the Parties. Ms Lester relied on the *Methanex* case as an example of where a tribunal excluded evidence because it was illegally obtained – found in a dumpster in a parking lot in California and copied from private files. It was submitted to that tribunal:

*“... Documents illegally fished out of another man’s trash have no place in an international arbitration under a Treaty such as NAFTA; and that it would act as a malign incentive if any NAFTA Tribunal were to condone the collection and submission of evidence procured by illegal means”.*

176. This case is nowhere near *Methanex*. It may be that Croatia is not allowed to use the documents because of the terms of the request and the Treaty under which the request was made. But that is a far cry from the situation in *Methanex*; the attempted analogy is hopelessly inapt.
177. The Tribunal is satisfied that under the provisions referred to by MOL and set out above, the Austrian files were only to be used for the purposes for which they were requested, namely the criminal proceedings in Croatia against Mr Hernádi.

### ***Waiver***

178. That is not the end of the matter. Croatia argues that MOL, by using these documents themselves, waived any right to complain about their legal admissibility. In the opinion of the Tribunal this is the real battleground between the Parties in relation to the Austrian files issue. If MOL knew that the documents in the record had been obtained contrary to the terms of a request from Croatia to Austria and proceeded without objection thereto, the Tribunal would prevent MOL from objecting to the use of these documents.
179. The argument that only Austria could waive its rights in relation to this issue is invalid; if the Tribunal were to prevent MOL from objecting to these documents, it would rather do so by virtue of a rule of evidence that prevents a party from taking a stance that is inconsistent with its prior behaviour. Accordingly, if MOL knew that Austria’s consent had not been obtained but had nevertheless made use of these documents

themselves, this rule of evidence would prevent such inconsistent position.

180. It must be remembered that Croatia is alleging waiver and that, consistent with legal principle, a party making an allegation has the burden of proving it on the balance of probability. MOL bears no evidential burden on this issue.
181. MOL submits that after these documents were tendered in the arbitration in August 2015, it objected to them in its responsive submission in October 2015. MOL submits that they could not possibly have objected earlier. MOL's formal application to strike the Austrian documents was made on the eve of the November 2015 main hearing.
182. Croatia relies heavily on the fact that these documents were produced in the criminal proceedings in Croatia against Mr Hernádi. These proceedings were in absentia. It seems clear that these documents, in German, were available to Mr Hernádi and Mr Karrá, MOL's General Counsel, who was co-ordinating all of MOL's and Mr Hernádi's proceedings. However, the criminal proceedings were against Mr Hernádi and not against MOL.
183. It is striking that although six pages of the Austrian files had been introduced into the arbitration record by Croatia, it was not until August 2015 – three months before the hearing – that Croatia sought to put the whole Austrian file into the record in this arbitration.
184. Both Parties had submitted document requests. In particular, on 16 January 2015 MOL had requested the following from Croatia:

*“16. Documents regards, or obtained in investigation conducted by the Bureau for Combatting Corruption and Organized Crime (USKOK) from 1 January 2011 to the present, insofar as such documents pertain to the alleged bribe by Mr. Hernádi and/or MOL.*

*21. Documents evidencing any effort by GoC to investigate Mr. Hernádi concerning the bribery allegations against him, and the results of such investigations.*

*34. Documents (including records of discussions between USKOK and any other Croatian Government Agency or authority), regarding the bribery allegations involving MOL and/or Mr. Hernádi.”*

185. Croatia informed the Tribunal that it had produced all documents relevant to this request that were in its possession, custody, or control.

186. On 25 March 2015 the Tribunal and the Parties sent a joint letter to USKOK and to the Croatian State Attorney requesting, inter alia:

*“[d]ocuments (including records of meetings between USKOK and any other Croatian Government agency authority) regarding the bribery allegations involving MOL and/Mr. Hernádi.”*

187. On 2 April 2015 [L] of USKOK responded to this joint letter stating that all documents in the possession of USKOK and the State Attorney that had been gathered during the investigations had already been shared with Croatia’s arbitration Counsel. The letter stated:

*“Copies of all documents gathered during the investigations of Mr. Ivo Sanader and Mr. Zsolt Tamas Hernádi that are in the possession of the State Attorney’s Office of the Republic of Croatia and the Office for the Suppression of Corruption and Organized Crime were delivered to the Government of the Republic of Croatia and its Legal Counsel in the arbitration proceedings against MOL in three batches in April and July of 2014 and March 2015.”*

188. On both 4 and 22 April 2015, Counsel for Croatia confirmed that they had produced all responsive documents in their possession. The Tribunal is satisfied that Croatia’s arbitration Counsel did have most of

the documents included in the Austrian files in their possession by the time this representation was made. During the early opening there was of course a reference to this “treasure-trove” of documents, but they were not all put into the record until August 2015.

189. It seems clear that Croatia did not provide a translation from the German of the correspondence with the Austrian Ministry of Justice, which included the request for mutual legal assistance. Counsel for MOL informed the Tribunal that the entirety of the Austrian files were translated in order to understand Croatia’s allegations and how this purported “new evidence” related to the bribery allegations in this case. The documents were translated by 21 September 2015.
190. On 10 September 2015, MOL’s Counsel wrote to Croatia’s Counsel, asking for the disclosure of all the correspondence between Croatia and Austria in relation to the Austrian files.
191. MOL’s Counsel informed the Tribunal in its submissions that following the translation of the Austrian files, it appeared that several of the documents were missing therefrom. Apparently the missing documents were the correspondence between Croatia and Austria in relation to the request for mutual legal assistance. There then followed correspondence between Counsel that concluded on 1 October 2015 with the production of further untranslated documents. MOL had the missing documents translated and completed its reconstruction of the Austrian files on 5 October 2015. As stated above, on 16 October 2015 MOL filed its Rejoinder, and objected to Croatia’s reliance on the Austrian files.
192. On 13 November 2015, following the completion of its factual and legal consideration of the Austrian files issue, MOL brought the matter to the attention of the Tribunal and applied for the Austrian File documents to be stricken from the record.
193. On 16 November 2015 the Tribunal agreed with the Parties that the matter would proceed with the Austrian files being admitted *de bene*

esse and that both Parties would have an opportunity to make legal submissions on the admissibility of these documents. There were several rounds of written submissions culminating in oral submissions in Zürich on 26 May 2016.

194. In the opinion of the Tribunal, Croatia has not established that MOL or its Counsel knew that the Austrian files had been provided by Austria to Croatia for the sole purpose of use in the criminal trial in Croatia of Mr Hernádi. Croatia has had every opportunity to establish that fact. It has not done so. It seems most unlikely that, given the intensity with which this arbitration has been conducted, MOL's Counsel would have known about the terms of the request and taken no action in respect thereto. Their subsequent conduct belies such a conclusion.
195. Unfortunately, the Austrian files issue has engendered a great deal of heat and allegations of bad faith as between Counsel. No purpose material to the mission of this Tribunal will be served by repeating these allegations or attempting to answer them. The plain and dispositive facts of the matter are that, firstly, these documents are clearly inadmissible under the terms of the COE Convention and that although the argument of waiver was in the opinion of the Tribunal open to Croatia to establish, it failed to do so on the facts placed before the Tribunal.
196. Finally, the Parties disagree on the extent that Swiss law governs the issue of admissibility of evidence in arbitration and the interpretation of that law. Still, it is accepted that Swiss law does not oblige, under all circumstances, the Tribunal to accept illegally obtained evidence. Even if *arguendo* the Tribunal adopts Claimant's interpretation that Swiss law governs the question of admissibility of the Austrian files and that the Tribunal must assess, *inter alia*, "*the importance of the documents to establish the truth*",<sup>74</sup> after reviewing the Austrian files the Tribunal concludes that the inclusion of the files does not support Croatia's

---

<sup>74</sup> Claimant's opposition to MOL's Application to strike the Austrian Files from the Record of 16 December 2015, para. 92.



arguments and will not have any significant probative value. Therefore, even under Swiss law, the Tribunal is not obliged to accept the admissibility of the Austrian files.

197. Accordingly, the Austrian Files are inadmissible and will be stricken from the record in this arbitration; they will not form any part of the Tribunal's consideration in this matter.

198. The Tribunal wishes to add the following comment. For the reasons set out above, the Tribunal has had access to the Austrian files and has had detailed submissions on them by Counsel. They have been referred to by some of the witnesses. Although the Tribunal will not go behind its Order declaring these documents inadmissible, it can and should state that having had regard to all of those documents and having heard submissions concerning their relevance or otherwise to the allegations in this case, it is satisfied that these documents do not corroborate either the evidence of Mr Ježić nor the narrative of the purported money trail described by Croatia.

**D. Croatia's Prima Facie Case on Corruption**

**(a) Robert Ježić and the Money Trail**

199. The main evidence of the bribery is alleged to come from Dr Sanader's acquaintance and associate, Mr Ježić.

**i. Mr Ježić's Background Relationship with INA, MOL and the Government**

200. Mr Ježić is a man of considerable mystery, long known in Croatia for his personal fortune and his political network. Mr Ježić owns several companies in Croatia, including [4Co]

201. Mr Ježić was certainly perceived as influential. For example, Mr Áldott, the President of the Management Board of INA, explained that thanks to Mr Ježić's connections in the government, [4Co] used to benefit from

a certain flexibility regarding gas prices and payment terms.<sup>75</sup> [4Co] debt to INA amounted to approximately USD 12 million in late 2009 and never stopped growing since then. In May 2010, [4Co] debt was as high as USD 18 million and, due to INA's change of control Mr Ježić was no longer able to use his contacts to obtain special treatment.

202. Despite several attempts, [4Co] and INA failed to find a settlement regarding [4Co] debt. Thus, INA started implementing measures to recover its money, e.g. "*activation of debenture notes, enforcement procedure and suspension of deliveries*".<sup>76</sup> This disagreement soon turned into a public dispute ventilated in the local press. [4Co] accused INA's new management, i.e. MOL and Mr Hernádi, of protecting its Hungarian subsidiaries and abusing its monopolistic position in Croatia.<sup>77</sup> As a result, in May 2010 Mr Ježić decided to take official control of [4Co] management in order to solve these issues.<sup>78</sup>
203. In July 2010, the pressure between INA and [4Co] seemed to ease and the two companies found an agreement regarding [4Co] debt. Under this deal, INA would recover USD 14 million from [4Co] and the remaining debt would be paid in several instalments.<sup>79</sup> Despite this agreement, [4Co] failed to pay its debt to INA, and Mr Ježić had to intervene again. He tried to meet Mr Hernádi in Budapest in late September 2010 but to no avail.
204. A few months later, Mr Ježić was arrested by USKOK because of his apparent involvement in the HEP-[4Co] Case. INA tried again to obtain payment from [4Co] in July 2011 while Mr Ježić was still in custody, and INA kept up its attempt to collect until [4Co] bankruptcy proceedings began in 2013.

---

<sup>75</sup> Zoltan Áldott's WS, p. 32, para. 73.

<sup>76</sup> MOL's Statement of Defense, p. 29, para. 54.

<sup>77</sup> R-087, R-088, R-089.

<sup>78</sup> R-090 and R-091.

<sup>79</sup> R-093 and R-094.

ii. **The Two Conversations with Dr Sanader in Late 2008 and Early 2009**

205. After his release from investigative detention in connection with the HEP-[4Co] case, Mr Ježić testified for the first time regarding the INA case on 25 May 2011. He stated to Croatian prosecutors that Dr Sanader asked him to secure a payment from MOL. This payment was in fact, so he said, a bribe promised by Mr Hernádi to the Prime Minister so as to ensure INA's change of control.
206. Mr Ježić explained that he had two conversations with Dr Sanader regarding the alleged bribe in late 2008 and early 2009. Dr Sanader allegedly asked Mr Ježić to help him arrange for the payment of EUR 10 million from Mr Hernádi.
207. Mr Ježić professes to have apparently random recollections of what happened between 2008 and 2009. For instance, he was able to give great details about unrelated events such as the lunch at the Marcellino restaurant, but he was completely incapable of remembering when or where Dr Sanader mentioned the bribe to him for the first time. Moreover, his alleged answer to Dr Sanader raises doubts. Despite the absence of particulars as to amount, currency, provenance, and destination of the money to be transferred, Mr Ježić did not ask Dr Sanader anything further and promised that he would "*see what can be done*" about it.<sup>80</sup> In fact in his narrative he did nothing after that first conversation and completely disregarded Dr Sanader's request.
208. According to Mr Ježić, Dr Sanader raised this matter again a few weeks or months later. Mr Ježić then spoke with Mr Hürlimann about the potential payment.<sup>81</sup> In particular, Mr Ježić stated that his conversation with Mr Hürlimann was about the cost of such a transaction for [1Co] He also said that he needed to consult the other

---

<sup>80</sup> Robert Ježić's WS, attachment A, p. 2.

<sup>81</sup> Robert Ježić's WS, attachment A, p. 3.

shareholders of [1Co] .<sup>82</sup> As a minority shareholder, he could not take any decision without them.

209. No evidence in the record supports the allegation that such a discussion between Mr Ježić and [1Co] 's other shareholders ever took place. According to Croatia, this is because Mr Ježić never intended to talk to the other shareholders about the transfer. Croatia stated that it was a mistake in the transcript of Mr Ježić's testimony. When he said that he would consult his colleagues, he was actually referring to one individual: Mr Hürlimann.<sup>83</sup>

210. After he received Mr Hürlimann's views on this matter, Mr Ježić allegedly gave Dr Sanader the "*information containing the name, last name and address of the person in Switzerland who was going to carry out the business deal related to the payment of the fee. This was Stephan Hürlimann*".<sup>84</sup>

### iii. The Meeting at the Prime Minister's Office on 26 May 2009

211. It is important to recall that the FASHA had been signed in January 2009. Mr Ježić asserted that on 26 May 2009 he saw Messrs Hernádi and Petrović after they had been into the Prime Minister's office. This is consistent with the entry and exit logs for the Prime Minister's office, and Mr Hernádi himself confirmed that he and Mr Petrović met the then Prime Minister that day.<sup>85</sup> For the sake of clarity, the Tribunal sets out the relevant part of the entry and exit logs below:

<b>Hernádi-Zsolt Tamas</b>				
26 May 2009	Sanader Ivo	11:17	12:28	1:11

<sup>82</sup> R-103, Statement of Robert Ježić to USKOK (25 May 2011), para. 3.

<sup>83</sup> Cross-Examination Robert Ježić, Transcript Day 2, pp. 90:11 – 91:2 (4 May 2015).

<sup>84</sup> R-103, op. cit., para. 4.

<sup>85</sup> C-0104, Croatian Government Visitors Log for 15 May to 1 July 2009 (certified translation); R-024; Zsolt Hernádi's WS, p. 35, para. 90-91; Cross-examination of Mr Hernádi, Merits Hearing Day 2 at 150-155.

26 May 2009	Sanader Ivo	12:34	12:39	0:05
<b>Ježić Robert</b>				
26 May 2009	Sanader Ivo	12:07	13:13	1:06
<b>Petrović Josip</b>				
26 May 2009	Sanader Ivo	11:17	12:28	1:11
26 May 2009	Sanader Ivo	12:34	12:39	0:05

212. Mr Ježić explained that in his meeting he informed Dr Sanader that the money had not come through yet. Dr Sanader's alleged reaction was to call Mr Petrović on his mobile telephone and ask him to return to his office with Mr Hernádi. Mr Ježić did not witness what happened when both Mr Petrović and Mr Hernádi came back to the Prime Minister's office because Dr Sanader had allegedly asked him to leave the room. However, Dr Sanader allegedly reported to Mr Ježić that Mr Hernádi confirmed that the payment would occur shortly and in two equal instalments of EUR 5 million.
213. MOL provides another version of the meeting described by Mr Ježić. Indeed, Dr Sanader, Mr Hernádi and Mr Petrović themselves tell a different story. They all said that the reason Dr Sanader called Messrs Hernádi and Petrović back in his office was to discuss [4Co] issues with INA. Considering Mr Ježić's involvement in this situation, Dr Sanader preferred to have this discussion without him. Hence he asked him to wait in the Prime Minister's office while he talked to Messrs Hernádi and Petrović in the anteroom.
214. MOL observes that the 26 May 2009 meeting was not the only occasion when Mr Ježić and Mr Hernádi went to the Prime Minister's office on the same day. They were both at Dr Sanader's office on 24 March 2009, i.e. two months after the FASHA and GMA were executed, and yet the bribe was not allegedly discussed then.

215. It may certainly be said that Mr Ježić's account of the rapid conclave in the Prime Ministerial antechamber is contextually implausible. The hour-long meeting involved the same three men (Dr Sanader, Mr Hernádi, and Mr Petrovic) as the subsequent discussion of the after-thought triggered by Mr Ježić (who arrived after the longer meeting and was not privy to the chat in the antechamber). The cone of secrecy was the same, indeed lesser when they were standing up in the outer office. If Mr Ježić's story were true, Dr Sanader was thus comfortable reminding Mr Hernádi of the expected payment in the presence of Mr Petrović. Dr Sanader would not have forgotten his EUR 5M, and surely his close friend Mr Ježić would have kept him aware that it had not been paid. (In fact Mr Ježić declared in his first pre-trial statement that Dr Sanader had asked him several times prior to 26 May whether the payment had been received.) It would have been pressing on his mind as soon as Mr Hernádi came into his presence.
216. What was plausibly less pressing on his mind was Mr Ježić's personal problem with INA; what is thus also plausible is that Mr Ježić, coming into Dr Sanader's office immediately after Mssrs. Hernádi and Petrović's departure, would have said "*you didn't forget my request, did you Ivo?*" to which Dr Sanader's likely response would be "*I'm so sorry – it slipped my mind; get them back right now and I'll say something to them immediately*". And so the improvised meeting might have gone this way:
- Dr Sanader: "Once MOL/INA are restructured I hope this will resolve my friend Robert's issue?"
- Mr Hernádi: "I'll do what I can, as long as the commercial terms are defensible."
217. But implausibility does not mean impossibility. The evidence is contradictory, and before reaching conclusions the Tribunal feels it imperative to consider other evidence in order to test the credibility of

each witness. In order to do so, the Tribunal must consider the 19 October 2009 meeting at the Marcellino restaurant.

**iv. The 19 October 2009 Marcellino Restaurant Meeting**

218. Mr Ježić explained that he met Dr Sanader at the Marcellino Restaurant, apparently an establishment frequented by VIPs, for lunch on 19 October 2009. During this lunch, he requested that Dr Sanader help him regarding [4Co] relationship with INA and MOL. Mr Ježić (and Dr Sanader) testified that he left the restaurant at around 3.00 pm after having paid the bill.<sup>86</sup> Shortly thereafter, Mr Hernádi joined Dr Sanader in the restaurant.<sup>87</sup> They discussed the situation of INA vis-à-vis [4Co] but Dr Sanader failed to convince Mr Hernádi to help Mr Ježić. The two men left the restaurant, and much later Mr Ježić came back to pay their bill (at 10.41 pm.).<sup>88</sup>
219. Dr Sanader's and Mr Hernádi's testimonies support Mr Ježić's evidence regarding this meeting.<sup>89</sup> However, the videotape provided by Croatia is to some extent contradictory. The video recording shows Dr Sanader's table on 19 October 2009 from 13:54 to 13:59. According to Mr Ježić's testimony and the receipt from the restaurant, the video should display Mr Ježić and Dr Sanader finishing their lunch. According to them, Mr Hernádi did not join Dr Sanader in the restaurant before 15.00. And yet, the video shows Dr Sanader and Mr Hernádi seated at a clean table at 13.54. It is common ground that the three gentlemen are telling the truth about the comings and goings of the protagonists in the restaurant that day; but the *timing* is a different matter. Thus, MOL's conclusion is that the video must have been altered "*so that the*

---

<sup>86</sup> The receipt shows that Mr Ježić paid at 15:29, C-0109, receipts from Marcellino restaurant.

<sup>87</sup> Cross-examination of Mr Ježić, Transcript Day 2, p. 110:13-19 (4 May 2015); R-104, op. cit., para. 10.

<sup>88</sup> C-0109, op. cit..

<sup>89</sup> Exh. CLA-0002, Sanader Trial Judgment - English Translation; C-145, Sanader Trial Testimony, p.6.

*clip would 'corroborate' Ježić's testimony that he met with Sanader and Hernádi on 19 October 2009 at the Marcellino*".<sup>90</sup> MOL also emphasises that the length of the video has probably been reduced as well without any apparent reason. Having regard to all the evidence in this case, including the expert testimony of Mr Quick who examined this video carefully, the Tribunal has concluded that it would be wrong to place great reliance on this video, especially as to date and time.

220. Even though it is agreed that none of the witnesses lied about the date, time and venue of that meeting, it is possible that someone was prepared to create evidence in order to support Mr Ježić's testimony.
221. Mr Quick – MOL's expert on the USKOK criminal investigation and the investigation against Mr Hernádi in Hungary – is a former senior police officer in England "*specialised in the areas of countering corruption, serious and organised crime and terrorism*".<sup>91</sup> He gave evidence about the very unsatisfactory nature of the video.<sup>92</sup> MOL spent considerable time questioning Mr Ježić about this meeting. Although the episode at the Marcellino has no real significance with regard to the issues at stake, the Parties devoted considerable time dissecting it because of, or so the Tribunal assumes, its possible implications with respect to the credibility of Mr Ježić. USKOK relied on this luncheon episode to contend that Mr Ježić was indeed telling the truth, while MOL maintains that it rather shows Mr Ježić to be an unreliable witness.
222. The Tribunal was struck by a line of questions put to Mr Ježić by MOL regarding the two receipts from the Marcellino restaurant. Counsel asked Mr Ježić to explain the inconsistency between the meals recorded on the receipts and the alleged number of participants to this lunch with the result that he had struggled vainly to provide a

---

<sup>90</sup> MOL's Rejoinder, p.53, para. 123.

<sup>91</sup> Robert Quick's Expert Report, para. 1, p. 1. Sir Calvert-Smith – who was First Senior Treasury Counsel in England and specialised in prosecuting and defending in serious crime, including allegations of murder, terrorism, fraud, corruption and organised crime - also gave evidence to the same effect.

<sup>92</sup> Robert Quick's Expert Report, para. 187, p. 63.



satisfactory explanation.<sup>93</sup> This detail is consistent with the conclusion that Mr Ježić's testimony must be approached with the utmost caution.

**v. The Trip to Milan and Zürich in October 2009**

223. On 20 October 2009, Dr Sanader and Mr Ježić went to Milan in a private aeroplane provided by [4Co] to see a football match.<sup>94</sup> Mr Ježić allegedly took this opportunity to tell Dr Sanader that he no longer wanted to help him with the transfer of the money from MOL.<sup>95</sup> Mr Ježić had apparently read articles in the Croatian press and realised (so he suggested) that he had been unwittingly involved in a bribe.
224. As a result, Dr Sanader allegedly asked Mr Ježić to use the plane to go from Milan to Zürich where [N] Dr Sanader's brother, would help him with the second payment of EUR 5 million. Dr Sanader, Mr Ježić and [N] all met in a hotel and allegedly discussed [N] possible role in the bribe. The Tribunal sees no need to await its ultimate assessment of the case to observe that it is difficult to understand why Mr Ježić agreed to accompany Dr Sanader to meet with his brother to discuss the transfer of the money – something he had just told Dr Sanader that he did not want to have anything to do with it. It is at least as strange in these circumstances that Dr Sanader, who impressed the Tribunal as the very opposite of naïve or slow-witted, would have allowed Mr Ježić to come along and thus for no reason become privy to dangerous secrets. In Mr Ježić's account, the two men never talked about the bribe again although Mr Ježić was still in possession of the first instalment.
225. At this point, it is worth repeating and emphasizing that to this day, Mr Ježić still remains in possession of the alleged bribe money and that Dr Sanader had never tried to secure the payment of this money into his

---

<sup>93</sup> Cross-Examination of Robert Ježić, Transcript Day 2, pp. 128:14 – 130:2 (4 May 2015).

<sup>94</sup> CLA-0002, Trial Judgment at 185, 226.

<sup>95</sup> R-103, op. cit., para. 8; R-104, op. cit., para. 12; Transcript of Mr Ježić's cross-examination (Day 2), p. 140:10–141:18.

account between these trips in October 2009 and his arrest in December 2010. MOL's position is that Mr Ježić's inconsistency in this regard can only be explained by the fact that his testimony is untruthful, and that USKOK provided him with information in order to help him concoct this story to bring down Dr Sanader.

226. Considering the importance of the issues in dispute, the Tribunal needs now to turn to the other evidence provided by Croatia in alleged support of Mr Ježić's testimony.

**(b) Other Relevant Evidence in Purported Support of Mr Ježić's Story**

227. Mr Ježić's allegations, if accepted, could have very serious consequences for both INA and MOL. MOL obviously disputes Mr Ježić's testimony and questions his credibility. To the extent that Mr Ježić's testimony were found not to suffice in itself to prove that Dr Sanader accepted a bribe from Mr Hernádi, the Tribunal needs to assess whether other evidence in the record adequately supports the bribe theory apart from Mr Ježić's testimony.

**i. The Consultancy Agreements Between [1Co] , [3Co] and [2Co] and the Premium Payments**

228. Croatia asserts that the two contracts signed by Mr Hürlimann on behalf of [1Co] with [3Co] and [2Co]<sup>96</sup> were actually made to cover the payment of the bribe to Dr Sanader. Indeed, the fact that Mr [Y]<sup>97</sup> and Mr [X]<sup>98</sup> both testified before the Hungarian State Attorney that they never met Mr Ježić<sup>99</sup> raises the question as to why they entered into these contracts. Moreover, Croatia established that

---

<sup>96</sup> C-0012 and C-0013, op. cit.

<sup>97</sup> Current owner of [3Co] and owns 50% of [2Co] , cf. Joint Dramatis Personae.

<sup>98</sup> MOL's ex-consultant, shareholder of [2Co] and indirect shareholder of [3Co] with Tóth.

<sup>99</sup> Robert Quick's Expert Report 042, p. 4 ; R-118.

