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CERTIFICATE

ROCKHOPPER ITALIA S.P.A., ROCKHOPPER MEDITERRANEAN LTD, AND ROCKHOPPER EXPLORATION PLC

v.

ITALIAN REPUBLIC

(ICSID CASE NO. ARB/17/14)

I hereby certify that the attached document is a true copy of the *ad hoc* Committee's Decision on Annulment dated June 2, 2025.

Martina Polasek
Secretary-General

Washington, D.C., June 2, 2025

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

Rockhopper Italia S.P.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc

Claimants

and

Italian Republic

Applicant

ICSID Case No. ARB/17/14

Annulment Proceeding

DECISION ON ANNULMENT

Members of the* ad hoc *Committee

Mr. Michael Nolan, President

Ms. Eva Kalnina

Ms. Carita Wallgren-Lindholm

Secretary of the* ad hoc *Committee

Ms. Ella Rosenberg

Date: June 2, 2025

REPRESENTATION OF THE PARTIES

Representing Rockhopper Italia S.P.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc:

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Mr. Ben Williams
Ms. Kateryna Frolova
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Representing the Italian Republic:

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Mr. Fiorentino Sergio
Mr. Pietro Garofoli
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and

Prof. Maria Chiara Malaguti
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and

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and

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Table of Selected Abbreviations

Arbitration	Arbitration proceeding in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings [2006]
Award	Award rendered on August 23, 2022, by the Tribunal in the arbitration proceeding between Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, Rockhopper Exploration Plc and the Italian Republic (ICSID Case No. ARB/17/14)
C-[#]	Rockhopper's Exhibit
CL-[#]	Rockhopper's Legal Authority
Committee	Annulment committee composed of Mr. Michael Nolan, Ms. Eva Kalnina and Ms. Carita Wallgren-Lindholm
Counter-Memorial	Rockhopper's Counter-Memorial on Annulment dated July 25, 2023
Court of Cassation	*Corte di Cassazione or* Italy's Supreme Court
Hearing	Hearing on Annulment held on April 11-12, 2024
Hr. Tr. Arb., [date] [page:line]	Transcript of the Arbitration Hearing
Hr. Tr. Day [#], [page:line] (speaker)	Transcript of the Hearing on Annulment
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Individual Opinion	Individual Opinion by Professor Pierre-Marie Dupuy in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and*

	Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14 dated August 19, 2022
Italian Republic's Post-Hearing Brief	Italian Republic's Annulment Post-Hearing Brief dated June 18, 2024
Memorial on Annulment	Italian Republic's Memorial on Annulment dated May 2, 2023
R-[#]	Italian Republic's Exhibit
Rejoinder	Rockhopper's Rejoinder on Annulment dated January 12, 2024
Reply Memorial	Italian Republic's Reply on Annulment dated October 3, 2023
Request for Annulment	Italy's Request for Annulment dated August 23, 2022
RL-[#]	Italian Republic's Legal Authority
Rockhopper's Memorial on Jurisdiction, Liability and Quantum	Rockhopper's Memorial on Jurisdiction, Liability, and Quantum *in Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14 dated December 22, 2017
Rockhopper's Post-Hearing Brief	Rockhopper's Annulment Post-Hearing Brief dated June 18, 2024
Tribunal	Arbitral tribunal in the underlying Arbitration constituted on September 26, 2017

I. INTRODUCTION

1. This proceeding concerns an application for annulment (the "**Request for Annulment**") brought by the Italian Republic with respect to the award rendered on August 23, 2022 (the "**Award**")[1] by the arbitral tribunal (the "**Tribunal**") in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14) (the "**Arbitration**").

A. THE PARTIES

2. The Claimants are Rockhopper Italia S.p.A., a company incorporated under the laws of the Italian Republic,[2] Rockhopper Mediterranean Ltd, a company incorporated under the laws of the United Kingdom, and Rockhopper Exploration Plc, a company incorporated under the laws of the United Kingdom (together, "**Rockhopper**," or the "**Claimants**" as they were in the Arbitration).

3. The Italian Republic is referred to as the "**Applicant**" (as the Italian Republic is in the annulment proceeding), the "**Respondent**" (as the Italian Republic was in the Arbitration), or "**Italy.**" The Italian Republic and Rockhopper are collectively referred to as the "**Parties**."

B. THE OIL & GAS DISPUTE

4. The Arbitration concerned a dispute that Rockhopper submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty, which entered into force on April 16, 1998 (the "**ECT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**", or "**Convention**").

5. The Italian Republic's regulation of oil and gas exploration and production in its coastal waters was at issue in the Arbitration. In 2010, the Italian Republic had made changes to its Code for Environmental Protection to ban offshore drilling within 12 miles of the Italian coast. In 2012, the Italian Republic made an exception to the drilling ban for pending applications for oil and gas

[1] Award (**R-15**).

[2] Due to foreign control, the Parties agreed to treat Rockhopper Italia S.pA. as a national of another contracting State under Article 26(7)) of the ECT and Article 25(2)(b) of the ICSID Convention. *See* Rockhopper's Memorial on Jurisdiction, Liability, and Quantum *in Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14 ("**Rockhopper's Memorial on Jurisdiction, Liability, and Quantum**"), ¶27, (**R-34**).

production concessions within the area subject to the ban. In 2015, the Italian Republic revoked the 2012 exception to the 2010 drilling ban.

6. The area subject to the drilling ban included the *Ombrina Mare* oilfield, which is off Abruzzo, a region of Central Italy. In August 2014, one of the Rockhopper entities had acquired an offshore exploration permit for the *Ombrina Mare* oilfield as part of the purchase of companies owned by Intergas Più S.r.l in a wider transaction. According to the Award, Rockhopper had announced a share and cash offer to acquire the Intergas Più companies earlier in the year and subsequently paid approximately EUR 36 million.[3]

C. THE AWARD IN ROCKHOPPER'S FAVOR

7. In the Arbitration, Rockhopper claimed (a) that the Italian Republic's treatment of Intergas Più's investment and its own investment was in violation of the fair and equitable treatment standard set out in Article 10(1) of the ECT, and (b) that the Italian Republic had failed to abide by its obligation set out in Article 13 of the ECT not to expropriate Rockhopper's investment unlawfully.

8. In the Award, the Tribunal ruled unanimously, with an individual opinion by one member (the "**Individual Opinion**"), that the Italian Republic had unlawfully expropriated Rockhopper's right to receive a production concession in the *Ombrina Mare* oil and gas field in violation of Article 13 of the ECT.[4] The critical matter in the consideration of the Tribunal was an exchange between the Ministry of the Environment and the Protection of Land and Sea and Rockhopper. The exchange occurred shortly before the denial by the Italian Republic's Ministry of Economic Development by a letter dated January 29, 2016 ("**the January 29, 2016, Letter**") of Rockhopper's application for a production permit.[5] The Tribunal ruled that, due to the approval by the Ministry of the Environment, the subsequent denial of the application for the production concession by the Ministry for Economic Development had been in violation of Italian law and a direct expropriation of Rockhopper's right to receive a production concession in violation of Article 13 of the ECT.

[3] Award, ¶95.

[4] Rockhopper had contended in the Arbitration that Italy's rejection of the production permit application was in violation of Italy's obligations under the ECT to provide fair and equitable treatment, to prevent impairment of the management, maintenance, and enjoyment of investments, and to refrain from unlawful expropriation. *See* Award, ¶87.

[5] January 29, 2016, Letter (**C-134**).

9. As a consequence of the ruling that the Italian Republic had committed a direct expropriation, the Tribunal said that it became unnecessary for the Award to address what it described as Rockhopper's narrative of "the twists and turns over some years of their (and their predecessor's) application" for the production permit.[6] The Award accordingly does not give extended consideration to Rockhopper's claim that Italy had denied fair and equitable treatment to the investment of Intergas Più, and then to its own investment following the acquisition, in violation of Article 10 of the ECT, which had been the main focus of the Parties.

D. THE "ENVIRONMENTAL DEBATE"

10. Both the Award and the Individual Opinion, which was from the arbitrator appointed by the Italian Republic, expressly remark upon environmental concerns that had figured prominently in the Parties' arguments in the Arbitration. The Tribunal described itself as "at pains to point out" that the Award in Rockhopper's favor "is not a 'victory' for one side or the other in that environmental debate, which is of a civic or political character."[7] The Award, in the description of the Tribunal,

> "rather addresses the legal issue at hand, namely, whether compensation is due to a foreign investor in respect of its investment, based on specific international criteria as contained in a treaty to which Italy was, at the material time, a contracting party."[8]

E. THE CLAIMED ANNULABLE DEFECTS

11. The Italian Republic contends that the Award should be annulled because the arbitrator appointed by Rockhopper, Dr. Charles Poncet, did not disclose his criminal prosecution in Italy during the 1990's. That prosecution arose out of Dr. Poncet's work as a lawyer on a matter related to the collapse of *Banco Ambrosiano* in 1982. The Italian Republic further contends that, as a result of the criminal charges and attitudes toward Italy that Dr. Poncet may have formed as result of his criminal prosecution, Dr. Poncet served as a member of the Tribunal despite lacking the qualities of high moral character and reliability for the exercise of independent judgment regarding all parties that were required for the Tribunal to be properly constituted. The charges against Dr. Poncet were for the

[6] Award, ¶96

[7] Award, ¶10.

[8] Award, ¶10.

fabrication of documentary evidence and aiding and abetting perjury and resulted in two criminal convictions and a two-year sentence that was affirmed in the *Corte di Appello di Milano* ("**Milan Court of Appeal**") but annulled in Italy's *Corte di Cassazione* ("**Court of Cassation**"). The annulment of Dr. Poncet's convictions was on the ground of *prescrizione*, Italy's equivalent to a statute of limitations, due in part to pre-trial delays. As a result of the annulment of his convictions, Dr. Poncet has no criminal record in Italy.

12. The Italian Republic also contends that annulment should be ordered due to the following annullable defects in the Award itself and in two jurisdictional decisions that the Award incorporates:

    12.1 First, the Tribunals' decision to hear treaty-based claims by nationals of EU member States[9] against another EU member state, which the Tribunal reaffirmed following the Italian Republic's motion after the ruling of the Court of Justice of the European Union ("**CJEU**") in Republic of *Moldova v. Komstroy LLC* ("***Komstroy* Judgment**").[10] The Italian Republic submits that the Treaty for the Functioning of the European Union (the "**TFEU**", or the "**Lisbon Treaty**") required jurisdictional dismissal of Rockhopper's "Intra-EU"[11] treaty claims.

    12.2 Second, the Award's finding that the Italian Republic had committed an unlawful direct expropriation when it denied Rockhopper's application for an oil and gas production concession based on a 2015 Italian law that revoked an exception for pending applications that was established in 2012 to Italy's 2010 ban on drilling in coastal waters. The Italian Republic submits that (i) the legal basis adopted in the Award had not been argued in the Arbitration, and (ii) the Tribunal failed adequately to address the Italian Republic's argument that the ECT's "fork-in-the-road" clause precluded arbitration due to earlier proceedings in the Italian courts.

[9] Decision on the Intra-EU Objection to Jurisdiction dated June 26, 2019 (**R-16**); Decision on the Italian Republic's Request for Reconsideration dated December 21, 2021 (**R-17**).

[10] Judgment of 2 September 2021, *Republic of Moldova v. Komstroy LLC,* C-741/19, EU:C:2021:655, ("***Komstroy* Judgment**") (**CL-247**).

[11] The United Kingdom's January 31, 2020, withdrawal from the European Union occurred after the matters at issue in the Arbitration.

12.3 Third, the award of EUR 190,675,391 in damages to Rockhopper. The Italian Republic submits that (i) the Tribunal adopted a valuation method that the Parties had not submitted or discussed, depriving the Italian Republic of the opportunity to challenge the validity of assumptions supporting the valuation, and (ii) the Tribunal failed to explain the rationale of the methodology and of its assumptions.

13. The Italian Republic has invoked the following grounds for annulment under Article 52 of the ICSID Convention: (i) improper constitution of the Tribunal (Article 52(1)(a)); (ii) manifest excess of the Tribunal's powers (Article 52(1)(b)); (iii) serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iv) failure to state reasons on which the Award is based (Article 52(1)(e)).

14. Rockhopper disputes each of the grounds for annulment that the Italian Republic has asserted.

II. THE ANNULMENT PROCEEDINGS

A. PROCEDURAL HISTORY

15. On October 20, 2022, the Italian Republic submitted a Request for Annulment of the Award dated August 23, 2022. The annulment application also contained a request for stay of enforcement of the Award (the "**Stay Request**").

16. On October 31, 2022, the ICSID Secretary-General registered Italy's application for annulment and notified the Parties that "the enforcement of the Award is provisionally stayed."[12]

17. On December 7, 2022, the ICSID Secretary-General informed the Parties that an *ad hoc* Committee, consisting of Mr. Michael Nolan, Ms. Eva Kalnina, and Ms. Carita Wallgren-Lindholm, had been constituted.

18. On December 14, 2022, the Secretary to the *ad hoc* Committee (the "**Secretary to the Committee**") wrote to the Parties on behalf of the Committee regarding the First Session of the annulment proceeding. In that letter, the Committee invited the Parties to confer and agree on a briefing schedule for the Stay Request. The letter also stated that, to afford the Parties an opportunity to submit their

[12] Letter from ICSID to the Italian Republic dated October 31, 2022.

arguments, the Committee had decided to extend the provisional stay of enforcement of the Award until it had heard both Parties and reached a final decision on the Stay Request.

19. On December 20, 2022, the Parties informed the Committee of their agreement to a schedule for the First Session and written proceedings and oral argument on the Stay Request, which the Committee accepted.

20. The First Session was held by video conference on January 10, 2023.

21. Procedural Order No. 1 regarding the organization of the proceedings was issued on January 31, 2023. A procedural calendar was included as an annex.

