COUR PERMANENTE D'ARBITRAGE PERMANENT COURT OF ARBITRATION

PCA Case No. AA917

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ESTABLISHING THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AREA, SIGNED ON 27 FEBRUARY 2009

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AS REVISED IN 2021

- between -

ZEPH INVESTMENTS PTE. LTD. (Singapore)

(the "Claimant")

- and -

THE COMMONWEALTH OF AUSTRALIA

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

DECISION ON THE CHALLENGE TO DR. CHARLES PONCET

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26 September 2023

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I. PROCEDURAL BACKGROUND

1. This challenge arises out of an arbitration between Zeph Investments Pte. Ltd. (the "**Claimant**") and the Commonwealth of Australia (the "**Respondent**", and together with the Claimant, the "**Parties**") under the *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed on 27 February 2009 ("**AANZFTA**"), and the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2021 ("**UNCITRAL Rules**").

A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

2. By Notice of Arbitration dated 28 May 2023 ("**Notice of Arbitration**"), the Claimant commenced arbitration proceedings against the Respondent pursuant to Articles 20 and 21(1)(d) of Chapter 11 of the AANZFTA, and Article 3 of the UNCITRAL Rules. In its Notice of Arbitration, the Claimant alleges, amongst other things, that the Respondent has breached its obligations under Articles 6 and 9 of Chapter 11 of the AANZFTA, in connection with the Government of Queensland's decision to grant an environmental offset to a direct competitor of the Claimant over land in which the Claimant's subsidiary had certain coal exploration permits.[1]

3. Further to Articles 18(4) and 23(3) of Chapter 11 of the AANZFTA, the Parties agreed that the Secretary-General of the Permanent Court of Arbitration ("**Secretary-General**" or "**I**") shall act as appointing authority in the proceedings.

4. In its Notice of Arbitration, the Claimant appointed Dr. Charles Poncet, a Swiss national, as the first arbitrator.

B. RESPONDENT'S CHALLENGE TO DR. PONCET

5. On 13 June 2023, the Respondent sent a Notice of Challenge ("**Notice of Challenge**") to Dr. Poncet and to the Claimant pursuant to Article 13(1) of the UNCITRAL Rules, inviting the Claimant to agree to the challenge, or Dr. Poncet to withdraw from his office.[2]

6. On 14 June 2023, the Claimant responded to the Notice of Challenge ("**Claimant's Response to the Notice of Challenge**"), indicating that "[it] does not agree with the Notice of Challenge and, indeed, considers it to be frivolous, vexatious and an abuse of the arbitral process".[3]

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1 Notice of Arbitration, para. 9.

2 Letter from the Respondent to the Claimant and Dr. Poncet dated 13 June 2023 ("**Notice of Challenge**"), appended as Annex A to the Letter from the Respondent to the Secretary-General dated 12 July 2023 ("**Request**").

3 Letter from the Claimant to the Respondent dated 14 June 2023 ("**Claimant's Response to the Notice of Challenge**"), appended as Annex E to the Request, p. 2.

7. On the same date, Dr. Poncet responded to the Notice of Challenge ("**Dr. Poncet's Response to the Notice of Challenge**"). In his response, Dr. Poncet indicated that he did not agree with the challenge and declined to resign from his position in this arbitration.[4]

8. On 26 June 2023, the Respondent responded to Dr. Poncet, reiterating its concerns, and requesting certain clarifications from Dr. Poncet.[5]

9. On 12 July 2023, the Respondent elected to pursue its challenge, pursuant to Article 13(4) of the UNCITRAL Rules, and submitted its request for a decision on the challenge by the Secretary-General ("**Request**"), together with, amongst other things, an expert report from Professor Enrico Mancuso ("**Mancuso Report**").[6]

10. On 14 July 2023, the Secretary-General invited the Claimant to submit its response to the Request by 27 July 2023.

11. On 26 July 2023, the Claimant submitted its response to the Request ("**Response to the Request**").

12. On the same date, the Secretary-General invited Dr. Poncet to provide any further comments he may have on the Request by 3 August 2023.

13. On 3 August 2023, Dr. Poncet submitted his further comments on the Request ("**Dr. Poncet's Further Comments**") and noted that he would submit an expert report prepared by Professor Luca Luparia as soon as practicable.

14. On the same date, the Secretary-General invited Dr. Poncet to apply for leave to submit Professor Luparia's expert report at such time as the report was finalised.

15. On 15 August 2023, Dr. Poncet submitted Professor Luparia's Legal Opinion ("**Luparia Report**").

16. On the same date, the Secretary-General decided to grant leave to Dr. Poncet to submit the Luparia Report and admit the Report onto the case record. In the same correspondence, the Secretary-General invited the Parties to provide any final comments on the Request by 22 August 2023.

17. On 22 August 2023, the Claimant and the Respondent each submitted their final comments on the Request ("**Claimant's Further Comments**" and "**Respondent's Further Comments**", respectively).

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4 Letter from Dr. Poncet to the Respondent dated 14 June 2023 ("**Dr. Poncet's Response to the Notice of Challenge**"), appended as Annex F to the Request.