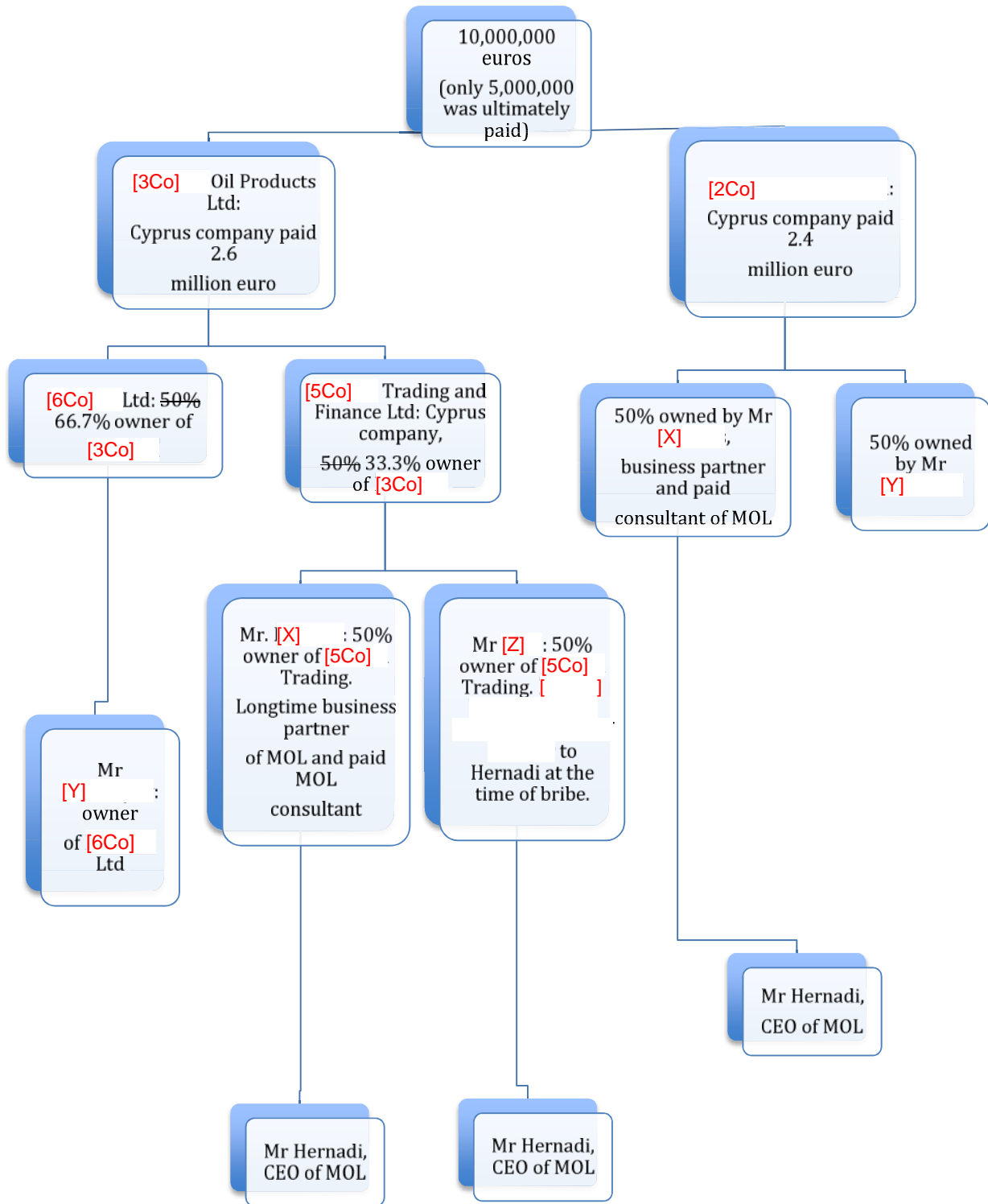
MOL and [3Co] had close financial links,<sup>100</sup> which could make the bribe theory plausible. MOL was [3Co] only source of revenue, and Mr [ ] – was also one of [3Co] owners (he owned 33% of the company when the alleged bribe occurred). Croatia asserts that the money needed to be laundered so as to erase any connection between MOL and Dr Sanader. These contracts between random companies were, so Croatia asserts, the best vehicle to achieve this goal.

229. Croatia submitted a chart to the Tribunal so as to emphasise the close links between these different entities. For the sake of clarity, the Tribunal reproduces this chart below:<sup>101</sup>

---

<sup>100</sup> Croatia's corrected Reply, p. 42, para. 124; MOL was [3Co] exclusive source of revenue: C-141, C-142 and C-143; [X] was MOL's paid-consultant, cf. Joint Dramatis Personae.

<sup>101</sup> Croatia has been able to provide the exact figures corresponding to [3Co] ownership, and accordingly the chart required correction. At the time of the alleged bribe, [3Co] was owned at 33,3% by [5Co] (controlled by Mr [ ]) and 66,7% by [6Co] C-107 at 6, HANFA letter to USKOK (1 Sept. 2011).



230. Not only is the purpose of these contracts unclear, but the payments that occurred in June 2009 from [3Co] and [2Co] to [1Co]

also raise doubts.<sup>102</sup> These payments occurred exactly one week after the vote regarding INA's management transfer to MOL. As far as Croatia is concerned, these facts are not just mere coincidence.

231. Croatia moreover points out that one of the two Termination Agreements prepared by Mr [X] recites that "*according to our Agreement dated 4<sup>th</sup> of June 2009 you had to use your contacts and lobbying in the interest of our company, in our opinion **it was partly fulfilled**, but after the partial payment of 2,400,00 EUR your activity was stopped for a not understandable reason for us*".<sup>103</sup> Croatia's understanding of these terms is that the alleged performance of this contract must have occurred "*during the 13 days between 4 June (when the contracts were signed) and 17 June (when the payment was made)*".<sup>104</sup> One significant event happened during these 13 days: on 10 June 2009, Croatia voted in favour of INA's change of control at the Shareholder's Assembly.
232. At the end of the day, however, there is no evidence that any services had been provided by [1Co] ;, and the payment remains unexplained. It is true that MOL has not provided a fully convincing explanation as to the purpose of these contracts. Still, the Tribunal notes that none of these agreements directly involves MOL and the money never reached Dr Sanader. The person who could have shed light on these agreements, Mr Hürlimann, declined to assist the Tribunal.
233. Croatia submits that it has succeeded in establishing a regular financial flow from MOL to [3Co] Further it relies heavily on an answer Mr Quick gave in cross-examination where he allegedly admitted that MOL was the source of the alleged bribe money paid to [1Co] :.<sup>105</sup>

---

<sup>102</sup> C-0014 and C-0015.

<sup>103</sup> C-0026, "Termination Agreements" for [2Co] and [3Co] Consultancy Agreements.

<sup>104</sup> Croatia's Reply, p. 63, para 198.

<sup>105</sup> Cross-examination of Mr Quick, Hearing Transcript (Amended), Day 8, 25 November 2015, at 69:11-15.

However an analysis of the background and context of these payments between MOL and [3Co] do not permit such an inference from Mr Quick's answer.

234. Pursuant to a Memorandum of Understanding signed in 1999 by MOL and Yukos,<sup>106</sup> MOL has purchased vast quantities of gasoil for the last 17 years from Yukos. [3Co] was Yukos' subsidiary and in 2001, Yukos and MOL began to use [3Co] as an intermediary at the insistence of Yukos. MOL thus signed its first agreement with [3Co] (the "2001 [3Co] Agreement")<sup>107</sup> dealing with, *inter alia*, "the reactivation of the Eastern Product Pipeline".<sup>108</sup> This 2001 [3Co] Agreement was the first of many more, as "MOL's needs for gasoil grew and changes in the market affected Hangam's ability to source and deliver the quantities of gasoil at previously agreed upon prices".<sup>109</sup> It is not disputed that these agreements were all negotiated by Mr Horváth on behalf of MOL and Mr [X] on behalf of [3Co] (and indirectly Yukos and then Lukoil).<sup>110</sup> These dates make it crystal clear that the contractual relationship between MOL and [3Co] long predated the matters in dispute in this arbitration and was part of a pattern of unrelated bona fide commercial transactions.
235. In the light of the above Croatia's reliance on Mr Quick's answer that the sums came from MOL must be viewed in the context of the substantial trading activities conducted between MOL and [3Co] over a number of years. Accordingly the Tribunal does not consider that the answer relied upon by Croatia assists Croatia in attempting to establish the corrupt payment.
236. In his testimony to the Tribunal, Mr Horváth explained that, in 2007, Mr [X] asked for a substantial price increase of [ ] per ton of gasoil. This request was mainly due to the growth of MOL's needs

---

<sup>106</sup> Ferenc Horváth's WS, para. 8.

<sup>107</sup> Horváth-002, [3Co] MOL Contract (19 July 2001).

<sup>108</sup> MOL's Rejoinder, p. 112, para. 274.

<sup>109</sup> MOL's Rejoinder, p. 113, para. 276.

<sup>110</sup> Ferenc Horváth's WS, para 20.

and the difficulties encountered by [3Co] in delivering such high quantities of gasoil. As he put it:

*“[3Co] difficulties originated in part from a decrease in the availability of Russian gasoil due to new transport routes, and in part due to losses that [3Co] had suffered on account of large scale thefts that occurred on the Ukrainian section of the pipeline.”<sup>111</sup>*

237. For the sake of their commercial relationship, Mr Horváth agreed that MOL would “pay [3Co] a performance premium for each metric ton of gas it delivered to MOL during the quarter, if the deliveries met a predetermined target set by MOL for the quarter”.<sup>112</sup>

238. Mr Horváth explained that:

*“[3Co] would have stopped the supply of gasoil to MOL altogether. As MOL continued to need (even more) gasoil for its diesel production and more flexibility in quarterly deliveries, as well as to ensure that MOL’s gasoil orders were continued to be fulfilled by [3Co] we suggested that instead of a fixed price increase we introduce a performance premium that [3Co] would get only if it delivered the quantities of gasoil that MOL would determine on a quarterly basis.”<sup>113</sup>*

239. According to Mr Horváth, the premium payments achieved three purposes. First, it was a financial incentive for [3Co]. Second, it ensured regular delivery of gasoil to MOL. And third, it gave MOL some flexibility by allowing MOL to review the quantity ordered to [3Co] on a quarterly basis.

---

<sup>111</sup> *Ibid.* para. 29.

<sup>112</sup> MOL’s Rejoinder, p. 113, para. 277.

<sup>113</sup> Ferenc Horváth’s WS, para. 29.

240. The outcome of these negotiations was set out in Addendum No.1 to the 2007 Agreement, which was then extended in 12 further addenda. Mr Horváth testified that the disputed payments made by MOL to [3Co] in 2009 related to Addendum No. 5.<sup>114</sup> According to him, between 1 April and 30 June 2009, MOL indeed met its target of [ ] tons of gasoil as set out in the relevant addendum and thus, MOL had no choice but to pay [3Co] premium.
241. However, Croatia asserts that there was no genuine rationale behind Addendum 1 or any other Addendum signed thereafter; under the old agreement, [3Co] had agreed to deliver [ ] tons per quarter whereas under the new agreement, [3Co] undertook to deliver only [ ] tons per quarter. This does not match Mr Horváth's testimony that MOL's demand was continuously increasing.
242. Croatia further asserts that MOL paid these performance premiums regardless of whether [3Co] fulfilled its contractual obligations. This was, according to Croatia, because Addendum No. 1's alleged purpose was in fact to allow the payment of commissions to Mr [ ] through [5Co] so as to facilitate the implementation of MOL's business in the region. According to Croatia's own words, [3Co] was a slush fund for MOL.
243. This allegation is said to be supported by two observations. First, although MOL paid [3Co] delivery of gasoil in USD, the so-called premium payments were all paid in Euros to a Cypriot bank account. Second, between 2008 and 2009, MOL made extraordinary payments to [3Co] despite its failure to deliver the target quantity of gasoil. These Premium payments amounted to a total of approximately EUR 5.2 million. Croatia states that nearly half of this sum, namely EUR 2.6 million, was then conveniently transferred to Mr Ježić from [3Co] account. As far as Croatia is concerned, this cannot be a simple coincidence.

---

<sup>114</sup> Horváth-009, addendum 5, 1 April 2009.



244. Croatia relies on this financial arrangement between MOL and [3Co] to support its bribe allegations.
245. The Tribunal has considered the evidence of Mr Horváth very carefully and concludes that Mr Horváth was an honest and reliable witness. He explained with clarity how the relationship with [3Co] commenced and continued. He explained the rationale behind the premium payments issue. The Tribunal is satisfied that in exchange for the premium payment MOL received the benefit indicated by Mr Horváth. It is common ground that these premium payments were invoiced in Euros and paid in Euros to [3Co] account. The Tribunal is sceptical of Croatia's depiction of the premium payments as a slush fund to be used as a bribe because the premium payments commenced long before the events of this case and thus lack the necessary connection with the allegation made. But there is more reason to resist Croatia's contention: if the Tribunal was persuaded that the premium payments were for nefarious purposes it seems incredible to conclude that Mr Horváth would not have been complicit. Yet no dishonesty or complicity was directly put to Mr Horváth. When the Tribunal raised with Counsel for Croatia whether their theory involved Mr Horváth's complicity, the response was on more than one occasion unsatisfactory and unacceptable. The Tribunal rejects any suggestion that Mr Horváth was dishonest or in any way complicit. If the premium payments were in fact a subterfuge to cover a bribe or some other nefarious activity, Mr Horváth must have been a party to it. The Tribunal is not the least convinced that this was so.
246. Furthermore, Croatia did not establish any link between Mr [Y] and MOL or even Mr Hernádi, nor prove that the sum paid by [2Co] to [1Co] came from MOL. Mr [X] controlled [2Co] in 2009, but he shared ownership with Mr [Y].<sup>115</sup> At the very least, Croatia was required to show that MOL was likely to be the source of the money transferred from [2Co] to [1Co]. Without this evidence, the

---

<sup>115</sup> C-31, [X] Trial Testimony p. 3.

Tribunal can only conclude that the money came from Mr [Y] and/or Mr [X] ' assets. This begs the question as to why Messrs [X] and [Y] would have agreed to pay EUR 2.4 million out of their own pocket for MOL. The simple fact that Mr [X] was MOL's paid consultant does not prove the origin of [2Co] s EUR 2.4 million.

247. Mr [Y] testified that he had only heard of Mr Ježić, Mr Hürlimann and Dr Sanader. When he was questioned in Budapest by the Central Investigation Bureau of the Attorney General's Office, he stated as follows:

*"I have heard about Ivo Sanader, as a former prime minister in Croatia, but I do not know him and we have never got anything common. I do not know him, just like Hürlimann or Ježić, and I do not want to seem as offending them, but they are not at the level to get into personal contact with me".<sup>116</sup>*

248. At the time of the alleged bribe, Mr [Y] owned 66,7% of [3Co] through his company, [6Co] and 50% of [2Co] .<sup>117</sup> Why would he take the risk of helping MOL bribe Dr Sanader through a Swiss Company, which was owned by Mr Ježić and some unknown shareholders? What would have been his motive? Or was he completely unaware of this matter? These questions are still unanswered.

249. Before concluding the analysis of this first category of evidence, the Tribunal underscores its perception of a serious overriding difficulty with the proposition Croatia advances to the effect that Mr Hernárdi, having resolved to bribe Dr Sanader, entrusted Mr Ježić with the organization of the illicit transaction, controlling it from beginning to end and using an unknown agent or agents (who in fact turned out to be Mr Hürlimann). The implausibility of this contention -- which requires that

---

<sup>116</sup> Quick-042, Quick Exhibit 42 2011-07-12 [Y] Statement, p. 5.

<sup>117</sup> C-0031, op. cit., p. 3.

one believe that the CEO of a major corporation would have exposed himself forever to the potential blackmail by Mr Ježić and to the latter's unknown agents -- is augmented by the uncontested fact that the relations between Mr Ježić and MOL were conflictual (Mr Ježić's distressed company, [4Co] was in substantial arrears to INA and MOL was unwilling to allow supplies to continue).

250. Bribers tend to take the elementary precaution of organizing their own *mise en scene* of fictitious transactions rather than running the risk that it is effectuated in the clumsy and perilous manner depicted in Mr Ježić's narrative, in such ways that MOL had no way of ensuring that the money would not stick in the hands of third parties beyond MOL's reach and never reach the intended recipient -- which is precisely what happened here.

251. According to Mr Ježić, his second discussion with Dr Sanader regarding the large offshore payment (which he vaguely situated as having taken place "sometime" in early 2009) revealed that the payment was coming from MOL, and on account of unspecified consulting services. No names of persons within MOL, or associated with MOL, were mentioned. Yet on 26 May Dr Sanader agreed to call back both Mr Hernadi and Mr Petrović for the alleged purpose of asking about the missing payment. So either:

- Dr Sanader, who could have made this inquiry directly of Mr Hernadi while he was with him, unnecessarily revealed Mr Hernadi's implication to Mr Ježić. This is something which, ex hypothesi, an intelligent and unscrupulous person would avoid.

or

- There had been intervening discussions when Dr Sanader

gave Mr Ježić further details. This would contradict the latter's testimony before this Tribunal.

252. Considering the very substantial international money transactions in which MOL is involved as matter of routine, surely Mr Hernádi (if he was guilty as charged) would have seen to it that the alleged bribe was arranged via channels that were entirely outside the sensitive Croatian context, and in any event not in the hands of Mr Ježić. Nor does it make any sense that Dr Sanader, on the putative receiving end, would have had any reason to entrust this matter to the latter, given any number of safer and more plausible alternatives starting with the evident one of his own expatriate brother.
253. Although the purpose of these agreements is unclear, it was incumbent on Croatia to prove MOL's role in this financial structure. The simple fact that MOL's top management was connected, through consultancy and employment agreements, to the directors of the two offshore companies allegedly involved in the bribe is not sufficient to establish that MOL initiated the signature of these contracts, let alone that they involved a payment to Dr Sanader. Other motives could explain the signature of these agreements. MOL contended that these agreements could have been related to the **D-A** project. The Tribunal will revert to this argument below.

**ii. The Negotiations of the FASHA, the GMA and the Share Swap**

254. The second category of evidence submitted by Croatia in support of Mr Ježić's testimony concerns the negotiations of the FASHA, the GMA, and the share swap. Croatia seeks to establish that but for the bribe and Dr Sanader's strong pressure on the government, these agreements would have never been concluded.
255. The thrust of Croatia's contentions with regard to the alleged corruption is that the agreements contemplated at the time of the bribe were

unbalanced in favor of MOL and detrimental to Croatia. The premise is ambitious. It asks the Tribunal to conclude that the contemplated bargain went beyond the pursuit of the expected self-interest of a negotiating party and can only be explained as a degree of overreaching that is possible if MOL had procured an illicit bargaining advantage by corrupting a person of influence on the Croatian side. For the reasons set out in the two following paragraphs, such contentions must be approached with caution and discernment.

256. Yet the existence of a self-interested motive does not suffice as proof of corruption. Successful negotiations should not automatically be exposed to a presumption that the conclusion of an advantageous deal is the fruit of underhanded dealings. While an egregious and uncontestable disequilibrium may tip the scales, a lack of astuteness is not proof of moral culpability, and all the less so when the bargain is evaluated retrospectively.
257. This is part of a more general difficulty of proof by inference; the fact that (A) is *consistent with* (B) does not prove (B). Just as the fact that an alleged middleman is connected to shadowy cross-border financial transactions does not prove that someone whom he has met, no matter on how many occasions, is a principal in a corrupt transaction, so also the fact that a transaction is said (or even proved) to be commercially “unbalanced” does not prove fraud or corruption in the inducement.

**a. Events Prior to the Start of the Negotiations**

258. In 2003, by virtue of its agreement with Croatia, MOL acquired 25% +1 share of INA. The same year, Croatia sold 7% of INA’s share to the Homeland War Veterans’ Fund and 7% to INA’s employees. Over the next few years, MOL purchased these shares from the Veterans’ Fund and INA’s employees, and became INA’s majority shareholder.
259. In 2008 MOL made a voluntary public offer to buy the Veterans’ Fund’s shares. This offer was first rejected because the offered price was

allegedly too low. However, after a few months, the Fund – which was then directed by [B] – gave up and sold its shares at the offered price. The Tribunal will return later to the issue whether Dr Sanader played any part in influencing this decision.

260. Later in 2008, MOL allegedly informed Mr [A] of its project to purchase more of INA shares so as eventually to become its main shareholder. In his testimony at the Sanader trial, Mr [A] reported that he spoke with Dr Sanader about MOL's agenda. According to Mr [A] Dr Sanader did not react to this information and said only that MOL's plan could succeed.

**b. Dr Sanader's Role in the Negotiations**

***The Negotiations of the FASHA***

261. In February 2008, the Government formed a Commission which was charged with negotiating the amendments of the SHA and the conditions of the share swap with MOL. The Commission, headed by Mr [A], held several meetings and had the mandate to protect Croatia's strategic interests.
262. In his testimony at Dr Sanader's trial, Mr [A] explained that Mr [S], who was a member of the Commission, was reluctant to cooperate with him and even tried to jeopardise the Commission's work. He refused to attend the Commission's meetings and always sent one of his assistant ministers instead. The assistant would defend a position during the meeting and then change sides afterwards. This behaviour obviously put the Commission in a difficult position. Dr Sanader was aware of this situation but encouraged Mr [A] to pursue the negotiations. [B] also attended two meetings in December 2008, where Mr Hernádi was also present.<sup>118</sup>

---

<sup>118</sup> C-0032, Mr [A] Trial Testimony, p. 5.

263. At some point, a meeting was held of the inner cabinet at the Government premises. Dr Sanader, Mr [A], Mr [S] and also [B] attended this meeting along with other ministers. Dr Sanader allegedly presented MOL's request to revise the management's right and obtain INA's consolidated accounts, i.e. MOL's project to acquire control over INA. According to Mr [A], Dr Sanader had already an opinion on this proposal and made clear statements to the effect that it should be accepted.

264. As far as Mr [A] was concerned, Dr Sanader's position on this matter was essential because it had a decisive influence on the other members of the Commission:

*"The way things worked, and other participants of such meetings talked about it in the media, was that if the then Prime Minister would express a certain position on a matter, the same would become binding. By stating this, I am stating something that is not in my favour, however, this is how it was, and I cannot remember a single meeting during which a decision was delivered that would be contrary to such a position".<sup>119</sup>*

265. However, during his cross-examination before this Tribunal, Dr Sanader made clear that his involvement remained at a high level:

*"The Chairman – Who in your Government was responsible for dealing with the amendment? Which minister had, as it were, the carriage of that particular –*

*Dr Sanader – Mr Deputy Prime Minister Mr Polančec.*

*(...)*

*The Chairman – So how much control did you have over that particular process?*

---

<sup>119</sup> C-0032, op. cit., p. 8.

*Dr Sanader – I was the Prime Minister and I was co-ordinating all the ministries, and like in any other case with any other Prime Minister I was the one to whom the ministers would report, next to the Government and to the party bureau (...).*

*The Chairman – There has been a suggestion somewhere in the evidence that everyone did what you told them to do, would you like to comment on that?*

*Dr Sanader – Yes, I would really like to comment on that, Mr President. This is complete nonsense. We are a Government, a body that runs the state that governs the state. (...) I am aware that such statements have been made. But people are trying to blame the Prime Minister and shift the blame on me”.<sup>120</sup>*

266. According to Dr Sanader, Mr [A] : was the one in charge of leading the negotiations:

*“Dr Sanader – (...) What a Prime Minister minds is that whoever conducts the negotiations, to report back to the Prime Minister and his colleagues, and then the leadership will gauge whether this is to the benefit of Croatia or not in political and other terms. (...) This [the details of the deal discussed with MOL in June 2008] was not the object of my interest. I have a Vice Prime Minister who is in charge of that. I trust him fully, he is a man of integrity, and he reports back to the party leadership and the Government (...).”<sup>121</sup>*

267. The Tribunal is in a difficult situation where, once again, it is Dr Sanader’s word against someone else’s. The Tribunal could recount in this Award the full process of the negotiations, based on Croatia’s pleadings. However, this would not assist the Tribunal in assessing

---

<sup>120</sup> Cross-examination of Dr Sanader, Hearing Transcript, Day 1, 15 April 2016, from line 7, p. 30 to line 20, p. 31.

<sup>121</sup> Cross-examination of Dr Sanader, Hearing Transcript, Day 1, 15 April 2016, lines 3 to 14, p. 99.



whether Dr Sanader did use his influence to make the government execute the FASHA. It seems that Dr Sanader was a strong personality with a firm hand on his Government's general policy, but the evidence does not establish that he involved himself in the detailed negotiation.

### ***The Negotiations of the GMA***

268. On 9 September 2008, Mr [A] held a meeting at the Ministry of Economy's office with MOL's management. Mr Hernádi, Mr Branko Radošević (the then Chairman of Plinacro) attended that meeting, as did several members of the Ministry of Economy and INA's representatives.
269. At this time, MOL was negotiating the amendment of the SHA and the content of the GMA with the Croatian commission led by Mr [A]. In particular, MOL and Croatia were discussing the transfer of the gas storage and gas trading activities to Croatia. Several subsidiaries of INA were involved, such as Plinacro. One of them was to acquire PP ("**gas storage**" or "**PP**") and/or PSP Okoli ("**gas trading**" or "**PSP**").

### **The Purchase of PP**

270. INA was required to unbundle its gas storage business in order to comply with the accession requirements set out by the European Union. This was also contemplated in the Gas Market Act passed by Croatia on 30 March 2007.<sup>122</sup>
271. As Croatia stated in its Statement of Claim, Plinacro "*was identified as a possible State-owned company to acquire PP and PSP*".<sup>123</sup> However, Mr Radošević was against MOL-INA's proposal as such. In his witness statement, Mr Radošević highlighted that, at the end of 2008 and despite Plinacro's "*very good business results*", the company was

---

<sup>122</sup> R-141, 2007 Gas Market Act, Article 73.

<sup>123</sup> Croatia's Statement of Claim, p. 24, para. 85.

unable to purchase PP and PSP without the Government's financial support.<sup>124</sup>

272. One of the key issues when negotiating the GMA was the price at which PP would purchase gas from INA. The gas price could be calculated using different formulae resulting in different prices. According to Croatia, MOL and INA wanted to use the Russian formula, i.e. INA would have sold its gas at the same price as Russia. On the other hand, Mr Radošević found that the Russian formula resulted in "*inflated gas pricing*".<sup>125</sup> Therefore, the use of this formula would inevitably lead to an increase of PP's loss, because the company would never be allowed to sell gas to Croatian people at a higher price than the purchase price. Croatia stated moreover that Mr Radošević favoured a gas market-based pricing scheme. This methodology would have allowed both INA and PP to adapt their prices taking into account the market and their costs and risks.
273. During the 9 September 2008 meeting, Mr [A] as well as Mr Radošević opposed MOL-INA's proposal. In his testimony at the Sanader trial, Mr Radošević explained that Messrs [A] and Hernádi left the meeting together for about 10 minutes. Mr Radošević assumed that Mr Hernádi was trying to convince Mr [A] to support MOL's position. This attempt apparently failed because Mr [A] decided to cut the meeting short. Thus, when Mr [A] finally agreed to MOL's proposal a few months later,<sup>126</sup> Mr Radošević was rather surprised.
274. After his change of mind, Mr [A] explained that Croatia's control over PP would allow it "*to negotiate lower prices on the imported Russian gas and keep prices down*".<sup>127</sup> For him, and despite his previous opposite position, the operation made economic sense for

---

<sup>124</sup> Mr Radošević's WS, p. 5, para 14.

<sup>125</sup> Croatia's Statement of Claim, p. 25, para. 88.

<sup>126</sup> C-0085, [A]'s presentation.

<sup>127</sup> Croatia's Statement of Claim, p. 27, para. 93.

Croatia on a long-term basis, but it required an immediate upfront payment of at least USD 500 million from the Government.

275. As far as Croatia is concerned, Mr [A] 's sudden change of heart has no real explanation but for the bribe and thus Dr Sanader's influence. It is argued that this position supports Mr Ježić's evidence. Dr Sanader made a deal with Mr Hernádi during this period, his alleged role was to facilitate the signature of the GMA; Mr [A] , who was Dr Sanader's avatar at the negotiation table, simply executed the Prime Minister's orders.
276. In late 2008, Mr [A] provided Dr Sanader, Mr [S] and Ms [M] with draft agreements. Dr Sanader wanted to execute these documents quickly but [M] thought that a further meeting was needed in order to overcome Mr [S] concerns. Dr Sanader believed that the delay in the signature of the agreement was mainly due to the discord between Mr [S] and Mr [A] . Thus, he asked [B] to attend the next meeting to help them settle the remaining issues. [B] succeeded and the GMA was signed on 31 January 2009.<sup>128</sup>
277. After his resignation, Dr Sanader stayed involved and held a meeting upon [B] 's request sometime during the summer of 2009. Mr Hernádi, Mr [S] and Mr [A] attended this meeting. Dr Sanader briefly introduced the matter to be discussed, namely the purchase of PP by Croatia, and then left. According to Mr [A] 's testimony, Mr [S] and Mr Hernádi found some grounds of agreement during the meeting. Several other meetings were held between Mr Hernádi, Mr [A] and Mr [S] [B] attended some of them.
278. Despite Mr [A] 's and Mr Hernádi's active support, no agreement was reached regarding PP and Croatia never purchased it.