22. The written proceedings on the Stay Request were conducted in accordance with the schedule proposed by the Parties and set out in the annex to Procedural Order No. 1.[13]

23. On March 6, 2023, the hearing on the Stay Request was held by Zoom videoconference. The hearing began at 2:00 pm GMT and ended at approximately 5:45 pm GMT.

24. On April 23, 2023, the Committee issued its Decision on the Stay of Enforcement of the Award, ordering, *inter alia*: (i) the Parties to confer in good faith and using their best efforts to cooperate and find an effective arrangement "for the mitigation of the risk of non-recoupment using a first-class international bank outside the European Union (or as Italy and Rockhopper otherwise agree) to be put in place in anticipation of the termination of the provisional stay of enforcement of the Award"; (ii) Rockhopper to apprise the Committee of arrangements agreed with Italy or that negotiations have failed and, in such circumstances, the concrete arrangements Rockhopper proposed to mitigate the risk of non-recoupment; and (iii) that the stay of enforcement of the Award to continue on a provisional basis pending further order.

[13] On January 24, 2023, the Italian Republic filed its Submission with respect to the Continued Stay of the Award dated August 23, 2022. On February 7, 2023, Rockhopper filed its Opposition to Italy's Request for the Continuation of the Provisional Stay of Enforcement. On February 14, 2023, the Italian Republic filed its Reply to Rockhopper's Opposition to the Continuation of the Stay of Enforcement of the Award dated August 23, 2022. On February 21, 2023, Rockhopper filed its Rejoinder in Opposition to Italy's Request for the Continuation of the Provisional Stay of the Enforcement of the Award.

25. On May 24, 2023, Rockhopper filed its submissions on the proposed arrangements in anticipation of the provisional stay of enforcement being terminated, in circumstances where no agreement was reached with the Italian Republic.

26. On June 22, 2023, the Italian Republic submitted to the Committee comments on Rockhopper's submissions.

27. On June 30, 2023, Rockhopper filed its Reply to Italy's comments of June 22, 2023.

28. On July 10, 2023, the Committee ordered that the provisional stay of enforcement would terminate upon Rockhopper putting in place the proposed arrangements. The arrangements for termination of the provisional stay of enforcement of the Award were set forth in Procedural Order No. 2 of that date.

29. On July 24, 2023, Rockhopper informed the Committee that, in accordance with Procedural Order No. 2, the Claimants had executed an escrow agreement, paid the escrow fee, and received confirmation from the bank that the escrow account had been opened.

30. On December 8, 2023, the Committee issued Procedural Order No. 3 regarding the schedule for written and oral proceedings. Procedural Order No. 3 altered the date for the submission of Rockhopper's Rejoinder, provided Italy with an opportunity to comment in writing on the decision in *Zeph Investments v. Australia* ("***Zeph Investments***") dated September 26, 2023, in the event Rockhopper addressed that decision in its Rejoinder, which Rockhopper subsequently did do,[14] and set dates for a pre-hearing conference and for a hearing in Madrid.

31. The written proceedings have included a Memorial on Annulment, a Counter-Memorial, a Reply Memorial, a Rejoinder, comments by the Italian Republic on the *Zeph Investments* decision and Post-Hearing Briefs.

32. In anticipation of a pre-hearing conference scheduled for February 28, 2024, the Secretariat on January 26, 2024, sent to the Parties a draft of Procedural Order No. 4 regarding the organization of the hearing on the application for annulment (the "**Hearing**").

[14] *Zeph Investments Pte. Ltd v the Commonwealth of Australia*, PCA Case No. AA917, Decision on the Challenge to Dr Charles Poncet (September 26, 2023) ("**Zeph Investments**") (**CL-422**).

33. On February 19, 2024, the Claimants sent a modified draft Procedural Order No. 4 and informed the Committee that the Parties have "agreed on all items", and that "there are no additional items at this stage that the parties would like to discuss during the Pre-Hearing Organizational Call." The Respondent confirmed the Claimants' message on February 20, 2024.

34. On February 21, 2024, the Committee informed the Parties that, considering their agreement on all items of draft Procedural Order No. 4, a pre-hearing conference appeared not to be needed. The Committee invited the Parties to so advise by February 23, 2024, if either side wished to proceed with a pre-hearing conference.

35. On February 27, 2024, the Committee, having received no comments, informed the Parties that the date for a pre-hearing conference was vacated.

36. On February 29, 2024, the Committee issued Procedural Order No. 4 in the form that the Parties had agreed.

37. On April 11-12, 2024, the Hearing took place in Madrid.

38. The following persons attended the Hearing:

Members of the ad hoc *Committee:*	
Mr. Michael Nolan	President
Ms. Eva Kalnina	Member
Ms. Carita Wallgren-Lindholm	Member
ICSID Secretariat:	
Mr. Ella Rosenberg	Secretary of the *ad hoc* Committee
Participating on behalf of Rockhopper:	
Mr. Thomas Sprange KC	King & Spalding
Mr. Ben Williams	King & Spalding
Ms. Flora Jones	King & Spalding
Ms. Kateryna Frolova	King & Spalding
Ms. Lisa Wong	King & Spalding
Ms. Catherine Munro	King & Spalding
Mr. Samuel Moody	Rockhopper Exploration Plc
Mr. William Perry	Rockhopper Exploration Plc
Participating on behalf of Italy:	
Mr. Giacomo Aiello	Avvocatura Generale dello Stato

Mr. Pietro Garofoli	Avvocatura Generale dello Stato
Ms. Laura Delbono	Avvocatura Generale dello Stato
Prof. Maria Chiara Malaguti	Ministero degli Affari Esteri e della Cooperazione Internazionale - MAECI
Mr. Domenico Di Pietro	Advisor to the Ministero dell'Ambiente edella Sicurezza Energetica

39. During the Hearing, the Parties reiterated and developed their positions, including in response to questions from the members of the Committee.

40. The Hearing was recorded and transcribed.

41. The written and oral proceedings on the Request for Annulment have taken place as set forth in Procedural Order No. 1 and Procedural Order No. 3 and as otherwise directed by the Committee taking account of the views of the Parties.

42. On September 9, 2024, the two sides submitted statements of costs on the schedule that the Committee had established considering the scheduling preferences of the parties.

43. On September 13, 2024, the Committee received an application from the European Commission for leave to intervene as a non-disputing party. The application stated as follows:

> "6. The Commission has decided to request leave to intervene as a non-disputing party in any pending or future investment arbitration proceeding concerning disputes between an investor of one Member State and another Member State, including annulment proceedings.
>
> "7. By its intervention, the Commission seeks to safeguard the interest in ensuring the uniform application of EU law."[15]

44. On September 16, 2024, in accordance with ICSID Arbitration Rule 37(2), the Committee requested comment from the Parties, if any, on the application of the European Commission by no later than September 26, 2024.

[15] European Commission's Application for Leave to Intervene as Non-Disputing Party in the Annulment Proceedings dated September 13, 2024.

45. On September 26, 2024, the Parties simultaneously commented on the application of the Commission, as the Committee had invited them to do.

46. On October 1, 2024, the Committee denied the application of the Commission. By letter of that date, the Secretary to the Committee informed the Commission as follows:

> "1. The Committee thanks the European Commission for the Application.
>
> "2. The Committee has carefully reviewed the EC's Application as well as the Parties' respective observations on the Application.
>
> "3. The Committee has also considered, *inter alia*, (i) that the proceedings in the present case have reached an advanced stage, with extensive written submissions, and oral presentations, which have covered several of the issues raised by the Commission in the Application; and (ii) that the Parties have already filed their Post-Hearing Briefs and Submissions on Costs. Procedural details of this case have been publicly available through the website of International Centre for Settlement of Investment Disputes ('**ICSID**') since the Secretary-General of ICSID registered the annulment application on October 31, 2022. Moreover, the Committee feels that it has adequately been informed by the Parties on issues of EU law as they may relate to the claims and the Parties' positions in this case.
>
> "4. In light of the above, and taking into account that ICSID Arbitration Rule 37(2), applied to the annulment proceeding by virtue of ICSID Rule 53, provides in its relevant part that '[t]he Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party', the Committee has decided not to accede to the EC's Application, as the Committee is of the view that the EC's intervention at this advanced stage would disrupt the proceedings."[16]

47. The proceeding was closed on May 29, 2025.

III. THE ARBITRATION

A. THE OIL & GAS PRODUCTION RIGHTS DISPUTE

[16] Letter from the Secretary to the Committee to the European Commission dated October 1, 2024 (emphasis in original).

48. At paragraphs 89-169 of the Award, the Tribunal provided an extensive summary of the factual background of the Parties' dispute upon which this Section heavily relies.

(1) The Ban Against Drilling in Italian Coastal Waters

a. The 2006 Code on the Environment

49. Law No. 152 of 2006 ("**Italian Law 152/2006**") approved the Italian Code on the Environment,[17] which sets out the legislative framework applicable to matters concerning environmental protection.

50. Article 6 of Italian Law 152/2006 establishes a technical-advisory commission for environmental assessments. The three subsequent Italian laws regarding coastal oil and gas production that are discussed in the Award – enacted in 2010, 2012 and 2015 – made various changes to Italian Law 152/2006, and in particular to Article 6 of Italian Law 152/2006.

b. The 2010 Prohibition of Drilling Within 12 Miles of the Coast

51. On June 29, 2010, Law No. 128 ("**Italian Law 128/2010**") introduced a prohibition on oil-and-gas exploration and production activities in proximity to certain protected marine and coastal areas, as well as in marine areas located within a specified distance from the Italian coastline.[18] Article 2 of Italian Law 128/2010 states at letter "h" of paragraph 3 as follows:

> "For the purposes of protecting the environment and the ecosystem, within the perimeter of marine and coastal areas which are for any reason protected for environmental protection purposes, pursuant to national or regional laws or in implementation of international deeds or conventions, the exploration, prospecting or exploitation of liquid or gaseous hydrocarbons in the sea, as envisaged by articles 4, 6 and 9 of Law no. 9 of 9 January 1991, are prohibited. The prohibition also applies to the marine areas located within twelve nautical miles of the external perimeter of such protected marine and coastal areas, as well as – exclusively with regard to liquid hydrocarbons – in the area enclosed within five miles from the baseline of territorial waters along the entire national coastal perimeter. Outside such areas, the authorization of the above activities is

[17] First Expert Report of Prof. Eugenio Piozzi in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, p. 8 (**R-37**).

[18] Law No. 128 ("**Italian Law 128/2010**") added paragraphs to Article 6 of legislative decree No. 152 of April 3, 2006, (**CLA-5**). *See* Award, ¶¶103-104.

> subject to the prior completion of the environmental impact procedure under article 21 et seq. of this decree, and after hearing the opinion of the local authorities located within twelve miles from the marine and coastal areas affected by the activities under the first sentence. The provisions under this paragraph apply to authorization procedures ongoing at the date of the entry into force of this paragraph. Enabling titles that have already been issued at the same date remain valid. Upon the entry into force of the provisions under this paragraph, paragraph 81 of article 1 of Law no. 239 dated 23 August 2004 shall be repealed."[19]

52. The following are facts stipulated by the Parties regarding Italian Law 128/2010 that are included in the Award:[20]

52.1 Uncertainty existed as to the interpretation of Italian Law 128/2010.

52.2 On January 12, 2011, the Ministry of the Environment sought clarification from the Council of State on how to interpret and apply Italian Law 128/2010. In particular, the Ministry of the Environment asked whether operators who had exploration permits and had already applied for production concessions would fall within the scope of the Prohibition contained in Italian Law 128/2010.

52.3 On March 16, 2011, the Council of State requested the opinion of the Ministry for Economic Development, as well as the Ministry for European Policies and the Ministry for Regional Affairs, on the questions raised by the Ministry of the Environment.

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[19] The Italian original is as follows:

"*Ai fi ni di tutela dell'ambiente edell'ecosistema, all'interno del perimetro delle aree marine e costiere a qualsiasi titolo protette per scopi di tutela ambientale, in virtù di leggi nazionali, regionali o in attuazione di atti e convenzioni internazionali sono vietate le attività di ricerca, di prospezione nonché di coltivazione di idrocarburi liquidi e gassosi in mare, di cui agli articoli 4, 6 e 9 della legge 9 gennaio 1991, n. 9. Il divieto è altresì stabilito nelle zone di mare poste entro dodici miglia marine dal perimetro esterno delle suddette aree marine e costiere protette, oltre che per i soli idrocarburi liquidi nella fascia marina compresa entro cinque miglia dalle linee di base delle acque territoriali lungo l'intero perimetro costiero nazionale. Al di fuori delle medesime aree, le predette attività sono autorizzate previa sottoposizione alla procedura di valutazione di impatto ambientale di cui agli articoli 21 e seguenti del presente decreto, sentito il parere degli enti locali posti in un raggio di dodici miglia dalle aree marine e costiere interessate dalle attività di cui al primo periodo. Le disposizioni di cui al presente comma si applicano ai procedimenti autorizzatori in corso alla data di entrata in vigoré del presente comma. Dall'entrata in vigoré delle disposizioni di cui al presente comma è abrogato il comma 81 dell'articolo 1 della legge 23 agosto 2004, n. 239.*"

[20] *See* Award, ¶104.

52.4 On June 14, 2011, the Ministry for Economic Development confirmed that, in its opinion, an exploration permit holder that has made a discovery has a legitimate expectation to obtain a production concession and should be allowed to file a production concession application for fields located in the marine and coastal areas affected by the Prohibition.

52.5 On October 20, 2011, the Council of State confirmed that an operator holding an exploration permit had no right to obtain a production concession.

c. The 2012 Exception for Pending Permit Applications

53. In June 2012, a new Italian government, led by Prime Minister Mario Monti, enacted Law No. 83 of 2012 ("**Italian Law 83/2012**").[21] Italian Law 83/2012 amended the Code on the Environment and made clear that the prohibition contained in Italian Law 128/2010 did not apply to applications for production concessions that were under review at the time Italian Law 128/2012 came into force.[22] Italian Law 83/2012 thus did not put an end to the 12-mile ban established two years earlier. Italian Law 83/2012 did, however, exclude from the 12-mile ban applicants who already had begun a production concession application.