5 Letter from the Respondent to Dr. Poncet dated 26 June 2023, appended as Annex G to the Request.

6 Expert Opinion of Prof. Avv. Enrico Maria Mancuso dated 5 July 2023 ("**Mancuso Report**"), appended as Annex H to the Request.

II. PRELIMINARY ISSUES

A. INTRODUCTION

18. As detailed further in Section III below, the Respondent's challenge to Dr. Poncet arises principally from Dr. Poncet's conviction by the Milan District Magistrates' Court (*Pretura*) in 1996 of the criminal offences of "personal aiding and abetting and false testimony" in connection with separate criminal proceedings against Mr. Marco Ceruti for fraudulent bankruptcy.[7] Dr. Poncet's conviction was upheld by the Court of Appeal of Milan, but quashed by the Italian Supreme Court of Cassation in 1999, principally given the expiry of the applicable period under the statute of limitations.[8] The Respondent contends that, in these circumstances, "Dr Poncet does not fulfil the requisite qualities to be appointed as arbitrator in this dispute, including the requirements of Article 12(1) of the UNCITRAL Rules".[9]

19. Before addressing the merits of the Respondent's challenge, it is important to recall the standard that I must apply to the challenge and the limits of my mandate as appointing authority pursuant to the UNCITRAL Rules and the AANZFTA.

B. APPLICABLE STANDARD AND SCOPE OF REVIEW

1. Respondent's Position

20. The Respondent acknowledges that Article 12(1) of the UNCITRAL Rules applies to its challenge to Dr. Poncet in the present proceedings.[10] Article 12(1) of the UNCITRAL Rules provides that:

> Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.[11]

21. According to the Respondent, the notions of 'impartiality' and 'independence' under the UNCITRAL Rules "must be considered to include the requisite qualities of arbitrators and judges in international adjudication".[12] In particular, the Respondent posits:

> persons appointed to international judicial office or to fulfil the functions of arbitrator in international disputes must maintain high standards of integrity and

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7 Request, para. 3; Judgment of the Italian Supreme Court of Cassation dated 23 November 1999 (translation) ("**Cassation Judgment**"), appended as Annex D to the Request, p. 1.

8 Request, para. 3.

9 Request, para. 2.

10 Request, para. 19.

11 UNCITRAL Rules, Article 12(1).

12 Request, para. 19. The Respondent further notes that in the discharge of the appointing authority's functions under the UNCITRAL Rules, the appointing authority must "have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator" (UNCITRAL Rules, Article 6(7)) (Australia's Comments in Reply dated 22 August 2023 ("**Respondent's Further Comments**"), para. 3).

> propriety, and that they must be, and be capable of being seen as being, of good fame and character.[13]

22. In support of this position, the Respondent invokes the standards applied to Members of the Permanent Court of Arbitration (who are required to be persons "of the highest moral reputation"),[14] Judges of the International Court of Justice ("persons of high moral character"),[15] Judges of the International Tribunal for the Law of the Sea ("persons enjoying the highest reputation for fairness and integrity"),[16] and arbitrators under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") (persons of "high moral character").[17] Further, the Respondent emphasises the need for arbitrators to uphold high standards of integrity in accordance with the Code of Conduct for Arbitrators in International Investment Dispute Resolution adopted by UNCITRAL, and the International Bar Association's International Principles of Conduct for the Legal Profession (2018).[18]

23. The Respondent contends that its doubts with respect to Dr. Poncet's compliance with the standard are "reasonable and sufficiently serious to be 'justifiable'".[19]

2. Claimant's Position

24. The Claimant does not dispute the application of the standard under Article 12(1) of the UNCITRAL Rules to the challenge. However, the Claimant contends that such standard must be distinguished from the "high moral character" standard set out in Article 14(1) of the ICSID Convention.[20]

3. Reasoning

25. The Parties agree that the standard I must apply is that set out in Article 12(1) of the UNCITRAL Rules – that is, I must determine whether "circumstances exist that give rise to justifiable doubts as to [Dr. Poncet's] impartiality or independence".[21]

26. The Respondent seeks to extend the scope of this standard to "the requisite qualities of arbitrators and judges in international adjudication", which the Respondent asserts includes criteria relating

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13 Request, para. 20.

14 Request, para. 19, *referring to* the 1899 Hague Convention for the Pacific Settlement of International Disputes, Article 23, and the 1907 Hague Convention for the Pacific Settlement of International Disputes, Article 44.

15 Request, para. 19, *referring to* the Statute of the International Court of Justice, Article 2.

16 Request, para. 19, *referring to* the Statute of the International Tribunal for the Law of the Sea, Article 2(1).

17 Request, para. 19, *referring to* the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 14(1).

18 Request, para. 19.

19 Respondent's Further Comments, para. 3.

20 Letter from the Claimant to the Secretary-General dated 26 July 2023 ("**Response to the Request**"), p. 8.

21 UNCITRAL Rules, Article 12(1). The Respondent has not suggested that Dr. Poncet has "fail[ed] to act" or is otherwise *de jure* or *de facto* unable to perform his functions pursuant to Article 12(3) of the UNCITRAL Rules.

to an arbitrator's "good fame and character", by reference to a range of standards that exist under other rules and instruments.[22]

27. The standards to which the Respondent refers are clearly distinct from the standards of independence and impartiality under Article 12(1) of the UNCITRAL Rules. It is not within my mandate (under the UNCITRAL Rules or otherwise under the AANZFTA) to determine a challenge on the basis of these other standards. The contracting parties to the AANZFTA (or the disputing Parties in this case) could have agreed to such criteria (as they did with respect to an arbitrator's "expertise or experience in public international law, international trade or international investment rules", for instance),[23] but have not done so in the present case.

