INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE ARBITRATION PROCEEDING BETWEEN

VC HOLDING II S.À.R.L., AND OTHERS

CLAIMANTS

and

ITALIAN REPUBLIC

RESPONDENT

ICSID Case No. ARB/16/39

DECISION ON THE PROPOSAL FOR THE DISQUALIFICATION OF ARBITRATOR DR. CHARLES PONCET

Unchallenged Members of the Tribunal deciding on the Proposal
Mr. Klaus Reichert SC, President of the Tribunal
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Alicia Martín Blanco

Date: April 21, 2023

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A. PROCEDURAL HISTORY

1. On November 4, 2016, VC Holding II S.a.r.l., SolEs XX Projekt GmbH, SolEs XXI Projekt GmbH, SolEs XXII Projekt GmbH, SolEs XXIII Projekt GmbH, SolEs Zarasol GmbH & Co. KG, Foresight European Solar 2 Ltd., Foresight Luxembourg Solar 4 S.a.r.l., Foresight Luxembourg (VCT) 2 S.a.r.l., CIC Renewable Energies Italy GmbH, Enernovum Asset 1 GmbH & Co. KG and Enernovum GmbH & Co. KG ("**Claimants**") submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") against the Italian Republic ("**Italy**" or "**Respondent**").

2. On December 6, 2016, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**").

3. The Tribunal is composed of Mr. Klaus Reichert SC, a national of Germany and Ireland, President, appointed by the co-arbitrators; Dr. Charles Poncet, a national of Switzerland, appointed by the Claimants; and Prof. Brigitte Stern, a national of France, appointed by the Respondent.

4. On August 4, 2017, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**"). Ms. Alicia Martín Blanco, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

5. On October 20, 2022, the Respondent proposed the disqualification of Dr. Charles Poncet, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 ("**Proposal**"). On that date, the Centre informed the Parties that the proceeding has been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6).

6. On October 24 and 28, 2022, Mr. Reichert and Prof. Stern ("**Unchallenged Arbitrators**") established a procedural calendar for the submissions on the Proposal, which was sent to the Parties and Dr. Poncet.

7. The Claimants submitted their response to the Proposal on November 21, 2022.

8. Dr. Poncet furnished his explanations on December 6 and 19, 2022.

9. The Parties filed a simultaneous round of comments on December 21, 2022.

10. On January 12, 2023, Dr. Poncet submitted further explanations.

11. On January 23, 2023, the Parties filed their final observations.

B. PARTIES' ARGUMENTS

1. Respondent's Arguments

12. The Respondent has proposed the disqualification of Dr. Poncet on account of facts indicating a manifest lack of the qualities required by ICSID Article 14(1), namely high moral character, and reliability to exercise independent judgment.[1]

13. Italy states that it "*very recently*" and "*as a result of an anonymous communication*" became aware that Dr. Poncet had been found guilty and sentenced to serve two years in prison by the first instance District Court (*Pretura Circondariale*) of Milan, later confirmed by the Milan Court of Appeal. On December 15, 1999, the Italian Court of Cassation annulled the decision of the Milan Court of Appeal for "prescription" (*prescrizione*). The Court of Cassation failed to identify any grounds that could have otherwise implied the reversal of Dr. Poncet's sentence, and its determination "*does not equate to acquittal of the defendant.*" Consequently, the Respondent argues that Dr. Poncet lacks the required high moral character and, as a further consequence, that the Tribunal was "*improperly constituted because Dr. Poncet lacked ab initio the high moral character that is required of individuals who wish to serve as arbitrators in ICSID arbitration proceedings.*"[2]

[1] Respondent's Disqualification Proposal (October 20, 2022), paras. 1-2.

[2] Respondent's Disqualification Proposal (October 20, 2022), paras. 5-13, 16; Respondent's Further Observations (December 21, 2022), paras. 51-60.

14. According to the Respondent, Dr. Poncet "*failed to disclose that he may be seen as lacking high moral character and that he may be perceived as being unable to exercise independent judgment*", and instead "*released a statement and a declaration at the outset of the proceedings where he confirmed his ability to serve as an arbitrator in ICSID proceedings*", thus depriving Italy of the opportunity to challenge his appointment.[3]

15. The Respondent alleges that the Proposal was filed promptly and disputes the contention that the right to seek disqualification for lack of an arbitrator's indispensable qualities is subject to waiver under ICSID Rule 27, as the qualities themselves are not waivable, and the principle of estoppel does not apply in these circumstances.[4] The Respondent further contends that the Claimants have failed to establish that Italy knew of the facts underlying its request before September 2022, that the Claimants cannot rely on the ARSIWA principles of attribution to impute knowledge to the Respondent, that there is no investigation duty on the part of the challenging party that corresponds to the arbitrator's duty of disclosure, and that any duty of investigation lies with the appointing party. In this context, the Respondent states that the Claimants have "*unearthed an additional investigation on Dr. Poncet in Italy*" where "*Dr. Poncet was accused of attempting to blackmail an Italian lawyer*" and notes that it "*at best, shows Dr. Poncet's very personal understanding of what is proper, his remarkably 'liberal' approach to the practice of law, and a recurring relationship with criminal law proceedings in Italy*."[5]