54. The relevant text of Italian Law 83/2012 is as follows. The Committee has added underlining to the part that would be changed by Law No. 208 of 2015:

> "17. For the purposes of protecting the environment and the ecosystem, within the perimeter of marine and coastal areas which are for any reason protected for environmental protection purposes, pursuant to national or regional laws or in implementation of EU or international deeds or conventions, the exploration, prospecting or exploitation of liquid or gaseous hydrocarbons in the sea, as envisaged by articles 4, 6 and 9 of Law no. 9 of 9 January 1991, are prohibited. <u>The prohibition also applies to the marine areas located within twelve miles of the coastlines alongside the whole national coast perimeter and of the external perimeter of such protected marine and coastal areas, except to the concession procedures under articles 4, 6 and 9 of Law no. 9 of 1991, ongoing as at the date of entry into force of legislative decree 29 June 2010 no. 128 and subsequent or connected authorization and concession procedures, as well as the validity of authorizations issued within that same date, also for the purposes of performing exploration, prospecting or exploitation activities yet to be</u>

[21] Law No. 83 of 2012 ("**Italian Law 83/2012**") (**CLA-6**).

[22] *See* Award, ¶101.

authorized within the framework of the authorizations themselves, of any relevant extensions and of subsequent and connected authorization and concession procedures. The authorization of the above activities is subject to the prior completion of the environmental impact procedure under article 21 et seq. of this decree, and after hearing the opinion of the local authorities located within twelve miles from the marine and coastal areas affected by the activities under the first sentence, without prejudice to the activities under article 1, paragraph 82-[…], of Law 23 August 2004, no. 239, authorized by the territorial supervisory offices of the national mining office for hydrocarbons and geo-resources, in compliance with the environmental restrictions imposed by the same, which shall send a copy of the relevant authorizations to the Ministry of economic development and the Ministry of the environment and the protection of land and sea. Upon the entry into force of the provisions under this paragraph, paragraph 81 of article 1 of Law 23 August 2004, no. 239 shall be repealed. As of the entry into force of this provision, the owners of offshore production concessions are required to pay on an annual basis the production rate under article 19, para. 1 of Legislative Decree 25 November 1996, no. 625 is hereby increased from 7% to 10% for gas and from 4% to 7% for oil. The sole owner or co-owner of each concession is required to pay the sums corresponding to the increase of the percentage to a specific income component of the State budget, all of which shall be reallocated, in equal parts, to specific income components of the budget of the Ministry of the environment and the protection of land and sea and of the Ministry of economic development, so as to ensure the full performance, respectively, of activities aimed at monitoring and countering marine pollution and activities for the supervision and control of the safety, also environmental, of offshore exploration and production plants."[23]

[23] Italian Law 83/2012 replaced paragraph 17 of Article 6 of Italian Law 152/2006 with the language set forth above. The Italian original is as follows:

"*Ai fini di tutela dell'ambiente e dell'ecosistema, all'interno del perimetro delle aree marine e costiere a qualsiasi titolo protette per scopi di tutela ambientale, in virtu' di leggi nazionali, regionali o in attuazione di atti e convenzioni internazionali sono vietate le attivita' di ricerca, di prospezione nonche' di coltivazione di idrocarburi liquidi e gassosi in mare, di cui agli articoli 4, 6 e 9 della legge 9 gennaio 1991, n. 9. Il divieto e' altresi' stabilito nelle zone di mare poste entro dodici miglia dalle linee di costa lungo l'intero perimetro costiero nazionale e dal perimetro esterno delle suddette aree marine e costiere protette, fatti salvi i procedimenti concessori di cui agli articoli 4, 6 e 9 della legge n. 9 del 1991 in corso alla data di entrata in vigore del decreto legislativo 29 giugno 2010 n. 128 ed i procedimenti autorizzatori e concessori conseguenti e connessi, nonche' l'efficacia dei titoli abilitativi gia' rilasciati alla medesima data, anche ai fini della esecuzione delle attivita' di ricerca, sviluppo e coltivazione da autorizzare nell'ambito dei titoli stessi, delle eventuali relative proroghe e dei procedimenti autorizzatori e concessori conseguenti e connessi. Le predette attivita' sono autorizzate previa sottoposizione alla procedura di valutazione di impatto ambientale di cui agli articoli 21 e seguenti del presente decreto, sentito il parere degli enti locali posti in un raggio di dodici miglia dalle aree marine e costiere interessate dalle attivita' di cui al primo periodo. Dall'entrata in vigoré delle disposizioni di cui al presente comma e' abrogato il comma 81 dell'articolo 1 della legge 23 agosto 2004, n. 239. A decorrere dalla data di entrata in vigoré della presente disposizione, i titolari delle concessioni di coltivazione in mare sono tenuti a corrispondere annualmente l'aliquota di prodotto di cui all'articolo 19, comma 1 del decreto legislativo 25 novembre 1996, n. 625, elevata dal 7% al*

55. The Award notes the stipulation of the Parties that one of the stated purposes of Italian Law 83/2012, which was set out in an accompanying government report, was to avoid contingent litigation that would follow from permit holders such as Rockhopper Italia.[24]

56. The Award describes Italian Law 83/2012 as "not a 'one-way-street' in favor of" oil companies.[25] Instead, Italian Law 83/2012 "came with a price" because royalty rates were increased from 7% to 10% for gas and from 4% to 7% for oil.[26]

d. The 2015 Revocation of the 2012 Exception

57. In late 2015, the exception for pending applications that had been made in 2012 to the 2010 ban against hydrocarbon production within 12 miles of the Italian coast was removed. The removal of the exception was accomplished by Law No. 208 of 2015 ("**Italian Law 208/2015**").[27]

58. A section of the Award headed "RATIONALE FOR THE CHANGE IN LAW IN LATE 2015" states that Rockhopper had commented extensively on what the Tribunal characterized as "the political tussles which they say were the predicate for the change."[28] According to the Award, Rockhopper had submitted that the background was "apparent tensions as between regional and central government",[29] and that remarks unfavorable to Rockhopper had been made in Parliament.[30] The Tribunal stated,

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10% per il gas e dal 4% al 7% per l'olio. Il titolare unico o contitolare di ciascuna concessione e' tenuto a versare le somme corrispondenti al valore dell'incremento dell'aliquota ad apposite capitolo dell'entrata del bilancio dello Stato, per essere interamente riassegnate, in parti uguali, ad appositi capitoli istituiti nello stato di previsione del Ministero dell'ambiente e della tutela del territorio e del mare e del Ministero dello sviluppo economico, per assicurare il pieno svolgimento rispettivamente delle azioni di monitoraggio e contrasto dell'inquinamento marino e delle attivita' di vigilanza e controllo della sicurezza anche ambientale degli impianti di ricerca e coltivazione in mare." *See* Memorial on Jurisdiction, Laibility and Quantum, ¶110 (*citing* Italian Law 83/2012, Article 35 (**CL-6**)) (**RFA-4**).

[24] *See* Award, ¶101.

[25] Award, ¶102.

[26] *See* Award, ¶102 (the increased royalty was to be used for activities aimed at monitoring and countering marine pollution and activities for the supervision and control of the safety, also environmental, of offshore exploration and production plants).

[27] Law No. 208 of 2015 ("**Italian Law 208/2015**") (**CLA-7**).

[28] *See* Award, ¶106.

[29] *See* Award, ¶106. There is reference in the Award to "six referendum proposals" pursuant to art. 75 of the Constitution, subject to the prior issue of a resolution on part of ten regional Councils, and to the Court of Cassation having expressed its favorable opinion on the formal correctness of the six fundamental referendum demands, with it being expected that the Constitutional Court would issue a ruling. *See* Award, ¶109.

[30] *See* Award, ¶110. The Award states as follows with respect to Rockhopper's reliance on statements made by members of parliament:

however, that its "principal focus" was "the objective background to the legislative activity concerned."[31] The Award explains as follows:

> "114. There were indeed political tensions in the background, and objectively speaking, such tensions as between central and regional authorities were undoubtedly present. There was an intention to hold a referendum […], but the political grounds for this were resolved through parliamentary action at a central level […]. It can reasonably be seen that this parliamentary action headed off the likely referendum issues […]. These are all the various manifestations of political discourse. They are, in and of themselves, part and parcel of the normal political functioning of a country. It is a different matter as to whether or not sovereign measures taken as a result of such political processes engage international responsibility pursuant to specific promises embodied in applicable treaties."[32]

59. The removal of the 2012 exception for pending applications was accomplished by the following provision of Italian Law 208/2015:

> "The prohibition also applies to the marine areas located within twelve miles of the coastlines alongside the whole national coast perimeter and of the external perimeter of such protected marine and coastal areas. Enabling titles that have already been issued remain valid for the entire lifecycle of the oilfield, in compliance with safety and environmental protection standards. Maintenance activities aimed at implementing the technological upgrades necessary for the safety of the plants and the protection of the environment, as well as final environmental restoration activities must always be ensured."[33]

(2) Rockhopper's Investment

60. The Tribunal ruled that Rockhopper had acquired its investment in August 2014.[34] Rockhopper had stated in its Memorial on Jurisdiction, Liability and Quantum that in August 2014, Rockhopper Exploration, the third claimant in the caption of the Arbitration, acquired Mediterranean Oil and Gas

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"While there were indeed exchanges of differing viewpoints expressed by different parliamentarians, those are the types of evolving political discussions which are the product of such debates. Attributing to such diverse and competing political views, expressed in the cut and thrust of parliamentary discourse, the content of the rationale for final governmental decisions would likely take such debates out of their proper context."

[31] Award, ¶106.

[32] Award, ¶114 (internal citations omitted).

[33] Award, ¶99.

[34] *See* Award, ¶95 (referring to Rockhopper's Memorial on Jurisdiction, Liability and Quantum (**R-34**)).

Plc ("**MOG**") and MOG's then-wholly owned subsidiary Medoilgas Italia S.p.A. ("**Medoilgas Italia**").[35] Formerly, Medoilgas Italia had been Intergas Più.[36] The names of MOG and Medoilgas Italia were then changed to "Rockhopper Mediterranean" and "Rockhopper Italia."[37] Rockhopper Mediterranean, which is the second claimant in the caption of the Arbitration, was the owner from May 2005 of all of the shares of Rockhopper Italia.[38] Rockhopper Italia, which is the first claimant in the caption of the Arbitration, was the named applicant for the production concession[39] that the Italian Republic ultimately refused to grant in January 2016.

61. In ruling August 2014 to be the date of Rockhopper's investment for purposes of the ECT analysis, the Tribunal gave weight to the fact that the Italian Republic used August 2014 in its arguments about Rockhopper's legitimate expectations, meaning, according to the Tribunal, that the positions of both sides were aligned as to the date of Rockhopper's claimed investment.[40]

62. According to the Award, Rockhopper had "announced in May 2014 a recommended share and cash offer to acquire MOG" and "subsequently paid approximately EUR 36,000,000.00."[41]

63. At the time when Rockhopper acquired its investment, there had already been a long factual history regarding Intergas Più that figured prominently in the Parties' submissions about Rockhopper's fair and equitable treatment and creeping expropriation claims. Rockhopper described this period as part of a "roller coaster ride" that continued up until the January 2016 rejection of its application for a production concession.[42] The Award emphasizes that, notwithstanding the events of these years, Rockhopper remained "in the game", stating as follows:

> "(1) The Claimants had a pending application (C-70) for an offshore production concession, since 2008, and this presupposes that the exploration permit stage had itself been addressed at an earlier time. Also,

[35] *See* Award, ¶94 (referring to Rockhopper's Memorial on Jurisdiction, Liability and Quantum (**R-34**)).

[36] *See* Award, ¶94 (referring to Rockhopper's Memorial on Jurisdiction, Liability and Quantum (**R-34**)).

[37] *See* Award, ¶94 (referring to Rockhopper's Memorial on Jurisdiction, Liability and Quantum (**R-34**)).

[38] *See* Award, ¶94 (referring to Rockhopper's Memorial on Jurisdiction, Liability and Quantum (**R-34**)).

[39] *See* Award, ¶4 (referring to Rockhopper's Memorial on Jurisdiction, Liability and Quantum (**R-34**)).

[40] See Award, ¶95 (referring to the Italian Republic's Counter-Memorial on Jurisdiction, Liability and Quantum in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14 (**R-33**)).

[41] Award, ¶95.

[42] *See* Rockhopper's Memorial on Jurisdiction, Quantum and Liability, ¶5 (**R-34**).

> while the Claimants describe the period from 2008 onwards as being a 'roller coaster ride' as regards how that application was dealt with by the Respondent […], factually speaking as of late 2015 they were still 'in the game' as regards their intended offshore production concession. That application had not been rejected outright throughout the 'roller coaster ride' years, but the aforementioned letter of 29 January 2016 unequivocally does so. It is a matter of ready logical inference than until such time as an application is rejected expressly, or by some rule which deems a certain amount of time passing to be a rejection (which does seem to apply in this matter), it is live and pending."[43]

64. The following are facts stipulated by the Parties pertaining to the period prior to Rockhopper's acquisition of MOG and Medoilgas Italia in August 2014 that are included in the Award:[44]

65. In 1992, the Italian Republic granted a production concession to Elf Aquitaine ("**Elf**") based on production data submitted by Elf.

66. In 1998, Edison Oil and Gas S.p.A ("**Edison**") acquired the *Ombrina Mare* production concession from Elf.

67. In 2000, Edison relinquished the production concession.

68. In 2005, the Italian Republic granted Rockhopper Italia an Exploration Permit to explore the *Ombrina Mare* Field for the duration of six years.

69. Between 2005 and 2008, Rockhopper Italia conducted exploration activity pursuant to the Exploration Permit, including acquiring 2D and 3D seismic data from Edison, obtaining an EIA for the "*Ombrina Mare* 2" exploratory well, and drilling the *Ombrina Mare* 2 ("OM2") and Ombrina *Mare* 2 Dir wells ("**OM2Dir**"). Rockhopper Italia spent approximately EUR 18 million on these exploration activities.