28. That said, it is conceivable that circumstances may exist that give rise to doubts both as to an arbitrator's "good fame and character" as well as an arbitrator's ability to act impartially in a given case (that is, an arbitrator's ability to determine the case solely on its merits, and not be influenced by factors other than the merits of the case),[24] including in cases where an arbitrator's "honesty and integrity" are challenged.[25] The standard to be applied is an objective one – the doubts going to Dr. Poncet's impartiality raised by the Respondent must be justifiable from the perspective of a reasonable, fair-minded, and informed third party for the challenge to be sustained.

29. With that standard and those limits to my mandate in mind, I now turn to the merits of the Respondent's challenge.

III. MERITS

1. Factual Background

30. The basic factual background to the Respondent's challenge is a matter of judicial record.[26]

31. In the mid-1980s, Mr. Marco Ceruti was investigated and charged with fraudulent bankruptcy in relation to the collapse of the Italian bank, Banco Ambrosiano.[27] As part of Mr. Ceruti's defence, documentation relating to a transaction involving a company called 'Merlin Writers Limited' (the

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22 Request, paras. 18-20.

23 *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed on 27 February 2009, Chapter 11, Article 23(2).

24 The Respondent's challenge does not include a cognisable challenge to Dr. Poncet's independence (that is, a challenge premised upon his connection to or relationship with one of the Parties, their counsel, or otherwise related parties).

25 Request, para. 4.

26 I understand that this basic factual background is largely uncontested in the context of this challenge. For the avoidance of doubt, this subsection is intended purely to contextualise the Parties' positions and I do not make any findings of fact in this subsection.

27 Judgment of the Milan District Magistrates' Court dated 12 December 1996 (translation) ("**First Instance Judgment**"), appended as Annex B to the Request, p. 5 (Prosecutor's Introductory Statement), pp. 30-32 (Reasons); *see also,* Request, para. 3(a); Mancuso Report, para. 10.1.

"**Transaction**") was advanced to justify one of the impugned transfers involving Mr. Ceruti.[28] In the alleged Transaction, Mr. Ceruti had been assisted by Mr. Frank Hogart and Mr. Christopher Anthony Delaney, operating out of Jersey.[29] Mr. Hogart also gave oral evidence in the Italian courts as part of Mr. Ceruti's defence, testifying to the genuineness of the Transaction documentation (Dr. Poncet was also made available as a witness by the defence but did not testify).[30]

32. Shortly after Mr. Hogart's evidence, Mr. Delaney confessed to the Jersey police that he had embezzled his clients' funds, and in his statement, also confessed to falsely creating the documentation concerning the Transaction.[31] Mr. Delaney further claimed that Dr. Poncet (amongst others) had been implicated in the (latter) process.[32] This led the Italian authorities to open an investigation into Mr. Hogart, Mr. Delaney, Dr. Poncet, and others for false testimony.

33. In the first instance proceedings before the Milan District Magistrates' Court, counsel sought to examine Mr. Delaney in relation to the allegations. However, Mr. Delaney would not appear, and when Mr. Delaney finally appeared (by letter rogatory in the English courts), he revoked his previous consent to testify and availed himself of the right not to answer questions.[33]

34. On 12 December 1996, the Milan District Magistrates' Court issued a judgment (the "**First Instance Judgment**"), finding that the documentation concerning the Transaction advanced to support Mr. Ceruti's defence had indeed been falsified,[34] and convicting Dr. Poncet (and others) of the following offence:

> personal aiding and abetting and false testimony for having:
>
> a. acting jointly and with Cristopher Anthony Delaney, after the commission by Marco Ceruti of the offence of fraudulent bankruptcy, helped him to circumvent the investigations by the authorities by creating fictitious documentation attesting to a commercial transaction, relating to objects of art, between the same and the "Merlin Writers limited" company operating in Jersey, capable of representing and justifying the funds in the amount of $10.000.000 coming from the accounts of Banco Ambrosiano, documentation which was produced before the Court of Milan by Raffaele Conte as a member of the Ceruti trial counsel;
>
> b. acting jointly and with Marco Ceruti, Hogart testifying as a witness before the court of Milan in the trial relating to the bankruptcy of Banco

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28 First Instance Judgment, pp. 5-6 (Prosecutor's Introductory Statement), p. 33 (Reasons), p. 44; *see also,* Request, para. 3(a).

29 First Instance Judgment, p. 6 (Prosecutor's Introductory Statement); *see also,* Dr. Poncet's Response to the Notice of Challenge, paras. 2-3.

30 First Instance Judgment, p. 6 (Prosecutor's Introductory Statement), p. 44; *see also,* Dr. Poncet's Response to the Notice of Challenge, para. 4.

