The Interplay between International and National Institutions in Fighting Corruption: Lessons from the Piero Foresti, Laura de Carli & Others v. The Republic of South Africa's Case

By *Dr. Rimdolmsom Jonathan Kabre**

Abstract: *Piero Foresti, Laura de Carli and others v. Republic of South Africa* is the only case, administered by the International Centre for the Settlement of Investment Disputes (ICSID), that involves the Republic of South Africa. This case was characterized by an allegation of corruption which appeared, not 'before' the referral to the tribunal as occurs in most investment disputes, but 'during' the proceedings of the ICSID tribunal: How did the corruption manifest in this case? How was it fought and by which institutions? This article examines these questions and discusses the role of arbitral tribunals and local institutions (notably courts and national bar associations) in addressing the challenge of corruption. It looks also at the kind of interplay that may exist between international and national institutions for an effective fight against corruption.

Such a discussion is particularly relevant in the context of a country like South Africa, which has terminated most of its bilateral investment agreements and replaced them with a national piece of legislation: The Protection of Investment Act (PIA) of 2015 which does not provide for Investor-State Arbitration. Consequently, foreign investors in this country have only recourse to national adjudicative bodies (but also to mediation or state-to-state arbitration) for the settlement of their disputes, including corruption-based disputes. Therefore, what are the lessons to be learned from this case with regard to the uses of the law to combat corruption and to the adequacy of national institutions to deal with corruption cases with transnational elements?

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A. Introduction

> *« 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,*

* Postdoctoral researcher, Centre for Human Rights, University of Pretoria (Republic of South Africa). E-Mail: rj.kabre@up.ac.za; kabrejonathan@yahoo.fr. ORCID number: 0000-0001-6889-2517.

terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor ».

Foreword of Kofi A. Anan, United Nations Convention Against Corruption, 2004[1].

The issue of corruption, which can be described as an « old challenge with new answers »[2], is found in all the legal systems, at domestic and international levels[3]. It has, however, a particular resonance in international investment regime[4], given the number of cases in

1 Foreword of *Kofi A. Anan*, United Nations Convention Against Corruption, New York 2004, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last accessed on 7 June 2020).

2 *Richard H. Kreindler*, Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge With New Answers, Transnational Dispute Management 3 (2013).

3 In reaction, many instruments have been adopted for fighting corruption, at international, regional and national levels notably the *United Nations Convention Against Corruption*; the *Inter-American Convention Against Corruption*, adopted at the third plenary session, held on 29 March 1996; the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted by the Negotiating Conference on 21 November 1997; the *African Union Convention on Preventing and Combating Corruption*, adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2003; the *United Nations Convention Against Corruption*, 2004.

4 According to the Preamble of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, « bribery is a widespread phenomenon in international business transactions, *including trade and investment*, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions » (emphasis added).

5 For some ICSID cases, see inter alia, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Award, 12 July 2001; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003; *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago,* ICSID Case No. ARB/01/14, Award, 3 March 2006; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12), Award, 14 July 2006; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006; *World Duty Free Company Limited v. Republic of Kenya,* ICSID Case No. ARB/00/7, Award, 4 October 2006; *Siemens A.G. v. Argentine Republic,* ICSID Case No. ARB/02/8, Award, 6 February 2007; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines,* ICSID Case No ARB/03/25, Award, 16 August 2007; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008; *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of Congo*, ICSID Case No ARB/05/21, Sentence sur les Déclinatoires de Compétence et la Recevabilité, 29 July 2008; *TSA Spectrum de Argentina SA v Argentine Republic*, ICSID Case No ARB/05/5, Award, 19 December 2008; *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009; *Azpetrol International Holdings B.V., Azpetrol Group*

which investment tribunals have dealt with this issue[6] and the abundant literature on this topic[6].

In general, corruption appears (or manifests itself) 'before' the referral to the arbitral tribunal and tends to be invoked as an investor claims[7] or deployed by the respondent State as a defence to the investor's claims[8] or as a defence to jurisdiction[9]. In the *Piero*

B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan, ICSID Case No. ARB/06/15, Award, 8 September 2009; *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010; *RSM Production Corp v Grenada*, ICSID Case No ARB/10/6, Award, 10 December 2010; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013; *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh*, ICSID Case Nos ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013; *Metal-Tech Ltd. v. Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, 4 October 2013; *Spentex Netherlands, B.V. v. Republic of Uzbekistan,* ICSID Case No. ARB/13/26, Award, 27 December 2016.

For some cases administrated by the Permanent Court of Arbitration (PCA), see *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *International Thunderbird Gaming Corporation v. The United Mexican States,* UNCITRAL, Arbitral Award, 26 January 2006; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* UNCITRAL, Final Award, 23 April 2012.

6 For some recent studies on this issue, see *Margareta Habazin*, Investor Corruption As a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration, Cardozo Journal of Conflict Resolution 18 (2017), pp. 805-931; *Dai Tamada*, Host States as claimants: corruption allegations, in: Shaheeza Lalani / Rodrigo Polanco (eds.), The role of the State in investor-state arbitration, Leiden/Boston 2015, pp. 103-122; *Kathrin Betz*, Proving bribery, fraud and money laundering in international arbitration: on applicable criminal law and evidence, Cambridge 2017, p. 341; *Marc D. Veit*, Proving Legality Instead of Corruption, in: Patricia Shaughnessy et al. (eds.), The powers and duties of an arbitrator : liber amicorum Pierre A. Karrer, Alphen aan den Rijn 2017; *Ana Gerdau de Borja Mercereau,* La corruption et l'arbitrage : Étude de sept sentences CIRDI impliquant l'Afrique, in : Walid Ben Hamida / Achille Ngwanza / Jean-Baptiste Harelimana (eds.), Un demi-siècle africain au CIRDI. Regards rétrospectifs et prospectifs, Issy-les-Moulineaux 2019, pp. 229-252; *Jeremy K. Sharpe*, Arbitral Tribunals' Inherent Powers In Corruption Matters, in: Franco Ferrari / Friedrich Rosenfeld (eds.), Inherent Powers of Arbitrators, Huntington, New York 2019, pp. 167-192.

7 See, for example, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13; see *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago,* ICSID Case No. ARB/01/14.

8 See for example, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4; *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15.

9 *Florian Haugeneder*, Corruption in Investor-State Arbitration, Journal of World Investment and Trade 10 (2009), p. 324. This needs to be differentiating with the phase, in the proceedings, where the tribunal deals with this issue, i.e. jurisdiction or merits phase, see *Aloysius P Llamzon*, Corruption in International Investment Arbitration, New York 2014, pp. 305-318.