70. In 2009, a flow test on the OM2Dir well confirmed the presence of oil, similar to that confirmed by OBM-1. The OM2 well also confirmed the presence of methane gas on the overlying Pliocenic levels.

[43] Award, ¶97 (internal citations omitted).

[44] *See* Award, ¶97. "Rockhopper Italia" is used in the Award to include the companies that Rockhopper Italia acquired from Intergas Più. *See* Award, ¶159 (defining the term "Rockhopper Italia").

71. In December 2008, Rockhopper Italia submitted, and the MED received, the Production Concession Application.

72. In June 2009, the Ministry of Economic Development wrote to Rockhopper to confirm:

> "having heard the opinion of the Commission for Hydrocarbons and Mining Resources (CIRM) during the session held on the 23 June 2009, has come to the decision to begin the procedure to grant the concession."[45]

73. On December 3, 2009, Rockhopper Italia submitted its EIA application to the Italian Ministry of the Environment and Protection of Land and Sea ("**MEPLS**") and the Ministry for Cultural Heritage and Activities ("**MCHA**").

74. On June 30, 2010, the MCHA approved the EIA.

75. The Award makes several observations regarding Rockhopper's acquisition of MOG. In the view of the Tribunal, Rockhopper's investment "can be encapsulated in its essential nature" as "the purchase by the third Claimant of an entity which had the benefit of a pending application for a production concession."[46]

76. The Award quotes a legal due diligence document dated May 21, 2014, as follows regarding "the *Ombrina Mare* situation" at the time of Rockhopper's investment:

> "- MOG Italia has a 100 per cent participating interest in the Ombrina Mare Exploration Permit.
>
> "- The term of the Ombrina Mare Exploration Permit was extended in 2012 until 5 May 2015 by MED decree. We understand that the Ombrina Mare Exploration Permit was suspended for one year from 5 May 2011 until 5 May 2012.
>
> "- We understand from the Target that the Ombrina Mare 2d well has been completed but is shut-in pending field development.

[45] Award, ¶97

[46] *See* Award, ¶97. "Rockhopper Italia" is used in the Award to include the companies that Rockhopper Italia acquired from Intergas Più. *See* Award ¶159 (defining the term "Rockhopper Italia").

"…

"- We understand that an application has been filed with the MED to obtain an exploitation production concession in relation to the well called "Ombrina Mare". However, such request has not yet been granted due to the pending arbitration proceedings."

"7.1 Ombrina Mare (administrative litigation)

"(a) We understand that MOG Italia has challenged (before the Lazio Regional Administrative Court (the 'Court')) a decision of the Italian Ministry of the Environment and Protection of Land and Sea (the "MEPLS") which found that an Integrated Environmental Authorisation ('AIA') must be obtained before the MEPLS would provide sign off on the Environmental Impact Assessment ('EIA') already initiated by MOG Italia.

"(b) An Environmental Impact Assessment is a statutory review of the potential environmental, social and economic effects that a proposed hydrocarbon development project may have and aims to identify, predict, evaluate and mitigate those effects.

"(c) The claim submitted by MOG Italia sought to:

"(i) obtain a declaration from the Court confirming that an AIA is not a precondition to the MEPLS signing off on the EIA; and

"(ii) require the MEPLS to commence its sign off of the EIA on the Ombrina Mare well.

"(d) On 17 April 2014, the Court rejected the claim filed by MOG Italia. As a result, MOG Italia has been required to apply for an AIA. We understand that MOG Italia has already prepared the necessary documentation in anticipation of this result and is ready to initiate the AIA procedure as soon as possible. However, we do not have visibility on how long it may take to obtain the AIA, as timings can vary widely from project to project.

"(e) The Court has instructed MOG Italia to pay its own court costs while MOG Italia has reserved its right of appeal against the Court's ruling."[47]

[47] Award, ¶117.

77. The Award notes that the Tribunal did not find any reference to the 2012 exception to Italy's offshore drilling ban in Rockhopper's due diligence materials, stating as follows:

> "Separately, in its review of the legal due diligence document the Tribunal finds no reference to Law No. 83 of 2012 save in connection with a different project (Guendalina) as regards an increase in royalty payments."[48]

78. The Award quotes the following statement from a contemporaneous document at the time of Rockhopper's investment concerning *Ombrina Mare*:

> "Rockhopper sees significant potential in the 100 per cent owned and operated Ombrina Mare project, which already has 2C Contingent Resources of 26.5 mmboe with the ability for this to be increased materially depending on the results of the next planned appraisal well. Rockhopper has spent time understanding the Ombrina Mare discovery and Rockhopper believes that with additional technical and engineering work, combined with some patience and funds available to support an appraisal of the discovery, its value can be significantly increased over time."[49]

(3) The Denial of Rockhopper's Application for a Production Concession

79. As indicated, above, there is a two-stage regulatory process in Italy for oil and gas projects. First one seeks an exploration permit.[50] If exploration is fruitful, one may seek[51] a production permit. The ban against oil and gas drilling that the Italian Republic established in 2010, subject for a time to the exception contained in Italian Law 83/2012, prohibits such activities in Italy's coastal waters.

80. The January 29, 2016, Letter denying Rockhopper's application for a production concession is in full as follows:

> "TO
>
> Rockhopper Italia S.p.A.

[48] Award, ¶118.

[49] Award, ¶120.

[50] Fact No. 8: "The MED granted Rockhopper Italia an Exploration Permit to explore the Ombrina Mare Field for the duration of six years", 5 May 2005. *See* Award, ¶90.

[51] Fact No. 11: "Rockhopper Italia submitted/the MED received Production Concession Application", 16/17 December 2008, *See* Award, ¶90.

Via Cornelia 498

00166 Rome …….

“Subject Application for the offshore exploitation concession of liquid and gas hydrocarbon called “d30 B.C-MD”. Notice of termination of procedure with subsequent rejection.

“We would like to refer to the application for the offshore production concession of liquid and gas hydrocarbons called “d 30 B.C.-MD.”, submitted by the company Rockhopper Italia S.p.A. on 18 December 2008, published in BUIG LIII-7, in order to notify the following: Law No. 208 of 28 December 2015 (2016 Law on Stability), published in the Official Gazette of the Italian Republic No. 302 of 30 December 2015, amended Article 6, paragraph 17 of Italian Legislative Decree No. 152 of 3 April 2006, laying down that: “for environmental and ecosystem purposes, (…) the research, prospection and exploitation of offshore liquid and gas hydrocarbons under Articles 4, 6 and 9 of Italian Law No. 9 of 9 January 1991 shall be forbidden within the boundaries of sea and coastal areas protected on any grounds for environmental protection purposes. Such prohibition shall also apply to sea areas up to twelve miles from the coastline around the entire Italian Peninsula and from the external perimeter of the aforementioned protected sea and coastal areas. The relevant in-depth technical and cartographic studies carried out by the Directorate- General for the safety – including environmental safety - of mining and energy activities (UNMIG) of this Ministry have ascertained that the area subject to the application for the offshore exploitation concession of liquid and gas hydrocarbons called “d 30 B.C.-MD.”, identified by the geographical coordinates included in the aforementioned application, interferes in full with the areas subject to the above-mentioned prohibition under environmental laws.

“At the time these prohibitions became effective, this Administration was examining the supplementary documentation supporting the technical and economic capabilities requested by Italian Ministerial Decree of 25 March 2015 and by Directorate Decree of 15 July 2015 (Update of Standard Regulation) finally submitted by the Company on 16 December to complete the procedure downstream of the Decree on Environmental Compatibility issued on 17 August 2015 by the Minister of Environment and Protection of Land and Sea and of the Conference concluded on 9 November 2015.

> "In view of the above, pursuant to Article 2, paragraph 1 of Italian Law No. 241/1991, we hereby notify you of the completion of the proceeding and the rejection of the application for the offshore production concession of liquid and gas hydrocarbons called "d 30 B.C.-MD."
>
> "The abstract of this notice shall be published in the Official Hydrocarbons and Geo Resources Bulletin.
>
> "DIRECTOR-GENERAL"[52]

81. The Tribunal found that Rockhopper's pending application had been rejected because of the Italian Republic's 2015 revocation of the exception to the drilling ban that had been put into place in 2012.[53] The Award remarks that the January 29, 2016, Letter did not go beyond that reason as a stated basis for rejection of Rockhopper's pending application.[54]

B. THE ARBITRAL PROCEEDINGS

(1) The Composition of the Tribunal and Procedural History

82. The members of the Tribunal were Mr. Klaus Reichert SC, acting as President of the Tribunal by selection of the other two Tribunal members; Dr. Charles Poncet, Rockhopper's appointee; and Prof. Pierre-Marie Dupuy, the Italian Republic's appointee.

83. At paragraphs 13-58 of the Award, the Tribunal provided a procedural history of the Arbitration up to the date of the Award.

(2) The Decisions Upholding Arbitral Jurisdiction

a. The Initial Objection to Jurisdiction

84. On March 28, 2018, the Italian Republic submitted an Objection to Jurisdiction under Article 41(1) of the ICSID Arbitration Rules and a Request for Bifurcation of the proceedings (the "**Resp. Intra-EU Jurisdictional Objection**").[55] The Tribunal stated in its Award that "[t]he Respondent's objection

[52] Award, ¶96 (quoting the January 29, 2016, Letter) (**C-134**).

[53] *See* Award, ¶97.

[54] *See* Award, ¶97.

[55] Respondent's Objection on Jurisdiction under Article 41(1) ICSID Rules on Arbitration and Request for Bifurcation dated March 28, 2018 ("**Resp. Intra-EU Jurisdictional Objection**") (**R-28**).

was that the ECT and the ICSID Convention could not provide jurisdiction between nationals of one European Union ("EU") Member State and another EU Member State."[56]

85. On January 29, 2019, the Respondent submitted a Request for Termination of the Proceedings (the "**Request for Termination**")[57] together with the Declaration of the Representatives of the Governments of the Member States, of January 15, 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Slovak Republic v. Achmea B.V.* (Case C-284/16) (the "***Achmea* Judgment**")[58] and on Investment Protection in the European Union (the "**Declaration**").[59] The Tribunal noted in its Award that Italy "requested the Tribunal to issue an award recognizing its lack of competence and terminating the proceedings."[60]

86. The Tribunal's Decision on the Intra-EU Jurisdictional Objection summarized the main argument of the Italian Republic:

> "61. […] Under EU law, EU Member States are prohibited from concluding agreements between themselves that might affect rules of EU law, alter their scope, or affect the EU legal order; it follows – the Respondent argues – that EU Member States lack the competence to conclude agreements concerning the protection of intra-EU investments."
>
> "65. Because of the alleged incompatibility of an arbitration mechanism with the primacy of the CJEU in the application of EU law, the offer to arbitrate in Article 26 of the ECT 'has to be considered inapplicable to intra-EU disputes since the signing of the Treaty.'"[61]

87. Italy further argued on the basis of the *Achmea* judgment that the CJEU "confirmed that arbitration clauses on investment agreements covering intra-[EU] situations are not compatible with EU law," as

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[56] Award, ¶20.

[57] Respondent's Request for Termination of the Proceedings dated January 29, 2019 ("**Request for Termination**") (**R-29**).

[58] Judgment of 6 March 2018, *Slovak Republic v. Achmea B.V.,*C-284/16, ECLI:EU:C:2018:158 ("***Achmea* Judgment**") (**RL-11**).

[59] *See* Declaration of the Member States, of 15 January 2019 on the Legal Consequences of the Court of Justice in *Achmea* and on Investment Protection in the European Union *cited* in full in the Decision on the Intra-EU Jurisdictional Objections, ¶177 (**R-16**).

[60] Award, ¶54.

[61] Decision on the Intra-EU Jurisdictional Objection dated June 26, 2019 ("**Decision on the Intra EU Jurisdictional Objection**"), ¶¶61, 65 (**R-16**).

they would "jeopardize the integrity of EU law."[62] Italy emphasized that "in the application of *Achmea* no distinction can be drawn between treaties exclusively undertaken between [M]ember States (like the BITs) and agreements signed also by the EU (like the ECT)."[63]

88. On June 26, 2019, the Tribunal issued its Decision on the Intra-EU Jurisdictional Objection rejecting Italy's jurisdictional objection. The Tribunal held that "nothing in EU law subsequent to the ECT has the effect of the former superseding (insofar as [Italy] is concerned) the latter."[64]

89. The Decision on the Intra-EU Jurisdictional Objections states that the *Achmea* judgment

> "stems entirely from the specific circumstances of the Achmea BIT, and is not based on any other BIT or a wider ISDS enquiry (particularly, not the ECT)."[65]

90. Further, according to the Tribunal, "the CJEU does not go so far as to say that [EU countries] are barred from offering to enter into arbitration agreements."[66] In effect, the *Achmea* judgment, to the Tribunal, "does not lead to the conclusion that it is in any way a relevant consideration for the investor-State arbitration mechanism established in Article 26 of the ECT as regards intra-EU relations."[67]

91. The Decision on the Intra-EU Jurisdictional Objections states that the Tribunal

> "[…] cannot see how the Declaration can be said to have an interpretative effect on the scope and content of EU law regarding investment protection and treaties concluded, *inter alia*, between EU Member States. That is because the Declaration was not adopted within the EU legal order and is not an EU legal instrument."[68]

[62] Resp. Intra-EU Jurisdictional Objection, ¶¶107, 112 (**R-28**).

[63] Italy's Response to Rockhopper's Reply on the Intra-EU Jurisdictional Objection, ¶64 (**R-30**).

[64] Decision on the Intra EU Jurisdictional Objection, ¶149 (**R-16**).

[65] Decision on the Intra-EU Jurisdictional Objections, ¶167 (**R-16**).