31 First Instance Judgment, pp. 16-17 (Summary of Hopper's Examination), p. 34 (Reasons); *see also,* Dr. Poncet's Response to the Notice of Challenge, para. 5; Response to the Request, p. 9.

32 First Instance Judgment, p. 33 (Reasons), p. 39; *see also,* Dr. Poncet's Response to the Notice of Challenge, para. 5.

33 First Instance Judgment, pp. 7-12; *see also*, Dr. Poncet's Response to the Notice of Challenge, paras. 8-9.

34 First Instance Judgment, p. 36 (Reasons).

> Ambrosiano, falsely affirmed the genuineness and authenticity of the documents referred to in charge a) and falsely declared that he identified Lino Gelli as the true purchaser of the objects of art apparently purchased by Ceruti, the others preparing the aforementioned fictitious documents, offered apparent documentary support for Hogart's statements.[35]

35. The Milan District Magistrates' Court sentenced Dr. Poncet to two years' imprisonment.[36] This sentence was suspended on the basis that Dr. Poncet was unlikely to repeat the behaviour.[37]

36. Dr. Poncet (and others) appealed the First Instance Judgment. However, the Milan Court of Appeal, by a judgment dated 27 January 1999, upheld the conviction (the "**Appeal Judgment**").[38]

37. Dr. Poncet (and others) appealed the Appeal Judgment to the Court of Cassation. On 23 November 1999, the Court of Cassation quashed the conviction given the expiry of the applicable period under the statute of limitations (the "**Cassation Judgment**").[39] The Court observed:

> the offences referred to in letters a) and b) of the charging documents, claimed by the prosecution as committed on 10 June and 10 December 1991, respectively […] must both be declared extinguished by the statute of limitations […]
>
> Therefore, all the grounds for appeal cannot be examined, the acceptance of which, if they were to be considered substantiated, would result in the annulment with referral of the judgment in question, as the latter is incompatible with the obligation of immediate declaration of dismissal due to the extinction of the crime […]
>
> [such grounds for appeal include] not only complaints of lack of justification […] but also the reasons concerning the unusability of the records of the declarations made by Cristopher Anthony Delaney on 13/02/92 during the interrogation carried out (during the hearings concerning the bankruptcy of the Banco Ambrosiano) by international letter rogatory in the presence of the judges of the Court of Milan, the Public Prosecutor and the defence lawyers of Marco Ceruti.
>
> There is no doubt, in fact, that the contested judgment should be annulled with referral as a result of the declaration of constitutional illegitimacy of art. 238/4, Code of Criminal Procedure, in the part in which it does not provide that, if in the hearings, the person examined pursuant to Art. 210 Code of Criminal Procedure refuses to respond on facts concerning the liability of others already the subject of its previous statements (hypothesis which arose in this case, as Delaney, in the interrogation by letter rogatory of 10/01/96, availed himself of the right not to

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35 Cassation Judgment, p. 1.

36 First Instance Judgment, p. 70 (Conviction); *see also,* Request, para. 3(b).

37 First Instance Judgment, p. 68 (Extent of the Punishment); *see also*, Request, para. 3(b).

38 Judgment of the Milan Court of Appeal dated 27 January 1999 (translation) ("**Appeal Judgment**"), appended as Annex C to the Request; *see also*, Request, para. 3(c); Dr. Poncet's Response to the Notice of Challenge, para. 11.

39 Cassation Judgment, p. 4; *see also,* Request, paras. 3(d)-4; Dr. Poncet's Response to the Notice of Challenge, para. 11.

> answer) in the absence of the defendant's consent to use, Art. 500 paragraphs 2-bis and 4 Code of Criminal Procedure applies (Constitutional Court no. 361/98).[40]

38. While this judicial record may be largely uncontested, the status of the factual findings made by the Milan District Magistrates' Court and the Milan Court of Appeal, the residual effects (if any) of the Judgments in light of the Cassation Judgment, and the relevance of these matters to my decision are contested by the Parties and by Dr. Poncet.

2. Respondent's Position

39. According to the Respondent, Dr. Poncet "lacks the requisite qualities to be appointed as arbitrator" in these proceedings, as a result of his conviction (by two levels of the Italian judiciary) for falsifying documents and aiding and abetting perjury – "serious criminal offences with a direct bearing on his honesty and integrity".[41] In particular, the Respondent contends that:

(i) notwithstanding the quashing of the conviction by the Court of Cassation, the lower courts' assessment of the facts remains unaffected; and

(ii) the (quashed) conviction continues to have residual effects, including with respect to Dr. Poncet's suitability for specific roles in the future.

40. *First,* the Respondent contends that the factual findings made by the Milan District Magistrates' Court at first instance, and the Milan Court of Appeal (in a *de novo* review) remain "an apparently correct assessment of the relevant facts" and were unaffected by the quashing of the conviction by the Court of Cassation.[42]

41. The Respondent argues that Dr. Poncet's conviction was quashed by the Court of Cassation on a "technical basis", that is, the expiry of the applicable period under the statute of limitations with respect to the offences.[43] The Court "did *not* choose to acquit Dr Poncet, evidently because 'the Court did not deem it possible to do so' on the basis of the evidence which had been collected".[44]

42. The Respondent acknowledges a part of the Court of Cassation's judgment "which may be interpreted as casting doubt on the soundness of one of the factual elements supporting Dr. Poncet's conviction", namely the indication from the Court that Dr. Poncet's conviction would have been quashed and a retrial ordered in the absence of the expiry of the limitation period, given the use of Mr. Delaney's previous statements notwithstanding the exercise of Mr. Delaney's right to remain silent in the proceedings.[45]

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40 Cassation Judgment, pp. 2-3.