Foresti, Laura de Carli & Others v. The Republic of South Africa's case[10] (hereinafter, the Foresti case), however, the corruption occurred 'during' the arbitral tribunal's proceedings. Also notable was that it involved a lawyer whose role in the fight against corruption is a crucial one: « without the cooperation of lawyers, the battle against international corruption will be a very difficult one »[11]. From a South African perspective, this case presents some other unique features, being the only affair, administrated by the International Centre for the Settlement of Investment Disputes (ICSID), which involves the Republic of South Africa (RSA)[12]. Additionally, this affair is often seen as the starting point of the direction change in the investment policy of this country, notably with the termination of many of its Bilateral Investment Treaties (BITs) and the adoption of new pieces of legislation concerning investment protection[13].

How did the corruption manifest in this case? How was it fought and by which institutions? The problems and questions connected to such considerations shall be the focus of this article. More specifically, the purpose of this article is to discuss the role of arbitral tribunals and local institutions (notably courts and bar associations) in addressing the challenges of corruption. In doing so, we will also look at the kind of interplay that may exist between the international institution and the local actors for an effective fight against corruption[14]. Such an exploration is of particular importance, for a country like South Africa, given that its Protection of Investment Act (PIA) of 2015 does not provide for Investor-State Arbitration[15]. Consequently, foreign investors in this country may only have recourse to domestic adjudicatory bodies (but also to mediation or State-to-State Arbitration) for the settlement of their disputes, including corruption-based disputes[16]. Therefore,

10 *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.

11 See the 'Anti-corruption Strategy for the Legal Profession', which is a joint project of the International Bar Association (IBA), the Organisation for Economic Cooperation and Development (OECD) and the UN Office on Drugs and Crime (UNODC) and focuses on the role lawyers play in combatting international corruption, https://anticorruptionstrategy.org/Default.aspx (last accessed on 14 May 2021).

12 There is another confidential case involving South Africa, but held under the UNCITRAL Arbitration Rules, see *Engela C. Schlemmer*, An Overview of South Africa's Bilateral Investment Treaties and Investment Policy, ICSID Review 31 (2016), pp. 186-187.

13 Herbert Smith Freehills, South Africa terminates its bilateral investment treaty with Spain: Second BIT terminated, as part of South Africa's planned review of its investment treaties, 21 August 2013, https://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties/#more-3295 (last accessed on 14 May 2021).

14 It should be recalled that this is in line with the 'multidisciplinary approach' suggested by the United Nations Convention Against Corruption (UNCAC Convention) for an effective against corruption, see the preamble of the UNCAC Convention.

15 Art 13 of the Protection of Investment Act 22 of 2015, entered into force on 13 July 2018.

16 This applies only to investors from countries which have not signed an investment agreement providing for investor-State Arbitration. According to UNCTAD database, RSA has terminated 11

what are the lessons to be learned from this case with regard to the uses of the law to combat corruption and to the adequacy of national institutions to deal with corruption cases with transnational elements?

This article will proceed as follows: Section B examines the manifestation of this corruption to underscore the different actors involved and how it was discovered. Section C discusses arbitral tribunal's reaction to this fraudulent behavior. Using a comparative analysis of different international courts, the aim will be to demonstrate that this tribunal could and should have addressed this issue and discuss the reasons of not doing so. Section D focuses on local institutions' responses to this corruption. The discussions and decisions of involved actors (namely State agencies, professional and human rights lawyers) offer a platform for investigating the question of the appropriate sanction for counsel corruption and the suitably of domestic institutions for investment-based corruption.

B. The manifestation of the corruption

In this case, seven nationals from Italy, and one company incorporated in Luxembourg, filed an expropriation claim for their mineral rights against the Republic of South Africa. These investors accused this government of having enacted a legislation in 2004 that has increased the participation of historically disadvantaged South Africans while extinguishing investors' mineral rights without providing adequate compensation. The case was finally dismissed after the claimants had been granted new mineral rights by the Respondent State.

However, this affair was also characterized by an allegation of corruption. It appeared when one of the respondents' counsels, Mr. Nthai, solicited for bribe. In fact, and for the purposes of representation before the arbitral tribunal, the South African government set up a legal team composed of both national lawyers and external counsel[17]. At a certain moment of the proceedings, one of the claimants decided to negotiate directly with the representatives of the respondents and, with the help of his lawyer named Maurizio Mariano, met Mr. Nthai[18]. Under international law, it is possible, and highly desirable, that parties to an international dispute seek other amicable ways to find a diplomatic solution to their dispute[19]. In fact, the judicial resolution is simply an alternative « to the direct and friendly settlement of such disputes between the parties »[20].

of its BITs and still have some investment agreements, either in force (19) or signed but not in force (30), see https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search (last accessed on 30 May 2021).

17 *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01*, Award*, 4 August 2010, p. 4, para 6.

18 Ibid, p. 8, paras 30-31.

19 See *North Sea Continental Shelf, (Federal Republic of Germany v. Denmark),* Judgment, I.C.J. Reports 1969, 48.

20 *Free Zones of Upper Savoy and the District of Gex*, Order of the 19 August 1929, PCIJ, Serie A, No. 22, p. 13.

During this meeting, the respondent's representative informed the claimant that « there was a faction within the South African Government which wanted the matter settled and another which wanted to pursue the matter to finality, including some in the Government who felt strongly that the Respondent should seek costs against the Claimants to make a statement »[21]. In addition, and according to the testimony of this claimant, Mr. Nthai then « solicited a bribe from Claimants, requesting that they pay him ZAR 5 million in return for his assistance in convincing the Respondent to permit Claimants to drop the case without paying the Respondent's attorneys' fees and costs, instead paying only their own attorneys' fees and costs and all ICSID and administrative costs »[22]. Later on, in support of his inappropriate solicitation, he disclosed some confidential information, assisted the claimants in the drafting of some important documents, and also engaged in prohibited phone discussions with them. Finally, Mr. Nthai and the claimant's lawyer met in Italy and had dinner together where the latter informed the former that the claimants did not want to get involved in any 'side deals' and then turn down the solicitation for bribe[23].

These facts are very serious given that lawyers are supposed to play a key role in fighting corruption in international business transactions, where they act as « intermediaries »[24]. This claimant reported this solicitation to the other claimants and, together, they decided to reject it[25]. In addition, they decided to inform their outside counsel as well as the whole legal team[26]. On the advice of this team, and despite the reluctance of one of them, the claimants decided to disclose this inappropriate conduct and informed the counsel of RSA government's about Mr. Nthai's conduct and the Tribunal[27].