[66] Decision on the Intra-EU Jurisdictional Objections, ¶171(d) (**R-16**).

[67] Decision on the Intra-EU Jurisdictional Objections, ¶173 (**R-16**).

[68] Decision on the Intra-EU Jurisdictional Objections, ¶180 (**R-16**).

92. The Tribunal did not agree with the Italian Republic that the Declaration had an amendatory or repealing effect on the ECT. According to the Tribunal,

> "[…] it purports to bring about an effect akin to an amendment of Article 25 of the ECT, or, at the very least, a reservation by the sovereign states whose representatives signed the Declaration. This would present considerable difficulties as such an interpretation would breach the prohibition made at Article 36 of the ECT which forbids the formulation of any reservation to that multilateral treaty."[69]

93. The Tribunal concluded as follows with respect to the intra-EU jurisdictional objections:

> "197. Taken all of the foregoing into account, the Tribunal finds that none of the objections raised by [Italy], whether the intra-EU position prior to *Achmea*, the *Achmea* Judgment properly construed in the wider circumstances of public international law, or the Declaration, either individually or collectively to have the effect of nullifying (whether at the time, or retrospectively) the offer to arbitrate on the part of the Respondent as of the date of the Request for Arbitration and consequently do not affect the jurisdiction of the Arbitral Tribunal."[70]

b. The Request for Reconsideration

94. On September 2, 2021, while the Tribunal was deliberating following proceedings on the merits of the case, the Grand Chamber of the CJEU issued its judgment in Case C-741/19, *Republic of Moldova v. Komstroy LLC* ("***Komstroy* Judgment**").[71] On September 13, 2021, the Italian Republic sought leave to introduce the *Komstroy* Judgment into the record.[72] On September 29, 2021, the Italian Republic submitted its Considerations on *Republic of Moldova v. Komstroy* (C-741/19) and AG Szpunar's Opinion ("**Italy's Considerations on the *Komstroy* Judgment**")[73] stating that the *Komstroy* Judgment "should convince the Tribunal to reconsider its position on jurisdiction in the light of the

[69] Decision on the Intra-EU Jurisdictional Objections, ¶195.

[70] Decision on the Intra-EU Jurisdictional Objections, ¶197.

[71] *Komstroy* Judgment (**CL-247**).

[72] Award, ¶78.

[73] Respondent's Considerations on *Republic of Moldova v. Komstroy* (C-741/19) and AG Szpunar's Opinion ("**Italy's Considerations on the *Komstroy* Judgment**") (**R-31**).

conclusions reached by the [CJEU]"[74] ("**Italian Republic's Request for Reconsideration**"). The Italian Republic's submission was that the CJEU ruled in *Komstroy* that

> "Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State."[75]

95. On December 20, 2021, the Tribunal issued its Decision on the Italian Republic's Request for Reconsideration, denying the request. The Tribunal held that it

> "does not understand how the fact that the EU (in addition to or in parallel to the sovereign states who also happen to be EU Member States) is a signatory to the ECT can, in and of itself, operate to turn the ECT in 'an act of EU law.'"[76]

96. Describing the ECT as "a multilateral treaty with many sovereign signatories beyond those sovereign states who also happen to be EU Member States,"[77] the Tribunal further held as follows:

> "48. While the Tribunal can accept, for present purposes, that the ECT may be "**part**" of EU law, it is not, as discussed above, an "**act of EU law**". Being part of EU law does not entail the ECT losing its character as an international agreement subject to and applicable as part of public international law, or that the text and meaning of the ECT must be interpreted and/or applied through the prism of EU law solely by the national courts of the sovereign states which make up the EU Member States, or the CJEU (itself a body created and maintained by acts of those sovereigns for specific and delineated purposes).
>
> "49. While EU law is (like the domestic laws of sovereign States) a source of international law, that does not make it a part of international law, much less a part of international law that has primacy over all other rules of international law, which is the body of law governing relations between all States and jurisdictions in the world."[78] (emphasis by Tribunal)

[74] Italy's Considerations on the *Komstroy* Judgment including the Italian Republic's Request for Reconsideration, ¶3 (**R-31**).

[75] Italy's Considerations on the *Komstroy* Judgment, ¶10 (**R-31**) *citing Komstroy* Judgment, ¶66 (**CL-247**).

[76] Decision on the Italian Republic's Request for Reconsideration dated December 20, 2021 ("**Decision on the Italian Republic's Request for Reconsideration**"), ¶46 (**R-17**).

[77] Decision on the Italian Republic's Request for Reconsideration, ¶47 (**R-17**).

[78] Decision on the Italian Republic's Request for Reconsideration, ¶¶48-49 (**R-17**).

97. The Tribunal's Decision on the Intra-EU Jurisdictional Objections and its Decision on the Italian Republic's Request for Reconsideration were incorporated by reference into the Award.[79]

(3) The Imposition of Liability Against the Italian Republic

98. This section presents the Tribunal's reasons for finding that a direct expropriation had occurred, including the Tribunal's predicate determination that Italian law required that Rockhopper be granted an *Ombrina Mare* production concession, and the gist of the Italian Republic's annulment position.

a. The Ruling that Italy Directly Expropriated Rockhopper's Right to Receive a Production Concession

99. In the Arbitration, Rockhopper had submitted that the investment of its predecessor companies, and then its own investment following Rockhopper's acquisition of those companies from Intergas Più in 2014, had been subjected to "a roller-coaster ride of unfair and inequitable treatment" in Italy.[80] In the post-hearing briefs in this annulment proceeding, the Italian Republic emphasized, and Rockhopper agreed,[81] that Rockhopper's legal theory in the Arbitration had been that the same facts supported both its claim of denial of fair and equitable treatment in violation of Article 10 of the ECT and its claim on unlawful expropriation in violation of Article 13 of the ECT. In its post-hearing brief, the Italian Republic quoted several remarks by Rockhopper's counsel in the Arbitration to support its position, including the following remark that Rockhopper's counsel made after concluding his argument that Rockhopper had suffered a denial of fair and equitable treatment:

> "I don't need to repeat the facts, because they are the same and they give rise to breaches of both standards, but I don't want you to think that we are discarding expropriation, it is just it simply follows if I'm right on all of those facts."[82]

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[79] Award, ¶¶171, 173.

[80] *See* Rockhopper's Memorial on Jurisdiction, Liability and Quantum, ¶5 ("From 29 June 2010 onwards, Italy subjected Claimants and their investments to a roller-coaster ride of unfair and inequitable treatment, and, ultimately, unlawfully expropriated their investments altogether by denying the Production Concession Application on 29 January 2016. The list of Italy's unlawful measures and acts is too lengthy to discuss in this Introduction") (**R-34**).

[81] *See* Rockhopper's Post-Hearing Brief, ¶55 (in the Arbitration "Rockhopper asserted that it had been subjected to a 'roller-coaster ride' of unfair and inequitable treatment over several years which violated its legitimate expectations. Rockhopper relied on the same facts to assert that Italy had also unlawfully expropriated its investment.").

[82] *See* Italian Republic's Post-Hearing Brief, ¶110 (*quoting* Hr. Tr. Arb., October 30, 2019, 45:22-46:1 (remarks of Rockhopper's counsel) (**C-192**)).

100. The Italian Republic also quoted the following exchange between the President of the Tribunal in the Arbitration and Rockhopper's counsel at the end of Rockhopper's closing argument:

> "THE PRESIDENT: And then you have got impairment and expropriation, but given the emphasis you gave to legitimate expectation, I just wanted to be certain that that wasn't your sole FET ground.
>
> "MR. SPRANGE: No, no, and I think you are very right to observe that's been our focus. It's been or focus because that's been the focus of Italy's attack, and the second point is that the factual matrix that we rely on for the vast majority of our claims, all of them, the FET claims, the impairment and the expropriation, really centre on the same chronology and key documents, so that's absolutely correct."[83]

101. The Tribunal did not find, however, that Rockhopper's legitimate expectations were frustrated by the denial of its application for a concession. Indeed, as set forth above, one member of the Tribunal wrote an individual opinion saying that

> "it would have been almost impossible to conclude, on the basis of the elements of the case, that Rockhopper could reasonably and legitimately expect a positive response from the Italian authorities to its application for an operating permit."[84]

102. Instead, the Tribunal's ruling was that part of the fact pattern that Rockhopper had presented in arguing the claim for fair and equitable treatment, sufficed, in isolation, to establish that the Italian Republic had directly expropriated Rockhopper's right to receive a production concession. The Award in Rockhopper's favor was on the basis that Rockhopper had a right to receive a production permit as a matter of Italian law, that the right was an investment protected by the ECT and that the Italian Republic's denial of the application for a production permit therefore resulted in liability under the ECT for direct expropriation of Rockhopper's investment.

103. In the Arbitration, Rockhopper's argument was that the expropriation it suffered was both "indirect" and, further, that it was "creeping." The claimed expropriation was "indirect" because the critical act of Italy was its failure to grant the application for a production concession. Thus, Italy did not take for

[83] *See* Italian Republic's Post-Hearing Brief, ¶111 (*quoting* Hr. Tr. Arb., October 30, 2019, 88:5-16 (exchange between Tribunal President and Rockhopper's counsel) (**C-192**)).

[84] Individual Opinion by Professor Pierre-Marie Dupuy dated August 19, 2022 ("**Individual Opinion**"), page 3 (**R-42**).

itself (or give to a favored third party) title or dominion over an asset owned by Rockhopper, which is what "direct" expropriation ordinarily is thought to entail. The expropriation that Rockhopper claimed to have occurred was "creeping" because it resulted from a sequence of acts.

104. Rockhopper's counsel told the Tribunal that the same "factual matrix" was the basis for not just its claim for denial of fair and equitable treatment but also its claims of unlawful impairment of its investment and expropriation. The following passage from its Post-Hearing Brief in the Arbitration is helpful for understanding Rockhopper's formulation of its case:

> "104. By rejecting Rockhopper's Production Concession Application, Italy unlawfully expropriated Rockhopper's investment in breach of Article 13 of the ECT. A production concession application benefits from protection against unlawful expropriation under the ECT because the definition of '*investment*' includes '*any right conferred by law or…permits.*' Rockhopper held an exploration permit and had the right to apply for (and, subject to the conditions set forth under Italian law, a legitimate interest to obtain) a production concession, both of which fall within this definition of investment.
>
> "105. Several tribunals have determined that the denial of a permit or authorisation amounts to expropriation. In particular, the tribunal in *Metalclad v Mexico* found that in the absence of a substantive basis, the denial of a permit will amount to indirect expropriation. Similarly, the tribunal in *Crystallex v Venezuela* held that the denial of a permit was part of a pattern of conduct constituting measures equivalent to expropriation. Other tribunals have made similar findings in relation to the cancellation of a contract, the cancellation of a permit, and the refusal to renew a permit. In *Tethyan v Pakistan*, the tribunal held that the denial of the mining lease amounted to expropriation on the basis that the denial '*rendered it impossible for Claimant to make use of the information and data it had collected,*' confirming that the value of the Claimant's investments was '*effectively neutralized*' as the investments could no longer fulfil their exclusive purpose after the expropriation had been completed.
>
> "106. The above cases all make clear that the denial of a permit by a host government can and does amount to expropriation (be that in the form of a cancellation, refusal to renew, or refusal to grant in the first place). The expropriation of Rockhopper's investment was unlawful because it was not carried out in the public interest, it was discriminatory, it was not carried

> out under due process of law, and it was not accompanied by the payment of prompt, adequate and effective compensation."[85]

105. The Tribunal's finding was that an expropriation had resulted from a specific act – that is, the fact that a permit was not issued within 15 days of the August 7, 2015, letter from the Ministry of Economic Development, as the Tribunal ruled Decree 484/94 ("**Italian Law 484/94**") to require. The following is one of the passages from the Award conveying the critical importance that the Tribunal assigned to the August 7, 2015, Decree of the Ministry of the Environment and what the Tribunal found to be its implication as a matter of Italian Law:

> "130. At para. 166 of the Memorial on Jurisdiction, Liability and Quantum, the Claimants posit the case that, at the latest, by operation of this law, the grant of the production concession was legally due on 29 August 2015. In the Claimants' view of Italian law, this appears to be the moment the Parties' relationship changed, and moved from that which obtained heretofore (namely, an applicant hoping for a successful outcome to that of an applicant with a vested right to the subsequent grant of a production concession). If the Claimants are correct in their view of Italian law, then the Rubicon was crossed insofar as the right to the subsequent grant of the production concession was concerned.
>
> "131. There is a profoundly important distinction, and the Tribunal has taken the greatest care to thoroughly appreciate its significance, namely, that as of that moment on 29 August 2015 the Claimants' position is that they had a right to be granted the production concession, **but** that is not the same thing as saying that they actually **had** such a production concession.
>
> "132. Expressed differently, the Claimants' argument is that they moved, at that moment on 29 August 2015, **from** the **hope** that their application for a production concession would be successful **to** a position where they definitively knew that their application was going to be successful and granted within a statutory time period. There was then, as a matter of Italian law, no going back and the outcome (*i.e.* the subsequent formal process of the grant of the production concession) was legally inevitable."

[85] Rockhopper's Post-Hearing Brief in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14 ("**Rockhopper's Post-Hearing Brief in the Arbitration**"), ¶¶104-106 (**RFA-10**) (emphasis added).