41 Request, para. 4.

42 Request, paras. 3, 5; Respondent's Further Comments, para. 5(d).

43 Request, para. 4; Respondent's Further Comments, para. 5(c).

44 Request, para. 16(c), *referring to* Mancuso Report, para. 23.3.

45 Request, para. 6.

43. However, the Respondent contends that the decisions of the lower courts were primarily based on documentary evidence rather than Mr. Delaney's testimony.[46] This documentary evidence included a series of Mr. Delaney's log pages (referred to as the "work programme") with references to Dr. Poncet's initials,[47] and the fact that Dr. Poncet had received a file of documents from Mr. Delaney with unsigned copies of contracts, which differed from those ultimately advanced by Mr. Ceruti's defence counsel at trial.[48] To that end, the lower courts specifically emphasised that Mr. Delaney's evidence did not play a "centrally important" role in their decision to convict Dr. Poncet.[49]

44. Given that the lower courts did not convict Dr. Poncet "on the basis of a single witness" but upon the documentary evidence presented before them, the Respondent argues that "there is no reason to suppose that the outcome would have been any different" if a retrial had in fact taken place.[50]

45. *Second*, the Respondent contends that the findings in the First Instance Judgment and Appeal Judgment have "residual effects".[51] The Respondent acknowledges that with the expiry of the limitation period and the Court of Cassation's dismissal of the conviction, "the vast majority of the 'criminal effects', *i.e.*, the consequences following a judgment of conviction, were extinguished together with the offence".[52] However, the Respondent observes that:

(i) the affirmation of Dr. Poncet's criminal liability by the lower courts remains "evidence of a historical undeniable fact";[53]

(ii) the findings of the two lower courts can still have consequences in the criminal law context, including in sentencing for other offences, as part of an accumulation of evidence to establish criminal liability for another offence, and in the assessment of whether an accused's criminal behaviour is 'habitual';[54] and

(iii) the lower courts' findings can also have effects in civil law in relation to asset confiscation, civil obligations arising from an offence (e.g., victim's compensation), and in the evaluation of an individual's suitability for various roles and positions.[55]

46. While the Respondent accepts that "the events at issue in the Italian proceedings are well in the past",[56] that a challenge to Dr. Poncet in respect of these same events in an arbitration under the

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46 Request, paras. 6-10; Respondent's Further Comments, paras. 5(b), 8.

47 Request, paras. 6(a), 8.

48 Request, paras. 6(b), 9.

49 Request, paras. 7, 9.

50 Respondent's Further Comments, para. 8; Request, paras. 10, 14.

51 Request, para. 16.

52 Request, para. 16(d), *referring to* Mancuso Report, paras. 24.4, 33.

53 Request, para. 16(e)(i), *referring to* Mancuso Report, para. 27.

54 Request, para. 16(e)(ii), *referring to* Mancuso Report, paras. 29.1.1-29.1.4, 34.1.

55 Request, para. 16(e)(iii), *referring to* Mancuso Report, paras. 30-32, 34.2.

56 Request, para. 18; Respondent's Further Comments, para. 4(c).

ICSID Convention was recently dismissed,[57] and that Dr. Poncet "is a well-established international arbitrator, and so far as [the Respondent] is aware there has never been an issue of integrity in the performance of his arbitral duties",[58] the Respondent highlights that these proceedings are of particular importance to it and its public, given that they involve a matter of significant public concern and a claim of very high value.[59] Perception is very important, and in that context, there is a strong perception that "a past conviction of fraud (even one overturned, albeit due to a limitation issue), renders a person unsuitable to arbitrate this important case".[60]

3. Claimant's Position

47. According to the Claimant, the Respondent's challenge to Dr. Poncet "is frivolous, vexatious and an abuse of the arbitral process" and "should be dismissed".[61] The Claimant highlights the fact that Dr. Poncet has been involved in some 65 cases as arbitrator, all post-dating the events at issue, in which "[h]is integrity and his record as an arbitrator are entirely unblemished".[62]

48. In support of its position, the Claimant raises four main arguments, namely that:

(i) the challenge has not been made *bona fide,* in light of the Respondent's public position on the investor-State dispute settlement ("**ISDS**") system, and the recent dismissal of a challenge to Dr. Poncet on the same grounds in an arbitration under the ICSID Convention;

(ii) the Respondent's request fails *in limine* (that is, as a threshold matter), given it is not within the appointing authority's function to delve into the reasoning of the Italian courts and seek to extrapolate further conclusions;

(iii) assuming that the appointing authority nevertheless does so, the Respondent's challenge is without substance and fails on the merits; and

(iv) the allegation that Dr. Poncet failed to disclose the circumstances giving rise to the challenge is without foundation.