Was this solicitation equivalent to corruption? Defining corruption is not easy. Even the United Nations Convention Against Corruption (UNCAC Convention)[28] does not define such term[29]. The absence of such definition is explained in the *Travaux Préparatoires* according to which « the informal working group stopped its discussion of definitions of the term "corruption" after it had been recognized that discussion was associated with certain core issues representing a sharp division for which the group had no mandate. The following draft of a note for the travaux préparatoires regarding the definition of the term "corruption" was proposed by the Chairman as the basis for further consultations: "The use

21 *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, *Award,* 4 August 2010, p. 8, para 31.

22 Ibid.

23 Ibid, p. 9, para 35.

24 The Anti-corruption Strategy for the Legal Profession, Risks and threats of corruption and the legal profession, Survey 2010, p. 12.

25 *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, *Award,* 4 August 2010, p. 9, paras 33-35.

26 Ibid, p. 9, para 36.

27 Ibid, p. 10, para 39.

28 United Nations Convention Against Corruption, New York, 2004.

29 This term has not been included in the Article 2, which defines the terms used in the Convention.

of the term 'corruption' in this Convention shall refer to the acts criminalized in chapter III, as well as to such acts as States Parties may criminalize or have already criminalized »[30]. But some other texts have tried to define corruption which may be seen as « any offer, promise or gift of any undue pecuniary and other advantage in order to obtain or retain business or other improper advantage »[31] or more broadly, an « abuse of entrusted power for private gain »[32]. The situation, in our study case, is similar to what is described at article 15 al b of UNCAC Convention, which is related to the « solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties ». Even if this lawyer is not a public official *per se*, he is assuming a public function[33], i.e., the representation of State interests before an international tribunal, which makes his situation similar to that of public officials.

Responding to this situation, what was the attitude of the arbitral tribunal? How this issue was addressed?

C. The corruption's issue before the arbitral tribunal

Confronted with this issue, the tribunal had a 'passive' reaction (I). This reluctance is questionable given their inherent powers (II) which seem to be sufficient to deal with this situation and fulfil tribunal's duties when confronted with an allegation of corruption (III).

I. The passive reaction of the arbitral tribunal

Based on the final decision, it would be safe to say that the tribunal did not take any specific measure as a response to this wrongdoing. This award only mentioned the withdrawal of Nthai as RSA' representative[34]. This attitude is questionable. One may think that the tribunal was not aware of this fraudulent conduct. However, its reasoning concerning the allocation of costs suggests that the tribunal was informed. It stated that the claimants

30 Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption, New York, November 2010, p. 51, note 122.

31 See article 1 al. 1 *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.*

32 Transparency International, What is corruption?, https://www.transparency.org/en/what-is-corruption# (last accessed on 30 May 2021).

33 According to *OECD Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, the public function includes « any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement », p. 12, available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last accessed on 30 May 2021).

34 « The Respondent had also been represented, until December 2009, by Advocate Seth Nthai SC. On 22 December 2009, the Tribunal was notified that Mr Nthai had been withdrawn as a representative of South Africa », Ibid, p. 4, para 6.

should bear responsibility for a portion of the respondent's costs because the former did not promptly disclose Mr. Nthai's corrupt solicitations[35]. The tribunal also added that it cannot « properly order that the costs of a Party's adviser who engages in the solicitation of bribes should be recovered from the other Party»[36]. While agreeing, this reasoning seems incomplete because one can reasonably think that the tribunal was aware of such wrongdoing but decided to focus on litigant parties and not to pay attention to the guilty of fraudulent behaviour: the lawyer.

This is not a new attitude. In fact, there has been a general reluctance of many investment tribunals to address misconducts and unethical behaviours of litigant parties' representatives[37]. This reluctance is grounded in the fact that investment tribunals are not expressly entrusted with the power to do so[38]. In one case, where allegations of corruption have been made by the respondent State[39], the arbitral stated that it « does not have deontological responsibilities or jurisdiction over the parties' legal representatives in their own capacities… the Committee has no power to rule on an allegation of misconduct under any such professional rules as may apply. Its concern is therefore limited to the fair conduct of the proceedings before it »[40].

Can the conduct of litigants' representatives be excluded from the scope of arbitral proceedings' fair conduct given the consequences that counsel actions may have on the conduct of proceedings and their outcomes? Admittedly, the consequences were limited in the current case because the lawyer proposed to convince his own side to assume its own legal costs, in return of the bribe. The counterpart was not grounded on the substance of

35 «The Tribunal thinks that the Respondent's costs (and, indeed, the Claimants' costs) would have been smaller if the Claimants had indicated earlier their willingness to settle on a 'with prejudice' basis, and if Mr Nthai's corrupt solicitations had been promptly disclosed. Accordingly, the Tribunal thinks it right that the Claimants should bear responsibility for a portion of the Respondent's costs", Ibid, p. 28, para 119.

36 Ibid, p. 29, para 120.

37 Some other international tribunals have also been reluctant to address such misconduct. For example, in the Louisa case, the ITLOS was confronted to a fraudulent conduct by a counsel and co-agent of one litigant State. In fact, this counsel lied about the content of a major piece of evidence and belatedly produced it. Instead of addressing the issue, the tribunal will just 'regret' this attitude, see *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 24, para 47.

38 « The ICSID Convention and Rules do not, however, explicitly give the power to tribunals to exclude counsel », *Hrvatska Elektroprivreda, d. d. v. Slovenia, Tribunal's ruling regarding the participation of David Mildon QC in further stages of the proceedings,* Case N° ARB/05/24, 6 May 2008, p. 10, para 24; see also *Rompetrol Group N.V. v. Romania, Decision of tribunal on the participation of a counsel*, ICSID Case N° ARB/06/3, 14 January 2010, p. 6, para 16.

39 « Corruption allegations recounted in various parts of the award but appear ultimately not to have been placed directly at issue by host State », *Aloysius P Llamzon*, Corruption in International Investment Arbitration, Oxford 2014, pp. 312-313.

40 *Fraport Ag Frankfurt Airport Services Worldwide V. Republic of The Philippines*, ICSID Case No. Arb/03/25, Annulment Proceedings, *Decision on Application for Disqualification of Counsel,* p. 10, para 39.

law. But the misconduct may affect the substance of the case and lead to an improper decision. With regard to the potential consequences, it is worth to recall that the wrongdoing of parties' counsel can, inter alia, damage the administration of international justice[41], create serious imbalance and infringe the principle of equality between the litigants parties[42], pollute the case[43], influence the deliberations and the credibility of the arguments made[44].