16. The Respondent contends that, contrary to the Claimants' allegations, it is the Claimants that "*grossly misrepresent the contents and consequences of the Judgment of the Court of Cassation.*" As the sole basis for the annulment was prescription, any *obiter* findings are of no legal consequence, including "*whatever statements the Court of Cassation made regarding the weight and admissibility of evidence against Dr. Poncet that the two lower courts relied on for his conviction*", and "*the factual basis for Dr. Poncet's criminal*

[3] Respondent's Disqualification Proposal (October 20, 2022), paras. 18-22.
[4] Respondent's Further Observations (December 21, 2022), paras. 6-15.
[5] Respondent's Further Observations (December 21, 2022), paras. 16-32.

conviction remains undisturbed." Therefore, "*the factual basis for his conviction remains and serves as basis for this disqualification request*", namely lack of high moral character.[6]

17. The Respondent argues that Dr. Poncet also manifestly lacks the required impartiality due to his failure to disclose "*his entanglement with the criminal justice system.*" According to the Respondent, "[a] *third party would reasonably believe that Dr. Poncet, having been previously investigated (on several occasions), prosecuted, and convicted by the Italian judiciary, may be predisposed against the State*", and the failure to disclose "*exacerbates the justifiable doubts that Italy reasonably has regarding Dr. Poncet's impartiality.*" Italy contends that it "*has not alleged any conflict of interest, but rather has argued that Dr. Poncet lacks impartiality more broadly*", as reflected in the 1987 Rules of Ethics which cover more topics than the IBA Guidelines. However, even if the Unchallenged Arbitrators were to apply the IBA Guidelines on Conflict of Interest, the conclusion would be the same as any doubt should be resolved in favor of disclosure and the purpose of the disclosure is to allow the parties, if they so wish, to explore the situation further. Italy contends that Rule 6(2) of the ICSID Arbitration Rules does not limit disclosure to circumstances which would be unknown in the public domain, and that the failure to disclose not only creates an appearance of bias, but it also prevented Italy from lodging a challenge much earlier in the proceedings.[7]

18. In reference to Dr. Poncet's last observations, Italy contends that Dr. Poncet "*misrepresents as Italy's evidence an article in Il Giornale dated 19 September 2009, which reported an investigation against him for reported extortion. Such article, however, was not Italy's evidence but Claimants.*" According to the Respondent, this confusion, as well as the comments based thereon, illustrates his inability to exercise independent judgment.[8]

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[6] Respondent's Further Observations (December 21, 2022), paras. 33-50; Respondent's Further Observations (21 December 2022), paras. 62-71.
[7] Respondent's Disqualification Proposal (October 20, 2022), para. 21; Respondent's Further Observations (21 December 2022), paras. 73-84.
[8] Respondent's Final Observations (January 23, 2023), pp. 2-3.

2. Claimants' Arguments

19. The Claimants contend that the Proposal, which is based on criminal cases that date back to the 1990s and concluded with a judgment of Italy's Court of Cassation in 1999, is untimely and must be deemed waived under Rules 9(1) and 27 of the ICSID Arbitration Rules, as these cases have (or should have) been known to Italy for nearly three decades. In particular, the Claimant contends that Italy was required to object promptly to the appointment of Dr. Poncet, but it failed to do so for more than five and a half years, thus waiving its right to challenge him.[9]

20. The Claimant argues that Italy mischaracterizes the facts and the judgment. Specifically, the Claimants dispute the allegation that the Court of Cassation only overturned Dr. Poncet's conviction based on the expiry of the relevant limitations period and that it did not identify any grounds that could have otherwise implied the reversal of the sentence. To the contrary, according to the Claimants, "[w]*hile it is true that no 'final' conclusion was ever reached as to the merits of the accusations against Dr. Poncet because there was no remand and retrial, there also was never any valid determination of Dr. Poncet's guilt, and the Court of Cassation strongly suggested, within the bounds of its ability to do so, that the evidence against Dr. Poncet was unreliable.*"[10]

21. The Claimants contend that Italy has failed to meet the disqualification standard of either manifest lack of high moral character or manifest lack of reliability to exercise independent or impartial judgment. Regarding the later, the Claimant alleges that "*Italy's suggestion that Dr. Poncet might harbor some sort of bias against Italy is rank speculation and assumes, contrary to logic, that Dr. Poncet feels something other than gratitude or relief toward Italy due to the professional, correct handling of this matter by the Italian Court of Cassation*."[11]

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[9] Claimants' Response (November 21, 2022), paras. 3-4, 14-17, 26-47; Claimants' Further Observations (December 21, 2022) paras. 2, 10; Claimants' Final Observations (January 23, 2023), para. 2.
[10] Claimants' Response (November 21, 2022), paras. 5-10, 50-53; Claimants' Further Observations (December 21, 2022) paras. 2. 9; Claimants' Final Observations (January 23, 2023), para. 2.
[11] Claimants' Response (November 21, 2022), paras. 82-89.