---

<sup>128</sup> C-0032, op. cit., p. 12.

*The Purchase of PSP*

279. The discussions between MOL and Croatia regarding the spin-off of PSP had been on going for a long time. Although the negotiations started in 2008, in 2006 INA's IPO prospectus – issued by the Supervisory Board – already mentioned that PSP was going to be detached from INA. Several meetings were then held in order to discuss the conditions of the purchase of PSP by Croatia. MOL's goal was to reach an agreement before the end of 2008 so as to improve INA's financial results.
280. On 24 December 2008, INA's representatives negotiated the draft agreement regarding the acquisition of PSP with Mr Radošević and representatives from the Government. Mr Radošević explained in his statement that the draft agreement proposed by MOL and INA was incomplete in that the purchase price of PSP was missing.<sup>129</sup> It also included a damages clause, which was not acceptable to Mr Radošević.
281. A few days later, on 28 December 2008, another meeting was held with Messrs Markotić and Petrović of INA. Croatia stated that both of them applied heavy pressure – supposedly on behalf of Dr Sanader – on Mr Radošević. Mr Radošević was still reluctant to enter into the agreement and he closed the meeting without signing anything.<sup>130</sup>
282. Croatia emphasized that it would not have been necessary to use illegitimate pressure to force Mr Radošević to enter into the GMA if the agreement was favourable to Croatia and Plinacro. In fact, the GMA's alleged main effect was to shift "*all of INA's losses in the gas business and placed them 100% with Croatia, rather than spreading the losses between MOL and Croatia as INA's shareholders*".<sup>131</sup>

---

<sup>129</sup> Mr Radošević's WS, p. 6, para. 18.

<sup>130</sup> Croatia's Statement of Claim, p. 29, para. 98.

<sup>131</sup> Croatia's Statement of Claim, p. 29, para. 99.

283. Ultimately, Dr Sanader allegedly pushed Mr Radošević into entering into the agreement, and it is alleged that he suggested that Mr Radošević should “*withdraw if he were not ‘capable’ of carrying out the conclusion of the agreement*”.<sup>132</sup> It is submitted that Dr Sanader’s alleged role in ensuring the signature and implementation of the GMA corroborates Mr Ježić’s story. For Croatia, the only reason explaining the Government’s support for this agreement was the bribe.
284. On 29 December 2008, in a final attempt to find an agreement on the purchase price, another meeting was held at the Ministry of Economy. Mr Radošević reported that Mr [A] was called away for a phone call with Dr Sanader. When he returned to the meeting room, Mr [A] said that Dr Sanader had decided that: “*the agreement between Plinacro and INA should be concluded, even if the price and method of payment were not specified*”.<sup>133</sup>
285. Despite the external pressure, the negotiations were still pending on 31 December 2008. Mr Radošević received further instructions stating that the agreement must be signed by 31 January 2009. On 30 January 2009, he finally capitulated and signed the agreement subject to Croatia’s financial support. Plinacro agreed to purchase PSP for 514 million Kuna.<sup>134</sup>
286. The FASHA was also signed on 30 January 2009. Significantly, this was 5 months before the alleged bribe was paid.

**c. The Decision of the Competition Agency (the “Agency”)  
Regarding INA’s Change of Control**

287. The Parties’ submissions have also led the Tribunal to look at the events surrounding the release of the Agency’s decision. In the

---

<sup>132</sup> Croatia’s Statement of Claim, p. 29, para. 102.

<sup>133</sup> Mr Radošević’s WS, p. 7, para. 21.

<sup>134</sup> C-0038, INA Annual Report, at 114.

Tribunal's perception, this episode is a good example of how things worked under the then Prime Minister's leadership.

288. In her testimony to USKOK, Ms Spevec – the Chair of Croatia's Agency between 2003 and 2013<sup>135</sup> – explained that on 9 April 2009 the Agency received complete notification of the transaction from MOL. The role of the Agency was to assess whether this it was a concentration under Croatian law and, if so, whether it complied with the Croatian Competition Act. Specifically,, the Agency needed to ensure that this change of control would not have a negative effect on the Croatian market.
289. The Agency was required to issue its decision within a 30-day deadline from the date of receipt of the notification from MOL. During this time, the "*competitors and all other interested natural persons and legal entities*" were publicly invited to provide their opinion regarding the change of control.<sup>136</sup> The Agency did not receive any external opinion.
290. Ms Spevec explained that Deputy Prime Minister Mr [A]<sup>137</sup> contacted her sometimes between February and April 2009 to inquire about the purpose of the Agency's proceedings. Dr Sanader also contacted her and highlighted that this deal was "*about getting the gas business up on its feet*", and that it was of a "*strategic interest*" for Croatia.<sup>138</sup> Contrary to the assertion that Dr Sanader had full control over the entire process, after the Prime Minister's call, the Agency did not stop its scrutiny nor did it issue a fully positive opinion regarding the take over. In fact, Ms Spevec decided to issue a report providing a "*legal and economic analysis of the concentration*".<sup>139</sup> The report also pointed out that some remedial alterations were needed to "*reduce the*

---

<sup>135</sup> Cf. Joint Dramatis Personae.

<sup>136</sup> Olgica Spevec's WS, p. 3.

<sup>137</sup> As well as Leo Begović (State Secretary) and several lawyers.

<sup>138</sup> Olgica Spevec's WS, p. 5.

<sup>139</sup> *Ibid.*

*negative effects of the concentration on the Croatian Market*". The Agency sent this report to both Dr Sanader and Mr [A] .

291. After the Agency had rendered its decision approving INA's change of control subject to certain conditions, Dr Sanader contacted Ms Spevec and questioned the Agency's decision. Ms Spevec tried to explain the rationale behind it, but Dr Sanader stopped the conversation and demanded that she come to his office for a meeting.<sup>140</sup>
292. Dr Sanader did not attend this meeting, but Mr [A] , Mr Bacs, and a representative from MOL were all there. They were particularly worried about the delay caused by the Agency's decision, but also by the fact that, due to this decision, INA would be forced to supply gas under the same conditions as those applicable to PP. The meeting was tense but Ms Spevec stood her ground and affirmed that the Agency's decision was final. At the end of the discussion, Mr [A] briefly met with Dr Sanader in *camera*. Dr Sanader then came to see Ms Spevec and apologised for his previous behaviour.
293. After this meeting, Ms Spevec stayed in regular contact with MOL and the commissioners without any further argument. She said:
- "Also, I must note that after the resignation of Prime Minister Sanader and the arrival of Áldott as the Chairman of INA's Management Board, MOL's attitude toward the Agency has changed significantly and has become more cooperative in relation to the implementation of measures regarding the sale of Crobenz".*<sup>141</sup>
294. This episode shows two things. First, Mr [A] played a key role in the negotiations, and even though he did report his actions to the Prime Minister, it was Mr [A] who was in charge of this issue. Second, the final decision regarding INA's change of control did not only depend on Dr Sanader's influence, or even on the Government's approval.

---

<sup>140</sup> Olgica Spevec's WS, p. 9.

<sup>141</sup> Olgica Spevec's WS, p. 10.

Other independent governmental entities were involved, and despite the fact that Dr Sanader was in favour of the operation, the Agency followed its usual procedure and rendered an independent opinion on this matter.

295. It follows that the Tribunal cannot conclude that Dr Sanader's influence was decisive. Moreover, and most importantly, the [B] Government unanimously approved the take over after Dr Sanader's resignation. This obviously puts into question why MOL would have paid Dr Sanader EUR 10 million without having the firm assurance that the change of control would succeed.
296. This question remains unanswered by Croatia. The Tribunal will now look at MOL's response and assess whether on the balance of probabilities Croatia's case is persuasive.

**E. MOL's Response to Croatia's Case on Bribery**

297. MOL defence is based on two assertions. First, MOL contends that Mr Ježić was an unreliable witness whose evidence should be given no, or at the very most scant, weight. Second, MOL submits that the contracts involving [1Co] , [3Co] and [2Co] had a legitimate purpose, i.e. the lobbying in support of the D-A project.

**(a) Mr Ježić's Lack of Credibility**

**i. Mr Ježić's Personal Interest in Blaming Dr Sanader**

298. Mr Ježić's testimony is the only direct evidence that allows Croatia to contend that Mr Hernádi arranged for the payment of EUR 10 million to Dr Sanader in exchange for the signature of the FASHA and GMA. Indeed, Mr Ježić is the putative essential link between MOL and Dr Sanader. Without his testimony, the money trail gets nowhere near to Dr Sanader. For this reason, MOL spent much time questioning Mr Ježić's credibility.



299. Mr Ježić gave several statements to USKOK and to this Tribunal. USKOK based its entire investigation on Mr Ježić's testimony to such extent that MOL now questions the neutrality and impartiality of the Croatian investigation bureau. MOL strongly relies on the fact that Mr Ježić has never returned the alleged bribe money to support the inference that Mr Ježić made a deal with USKOK in exchange for his testimony against the Prime Minister. MOL's first argument is that Mr Ježić has not been charged in the INA-MOL case despite admitting having participated in a bribe.
300. Yet he has been indicted by Croatia in the HEP-[4Co] case. If there had been a deal between Mr Ježić and Croatia, one might wonder why he is still facing those proceedings. On the other hand, that case has not progressed for some time. Moreover, Mr Ježić was released and authorized to leave the country before he gave his testimony to USKOK. If USKOK had agreed to release Mr Ježić in exchange for his testimony, he would have certainly been released after and not before he testified.<sup>142</sup>
301. Croatia also emphasises the fact that the money is not actually held by Mr Ježić but by [4Co] As a matter of fact, no judgement nor any other adverse decision has ever been rendered against [4Co] in Croatia with regard to this matter.<sup>143</sup> [4Co] bank account is located in Switzerland, which makes the proceedings to recover the money more difficult. Croatia did request judicial assistance in Switzerland, but to no avail so far.
302. At this stage, it is worth going back to the chronology of events. Croatia asserts that USKOK had not started to investigate the FASHA and GMA when Mr Ježić was in prison. Hence, nobody could have whispered the bribe story to him. The chronology, however, suggests otherwise.

---

<sup>142</sup> C-200, Zagreb County Court decision re Mr Ježić.

<sup>143</sup> Croatia's Corrected Reply, para. 147.

303. The joint chronology submitted at the request of the Tribunal reveals that USKOK requested the Hungarian authorities to interview Mr Hernádi regarding the FASHA and GMA on 27 October 2010.<sup>144</sup> Mr Ježić was arrested on 9 December 2010. Then, on 7 March 2011, USKOK requested the entry and exit logs into the Prime Minister's office for Mr Ježić. This was more than a month before Mr Ježić's release.<sup>145</sup> It was only 5 days after Mr Ježić's release, namely on 26 April 2011, that USKOK requested the entry and exit logs into the Prime Minister's office for Mr Hernádi.<sup>146</sup> Croatia claims now that these two requests were related to the Podravka investigation, but it seems that USKOK was mainly focusing on investigating the FASHA and GMA at that time. Moreover, MOL pointed out that neither Dr Sanader nor Mr Ježić was involved in the Podravka case. Thus, it is unclear why USKOK would have requested the logs relating to Mr Ježić in the context of this investigation. Consequently, it appears that the documents that are now used to corroborate Mr Ježić's testimony had in fact been obtained by USKOK before he gave evidence.

**ii. Mr Ježić's Inconsistencies**

304. Considering Mr Ježić's conflict of interest in this case and the chronology of events, the veracity of his evidence must be seriously in doubt. This is further supported by the fact that Mr Ježić changed his testimony to USKOK several times. For instance, Mr Ježić said in his second statement that the point of his 26 May 2009 meeting with Dr Sanader was to give him an update regarding the payment of the bribe. However, at the Sanader trial he changed this part of his testimony and said that the only reason why he mentioned the payment was because he saw Mr Hernádi in the building.<sup>147</sup>

---

<sup>144</sup> R-083.

<sup>145</sup> C-0081, Ježić Visitor Records.

<sup>146</sup> C-0082, Hernádi Visitor Records.

<sup>147</sup> R-104, Minutes of Testimony of Robert Ježić before the Zagreb County Court (8 March 2012), para 6.

305. For the sake of clarity, the Tribunal sets out some of the most important inconsistencies in Mr Ježić's testimonies in the form of a table:<sup>148</sup>

Topics	Mr Ježić's Version	Inconsistencies
The first conversation between Mr Ježić and Dr Sanader in late 2008	In late 2008, during a meeting, Dr Sanader allegedly asked whether Mr Ježić " <i>could arrange the receipt of a larger amount of money which was supposed to be paid to [Dr Sanader]</i> ". Mr Ježić said that " <i>given that Ivo Sanader was the Prime Minister, and that his requests were always carried out without question</i> ", he replied that he " <i>was going to see what can be done and that [he] didn't think there were going to be any problems</i> ". <sup>149</sup>	Contrary to what he said to USKOK, Mr Ježić testified before this Tribunal that he did not take Dr Sanader's request seriously when he first formulated it (Examination of Robert Ježić, Transcript Day 1, 81:20-82:6).
The information he passed on to Dr Sanader after his conversation with Mr Hürlimann	Mr Ježić told USKOK that he gave Dr Sanader " <i>the information containing the name, last name and address of [Mr Hürlimann]</i> " (Statement of Robert Ježić to USKOK, para. 4 (25 May 2011) [Ex. R-103])	Mr Ježić then said before this Tribunal that he " <i>took the bank account number from [Mr Hürlimann] and [he] took this bank account number to Mr Sanader</i> " (Examination of Robert Ježić, Transcript Day 1, 90:9-11 (3 May 2015)).

<sup>148</sup> Mr Ježić did not refute his previous testimonies when he gave evidence before this Tribunal, see his cross-examination, Day 1, p. 13, line 14.

<sup>149</sup> R-103, Statement of Robert Ježić to USKOK (25 May 2011); see Examination of Robert Ježić, Transcript Day 1, 13:21-23, 75:2-13, 84:13-15 (3 May 2015).

Events prior to the 26 May meeting	<ul style="list-style-type: none"> <li>- Mr Ježić: <i>“Even prior to this [26 May 2009] meeting at the Government, Sanader would ask me whether any deposits had been made”</i><sup>150</sup></li> </ul>	<ul style="list-style-type: none"> <li>- Mr Ježić then changed his testimony: <i>“Q. had you ever before mentioned that the money had not arrived before May 26<sup>th</sup>? A. No”</i><sup>151</sup></li> </ul>
The 26 May 2009 meeting at Dr Sanader’s office	<ul style="list-style-type: none"> <li>- Mr Ježić encountered Mr Hernádi and Mr Petrović in the government building</li> <li>- Then Mr Ježić allegedly told Dr Sanader that the <i>“money has not arrived yet”</i></li> <li>- Dr Sanader called Mr Hernádi and Mr Petrović back to his office</li> </ul> <p>During this second meeting which lasted one or two minutes, Mr Ježić contended that Dr Sanader told him that Mr Hernádi explained:</p> <ul style="list-style-type: none"> <li>- The money would be paid in two instalments of EUR 5 million</li> <li>- The first payment would occur soon and the second payment would be made at the end of 2009</li> </ul>	<ul style="list-style-type: none"> <li>- In his first testimony to USKOK, Mr Ježić said that he <i>“met Zolt Hernádi and Jozo Petrović who were leaving the Government (...) they were leaving the building of the Government”</i><sup>152</sup></li> <li>- In his second statement to USKOK, Mr Ježić said that he <i>“waited for [Sanader] to see [Mr Ježić] in the lobby in front of his office, in a room that is situated in front of the room of the secretary. [He] waited for about 20 or so minutes, when Zsolt Hernádi and Jozo Petrović came from the direction of the office of Prime Minister Sanader to the room in which I was in, and we briefly greeted each other”</i>.<sup>153</sup></li> </ul>

<sup>150</sup> R-104, *ibid.*<sup>151</sup> Examination of Robert Ježić, Transcript Day 1, 3 May 2015, 124:23-125:4.<sup>152</sup> R-103, Statement of Robert Ježić to USKOK, para, 5.<sup>153</sup> Ex. R-109, Statement of Robert Ježić to USKOK, para. 6.

		<p>- Mr Ježić did not contest that USKOK might have reminded him the date and time of this meeting when he testified for the second time. <sup>154</sup></p> <p>- Mr Ježić stated that he exited Dr Sanader's office and then Mr Hernádi and Mr Petrović entered and discussed with Dr Sanader. However, Messrs Petrović, Hernádi and Sanader all stated that "<i>the conversation took place in the anteroom to Sanader's office, in plain view of one or both of Sanader's secretaries</i>".<sup>155</sup> According to Dr Sanader, Mr Ježić was actually waiting in his office during that second meeting.</p> <p>- Mr Ježić first stated at the Sanader Trial that Mr Petrović attended the second meeting. Then he said that Mr Hernádi was more likely to have attended this meeting on his own. Finally, Mr Ježić stated that he "<i>did not see Petrović or</i></p>
--	--	---

<sup>154</sup> Examination of Robert Ježić, Transcript Day 1, 3 May 2015, 126:12-22.

<sup>155</sup> MOL's Post-hearing Brief Volume II, p. 24, para. 54.

		<i>Hernádi enter the room after Sanader called Petrović to ask them both to return”.</i> <sup>156</sup>
Did Mr Ježić know that the transaction was for illegitimate services?	- During Sanader’s trial, Mr Ježić stated that: <i>“these were consultancy agreements based on which no services were provided or business activities performed; these were fictitious agreements which were concluded as a form for the payment of funds upon the request of the then Prime Minister Ivo Sanader, and which were supposed to be paid to him by MOL”.</i> <sup>157</sup>	Before this Tribunal, Mr Ježić said the complete opposite: <i>“Q. Did you consider that you were bound by these contracts against a value of €10 million? A. In any case. Yes, in all respects, yes. Q. What services were you going to perform, either as an individual and/or as [1Co] for €10 million of consideration? A. Not only me, maybe even the Prime Minister. It was possible that some activities outside Croatia would be carried out requiring certain consultancy activities that surely meet this amount of money. A. I still maintain that it was – it is a contract at arm’s length”.</i> <sup>158</sup>
The lunch at the Marcellino restaurant on 19 October 2009	- At the Sanader trial, Mr Ježić testified that he discussed the bribe with Dr Sanader during this lunch.	- Mr Ježić stated before this Tribunal that the bribe was not discussed during that lunch:

<sup>156</sup> MOL’s Post-hearing Brief Volume II, p. 36, para. 85.<sup>157</sup> R-103, op. cit., para 4; R-109, op. cit.<sup>158</sup> Examination of Robert Ježić, Transcript Day 1, 3 May 2015, 109:18-110:20.

	<p>In particular, Dr Sanader allegedly asked him “when he could withdraw the money”.<sup>159</sup></p>	<p>“Q. Was anything said at the Marcellino about the €5 million or €10 million at stage by anyone? A. No, not as long as I was present there. Q. Why then did you mention it in your statement or in your testimony to USKOK? What was the point? A. Well, I’m also talking about it now. Nobody asked me then”.<sup>160</sup></p>
--	--	--

(b) **The D-A Project**

307. Another possible explanation for the transfer of the money has emerged from both the Hungarian and the Croatian investigations. Mr [Y] and Mr [X] testified<sup>161</sup> that in 2009 they tried to implement a prospective venture with Mr Ježić, specifically involving [2Co] and [3Co] as vehicles to promote their interest in the D-A Project. Their goal was to “connect the D-A pipeline networks in such a way that Russian oil could be shipped through Croatia to the port town at Omisalj”.<sup>162</sup> This project would have allowed a reduction of delays that were due to the high traffic on the

<sup>159</sup>R-103 *ibid.*

<sup>160</sup> Examination of Robert Ježić, Transcript Day 2, 4 May 2015, 117:13-20.

<sup>161</sup> R-274, Protocol Taken on Witness Hearing of [X] before the Hungarian Attorney General’s Office (24 November 2011); R-275, Continuous Protocol Taken on Witness Hearing of [X] before the Hungarian Attorney General’s Office (15 December 2011); R-276, Protocol Taken on Witness Hearing of Mikhail [Y] before the Hungarian Attorney General’s Office (7 December 2011); R-118, Minutes of Testimony of [X] before the Zagreb County Court (17 May 2012); R-105, Minutes of Testimony of [Y] before the Zagreb County Court (18 May 2012).

<sup>162</sup> MOL’s Rejoinder, p.106, para. 259.

Black Sea/Bosporus route. They wanted to rely on Mr Ježić's connections in the government to move their project forward. They also knew that he owned land on Omišalj through his several companies. MOL's pleadings stressed that this ownership was essential to Mr [Y] and Mr [X]

308. In 2002, several countries including Russia and Croatia "executed the Intergovernmental Agreement on Cooperation on Implementation of the Project of Integration of the D-A Oil Pipelines". MOL admitted that the project "stalled in the mid-2000s, largely due to the opposition of the Sanader Government on environmental grounds", i.e. the government issued a negative evaluation regarding the project and this led to litigation in Croatia.<sup>163</sup>
309. Whereas it is true that after a long break, the discussion between Croatia and Russia regarding the D-A project resumed in 2009,<sup>164</sup> there is no evidence that Messrs [X] and [Y] were involved. In fact, the most recent evidence of Mr [X]' involvement in the project leads back to early 2000 when he was working for Yukos, and there is no indisputable evidence that he and Mr [Y] were really in the process of implementing this project in 2009.<sup>165</sup>
310. According to Croatia, it was not necessary to lobby Croatia because the blockage came from Russia.<sup>166</sup> In early June 2009, when the agreements were signed with [1Co], Croatia had already stated to the press that it was willing to reconsider the project.<sup>167</sup>

<sup>163</sup> MOL's Rejoinder, p.107, para. 259.

<sup>164</sup> R-280.

<sup>165</sup> R-278 and R-118.

<sup>166</sup> R-270.

<sup>167</sup> [B] then Prime Minister visited Russia and expressed interest in this project to Mr Putin. Ex R-279, Nikola Bajto, Prime Minister's D, Portalnovotsi, 2 July 2010, p. 1; Ex R-285, Jagoda Marić, The Russians Are No Longer Interested in D-A, Novilist, 24 September 2011, p. 1; Ex. R-108, Jamestown Foundation Analysis (Russia and Croatia Resurrect D-A Oil Transport Scheme) (8 March 2010), p. 1.



311. On the other hand, Dr Sanader testified before this Tribunal that Russia's support was in fact much stronger. MOL therefore argues that it made more sense to lobby Croatia whose support was still uncertain. During his examination by the Tribunal, Dr Sanader explained:

*"While we were in the Opposition we were taking this project, and I personally was very much against it and I will say openly why. Not due to any economical reasons but due to political reasons, Croatia wanted to become a NATO member, and at the moment when we are fighting for our NATO membership in this western alliance where we want to become a member, and where I think that Croatia belongs to, it would really be counterproductive we would enter into huge infrastructure programme with the Russians.*

*So due to political reasons I was against this project. Then in 2006 and when I became the Prime Minister in 2003 I was against the [D-A] project."*<sup>168</sup>

312. MOL asks the Tribunal to find it possible that in 2009, Mr [X] agreed that in exchange for Mr Ježić's active lobbying, Mr [X] would pay him EUR 10 million in two instalments of EUR 5 million. This deal was set out in two contracts, one between [1Co] and [2Co], and the other one between [1Co] and [3Co]. Mr [X] admitted that neither of the contracts he signed with Mr Hürlimann actually mentioned their real purpose. However, he explained that this was because he wanted to maintain the confidentiality of the project. He also insisted on the fact that he told Mr Hürlimann that the money was not going to be used to bribe politicians.<sup>169</sup>

<sup>168</sup> Cross-examination of Dr Sanader, Day 1, p. 58, lines 12-25.

<sup>169</sup> C-0031, [Name of Non-Party Witness] Trial Testimony, p. 5.

313. After Dr Sanader's resignation and considering the lack of efforts from Mr Ježić, Mr [X] testified that he decided to terminate the agreements in December 2009. For the same reasons, he refused to pay the remaining EUR 5 million.<sup>170</sup>
314. The Tribunal notes that apart from Messrs Sanader's, [X] ' and [Y] statements and testimony to the Hungarian and Croatian authorities, nothing else supports this narrative. However, the Hungarian Attorney General, who reviewed all the evidence regarding this case, concluded that the money paid by [2Co] and [3Co] to [1Co] was indeed to "support the initiative making the [D-A] oil transmission pipeline a two-way facility, and the lobby activities (which remained unsuccessful) aiming at expanding the storage capacity for the said pipeline in the interest of the major Russian investor holding actual business interests in the said-Cyprus based companies".<sup>171</sup>
315. It is not really necessary for the Tribunal to decide whether these payments were in fact connected to the D-A project. The Tribunal's proper focus is on the issue whether Croatia has established that the payments relied upon were corrupt payments as alleged. All the Tribunal needs to say about the D-A project is that it cannot be ruled out as the reason for this payment.

#### F. Absence of Crucial Croatia's Witnesses

316. Given that Croatia's case is that the FASHA and GMA were detrimental to the interests of Croatia and that Dr Sanader was an overbearing Prime Minister who cowed his senior colleagues into agreeing with him, it is highly surprising – now that Dr Sanader has been comprehensively disgraced – that none of them has come forward to support this case. The Tribunal will consider some of them below.

---

<sup>170</sup> R-118, p. 5.

<sup>171</sup> R-009, at 2. Also see MOL's Rejoinder at para 274 to 277, pp. 113-114.

**Mr [A] , the Minister of Economy**

317. He told the Sanader trial *"I acted according to my own beliefs in the negotiations on the amendments of the Shareholders Agreement and I was not taking the easy way out by predicting what Sanader was predicting; I believe the negotiation of the agreements were protecting the interests of the Republic of Croatia"*.

318. With regard to the Veterans' Fund shares, Mr [A] told the Sanader trial *"that the Government did not have any influence over the sale of shares of the Homeland War Veterans' Fund; all the decisions regarding the same were delivered by the Funds' management board upon a proposal of the company governing the Fund. The Government was no obligated to discuss this matter"*. He also told the trial court *"The War veterans, or rather those War veterans who had a stake in this Fund, were requesting payments in cash for their stake and the Fund was at a risk of becoming insolvent. Thus, the people who were managing the Fund decided to sell the shares at a price of Kuna 2,800"*.

**Mr Šuker, Minister of Finance**

319. He told the Sanader trial *"Sanader did not previously give me instructions regarding the detachment of the gas business; we never spoke about it, aside from what I mentioned today regarding the financial aspects"*.

**Ms [B] , Deputy Prime Minister and also President of the Veterans' Fund at the relevant time**

320. She gave a statement in relation to the FAGMA wherein she said *"we have not completely given up on the acquisition of [INA's gas trading business] because we believed that this would be a good decision in the end and it was good for Croatia"*.