Some authors have explained such a reluctance, saying that « in an adversarial system such as arbitration where it is normally incumbent on each party to prove its claims, a sua sponte investigation upsets the normal burden of persuasion between the parties. The tribunal may also be concerned about exceeding its mandate, impinging on party autonomy, or offending due process guarantees such as impartiality and the right to be heard. Moreover, additional fact-finding by the tribunal may be expensive and time-consuming and may still not illuminate the existence (or lack) of corruption with clarity »[45]. But, as good as these justifications might be, these are the trees that conceal the forest.

II. The inherent powers of investment tribunals and the misconduct of parties' representatives

Do investment tribunals have the powers to address the misconduct of parties' representatives? Such a power has not been expressively provided to these tribunals. Nevertheless,

41 « While I must accept, as I do, Qatar's disclaimer and apologies, in my opinion I cannot consider Qatar's case without having in mind *the damage that would have been done to the administration of international justice, indeed to the very position of this Court,* if the challenge by Bahrain of the authenticity of these documents had not led Qatar, eventually, to inform the Court that it had "decided [to] disregard al1 the 82 challenged documents for the purposes of the present case » (emphasis added) *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain),* Judgement of 16 march 2001, Separate opinion of Judge Cot, p. 121, para 72.

42 « Counsel for Saint Vincent tried knowingly to mislead the Tribunal. Furthermore, they created *a serious imbalance in the proceedings and infringed the principle of equality between the Parties* » (emphasis added), The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, separate opinion of Judge Cot, p. 121, para 72.

43 According to Sir Elihu Lauterpacht, « although Qatar has undertaken not to rely on the forged documents, the fact is that once such material has polluted the case it continues to exercise an insidious influence from which it is not easy to escape », *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain),* Verbatim record 2000/11, Public sitting held on Thursday 8 June 2000, at 10 a.m., at the Peace Palace, President Guillaume presiding, p. 14, para 14.

44 « The misconduct obviously influences the deliberations. It stains the credibility of the arguments advanced », The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, separate opinion of Judge Cot, pp. 119-120, para 63.

45 *Domitille Baizeau and Tessa Hayes*, The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte, in: Andrea Menaker (ed.), International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series 2017, p. 228.

this absence does not mean inexistence of such power, which is rather 'inherent'[46]. The existence of such inherent powers is widely recognized and accepted by international tribunals such as the International Court of Justice[47], the International Tribunal for the Law of Sea[48] and the Dispute Settlement Body of World Trade Organization[49]. However, the question of whether or not, they include the control and the exclusion of parties' representatives remains unanswered[50]. According to one tribunal, this question is an 'open question'[51].

There is some evidence in favour of the position according to which international tribunals in general and investment tribunals in particular, are entrusted with the power to control litigant parties' representatives and to exclude them in case of misconduct. In *Hrvatska Elektroprivreda, d. d. v. Slovenia*, for example, the tribunal relied on its inherent powers to exclude the respondent's counsel[52]. In the *Rompetrol Group N.V. v. Romania,* although the tribunal did not exclude the counsel, it did not deny the existence of the power to exclude counsel. Rather, this tribunal has limited the scope of such power, saying that it should be exercised « only rarely, and in compelling circumstances »[53]. In the same vein, the Article 26 of IBA Guidelines on Party Representatives confers to the arbitral tribunal

46 « 'Inherent' can be used as a synonym to 'implicit' but there is a difference with 'implied'. Even if 'implied' and 'inherent' powers are both non-express powers, the former can be linked to an "express provision of powers to the tribunal" while the latter "exist independently from the express powers conferred to the tribunal and find their source in the tribunal's function or nature », *Maxi Scherer,* Inherent Powers to Sanction Party Conduct, in: F. Ferrari / F. Rosenfeld et al. (eds.), Inherent Powers of arbitrators, Huntington, New York 2019, p. 110, Available at SSRN: https://ssrn.com/abstract=3377228 (last accessed on 23 June 2021).

47 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253 at pp. 259-260.

48 *Affaire du navire « Louisa » (Saint-Vincent-et-les-Grenadines c. Royaume d'Espagne),* arrêt, opinion individuelle de M. Cot, juge, TIDM Recueil 2013, p. 112, para 31.

49 WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages, Report of the Appellate Body,* 6 March 2006, WT/DS308/AB/R, p. 20, para 45.

50 For some authors, arbitral tribunals are established to resolve disputes between litigant parties and not to police the conduct of their representatives, see *Jan Paulsson*, Standards of Conduct for Counsel in International Arbitration, American Review of International Arbitration 214 (1992), p. 215. Some other authors think that these tribunals have arguably the authority to sanction counsel, *Stephan Wilske*, Sanctions against Counsel in International Arbitration – Possible, Desirable or Conceptual Confusion? Contemporary Asia Arbitration Journal 8 (2015), p. 156. Maxy Sherer has argued that there is little room for inherent powers when it comes to sanction party conduct, see *Scherer*, note 44, p. 108.

51 *Hrvatska Elektroprivreda, d. d. v. Slovenia, Tribunal's ruling regarding the participation of David Mildon QC in further stages of the proceedings,* Case N° ARB/05/24, 6 May 2008, p. 9, para 22.

52 Ibid, p. 10, 13-14, paras 22-24, 33. However, one author stated that such exclusion cannot be phrased as a sanction but rather is it is the « result of a necessary balancing exercise of, on the one hand, the party's right to appoint a counsel of its choice, and, on the other hand, the disruption a challenge and replacement of an arbitrator would cause », *Scherer*, note 44, pp. 113-114.

53 ICSID, *Rompetrol Group N.V. v. Romania, Decision of tribunal on the participation of a counsel*, Case N° ARB/06/3, 14 January 2010, p. 12, para 25.

the power to sanction a Party representative who committed a misconduct[54]. Even if this is not a binding instrument, IBA Guidelines are getting more weight in the context of international arbitration as recently evidenced by the fact that the CETA has provided a legally binding character to the IBA Guidelines on Conflicts of Interest in International Arbitration (adopted on 23 October 2014 and updated on 10 August 2015)[55].

Comparatively, this power of control over parties' counsel has been acknowledged by some other international adjudicative bodies such as the ITLOS[56] or International criminal courts and tribunals (ICCTs)[57]. It may be objected that the absence of State litigants before ICCTs makes the issue of the control over parties' representatives and counsel less complicated[58]. However, in the context of ISDS, some investment tribunals have recently exercised control over States' representatives in order to determine who is the 'legitimate' representative (this was the case with Venezuela)[59]. The recognition of a government seems

54 IBA Guidelines on Party Representation in International Arbitration, Adopted by a resolution of the IBA Council 25 May 2013 International Bar Association.