22. The Claimants dispute that Dr. Poncet wrongfully failed to disclose the criminal cases from the 1990s, thus depriving Italy of the opportunity to challenge him at the time. The Claimant alleges that this accusation constitutes an attempt by Italy to shift the blame for Italy's own failure to conduct a diligence on Dr. Poncet upon his appointment, and that allegations of failure to make disclosures are typically dismissed when the facts in question were known or readily knowable. Moreover, according to the Claimants, there was nothing to disclose as the convictions were rightly dismissed; the circumstances fail to satisfy the relevant standards regarding disclosure of potential conflicts; "*Italy has not and cannot explain why Dr. Poncet would feel any animus toward Italy*" in the circumstances; and even a failure to disclose something material would not be sufficient to disqualify an arbitrator unless the evidence showed manifest lack of one of the requisite qualities.[12]

23. The Claimants further contend that this is not changed by the Respondent's remarks regarding extortion allegations made against Dr. Poncet in a different case (the case of Ms. Margherita Agnelli), which are also based on "*a stark mischaracterization of the procedure and decisions of its own criminal justice system*." After investigating, the Milan Public Prosecutor and the Milan Trial Court confirmed that there was no evidence of extortion or blackmail justifying the filing of charges against Dr. Poncet. According to the Claimants, Italy has produced no evidence that Dr. Poncet behaved improperly before Italian courts or that he would have any reason to harbor animus against Italy.[13]

24. Because of the above, the Claimants request that the Unchallenged Arbitrators dismiss the Proposal, with costs.[14]

3. Arbitrator's Explanations

25. In his explanations, Dr. Poncet states that he is, has been, and intends to remain entirely independent and impartial in this arbitration.[15] He further states that he "*fail*[s] *to see the*

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[12] Claimants' Response (November 21, 2022), paras. 90-103.
[13] Claimants' Final Observations (January 23, 2023), paras. 3-6.
[14] Claimants' Response (November 21, 2022), paras. 105-106; Claimants' Further Observations (December 21, 2022) para. 11, Claimants' Final Observations (January 21, 2023), para. 7.
[15] Dr. Poncet's Explanations (December 6, 2022), p. 1.

relevance in the context of challenge proceedings against [him] *five years into an ongoing arbitration, of a reference to a false accusation, brought by a rogue individual some 30 years ago*", that he is "*puzzled by the suggestion that* [he] *should have disclosed anything in this respect*", and that he is "*grateful that the Italian Supreme Court corrected the wrong decisions of the lower courts in this matter.*"[16]

26. He explains that in the late 1980s he represented "*a Mr. Marco Ceruti in an international judicial assistance case*" whom he recalls as being "*one of the suspects in the Banco Ambrosiano scandal.*" He explains that Mr. Ceruti's "*version of the events was that he had sold a large amount of jewelry and art objects to Liccio Gelli, which explained the payments received, part of which was sitting in Swiss bank accounts*" and was assisted in the alleged sale by "*two offshore operators in Jersey, Mr. Frank Hogart and Mr. Antony Delaney*", with whom Dr. Poncet met.[17] Dr. Poncet explains that in January 1992, Mr. Delaney confessed to having embezzled his clients' funds and to having prepared an entirely false set of documents to prove the sale of jewelry by Mr. Ceruti, and he "*wrongly claimed that* [Dr. Poncet] *was implicated in the process.*" This statement triggered an investigation in Italy for false testimony against Mr. Delaney, Mr. Hogart, Mr. Ceruti, the Italian lawyers, and Dr. Poncet.[18]

27. Dr. Poncet explains that he denied any involvement, fully cooperated with the Italian authorities, and demanded to confront Mr. Delaney with the false accusations he had made against him. Dr. Poncet states that in October 1996, "*Mr. Delaney (out of jail by then) finally appeared before an (English) Court but he refused to answer any questions and invoked his right to remain silent.*" Dr. Poncet explains that "[a]*t the Pretura hearing on November 27, 1996 I appeared in person to state my innocence and Mr. Hogart conceded that I had nothing to do with the fraudulent scheme.*" However, the Pretura initially found for the prosecution, and this was confirmed on appeal on January 27, 1999.[19]

[16] Dr. Poncet's Explanations (December 6, 2022), paras. 14-16.
[17] Dr. Poncet's Explanations (December 6, 2022), paras. 1-3.
[18] Dr. Poncet's Explanations (December 6, 2022), paras. 5-6.
[19] Dr. Poncet's Explanations (December 6, 2022), paras. 7-12.