49. *First*, the Claimant asserts that the challenge is "merely a cynical attempt to frustrate or delay the arbitral process".[63] While the Respondent claims that its Request is made to promote "the integrity of the system of investor-State dispute settlement" and that it "takes no pleasure in raising this matter",[64] public statements by made by representatives of the Respondent (and in

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57 Request, para. 18.

58 Request, para. 20; Respondent's Further Comments, para. 4(d).

59 Request, para. 18.

60 Request, para. 20.

61 Response to the Request, pp. 1, 12; Letter from the Claimant to the Secretary-General dated 21 August 2023 ("**Claimant's Further Comments**"), p. 5.

62 Response to the Request, p. 12.

63 Response to the Request, p. 2.

64 Response to the Request, p. 2, *referring to* Request, paras. 18, 21.

particular, by Mr. Josh Wilson MP, the Chair of the Joint Standing Committee on Treaties) reveal the Respondent's "contempt and disdain" towards the ISDS system as a whole.[65]

50. Further, the challenge has been brought on "grounds materially identical" to those in a challenge against Dr. Poncet very recently dismissed by the unchallenged arbitrators in *VC Holding II S.A.R.L. & Ors v. Italy,* an arbitration under the ICSID Convention.[66] The *VC Holding II* decision illustrates that the Respondent's challenge "has no basis whatsoever".[67] According to the Claimant, the *VC Holding II* decision should be followed by the Secretary-General "without the need to re-examine the very same matters [already] considered and determined".[68]

51. *Second,* the Claimant, echoing the decision of the unchallenged arbitrators in *VC Holding II*, suggests that:

> it is no part of the role of the Appointing Authority to delve into the Italian domestic law rationale or reasoning underpinning the decision of an Italian domestic court and to seek to resolve a disputed interpretation of the true meaning of that decision, much less to seek to extrapolate further conclusions, one way or the other, about the true meaning and effect of that decision.[69]

52. As such, the Secretary-General must reject the Respondent's invitation to engage in such an "impossible task" and dismiss the Request as a threshold matter.[70]

53. *Third,* assuming that the Secretary-General decides to engage with the substance of the Respondent's challenge, the challenge fails on its merits. In particular:

(i) The unambiguous outcome of the Cassation Judgment is that Dr. Poncet's conviction was annulled, and Dr. Poncet has no recorded convictions. It is not permissible for an appointing authority to effectively reinstate such conviction as a matter of substance (by reinterpreting the lower courts' (annulled) decisions).[71]

(ii) The witness and documentary evidence on which the Respondent relies emanated from Mr. Delaney and is "manifestly unreliable and incapable of standing up to proper scrutiny".[72] As such, it cannot be safely relied upon to support Mr. Delaney's allegation that Dr. Poncet was implicated in his activities.[73]

(iii) Rather, the only inference that should be drawn from the facts is that Mr. Delaney's allegation against Dr. Poncet was false. Such an inference is supported by Mr. Delaney's

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65 Response to the Request, pp. 2-5.

66 Response to the Request, p. 6.

67 Response to the Request, p. 6.

68 Response to the Request, p. 6

69 Response to the Request, p. 6.

70 Response to the Request, pp. 6-7; Claimant's Further Comments, p. 2.

71 Response to the Request, pp. 7-8.

72 Response to the Request, p. 8.

73 Response to the Request, pp. 8-9.

refusal to testify in open court, Dr. Poncet's denial of the allegation and cooperation with the Italian authorities, as well as the testimony of Mr. Hogart, who conceded that Dr. Poncet "had nothing to do with the fraudulent scheme".[74]

54. The Claimant further contends that the Mancuso Report advanced by the Respondent should be disregarded, given its subject matter (a commentary on the meaning and effect of the Italian courts' decisions) is not properly a matter for expert evidence.[75] Alternatively, the Mancuso Report should be given no weight in light of, amongst other things, the flaws in the instructions to Professor Mancuso, the contradictions in Professor Mancuso's analysis, and the irrelevance of the hypothetical scenarios highlighted in the Report.[76] To the extent that the appointing authority engages with the expert evidence, the expert report of Prof. Luparia should be preferred, given it is "much more firmly grounded in principle and logic" and in particular, given the emphasis it places on the presumption of innocence.[77]

55. *Finally,* the Claimant observes that Dr. Poncet has not breached his disclosure obligations under the UNCITRAL Rules as there were no circumstances "likely" to give rise to justifiable doubts as to his impartiality and independence requiring disclosure, especially given the outcome of the recent *VC Holding II* decision.[78]

4. Dr. Poncet's Comments

56. Dr. Poncet sees "no reason to resign from this arbitration at all" and suggests that the Respondent's allegation that he would not fulfil the requisite qualities to be appointed as arbitrator "unfair and completely unjustified".[79]

57. In particular, Dr. Poncet notes that the accusations made by Mr. Delaney against him were false, and that the Court of Cassation ultimately corrected the "wrong decisions" of the lower courts "after a full judicial and public process more than *twenty-three* years ago".[80] Further, in light of the Cassation Judgment, Dr. Poncet highlights that he has no record of any kind in Italy and the earlier convictions have no remaining 'residual' or 'extra-criminal' effects, as the Respondent contends.[81]

58. *First*, Dr. Poncet maintains that he did not falsify documents or aid and abet perjury. Dr. Poncet notes that Mr. Delaney, a "rogue individual", falsely implicated Dr. Poncet in the scheme,[82] but

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74 Response to the Request, pp. 9-10.