55 See article 8:30 Comprehensive Economic and Trade Agreement, concluded between the EU and the Canada and entered into force provisionally on 21 September 2017.

56 « A jurisdiction has the inherent power to adopt a code of conduct and thus to clearly signal to the parties the norms applicable in the proceedings » The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, separate opinion of Judge Cot, p. 118, para 57.

57 The International Criminal Tribunal for the former Yugoslavia (ICTY), in the Milan Vujin case, recognized that its inherent powers extend to the power to control and sanction lawyers appearing before it, see *Prosecutor v Duško Tadic, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin,* Case IT-94-1-A-R77, 31 January 2000, p. 7, para 13 and *Prosecutor v Duško Tadic , Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case IT-94-1-A-R77, 27 February 2000, p. 4. With the adoption of the Rome Statute establishing the International Criminal Court (ICC), these powers have been reaffirmed at Articles 70 and 71 of the Rome Statute and contained in the Code of Professional Conduct for Counsel, Adopted on 2 December 2005, Resolution ICC-ASP/4/Res.1. For a discussion of ICC's powers to address offenses and contempt of courts, see *Hilde Farthofer*, Contempt of Court, Max Planck Encyclopedia of International Procedural Law, January 2019; see also *Hilde Farthofer,* Contempt of Court, in: Christoph Safferling (ed.), International Criminal Procedure, Oxford 2012, pp. 560 ss.

58 In fact, and as Judge Cot pointed out, the presence of a sovereign entity in the proceedings can complicate the issue as States may fear « a possible abridgement of their sovereign right to present their cases as they wish » The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, separate opinion of Judge Cot, p. 119, para 59.

59 In the *Favianca* case, the ad hoc committee « rejected arguments by Mr. José Ignacio Hernandez that Nicolas Maduro's government attorneys have no longer authority to represent Venezuela. The committee observed that Venezuela "*as such*" is the respondent and that it is being represented by attorneys from the Attorney General's Office "as required by [its] domestic law", and therefore, there is no basis to change the status quo », Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/21), Decision on Annulment, 22 November 2019 (not available); see also *Sondra Faccio,* New Developments in Proceedings Involving Venezuela: Interim President Guaidó Intervenes Before US Courts*,* Kluwer Arbitration Blog, 24 November 2019, http://arbitrationblog.kluwerarbitration.com/2019/11/24/new-developments-in-proceedings-involving-venezuela-interim-p

to be a more serious attempt to a State sovereignty than the control exercised over its representatives. This is particularly true given that, under certain circumstances, one can distinguish between the parties' conduct and their legal representatives' conduct. Under international law, the acts of the representatives are attributed to the represented State. However, it may appear that a legal representative act inappropriately and this, without being instructed to do so by the represented state. This distinction between what has been instructed by the representative State and what is the own conduct of its representative is not an easy one[60]. In our study case, it is difficult to attribute to South Africa, the bribe solicitation of its lawyer. It is safe to say that Mr. Nthai acted for his own interests. This situation cannot, therefore, be covered by the agency relationship between the party and its legal representative.

In the light of the above, it can be concluded that the tribunal has the power to control parties' representatives and counsel. However, what should it do concretely to address the issue of corruption?

III. Arbitral tribunals duties in case of corruption

When there is an allegation of corruption, at least two duties can be found: a duty to investigate and a duty to sanction[61]. One the one hand, and with regard to the duty to investigate, the major challenge arbitral tribunals may encounter is that of the sufficient means to investigate on corruption' allegations[62]. This is where a first level of collaboration between

resident-guaido-intervenes-before-us-courts/ (last accessed on 27 March 2020); see also *Tom Jones / Sebastian Perry*, ICSID committee rebuffs Guaidó, Global Arbitration Review, 10 May 2019, https://globalarbitrationreview.com/article/1192627/icsid-committee-rebuffs-guaido (last accessed on 27 March 2020).

60 « Due to the agency relationship between the party and its legal representative, the legal representative's acts are in principle attributed to the party and assumed to have been done as instructed by the party. But this might not always be the case, in particular if the acts go beyond what is normally expected from a legal representative. For instance, if a legal representative has ex parte contacts with an arbitrator, he or she might have acted either under the instruction of the party or without the party's knowledge. In most cases it will be difficult, if not impossible, to establish this with certainty. Therefore, in this chapter, the term "party conduct" also includes the conduct of the party's legal representative, unless specified otherwise », *Scherer*, note 44, p. 111.

61 *Christina Parajon Skinner*, Ethical Dilemmas in Inter-State Disputes, Alabama Law Review 68 (2016), pp. 281-301.

62 « But whether the Court should attempt to engage in this kind of factual investigative work, directly or by delegation, is a more difficult question. One concern is that doing so could delay the case, leading to prolonged uncertainty that could have significant social and economic costs. An independent fact-finding mission could take months, even years. Moreover, and relatedly, parties may be tempted to abuse a newly created duty to investigate by alleging fraud as a delay or harassment technique. For these reasons, it may be preferable to focus on the development and implementation of counsel's obligations to engage in adequate due diligence, so that factual accuracy can be sorted prior to the submission of the pleadings and without the Court's involvement », *Skinner*, note 61, p. 296.

the arbitral tribunal and local institutions can be envisioned. Given their *ad hoc* nature, arbitral tribunals may feel unprepared and unequipped to conduct such investigations[63]. But it may be possible to ask for collaboration with domestic authorities in order to establish the accuracy of these allegations[64], and such collaboration is mentioned in texts such as UNCITRAL Arbitration Rules[65] and the ICSID Convention[66]. In the Foresti case, one of the challenges was to establish the correctness of the recordings. In fact, one claimant recorded the discussions where the counsel solicited for bribe[67]. These recordings were brought to the tribunal[68]. However, and maybe given the resignation of the counsel, the tribunal did not look at this problem. But, the correctness of these audios was, later on, questioned by the lawyer at the domestic level, before the disciplinary Committee[69].

On the other hand, and once the corruption or fraud is established, the court has a duty to censure. This is also important given the fact that not all national codes of conduct require the members of their local bars' lawyers to comply with their ethical rules before international courts and tribunals[70]. This problem is further complicated by the fact that

63 This task may be given to organizations like the ICSID or the PCA which may be seen as « public actors serving a public purpose in the peaceful settlement of international disputes », see *Stephan Schill*, The Case for Public Regulation of Professional Ethics for Counsel in International Arbitration, Kluwer Arbitration Blog, 7 July 2017, http://arbitrationblog.kluwerarbitration.com /2017/07/07/case-public-regulation-professional-ethics-counsel-international-arbitration/ (last accessed on 23 June 2021).