28. Dr. Poncet states that "[b]*y the time the case reached the Italian Supreme Court, the statute of limitations (prescrizione) had run out.* […] *In reasoning the Court stated very clearly that but for the statute of limitations, it would have in any event overturned the lower courts for their reliance on a statement never confirmed in Court by a rogue individual who refused to answer any questions.*"[20]

29. For the sake of good order, Dr. Poncet has provided "*a certificate from the Italian record system ('Certificato del Casellario Giudiziario') confirming that* [he has] *no record of any kind in Italy.*"[21]

30. On January 12, 2023, Dr. Poncet submitted further comments,[22] copied in part below:

> *I am grateful for the link containing the Respondent's attachments and noted that Annex 3 is an article in Il Giornale dated 19 September 2009 purporting to show that I was investigated for attempted extorsion when in fact I had acted as a whistleblower and counsel for the aggrieved party.*
>
> *It would have been appropriate to include the attached two decisions of February 21, 2013 (Exhibit 7) and of July 2, 2013 on recourse by the plaintiff (Exhibit 8). These decisions cleared me of any suspicion and dropped any charges and I assume they are known to the Italian state, from which they emanated.*
>
> *Also attached is the Italian Court decision of March 30, 2010 (Exhibit 9) by which the Italian lawyer reported by me to the proper Italian authorities for charging a huge "tax free" fee to my client and then claiming "extorsion" when he was asked to render accounts, was sentenced to 14 months of imprisonment for tax fraud, a sentence reduced to eight months on appeal on March 2, 2012 (Exhibit 10). These Court decisions too are likely to be known to the Respondent, from whose judicial system they emanated.*
>
> *I wish they too had been produced with a view to fully informing the unchallenged co-arbitrators.*

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[20] Dr. Poncet's Explanations (December 6, 2022), para. 12.
[21] Dr. Poncet's Explanations (December 6, 2022), para. 13.
[22] Dr. Poncet's Explanations (January 12, 2023).

C. ANALYSIS

1. Introduction to the Analysis of the Unchallenged Members

31. The Respondent proposes the disqualification of Charles Poncet on two bases: (a) on account of facts which indicates a manifest lack of high moral character[23]; and (b) on account of his failure "*to disclose that he may be seen as lacking high moral character and that he may be perceived as being unable to exercise independent judgment.*"[24] The Unchallenged Members will, for convenience only, refer to these two bases as "High Moral Character" and "Disclosure" respectively. The Unchallenged Arbitrators also note that a number of subsidiary matters are raised by the Respondent which will be addressed as well.

2. High Moral Character

32. The existence of the predicate facts (as opposed to their underlying substance, if any) are not in dispute. There are three such predicate facts, namely, decisions of Italian Courts.

    a. On December 12, 1996, a magistrate in Milan found Charles Poncet along with Raffaele Conte, Frank Hogart and Neville Munson guilty of personal abetting and perjury.[25] The decision of the Milanese magistrate was as follows:

    > *For these reasons*
    >
    > *the magistrate, having read the articles 533. et seq, c.p.p., declares MUNSON NEVILLE, HOGART FRANK, PONCET CHARLES and CONTE RAFFAELE responsible for the crimes ascribed to them and deemed among them the continuation, applied the reduction of sentence pursuant to articles 438 et seq, c.p, p. to Conte Raffaele,*
    >
    > *sentences*
    >
    > *MUNSON NEVILLE to one year of imprisonment;*
    >
    > *HOGART FRANI and PONCET CHARLES to two years of imprisonment;*

[23] Respondent's Disqualification Proposal (October 20, 2022), para. 1.
[24] Respondent's Disqualification Proposal (October 20, 2022), para. 18.
[25] District Magistrate's Court of Milan (December 12, 1996), Judgement No. 7402/96.

CONTE RAFFAELE to sixteen months of imprisonment;

as well as all jointly and severally to the payment of legal costs;

grants the benefits referred to in Articles 163 and 175 c.p. to all the accused;

orders the transmission of the documents, in copy, to the Public Prosecutor's Office in relation to the offense referred to in Article 372 of the Italian Criminal Code, possibly identifiable in the depositions of BIONDI ALFREDO and TONANI PASQUALE;

orders the transmission of a copy of the sentence to the Council of the Milan Bar and Prosecutors Association as far as it may possibly be in relation to CONTE RAFFAELE.

MILAN, 12.12.96

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b. On January 27, 1999, the Milan magistrate's decision was upheld by the Court of Appeals.[26]

c. On November 23, 1999, the *Corte Suprema di Cassazione* annulled the conviction against Charles Poncet.[27]

33. What is in dispute, insofar as the Respondent's Proposal is concerned, is: (a) the characterization of what it was the *Corte Suprema di Cassazione* did in substance; and (b) do these predicate facts indicate that Charles Poncet manifestly lacked high moral character for the purposes of the ICSID Convention.