106. The following is another such passage from the Award:

> "149. The Tribunal has taken the greatest care possible to ensure that a full, thorough and fair consideration has been given to the competing viewpoints, both in its extensive deliberations on the issue, and also reflected in the fullest opportunity afforded to both sides to cross and re-examine both witnesses. Ultimately, as with any contested matter of material and predicate importance, the Tribunal must decide by reference to that which has been persuasive. In this case, as discussed and analysed above, the Tribunal is persuaded that Decree 484 was in force at the relevant time.
>
> "150. This finding has the factual consequence, in the Tribunal's view, that the (temporal) Rubicon was indeed crossed once the Respondent issued its Decree on 7 August 2015 and the Claimants lodged their application on 14 August 2015. At that latter moment, as a matter of the Tribunal's appreciation and factual findings of Italian law, the Claimants held a right to be granted the production concession. This was no mere hope or aspiration; the legal right to be granted such a concession was then irrevocably in train as a matter of Italian law as it then stood."[86]

107. The following passage from the Award is a helpful for understanding what the Tribunal meant by "direct expropriation":

> "194. As of that moment, 29 January 2016, the Claimants' right to be granted a production concession was taken away from it. Thereafter the Claimants had neither the right to be granted the production concession, much less the production concession itself. The Claimants went, in one fell swoop, from a position where they had rights to a valuable production concession which would actually lead, under Italian law, to such production concession, to essentially nothing at all. No lengthy elaboration is required to arrive at this conclusion. There was, factually speaking, an immediate and complete deprivation of the Claimants' investment. There were no indirect actions, whether described as creeping or otherwise, cumulatively leading to such deprivation, but rather a specific act on the part of the Respondent which brought about this circumstance on 29 January 2016."[87]

108. At the Hearing, Rockhopper's counsel offered the opinion that the Tribunal had used the terminology "direct expropriation" to make a distinction with the theory of creeping expropriation that Rockhopper

[86] Award, ¶¶149-150 (emphasis by Tribunal).

[87] Award, ¶194 (emphasis by Tribunal).

had advanced on the same facts that it based its claim for denial of fair and equitable treatment. The following is from the transcript of the Hearing:

> "It is dangerous and unnecessary to unpick the tribunal's reasonings and second guess what they meant, but certainly **one reading of this is that the reference to indirect is to the actions in saying factually speaking there was one act here, not a series of acts, so there wasn't a creeping**. Now, creeping acts amounting to **expropriation is one type of indirect expropriation, but a single act can be an indirect expropriation**, so it is not necessarily in this paragraph a legal designation that there is either a direct or an indirect expropriation, and certainly I see force in that argument on the basis that elsewhere in the award are far more instances. There is the determination that if you want to place high level importance on the dispositif of the award, that that reference is to an unlawful expropriation with no designation of direct or indirect."[88]

109. Rockhopper submitted during the annulment hearing that the Award's use of the terminology "direct expropriation" should be understood as a "labelling error", explaining that

> "what is important is factually what the tribunal is describing has happened here and the consequence of it, so if the Tribunal is describing a scenario which in fact is an indirect expropriation but it is labelled a direct expropriation, that in annulment terms would be a legal error, a legal error that is not susceptible to annulment. It is a labelling error, putting it in more layman's terms."[89]

b. The Predicate Determination that Rockhopper's Application Had Been Denied in Violation of Italian Law Due to a Decree by the Ministry of the Environment.

110. For the predicate matter – that is, that it became "legally inevitable" as a matter of Italian law that Rockhopper would receive a production permit once the Ministry of the Environment had issued its "MINISTERIAL DECREE – REGISTRATION 0000172 OF 07/08/2015" – the Award gives determinative weight to on the hearing testimony of two of the Italian Republic's witnesses. At paragraph 129 of the Award, the Tribunal sets forth Italian Law 484/1994 as follows:

> "Decree of the President of the Republic 18 April 1994, No. 484

[88] Hr. Tr. Day 1, 229:19-230:11 (remarks of Rockhopper's counsel; emphasis added).

[89] Hr. Tr. Day 1, 231:1-9 (remarks of Rockhopper's counsel).

> "Art. 16, para. 3
>
> "The Ministry [translator's note: Ministry of economic development], within fifteen days from the receipt of the environmental compatibility decree by the Ministry of the environment, issues the decree for the award of the production concession."[90]

111. In the Arbitration, the Respondent disputed the applicability of Italian Law 484/1994 and argued that it was repealed.[91] More precisely, the Italian Republic contended that Italian Law 484/1994 was repealed as of February 13, 2008, by Article 36, ¶ 3(a) of the Code on the Environment.[92]

112. Rockhopper countered, in its Reply, as follows:

> "61. […] The amendments to the Environmental Code that allegedly impacted Articles 16 and 17 of Decree no. 484/1994 did not regulate the specific issues contained in those provisions. As Mr. Leccese explains, Decree no. 484/1994 and the Environmental Code regulate different matters: the former regulates applications for hydrocarbons permits before the MED, while the latter governs environmental matters, such as EIA applications pending before the MEPLS."[93]

113. In adopting Rockhopper's understanding of Italian Law 484/1994, the Tribunal relied upon the hearing testimony of the Directorate General for Safety of Mineral and Energy Activities, National Office for Hydrocarbons and Gee-resources (DGS-UNMIG), within the Ministry of Economic Development (MISE), Franco Terlizesse. The Award sets forth the following quotation of Mr. Terlizesse's testimony, which it describes as "extensive" but "of importance in order to fully and fairly reflect his testimony":

---

[90] The Italian original is as follows:

> "*3. Il Ministero, entro quindici giorni dalla notifica da parte del Ministero dell'ambiente della pronuncia di compatibilità ambientale, emana il decreto di conferimento di concessione di coltivazione*."

[91] *See* Award, ¶134.

[92] The Italian Republic relied upon Article 15 on "Repeal of laws" of the "Provisions on the law in general" of the Italian Civil Code, which provides that laws are repealed by express declaration of the lawmaker, for incompatibility between new and preceding provisions, and when a new law governs the entire matter already governed by a prior law. The Italian Republic argued that the Code on the Environment governs the entirety of environmental matters. *See* Award, ¶134 (referring also to the Expert Report of Prof. Eugenio Picozza).

[93] Rockhopper's Reply Memorial on Jurisdiction, Liability and Quantum in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, ¶61 (**R-36**).

"Q. How engaged were you, on a day-to-day basis, on Rockhopper's production concession application between August 2015 and December 2015?

"A. A fair amount. I would say that a significant part of my time that is not simply dedicated to this side of oil production was dedicated to this file, because it was very important, it was urgent, and it was important from many points of view. So I did give a lot of my time. I took part in meetings and I was also briefed regularly by the manager in charge.

"Q. When you say it was very urgent, is that because the law requires a production concession to be granted within 15 days of the environmental decree being granted?

"A. No, this is not so. The concession needs to formally be given within 150 days from the application. So my aim was to finish this work, having received the file around 15th August 2015, by the end of 2018 [sic].

"Q. Are you sure it's not the fact that the concession has to be provided within 150 days of it being filed, and that it's 15 days after the EIA has been granted? I can show you the provisions of the law if you're unsure.

"A. Yes, but I could also show you a list of the concessions that were granted in the whole history, and none of them were granted within 15 days of the EIA. And this is impossible because the operator is not in a position to give all the material, the documents that are necessary, within 15 days of the decree.

"Q. Is it your evidence that you couldn't do it in 15 days because Rockhopper didn't give you some documents?

"A. Even if Rockhopper had provided the documents, technically it would have been impossible for our offices to contact all the local administrations and follow this process that goes back to 2008/2009. So something that had happened at a very different time, with a different price scenario, but also from a technical, economic, structural and development the situation was completely different, so it had to completely be reviewed, and I think here there was nothing said by the company. The company wanted to obtain quickly the concession, like all other companies do. So we try, because the law asks us, to keep to the timing of the applications. So this is what we

were doing. So we were committed, I was personally committed, and it was urgent, and the law states that. So we were completely compliant."[94]

114. The Award also sets forth the following re-direct examination of Mr. Terlizesse by the Italian Republic:

> "Q. (Interpreted) Mr Terlizzese, we mentioned the files that exist at the ministry on this procedure, the production concession application by Rockhopper, and we also talked about some draft documents that, as a result of meetings and exchanges, were included in these files. Do these files contain also the assessments on the technical and financial producibility of this oilfield that were discussed with Mr Morandi?
>
> "A. Yes, there were a number of discussions, especially on the development project. We acknowledged that it would have been impossible to have more information on the amount available in this oilfield on the basis of a single well. The Rockhopper assessment is based particularly on how complex the treatment and recovery would be.
>
> "Q. So Rockhopper knew that the ministry had some doubts on the producibility from a technical and financial point of view of this oilfield? And here I refer to a question asked at 10.46 --
>
> "[Counsel for Rockhopper]: I can be a patient man, but when a supposedly nonleading question starts with, 'So Rockhopper knew the ministry had some doubts', even I lose my patience.
>
> "THE PRESIDENT: Could I say that, particularly in re-direct --
>
> "[Counsel for the Italian Republic]: (In English) Okay, I'll go on.
>
> "THE PRESIDENT: -- it's probably best not to suggest the answer, because the answer that would come perhaps may not necessarily have the same weight with the Tribunal.
>
> "[Counsel for the Italian Republic]: (Interpreted) Do you know whether Mr Morandi had been informed about these critical points and this doubt?
>
> "A. Yes.

[94] *See* Award, ¶138.

> "Q. Did you discuss with Mr Morandi only the technical aspects or also the economic and financial aspects linked to this oilfield and the project in general?
>
> "A. We discussed the technical and economic capability of Rockhopper Italia and we discussed the economic viability of the project.
>
> "Q. Okay. Let's go to slide 49 of the Claimants' presentation. Maybe you were taken a bit by surprise when you replied, when you answered, because the way we interpret this slide, these are the studies made over time relating to the Ombrina Mare oilfield, and which were prepared and presented over time. Did you take into account all the technical studies prepared and presented by the applicants in the various phases of the project?
>
> "A. Yes. Even though they didn't have this form, we examined and compared the different scenarios, starting from when Elf submitted the first project. At that time the amount of data available were far more limited than what we later had. We could follow the evolution of the value of the figures, and obviously we focused on the recoverable oil, which is what was of interest to us. We also especially focused on the recovery rate, because this is a very controversial criterion. But if we look at the literature, we can see that the value[s] given by Elf in 2010 are very optimistic values.
>
> "[Counsel for the Italian Republic]: (In English) Thank you, Mr President. This is enough for us."[95]

115. The second witness upon whom the Tribunal relied for its understanding of Italian Law 484/1994 was Professor Eugenio Picozza, an expert for the Italian Republic. Again, the Award sets forth what the Tribunal described as extensive quotation necessary fully and fairly to reflect the witness' testimony:

> "Q. Do you agree that there is a timeline in the law for the Ministry of Economic Development to decide an applicant's request for a production concession?
>
> "A. Yes. But I would like to point out the fact that the minister does not have a contractual obligation, but it also has administrative powers. This is quite different. So we cannot reason in terms of obligations. Otherwise the law would have not made a distinction between a damage caused by a delay and a damage caused by a tort. You may like it or not, but that's the truth.

[95] Award, ¶139.

"Q. I like your answer very much because it's the truth, but also the answer to my question was: yes, there is a timeline. So now I want to ask you the next question. What is that timeline for the ministry to decide the application?

"A. We are talking about the Ministry of Economic Development, aren't we? We are talking about the Ministry of Economic Development, aren't we? Because we have already exhausted the example with the Ministry of Environment.

"Q. We are.

"A. According to Decree 484, there were 15 days. But in my opinion, this rule is not applicable because it was based on the assumption that the ministry could decide independently from the EIA, regardless of the EIA. This is no longer true. But if we want to talk of who is at fault, I don't think it was the government, but the Parliament and the council of European ministers, because they said that the EIA was mandatory for these types of activities. And they also said that if a country did not comply, if a Member State did not comply with this, it could be subject to proceedings for breach of the regulations. This affected also the United Kingdom; obviously before Brexit, if it will take place.

"Q. So I want to go to the first part of your answer. You say that there were 15 days for the Ministry of Economic Development to decide the production concession application after the Ministry of the Environment has issued the environmental permit, but you suggest that this should not be the case. What I want to know then is: affirmatively, what do you put forward as any indication of the timeline that the Ministry of Economic Development must act within after the Ministry of Environment has awarded the environmental permit?

"A. It's important to say, first of all, that here we are talking about non-peremptory terms, if we talk about compensation. This has to be clear. Normally the same Law 241, which, as you know, is the main law of reference for administrative procedures, the law states 30 days. But this can be -- you can also have a challenge in a --

"Q. Professor, if I may interrupt you. I don't want to talk about whether something is peremptory or non-peremptory, or the consequences that may follow if a timeline is not respected. I just want to know that if you are in Rockhopper's position, the Ministry of Environment has issued its environmental application permit on 7th August, and Rockhopper came to you and said, 'Professor, what is the timeline now that the Ministry of

> Economic Development is supposed to act within on my production concession application?', what would you say in terms of the timeline under law?
>
> "A. I would tell them to be as patient -- to have biblical patience, patience in a biblical sense, because the ministry does what they can. But you can also use an injunction, which is an instrument which is used quite often, and which is very important also according to the Italian Civil Code, an injunction that we notify by means of court officer. It has to be official; obviously an email or a letter sent by registered post is not enough. And this is very important to establish alleged fault. It's very important. Today this system is used also for public tenders, public procurement. If a company wants to appeal, they first have to send an injunction to the public body involved, and the public body has the opportunity to withdraw its measures if they are considered unlawful.
>
> "Q. So if Rockhopper came to you in August 2015, I understand your answer to be that you would tell them to be patient, that you would not be able to provide any timeline. So if they said, 'Is it 15 days, 30 days, a year, two years?', you could not answer that, but you would say, 'Perhaps you can seek an injunction at some point'. Is that a fair summary of what you just said?
>
> "A. This is a statement that I don't entirely agree with. I would have indicated a timeframe, 30 days, because that's what the law says. I would have said, 'Wait for 30 days. Maybe first send them a very polite letter. If they don't answer within 30 days, then issue an injunction, get an injunction issued'. If I may add something, after 30 days, after another 30 days, you can start proceedings in front of the administrative tribunal, the power to demand the granting of the permit. This is how the Italian system works. In my presentation I forgot to say that I was a member of the committee that prepared the Administrative Procedure Code, so I know it inside out."[96]

116. The Award also sets forth the following re-direct examination of Prof. Picozza by the Italian Republic:

> "Q. (Interpreted) Only one question and then we are done. Can you remember the judgment of the Council of State 943/2016 that involved Rockhopper Italia SpA?
>
> "A. (Interpreted) Yes, of course.