75 Response to the Request, p. 10.

76 Response to the Request, pp. 10-12.

77 Claimant's Further Comments, pp. 3-4.

78 Response to the Request, p. 12.

79 Dr. Poncet's Response to the Notice of Challenge, para. 15.

80 Dr. Poncet's Response to the Notice of Challenge, paras. 5, 14-15; Letter from Dr. Poncet to the Secretary-General dated 3 August 2023 ("**Dr. Poncet's Further Comments**"), para. 3.

81 Dr. Poncet's Response to the Notice of Challenge, para. 12; Dr. Poncet's Further Comments, para. 4; Legal Opinion of Prof. Avv. Dr. Luca Lupária Donati dated 14 August 2023 ("**Luparia Report**"), para. 3.

82 Dr. Poncet's Response to the Notice of Challenge, paras. 5-6, 13; Dr. Poncet's Further Comments, para. 2.

this allegation was never confirmed in court, and Mr. Delaney refused to answer questions when he was forced to appear in court.[83] Dr. Poncet regards this "as a sufficient indication of [Mr. Delaney's] trustworthiness and reliability".[84] In contrast, Dr. Poncet fully cooperated with the Italian authorities.[85] Dr. Poncet further notes that Mr. Delaney's allegation was contradicted by Mr. Hogart (the "other rogue involved in the 'reconstruction' scheme"), who "had to admit that [Dr. Poncet] was not aware of what was going on".[86]

59. *Second*, the Luparia Report submitted by Dr. Poncet highlights that the Cassation Judgment "cannot be considered as productive of any negative effect towards Dr. Poncet, nor could it impact on the evaluation of the honorability, integrity and fairness requirements necessary as to an arbitrator position".[87] In particular, Dr. Poncet highlights:

(i) Italian law (consistently with European law and the European Convention on Human Rights) enshrines the presumption of innocence, such that any 'non-final' judgments cannot undermine that presumption.[88]

(ii) The dismissal reflected in the Cassation Judgment is "merely a ruling on procedural aspects that forecloses a finding on the merits of a historical event".[89] If a judge acknowledges that an offence is extinguished (for example, as a result of the expiry of the applicable period under the statute of limitations, as in this case), "he must declare it immediately by issuing a judgment".[90] A judge may only go further (that is, to acquit) if the grounds for acquittal are clearly proven in "an absolutely, uncontroversial way" at that point in time.[91]

(iii) Dismissal judgments cannot produce extra-criminal effects (for example, in civil trials), and cannot be equated with a final judgment in the disciplinary context.[92]

(iv) To the extent that the Judgments can produce effects, the effects cited in the Mancuso Report (with respect to sentencing for other offences, confiscation, civil liabilities, etc.) are irrelevant to the present facts.[93] The Judgments would not necessarily preclude a finding that Dr. Poncet is a 'fit and proper' person, particularly given the relevance of the time that has elapsed since the alleged offence.[94]

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83 Dr. Poncet's Response to the Notice of Challenge, paras. 8-9, 13; Dr. Poncet's Further Comments, para. 1.

84 Dr. Poncet's Further Comments, para. 1.

85 Dr. Poncet's Response to the Notice of Challenge, para. 7; Dr. Poncet's Further Comments, para. 2.

86 Dr. Poncet's Response to the Notice of Challenge, para. 10; Dr. Poncet's Further Comments, para. 2.

87 Luparia Report, para. 3.

88 Luparia Report, paras. 4-6.

89 Luparia Report, para. 7.

90 Luparia Report, para. 7.

91 Luparia Report, paras. 8-11.

92 Luparia Report, paras. 14-18.

93 Luparia Report, paras. 19-26.

94 Luparia Report, paras. 27-33.

5. Reasoning

60. I note that I have carefully considered all of the submissions of the Parties in reaching my decision, even if the reasoning that follows only addresses the aspects of those submissions that are necessary to reach my decision.

61. I recall that the relevant enquiry under Article 12(1) of the UNCITRAL Rules is whether *circumstances exist* that give rise to justifiable doubts as to Dr. Poncet's independence or impartiality. In the present case, these *circumstances* are Dr. Poncet's alleged conduct culminating in 1991, rather than what may have followed from that conduct as a matter of Italian law and procedure (which does not independently reflect on Dr. Poncet's ability to discharge his function as an arbitrator in an impartial fashion).

62. However, the judgments of the Italian courts *are* relevant to my enquiry in that they are the (sole) evidence before me of Dr. Poncet's alleged conduct, and the developments with respect to those judgments affect the weight that I can attach to that evidence.

63. In the present case, I need to exercise particular caution, given that I do not have the benefit of the original evidence before the Italian courts, only the evaluation of that evidence by the lower courts in support of the courts' reasoning and the conclusions ultimately reached.