34. Taking the first of these issues, the Parties differ considerably as to what the Unchallenged Arbitrators should draw from the *Corte Suprema di Cassazione*'s judgment. On the one hand, the Respondent argues that all that the Court did was to quash the conviction on what it says was the technicality of a time-bar or prescription. On the other hand, the Claimants say that the *Corte Suprema di Cassazione* went out of its way to express doubts about the

[26] Court of Appeal of Milan (January 27, 1999), Judgement No. 821/97.
[27] Supreme Court of Cassation (November 23, 1999), Judgement No. 1774.

conviction but, rather than sending the matter back down to courts below for reconsideration decided to rely upon the ground resulting in immediate termination.

35. The Unchallenged Arbitrators now record certain portions of the judgment of the *Corte Suprema di Cassazione* insofar as it referred to Charles Poncet. Given the importance of the matter, the Unchallenged Arbitrators consider it important that such portions be extensively set out (as per the translation provided to us).[28]

> *On to legal recourse raised by*
>
> *1) PONCET Charles, born in Geneva on December 31, 1946*
>
> *2) CONTE Raffaele, born in Pozzuoli on September 26, 1926*
>
> *3) HOGART Frank, born in Rabat (Morocco) on June 5, 1933*
>
> *4) MUNSON Neville, born in Jersey on 11 September 1961*
>
> *Against the sentence of 27 January 1999 of the Court of Appeal of Milan.*
>
> *the Court*
>
> *having regard to the acts, the judgment under appeal and the legal recourses;*
>
> *having heard the report of the Counselor Renato Fulgenzi;*
>
> *having heard from the public esecutor* (sic) *in the person of the Deputy Attorney General Giuliano Turone, who concluded for annulment without referral because the offences were extinguished by the statute of limitations;*
>
> *having heard the defense attorneys, attorney Federico Stella and attorney Raffaele Dolce for Charles Poncet, attorney Michele Saponara for Raffaele Conte,*
>
> *the Court remarks*
>
> *the Milan magistrate, by judgment Dec. 12, 1996, found Charles Poncet, Raffaele Conte, Frank Hogart and Neville Munson guilty of personal abetting and perjury as:*

[28] Supreme Court of Cassation (November 23, 1999), Judgement No. 1774.

a) Marco Ceruti carried out the crime of fraudulent bankruptcy then, the plaintiffs, in collusion with each other and with Christopher Anthony Delaney helped Ceruti to evade the authority's investigation by creating fictitious documentation attesting to a business transaction related to art objects between Ceruti and the company "Merlin Writers Limited" in Jersey, in order to represent and justify the availability of the sum of $10,000,000 from the accounts of Banco Ambrosiano. This documentation was introduced to the Court of Milan by Raffaele Conte as a member of Ceruti's defense team.

b) The plaintiffs in collusion with each other and with Marco Ceruti, Hogan testified as a witness before the Court of Milan in the trial relating to the bankruptcy of Banco Ambrosiano, affirmed the falsehood about the genuineness and authenticity of the documents indicated in paragraph a) and declared falsely that he recognized Licio Gelli as the true purchaser of the art objects apparently purchased by Ceruti, the others prepared the aforementioned fictitious documents, offered apparent documentary support for Hogart's statements.

The conviction was upheld by the Court of Appeals on 01/27/99, and against this decision Messrs. Poncet, Conte, Hogart and Munson appealed to the Supreme Court.

Charles Poncet's defense deduces:

(a) failure to take decisive evidence and flaw to state reasons with allusione (sic) *to the failure to renew the pre-trial investigation, requested to acquire the depositions of the collaborators of Christopher Anthony Delaney, administrator of "Merlin Writers limited" and co-defendant in aiding and abetting;*

(b) unusability (sic) *of the minutes of the statements made by Delaney in the international rogatory, under two distinct profiles: for the constitutional illegitimacy of Art. 238/4 CPP (Constitutional Court 02.11.98 no. 361 and insofar the statements were made as witness without the warning in Art. 63/1);*

(c) unusability (sic) *of the documentation filed at the hearing by inspectors Hopper and Pryke, of the Jersey State Police;*

(d) misapplication of criminal law and contradictory reasoning as like the crime of perjury existed (there was - nor was it indicated - any evidence that HOGART had knowledge of Poncet's willingness to be heard as witness

and about his inclusion in the witness list; the court had also already given up hearing him when Hogart turned up to testify);

(e) lack of correlation between the disputed fact (making false documents) and the fact held in the sentence (strengthening of the criminal intent of others);

(f) contradictory reasoning as to Poncet's deemed participation in the formation of false documents;

(g) erroneous application of the criminal law with concern to the existence of personal aiding and abetting;

(h) lack of motivation on the denial of generic extenuating circumstances;

…

New reasons were presented by Poncet's defenders (who develop in a more exhaustive way the thesis of the usability of the statements of Delaney and regret the failure to take on the statements made by Marco Ceruti to the defenders themselves on 25.09.1996 according to article n. 38 disp.art.CPP) and by the defender of Conte (who, in reporting the prescription of both crimes, underlines how the reasons illustrated in the main appeal, demonstrate the non-existence or extraneousness of his client to them).