[96] Award, ¶140.

"Q. For the record, it is L-0137.

"[Counsel for Rockhopper]: I did not discuss any Council of State judgments.

"THE PRESIDENT: Although you did not in fact discuss it, it may still touch upon the cross-examination.

"[Counsel for Rockhopper]: Fair enough.

"[Counsel for the Italian Republic]: As a result of this judgment, in terms of delay of the public administration or what could be considered lawful by the judges, was there a margin to request compensation in Italy by Rockhopper?

"A. I can only express my opinion obviously; it is not necessarily the truth. Rockhopper also had another possibility: they could challenge the final rejection of the concession. I think it was dated 17th January 2017. And they could have also raised a constitutionality issue of the Budget Law, and they could have reported Italy to the European Commission. And they could have requested the annulment and compensation or even just compensation. I would like to add that in the case law of the Court of Justice, although the assessment of responsibility does not necessarily go hand in hand with compensation, we have to decide, it has to be decided whether a breach has been committed or not. This is my opinion.

"Q. So because they didn't do this, could they apply for compensation?

"A. They didn't do this, and then they kind of lost the right to do it, because our code has two provisions: Article 29, that provides for annulment that must happen between 60 days; and then within 120 days from when the fact was assessed or the judgment became final, then they can apply for compensation.

"[Counsel for the Italian Republic]: Thank you very much, Professor.

"THE PRESIDENT: Sir, thank you for your testimony. It's now concluded. Thank you. There are no questions from the Tribunal."[97]

[97] Award, ¶141.

117. The Award described Rockhopper's Post-Hearing Brief as having submitted that both Prof. Picozza and Mr. Terlizesse conceded during the Hearing that Italian Law 484/1994 provides a timeline for the Ministry for Economic Development to act, and that nothing in Italian Law 484/1994 modified Law 9/1991.[98] The Award says that the Italian Republic did not make contrary arguments about the implications of the hearing testimony of the two witness in its Post-Hearing Brief and that the Italian Republic did not contradict Rockhopper's position that the 15-day deadline under Italian Law 484/1994 was law and carried consequences.[99] The Award states as follows:

> "148. Having considered all of the Parties' positions and the detailed evidence which was placed before the Tribunal, both by way of written materials and, critically, oral testimony (in particular those summarized and recorded in the preceding paragraphs), it is duly established, as a matter of fact, that Decree 484 was in force at the relevant time, and not repealed."[100]

118. The Award continues as follows:

> "150. This finding has the factual consequence, in the Tribunal's view, that the (temporal) Rubicon was indeed crossed once the Respondent issued its Decree on 7 August 2015 and the Claimants lodged their application on 14 August 2015. At that latter moment, as a matter of the Tribunal's appreciation and factual findings of Italian law, the Claimants held a right to be granted the production concession. This was no mere hope or aspiration; the legal right to be granted such a concession was then irrevocably in train as a matter of Italian law as it then stood."[101]

119. The Award concludes as follows:

> "152. Quite apart from the engagement of the time limit found in Decree 484, the Tribunal also reads the Decree of 7 August 2015 as unambiguously confirming that the Claimants had passed all the necessary tests to get the production concessions, save that a number of additional items of information (as contained in the four Annexes) needed to be submitted. There is no invocation of the precautionary principle, whether by express language or by inference, and the Tribunal considers the Decree of 7 August 2015 to be an unambiguous demonstration of the Respondent's unequivocal intention to move ahead to a grant of a production concession for the

[98] *See* Award, ¶143.

[99] *See* Award, ¶¶144-147.

[100] Award, ¶148.

[101] Award, ¶150 (emphasis by Tribunal).

> *Ombrina Mare* field, with the Claimants having duly satisfied the requirements for 'environmental compatibility.'"[102]

c. The Decision that the Decree of the Ministry of the Environment also Precluded the Continuation of Precautionary Measures Based on Uncertainty About Environmental Hazard

120. The precautionary principle enables decision-makers to adopt precautionary measures when scientific evidence about an environmental hazard is uncertain and the stakes are high. The Tribunal determined, however, that the Decree of the Ministry of the Environment precluded the Italian Republic from continuing the operation of the precautionary principle on environmental grounds from the moment of its issuance. The Award explains as follows:

> "153. As regards the precautionary principle, the Tribunal understands this rule to have acceptance and application within the EU. However, given the specific facts of this case, it does not have a determinative role. The Tribunal understands why the Respondent's various organs would have applied the precautionary principle to the project for several years, but it must have, of course, a consistent basis throughout the time during which it is said to apply. Thus, a government or municipal authority, when invoking the precautionary principle must have a particular concern in mind. However, if that particular concern is then investigated and the government or authority decides that it is not as worrying as originally feared, then the action or plan stayed by the precautionary principle can go ahead. Such a government cannot, having satisfactorily investigated the matter, then decide to continue the operation of the precautionary principle on a new ground. This would, colloquially speaking, move the goalposts.
>
> "154. Thus, in the present case the Respondent's prior environmental concerns (which the Tribunal can entirely and readily understand would implicate the operation of the precautionary principle) must have logically come to a conclusion when it decided to issue the Decree on 7 August 2015. It emerges from that Decree, and the process which led up to it, that the Respondents carefully examined the environmental issues and then, for its own reasons, gave the environmental *imprimatur* to the Claimants on 7 August 2015. It was, therefore, not open to the Respondent to continue the operation of the precautionary principle on environmental grounds after that moment."[103]

[102] Award, ¶152 (emphasis by Tribunal).

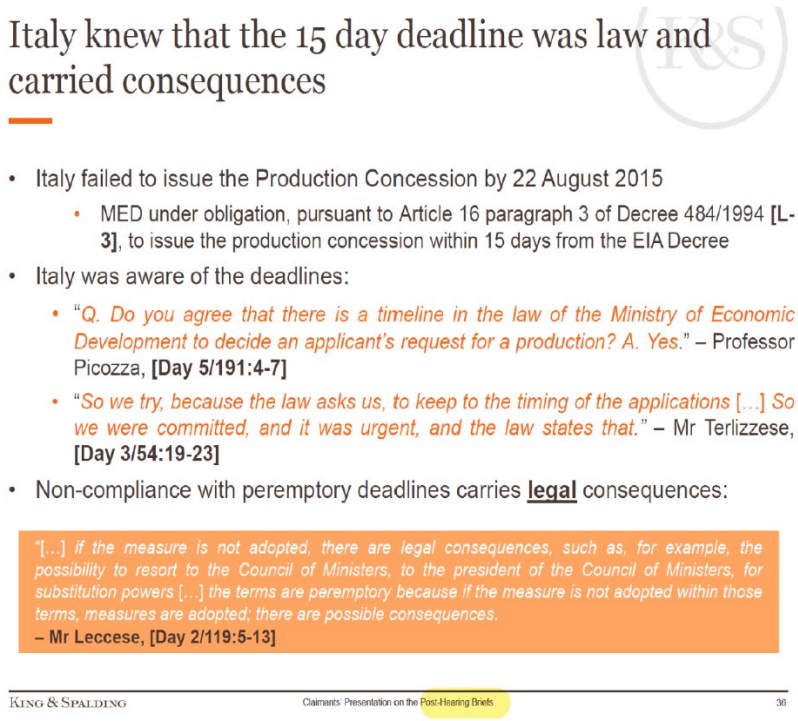
[103] Award, ¶¶153-154.

d. The Crux of the Italian Republic's Objection to the Direct Expropriation Ruling

121. The Italian Republic annulment argument proceeds from the premise that the Tribunal found a part of the fact pattern that Rockhopper had presented to constitute an expropriation, even though Rockhopper had not, in the Italian Republic's view, claimed that to be the case.

122. During oral argument in the Arbitration, Rockhopper used a PowerPoint slide, which is reproduced in the Award at paragraph 145, in connection with its submission that Italian Law 484/1994 required approval of its production application within a set number of days following the August 7, 2015, Decree of the Ministry for the Environment. The following is a quotation of paragraphs 145-149 of the Award (yellow highlighting added by Committee):

> "145. During the October Hearing the Claimants presented arguments encapsulated in a PowerPoint presentation and one page thereof is replicated now in full.



> "146. During the October Hearing, the Claimants' oral submission on this Slide (p. 43 of the transcript) was as follows:
>
> > 'I just refer you to slide 36, I would like you to start with the fact that Italy was very aware of the deadlines, and both

> Professor Picozza and Mr Terlizzese, who was considering the production concession, were aware of that, and Mr Leccese's evidence regarding the legal consequences of noncompliance is, as far as we see, unchallenged.'
>
> "147. The Tribunal does not ascertain, from the October Hearing transcript, that the Respondent presented similar, albeit contrary arguments on this issue. However, that absence is not, in and of itself, determinative, and the issue must be decided taking all matters and evidence into due account.
>
> "148. Having considered all of the Parties' positions and the detailed evidence which was placed before the Tribunal, both by way of written materials and, critically, oral testimony (in particular those summarized and recorded in the preceding paragraphs), it is duly established, as a matter of fact, that Decree 484 was in force at the relevant time, and not repealed."[104]

123. It aids in understanding the Italian Republic's annulment position that the PowerPoint slide reproduced in the Award was used in oral arguments that took place in October 30, 2019, after the post-hearing briefs had been filed (as the slide's yellow-highlighted legend makes clear), which was more than 10 months after the oral hearing.[105] Rockhopper had addressed Italian Law 484/1994 in its post-hearing brief as part of its FET claim.[106] Point (A) of the section of its post-hearing brief in which Rockhopper argued that Italy had breached its obligations under the ECT was the following:

> "**A. Italy Breached Article 10(1) of the ECT by Failing to Treat Rockhopper's Investment Fairly and Equitably**".

124. The first sub-point was the following:

> "**(1) Italy Made Investment-Inducing Representations that Gave Rise to Legitimate Expectations That the Italian Government would Review the Production Concession Application in Accordance with Long-Standing Italian Laws Governing the Process**".

125. Under that heading, Rockhopper makes the following submission referencing Decree 484/1994:

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[104] Award, ¶¶145-148.

[105] *See* Award, ¶57. The hearing had taken place in Paris during the week of February 4, 2019.

[106] The quotations in this paragraph are from pages 6 and 7 of Rockhopper's Post-Hearing Brief in the Arbitration, with footnotes omitted and all emphasis Rockhopper's. As the yellow highlighting added to the PowerPoint slide by the Committee shows, the procedure of the Arbitration was such that there were post-hearing briefs followed by in-person oral arguments.

> "14.4. Decree 484/1994, Article 16, ¶3, which provides that the MED is to issue the Production Concession within 15 days of the MEPLS granting the EIA, thereby providing certainty and stability to the investor regarding the defined time period for completion of review of the application by the MED. Italy's Professor Picozza conceded during the hearing that Decree 484/1994 provides a timeline for the MED to act, failing which an applicant may pursue legal action against the Italian authorities, and that nothing in Decree 484/1994 modified Law 9/1991."[107]

126. Consistent with the post-hearing brief, Rockhopper made its oral submissions regarding Decree 484/1994 and the August 7, 2015, letter from the Ministry for the Environment to which the Award refers as part of its argument that it was denied fair and equitable treatment.[108]

127. The crux of the Italian Republic's annulment position is that the basis for the Award's imposition of liability– that is, that a direct expropriation occurred as a consequence of the Decree of the Ministry for the Economy, without need for the larger fact pattern to be taken into account apart from the lodging of the Decree by Rockhopper and the fact that a production license was not granted as a consequence – was not argued by Rockhopper even at the post-Hearing stage of the Arbitration, and that Rockhopper instead had consistently advanced different legal theories. In the submission of the Italian Republic, this entails that it was denied a fair opportunity to be heard.[109]

(4) The Quantification of Damages

128. Rockhopper was awarded damages in the principal amount of EUR 190,675,391.

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[107] Rockhopper's Post-Hearing Brief in the Arbitration, ¶14.4 (**RFA-10**) (footnote omitted).

[108] *See* Closing argument transcript 37:14-19 ("So having made clear why Rockhopper legitimately expected to get its production concession, what went wrong?"); 38:23-39:07 ("As I have observed at the end of slide 31, this chronology brings into sharp focus the parties' competing case theories. Was Italy busily considering public policy points at this time, and technical commercial viability? Or as we say, was the central government and the regions engaged in political machination where deals were being done behind the scenes for purely political reasons. You have to balance up the evidence and decide which is the most plausible."); 43:12-18 ("So what I say there is that when you look at this failure to comply with the 15-day deadline you can dismiss in its entirety the notion that there was any public policy or public interest consideration, and then you ask yourself, was there any reason or any basis or any explanation for not providing the concession within 15 days") (remarks of Rockhopper's counsel).

[109] *See* Hr. Tr. Day 2, 339:18-340:15 ("So we never really discuss whether this was an investment under the Treaty, we didn't discuss the case law that would apply expropriation to rights, to it coming from a law. We would have discussed or tried to discuss and defend our case saying that there was no transfer of title, they would have probably answered that that was not necessary, and then we would ask that the outright seizure in a situation of a right, we would try to prove that one other standard that you have on direct expropriation is that you transfer the benefit of that on either the state of a third person, and that was never discussed. So my point is that we all – not just us, but also the Claimant – based everything on this theory of legitimate

129. In awarding damages in that amount, the Tribunal concluded that "full compensation" was required under the ECT in a case, such as it found at hand, of unlawful expropriation.[110]

130. The Tribunal used January 29, 2016, as the valuation date[111] and a discounted cash flow methodology to assign a commercial value to the oil and gas that could have been extracted from the *Ombrina Mare* oilfield.[112] The Tribunal also awarded decommissioning costs as a component of damages.[113]

131. In addition to the damages awarded, the Tribunal ordered the Italian Republic to pay GBP 3,500,000 for Rockhopper's fees and expenses of lawyers, witnesses, experts and consultants plus 80 percent of the expended portion of Rockhopper's advances to ICSID for the costs of the Arbitration.