321. As it was also suggested that somehow Sanader used his influence (because of the bribe) to persuade Ms [B] to sell the Veterans'

Funds' shares in INA to MOL, it is even more surprising that Ms [B] was not called. It was reported in the press on 1 October 2008 "*at the Veterans Fund Board Meeting it was unanimously decided that the whole packet of INA shares that the fund owned, be sold to MOL said the Vice President of the Croatian Cabinet, [B] ... she added that there was no political pressure for the Cabinet to sell all of the 700,000 shares that the Veterans Fund owned ... the decision of the sale was proposed by the fund manager, meaning the association controlling the assets, explained [B] , and stressed the Croatian Veterans Fund is operating well*".

[M]

322. He told the trial court "*I thought about everything and voted for the decision. Therefore the decision was rendered on the basis of my deliberations and of course there had been nobody, even the former Prime Minister Sanader, who would have put pressure on me how to vote.*"

[U]

323. He told the trial court "*As for the signed Agreement, I think that it was a good Agreement, by which provisions the ROC protected its position and kept certain rights regarding the ban to MOL to sell its shares for a certain period of time, and the right of the ROC to repurchase MOL's shares*".
324. These are some of the witnesses that one would reasonably expect to support Croatia's main case, namely that Dr Sanader used his influence to push through these agreements and that this informs the bribery allegation. What these witnesses said in the Sanader trial undermines Croatia's case that Dr Sanader used his influence to make the Government enter into the FASHA and the GMA. It is regrettable

that the Tribunal has not had the opportunity to hear directly from these witnesses who were at the heart of the ratification process.

**G. Conclusions on the Allegations of Bribery**

325. As a preliminary point, the Tribunal wishes to emphasise that it appreciates the importance of this case to the Parties. It also appreciates that this case and all its component issues have engendered considerable publicity in Croatia. Both sides hold impassioned views as to what happened and why.
326. It is very important for all concerned Parties to appreciate the precise role and function of this Tribunal. No Tribunal can ascertain the absolute truth of the contested events in this case. What a Tribunal has to do is to weigh up the evidence, which has been presented to it, in accordance with applicable legal principles.
327. A party making an allegation has the onus of establishing the allegation. It may fail to establish the events in question because the evidence does not tip the scales in favour of proof. Such a finding does not necessarily mean that the event in question did not occur – only that in applying the applicable rules the evidence did not satisfy the Tribunal that it could confidently conclude that the event did in fact occur.
328. The Tribunal makes this observation to underscore the nature of the task facing the Tribunal and to ameliorate the disappointment that will be experienced by the non-prevailing party.
329. Considering what has already been said relating to Mr Ježić, the Tribunal is 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. The Tribunal will set out below a list of implausibilities in his version of events which trouble the Tribunal. However, the Tribunal has borne in mind that even an untruthful and unreliable witness occasionally gives accurate evidence. The Tribunal acknowledges that both Mr Ježić and Dr Sanader gave evidence about

events that occurred some years ago. The Tribunal is well aware of the frailties of human recollection.

***Implausibilities of the evidence of Mr Ježić***

- a) 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?
- b) Why would MOL agree to use Mr Ježić when it knew he was in dispute with INA relating to the affairs of [4Co] Why would MOL, an internationally active corporation with very large streams of income and expenditures, expose itself to the risk of Mr Ježić having knowledge of an illegal transaction which could rather easily have been arranged using more distant intermediaries who could arrange the matter for a fraction of the cost of 20% Mr Ježić "thought" or "was informed" it would cost?
- c) Why would Dr Sanader use Ježić, a Croatian citizen, when he knew that [4Co] and INA were in dispute? Why would someone in his position expose himself to the permanent leverage that Mr Ježić would have by dint of his knowledge of the secret?
- d) Why would Dr Sanader discuss a bribe in the Government offices with secretaries nearby, especially in the light of Mr Ježić's testimony that on occasions he and Dr Sanader would drive around town alone discussing various matters?<sup>172</sup>
- e) Why would he discuss the bribe in front of Mr Petrović?
- f) In light of the entry and exit logs to the Government building, Mr Ježić's version of events is simply incoherent.

---

<sup>172</sup> Robert Ježić's WS, attachment C, p. 2.

- g) Why would Dr Sanader permit the execution of the FASHA in January 2009 before any funds had been transferred and before discussion with Mr Ježić, which Mr Ježić now puts in March or April 2009?
- h) How could Mr Ježić honestly say that when Dr Sanader mentioned the Euro 10 million payment, it did not cross his mind that something unlawful was being planned? It cannot be right that Mr Ježić only tumbled onto the realisation that something was wrong when he read the rumours in the papers.
- i) Although Mr Ježić said that he mentioned the issue of a possible 20% fee this was never mentioned again and as far as the Tribunal knows, no such fee was ever paid. Why was that?
- j) Why would not Dr Sanader have asked Mr Ježić during the Milan trip why he was no longer prepared to be involved?
- k) If Mr Ježić told Dr Sanader that he wanted no more to do with this payment, why would Dr Sanader include Mr Ježić in his discussion with his brother, [N] about alternative means of receiving the money? Why give Mr Ježić a hold on [N] as well? In any event, how can it be explained why Dr Sanader would not in any event have used [N] who lives in Switzerland, in the first place -- rather than Mr Ježić?
- l) Mr Ježić has failed to repay the money to this day after having given sworn testimony to the Zagreb County Court that: *"I will transfer the money within thirty days on to (sic) the deposit account of the Zagreb County Court"*, Why?
- m) Why has Mr Ježić not been charged? Why has his passport been returned, and why has he been allowed to live undisturbed in Switzerland?

330. The Tribunal has no choice but to conclude that Mr Ježić is a witness unworthy of belief, who had a strong motive to shift the blame onto Dr Sanader. However, most unreliable witnesses sometimes tell the truth and the Tribunal might have been able to accept Mr Ježić's evidence had Croatia provided sufficient additional proof in support of his testimony. The Tribunal has carefully analysed the other evidence submitted by Croatia such as the bank statements showing years of money transfers from MOL to [3Co] and the consultancy agreements signed by [1Co], [3Co] and [2Co]. But none of these documents traces back to Dr Sanader. Mr Ježić's testimony apart, nothing that has been presented to the Tribunal in this case over the past two years has permitted a finding that, even on the balance of probabilities, the money received by [1Co] from [3Co] and [2Co] was ultimately intended for Dr Sanader rather than any other purposes.
331. Croatia stated that "*adverse inferences can be important element in corruption-related cases where, as here, there is an unexplained money trail leading back to the accused party*".<sup>173</sup> The Tribunal agrees that adverse inferences could have been drawn, had Croatia demonstrated that there was a money trail connecting MOL to Dr Sanader through several entities. In fact the money trail allegedly established by Croatia is flawed by two missing links. First, Croatia failed to prove that the source of the money received by [2Co] was indeed MOL. Second, nothing in the record allows the Tribunal to conclude that the money received by Mr Ježić was actually a bribe to Dr Sanader. Thus, the Tribunal does not even need to look at MOL's D-A defense to reject Croatia's case on corruption.
332. Croatia has laid great emphasis on the argument that the FASHA was detrimental to Croatia and can only be explained by the bribe. But this is the fallacy that led the Constitutional Court to set aside the Zagreb County Court finding. The Zagreb Court had placed too much

---

<sup>173</sup> Croatia's PHB Brief, Volume 3, Burden of Proof, p. 7, para. 217.



significance on this issue and had not properly analysed the evidence relating to the alleged bribe. As the Constitutional Court put it:

*“Any such transaction [procured through bribery] is [by definition] contrary to the interests of the Republic of Croatia.’ The Constitutional Court therefore held that it does not matter whether a contract procured through a bribe ‘is favorable, less favorable, unfavorable, extremely unfavorable, detrimental or neutral to the Republic of Croatia, strategically or otherwise,” and the trial court should not have analysed the issue.”<sup>174</sup>*

333. Having considered most carefully all of Croatia’s evidence and submissions on the bribery issue, which has been presented in a most painstaking and comprehensive way, the Tribunal has come to the confident conclusion that Croatia has failed to establish that MOL did in fact bribe Dr Sanader. Accordingly, Croatia’s case that the FASHA and GMA be rendered null and void due to the alleged bribery fails.

**H. Is the FASHA Null and Void Under Croatian Corporate Law?**

334. Croatia contends, in the alternative, that if the Tribunal were not to find the FASHA to be null by virtue of the bribery, it should nevertheless be declared null and void as a matter of Croatian corporate law.

335. INA’s corporate structure changed with the signature of the FASHA. This new structure strengthened MOL’s influence – as a majority shareholder – at three different levels. First, MOL now benefits from a simple majority of 5 seats on the 9-seat Supervisory board. Second, MOL has the right to nominate the President of the Management Board, who has a tie-breaking vote. Third, the FASHA created a new body, the Executive Board, composed of Executive Directors who are all appointed by the Management Board.

---

<sup>174</sup> R-266, Letter from Croatia’s counsel to the Tribunal, p. 2-3 (15 Sept. 2015).

336. According to the Claimant, these changes were only acceptable to Croatia on the premise that the share swap between MOL and Croatia would take place. Indeed, according to the Parties' negotiations on the so-called Bluebird project, MOL's increase of power in INA should have been balanced by Croatia taking 6,5% shares in MOL and, more importantly, obtaining the right to appoint one member of MOL's Board of Directors.<sup>175</sup> Croatia contends that but for the share swap, MOL's deal was in effect a catch-22 for Croatia. Although Croatia still owned 44.85% shares, it lost control over INA. Croatia could have made the share swap a condition precedent to the signature of the GMA, but it did not. Ultimately, the share swap never happened, and yet Croatia agreed to the GMA and even adopted the Russian formula as a basis to calculate the gas price.<sup>176</sup>
337. Croatia's position is that "*clause 7.5 of the First Amendment is unlawful also because it is not for the shareholders to decide upon the delegation of the Management Board's authority*".<sup>177</sup> The Tribunal is of the opinion that the FASHA, as an agreement between shareholders, to the extent that it purports to regulate the decision-making of the Executive Directors and Executive Board, can only be implemented through the vote of the Management Board members, which the Parties to the FASHA were expected to procure. Shareholders agreements are commonly used to regulate corporate governance when a company has several substantial shareholders but decisions as to how corporate governance will be implemented depend exclusively on the resolution of competent corporate organs and not on the will of two shareholders alone.
338. Croatia considers that the Shareholders Agreements are invalid because pursuant to article 275 para 2 of the CCA "*General assembly shall decide upon issues relating to conducting the company business*

---

<sup>175</sup> Hernádi-009, Project Bluebird, draft term sheet.

<sup>176</sup> R-163, 9 Oct. 2008, MOL proposal.

<sup>177</sup> Croatia's Reply, para. 501

*affairs only if this is requested from it on the part of the company management board*".<sup>178</sup> The Tribunal is of the opinion that this provision of the CCA regulates the competence of the General Meeting and is irrelevant to the FASHA's validity. Croatia and MOL are not themselves the general meeting, nor does that part of the FASHA relating to the Management Board, Executive Directors and the Executive Board contemplates acting through the General Meeting.

339. The simple fact that Croatia contends that it entered into a poor agreement with MOL does not suffice to conclude that the FASHA breaches Croatian law. The Tribunal needs to scrutinise the provisions of the FASHA, and the way the Parties implemented them, in INA's by-laws, in order to determine whether they respected the letter of Croatian law.
340. Croatia's position is that the FASHA is "*null ab initio because clause 7.5 provides for impermissible performance*" under articles 270, 271 and 322 Croatian Obligations Act ("COA").<sup>179</sup> The nullity of article 7.5 allegedly infects the entire agreement because it sets out the "*decisive motive for MOL to enter into the First Amendment*".<sup>180</sup>
341. Article 7.5 – the content of which was suggested by Mr Hernádi – allows MOL to increase its influence in INA. It is common ground that this provision was crucial to MOL. Indeed, the members of the Management Board are appointed by a simple majority vote of the Supervisory Board. MOL has full control over the selection process with its 5 Supervisory Board's members. In addition to this first circle of influence, MOL also indirectly controls the Executive Board members who are all nominated by the Management Board. This three-dimensional power gives an undisputable advantage to MOL, which now has either a majority or a casting vote in each decision-making body of INA.

---

<sup>178</sup> C-40, Croatian Companies Act, Art. 240, as quoted in Croatia's Reply at para. 504.

<sup>179</sup> Croatia's Reply, p. 136, para. 467.

<sup>180</sup> Reference is made to article 324 COA, Croatia's Reply, p. 137, para. 468.

342. Contemplating this result, Croatia firstly asserts that article 7.5 is impermissible because it creates a corporate governance model that breaches the mandatory provisions of Article 240 of the Croatian Companies Act (the “CCA”);<sup>181</sup> second, it gives INA’s shareholders the right to decide on certain matters that are outside of their prerogatives.

343. Article 7.5 of the FASHA reads as follows:

*“7.5. Executive Directors and Executive Board*

*7.5.1. Executive Directors, including the Chief Executive Officer, will be appointed by the Management Board and shall be responsible for day-to-day operation of each business and function (“Executive Directors”). The Management Board members shall not be Executive Directors at the same time.*

*7.5.2. The key selection criteria for the appointment of the Executive Directors shall be the relevant business expertise and knowledge. Their tasks and responsibilities will be regulated and controlled by the Management Board.*

*7.5.3. Executive Directors shall form an Executive Board. The Executive Board will be headed by the Chief Executive Officer.*

*7.5.4. The Management Board will issue the Rules of Procedure of the Executive Board, which in any case cannot hurt the fulfilment of the Management Board’s obligation with respect to the necessary prior approval of the Supervisory Board in case of*

---

<sup>181</sup> CLA-0040 and R-LEX-12.

*Reserved Matters*.<sup>182</sup>

344. According to Croatia, article 7.5 of the FASHA has two pertinent consequences. First, the Management Board members' hands are tied when it comes to INA's daily management. Indeed, as per article 7.5, the Executive Board's members are now in charge of piloting the ship, whereas, under the previous agreement, the Management Board used to take the day-to-day business decisions.
345. Second, Croatia considers that article 7.5 introduces a hierarchy among Managing Board's members with additional powers given to the President of the Management Board. This inequality of Management Board members, so it contends, breaches Croatian corporate law.
346. The Tribunal will discuss these two claims below.

**(a) Applicable Provisions and Jurisdiction of the Tribunal**

347. Before going further with the analysis of the relevant provisions and facts, it is essential to set out the applicable legal framework. The Tribunal's jurisdiction is entirely based on the relevant dispute resolution clause of the FASHA and GMA. The corporate structure of INA, on the other hand, rests upon other rules and agreements: INA's Articles of Association (Schedule 1 of the FASHA), the Rules of Procedure of the Supervisory Board and Management Board (respectively Schedule 2 and 3 of the FASHA) and the Rules of Procedure of the Executive Board, issued by the Management Board.<sup>183</sup> The so-called LODO system which regulates, inter alia, the relationship between MOL and its new subsidiary INA, is also relevant

---

<sup>182</sup> C-2, First Amendment, Clause 7.5.

<sup>183</sup> C-LEX-040.

to INA's management structure as it allegedly "*allowed MOL to circumvent the Management Board*" of INA.<sup>184</sup>

348. As far as Croatian law is concerned, Croatia relies heavily on article 240 of the CCA and articles 270, 271 and 322 of the COA.
349. While the Tribunal has no doubt as to its jurisdiction over any dispute related to or arising out of the FASHA and its attached schedules, nothing seems to support the argument that disputes between the Parties in relation to INA's Executive Board's Rules of Procedure or the LODO system could be submitted to this Tribunal. The Executive Board's Rules of Procedure have been freely decided and issued by the Management Board in accordance with article 7.5.4 of the FASHA and article 11 para. 2 of the Articles of Association, just as any other decision from the Management Board. Moreover, it appears that the Management Board's members unanimously voted in favour of the Executive Board's Rules of Procedure. It follows that Croatian members have voted in favour of these Rules. On 10 June 2009, they also voted in favour of the Management Board's Rules of Procedure. Article 11 of which relates to the Executive Board. These latter Rules of Procedure differ from the Management Board's Rules of Procedure in Schedule 3 of the FASHA.
350. The content and the implementation of these Rules of Procedure and the list of Decision-Making Authorisation for INA d.d. the so-called INA LODO, are not related to the FASHA or GMA. If a dispute arises in relation to the content or the implementation of these Rules, it should be referred to the competent court in Croatia, as it is a matter of corporate governance. The Tribunal cannot disregard the fact that the Croatian Commercial Court may have exclusive jurisdiction over any dispute arising out of these rules.

---

<sup>184</sup> Croatia's Reply, p. 83, para. 259 and exh. C-165, *Croatian government seeks greater influence in INA management*, MTI Econews (3 Jun. 2011).

351. Finally, and maybe more importantly, neither MOL nor Croatia is allowed to intervene in the Executive Board's work. This prerogative is assigned to the Management Board. Pursuant to article 274 para 1 of the CCA, "*unless otherwise provided by the law, shareholders shall exercise their rights with respect to company matters through the general meeting*". Thus, one can reasonably doubt that Croatia would, in any event, have been allowed to submit such a claim before the relevant state court, had no arbitration agreement been in place.
352. Considering the above, when ruling on this claim the Tribunal will exclusively consider the provisions of the FASHA (including the three Schedules) as well as the way the Parties to this arbitration implemented them.

**(b) MOL's Alleged Right to Veto the Management Board's Decisions**

353. After the FASHA was implemented, INA became one of MOL's subsidiaries.<sup>185</sup> On 17 August 2009, the Management Board of INA passed the List of Decision-Making Authorisation for INA d.d., *i.e.* the so-called INA-LODO.<sup>186</sup> The relationship between INA and MOL is regulated by INA-LODO, *inter alia*, section 4, under the paragraph called 'Consultation', sub-paragraph 4 of which reads as follows:

*"When consultation must be required from the Management Board of MOL Group or a competent director of the MOL Group, the body or person requesting consultation must reach an agreement with the Management Board of MOL Group or a manager from MOL Group."*

---

<sup>185</sup> For definition of control see article 1.5 under b) of the FASHA, see also section 475 para 1 of CCA which states: "(1) a controlled company shall be legally independent company over which another company (controlling company) is able to exert a controlling influence, either direct or indirect".

<sup>186</sup>C-0075.

354. Croatia argued that this provision granted a veto right to MOL's management (subject to certain limitations). Under Croatian corporate law, such interference in a company's decision-making process is clearly limited pursuant to article 496 of the CCA, which reads as follows:

*"(1) Unless a control agreement has been concluded, the controlling company shall not be allowed to exert its influence on the controlled company by instructing it to perform disadvantageous legal transactions or to perform other activities at its own expense, unless the controlling company has committed itself to compensate the damage caused to the controlled company.*

*(2) If the damage is not compensated within the current financial year, not later than at the end of the financial year in which the damage to the controlled company was caused, it shall be determined when and in what manner the said compensation shall be effectuated. The priority right in settling the claims shall be guaranteed to the controlled company."*

355. However, Mr Áldott firmly rejected the assertion that MOL used its influence on INA in the form of a formal veto right. Indeed, he testified as follows:

*"There would not, of course, be a formal veto right, for sure. (...) Don't forget that at that time in 2009 there was a lot of internal inefficiencies in the system, so the company needed to improve the quality of decision-making. So therefore the idea was to consult with people who had experience in that to get their value added to the process. And that was the formal way to achieve this."<sup>187</sup>*

---

<sup>187</sup> Cross-examination of Mr Áldott, Hearing Transcript, Day 6, p. 184 lines 1-7.



When Counsel asked Mr Áldott whether there was any procedure in place in case MOL's and INA's managements could not reach an agreement on certain issues, his answer was clear: "*At that time I don't think there was, yeah*".<sup>188</sup>

356. Despite the uncertainty regarding MOL's veto right, the Tribunal is of the view that the INA-LODO was in line with Croatian corporate law. Indeed, pursuant to article 496 of the CCA, MOL has the right to exert its influence on the conduct of INA's business. On the ground of article 496 para. 1 of the CCA, INA can refuse to perform disadvantageous legal transactions or to perform other activities at its own expense unless MOL has committed itself to compensate the damage caused to INA. Croatian corporate law even foresees the consequences that such influence could have on INA at para. 2 of article 496. Any dispute concerning such issues would quintessentially be a matter for the Croatian Court and not this Tribunal.
357. The latest version of the INA-LODO (as amended in 2014) supports the assertion that MOL had a limited right to influence INA's affairs. For instance, pursuant to article 2.2. of the 2014 INA-LODO, INA's management body must obtain a "*prior opinion*" from MOL regarding certain specified matters. However, INA's management (i) shall refuse professional opinions or recommendations from MOL's managers/bodies, if they breach the applicable laws; (ii) may refuse or revise professional opinions or recommendations from MOL's managers/bodies if they a) negatively affect INA's business results, b) could harm INA's business processes or c) are not feasible. INA's interests are thus protected in full, which complies with the letter of the CCA.

---

<sup>188</sup> Cross-examination of Mr Áldott, Hearing Transcript, Day 6, p 184 lines 12-14.

(c) **The Limitation of the Management Board's Members' Prerogatives**

358. As a preliminary point, it is essential to emphasise that after the FASHA entered into force, the Supervisory Board adopted its amended Rules of Procedure on 10 June 2009, and on the same day, the Management Board adopted its amended Rules of Procedure as well as the Executive Board's Rules of Procedure. Croatia's Experts, Prof. Baretić and Prof. Tepeš,<sup>189</sup> have spent considerable time describing INA's governance structure under these rules in their first Expert Report. However, the Tribunal notes that INA's corporate governance has been amended several times since 2009. The rules now applicable to INA's governance structure are as follows:

- Articles of Association of INA dated 5 June 2013;<sup>190</sup>
- 2014 Management Board Rules of Procedure;
- 2011 Executive Board's Rules or Procedure;
- 2014 LODO.

The previous versions of these rules provide helpful contextual background when assessing whether INA's governance fully complies with Croatian corporate law.

359. Under Article 240, 1) of the CCA,<sup>191</sup> the Management Board of a PLC company is responsible for the day-to-day management of the company. This prerogative is not transferable and must be exercised with no limitation or control from the other organs of the company.

360. Considering this formal requirement, the Tribunal needs to ascertain the exact scope of the Management Board's legal obligation. Does that provision mean that the Management Board must take each and every

---

<sup>189</sup> Prof. Baretić's and Prof. Tepeš' Expert report, from para. 179.

<sup>190</sup> C-LEX-038.

<sup>191</sup> CLA-0040.

decision for INA apart from the decisions relating to the reserved matters? This interpretation does not seem reasonable nor practicable. Rather, Croatian law requires the Management Board to enable efficient and adequate performance of the company by means of a pertinent decision process. Thus, the Management Board is allowed to empower certain tasks to middle and low-level management bodies, so long as the implementation of these tasks remains under the Management Board's control (Art. 7.5.2 of the FASHA).

361. Moreover, the structure of the company shall not deprive the Management Board of its authority, which means that it must have access to information regarding the company's activity. Its substantive role in the decision-making process cannot be denied.
362. This leads the Tribunal to look at the responsibilities that INA's new Executive Board assumed. Pursuant to article 7.5. of the FASHA, the Executive Board works under the control of the Management Board. This also results from the fact that (i) Executive Directors and the Chief Executive Director are appointed by the Management Board (Art. 7.5.1.), (ii) the Management Board determines and controls the Executive Board's work (Art. 7.5.2.), and (iii) the Management Board has issued the Rules of Procedure of the Executive Board (Art. 7.5.3.).
363. Croatia considers that article 7.5 undermines the Management Board's members' right to access information and monitor the Executive Board's work because, as a matter of fact, only the President of the Management Board is allowed to attend the Executive Board's meetings:

*"What the practice was is that the Management Board did not operate and function in the way that the law lays down, meaning it doesn't run the company. Most of that has been transferred to the Executive Board, and the LODO-based system of running the company, and the CEO's way of running the company, which*

*means that the overall situation ran counter to the Companies Act.*"<sup>192</sup>

364. However, there is a difference between the organ of a company and its other corporate bodies. Article 173 para. 4 of the CCA states that *"unless explicitly excluded by this Law the Articles of Association may regulate other matters besides those referred to in paragraph 3 of this article"*. In other words, the CCA is silent regarding the Management Board's right to create working groups. The Tribunal agrees that, under Croatian law, it is not possible to create new organs in addition to the Management Board and the Supervisory Board. But nothing prevents the Board from establishing an additional working group to assist in managing the company.
365. Moreover, pursuant to article 11 para. 2 of the Articles of Association of INA, *"the Management Board may appoint committees together with their Rules of Procedure, for the scope defined by the Management Board"*.<sup>193</sup> This was supposed to be the role of the Executive Board.
366. Mr Áldott's testimony reinforces this interpretation of the FASHA. Indeed, Mr Áldott has been President of the Management Board of INA since 2010. He gave evidence at the main hearing of his personal understanding of article 7.5 of the FASHA and how it was implemented:

*"I don't think there is voting on the Executive Board because, for sure since I was there, it was not operating like that, it was more collegial meeting when basically the executives will bring materials, it would be discussed, some comments would be given and they either decide to take the decision, to rework or to forward it to the Management Board, or further even to the Supervisory Board if the material is good. So there is no formal voting on that because anyway now is not working as a body—or a board, or something like that. You should consider it like a collegial meeting*

---

<sup>192</sup> Cross-examination of Mr Mayer, Hearing Transcript Day 2, p. 15, lines 7-14.

<sup>193</sup> C-0009 and C-LEX-038.

*of the senior management of the company, and my role there basically is to channel according to the internal rules those proposals which are going to the Management Board further to that level".*<sup>194</sup>

367. In fact, according to article 12 of the Rules of Procedure of the Executive Board dated 10 June 2009 *"the Executive Board passes preliminary resolutions and opinions on issues delegated, in accordance with Company's by-laws in effect. The resolutions or opinions of the Executive Board are passed or rendered if simple majority of the Executive Directors being present in person or by telephone agree on such"*.<sup>195</sup> It is clear that the Executive Directors' right to vote was strictly limited to issues empowered by the Management Board in accordance with INA's by-laws.

368. This interpretation is confirmed by the Executive Board's Rules of Procedure dated 13 October 2011, which now in article 12 para 1 expressly states that:

*"Based on conducted discussion/advice in the Executive Board meeting, Executive Director passes resolution and opinions on issues delegated to him/her, in cases when the Executive Board discussion/advice is required in accordance with internal acts of INA d.d."*<sup>196</sup>

369. Further, article 9 para. 5 of the 2011 Rules of Procedure reads as follows:

*"In case where resolution or other act of the Management Board is required, the Executive Director shall, after the discussion and advice obtained in the Executive Board meeting, submit the*

---

<sup>194</sup> Cross-examination of Mr Áldott's testimony, Hearing Transcript, Day 6 p. 145 lines 14-25, 146 lines 1-5.

<sup>195</sup> C-LEX-040.

<sup>196</sup> C-LEX-043.

*material to the Management Board through the President of the Management Board*".<sup>197</sup>

370. Another provision criticised by Croatia's Experts was article 9 para. 1 of the Rules of Procedure dated 10 June 2009.<sup>198</sup> It reads as follows:

*"Every Executive Director shall make proposals to the Executive Board on matters within his/her sphere of competence and responsibility highlighting where a solution or other act is required by the by-laws including the decision-making rules of the Company"*.