Brief notes for the hearing were presented, in the interest of Poncet, by the lawyer Raffaele Dolce, who points out the prescription of the crime of perjury and dispute that the personal aiding and abetting is conceivable when the offending conduct is put in place in the hearing phase of the trial and he reiterates that the failure to renew the hearing in order to hear the Delaney again follows the absolute unusability (sic) *of the previous statements by Delaney himself.*

As correctly pointed out by the Procuratòre Generale (general Attorney), the crimes referred to in letters a) and b) of the section, contested by the charge inasmuch committed respectively on 10 June and 10 December 1991 but deemed by the magistrate to be unified by the constraint of continuation, must both be declared extinct for prescription, since the time necessary to prescribe has matured on 10.6.99, which in this case was seven and a half years pursuant to art. 157, first paragraph n. 4 and second paragraph, and of art. 160, second paragraph, of the penal code.

False testimony at the time of the facts was punished with imprisonment from six months to three years, and for the crime (more serious at the time) of aiding and abetting, was punished with imprisonment up to four years, the aggravating circumstance referred to in art. 112 n.l CP, having the magistrate ordered, on 23.11.94, the excerpt of the deeds against Delaney.

All the grounds for appeal cannot be examined, the acceptance of them, if in the hypothesis they were to be considered well founded, would result in the annulment with postponement of the sentence in question, the latter being incompatible with the obligation of the immediate declaration of acquittal for extinction of the crime, established by art. 129/1 of the CPP.

Therefore, not all the complaints of lack of motivation are considered here (SS.UU. 21.10.92, Marino), but also the cases concerning the unusability (sic) *of the minutes of the statements made by Cristopher Anthony Delaney on 13.2.92 at the interrogation carried out (during the trial concerning the bankruptcy of Banco Ambrosiano) for international letters rogatory in the presence of the judges of the Milan court, the PM and the defenders of Marco Ceruti.*

There is no doubt, in fact, that the contested sentence should be annulled with postponement as a result of the declaration of constitutional illegitimacy of art. 238/4 CPP, in the part in which it does not foresee that. If the person examined, in accordance with art. 210 CPP, refuses to answer on facts concerning the responsibility of others, already covered by its previous declarations, (hypothesis which occurred in this case, since Delaney, in the questioning for rogatory of the 01.10.96, availed himself of the right not to answer). Without the consent of the accused it will be applied art. 500 paragraphs 2-bis (comma) and 4 CPP (Constitutional Court n. 361/98).

It is necessary to dwell only on the complaints of shortage of correlation between the disputed accusation and the sentence, referred to letter e) of the reasons presented by the defenders of the plaintiffs Poncet and Conte; of violation of criminal law with reference to the deemed configurability of a personal aiding and abetting conduct in the trial phase (Poncet and Hogart); of violation of the same law for the non-recognition of the exemption provided for by art. 386 CP (Hogart).

About the first complaint, it must be ruled out that in the present case the radical transformation of the fact, took place in this case, where the abstract hypothesis of violation of the principle of correlation between accusation

and sentence, whose observation is not reached on the basis of the slavish and mere literal comparison between contestation and sentence, because, the violation cannot be considered to exist when the defendants have come to be, during the trial, in the concrete condition of making a defense of the accused defend the accused in relation to the object of the appeal (SS.UU. 19.6.96, Di Francesco).

The second complaint appears unfounded.

In an attempt to offer a greater concretization of the interest protected by art. 378 CP, the legal objectivity of personal aiding is recognized by the most recent doctrine in terms of protecting the interest of the administration of justice in the regular conduct of the criminal trial, in the phase of investigations and research, during or immediately after the commission of a crime, or in the protection of the activities of the judicial police, justified by the immediacy of its intervention.

The functions of the judicial police set out in art. 55 CPP would in fact find a synthetic clarification in the formula of the incriminating provision both from the point of view of avoiding investigations and under that of subtraction from research.

The same doctrine didn't fail to observe that the apparent delimitation to the single phase of the activity of the judicial police is excessively reductive and it is not justified in the face of the formulation of the norm, which is expressed in terms that certainly cannot exclude that in the sphere of protection can include the hearing instruction activity.

It does not appear relevant the recall of this Court's jurisprudence according to which the crime of aiding and abetting is absorbed in that of perjury in the hypothesis in which the material element of the crime can be identifiable or appears pertinent only in the deposition given to the judicial authority.

When, as in this case in point, the deposition of a false witness is designed to strengthen, making more credible, a conscious activity of production in the criminal trial of a coordinated set of false documents in order to allow the accused to escape the assessment against him of his charge in the crime.

It must be admitted that the interest in preventing the disturbance of the formal context of the investigative model is autonomous and cannot be considered absorbed in a different one in order to the genuineness of the witness evidence.