64 This is not without challenges related notably to confidentiality, additional costs or delays, see *Scherer*, note 44, pp. 127-128; see also *William S. J. Rowley*, Guerrilla Tactics and Developing Issues, in: Günther J. Horvath / Stephan Wilske (eds.), Guerrilla Tactics in International Arbitration, Alphen aan den Rijn 2013, p. 20; *Wilske*, note 50, pp. 149-153.

65 Art 27 al. 3, UNCITRAL Arbitration Rules 2010.

66 Article 43 ICSID Convention.

67 Actually, he had recorded 12 conversations with the counsel, *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01*, Award*, 4 August 2010, p. 8, para 31 and p. 9, para 33.

68 See Exhibit C887 (recordings of conversations between Mr. Marcenaro and Mr. Nthai).

69 See infra (Section D1, pp. 258-259). Another interesting issue that could have been addressed is related to the lawfulness of the claimants' manoeuvres in getting these records. Was it a guerrilla tactics of the claimant? Or were these claimants driven by a sense of ethics and justice? It should be recalled that, while the claimants wanted to withdraw their claims, the South African government 'insisted' to continue the case. In fact, their unilateral application for discontinuance of the proceedings was opposed by the Respondent (*Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01*, Award*, 4 August 2010, p. 28, para 117). In our opinion, they saw an opportunity and exploited it to advance their own interests in the case, since some elements of their claims were abandoned in the course of the proceedings. The claimants used Mr Nthai's misconducts to advance their claim for discontinuance.

70 This requirement is provided by the British code of conduct. *Liz Williams* (ed.), The Baker & Mckenzie International Arbitration Yearbook 2013-2014, Huntington, New York 7th ed. 2014 analyzed the case of countries where there do not seem to be applicable rules for lawyers admitted to the bar of these states when practicing international arbitration, cited by *Wilske*, note 50, p. 152.

some arbitral tribunals consider not to be bounded by national codes of conduct[71]. If the international tribunal before whom they appear, does not take appropriate measures to ensure that these lawyers behave ethically, this may lead to an 'ethical no man's land'[72]. With regard the duty to censure, the important challenge is related to the (un)existence of rules of conduct which may also provide with a range of sanctions in case of misconduct[73]. This obstacle is not insurmountable: although the differences between legal traditions can lead to some procedural imbalance (in terms of witness preparation, disclosure's obligations, leading questions, etc.), no country allows counsel to engage in corruption.

In addition, two measures can be particularly efficient: fines or financial sanctions and the naming and shaming: An arbitral tribunal already imposed an 'indirect' financial sanction to counsel for a breach of confidentiality rules[74]. Also, and in the small community of international lawyers, the naming and shaming can be an efficient sanction since it affects the reputation of the counsel[75]. The exclusion of the proceedings is an extreme sanction and international adjudicative bodies should use it carefully, given its consequences. Mr. Nthai's resignation probably prevented the tribunal to sanction him. Nevertheless, the tribunal missed a good opportunity to pave the way in terms of sanctions for counsel's misconduct. Additionally, the tribunal should have referred the case to national institutions since the corruption is subject to penal sanctions at domestic level[76].

71 « The parties have made extensive reference in their submissions to the Californian law on legal ethics; and also to the ethical rules of the Paris Bar and, following the Committee's request, to the Code of Conduct for Lawyers issued by the Council of the Bars and Law Societies of the European Union. This material is valuable to the extent that it reveals common general principles which may guide the Committee. *But none of it directly binds the Committee, as an international tribunal* » (emphasis added), Fraport Ag Frankfurt Airport Services Worldwide V. Republic of The Philippines, ICSID Case No. Arb/03/25, Annulment Proceedings, *Decision on Application for Disqualification of Counsel,* pp. 10-11, 40-41.

72 *Catherine A Rogers*, Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration, Michigan Journal of International Law 23 (2002), p. 341.

73 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, separate opinion of Judge Cot, p. 119, para 63.

74 « The Tribunal accordingly directs the Investor to pay to the Respondent the sum of US$ 10,000 no later than October 11, 2000. 12. In so directing, the Tribunal expresses the wish that Mr. Appleton will recognize that it is his conduct which has resulted in this direction being made against the Investor and, consequently, that he will voluntarily personally assume those costs » *Pope & Talbot, Inc. v. Canada, UNCITRAL Arbitration Rules, Decision on Confidentiality, (27 September 2000*), para 11-13.

75 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, separate opinion of Judge Cot, p. 120, para 63; see also *Skinner*, note 61, pp. 296-297.

76 « Other informal sanctions may be considered. A case may be referred to the national disciplinary body. This possibility, on the motion of the injured party, is provided for in certain codes of conduct and could be considered to fall within the inherent powers of the international court or tribunal. A State whose counsel has jeopardized the case by breaching fundamental principles may itself bring misconduct proceedings in its own domestic courts", The M/V "Louisa" Case (Saint

More generally, can the mishandling of the corruption claim by the arbitral tribunal be due, as suggested by some authors[77], to the fact that almost none of the investment agreements address corruption? This is no longer the case as most of recent investment agreements signed by African countries contain anti-corruption clauses[78] or explicitly refer to the UNCAC Convention[79]. Additionally, although combatting corruption is not the main (or the most important) goal of investment arbitration, its legal infrastructure gives it the potential to play a direct role in the fight against corruption[80]. Furthermore, such a call for a robust involvement of investment tribunal in cases of (counsel) corruption is necessary to rebalance the pre-existing asymmetry under investment law, which has already been extensively discussed[81].

If the arbitral tribunal decided not to address it, the corruption issue was brought to national institutions.

D. Local institutions and the fight against corruption: Multiples responses

One of the main characteristics of the PIA is the absence of an investor-State arbitration's clause. This means that investors from countries without an investment agreement with the Republic of South Africa providing for Investor-State Arbitration, may approach domestic courts, tribunals or statutory bodies for the resolution of their disputes. It is therefore important to discuss the reaction of these domestic institutions when confronted with corruption and the lessons that can be learnt. These domestic institutions are also at the heart of the

Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, separate opinion of Judge Cot, p. 120, para 64.

77 See, for example, *Andrew T. Bulovsky*, Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development, Michigan Law Review 118 (2019), p. 128.

78 See, for example, Article 21 of 2016 Pan-African Investment Code and its preamble, Article 13 of 2008 ECOWAS Supplementary Act, article 10 of 2012 SADC Model Bilateral Investment Treaty Template with Commentary.