371. Article 9 para. 5 and 6 further specified that:

*"In case the Executive Board or the CEO does not support the proposed resolution of the Executive Directors, such resolution shall not be passed by the Executive Director, unless the proposal is referred to and approved by the Management Board. Such Referral can be made only by the President of Management Board.*

*The Executive Board may also make proposals to the President of the Management Board, who may submit such proposal to the Management Board, where resolution or other act of Management Board is required, or render resolutions in his or her competence"*.

372. On a *prima facie* basis, these provisions might seem to contradict the mandatory provisions of the CCA. However, the Parties subsequently deleted these provisions from the 2011 Executive Board's Rules of Procedure. This deletion is certainly a sign that this article did not reflect the Management Board's real intent when the rules were adopted in 2009. The Tribunal is particularly minded to give more attention to the way the rules were implemented rather than how the Management

---

<sup>197</sup> C-LEX-0043.

<sup>198</sup> Prof. Baretić's and Prof. Tepeš' Expert report, from para. 194.

Board drafted them some 7 years ago. The Tribunal has read and heard the testimony of Mr Áldott as well as some members of the Management Board, such as Mr Mayer and Mr Krešić, and is not persuaded by the assertion that the Executive Board controlled the Management Board since the signature of the FASHA.

373. The Tribunal understands that at the time article 9 was in force, i.e. before October 2011, if a resolution or an act from the Management Board was required under the CCA, the Executive Board was required to make proposals to the President of the Management Board, who had to submit such proposals to the vote of the Management Board. Pursuant to article 13 para 1 of the Rules of Procedure of the Management Board "*each member of the Management Board may from time to time make proposals to the Management Board*". On the basis of this provision, every member of the Management Board may submit proposals that were not submitted by the Executive Board and/or the President of the Management Board to the vote of the Management Board.
374. Mr Áldott also confirmed that "*Executive Directors must report to the Management Board as a collective body*"<sup>199</sup> as opposed to individual Management Board's member. Also, whereas members of the Management Board were not allowed to request documents and data from the Executive Board, the Management Board, as a collective body, had the right to request any kind of documents it found pertinent.<sup>200</sup>
375. The Executive Board was subordinated to and controlled by the Management Board and – as INA's second level management – it was authorized to give binding directives from the Management Board. The Tribunal is of the opinion that it is the responsibility of the Management

---

<sup>199</sup> Zoltan Áldott's WS, para. 13.

<sup>200</sup> As to the Management Board members' right to be informed, see article 7 para 3 of the Rules of Procedure of the Executive Board (2009 and 2011); Article 16 para 1 of the Rules (2009) and article 16 para 1 of the Rules (2011).

Board to decide which specific authorities will be delegated to the Executive Directors in accordance with Croatian law. It is in line with the Management Board's position, which according to article 7.5.2 of the FASHA regulates and controls "*tasks and responsibilities*" of the Executive Directors. Pursuant to article 7 para 3 of the Rules of Procedure of the Executive Board dated 10 June 2009 "*the Chief Executive Officer shall take-over and directly handle all operational, executive matters from President of the Management Board to the extent such matters haven't been reserved by the Management Board or the President of the Management Board.*"

376. The Tribunal concludes from the above that the Executive Board's Rules of Procedure fully complied with the mandatory provisions of the CCA.
377. The Parties have debated another issue related to the Executive Board's role in INA, namely the regularity of the Powers of Attorney unanimously granted by INA's Management Board to all Executive Directors on 19 June 2009.<sup>201</sup>

These Powers of Attorney were granted pursuant to articles 55 and 56 of the CCA, which read as follows:

*"COMMERCIAL POWER OF ATTORNEY*

*Definition of Commercial Power of Attorney*

*Article 55*

*(1) A holder of a commercial power of attorney is an employee of a company, or some other person authorized by the merchant to run whole or part of his undertaking.*

*(2) The commercial power of attorney shall be granted in writing.*

---

<sup>201</sup> C-0215, INA Trade Power of Attorney.



*Authorities from Commercial Power of Attorney*

*Article 56*

- (1) *A holder of commercial power of attorney shall be authorized to conclude all contracts and undertake all legal acts that are either customary in the management of the undertaking or of that particular part of the undertaking to which his power of attorney relates, or are required for such purpose.*
- (2) *Without a special authorization a holder of commercial power of attorney shall not alienate or encumber immovable property of his principal, put him under any obligation by means of a bill of exchange or check transactions, undertake any obligation following from the guarantee, take a loan for him, arrange the jurisdiction of an arbitration court, negotiate or initiate a court procedure.*
- (3) *Restrictions of authority of a holder of commercial power of attorney, except for these referred to in the preceding paragraph, shall have no effect on the third parties who neither knew nor ought to have known about them.*
- (4) *Restriction referred to in Article 49 shall also apply to the holder of commercial power of attorney.*
- (5) *Without explicit authorization of the principal, a holder of commercial power of attorney shall not transfer to another person authority from his power of attorney."*

378. Article 19 para. 2 of INA's Articles of Association is in line with Croatian corporate law and reads as follows:

*"The members of the Management Board may, within their authority to represent defined in Article 18, authorise one or more persons for entering into particular types of agreements or for taking legal actions."*

379. The Tribunal now needs to look at the wording of the Powers of Attorney, in order to ascertain whether these documents are in compliance with Croatian law. They read as follows:

*"POWER OF ATTORNEY*

*Which authorizes,*

*For managing daily activities, job management, execution of tasks and commitments as defined by by-laws of INA - Industrija nafte d.d. and upon Management Board's order and for signing decisions, contracts, Company's by-laws and submitting of the same to public notary's verification, as well as undertaking all other legal activities that usually belong to daily business activities and activities from the assigned Company's business division/function, the following Attorneys-in-fact:*

*An Attorney-in-fact has the right to sign together with one more Attorney-in-fact from this Power of Attorney.*

*An Attorney-in-fact is authorized to transfer his/her powers from this Power of Attorney to another person.*

*This Power of Attorney is valid until its withdrawal."<sup>202</sup>*

380. By granting these Powers of Attorney to the Executive Directors, the Management Board was not deprived of its authority to manage INA's business. The Power of Attorney only extends the Management Board's authority regarding INA's daily business to the Executive Directors. This extension is (1) limited to the prerogatives specified in the Power of Attorney and (2) subject to the Management Board's right to withdraw such Power.

---

<sup>202</sup> C-0215, op. cit.

381. According to Croatia "*Croatian law indeed allows companies to issue trade powers of attorney, but only to individuals, not to a group*".<sup>203</sup>
382. Croatia further contends that "*the powers of attorney granted to each executive director always require co-signature of another executive board member, which is typical for the joint acting of management board members, and requires the executive directors to work as a body, just like the management board*"<sup>204</sup> and that "*the co-signatory requirement and the powers of attorney to the executive directors, together with the rules of procedure of the executive board, mean that the delegated authority is exercised at the level of the executive board rather than individually by the holders of the powers of attorney, and this is not consistent with Croatian law*".<sup>205</sup>
383. The Tribunal does not share this opinion. The Powers of Attorney were granted to the individually nominated persons (executive directors) and not to a corporate body. Nothing prevents the Management Board from indicating in the Powers how the empowered persons should act when they represent the company. The Management Board is allowed to limit the authority of attorneys-in-fact by requiring them to act jointly when they represent the company. It is not unusual in the business practice. This is also consistent with Croatian law.
384. The above supports the position that, according to INA's by-laws, INA's Management Board, as a collective body, appears to have enjoyed the right and the power to manage INA in compliance with Croatian law. In any case, had the Management Board's members considered that they were unduly deprived of their right to manage INA, they could have submitted their claim to the Commercial Court in Zagreb, but none of them did.

---

<sup>203</sup> Counsel for Croatia, Hearing in Zurich, Day 1 p. 140 lines 20-22.

<sup>204</sup> Counsel for Croatia, Hearing in Zurich, Day 1 p. 139 lines 23-25 and p 140 lines 1-3.

<sup>205</sup> Counsel for Croatia, Hearing in Zurich, Day 1 p. 140 lines 23-25 and p. 141 lines 1-4.

(d) **Management Board's Members' Right to Information and Attendance at the Executive Board's Meetings**

385. Croatia alleges that the CCA requires each member of the Management Board to have plenary capacity to assert a right to access information and control the implementation of the Board's instructions.<sup>206</sup> Therefore, the fact that, on a *prima facie* basis, the Management Board is in charge of INA's day-to-day management does not necessarily mean that the FASHA fully complies with Croatian law.
386. Two issues have been debated at length by the Parties in their pleadings: the Management Board's members' access to information and their right to attend Executive Board's meetings. These two issues are connected and the Tribunal will discuss them jointly.
387. According to certain members of the Management Board, the fact that they were not allowed to attend the Executive Board's meetings prevented them from properly exercising their role. Mr Krešić, for instance, explained in his testimony that Croatian members of the Management Board submitted a formal request to the Management Board that members be allowed to attend the Executive Board's meeting. This request was denied by the Management Board by the means of Mr Áldott's tie-breaking vote. Mr Áldott was questioned on this issue at the main hearing and explained the following:

*"There was two or three discussions to that matter. I think immediately after they were nominated to the Management Board. I think it was in February 2011. It was just in the Management Board meeting discussed. They expressed that it would be better or good if they would get a standing invitation to the Executive Board meetings, on which there was a debate and there were no consistent views on that. Some of us, we were on the view that that would not be in line with the best operation of*

---

<sup>206</sup> Second Baretić-Tepeš' Expert Report, para. 247.

*the company under segregation of the duties among different decision levels. And later on, I think in March probably, it went to formal voting, because they made a formal proposal to that extent. What the actual wording of that was that they wanted to change the operation of that in a way that the Chief Executive always must call them, all of them, all of the members of the Management Board, to all of the meetings of the Executive Board; and to that we – three of us – basically we said we don't agree with that, we explained our opinions in the debate. At the end we did not vote positively for that, so this proposal did not get the majority required".*

388. Mr Áldott also specified that the Management Board's members were generally welcome to attend Executive Board's meeting if they wished to do so:

*"But there is no such kind of limitation as far as who can appear and who cannot appear, but invitation only goes to the standard people who are there. And I think the information, actually, on the meeting, it is normally sent in email from, but it also uploaded into the internal system of the company so that the Management Board members could also see what has been discussed from that meeting and so on. So that's how it operates".<sup>207</sup>*

389. This testimony contradicts Mr Mayer's and Mr Vandelić's recollection of INA's management structure under the FASHA:

*"(...) When I came to the Management Board, I encountered an illegal situation whereby a third body had executive powers, ran the company (...)"<sup>208</sup>*

---

<sup>207</sup> Cross-examination of Mr Áldott, Hearing Transcript, Day 6 p. 240 lines 10-25, p. 241 lines 1-9.

<sup>208</sup> Cross-examination of Mr Mayer, Hearing Transcript, Day 2, p. 18 lines 1-4.

*"In addition, in March 2011 we had a situation where people who were sitting at the Management Board of INA were not allowed to do their duty as they have been stopped of attending the meeting of the executive directors body".<sup>209</sup>*

390. Regarding the right to access information, Mr Mayer further explained that he could access documents, but had to go and sit in the office of a subordinate, i.e. an executive director, to do so. This situation was allegedly a way to discourage him from accessing information about INA's business:

*"(...) That would encroach upon my dignity, and my subordinates would be imposing limitations on me as instructed by Mr Áldott. I saw that as something that would be disgraceful. This was not professional and this was not based in law. I did not want to bring myself into a situation where I would be part of some shenanigans which are not proper (...)"<sup>210</sup>*

391. This situation, he said, gave rise to suspicion among Management Board's members:

*"(...) These data were historical data anyway; they do not pertain to the present day, they refer to history. So non-delivery to us of those pieces of information would imply that something is being covered up, and I did not want to be part of that game (...)"*

392. This issue apparently created a division between MOL's and Croatia's Management Board's members to such extent that the latter stopped trying to access information anymore. Indeed, Mr Mayer confirmed that he never actually went to one of the Executive Directors' office to review documents:

---

<sup>209</sup> Cross-examination of Mr Vandelić, Hearing Transcript, Day 2, p. 116 lines 8-17.

<sup>210</sup> Mr Mayer's testimony, Day 2 p. 44 lines 21-25, p. 45 lines 1-2.

*"I was told beforehand what the conditions would be, and I assume they would not have been much different from what I was told. I allow that there might have been some differences from what I understood at the time, but yes, the truth is I don't know".<sup>211</sup>*

393. Despite the criticism from Croatian Management Board's members, Mr Áldott did not resile from his previous position that the Executive Board was only a consultative body with no real decision-making power. He also emphasised that *"on a yearly basis, 300 to 500 proposals/decisions and so on come to the Management Board as well".<sup>212</sup>* He further stated that, apart from two cases, Executive Directors were generally appointed jointly by all members of the Management Board. This contradicts the position that MOL had a stranglehold on the Executive Board.
394. The Tribunal is of the opinion that the Management Board's members were not deprived of their right to access information pursuant to the provision of article 240 para 1 and of the first sentence of para 2 of the CCA, which means that all members of the Management Board were equal. The principle that all members of the Management Board are equal is also reflected in article 252 para 2 of the CCA, which provides that members of the Management Board are jointly and severally liable for damages caused to the company if they manage the company in violation of the standard of care of a diligent and conscientious businessman. It cannot be neutralised by any provision of the Rules of Procedure. Although this was not expressly stated in the Rules of Procedure, Management Board's members had the right to attend Executive Board's meetings. The President also had the right to invite them to attend pursuant to article 10 para. 1 of the Rules.<sup>213</sup> In so far as there is any difference in testimony the Tribunal prefers the evidence of Mr Áldott on these issues.

---

<sup>211</sup> Cross-examination of Mr Mayer, Day 2, p. 53 lines 14-24.

<sup>212</sup> Cross-examination of Mr Áldott, Day 6, p 191 lines 22-25, p. 192 lines 1-13.

<sup>213</sup> Exh. C-LEX-043.

395. The Tribunal is of the opinion that attendance of the Management Board's members at Executive Board's meetings is not subject to invitation of the Chief Executive Officer. They do not need permission or invitation to execute their rights to attend any internal meeting in INA. They are vested with this right on the ground of their position designated by the CCA. They cannot be deprived of this right by a decision of the Management Board that there will be no standing invitation to the Management Board's members to attend any meeting of the Executive Board.
396. Further, had the Management Board's members considered that they were deprived of their right to attend the Executive Board's meetings, they could have submitted their claim to the Commercial Court in Zagreb. In fact, none of them did.

**(e) The Role of the President of the Management Board**

397. Croatian corporate law provides that notwithstanding the formal equality among Management Board's members, the President of the Management Board has a special position.
398. Article 240 (2), CCA reads as follows:

*"(2) If management board consists of several persons, members of the board shall manage the business only jointly. The articles of association may provide for a different method of management, but they may not provide that, in case of different opinions among members of the management board on a particular matter, final decision may be made by a minority of members. If the voting results in a tie and the articles of association do not provide for a different way of settling the matter, the decisive vote shall be that of the chairman of the board."*

399. The President of the Management Board has a tie-breaking vote and, in practice, he communicates with other bodies of the company on behalf of the Management Board.



400. According to Croatia, the President of INA's Management Board has specific rights, which exceed the framework set out by Croatian law.

401. First, the President of the Management Board is explicitly allowed to convene Supervisory Board meetings according to article 11 para. 1 of the Supervisory Board's Rules of Procedure. Article 11 para. 1 reads as follows:

*"Each member of the Supervisory Board, as well as the President of the Management Board, can request that the president convene a meeting, provided that the member states his reasons and the purpose of it, such request can not be rejected. The president shall procure that a meeting is held within 7 days after the request for the convocation has been made.*

*(...)"*

402. This, it is said, as a matter of Croatian law allegedly violates the mandatory provisions of article 265 of the CCA, which provides that *"each member of (...) the Management Board (...) can request that the president convene a meeting (...) the Management Board can convene the meeting of the Supervisory Board (...)"*.

403. However, the Tribunal is of the opinion that article 265 para. 1 and 2 of the CCA provides a strong protection of the Management Board's members' right to request that the President of the Supervisory Board convene Supervisory Board's meetings. This mandatory provision cannot be neutralised by the Rules of Procedure. Thus, article 11 does not put Management Board's members in an unequal position; all members are provided with the same right under Croatian law. In and of itself, the fact that article 11 refers specifically to the President of the Management Board does not undermine the other members' right to request that the President of the Supervisory Board convene Supervisory Board's meeting. Only the Management Board and not its President or its individual Members can convene the Supervisory Board Meeting so all of them are in an equal position.

404. Pursuant to article 266 para 1 of the CCA, “*the meetings of the Supervisory Board shall not be attended by persons who are not its members or members of the Management Board of the company*”.
405. Second, Croatia emphasises that the President of the Management Board is the only member explicitly allowed to attend the Executive Board meetings. A meeting might even be postponed if the President of the Management Board advises that he cannot attend.
406. Mr Mayer’s testimony also supports the position that the President of the Management Board has a specific position in this regard. Indeed, he stated that the President of the Management Board and the Chief Executive Officer were actually the decision makers.
407. The Tribunal’s analysis of this matter leads it to conclude that the Management Board’s members had the opportunity to attend meetings if they wished. At least, nothing in the Rules of Procedure of the Management Board prevented them from attending, and the Rules are not in contradiction with Croatian corporate law. There is no provision in the article 11 of the Rules accepted on 10 June 2009 stating that the President of the Management Board shall be always present in the Executive Board meeting. The relevant part of Article 11 reads as follows: “*The Chief Executive Officer may invite to take part in the formal Executive Board meetings the President of the Management Board, other members of the Management Board or any other person*”. It is worth noting that the Parties to the FASHA did not make any distinction between the importance of the participation of the President and of the other members of the Management Board at the Executive Board meetings. In the Rules of procedure of the Executive Board it is stated that “*the meeting can not be held in absence of the President of the Management Board, in case he or she expressed its intention in writing to participate in such meeting in advance, but the meeting shall be postponed to the earliest practicable time.*”<sup>214</sup> These Rules are not

---

<sup>214</sup> Article 11 of the Rules accepted 10 June 2009 and article 11 para. 2 of the Rules amended on 13 October 2011.

part of the FASHA and cannot have any influence on the validity of article 7.5 of the FASHA. These Rules were unanimously accepted by the Management Board's members and not by the Parties to the FASHA.

408. This being said, the Tribunal cannot ignore that, as a matter of fact, Management Board's members were not encouraged to attend to say the least. It is clear that INA's Chief Executive Officer's and President of the Management Board's exercise of their powers exceeded the scope anticipated by Croatia when it entered into the FASHA.

(f) **Conclusions**

409. The provisions of Article 7.5 of the FASHA are not contrary to Croatian corporate law. Pursuant to the CCA, the Parties were allowed to include a provision in the FASHA regarding the creation of the Executive Board as a working group, so long as it was understood that this body was not a third corporate organ.
410. The Tribunal notes that the Executive Directors are indeed in charge of the day-to-day business. However, after analysis of INA's relevant by-laws, the Tribunal does not consider that the Management Board yielded its responsibilities to the Executive Board. To the contrary, the Management Board was entitled to – and expected to – control the work of the Executive Board.
411. The Tribunal acknowledges that, as a matter of fact, the Management Board – upon MOL's initiative – delegated more duties to the Executive Board than Croatia had expected. This created tensions between Croatia and MOL and has exacerbated this dispute. However, this issue relates to the Management Board's decisions and, more particularly, to the content and implementation of the Executive Board's Rules of Procedure. The Tribunal has already stated that its jurisdiction is limited to the FASHA and its attached schedules. Thus, the Tribunal cannot decide on whether the Executive Board's Rules of Procedure

and the so-called LODO-system led to INA's being in breach of Croatian Corporate Law.

**I. Croatia's Claim Based on Breaches of the SHA**

412. At the outset, it has to be noted that whereas this Tribunal is competent to decide whether MOL is in breach of certain provisions of the SHA, it is not for this Tribunal to comment generally on how MOL, as INA's controlling shareholder, has conducted INA's business in general. Thus it is important for the Tribunal to concentrate on the specific breaches alleged and to note that the 'best effort obligation' is not an obligation to achieve a specific result.

413. Croatia contends that MOL is in breach of some provisions of the 2003 Shareholders Agreement. Croatia's case is summarized as follows:

*"As Croatia's strategic partner and shareholder of INA, MOL was entrusted in assisting with the development and expansion of INA's business, including its crucial E&P segment, refining operations and retail strategy by favouring its own interests over its duties to INA, MOL failed to meet its contractual obligations under the SHA and the Cooperation Agreement."*

414. Croatia contends that in entering into the SHA MOL accepted a comprehensive set of obligations. Section 6.1 of the SHA defines INA's business as follows:

*"The Parties agreed that the business of INA will be the continuation and development of its activities in the spheres of exploration for and production refining and wholesale and retail of oil and gas and oil and gas products, as the case may be, and the provision of on-shore and off-shore oil field related services conducted in accordance with applicable law, the Articles of Association, this Agreement, the Cooperation Agreement, the Annual Budget and the Business Plan."*

415. Section 6.2 of the SHA provides that:

*“The Parties shall cooperate in good faith and use their best efforts to ensure that INA is able to carry on the business after completion ...”*

416. Section 9.2.16 of the SHA provides that MOL *“will comply with the terms of the Cooperation Agreement.”*

417. Thus, it is alleged that a breach of the Cooperation Agreement is considered a breach of Section 9.2.16 of the SHA.

418. The Cooperation Agreement was entered into on 17 July 2003 between INA and MOL. Its preamble clarifies that its purpose is to set out matters necessary for the achievement of INA’s strategic objectives:

*“INA has certain strategic objectives, as set out in its Business Plan which objectives are supported by the Strategic Investor. Accordingly, the Parties wished to enter into this Agreement to set out certain matters relating to the achievement of the strategic objectives.”*

419. Section 3.1 of the Co-operation Agreement replicated section 6.1 of the SHA on INA’s business and confirmed that:

*“[t]he Parties agree that the business of INA will be the continuation and development of its activities and the sphere of exploration for and production, refining and wholesale and retail of oil and gas of oil and gas products.”*

420. Section 3.2 of the Co-operation Agreement contained the same good faith obligation set out in Section 6.2 of the SHA.

421. Section 5.1 of the Co-operation Agreement contains a list of INA’s strategic objectives. Sections 5.1.2 and 5.1.3 provide some of these strategic objectives and read as follows:

*“Become a dominant regional supplier of oil and oil refined products and derivatives by enhancing its refining, wholesale and trading*

*operations and to maximize fully the comparative location and advantages of both refineries through:*

*(a) further, modernization of Rijeka and Sisak Refineries to enable them to produce products which conform to the European Union quality standards for all white products*

*(b) maintain its market share and leading position in the Croatian market and increase profitability and competitiveness of its retail network ...”*

422. Finally, Croatia relies upon clause 7.1.2 of the Co-operation Agreement which provides that MOL will:

*“Acting in good faith ... refrain from doing anything out side the ordinary course of business which is intended to interfere with or disrupt the business as defined in Section 3.1.”* (which in turn, it is alleged, mirrors Section 6.1 of the SHA).

423. Croatia contends that in addition to MOL’s general obligations of continuing INA’s business, it had further specific obligations regarding INA’s refinery operations in Rijeka and Sisak.

424. Section 9.2.14 of the SHA provide that MOL:

*“Will not ... exercise its or their voting rights or take any other action to:*

*(...)*

*(b) dispose of either the Rijeka refinery or the Sisak Refinery (...).”*

425. This obligation is further defined by Section 9.2.15 which provides that MOL:

*“Will procure that its nominated members of the Supervisory Board and the Management Board will exercise their voting rights to*

*procure that INA maintains and develops each of the Rijeka Refinery and the Sisak refinery in accordance with the Business Plan.”*

426. It is Croatia's positive case that these two provisions establish that MOL's obligation extends beyond simply voting not to dispose of these refineries, but requires MOL to exercise its contractual rights so as to ensure that these refineries are maintained and developed. Croatia also relies upon Article 4(3) of the Croatian Energy Act, which provides that oil refineries are amongst certain facilities that are of special interest to the Republic of Croatia. Article 4 in turn provides that owners of these facilities have an obligation to maintain, improve and modernize such facilities in accordance with the provisions of the Energy Strategy of the Republic of Croatia and the interests of the Republic of Croatia described in applicable laws and regulations. It is asserted that the Energy Strategy of the Republic of Croatia requires, among other things, expedited modernization of oil refinery facilities.
427. This part of Croatia's general claim is heavily dependent on the expert testimony of Mr Anthony Way. MOL's experts were Dr Pablo Spiller and David Aron.
428. Mr Way made clear in his report that he *“had been assisted in the preparation of this report by the consulting firm of Oil and Gas Consulting International LLP and its subsidiary, UK and Oil and Gas Consulting d.o.o Croatia, whom I engaged to assist me in the analysis of Croatian data”*.
429. However, Mr Way did not know that Oil and Gas Consultants were frequently consulted by the Government of Croatia and that one of the two directors of that company was a Mr Jasminko Umičević, a former manager of INA who had publically criticized MOL's management of INA. Therefore, insofar as Mr Way relied uncritically on information provided to him by Oil and Gas Consultants, the Tribunal must treat that evidence with caution. When an expert witness relies on information provided by others, the expert has a duty to verify this

information independently; it is unfair if the provider of the information is not called to give evidence and the other party has no opportunity to challenge the veracity of the statement relied upon.

430. An example of Mr Way failing to carry out independent due diligence is reflected in the part of his report where he concluded that MOL's exports to Croatia have increased. In the course of his cross-examination, he was asked for the basis of this assertion and he replied: "*No, it is only my own basis*". In fact, as can be seen from the unchallenged Aron slide 19,<sup>215</sup> MOL's exports to Croatia have declined during the period 2010 to 2014 as MOL's other exports have increased.
431. The Tribunal considered most carefully the cross-examination of Mr Way and concludes that his evidence was not persuasive. A few instances are sufficient to support this conclusion.
432. Mr Way stated that: "*The oil refining business of INA is still economic*", but in so doing only referred to Rijeka and made no mention of Sisak. This was pointed out, but Mr Way nevertheless did not provide a specific analysis of whether modernization of Sisak was economical, but instead assessed the combined effects of modernizing both Rijeka and Sisak. Accordingly, he has never concluded one way or the other whether the modernization of Sisak was economical.
433. Even taking the two refineries together, it is still not clear how Mr Way could have reached the conclusion that the combined improvement of the two refineries would be economical. Mr Way concluded that the improvement would lead to a US \$175-tonne enhancement of the refining margin. His conclusion is not sufficiently substantiated, and the same is true with respect to his projection that INA's refining margin would hold steady at this rate for the next twelve years.
434. Mr Way admitted that: "*refinery margins change from year to year and refineries get, unfortunately, rather cyclical on whether their products*

---

<sup>215</sup> David Aron's Hearing Presentation, slide 19 (20 Nov. 2015).



*are economic or not. And looking at the cycle of refinery margins is somewhat tricky.*” This statement, which seems fair, also seems inconsistent with the idea that INA’s margins would hold steady for a substantial period of time.