64. Further caution is warranted in light of the Court of Cassation's observations that in the absence of the expiry of the limitation period, a retrial would have in any event been ordered in light of the lower courts' reliance on Mr. Delaney's earlier statement (notwithstanding his refusal to answer questions in court), given, amongst other things:

(i) Mr. Delaney's statement provided key *direct* evidence of Dr. Poncet's *knowing* involvement in the scheme;

(ii) as is perhaps unsurprising in cases of alleged fraudulent behaviour, the constellation of evidence before the courts was primarily *circumstantial* in nature, from which the courts drew inferences to determine what had actually occurred and what Dr. Poncet knew at the relevant times;[95]

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95 *See, for example,* First Instance Judgment, pp. 55-56 ("it is absolutely undisputed that Poncet met at least four times with [Hogart] and Delaney, and personally picked up the documents from Delaney, in Jersey: this has already been said, but it bears repeating: was it necessary to engage a lawyer of Poncet's caliber simply to pick up documents?"), p. 57 ("[a]ny conjecture is possible in relation to the fact that Poncet was in possession of documents that were unsigned […] [t]heir possession, however, irrefutably proves participation in the forgery and excludes the possibility that he might not have known of their forgery"), p. 60 ("Ceruti had sent Conte the documents but not the list of items, which was in the hands of Poncet alone […] one inference is certain, and it concerns Poncet's participation in the forgery and his awareness of the forgery. Because a lawyer cannot be unaware of the evidentiary [inefficacy] of a document proving the conclusion of a transaction contract whose subject matter remains unknown"); Appeal Judgment, p. 48 ("Poncet and Conte also had the dossier materially available, which was abnormally incomplete, including on the essential elements of the proposed 'transaction', and whose inconsistencies were immediately perceptible"), p. 52 ("confirmation of [Dr. Poncet's] participation in the falsification results from the possession of a copy of the dossier allegedly delivered to him by Delaney […] it should be inferred at least that there were different documents available, this circumstance is relevant in terms of both the further response to their falsity and the awareness of the defendant regarding said falsity"), p. 53 ("[Dr. Poncet]'s presence at that meeting […] could not have had an alternative justification than being aimed at his potential

(iii) some of this (documentary) evidence originated from Mr. Delaney, the meaning and effect of which was explained and corroborated by Mr. Delaney's statement;[96] and

(iv) in preferring the version of events advanced by the prosecution, the lower courts discounted countervailing documentary evidence advanced by Dr. Poncet (for a variety of substantive and procedural reasons) and the statement of Mr. Hogart tending to exculpate Dr. Poncet from knowing involvement in the scheme.[97]

65. It is not my function to evaluate what may have occurred had a retrial taken place. As is abundantly clear and is agreed by the experts, "the [Italian] criminal proceedings did not conclude with an evaluation of Dr Poncet's criminal liability on the facts which were the object of the indictment, and no further evaluation thereof is possible".[98] It is sufficient to observe that it would not be safe for me to conclude with certainty, as the Respondent suggests, that "there is no reason to suppose that the outcome would have been any different".[99]

66. Such an evaluation is also unnecessary for the task before me – that is, to assess whether circumstances exist giving rise to justifiable doubts as to Dr. Poncet's ability to discharge his function as arbitrator in an impartial fashion in the *present case*.

67. In light of the uncertainty as to whether any of the alleged conduct in fact occurred, the particular context in which the alleged conduct may have occurred,[100] the very significant passage of time (now more than 30 years) since the alleged conduct, and the fact that, as the Respondent acknowledges, there is no evidence of any "issue of integrity in the performance of [Dr. Poncet's] arbitral duties" in the long period of time since the alleged conduct,[101] I do not accept that justifiable doubts as to Dr. Poncet's independence or impartiality exist in the present case. Accordingly, the Respondent's challenge must be dismissed.

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testimony; in that meeting, therefore, the moment of the conspiracy between Poncet, Conte and Ceruti […] can well be identified"), p. 55 ("it is clear, therefore, that Poncet, a well-known lawyer, was in a position to grasp all the inconsistencies concerning the 'transaction' that highlighted its fictitious nature").

96 *See, for example,* First Instance Judgment, pp. 61-62 ("if to all that has been meticulously reported and analyzed so far we add Delaney's statements […] there can be absolutely no doubt of Charles Poncet's heavy responsibility in the whole affair").

97 *See*, *for example,* First Instance Judgment, pp. 56-59; Appeal Judgment, p. 55.

98 Mancuso Report, para. 33; Luparia Report, p. 22.

99 Request, paras. 10, 14.

100 *See, for example,* Appeal Judgment, p. 51 ("the long-standing and continuous relationship with Ceruti, both of friendship and legal assistance, has already been mentioned: this is a relationship which [Dr. Poncet] reported during the examination, the overall content of which, it is recalled – is of particular importance as it also highlights his concrete role in the matter").

101 Request, para. 20.

IV. DECISION

NOW THEREFORE, I, Dr. Hab. Marcin Czepelak**,** the Appointing Authority in this matter, after having considered the submissions of the Parties and the comments of the challenged arbitrator, and having established to my satisfaction my competence to decide this challenge in accordance with the UNCITRAL Arbitration Rules 2021,

HEREBY dismiss the challenge brought against Dr**.** Charles Poncet.

Done at The Hague, the Netherlands on 26 September 2023.

Dr. Hab. Marcin Czepelak