79 See the preamble of the 2015 Burkina Faso-Canada BIT.

80 *Aloysius Llamzon*, The control of corruption through international investment arbitration: Potential and limitations, Proceedings of the Annual Meeting (American Society of International Law) 102 (2008), p. 208.

81 *Alessandra Arcuri*, The Great Asymmetry and the Rule of Law in International Investment Arbitration, in: Lisa Sachs, Lise Johnson and Jesse Coleman (eds.), Yearbook on International Investment Law and Policy 2018, Oxford 2019, pp. 394-413. Available at SSRN: https://ssrn.com/abstract=3152808 (last accessed on 23 June 2021); See also the symposium on Centering Voices from the Global South on Investor-State Dispute Settlement Reform: A Debate, convened by James Thuo Gathii and Olabisi D. Akinkugbe,

https://www.afronomicslaw.org/2020/09/07/symposium-introduction-centering-voices-from-the-global-south-on-investor-state-dispute-settlement-reform-a-debate/ (last accessed on 1 June 2021).

fight against corruption as evidenced, notably by article 30 UNCAC[82]. In the present case, this issue of corruption was brought before domestic institutions and was, first addressed by the local bars (I) and, many years after, by the domestic courts (II).

I. The disbarment

The resignation of the lawyer from the proceedings before the arbitral tribunal was not the end of the process. At national level, a disciplinary committee (the Committee) was appointed by the council bar of Pretoria and the council bar of Johannesburg with the mandate of inquiring into the conduct of Mr. Nthai. This was made after the complaint of the State Attorney[83]. The Committee was composed of three persons, one person of each bar (Johannesburg and Pretoria) and a retired judge[84].

The major question was related to the authenticity of the recordings. In this regard, the Committee called and heard two witnesses. The first one, Mr. Veeran, was the attorney of one of the claimants in the ICSID proceedings. He provided the tribunal with, *inter alia*, the witness statement of Marcenaro, « the person with whom Nthai SC had the discussions which gave rise to the complaint »[85]. Mr. Veeran brought also the transcripts of audio recordings of conversations between Nthai SC and Marcenaro. However, Mr. Nthai, first, and his lawyers, later, challenged the content of these recordings[86]. In fact, he admitted that these discussions were held but did not admit their content. Consequently, his legal team submitted these recordings to an expert and received his report, which was not submitted to the Committee. The second witness, a lawyer who worked with Mr. Nthai in the South African's legal team in the context of this arbitration, identified the voice of Mr. Nthai[87].

The declarations of these two witnesses, coupled with the equivocal attitude of the lawyer, led the Committee to establish the correctness of the recordings and the resulting transcripts. The Committee found him guilty[88] and recommended that Mr. Nthai's membership of both the Johannesburg and Pretoria Societies of Advocates should be terminated. This Committee also recommended the removal of his name from the roll of advocates and

82 See also the commentary of this provision, Thea Conventry, Article 30: Prosecution, Adjudication, and Sanctions in *Cecily Rose / Michael Kubiciel / Oliver Landwehr*, The United Nations Convention Against Corruption, A Commentary, Oxford 2019, pp. 301-318.

83 The identity of nationality between the counsel and the injured State may explain this local reaction.

84 *TJB Bokaba SC* (of the Johannesburg Bar) / *J H Dreyer SC* (of the Pretoria Bar) / *K van Dijkhorst* (a retired judge), Report of the Disciplinary Committee in Adv Seth Nthai Case, 6 April 2010, https://constitutionallyspeaking.co.za/report-of-the-disciplinary-committee-in-adv-seth-nthai-case/ (last accessed on 3 March 2020), para 1.

85 Ibid, para 9.

86 Ibid, para 11.

87 Ibid, para 10.

88 Ibid, para 24.

the publication of the report[89]. These recommendations were followed by the High Court which, by an order granted the 15 April 2013, decided of his removal from the roll of advocates at the instance of the PSA.

One would have thought that the matter would end like that. *Que nenni*! Some years later, this counsel embarked on a long trip towards his readmission.

II. A long walk to readmission

On the 18 October 2018, Mr. Nthai lodged an application to the High court of South Africa, Limpopo Division, Polokwane, in order to be readmitted as an advocate. The application was opposed by the Pretoria Society of Advocates (PSA), the Johannesburg Society of Advocates (JSA) and the South African Legal Practice Council (SALPC) and supported by the Polokwane Society of Advocates (POLSA). In its decision rendered on the 24 May 2019[90], the tribunal investigated the question of whether there has been a «genuine, complete and permanent reformation on Nthai's part»[91], condition *sine qua non* to his re-admission.

Such a readmission requires some conditions to be fulfilled: The first step was to hear the applicant's version of the circumstances of the case. It should be recalled that, before the arbitral tribunal and the Committee, the applicant did not give his own version of the case. Before the High Court, Mr. Nthai set out the history and background of the facts that led to the removal of his name from the roll of advocates[92]. His disclosure of the events has been described as 'full and frank' by the Court[93]. In this regard, he pointed out the role that his hidden condition played in his misconduct[94]. This was supported by reports of some medical practitioners such as Dr Williamson, a psychiatrist, and Prof. Woolf, a clinical psychologist[95].

Secondly, the tribunal assessed the professional conduct of the lawyer during the time of the sanction, i.e., after the removal of his name from the roll, and concluded that Nthai has demonstrated « absolute personal integrity and scrupulous honesty in his subsequent employment and interaction with others »[96].

Thirdly, the analysis of the tribunal focused also on the personal level. Since the claimant gave a medical explanation to his conduct, the tribunal had to determine whether

89 Ibid, para 25.

90 High Court of South Africa, Limpopo Division, Polokwane, *Seth Azwihangwisi Nthai vs Pretoria Society of Advocates, Johannesburg Society of Advocates, Polokwane Society of Advocates, South African Legal Practice Council, Judgement, 24 May 2019,* Case Number 6271/18.

91 Ibid, p. 3, para 3.2.

92 Ibid, pp. 4-14.

93 Ibid, p. 13, para 9.1, p. 14, para 13.

94 Ibid, pp. 48-49, para 59.1.

95 Ibid, pp. 49-51.

96 Ibid, p. 40, para 55.7.

or not, he had fully recovered from his health condition. The reports of medical practitioners demonstrated that he has « fully recovered from his health »[97]. He also engaged in a self-introspection process with the help of spiritual guides, who produced affidavits attesting that the claimant has shown genuine remorse[98]. This is also evidenced by the apologies he sent to various individuals and institutions[99]. Based on these 'objective facts', the tribunal concluded that the claimant is now a « fit and proper person to practise as an advocate again »[100]. This is also supported by affidavits from former colleagues, human rights activist and traditional leader[101] and also by the Polokwane Society of Advocate Stance that has pledged 'solidarity' with the applicant and offered him to become its member, if the application was granted[102].