435. Mr Way also accepted that if his calculation were expressed in dollars per barrel, a refinery margin for Rijeka and Sisak would equal 8.97 dollars bbl. Mr Way’s projection, assuming a constant margin over a twelve-year period, would exceed the peak for the margins of European refineries in the report upon which he himself relied, which seems to have been 8.5 dollars bbl.
436. Mr Way was shown evidence that indicated that INA itself did not consider improvements to both Rijeka and Sisak to be economical. He admitted that he had not engaged with such evidence in his reports. He was asked whether the return on investment from the refinery improvements he claims would have been sufficient to cover debt repayments and increased return to shareholders, and then admitted he had not looked at the question of return to shareholders.
437. Mr Way made clear that the proposition that refinery improvements would be economical was based on two conditions. First, Croatia could give INA a substantial subsidy through a cash injection or a foregoing of dividends. However, he admitted that he did not know whether this would be permissible under EU law. His other condition was that INA could obtain a strategic partner who could provide advantageously priced crude oil to bring refining margins up. This seems to have been a matter of conjecture rather than expert evaluation.
438. Mr Way’s evidence that improvements should have been made is inconsistent with the conclusion reached by INA’s own staff and reflected in two presentations to INA’s management. A slide presented to INA’s management dated October 2011 showed that: *“investments in Sisak Refinery do not bring the expected return, concentrating Rijeka*

*Refinery was the biggest value to shareholders.*"<sup>216</sup> Further in November 2014 a presentation to INA's Supervisory Board suggested concentrating on Rijeka. On 17 December 2014, INA's Management Board after acknowledging the Report on CAPEX realisation for January - November 2014 noted that concentrating on crude processing in Rijeka was in the best commercial interests of INA.<sup>217</sup>

439. Furthermore, the INA Group Revised 2014 Plan and the 2015-2016 Outlook of 21 May 2014<sup>218</sup> stated:

*"Refinery Sisak turned into a product depot/terminal, effective 2018. Rijeka processing 2014: business plan level, 2015-2017: at least on a technical minimum capacity, from 2018: operation on a maximum processing capacity."*

INA's Supervisory Board gave prior approval to INA Group Revised 2014 Business Plan at the meeting held on 21 May 2014; two out of three representatives of Croatia voted against.<sup>219</sup> Though it cannot be seen from the files that the INA Group revised plan was later accepted by the Management Board, it demonstrates MOL's efforts to continue with investments in the Rijeka refinery.

440. It is also worth pointing out that Mr Aron told the Tribunal that: *"Refineries have been closing all over Europe."* In 2014 there had been a drop in refinery utilization: across Europe 85% in 2005 to 77% in 2014. These figures do not accord with Mr Way's expert testimony.
441. Another plank in Croatia's argument is that MOL's alleged neglect with respect to INA's refineries is substantiated by considering the decline in capital spend on INA's refineries whilst at the same time looking at increase in capital spent on other refineries under MOL's control. In

---

<sup>216</sup> DA-132, INA Presentation – INA 2011 to 2015 Strategy, slide 20 (Oct. 2011).

<sup>217</sup> See minutes from the 24th/2014 Management Board Meeting, items 3 and 35, DA-048.

<sup>218</sup> R-253, on page 6 under "Business Highlights-R&M" - Investment in Delayed Coker Unit in Rijeka Refinery.

<sup>219</sup> Annex, Aldott-042.

short, Croatia relies upon the fact that INA's downstream Capex has decreased since 2009, whilst MOL's downstream Capex has increased since 2009.

442. Croatia relies heavily on certain answers given by Mr Aron on Day 5, at Transcript page 230, lines 3 to 15, relating to INA's and MOL's upstream and downstream Capex and their reserves. From these answers they seek to draw the conclusion that MOL is somehow treating itself more favourably than the way MOL is dealing with INA. The Tribunal does not consider that the comparisons are necessarily valid nor dispositive. They fail to recognize that different circumstances face the two companies, nor do they establish a necessary causal link. The financial and economic positions of the two companies were markedly different and, thus, it is hard to argue that steps MOL took in relation to its own development would actually have been appropriate for INA. The two companies were operating in different markets and had differing financial structures.
443. Croatia states boldly; "*Capex investment in INA declined steadily since MOL took control of INA in 2009*". However, MOL pointed out that 2009 is not necessarily the correct starting point as MOL became a strategic investor in INA in 2003 and Capex in INA actually increased from that time. Further, it is not without significance that before MOL took control, INA had been planning for decreases in Capex. The Tribunal moreover observes that INA's ability to meet Capex's requirements already planned was assisted by inter-company loans from MOL.
444. INA had substantial loan facilities and banks were more concerned at ensuring repayment than seeing INA spending more on Capex.<sup>220</sup>
445. Insofar as Croatia's claim is based on a breach of a best endeavours obligation, it is important to bear in mind that, absent other provisions, that obligation is not the same as an obligation to achieve a stated

---

<sup>220</sup> PTS-067, INA 2008-2012 Business Plan and PTS-068, INA 2009-2013 Business Plan.

objective. Had that been the Parties' agreement, it would have so specified.

446. The Tribunal is satisfied on the evidence it has seen and heard that INA, under MOL's management, did make improvements to its refineries, calculated to maximize INA's returns. The reasons why INA made some improvements to refineries, but declined to make others, are explained by Mr Áldott who told this Tribunal in his second witness statement:

*"INA's management is responsible to act in the best commercial interest of INA, and not according to the wishes of one shareholder to increase investments without any return expectations. And that is what MOL's delegates have done. Some goals that were defined in 2003 and could be pursued, were pursued. One example is the hydrocracker investment in Rijeka refinery. Other goals (e.g. residue upgrade in Rijeka), which made sense and still make sense under certain conditions (e.g. fair and predictable taxation), were delayed by lack of permits, but are now proceeding. But there are projects that no longer make economic sense such as the development of oil refining assets in Sisak, as external and internal experts have repeatedly concluded."*

447. Mr Aron also established that even at the Sisak refinery there have been improvements made such as isomerisation and new coke chambers. Indeed, INA started a two-phase modernisation plan. Phase 1 was considered by Mr Aron as a 'stay in business' investment required by the E.U. On the other hand, phase 2 was more controversial:

*"(...) The Supervisory Board was well aware of the great difficulty in economically justifying any Phase 2 development at Sisak,*

*although it had a dilemma in that closure of the refinery was politically very difficult, if not impossible.*"<sup>221</sup>

448. There was also a debate between Mr Way and Mr Aron regarding the pertinence of phase 2. Mr Way stated that the modernisation of the Sisak refinery made economic sense, although he admitted that *"the delayed and incomplete implementation of modernisation plans (Phases 1 and 2) has, it is true, resulted in INA reducing the amount of oil it refines in order to cut losses"*.<sup>222</sup> On the contrary, Mr Aron asserted that Phase 2 carried major risks for INA and as a result did not make economic sense. In Appendix A of his Second Expert Report<sup>223</sup> Mr Way stated that investment for a coking unit in the Rijeka refinery would cost US\$ 650 million in order to increase the capacity to 4500 kt per annum. The same kind of investment in the Sisak refinery would cost US\$ 350 million in order to increase the capacity to 3090 kt per annum and would permit *"a positive (pre-tax) Net Present Value (NPV) US\$ 13 million discounted by a reasonable 10%."* He added the hypothesis that *"Croatian Government assistance in the form of beneficial tax treatment due to the projects strategic importance would increase the profitability of the modernisation of INA's refineries"*. This led to the question as to whether this governmental support would have been in compliance with European law. Mr Aron asserted that a US\$ 1 billion capital investment in the project could have led to a positive return pre-tax NPV of only US\$ 13 million. As Mr Aron stated it was *"a very risky investment given the huge capital investment required and the very small return"*.<sup>224</sup>
449. Indeed, Mr Aron persuasively emphasised that *"Mr Way fails to take into account the value destroying impact that the Phase 2 investments at Sisak would cause and the underlying problems of operating two refineries in an over-supplied regional market."*<sup>225</sup>

---

<sup>221</sup> David Aron's Expert Report, p. 48, para. 231.

<sup>222</sup> Anthony Way's Expert Report, p. 66, para. 254.

<sup>223</sup> P. 79 paras 308 and 312.

<sup>224</sup> David Aron's Second Expert Report of 16 October 2015, para 20.

<sup>225</sup> David Aron's Expert Report, p. 50, para. 239.

450. Phase 2 of the modernisation of the refineries was suspended on 8 September 2009 by unanimous decision of all members of the INA's Management Board. The Management Board concluded that, *inter alia*, the phase 1 of the modernisation of INA's refineries should be completed. Also, the schedule for the implementation of phase 2 in Rijeka should be modified in the light of the financial status and financing capacity of INA. The overall plan for phase 2 of modernisation of the refinery in Sisak was also to be reconsidered.<sup>226</sup> On 21 September 2009, INA's Supervisory Board unanimously gave consent to INA's Management Board regarding the preparation of a detailed study on possible rescheduling of phase 2 in Rijeka and Sisak. The modernisation project was also to remain a top priority in case of a sale of Prirodni plin d.o.o. by the end of September 2009.<sup>227</sup>
451. On 29 November 2011 INA's Management Board approved the 2011-2015 Strategic Development Plan and decided:
- "Further development of refinery system with an emphasis on strengthening synergies. Investments into Rijeka refinery with special focus on residue conversion, investments into the Sisak refinery with a view of ensuring 2 million tons/year available technical capacity in the strategic period with special focus on maintenance-type and HSE investments, and investments into logistic system with special focus on pipeline connection between Rijeka and Sisak refineries".*<sup>228</sup>
452. This shows that in 2011, INA was still considering investing more in the Sisak refinery. MOL intended to make substantial efforts to implement

---

<sup>226</sup> See minutes of the Management Board's meeting held on 8 September 2009, Item 3 C-0064, R-217.

<sup>227</sup> See minutes from the Supervisory Board's meeting held on 21 September 2009, p. 5, R-241.

<sup>228</sup> See Minutes from 36<sup>th</sup> Management Board meeting held on 29 November 2011, p16-17, DA-85.

this strategy. However, the circumstances and the needs for crude oil products led to a change in this strategy.

453. According to MOL's delegate on INA's Supervisory Board, Ferenc Horváth, the modernisation of the refinery in Rijeka was still a top priority for INA and MOL. This position was stated during the Supervisory Board's meeting held on 10 May 2013.<sup>229</sup> Neither the SHA nor the Cooperation Agreement obliged MOL to proceed with the modernisation of the refineries. However, Mr Áldott stated that the delay in the modernisation of the refinery in Rijeka was not due to a lack of effort from MOL but rather to some difficulties to obtain permits. Indeed, MOL alleged that "*while the Environmental Impact Study (EIS) was submitted to the Ministry in March 2009, the permit was not received until December 2013*".<sup>230</sup> Croatia challenged this allegation.<sup>231</sup>
454. However, Croatia did not support its position with actual evidence. To the contrary, the Tribunal is of the view that MOL did make its best efforts to modernise INA's refineries as agreed in the SHA and in the Cooperation Agreement.
455. Mr Aron's analysis is supported by the Arthur Andersen report upon which INA based its 1998-2007 strategic proposal. This report acknowledged the "destroying value" of INA's refineries.<sup>232</sup> As a result, INA 1998-2007 strategic proposal went as far as proposing the closure of Sisak refinery, but the Government rejected this option.
456. In the light of the above, the Tribunal rejects Croatia's assertion that MOL breached its obligations under the SHA when managing INA's refineries.

---

<sup>229</sup> See minutes from the INA's Supervisory Board's meeting held on 10 May 2013, pp 7-8, R-242.

<sup>230</sup> MOL's Statement of Defense of 18 May 2015, para 636.

<sup>231</sup> Croatia's corrected Reply, paras 542 to 546.

<sup>232</sup> DA-42.

457. Croatia further contends that MOL has failed in its obligations to expand exploration in the Region on behalf of INA and that INA failed to meet the Strategic Objective laid out in the Co-operation Agreement regarding exploration and production.<sup>233</sup> Croatia argues that capital expenditures drastically declined from over 3 billion HRK in 2009 to nearly 1.4 billion in 2013 and consequently, INA has been depleting its own reserves at an alarming rate. According to Croatia, INA is currently behind schedule in developing certain Croatian fields, has no exploration licences due to inactivity and allowed two other licenses to expire, further decreasing INA's upstream potential. The reserve replacement ratio is a critical component to the life of an oil and gas company and INA's is extremely poor. Comparable companies to INA have managed to have much healthier reserve replacement ratio. INA used to be the only holder of exploration licenses in Croatia and this is no longer the case.
458. MOL's position is that it has not failed in its obligation to expand exploration in the Region on behalf of INA. It argues that Croatia's upstream argument relies entirely on Clause 6.2 of the SHA, whereby MOL and Croatia undertook to "*co-operate in good faith and use their best efforts to ensure that INA is able to carry on [its] Business*" as described in the Co-operation Agreement.<sup>234</sup> The basic premise that INA failed to meet its 70,000 BOED production objective is wrong. INA met that objective in 2011, when it was under MOL's control. It was projected to sustain that level of production for the next several years but this was impacted by the loss of its Syria assets due to force majeure.<sup>235</sup> Oil production in Croatia has been in constant decline over four decades.<sup>236</sup> It was Croatia's expectation that gas production would

---

<sup>233</sup> Croatia's Statement of Claim, paras 431 to 441; Croatia's Reply paras 553 to 566; Croatia's Post-hearing Brief Vol.VI paras 341 to 353.

<sup>234</sup> MOL's Post-hearing Brief, Vol. IV, para 41.

<sup>235</sup> David Aron's Expert Report, para 83.

<sup>236</sup> David Aron's Expert Report, paras 35-40.



decline and imports would increase.<sup>237</sup> In 2014, domestic production even increased for the first time in several years.<sup>238</sup> INA under MOL's control started implementing EOR projects, and these are expected to yield production increases.<sup>239</sup> Three of INA's onshore exploration licenses were revoked by the Ministry of Economy and then, even after a court ordered the licenses restored, it revoked them again on the very same grounds that the court had rejected.<sup>240</sup> Croatia's argument that INA could have produced more if it had made more aggressive use of certain EOR techniques is not substantiated. It relies on Mr Way's own impression only.

459. Croatia's claim regarding alleged breach of MOL's obligation under the SHA to expand exploration in the Region on behalf of INA is heavily dependent on the expert testimony of Mr Anthony Way. Croatia's particular contentions of breach of SHA are neither sufficiently articulated nor accompanied with relevant evidence. The only evidence is Mr Way's expert testimony, which is not convincing.
460. Mr Way states in his Second Expert Report that "*INA has not come close to a 100% reserve replacement ratio, and its successful upstream business has eroded over recent years...*".<sup>241</sup> Mr Way is of the opinion that INA's objective is to achieve 100% reserve replacement ratio, which is unrealistic because the largest companies in 2014 were only able to achieve a reserve replacement ratio of 84% and a regional company like the Romanian oil company Petrom, only achieved ratio of 42%.<sup>242</sup> INA is not a large international company.<sup>243</sup> Mr Way also

---

<sup>237</sup> Anthony Way, November 2015 Hearing Transcript, Day 5, p. 22, lines 20-25 (20 Nov. 2015); Presentation - Croatian Energy Strategy and Set Plan, DA-79.

<sup>238</sup> First Expert Report of David Aron, 80.

<sup>239</sup> David Aron's Expert Report, para 110.

<sup>240</sup> David Aron's Second Expert Report, paras 155-158.

<sup>241</sup> Anthony Way's Second Expert Report, para 43 (ii).

<sup>242</sup> David Aron at November 2015 Hearing (see Hearing Transcript, Day 5, p. 203, lines 1-5).

<sup>243</sup> Anthony Way at November 2015 Hearing, Hearing Transcript, Day 5, p. 18 line 2 (20 Nov. 2015).

states that the strategic objective of INA is to maintain hydrocarbon production at a minimum of 70,000 BOED.<sup>244</sup> He suggested *inter alia* that maintaining domestic gas production levels to avoid gas imports – i.e. obtain 70,000 barrels of oil equivalents a day – was one of the strategic objectives of INA.<sup>245</sup> Mr Way did not mention that this objective had been restored in INA's 2011-2015 Strategic Plan<sup>246</sup> with an important qualifier "*at a reasonable price*". Mr David Aron paraphrased it as "*at an economic cost*."<sup>247</sup> The same is with the objective of achieving a 100% reserve replacement ratio.<sup>248</sup> It means that it could be done only if it would be viable. Croatia did not show that it would be the case.

461. Based on what is presented by Croatia the Tribunal is not able to say that MOL failed in its best efforts obligations to expand exploration in the Region on behalf of INA.
462. Croatia also contends that MOL has breached its best efforts obligation to assist INA in maintaining its market share in Croatia as well as expanding its network into adjacent SEE markets of Albania, Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.<sup>249</sup> According to Croatia INA's share of Croatian market fell 17% between 2003 and 2012. A comparison of INA and its competitors reveals that only INA has suffered a loss of retail sales in the same period, a drop 26% in sales volume. This is in contrast to MOL, which has massively increased its retail network by more than 50% from 2006-2012, while

---

<sup>244</sup> Anthony Way's Expert Report, para. 38.

<sup>245</sup> November 2015 Hearing Transcript, Day 5, p. 19, lines 14-22; Co-Operation Agreement, Art 5 ("*to maintain its [INA's] oil and gas production at least 70 kboed of oil equivalent per annum and to achieve a one hundred per cent. (100%) reserve replacement ratio*").

<sup>246</sup> INA Strategic Plan for 2011-2015, Minutes from 36<sup>th</sup> Management Board Meeting, A-85.

<sup>247</sup> November 2015 Hearing Transcript, Day 5, p. 220, line 24 (20 Nov. 2015); Second Expert Report of David Aron, p. 84.

<sup>248</sup> *Id.*, p. 221, line 15. David Aron's Second Expert Report, p. 84.

<sup>249</sup> Croatia's Statement of Claim, paras 442-448; Croatia's Reply, paras 567-572; Croatia's Post-hearing Brief Vol. VI. Contract Claims, paras 354-360.

INA did not add a single retail site during the same period. Despite its refineries being well placed to compete, the lack of modernisation means that Croatia has been exposed to higher inflows of competing sales volumes, making it difficult to retain market share.

463. MOL's position is that INA's loss of retail market share is not the result of neglect by MOL, but transition from a government-controlled monopoly to an open market. INA's retail sales are not limited to the items produced by its own refineries. If domestic supplies were insufficient to meet demand, INA could have imported products to meet demand. INA has an active retail modernisation plan according to which in order to improve profitability the retail sites with the lowest throughput have to be closed. It has not been done due to Croatia's opposition. INA did not participate in MOL's investments in Serbia for political reasons<sup>250</sup> and INA's Management and Supervisory Board expressly consented to MOL's investment in Serbia<sup>251</sup> In Bosnia and Herzegovina, INA participates in a 50-50 joint venture with MOL. MOL's acquisition of retailer Tifon in Croatia was affirmatively allowed by Croatian competition authorities after they had prohibited INA from making the acquisition.<sup>252</sup> INA benefits from MOL's acquisition of Tifon, as MOL gave INA exclusive rights to provide refined products to Tifon.<sup>253</sup>
464. Croatia's claim is again dependent on the expert testimony of Mr Anthony Way. Croatia's particular contentions of this breach of SHA are neither sufficiently articulated nor accompanied by relevant evidences. The only evidence is Mr Way's expert testimony, which is not convincing.

---

<sup>250</sup> INA's letter of 21 Oct. 2004 to MOL, R-254.

<sup>251</sup> MOL should be permitted to undertake retail and wholesale activities in Serbia through its subsidiary INTERMOL d.o.o. David Aron's Expert Report, para. 298; DA-58 and 59.

<sup>252</sup> Letter from Croatia to MOL of 12 Apr. 207, R-259.

<sup>253</sup> Mr Anthony Way's testimony at November Hearing, Hearing Transcript, Day 5, 69:18-22 (20 Nov. 2015).

465. For example when Mr Way says that in his "*view a 26% drop in volume sales and a 17% drop in market share was larger than justified by market liberalisation. Additionally, in the case of INA, this drop would have been avoidable had the modernisation of INA's refineries allowed it to retain its competitiveness and a viable retail site growth strategy on its local retail markets.*"<sup>254</sup> By saying this Mr Way did not substantiate how much the non-modernisation of the refineries would contribute to INA's drop in volume sales and market share. Mr Aron showed in his Second Expert Report that INA's loss of retail market share is entirely consistent with loss of market share by similar state oil companies in Romania, Hungary and Slovakia under market liberalisation. The market share of Petrom in Romania dropped in 2000 by 24% and in 2014 by 25.5%. The market share of Slovnaft in Slovakia showed a reduction of 22% in 2013, MOL in Hungary in 2011 showed a reduction of 13% in 2011. On average, the market share of these three companies dropped by over 20% compared with the reduction of 16% that Mr Way has noted in Croatia.<sup>255</sup> The drop in volume sales and market share cannot be linked to the extent of refinery modernisation because INA was not obligated to only use its own refineries to supply its costumers. The products sold in the Croatian market are freely available and INA could import them. The former State-owned energy companies in central and eastern Europe held between 9 and 30% of their respective retail markets as of 2013, INA still held about 70% of its market.<sup>256</sup>
466. Based on what has been presented by Croatia the Tribunal is not able to say that MOL failed in its best efforts obligations to assist INA in maintaining its market share in Croatia as well as expanding its network into adjacent SEE markets.

---

<sup>254</sup> Anthony Way's Second Expert Report, para 295.

<sup>255</sup> David Aron's Second Expert Report, para 364.

<sup>256</sup> David Aron's testimony at November 2015 Hearing, Hearing Transcript, Day 5, p. 205, line 18; p. 206, line 15 (20 Nov. 2015).

**J. Conclusions on Claims**

467. In relation to both the corporate governance claims and the breach of the SHA, Croatia's claims fail. The Tribunal is bound to say that it doubts very much whether Croatia would have launched either of these claims as freestanding and independent claims. In effect, they were no more than makeweight claims instituted on the back of the bribery allegation.

**IX. COSTS**

468. On 1 August 2016, both Parties submitted their costs' schedules. MOL also filed a brief setting out its objections to Croatia's costs statement.
469. On 8 August 2016, MOL rectified an error and submitted a revised statement of costs.
470. On 28 August 2016, Croatia submitted its comments on the content of MOL's costs.
471. On 9 September 2016, MOL submitted its objections to the quantum of Croatia's cost claim and a response to Croatia's comments.
472. The Claimant claims a total of **USD 11,703,839.70**.
473. The Respondent claims a total of EUR 4,067,390.32; USD 8,498,597.05; GBP 5,281,781.89; CHF 254,709.30; HUF 380,192.00. In USD terms this totals **USD 19,564,786.27**.
474. Both sides claimed their costs on the hypothesis of success in this arbitration. This arbitration has been conducted under the UNCITRAL Rules. The relevant articles with regard to costs are articles 38 to 41 which states as follows;

***“Article 38***

*The arbitral tribunal shall fix the costs of arbitration in its award.*

*The term "costs" includes only:*

*(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;*

*(b) The travel and other expenses incurred by the arbitrators;*

*(c) The costs of expert advice and of other assistance required by the arbitral tribunal;*

*(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*

*(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*

*(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.*

**Article 39**

*1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.*

*2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that*

*schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.*

*3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.*

*4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.*

#### **Article 40**

*1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*

*2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*

*3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.*

*4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.*

#### **Article 41**

*1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).*

*2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.*

*3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.*

*4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.*



*5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.”*

475. There can be no doubt that MOL is the successful party. Accordingly in the exercise of the Tribunal's discretion, in accordance with generally held principle as well as the terms of article 40 of the Rules, not to mention the Parties' submissions consistent therewith, costs should follow the event.
476. The real issue thus relates to the quantum of such costs. Croatia has contended that MOL's costs are excessive and should not be allowed in full. Croatia in effect contends that MOL has over-lawyered this case and whilst entitled to spend its money as it sees fit it should not follow that Croatia should pay for such excesses. It of course refers to the disparity in total costs claimed by both sides.
477. In a normal case where experienced international legal counsel are involved one would expect the legal costs claimed by both sides to be in a similar order of magnitude. Where this is not the case a tribunal will look carefully for an explanation of the disparity.
478. In this case it is clear that MOL's legal costs exceed Croatia's legal costs by a large amount. Is there any justifiable explanation for this?
479. It is accepted by the Tribunal that the allegations against MOL as a corporate entity and against Mr Hernádi as an individual were of the greatest seriousness. He was entitled to defend the criminal charges brought against him in two jurisdictions. MOL was entitled to defend this arbitration as vigorously as it has because the consequences of an adverse ruling would likely have been of the gravest moment for MOL.
480. The Tribunal believes that there is a genuine explanation for the disparity in legal fees. In relation to the bribery allegation, Croatia's legal team had the benefit of all the investigative work done by public officials of Croatia. This clearly involved significant costs borne by its

taxpayers for which Croatia (unsurprisingly) gave no account. MOL, on the other hand, did not have the benefit of such agencies. The Tribunal intends no disrespect to Croatia's excellent legal team but they were presented with the case that USKOK made against Dr Sanader and Mr Hernádi. Accordingly they were spared a great deal of investigative work. At the outset of this arbitration Croatia rested its case on (1) Dr Sanader's upheld conviction, (2) the evidence of Mr Ježić and (3) the evidence of Mr Hürlimann.

481. What MOL's team had to do was to attempt to deconstruct this case. This took very substantial time and effort of retrieval and dissection of documents written in several languages and not always easy to obtain.

482. Accordingly the Tribunal does not consider that the large disparity in legal fees between the parties can be explained simply by over lawyering.

483. The assessment of what costs the losing party should pay is not a science any more than is the assessment of damages. As the US Supreme Court once observed;

*"...courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees ... is to do rough justice, not to achieve auditing perfection."*<sup>257</sup>

484. This Tribunal has years of experience in dealing with cases of this nature and has a feel for the items and amounts of costs that are reasonable to award. It will mention the following factors which have a significant effect on its assessment, but illustrate the impossibility of scientific exactitude.

485. The core of MOL's legal team migrated from one law firm to another at midstream. The Tribunal is considers that this was likely to create significant inefficiencies which Croatia should not have to bear.

---

<sup>257</sup> Fox v Vice, 131 S. Ct. 2205 (2011), at 2216.

486. Some of the expert evidence was unnecessary although that is easy for the Tribunal to say in hindsight. It is less apparent to a Party in the midst of a bitter dispute where neither side is willing to forego any effort, which might conceivably contribute to the success. However the Tribunal is disinclined to identify work that was “unnecessary” given the high standard which practically all contributors to the process exhibited on both sides
487. The Tribunal is satisfied that there must have been some overlap between the costs strictly incurred in this arbitration and those incurred in investigating the criminal proceedings against Mr Hernádi, which are of course closely linked to the issues in the arbitration. As an example, the Tribunal doubts that Mr Fitzgerald of Peters and Peters spent 2964 hours solely on this arbitration. This amounts to roughly 50 hours per week for 15 months. It seems far more likely that his time crossed over between the criminal and civil proceedings however hard he might have tried to separate them.
488. Similarly the costs associated with the evidence of Mr Quick must have partly related to the criminal proceedings and cannot be said to be 100% attributable to this arbitration.
489. Avoiding the temptation to take on the role of “green-eyeshade accountants” and relying on its experience and in the exercise of its discretion, the Tribunal considers that it should make the following orders in relation to costs which will reflect the points made above;
- 1) Croatia shall pay 100% of the administrative fees and other costs of the PCA as set forth in the Statement of Account to be provided by the PCA following the issuance of this Award;
  - 2) Croatia shall pay 100% of the fees and expenses of the Arbitral Tribunal as set forth in the Statement of Account to be provided by the PCA following the issuance of this Award;

3) In respect of the work provided by Mr Bärtsch from Schellenberg Wittmer regarding the proceedings in Switzerland involving Mr Hürlimann, each Party shall pay 50% of Mr Bärtsch's fees and expenses as set forth in the Statement of Account to be provided by the PCA following the issuance of this Award;

4) In respect of MOL's claim for legal representation and expert witnesses fees and expenses, claimed as follows:

a) Legal representation:

EUR 3,221,856.18;

USD 6,284,965.46;

GBP 3,016,835.22;

CHF 254,709.30

b) Expert fees and expenses

EUR 240,469.05;

USD 1,948,581.10;

GBP 2,165,926.91;

Croatia shall pay MOL 75% of the sum claimed, namely:

c) Legal representation:

EUR 2,416,392.13;

USD 4,713,724.09;

GBP 2,262,626.42;

CHF 191,032

d) Expert fees and expenses

EUR 180,352;

USD 1,461,435.8;

GBP 1,624,445.2.