> *The third complaint is also unfounded.*
>
> *The applicability of the exemption pursuant to art. 384 CP was invoked by Hogart.*
>
> *When he was called to testify in the context of the Banco Ambrosiano trial, he had already carried out a criminal activity before that moment, so he had no other choice if not that of providing a distorted interpretation of events.*
>
> *Now, contrary to what the applicant claims, the prevailing jurisprudence of this Court is in the sense that the special rule provided for those who find themselves in the need to save themselves or a close relative from a serious and inevitable harm in freedom and honor. This is not a responsibility of the agent when the dangerous situation was voluntarily caused by him (such as personal aiding and abetting, see Section VI, 23.5.95, Nizzola).*
>
> *P.Q.M.*
>
> *The contested sentence is canceled without postponement because the crimes ascribed are extinguished by prescription.*

36. The Unchallenged Arbitrators understand that no further legal or prosecutorial action was taken by Italian authorities against Charles Poncet thereafter. Essentially, the judgment of November 23, 1999, brought the "legal peril" for Charles Poncet to an end.

37. The Unchallenged Arbitrators do not see their role as delving into the domestic law *rationale* or reasoning underpinning a national court judgment concerning municipal criminal charges, and then extrapolating further conclusions one way or the other. Put another way, the Unchallenged Arbitrators do not consider themselves to be an interpretative body or indeed some form of appellate court for this purpose. Objectively speaking, the Unchallenged Arbitrators see one unambiguous outcome from the judgment of the *Corte Suprema di Cassazione*, namely, that **the conviction against Charles Poncet was annulled**. As and from the moment which the *Corte Suprema di Cassazione* pronounced its decision that was the end of the matter and Charles Poncet must be considered as having had no conviction against him. This is consistent with Exhibit 2 to the comments provided by Charles Poncet as supplied to the Parties on December 6, 2022, namely a Criminal Records Certificate (ref. 140464/2022/R) dated October 25, 2022, from

the Criminal Records Information System (the Respondent's Ministry of Justice) which states: "*Si attesta che nella Banca dati del Casellario giudiziale risulta: NULLA*".

38. The Unchallenged Members read this as "*It is hereby certified that the Criminal Records Database shows: NOTHING*".

39. The Unchallenged Members do not understand, from the record relating to the Respondent's Proposal that this Certificate is anything other than authentic and accurate. No comment appears to have been made by the Respondent following its filing.

40. The Unchallenged Members, therefore, consider that the matters relied upon by the Respondent to manifestly indicate that Charles Poncet lacked high moral character for the purpose of the ICSID Convention are not established. The Proposal would require the Unchallenged Arbitrators to gainsay or interpret an annulment of a conviction so as to, in all but name, reinstate such conviction as a matter of its underlying "substance". That proposition falls very far short of the unquestionably stringent requirements to impugn (much less remove) an arbitrator for a manifest lack of high moral character.

41. The Unchallenged Arbitrators, therefore, find that the Respondent has not established that Charles Poncet manifestly lacks high moral character; further, as a direct consequence thereof, its argument that he was ineligible to accept the appointment as an arbitrator in this arbitration *ab initio* must be dismissed.

3. Disclosure

42. The Respondent's Proposal advances an alternative ground to disqualify Charles Poncet in that, at the outset, he failed "*to disclose that he may be seen as lacking high moral character and that he may be perceived as being unable to exercise independent judgment*",[29] "*failed to disclose his conviction for heinous crimes that are particularly relevant to the*

[29] Respondent's Disqualification Proposal (October 20, 2022), para. 18.

administration of Justice"[30] and "*confirmed, falsely, to possess the high moral character required of him by the ICSID Convention to sit as an arbitrator*".[31]

43. The Unchallenged Members see, immediately, that a key predicate for this challenge is unavailable for the Respondent, namely, that he "*may be seen as lacking high moral character.*"[32] Given the earlier finding that the Respondent has failed to establish that Charles Poncet manifestly lacked high moral character (and that is the standard required by the ICSID Convention), it stands to reason that such an unestablished allegation cannot be resurrected in a different and considerably looser formulation, *i.e.*, "*may be seen*", for the purposes of disclosure requirements. To that extent, the Unchallenged Members dismiss the Proposal and the alleged falsity is not established.

44. The Respondent's Proposal does, however, suggest that Charles Poncet should have disclosed, at the outset, "*his past troubles with Italy.*" The Respondent, further, says that the consequence is that "*Dr. Poncet deprived Italy of the opportunity to challenge his appointment pursuant to Article 57 of the ICSID Convention at the onset of these proceedings.*"[33] The Respondent says that the circumstances ("*any persons who have been prosecuted and sentenced to jail by the judiciary of a State are not able to exercise independent judgment in proceedings involving that same Stat*e") were such that they were disclosable matters as they indicate a manifest lack of an ability to exercise independent judgment.[34]