However, all these evidences and statements were rejected by PSA and JSA. As a reminder, these two bars appointed the Committee that issued the written report recommending the termination of Mr. Nthai's membership of both Pretoria and Johannesburg Bars and also the removal of his name from the roll of advocates. For them, he had not done nothing more than words to make amends for the wrongdoing. His failure to disgorge some ill-gotten gains, coupled with the fact that he did not inform PSA and JSA of his letter are proof enough that the claimant had not reformed, they contended[103]. They maintained that, on a conspectus of all the facts, Nthai is not a « fit and proper person to practise as an advocate »[104].

Finally, the tribunal decided that Mr. Nthai be « re-admitted as a legal practitioner of the High Court of South Africa to be enrolled as an advocate »[105]. However, the JSA and the LPC brought applications for leave against this judgement, which were finally refused by a decision of the Court on 18 July 2019[106].

This decision raises some interesting questions with regards to the attitude of both PSA and JSA, the reasoning of the Court and also the efficiency of the naming and shaming. *Primo*, the attitude of both Pretoria and Johannesburg bars raises an important question

97 Ibid, p. 52, para 59.11.

98 Ibid, pp. 46-48, para 58.

99 Ibid, p. 58-60, paras 61-62.

100 Ibid, p. 56, para 60.2.

101 Ibid, pp. 70-75.

102 Ibid, p. 75-76, para 84.

103 Ibid, p. 75, para 82.

104 Ibid, p. 32, para 49.5.

105 High Court of South Africa, Limpopo Division, Polokwane, *Seth Azwihangwisi Nthai vs Pretoria Society of Advocates, Johannesburg Society of Advocates, Polokwane Society of Advocates, South African Legal Practice Council, Judgement, 24 May 2019,* p. 83, para 93.1.

106 See the decision of the High Court of South Africa, Limpopo Division, Polokwane, *Pretoria Society of Advocates, Johannesburg Society of Advocates, Polokwane Society of Advocates, South African Legal Practice Council vs Seth Azwihangwisi Nthai, Judgement, 18 July 2019*, Case Number 6271/18.

regarding the appropriate sanction for such corruption: is Nthai supposed to be condemned and suffer for the rest of his life for a corruption that occurred many years ago? Or is a ten-years exclusion sufficient? As POLSA stated, some other lawyers, guilty of corruption or even worse, did not receive such a ban. In addition, and as clearly pointed out by POLSA, « punishement is not meant to break a person but is meant to correct reprehensible conduct »[107]. This 10-years exclusion can be viewed as sufficient and the reintegration in line with article 30 (10) UNCAC according to which « States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention ».

Segundo, the reasoning of the court is worth reflecting upon as it used superlatives and expressions which can ultimately question its neutrality. For example, the Court said that « Nthai has demonstrated *absolute* personal integrity and s*crupulous* honesty »[108] (emphasis added). Further, it declared that « it must be accepted that Nthai has *completely, genuinely and permanently* reformed and furthermore that *there is no chance* that he will transgress the rules of the practice in future » (emphasis added)[109]. What allows the court to make such a statement? And to predict to future? These questions are of particular importance given the fact that, dealing with the appeal, the court declared not to be « expert on the matters raised by the medical experts »[110]. A non-expert needs great caution and partisan rhetoric (or what looks like) should be avoided.

Tercio, and as said earlier, the naming and shaming is a very powerful weapon, courts can use in case of proven misconduct. This decision helps in assessing the impact of the naming and shaming, from the perspective of the faulty counsel. In his affidavit, this counsel described the disclosure of his wrongdoing by medias as' devastating'[111]. This publicity affected not only the lawyer, but also his family members because even his children were teased at by their classmates at school[112].

However, this decision was overturned by the Supreme Court of Appeal which found that what this lawyer did, went way beyond « mere professional misconduct »[113] and

107 High Court of South Africa, Limpopo Division, Polokwane, *Seth Azwihangwisi Nthai vs Pretoria Society of Advocates, Johannesburg Society of Advocates, Polokwane Society of Advocates, South African Legal Practice Council, Judgement, 24 May 2019,* p. 82, para 91.

108 Ibid, p. 40, para 55.7.

109 Ibid, p. 55, para 60.2.

110 See the decision of the High Court of South Africa, Limpopo Division, Polokwane, *Pretoria Society of Advocates, Johannesburg Society of Advocates, Polokwane Society of Advocates, South African Legal Practice Council vs Seth Azwihangwisi Nthai, Judgement, 18 July 2019*, Case Number 6271/18, p. 25, para 37.

111 High Court of South Africa, Limpopo Division, Polokwane, *Seth Azwihangwisi Nthai vs Pretoria Society of Advocates, Johannesburg Society of Advocates, Polokwane Society of Advocates, South African Legal Practice Council, Judgement, 24 May 2019*, p. 20, para 32.1.

112 Ibid, p. 21, paras 32.4-5.

113 The Supreme Court of Appeal of South Africa, *Johannesburg Society of Advocates and Another v Seth Azwihangwisi Nthai and Others, Judgment,* 15 December 2020, p. 24, para 47.

that his « conduct post-removal has demonstrated that he is fundamentally ill-suited to a profession based on integrity, candour and honesty »[114]. He could even face criminal prosecution since a copy of the judgement was sent to the National Director of Public Prosecutions.

E. Some concluding remarks

Corruption is undoubtedly one of the most important issues to be addressed by our societies. This analysis has shown that the fight against corruption is a difficult one, which requires a multi-layered approach in which tribunals are playing the most important, but not the unique role. When confronted with an allegation of corruption, investment tribunals should depart from their passive approach, as evidenced in this affair, given their inherent powers and the impact of corruption in the administration of international justice. Additionally, and since this plague affects also 'values of democracy, ethical values and justice', a community response is needed with the inclusion of some other actors (community and religious leaders, scientists, etc.). Furthermore, the interactions between international and local courts need to be clarified and strengthened. Rather than an exclusive approach, as it was the case in this affair, these courts should operate in complementarity. This is particularly true given that the idea of establishing an International Anti-Corruption Court, which has recently emerged, would operate on the principle of complementarity (with local institutions)[115].

114 Ibid, p. 44, para 88.

115 *Matthew C. Stephenson / Sofie Arjon Schütte*, An International Anti-Corruption Court? A synopsis of the debate, U4 Brief 2019:5, https://www.u4.no/publications/an-international-anti-corruption-court-a-synopsis-of-the-debate (last accessed on 11 June 2020).