5) In respect of MOL's claim for party witnesses and other party representatives, claimed in the sum of EUR 428,925.00, Croatia shall pay 100% of the sum claimed;

6) In respect of MOL's claim for other expenses, claimed in the sum of EUR 176,140.09; USD 265,050.49; GBP 99,019.76; HUF 380,192.00, Croatia shall pay 100% of the sum claimed.

## **X. DISPOSITIVE**

490. In this Arbitration between the Claimant, the Republic of Croatia, and the Respondent, MOL Hungarian Oil and Gas PLC., for the reasons appearing above and rejecting all submissions and contentions to the contrary, the Arbitral Tribunal FINDS, DECLARES, RULES, ORDERS and AWARDS that:

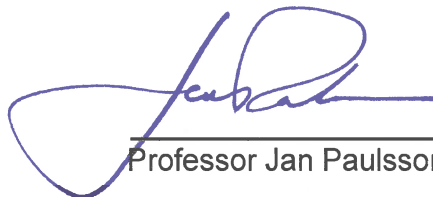
- 1) Croatia's claims based on bribery, corporate governance and MOL's alleged breaches of the 2003 Shareholders Agreement are all dismissed.
- 2) Croatia shall pay to MOL in respect of costs and expenses the sums set out in paragraph 489 of this Award.
- 3) The amounts awarded on account of costs are due as of receipt of this Award. In the absence of a request to make a determination as to the rate of interest that would run in case of non-payment, this matter is left open as a matter for the determination, if necessary and proper, of any enforcement forum, which may be seized.
- 4) After discharge by the PCA of all sums due and payable, any credits remaining in the account held by the PCA shall be returned to the Parties in equal shares in accordance with Article 41(5) of the UNCITRAL Rules.

Place of Arbitration: Geneva, Switzerland

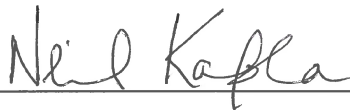
Dated this 23rd day of December 2016.



Professor Jakša Barbić



Professor Jan Paulsson



Neil Kaplan CBE QC SBS  
(Presiding Arbitrator)

**PCA CASE No. 2014-15  
IN THE MATTER OF AN ARBITRATION  
UNDER THE UNCITRAL ARBITRATION RULES 1976  
("UNCITRAL RULES")  
AND  
SHAREHOLDERS AGREEMENT RELATING TO INA-INDUSTRIJA NAFTE  
D.D DATED 17 JULY 2003 AS AMENDED ON 30 JANUARY 2009  
("SHAREHOLDERS AGREEMENT OR "SHA")**

**-between-**

**THE REPUBLIC OF CROATIA**

**(the "Claimant" or "Croatia" or "GOC")**

**-and-**

**MOL HUNGARIAN OIL AND GAS PLC.**

**(the "Respondent", "MOL", and together with the Claimant, the  
"Parties")**

---

**APPENDIX 1 – PROCEDURAL HISTORY**

---

*Tribunal*

*Neil Kaplan CBE QC SBS (Presiding Arbitrator)  
Professor Emeritus Jakša Barbić  
Professor Jan Paulsson*

*Administrative Secretary to the Tribunal  
Lucille Kanté*

*Registry  
Permanent Court of Arbitration*



DATES	PROCEDURAL FACTS
17 January 2014	The Claimant (“ <b>Croatia</b> ”) submitted its Request for Arbitration.
14 May 2014	The Respondent (“ <b>MOL</b> ”) submitted its Response.
3 June 2014	The Parties and the Tribunal signed the Tribunal’s Terms of Appointment.
5 June 2014	The Parties signed the Tribunal’s Secretary’s Terms of Appointment, by which they appointed Ms. Olga Boltenko as the Tribunal’s Secretary.
23 June 2014	The Parties and the Tribunal signed the Terms of Reference, which included, <i>inter alia</i> , an agreement that the PCA act as Registry.
30 June 2014	The Claimant served its Application for Interim Measures and Temporary Restraining Order under UNCITRAL RULES 15 and 26.
1 July 2014	The Tribunal wrote to the Parties asking the Respondent whether it would undertake not to take the steps outlined in the above mentioned Application pending the hearing on this matter on 11 August 2014.
8 July 2014	The Respondent declined to give the undertaking as suggested by the Tribunal.
9 July 2014	The Claimant requested the Tribunal to grant the Temporary Restraining Order pending the hearing on 11 August 2014 and reiterated its claim that the order sought was necessary to protect the Claimant’s interests.
9 July 2014	The Respondent denied that there were any grounds for granting the order sought, and that no urgency has been made out.
12 July 2014	The Tribunal issued its Order on Claimant’s Interim Measures Application and Temporary Restraining Order, declining to make the order sought pending the hearing on 11 August 2014.
12 July 2014	Pursuant to the Tribunal’s Order, the Respondent confirmed that it “ <i>has no objection agreeing not to take any of the steps allegedly</i>

	<i>threatened in the Application between now and 11 August 2014 without giving the Claimant and the Tribunal not less than seven (7) calendar days' notice before taking of any of these steps."</i>
23 July 2014	The Respondent served its Opposition to the Claimant's Interim Measures Application.
30 July 2014	The Claimant served its Reply in Support of the Application for Interim Measures.
6 August 2014	The Respondent served its Rejoinder to the Claimant's Interim Measures Application.
11 August 2014	The hearing of the Application for Interim Measures was held at the ICC Hearing Centre in Paris.
16 August 2014	The Tribunal issued its Decision on the Claimant's Application for Interim Measures, directing MOL as follows:  <i>"(i). That MOL must so exercise its various rights including relating to its shares in INA so as to ensure at all times that it acts in the best commercial interests of INA;</i>  <i>(ii). That MOL ensure that in the event of any sale of its shareholding in INA it will procure that the purchaser undertake that as a shareholder of INA it will stand in the shoes of MOL and therefore bear the consequence of the present Tribunal's rulings with respect to the validity of agreements relevant to shareholder relations within INA."</i>
16 August 2014	The Respondent sought clarification whether the Interim Measures Decision applied equally to both Parties.
8 September 2014	The Tribunal issued its Procedural Order No. 1 (" <b>PO No. 1</b> ").
23 October 2014	The Tribunal issued its Clarification of the Decision on the Claimant's Application for Interim Measures.
29 October 2014	The Claimant submitted its Statement of Claim along with the witness statements of:  - Branko Radošević, 18 pages.  - Damir Vandelić, 13 pages.  - Davor Mayer, 13 pages.

	<ul style="list-style-type: none"> <li>- Ivan Krešić, 18 pages.</li> <li>- Olgica Spevec, 38 pages.</li> <li>- Robert Ježić, 64 pages.</li> <li>- Stephan Hürlimann, 13 pages.</li> <li>- Vedran Duvnjak, 7 pages.</li> </ul> <p>The Claimant also presented the expert reports of:</p> <ul style="list-style-type: none"> <li>- Anthony Way; analysis of the performance of MOL's investment in INA in light of INA's strategic objectives, as set out in the Cooperation Agreement.</li> <li>- Marko Baretić and Nina Tepeš; (a) analysis of INA's governance structure under Croatian contract and company law and, (b) the legal effect of bribery on the validity of the GMA, FASHA and FAGMA under Croatian contract and company law.</li> </ul>
18 November 2014	The Claimant replaced the exhibits to the Expert Witness Statement of Marko Baretić and Nina Tepeš (the " <b>C-LEX exhibits</b> ").
26 November 2014	The Respondent requested that the Tribunal grant a four-day extension for submittal of its Request for Production of Documents due on 1 December 2014. The Tribunal granted this extension on the same day.
5 December 2014	The Respondent submitted its first Request for Production of Documents (" <b>RRPD</b> ") to the Claimant.
16 January 2015	The Respondent submitted a revised version of its first RRPD.
26 January 2015	The Claimant submitted its Objection to RRPD.
2 February 2015	The Respondent submitted its Reply to Claimant's Objection to RRPD.
4 February 2015	The Claimant submitted to the Tribunal a Redfern Schedule which set out both sides' contentions on RRPD and requested that a telephonic hearing be held with regard to the remaining disputed issues on RRPD.
11 February 2015	Following the Parties' failure to reach an agreement, the Claimant requested that the Tribunal " <i>convene a one-day hearing to</i>

	<i>address the Parties' respective positions regarding Croatia's objections to MOL's document requests."</i>
11 February 2015	The Respondent expressed its opposition to the Claimant's request, stating that PO No.1 <i>"only contemplates the submission of written arguments by the Parties concerning discovery disputes."</i>
12 February 2015	The Claimant insisted that it be allowed to express its case orally to the Tribunal.
12 February 2015	Croatia reiterated its opposition to an in-person hearing with regard to RRPD.
13 February 2015	Upon the Presiding Arbitrator's request Croatia confirmed that it was <i>"content for the Tribunal to rule on the disputed document requests on the basis of the submissions to date."</i>
23 February 2015	The Tribunal issued its First Order on the RRPD (" <b>First Order RRPD</b> ").
24 February 2015	The Claimant requested the Tribunal for an additional 21-day period for the production of the responsive documents. The Claimant further requested the Respondent to explicitly confirm the confidentiality of the documents to be produced by Croatia.
25 February 2015	The Tribunal granted the Claimant's request for additional 21 days period for the production of documents.
26 February 2015	The Respondent confirmed that <i>"it is bound by the confidentiality terms contained in the Tribunal's Procedural Order No. 1, subject to the exceptions stated therein, and to any agreement between the parties or ruling from the UNCITRAL or ICSID Tribunals allowing for the disclosure of such documents."</i>
1 March 2015	The ICSID Tribunal declined the invitation of the Parties to attend the cross-examination of Mr. Ježić and noted that the video recording of the cross-examination may be used in the future. [MEANING – SOMETHING MISSING?]
2 March 2015	The Claimant submitted further comments on its confidentiality objections to Respondent's document production requests, noting that the Respondent <i>"has failed to confirm expressly that the documents will not be used in the impending domestic criminal prosecution of MOL CEO Zsolt Hernádi or against any third</i>

	<i>parties in pursuit of defamation claims or any other claims</i> " and invited the Respondent to amend its confirmation.
3 March 2015	The Claimant informed the Respondent that all requests for the production of documents must be directly submitted to the relevant bodies in accordance with the requirements of Croatian law.
3 March 2015	The Secretary to the Tribunal informed the Parties of her resignation and of the Presiding Arbitrator's proposal of appointing Ms. Lucille Kante as the Tribunal's Secretary.
6 March 2015	The Parties supported the proposal of appointing Ms. Lucille Kante as the Tribunal's Secretary.
11 March 2015	The Respondent wrote to the Tribunal objecting that the Claimant has withheld documents on the basis of " <i>settlement negotiation</i> ". The Respondent requested the Tribunal to direct the Claimant to comply with its disclosure obligations and refrain from further seeking to renegotiate " <i>the parties' already agreed-upon confidentiality language</i> " as set out in PO No. 1. The Respondent further brought to the attention of the Tribunal that the request for the production of documents had been properly transmitted to Claimant's Counsel in line with the common practice of transmission of documents in arbitration.
12 March 2015	The Claimant observed that settlement privilege is attached to any documents that Croatia [PROVIDED?] for the purpose of settlement negotiations with MOL at the end of 2013. The Claimant stressed the need for the Respondent to explicitly confirm that the documents produced by the Claimant will remain confidential and will not be used in other proceedings, including a pending criminal proceeding against Mr. Hernádi. The Claimant noted that the requests for documents production should be submitted to the relevant Croatian authority pursuant to the First Order RRPD.
13 March 2015	The Claimant asked the Tribunal to " <i>immediately request Croatia to take the necessary steps to produce the requested documents or issue an order directing USKOK and the State Attorney to produce the requested files to the Tribunal.</i> "
16 March 2015	The Claimant reiterated its request for the Respondent's confirmation that the documents produced by the Claimant will remain confidential.

16 March 2015	The Respondent signed the Terms of Appointment of Ms Lucille Kante as Tribunal's Secretary
17 March 2015	The Tribunal requested the Respondent to confirm that " <i>it will not use any of the produced documents in the criminal case pending against Mr. Hernádi or any other proceedings involving a third party.</i> "
17 March 2015	The Respondent confirmed that " <i>it will not use any of the produced documents in the criminal case pending against Mr. Hernádi or any other proceedings involving a third party.</i> "
17 March 2015	Following exchanges of submissions between the Parties on the issue of Mr. Ježić's cross-examination, the Tribunal informed the Parties of its decision to allow the Claimant to cross-examine Mr. Ježić in May ahead of the substantive hearing in November on the grounds that he is suffering from a medical condition that may prevent him from attending in November. The Tribunal further noted that " <i>if it is possible Mr. Ježić should be available to be cross-examined again in November. But this cross-examination will only be permitted to be based on materials not in MOL's possession at the time of the May cross-examination</i> ".
18 March 2015	The Tribunal directed the Parties to provide it with an agreed draft application to be sent to the State Attorney's Office and the USKOK regarding the Claimant's document disclosure.
19 March 2015	The Claimant signed the Terms of Appointment of Ms Lucille Kante as Tribunal's Secretary.
21 March 2015	Ms. Lucille Kante signed the Terms of Appointment of Ms Lucille Kante as Tribunal's Secretary.
23 March 2015	The Claimant submitted the Parties' joint draft application regarding the Claimant's document disclosure.
25 March 2015	The Tribunal signed the application regarding the Claimant's document disclosure. The Claimant transmitted the application to the State Attorney's Office and the USKOK.
25 March 2015	The Claimant proposed a Croatian translation of the application in order to facilitate the response from the State Attorney's Office and USKOK.
26 March 2015	The Claimant affirmed the receipt of the application by the State Attorney's Office and the USKOK.

26 March 2015	The Respondent submitted its amendments to the proposed Croatian translation of the application. The Claimant submitted the translated application with amendments and affirmed the receipt of the application by the State Attorney's Office and the USKOK.
27 March 2015	Upon the Presiding Arbitrator's request, the Claimant confirmed the availability of Mr. Ježić for the cross-examination on 3 and 4 May 2015.
7 April 2015	The President of the Tribunal circulated to the Parties the USKOK's letter authorizing and requesting the Claimant's counsel to disclose the documents.
3 and 4 May 2015	A hearing was held in Zurich for the cross-examination of Mr. Jezic.
9 May 2015	The Tribunal issued its Procedural Order No. 2 ("PO No. 2").
12 May 2015	Pursuant to Section 4.1 of PO No.1, the Respondent provided the Tribunal and the Claimant with information regarding the expert witnesses.
13 May 2015	The Claimant requested clarification from the Tribunal as to whether it deems the issues raised by MOL's experts to be sufficiently relevant and material such that that the Tribunal would like to hear from Croatia's experts on the matter.
13 May 2015	The Respondent requested the Tribunal not to issue any sort of ruling on the issue of engagement of expert witnesses until the Tribunal had heard from the Parties at the hearing scheduled for 23 and 24 June 2015.
15 May 2015	The Tribunal clarified that it would like to hear from Croatia's experts on the issues raised by MOL's experts.
18 May 2015	The Respondent submitted its Statement of Defence along with the witness statements of: <ul style="list-style-type: none"> <li>- [G] 10 pages.</li> <li>- Ilona Fodor, 38 pages.</li> <li>- Katalin Tamás, 25 pages.</li> <li>- Zalán Bács, 8 pages.</li> <li>- Zoltán Áldott, 37 pages.</li> </ul>

	<ul style="list-style-type: none"><li>- Zsolt Hernádi, 45 pages.</li></ul> <p>The Respondent also presented the expert reports of:</p> <ul style="list-style-type: none"><li>- Arend B. Vast; (a) reliability and integrity of the Croatian criminal proceedings and investigations against Ivo Sanader and Zsolt Hernádi and, (b) justiciability of the allegation that Ivo Sanader agreed to accept a bribe from MOL's CEO with reference to the civil law system employed by the Netherlands.</li><li>- David Aron; comments on the report of Anthony Way submitted by the Claimant regarding the performance of MOL's investment in INA.</li><li>- David Calvert-Smith; (a) reliability and integrity of the Croatian criminal investigation and criminal proceedings against Ivo Sanader and Zsolt Hernádi and, (b) whether the decision to uphold the conviction of Ivo Sanader was justified by the evidence presented by Croatia from the perspective of the criminal law and procedure of England and Wales.</li><li>- Pablo T. Spiller; (a) the economic rationale for the execution of the FASHA, GMA and LTGSA and, (b) comments on the report of Anthony Way submitted by the Claimant regarding the impact of MOL's financial and managerial intervention on INA's performance.</li><li>- Robert Quick; reliability and integrity of the Hungarian criminal proceedings against Zsolt Hernádi and the Croatian criminal proceedings and investigations against Ivo Sanader and Zsolt Hernádi, with reference to any additional lines of enquiry and any new evidence of the allegation that Ivo Sanader agreed to accept a bribe from Zsolt Hernádi.</li><li>- Stefan Trechsel; analysis of the Croatian criminal proceedings against Ivo Sanader from the perspective of international human rights law and standards.</li><li>- Stephen M. Schwebel; the binding authority of the Croatian judgements on the international arbitral tribunals constituted in <i>Republic of Croatia v. MOL</i> (PCA Case) and in <i>MOL v. the Republic of Croatia</i> (ICSID case).</li><li>- W. Michael Reisman; <i>res judicata</i> and the preclusive effect of the Croatian judgements on the Tribunal's standard of review regarding bribery findings.</li></ul>
--	--



	- Zvonimir Slakoper; (a) analysis of INA's governance structure under Croatian law and, (b) the legal effect of bribery on the validity of the GMA, FASHA and FAGMA under Croatian law.
22 May 2015	The Claimant submitted its first Request for Production of Documents (" <b>CRPD</b> ") to the Respondent.
23 May 2015	The Claimant submitted an amended version of its first CRPD.
12 June 2015	The Respondent produced the documents responsive to CRPD and submitted its objections to certain requests in the CRPD.
23 and 24 June 2015	The opening hearing was held at the ICC Hearing Centre in Paris.
3 July 2015	The Claimant submitted to the Tribunal its CRPD, the Respondent's objections to the CRPD and its Reply thereto.
15 July 2015	The Claimant submitted its Notice requesting the Appearance of [X] and [Y] [Y] at the Evidentiary Hearing (the "[X] [Y] Request").
27 July 2015	The Tribunal issued its First Order on the CRPD (" <b>First Order CRPD</b> ").
31 July 2015	The Claimant informed the Tribunal that the Constitutional Court of Croatia had issued a decision on 27 July 2015, overturning the Country [?] Court conviction of Mr. Ivo Sanader and the Supreme Court confirmation of the conviction (the " <b>Constitutional Court's Decision</b> ").
31 July 2015	The Respondent advised the Tribunal " <i>that MOL's letter significantly misrepresents the findings of the Croatian Constitutional Court</i> ".
14 August 2015	The Respondent submitted its Observations on the [X] [Y] Request.
14 August 2015	The Claimant submitted its Reply in Support of its Statement of Claim along with the expert reports of: <ul style="list-style-type: none"> <li>- Anthony Way; Reply to the Expert Reports of Pablo T. Spiller and David Aron.</li> <li>- Marko Baretić and Nina Tepeš; Reply to the Expert Report of Zvonimir Slakoper.</li> </ul>

	<p>- Vincent Berger; (a) analysis of the criminal proceedings against Ivo Sanader in light of Article 6 of the European Convention on Human Rights and, (b) credibility and reliability of the conclusions of Stefan Trechsel regarding the violation of Ivo Sanader's human rights.</p> <p>- Zlata Đurđević; (a) compliance with Croatian Law and the European Convention on Human and Fundamental Freedoms of the criminal proceedings against Ivo Sanader, (b) analysis of the findings of the Constitutional Court's Decision and, (c) reliability of the reports of David Calvert-Smith, Robert Quick, and Arend B. Vast.</p>
19 August 2015	The Claimant submitted its Revised Reply in Support of its Statement of Claim, amending the errors in the brief and supporting materials.
19 August 2015	The Claimant submitted its Reply in Support of Croatia's Notice.
29 August 2015	The Respondent submitted its Rejoinder to Croatia's Notice.
6 September 2015	The Respondent requested authorization from the Tribunal to issue document productions requests to Mr. Stephan Hürlimann and the law firm, Wenger & Vieli (the " <b>Respondent's Request</b> ").
7 September 2015	The Tribunal issued its Procedural Order No. 3 on Croatia's Application for the Appearance of Messrs. [X] and [Y] at the Evidentiary Hearing (" <b>PO No. 3</b> "), observing that " <i>it would be greatly assisted if Messrs [X] and [Y] but also Messrs Tóth, Petrović and Sanader were to attend the hearing in The Hague in November, in order for the Tribunal to get a complete picture of material events.</i> "
7 September 2015	The Tribunal requested an English translation of the Constitutional's Court Decision.
11 September 2015	The Claimant submitted its Opposition to the Respondent's Request regarding Mr. Hürlimann's documents.
15 September 2015	The Claimant provided an English translation of the Constitutional Court's Decision and submitted its objections to Respondent's interpretation of the Constitutional Court's findings set forth in its letter dated 31 July 2015.
16 September 2015	The Respondent submitted its Reply in support of the Respondent's Request regarding Mr. Hürlimann's documents.

18 September 2015	The Claimant requested the Tribunal to approve its proposed cover letter regarding the Tribunal's request for appearance of certain individuals at the Evidentiary Hearing, as set out in PO No. 3 (the " <b>Cover Letter</b> "). The Claimant also requested the Tribunal to direct the Respondent to file its request for safe passage for Mr. Hernádi.
18 September 2015	The Presiding Arbitrator issued the Tribunal's Request for Production of Documents to Mr Hürlimann.
19 September 2015	The Tribunal agreed with the form of the Cover Letter proposed by the Claimant.
25 September 2015	The Claimant submitted its Application to Supplement the Record of Evidence.
25 September 2015	The Secretary-General of the PCA issued the Certificate of Safe Passage in respect of Mr. Zsolt Hernádi.
25 September 2015	The Presiding Arbitrator confirmed the receipt of the Tribunal's Request for Production of Documents by Mr. Hürlimann.
2 October 2015	Following Mr. Petrović's refusal to testify, the Claimant requested the Tribunal to order the disclosure of the memoranda prepared by Mr. Petrović pursuant to his obligations under the MOL-Petrović Engagement Contract dated 19 December 2012 (" <b>Croatia's Request for Order to Produce</b> ").
6 October 2015	The Respondent submitted its objections to Croatia's Request for Order to Produce, stating, <i>inter alia</i> , that the Tribunal had already denied this request in its First Order on CRPD dated 27 July 2015. Alternatively, the Respondent offered to produce Mr. Petrović's reports to the Tribunal <i>in camera</i> , so as to allow the Tribunal to review them and decide whether a redacted version of these reports should be disclosed to the Respondent.
7 October 2015	The Claimant submitted its reply in support of Croatia's Request for Order to Produce, underscoring that the disclosure of Mr. Petrović's documents would allow Croatia to demonstrate the veracity of its allegations that MOL hired Mr Petrović " <i>to lobby for MOL's version of events about the bribe before he testified in the Sanader trial.</i> "
8 October 2015	The Respondent reiterated its objections to Croatia's Request for Order to Produce and repeated its offer to submit the reports to the Tribunal's review <i>in camera</i> .

14 October 2015	The Tribunal issued its Procedural Order No. 4 on Croatia's Request for Order to Produce (" <b>PO No. 4</b> "), ordering MOL to produce to the Tribunal the activity reports prepared by Mr. Petrović.
15 October 2015	Mr. Hürlimann informed the Presiding Arbitrator of its refusal to provide the documents identified in the request dated 18 September 2015 and its refusal to appear at the Evidentiary Hearing.
16 October 2015	<p>The Respondent submitted its Rejoinder along with the witness statements of:</p> <ul style="list-style-type: none"> <li>- Ferenc Horváth, 14 pages.</li> <li>- Ilona Fodor, 10 pages.</li> <li>- Zalán Bács, 5 pages.</li> <li>- Zoltán Áldott, 5 pages.</li> <li>- Zsolt Hernádi, 16 pages.</li> </ul> <p>The Respondent also presented the expert reports of:</p> <ul style="list-style-type: none"> <li>- Arend B. Vast; analysis of the developments in the criminal proceedings and investigations against Ivo Sanader and Zsolt Hernádi with reference to (a) the cross-examination of Robert Ježić and, (b) the expert evidence served by Croatia.</li> <li>- David Aron; Reply to the Second Expert Report of Anthony Way.</li> <li>- David Calvert-Smith; analysis of the developments in the criminal proceedings and investigations against Ivo Sanader and Zsolt Hernádi with reference to (a) the cross-examination of Robert Ježić, (b) the expert evidence served by Croatia and, (c) any documents which were not available or not reviewed for the purposes of its First Expert Report.</li> <li>- Ivica Crnić; (a) legal effect of bribery on the nullity of the GMA, FASHA AND FAGMA under Croatian law and, (b) legal effect of the actions of Ivo Sanader before and during the execution of the GMA, FASHA and FAGMA on the validity of Government's decisions.</li> </ul>

	<ul style="list-style-type: none"> <li>- Pablo T. Spiller; Reply to the Second Expert Report of Anthony Way regarding the economic rationale for the execution of the FASHA, GMA and LTGSA</li> <li>- Robert Quick; analysis of the developments in the criminal proceedings and investigations against Ivo Sanader and Zsolt Hernádi with reference to (a) the cross-examination of Robert Ježić, (b) the expert evidence served by Croatia and, (c) any documents which were not available or not reviewed for the purposes of its First Expert Report.</li> <li>- Stefan Trechsel; analysis of the developments in the criminal proceedings and investigations against Ivo Sanader with reference to (a) the Constitutional Court's Decision and, (b) the expert opinions of Vincent Berger and Zlata Đurđević.</li> </ul>
19 October 2015	Pursuant to PO No. 4, the Tribunal reviewed the documents prepared by Mr. Petrović and ordered MOL to produce them to the Respondent.
20 October 2015	A prehearing conference call was held with regard to the procedural and logistical arrangements for the evidentiary hearing.
21 October 2015	The Respondent submitted its Revised Rejoinder amending the errors in the brief and supporting materials.
25 October 2015	The Claimant submitted its Application to strike the Report of Ivica Crnić from the record.
29 October 2015	The Respondent submitted its Response to Croatia's Application to Strike the Report of Ivica Crnić.
30 October 2015	The Secretary-General of the PCA issued a Revised Certificate of Safe Passage in respect of Mr. Zsolt Hernádi.
31 October 2015	The Tribunal decided to keep the Report of Ivica Crnić in the record, given that <i>"it deals with Croatian legal matters, that the experts on Croatia side would be able to comment on it, and Counsel will be able to make submissions on the legal issues involved at the appropriate time."</i>
31 October 2015	The Claimant submitted its Second Application to Supplement the Record of Evidence along with the Claimant's proposed supplementary exhibits.