45. The Unchallenged Members consider that the Respondent's *rationale*, in quotation marks just above, does not fully reflect the position as of the moment of acceptance by Charles Poncet of his appointment in this arbitration. While he was indeed prosecuted and sentenced to jail by a magistrate in Milan, the Supreme Court of the Italian Republic (and it is, of course, the Italian Republic, rather than any individual organ of State which is the Respondent) annulled that conviction. The judiciary at the highest level within the Respondent pronounced this annulment so it is a matter of considerable doubt whether a

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[30] Respondent's Disqualification Proposal (October 20, 2022), para. 19.
[31] Respondent's Disqualification Proposal (October 20, 2022), para. 21.
[32] Respondent's Disqualification Proposal (October 20, 2022), para. 18.
[33] Respondent's Disqualification Proposal (October 20, 2022), para. 22.
[34] Respondent's Disqualification Proposal (October 20, 2022), para. 21.

cognizable and manifest link could be made between an alleged inability to exercise independent judgment on the part of Charles Poncet and the very judiciary (at the highest level) which brought his "legal peril" to an end. As a matter of fairness to all involved, the Unchallenged Members must take account of what finally happened rather than just concentrate on earlier magistrate and appellate decisions. It is not, therefore, accurate to say, for the present purposes, he was convicted of "heinous crimes" when the full facts are that such earlier conviction by a Milanese magistrate was annulled.

46. There does not appear to be any suggestion, nor do the Unchallenged Arbitrators consider that such a suggestion is capable of establishment based on the record before us, but that Charles Poncet honestly completed his acceptance form. We do not understand it to be the case that it is alleged that Charles Poncet dishonestly suppressed the events of 1996-1999.

47. The Unchallenged Arbitrators also take note of the fact that more than 17 years passed between the annulment by the *Corte Suprema di Cassazione* and the acceptance by Charles Poncet of his appointment as an arbitrator in this matter.

48. Having taken all the matters together, namely:

a. the denial by the Unchallenged Arbitrators of the Respondent's allegation that Charles Poncet manifestly lacked high moral character,

b. the absence of any suggestion of dishonest suppression by Charles Poncet of facts occurring more than 17 years ago, when the final outcome of such facts was in his favour by reason of the annulment of the magistrate's conviction, and

c. the long passage of time,

the Unchallenged Arbitrators dismiss the Proposal to the extent remaining to be decided. In coming to this decision, the Unchallenged Arbitrators have considered the aforementioned matters, both individually and collectively, without any particular matter being determinative, but rather as an exercise in their judgment of the whole.

49. Most particularly, this is the case even if we were to consider it established that Charles Poncet had an obligation to make the sort of disclosure argued for by the Respondent. An

honest exercise of his judgment, in not referring to a matter which resolved, finally, without a conviction recorded against him more than 17 years ago, would not rise to the level, in our judgment, of establishing (at the time of acceptance of appointment) a manifest lack of the ICSID Convention's highly specific requirement of someone "*who may be relied upon to exercise independent judgment*".[35]

4. Subsidiary Matters

50. The Unchallenged Arbitrators note that the Respondent suggests that the reaction of Charles Poncet to the Proposal is a ground for his removal. The Unchallenged Arbitrators do not consider this argument to be well-founded. At no point in his comments and reactions to the Proposal did Charles Poncet exhibit anything other than a prudent wish to assist the Unchallenged Arbitrators in arriving at a fair decision based on as full a record of the predicate circumstances as possible.

51. Secondly, the Unchallenged Arbitrators note that the Respondent seeks to impugn the high moral character of Charles Poncet by reference to certain newspaper reports in connection with some legal issues associated with a member of the Agnelli family (which the Unchallenged Arbitrators understand to be a family of famous businesspeople in Italy). No inference of any kind is established in connection with the high moral character of Charles Poncet in connection with a matter he himself has put on the record before the Unchallenged Arbitrators. As far as the Unchallenged Arbitrators are concerned, the few media reports we have seen indicate nothing other than Charles Poncet discharging his professional duties as a lawyer in the ordinary course.

D. CONCLUSION

52. The Unchallenged Arbitrators, therefore, dismiss the Proposal of the Respondent to disqualify Charles Poncet. For completeness, the Unchallenged Arbitrators are not persuaded by the propositions advanced by the Claimants that the Respondent should have known about these matters, that these were all readily discernible from the public domain,

[35] ICSID Convention, Article 14(1).

or that the Respondent should have been shut out *in limine* from making the Proposal. The duty of disclosure rests on the arbitrator nominated by one Party, and there is no duty of due diligence on the shoulders of the other Party.

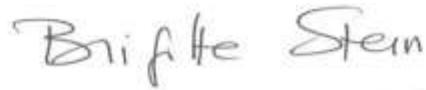
E. DECISION

53. For the reasons set forth above, the Unchallenged Arbitrators decide as follows:

a. The Proposal to disqualify Dr. Charles Poncet is dismissed.

b. A decision on the costs arising from the Proposal is deferred to the Award.

Mr. Klaus Reichert SC
President



Prof. Brigitte Stern
Arbitrator