2 November 2015	Following the Parties' failure to agree upon the list of issues referred to in Section 5.4 of PO No. 1, the Claimant and the Respondent submitted their separate proposed list of issues.
2 November 2015	The Parties submitted an agreed draft timetable for the evidentiary hearing.
2 November 2015	The Claimant submitted the corrected supplementary exhibits set forth in its Second Application to Supplement the Record of Evidence.
3 November 2015	Pursuant to Section 5.4 of PO No. 1, the Respondent submitted the Joint Dramatis Personae and the Joint Chronology of Events agreed by the Parties.
4 November 2015	The Respondent submitted its first Application to Supplement the Record of Evidence along with the Respondent's proposed supplementary exhibits.
4 November 2015	<p>Following the Parties' late applications to supplement the record, the Tribunal invited the Parties to resolve the resulting issues in a spirit of professional cooperation and directed as follows:</p> <p><i>"...[A]ny document that has been disclosed can be added to the record unless either party provides the Tribunal immediately with a cogent reason why a specific document(s) should not be included.</i></p> <p><i>In relation to any document that is new in that it has not been previously disclosed by either party such documents may be added unless either party immediately states its objection to a specific document(s) in which case the Tribunal will rule as soon as it can. If necessary it will rule on 16 November at the opening of the hearing."</i></p>
4 November 2015	The Claimant provided its objections to Respondent's Application to Supplement the Record of Evidence on the grounds that the requirement of " <i>exceptional circumstances</i> " specified in Section 8.7 of PO No. 1 has not been met.
4 November 2015	The Respondent declined to respond to Croatia's Second Application to Supplement the Record of Evidence " <i>pending further efforts to resolve these issues in cooperation with Croatia's counsel.</i> "

11 November 2015	The Respondent submitted its amended Application to Supplement the Record of Evidence with the outstanding supplementary exhibits.
12 November 2015	The Respondent supplemented the record as per MOL's undisputed supplementary exhibits.
12 November 2015	The Respondent submitted its Comments on Claimant's Second Application to Supplement the Record, opposing to Croatia's representations set forth therein regarding Mr. Petrović's activity reports and its role in the alleged bribery scheme.
13 November 2015	The Claimant informed the Tribunal of Mr. Tóth's refusal to testify and underscored the importance of the Austrian Investigation Files, showing that " <i>MOL's employee [Z] ] was an owner of the company that paid the bribe.</i> "
13 November 2015	The Respondent submitted its Application to strike the Austrian Investigation Files submitted with Croatia's Reply from the record.
13 November 2015	Upon the Presiding Arbitrator's invitation, the Claimant submitted its response to MOL's amended Application to Supplement the Record.
16-26 November 2015	The Evidentiary Hearing was held at the Peace Palace in the Hague.
22 November 2015	The Respondent submitted its Second Application to Supplement the Record.
24 November 2015	The Tribunal ruled on the Respondent's Second Application to Supplement the Record.
27 November 2015	Following Mr. Sanader's release on bail, the Presiding Arbitrator renewed the Tribunal's request that Mr Sanader make himself available to the Tribunal for examination.
17 December 2015	Croatia submitted its Opposition to MOL's Application to strike the Austrian Investigation Files from the record.
23 December 2015	The Respondent submitted the joint Statement of Non-Contentious Facts.
18 January 2016	MOL submitted its Reply to Croatia's Opposition regarding the Application to strike the Austrian Investigation Files from the record.

18 January 2016	The Presiding Arbitrator requested the Tribunal of First Instance of Geneva to order the appearance of Mr Hürlimann before the present Arbitral Tribunal.
8 February 2015	Croatia submitted its Rejoinder on MOL's Application to strike the Austrian Investigation Files from the record.
11 February 2016	The Tribunal issued its Provisional Decision on MOL's Application regarding the Inadmissibility of the Austrian Files (" <b>Provision Decision on the Austrian Files</b> "), in which it invited the Parties to present their closing submissions on two alternative bases, namely, on the bases that the Austrian files were not admitted, or alternatively, that they were admitted.
14 February 2016	The Parties jointly submitted their respective Notice of Errata and Croatia's Notice of Interpretation Errors with respect to the transcripts of the Evidentiary Hearing.
15 February 2016	Mr. Sanader's counsel confirmed that Mr. Sanader was available to testify before the Tribunal.
17 February 2016	A procedural tele-conference was held with regard to the procedural and logistical arrangements for Dr. Sanader's examination.
24 February 2016	The Tribunal of First Instance of Geneva ordered the appearance of Mr. Hürlimann before the Arbitral Tribunal in the present case.
26 February 2016	Mr. Petrović's counsel confirmed that Mr. Petrović was available to testify before the Tribunal.
15 March 2016	The Respondent submitted its Third Application to Supplement the Record.
16 March 2016	Croatia submitted its Objection to the Respondent's Third Application to Supplement the Record.
17 March 2016	The Respondent submitted its Reply to Croatia's Objection to the Respondent's Third Application to Supplement the Record.
21 March 2016	Upon the Presiding Arbitrator's invitation, Croatia filed its Rejoinder on the Respondent's Third Application to Supplement the Record.
26 March 2016	The Tribunal ruled on the Respondent's Third Application to Supplement the Record.



6 April 2016	The Parties agreed to amend Exhibit C-195 in order to include the recording of the statement that Mr. Sanader made before USKOK.
13 April 2016	The Parties reached an agreement on the admission of three additional exhibits: C-0251, C-0252 and R-348.
15 April 2016	The Parties agreed on the admission of Exhibits R-349, R-350, C-0253 and C-0256 into the record.
15-17 April 2016	The examination of Mr. Sanader and Mr. Petrović was conducted at the IDRC in London.
21 April 2016	The Tribunal directed the Parties to issue a joint press release stating, <i>inter alia</i> , that Dr. Sanader and Mr. Petrović had appeared by invitation of the Tribunal, having refused to testify for MOL.
28 April 2016	The Respondent requested an extension until 6 May 2016 for the filing of its post-hearing volume addressing Croatia's nullity claim based on the alleged bribery.
28 April 2016	The Tribunal extended the time limit for the filing of the Parties' Post-Hearing Briefs to 8am (UK time) on 3 May 2016 and granted permission to both sides, should Mr. Hürlimann give further relevant evidence, to serve additional submissions and amend their original submissions in light of any such evidence.
2 May 2016	The Claimant submitted certified translations of Exhibits C152 and C-153.
3 May 2016	The Parties submitted their Post-Hearing Briefs.
12 May 2016	The Tribunal invited the Claimant to clarify certain questions in relation to evidence discussed at paragraph 191 of Volume 2 of the Respondent's Post-Hearing Brief.
17 May 2016	The Claimant provided clarification of its submissions in response to the Tribunal's questions of 12 May 2016
18 May 2016	Mr. Hürlimann confirmed his availability to attend a hearing in Zürich on 27 May 2016
18 May 2016	The Respondent reported that confidential materials from the arbitration, namely the first witness statement of Ms. Ilona Fodor, appeared to have been disclosed in the Croatian Parliament and requested that the Tribunal order Croatia to cease the

	dissemination of confidential information; to take steps to identify the source of the leak; and to report back to the Tribunal on what it has found and what it has done pursuant to the Tribunal's order.
18 May 2016	The Claimant submitted its response to the Respondent's allegations of breach of confidentiality.
18 May 2016	The Claimant informed the Tribunal that at the hearing, Mr. Hürlimann intended to invoke his rights under Article 166(a) of the Swiss Code of Civil Procedure and refuse to answer all questions posed to him.
19 May 2016	The Tribunal invited the Parties to comment on certain questions relating to the legal consequences under Swiss law should Mr. Hürlimann refuse to answer questions put to him during the hearing.
19 May 2016	The Tribunal ordered Croatia (1) to take all necessary steps to prevent the further dissemination of material confidential to this arbitration; (2) to investigate how the Fodor statement and other confidential information became disseminated and (3) to report back to the Tribunal with its findings as soon as possible but no later than 24 May 2016.
20 May 2016	The Respondent submitted its proposed schedule for the hearing. The Tribunal invited the Parties to agree on a schedule for the hearing.
20 May 2016	The Respondent submitted an updated privilege log with respect to certain documents connected with the evidence of Mr. Robert Quick QPM.
21 May 2016	The Claimant objected to the Respondent's update to its privilege log.
23 May 2016	The Respondent submitted additional legal authorities RLA-142, RLA-143 and RLA-144.
25 May 2016	The Respondent provided comments from the firm Schellenberg on the Swiss law questions posed by the Tribunal in relation to the examination of Mr. Hürlimann and advised that Mr. Peter Burckhardt of Schellenberg would attend the hearing to answer further questions.
26 May 2016	The Respondent made submissions by e-mail concerning the admissibility of the Austrian files.
26 and 27 May 2016	A hearing was held in Zürich for the cross-examination of Mr. Stephan Hürlimann; the Parties' submissions on the admissibility of the Austrian files; and the Parties' closing submissions.

4 June 2016	The Claimant made submissions in response to the Respondent's e-mail of 26 May concerning the Austrian files.
9 June 2016	The Respondent submitted its comments in response to the Claimant's letter of 4 June 2016 concerning the Austrian files.
9 June 2016	The Tribunal reported to the Tribunal of First Instance of Geneva on Mr. Hürlimann's refusal to answer questions at the hearing on 27 May 2016.
10 and 11 June 2016	The Parties made further submissions by e-mail concerning the Austrian files.
11 June 2016	The Tribunal confirmed that submissions on the admissibility of the Austrian files were closed.
20 June 2016	The Tribunal issued its ruling, declining to grant the interim relief requested by the Respondent in respect of the Austrian files; closing the evidential and submissions phase of the arbitration save for the Parties' submissions on costs; and reserving the right to pose specific questions to the Parties on the Austrian files issue should this be necessary.
2 August 2016	The Parties filed their Statements of Costs. The Respondent filed a Brief in support of its Statement of Costs (" <b>Brief on Costs</b> ").
2 August 2016	The Claimant objected to the admissibility of the Respondent's Brief on Costs and requested that this be struck from the record.
18 August 2016	The Claimant stated that it intended to object to the quantum of the Respondent's Statement of Costs.
18 August 2016	The Tribunal ruled that the Respondent's Brief on Costs would not be admitted into the record; directed the Claimant to file its objections to the quantum of the Respondent's costs by 28 August, and directed the Respondent to file any response by 9 September 2016.
29 August 2016	The Claimant filed its comments on the quantum of the Respondent's costs.
9 September 2016	The Respondent filed its Response on Cost Submissions.

**PCA CASE No. 2014-15  
IN THE MATTER OF AN ARBITRATION  
UNDER THE UNCITRAL ARBITRATION RULES 1976  
("UNCITRAL RULES")  
AND  
SHAREHOLDERS AGREEMENT RELATING TO INA-INDUSTRIJA NAFTE D.D  
DATED 17 JULY 2003 AS AMENDED ON 30 JANUARY 2009 ("SHAREHOLDERS  
AGREEMENT OR "SHA")**

**-between-**

**THE REPUBLIC OF CROATIA**

**(the "Claimant" or "Croatia" or "GOC")**

**-and-**

**MOL HUNGARIAN OIL AND GAS PLC.**

**(the "Respondent", "MOL", and together with the Claimant, the "Parties")**

---

**APPENDIX 2 – JOINT *DRAMATIS PERSONAE***

---

*Tribunal*

*Neil Kaplan CBE QC SBS (Presiding Arbitrator)*

*Professor Emeritus Jakša Barbić*

*Professor Jan Paulsson*

*Administrative Secretary to the Tribunal*

*Lucille Kanté*

*Registry*

*Permanent Court of Arbitration*

**IN THE MATTER OF AN ARBITRATION  
UNDER THE UNCITRAL ARBITRATION RULES 1976  
("UNCITRAL RULES")  
AND  
SHAREHOLDERS AGREEMENT  
RELATING TO INA-INDUSTRIJA NAFTE D.D.  
DATED 17 JULY 2003 AS AMENDED ON 30 JANUARY 2009**

**B E T W E E N:**

**THE REPUBLIC OF CROATIA,**

*Claimant,*

- and -

**MOL HUNGARIAN OIL AND GAS PLC.,**

*Respondent.*

---

**JOINT DRAMATIS PERSONAE**

---

PCA Case No. 2014-15

*Members of the Tribunal:*

Neil Kaplan CBE QC SBS, *President*  
Professor Emeritus Jakša Barbić, *Arbitrator*  
Professor Jan Paulsson, *Arbitrator*

*Secretary of the Tribunal:*

Ms. Lucille Kante

3 November 2015

Name	Description
Zoltán Áldott	President of the Management Board of INA (Apr. 2010 – present). Current member of Executive Board of MOL. Member of the Supervisory Board of INA (Oct. 2003 – Apr. 2010).
David Aron	MOL’s industry expert. A petroleum engineer and chemical engineer with nearly 40 years of experience in the oil industry. He served as Chairman of the London Section of the Society of Petroleum Engineers (“SPE”) from 2000 to 2001 and as a member of the SPE’s Project, Facilities, and Construction Advisory Committee. In 2002, he led a World Bank-financed project on oil and gas pricing in Croatia for the Ministry of Economy.
Zalán Bács	Director at Rosatom Central Europe (Present). Executive Director for Refineries of the Management Board of INA (June – Dec. 2009). Executive Director for Finance of the Management Board of INA (Jan. 2007 – June 2009). Director of Corporate Services of the Management Board of INA (Jan. 2005 – Jan. 2007).
Mladen Bajić	State Attorney ( <i>i.e.</i> chief prosecutor) for Croatia (2002 – 2014).
Marko Baretić	Croatia’s expert on Croatian law, with expertise in civil law and consumer protection. Vice-dean of the Faculty of Law of the University of Zagreb (Oct. 2013 – present). Associate Professor at Civil Law Chair, Faculty of Law, University of Zagreb (July 2011 – present).
[E]	[Description of Non-Party Witness]
Dr. Vincent Berger	Croatia’s expert on international law and human rights. French attorney registered at the Paris Bar since 2013. A 35-year advisor to the European Court of Human Rights, serving as Jurisconsult (2006–2013) and before that, Registrar of the one of the four sections of the Court. Author of several books on human rights. His principal area of expertise is the international and European law of human rights.
Sir David Calvert-Smith	MOL’s expert on criminal law and evidence. English barrister, prosecutor and judge. Chairman of the Parole Board for England and Wales (present). Presiding Judge of the South Eastern Circuit (2006 – 2010).

Name	Description
	High Court Judge (Queen's Bench Division) (2005 – 2012). Director of Public Prosecutions (1999 – 2003). Queen's Counsel (1997).
[C]	[Description of Non-Party Witness]
Ivica Crnić	MOL's Croatian law expert. Presently in private practice. Judge of the Croatian Supreme Court (1992 – 1998, May 2005 – September 2008). Chief Judge of the Croatian Supreme Court (2001–2005). Minister of Justice, Minister without Portfolio and Minister of Administration of the Republic of Croatia (15 Apr. 1992 to 18 May 1995).
Professor Zlata Đurđević	Croatia's criminal law and human rights expert. Currently Visiting Fellow at Yale University and Senior Research Scholar at Yale Law School. Professor of Criminal Procedural Law (Department Head, 2007–2014), Human Rights Law and Criminal Law of European Union, School of Law, University of Zagreb.
Vedran Duvnjak	Member of the Government Commission that negotiated the amendments to the 2003 INA Shareholders Agreement with MOL. Appointed as President of the Croatian Privatization Fund (18 Feb. 2008). Former assistant to the Croatian Minister of Finance, in the Financial Systems Department, Insurance Unit. (Nov. 2006 – Feb. 2008).
Tomislav Dragičević	President of the Management Board of INA (March 2000 – June 2009).
[X]	[Description of Non-Party Witness]
Ilona Fodor	MOL employee (Sep. 1997 – Mar. 2015). MOL's Public Affairs Senior Expert (Mar. 2012 – Mar. 2015). Held various positions in MOL's M&A department (May 2000 – Feb. 2012). Participated in the negotiation of the FASHA and the GMA (2008 – 2009). Assisted with drafting of the FAGMA (2009). Participated in MOL's bid to become INA's Strategic Investor (2002 – 2003). Participated in the negotiation of the SHA (2003).

Name	Description
Abel Galacz	MOL Vice-President for Corporate Development. Former Supply and Sales Senior Vice President of MOL.
Mikhail [Y]	[Description of Non-Party Witness]
Ferenc Gyurcsány	Prime Minister of Hungary (29 Sep. 2004 – 14 Apr. 2009).
[H]	[Description of Non-Party Witness]
[F]	[Description of Non-Party Witness]
Branimir Horacek	Head of the Energy Department of the Ministry of Economy and Croatia's lead technical expert in the negotiation and drafting of the GMA.
Zsolt Hernádi	Chairman of the Board of Directors and Chief Executive Officer of MOL (June 2001 – present). Member of the Board of Directors of OTP Bank Plc. (Apr. 2011 – present).
Ferenc Horváth	Executive Vice President of Downstream of MOL since 2011. Joined MOL in 1998 as Head of Liquefied Petroleum Gas Sales. Commercial Director of MOL from 2001. Vice President of Refining and Marketing of MOL from 2003.
Stephan Edgar Hürlimann	Robert Ježić's long-term tax advisor. Partner in Wenger & Vieli AG. Director of [1Co] Shipping AG and representative of the beneficial owners of [1Co] Shipping AG.
Robert Ježić	Croatian businessman currently residing in Switzerland. Beneficial owner of 10% of [1Co] & Shipping AG and 100% of [4Co] Holding



Name	Description
	AG.
[B]	[Description of Non-Party Witness]
Ivan Krešić	Current INA Management Board member by appointment of INA's Supervisory Board on 11 Feb. 2011 (2011 – present). Previously head of the Rijeka oil and lubricant refinery within INA.
[L]	[Description of Non-Party Witness]
[M]	[Description of Non-Party Witness]
[R]	[Description of Non-Party Witness]
Davor Mayer	Current member of the Management Board of INA by appointment of INA's Supervisory Board on 11 Feb. 2011 (2011 – present).
Stjepan Mesić	President of Croatia (19 Feb. 2000 – 18 Feb. 2010).
[G]	[Description of Non-Party Witness]
Josip Petrović	Consultant to MOL (14 Feb. 2011 – present). Former senior member of the HDZ Party. Former INA Board Member nominated by Croatia (Jun. 2008 – 10 Feb. 2011).

Name	Description
[A]	[Description of Non-Party Witness]
[P]	[Description of Non-Party Witness]
Robert Quick	Chief Executive of BlueLight Global Solutions (Present). Served as police officer from 1978 to 2009 specializing in, inter alia, corruption and serving as Assistant Commissioner of the Metropolitan Police (2008 – 2009), Deputy Chief Constable and then Chief Constable of Surrey Police (2003 – 2008). Queen’s Police Medal for Distinguished Service (2003).
Branko Radošević	Current Director of Crodux Energetika Ltd. Former Chairman of the Management Board of Plinacro Ltd. (24 Nov. 2005 – Jun. 2009).
Professor W. Michael Reisman	MOL’s international law expert. The Myres S. McDougal Professor of International Law at the Yale Law School, and member of the faculty since 1965. He has been Chairman or member of the tribunal in numerous international commercial and interstate arbitration proceedings. He was President in the OSPAR arbitration (Ireland v. UK) and arbitrator in the Eritrea/Ethiopia Boundary Dispute and in the Abyei (Sudan) Boundary Dispute.
Ivo Sanader	Prime Minister of Croatia (23 Dec. 2003 – 1 Jul. 2009).
Judge Stephen M Schwebel	MOL’s international law expert. Former Judge (1981 – 2000), Vice President (1994 – 1997), and President (1997 – 2000), International Court of Justice. Chairman or member of the tribunal in numerous international commercial and interstate arbitration proceedings, ad hoc (including UNCITRAL) and under the Rules of the ICC, AAA, LCIA, Stockholm Chamber of Commerce (SCC), ICSID / NAFTA, and Japan Commercial Arbitration Association (JCAA).
Professor Zvonimir Slakoper	MOL’s Croatian law expert. Head of the Civil Law Department of the Faculty of Law of the University of Rijeka (2004 – present). Author and co-author of numerous publications including commentaries on Croatia’s Obligations Act and Companies Act and the textbooks Obligations Law: General Part, Obligations Law: Special Part I – Specific Contracts, and

Name	Description
	Fundamentals of the Law of Commercial Agreements and Securities.
Olgica Spevec	Chair of Croatia's Competition Agency (2003 – 2013).
Pablo T. Spiller	MOL's economics expert. Professor Pablo T. Spiller of Compass Lexecon is an economist with more than 35 years of experience. He has extensive consulting experience in relation to damage assessment, contract interpretation, and regulatory conduct in a variety of sectors including oil and gas.
Davor Štern	Former Head of the INA Supervisory Board (2011–2012). General Manager of INA (1997 – 2000). Croatian Minister of Economy (1995 – 1997).
[S]	[Description of Non-Party Witness]
Katalin Tamás	Current Advisor of the CEO of MET Hungary Zrt. Business Analyst and Business Development Manager at MOL (2005-2010). Involved in the negotiation and implementation of the GMA on behalf of MOL.
Professor Nina Tepeš	Croatia's expert on Croatian law. Associate Professor at the Department of Commercial and Company Law, University of Zagreb. Consultant to the Ministry of Justice. Her area of expertise is commercial and corporate law.
[Z]	[Description of Non-Party Witness]
Stefan Trechsel	MOL's human rights expert. Former Judge of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). Scholar of European

Name	Description
	criminal and human rights law. Author of numerous books and articles, including <i>Human Rights in Criminal Proceedings</i> (Oxford University Press 2005).
Franjo Tuđman	President of Croatia (30 May 1990 – 10 Dec. 1999).
Judge Ivan Turudić	Presiding judge at the trial of Ivo Sanader.
Damir Vandelić	Currently a member of the Audit Committee of INA. Appointed by the Government of the Republic of Croatia as member of the Supervisory Board of INA (17 Jan. 2011 – 18 Dec. 2012).
Judge Arend B. Vast	MOL's expert on criminal law and evidence. Judge, Hague Court of Appeals (present). Chief Public Prosecutor at the Zwolle-Lelystad District Public Prosecutor's Office (Jun. 2000 – Jun. 2007). Chief Public Prosecutor at the Court of Appeal in the Hague, in the Netherlands (1995-2000). President of the Public Prosecutors Section of the Netherlands Association for the Judiciary (1998 – 2001). Director of the Constitutional Law and Criminal Law Department of the Ministry of Justice (Netherlands) (1991–1995).
Anthony Way	Croatia's energy-industry expert. Director of TWC Oil & Gas Ltd and an Executive Director since 2001 of the Energy Contract Company Ltd. He has worked in the oil and gas industry since 1977, principally in senior commercial positions. Former Senior Vice President of Enron International until 2000, responsible for developing the international gas and power business of Enron.

**PCA CASE No. 2014-15  
IN THE MATTER OF AN ARBITRATION  
UNDER THE UNCITRAL ARBITRATION RULES 1976  
("UNCITRAL RULES")  
AND  
SHAREHOLDERS AGREEMENT RELATING TO INA-INDUSTRIJA NAFTE D.D  
DATED 17 JULY 2003 AS AMENDED ON 30 JANUARY 2009 ("SHAREHOLDERS  
AGREEMENT OR "SHA")**

**-between-**

**THE REPUBLIC OF CROATIA**

**(the "Claimant" or "Croatia" or "GOC")**

**-and-**

**MOL HUNGARIAN OIL AND GAS PLC.**

**(the "Respondent", "MOL", and together with the Claimant, the "Parties")**

---

**APPENDIX 3 – CHRONOLOGY REGARDING THE AUSTRIAN FILES**

---

*Tribunal*

*Neil Kaplan CBE QC SBS (Presiding Arbitrator)  
Professor Emeritus Jakša Barbić  
Professor Jan Paulsson*

*Administrative Secretary to the Tribunal  
Lucille Kanté*

*Registry  
Permanent Court of Arbitration*

DATES	FACTS
10 April 2014	The existence of the Austrian Files (“the Files”) leaked in the press
13 May 2014	USKOK’s request for legal assistance sent to the Austrian authorities
4 June 2014	800 pages of Austrian documents provided to USKOK
Late July 2014	The Files requested of USKOK by Croatia’s arbitration team, based on what was leaked in the press
Sometimes thereafter	A portion of the Files provided by USKOK to Cr [L] ia
30 July 2014	Photographs of six pages of the Files submitted by Croatia
29 October 2014	Croatia’s Statement of Claim filed along with some of the documents received from USKOK
24 November 2014	The entire Files given by USKOK to Mr Hernadi’s defense lawyers and the Croatian Criminal Court
8 December 2014	The Austrian Files admitted into the record in the Croatian Criminal Court proceedings
16 January 2015	MOL’s Revised First Request for Documents submitted, with the Files corresponding to items 16, 21 and 34
25 March 2015	Joint request by the Tribunal and the Parties transmitted to USKOK and the State Attorney for access, inter alia, to “ <i>documents (including records of meetings between USKOK and any other Croatian government agency or authority) regarding the bribery allegations involving MOL and/or Mr. Hernádi</i> ”
2 April 2015	Response made by [L] of USKOK to the effect that all documents gathered by USKOK during the Sanader-Hernadi investigation had been transmitted to Croatia’s arbitration team in three batches in April and July 2014 and in March 2015
4 April 2015	Confirmation by Croatia that it had provided all responsive documents to MOL
22 April 2015	Re-confirmation by Croatia that all responsive documents had been transmitted to MOL
18 May 2015	MOL’s Statement of Defense filed, responding to Croatia’s allegations based on an extract of the Files submitted by Croatia

23 June 2015	References made by Croatia's arbitration team to the Austrian Investigation during the Kaplan Opening
13 July 2015	Written request by Mr Misetić to his contact Vanja Marusic (USKOK) for further documents
14 July 2015	Response from Ms Marusic to the effect that she would provide the documents obtained from Austria; due to the size of the documents the scanning would take several days
July 2015	Communication by USKOK of the rest of the Files to Croatia's arbitration team for use in this arbitration
15 August 2015	The entire File submitted by Croatia with its Reply
10 September 2015	Request sent by MOL to Croatia for the disclosure of all correspondence between Croatia and Austria with regard to the Files (i.e. request for Mutual Legal Assistance etc.)
Mid-September 2015	Meeting between Messrs Kara and [Z] to discuss the content of the Files
21 September 2015	Completion by MOL of the translation of the Austrian Files
1 October 2015	Production by Croatia to MOL of further untranslated documents
5 October 2015	Completion by MOL of the translation of the documents produced by Croatia
16 October 2015	Submission of MOL's Rejoinder with the English translation of the Austrian Files presented as its own exhibit
10 November 2015	Letter addressed by Mag. Bertsch, [F]'s and Dr [Z] representative to Croatia's arbitration team (Mr Kara read in copy) enquiring about the origin and the use of the Files in this arbitration.
11 November 2015	Mr Bertsch directed by Croatia's arbitration team to the relevant Austrian Authorities and the Croatian Ministry of Justice, along with an inquiry by Croatia whether Mr [Z] had signed a confidentiality agreement before seeing the confidential documents
13 November 2015	MOL's application to exclude the Austrian Files submitted
16 November 2015	The Austrian Files admitted <i>de bene esse</i> .