132. The Tribunal also ordered pre- and post-Award interest.

(5) The Individual Opinion

133. The Individual Opinion begins with a statement that "the general context" and "the concrete issues at stake in the question whether" Rockhopper "would ultimately be allowed to undertake drilling and exploitation at the *Ombrina Mar* [sic] oilfield" could, in the arbitrator's view, "have been emphasised even more" in the Award.[114] The arbitrator states that there was "no doubt' that Rockhopper "could not seriously claim that its expectations were legitimate", and that, if the Tribunal had been required to determine the dispute on this basis alone, it would have ruled in favor of the Italian Republic.[115] The Individual Opinion's elaboration of these observations is as follows:

> "1. With regard to fair and equitable treatment, both the extensive written arguments and the debates on both sides focused for a good part, in this case as in many others, on the question of what the Claimant's legitimate expectations were and to what extent they had been met or disregarded by the Respondent. Consideration of the first question (FET) was, however,

expectation to the point that they even mention the fact that they had already a 100 per cent refusal that would never claim to be a direct expropriation. In all of this – so we discuss the facts and then an assessment of those facts was made under a different legal basis where the criteria of standards are different from those of FET.") (Remarks of counsel for the Italian Republic).

[110] *See* Award, ¶¶204, 208.

[111] *See* Award, ¶¶214-15.

[112] *See* Award, ¶¶284-85. As discussed below, the Tribunal made changes to the discounted cash flow methodology that had been proposed by Rockhopper's damages expert, which would have resulted in a higher damage,

[113] *See* Award, ¶272.

[114] Individual Opinion, page 1.

[115] Individual Opinion, page 2.

dependent on the answer to the second (expropriation): the illegality of the expropriation under Article 13, if proven, would in itself entail Italy's responsibility and obligation to provide compensation for the damage thus created. If the expropriation had been carried out in accordance with the provisions of article 13, the Tribunal would still have had to consider the question of the existence of legitimate expectations, but such was not the case. In other words, it was only because the Tribunal was ultimately led to conclude that there had been an unlawful expropriation that it did not have to consider in the body of its award an issue that it had nevertheless discussed extensively in the course of its work, namely whether or not the Claimant could have legitimately expected the successful outcome of its claim for exploitation of the *Ombrina Mare* field.

"2. This objectively resulted in an undeniable advantage for the Claimant: in my opinion, it would have been almost impossible to conclude, on the basis of the elements of the case, that Rockhopper could reasonably and legitimately expect a positive response from the Italian authorities to its application for an operating permit. The Respondent was able to demonstrate efficiently that no promise had ever been made by its administration to the investor to that effect, especially since, as confirmed by the Italian Council of State itself, the granting of an exploration permit by a company in no way entailed in domestic law the automatic granting of an exploitation permit. Moreover, in view of the relevant legal context and its still recent development, the Claimant could not ignore that the entire area in question had previously been considered off-limits to drilling because of its immediate proximity to the coast and the very serious concerns that could rationally be entertained with regard to its ecological harmlessness. It was only after this general prohibition that certain exceptions were established, which were precarious and reviewable, and which the Claimant was able to benefit from.

"As for the intrinsic profitability of the project itself, this was all the more worrying as other companies had already given up on an operation; this explains the relatively low price at which Rockhopper was able to make its investment in the site in question as late as 2014. Therefore, there was in my view no doubt that the Claimant could not seriously claim that its expectations were legitimate. If the Tribunal had only had to determine whether Italy was liable on this basis alone, I would certainly have answered in the negative. In any event, as already stated, the question of fair treatment was only relevant to establishing Italy's liability if this country had not expropriated the investment concerned under illegal conditions."[116]

[116] Individual Opinion, pages 2-3 (footnotes omitted).

(6) The Disposition of the Claims

134. The operative part of the Award states as follows:

> "335. For the reasons set forth above, the Tribunal decides as follows:
>
> (1) Declares that the Tribunal has jurisdiction to decide this dispute under the ECT and the ICSID Convention and denies the Respondent's preliminary objections to the Tribunal's jurisdiction to decide the Claimants' claims;
>
> (2) Declares that the Respondent has violated its obligation under Article 13 of the ECT (the obligation not to unlawfully expropriate the Claimants' investment).
>
> (3) Orders the Respondent to pay compensation to the Claimants in the amount of EUR 184,000,000.00 (pre-tax) and EUR 6,675,391 for decommissioning costs.
>
> (4) Awards pre- and post-award interest at EURIBOR +4% compounded annually from 29 January 2016 (on any outstanding balance as may be the case from time to time) until payment in full save for the four months from the date of this Award during which period no interest shall accrue, as contemplated in paragraphs 319 and 320 above;
>
> (5) Orders the Respondent to pay the Claimants GBP 3,500,000.00 by way of costs incurred in connection with this arbitration, including fees and expenses of the legal counsel, witnesses, experts and consultants;
>
> (6) Orders the Respondent to pay the Claimant 80% of the expended portion of the Claimants' advances to ICSID, i.e. USD 301,284.18; and
>
> (7) All other prayers for relief are hereby denied."[117]

IV. THE ANNULMENT REQUESTS

135. This section begins by setting forth the Italian Republic's positions regarding its claims for annulment based on Dr. Poncet's disclosure pursuant to ICSID Arbitration Rule 6 and contended lack of the

[117] Award, ¶335.

qualities necessary to serve on the Tribunal. The positions that Rockhopper has taken in opposition are set forth next.

136. The Committee's analysis of the Parties' positions begins with identification of the applicable law and relevant legal principles. This includes discussion of the function of annulment in the legal system established by the ICSID Convention, the powers of *ad hoc* committees and the legal framework for the analysis of the Parties' claims.

137. The "new" facts are summarized next. These are facts that were not considered in the Award but that the Parties have put into the record in this annulment proceeding. Specifically, the new facts pertain to criminal proceeding in Italy against Dr. Poncet that he omitted from the disclosure that he was required to make pursuant to ICSID Arbitration Rule 6 at the outset of the Arbitration. The prosecution of Dr. Poncet during the 1990s was related to his work as a lawyer on matters that followed the 1982 collapse of *Banco Ambrosiano*. Dr. Poncet was convicted of two felonies and the convictions were upheld on appeal prior to their annulment by the Court of Cassation due to the application of Italy's equivalent of a statute of limitations.

138. The Decision next considers the Italian Republic's annulment requests on the grounds of subparagraphs (a) and (d) of Article 52(1) of the ICSID Convention that are factually based on Dr. Poncet's contended lack of the qualities of high moral character and reliability for the exercise of independent judgement specified in paragraph (1) of Article 14 of the ICSID Convention and failure to disclose his criminal prosecution in Italy.

139. Rockhopper contends that the Italian Republic has waived any objection regarding Dr. Poncet because the criminal proceedings against him were in the Italian Republic's own courts and, in addition, are a matter of public record in Italian and other media. Because the Italian Republic maintains that the promptness of its objection to Dr. Poncet's participation in the Arbitration should be considered in light of his disclosures pursuant to Rule 6, the Committee's analysis concludes with consideration of whether the Italian Republic should be precluded from seeking annulment based on Dr. Poncet's disclosure or qualifications.

A. THE POSITIONS OF THE PARTIES

(1) The Italian Republic's Contentions

140. The Italian Republic seeks annulment of the Award in Rockhopper's favor on the basis of facts that were not considered in the underlying Arbitration. The Italian Republic submits that "[a]n arbitrator must not only be impartial and independent but must also be perceived as such by an independent and objective third-party observer."[118] The Italian Republic refers to this as a "duty" of arbitrators that "includes the obligation" to disclose any circumstance that might cause reliability for independent judgement to be questioned by a party.[119]

141. The Italian Republic submits that the new facts that have been presented in this annulment proceeding manifestly indicate that Dr. Poncet failed in his disclosure obligations and that, on the facts that have now come to light, Dr. Poncet should be seen to have lacked the qualities required to be a suitable arbitrator in the underlying Arbitration, namely both high moral character and reliability for the exercise of independent judgement regarding Italy. As a result, Rockhopper contends that the Tribunal was not properly constituted and that its Award may be annulled pursuant to Article 52(1)(a) of the ICSID Convention.[120] The Italian Republic contends that a failure to make such disclosure constitutes a serious departure from a fundamental rule of procedure within the meaning of Article 51(1)(d).[121]

142. On the same facts concerning the Italian criminal proceedings against Dr. Poncet, the Italian Republic invokes Article 52(1)(d) as an additional ground for annulment. The Italian Republic's contention is that the right to appear before an impartial and independent tribunal is a fundamental rule of procedure essential for the integrity of the ICSID system. The Italian Republic contends that Dr. Poncet's failure to disclose the criminal proceedings deprived Italy of its right to be heard and to a fair trial, and for that reason was a serious departure from a fundamental rule of procedure.[122]

143. When there is a derogation from a fundamental rule of procedure, "there is no discretion not to annul", in the Italian Republic's view.[123]

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[118] *See* Italian Republic's Memorial on Annulment dated May 2, 2023 ("**Memorial on Annulment**"), ¶40.

[119] *See* Memorial on Annulment, ¶40. *See also* ¶¶44-45.

[120] *See* Memorial on Annulment, Section III (A)1-3.

[121] See Memorial on Annulment, Section III (A)4.

[122] *See* Memorial on Annulment, ¶¶114-119.

[123] *See* Memorial on Annulment, ¶46.

144. According to the Italian Republic, international bodies having requirements like ICSID's requirement that arbitrators have high moral character employ mechanisms such as vetting processes to assure compliance and find high moral character to be lacking based on even disciplinary proceedings.[124]

145. The Italian Republic submits that Dr. Poncet's prior prosecution and convictions in Italy give rise to justifiable doubts about his impartiality and independence and that appearance of bias is sufficient, as opposed to a demonstration of actual bias.[125]

146. The Italian Republic emphasizes that ICSID Arbitration Rule 6 required Dr. Poncet to include the information the Italian Republic has now brought forward in the annulment proceedings in his disclosure upon his appointment to the Tribunal, that the information was known to Dr. Poncet, and that the information had to be understood by Dr. Poncet to be an obstacle to his serving as an arbitrator for an ICSID claim involving Italy.[126]

147. The Italian Republic emphasizes that Dr. Poncet's failure to disclose his involvement in criminal proceedings prevented it from seeking his disqualification and stripped Italy of its rights to be heard and to a fair trial.[127]

148. The Italian Republic emphasizes the breadth of the ICSID disclosure requirement, and that full disclosure is necessary to ensure the general legitimacy of arbitral proceedings.[128]

149. The Italian Republic disputes the relevance of the IBA Guidelines on Conflict of Interest in International Arbitration ("**IBA Guidelines**"), upon which Rockhopper relies. The Italian Republic submits that Rockhopper has not established the applicability of the IBA Guidelines. The Italian Republic further submits that it has not alleged any conflict of interest but rather argues that Dr. Poncet "lacks impartiality" and that there is a "lack of moral character more broadly."[129] The Italian Republic also disputes the appropriateness of timeframes such as those indicated in the IBA Guidelines

[124] *See* Memorial on Annulment, ¶¶103-107,

[125] *See* Memorial on Annulment, ¶111.

[126] *See* Memorial on Annulment, ¶114.

[127] *See* Memorial on Annulment, pages 40-42.

[128] *See* Memorial on Annulment, ¶115.

[129] *See* Italian Republic's Reply Memorial on Annulment dated October 3, 2023 ("**Reply Memorial**"), ¶48.

when, as it contends with respect to Dr. Poncet, matters involving an arbitrator's "moral turpitude" are presented.[130]

150. The Italian Republic relies upon the 1987 IBA Rules of Ethics for International Arbitrators ("**IBA Rules of Ethics**") for the argument that the failure to make full disclosure creates an appearance of bias.[131]

151. The Italian Republic contends that, notwithstanding a requirement in the ICSID Arbitration Rules that proposals for the disqualification of arbitrators are to be made "promptly", it should not be held to have waived any objection it may have to the suitability of the arbitrator appointed by Rockhopper.[132]

152. The Italian Republic denies having had knowledge of the criminal proceedings during the pendency of the underlying Arbitration. The Italian Republic submits that:

> "82. In the present case, Italy did not know and could not have known of the facts underlying its Request for Annulment insofar as it related to the qualities that Dr. Poncet does not possess until its receipt of an anonymous communication received by phone by a team member of *Avvocatura Generale dello Stato* on 30 September 2022. Italy then conducted urgent searches and checks to confirm the content of the communication, including obtaining the relevant court judgments that prove Dr. Poncet's prior prosecution for and conviction of crimes involving moral turpitude."[133]

153. With respect to the principles of attribution applicable with respect to States,[134] the Italian Republic submits that the responsibility of Italy for internationally wrongful acts is not at issue in a disqualification proposal and that, outside the international law concerning State responsibility, there is no legal rule attributing to the State the knowledge possessed by its several agencies.[135] Nor, the

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[130] *See* Reply Memorial, ¶¶55-56.

[131] *See* Memorial on Annulment, ¶116 (relying upon IBA Rules of Ethics for International Arbitrators, 1987 ("**IBA Rules of Ethics**"), Art. 4.1 (**RL-130**)).

[132] *See* Memorial on Annulment, ¶78; *See* Reply Memorial, ¶5.

[133] Memorial on Annulment, ¶82. *See also* Reply Memorial, ¶9 ("Italy did not at all make any representation that it was allowing Dr. Poncet to sit as an arbitrator despite his commission of perjurious acts. Italy could not have even made any such representation because it did not know and could not have known of these facts until its receipt of an anonymous communication.")

The Italian Republic's "Official Request on Dr. Poncet's Case" is Exhibit **R-18**.

[134] *See* Reply Memorial, ¶15 ("That curtain between the Italian judiciary and the other branches of government prevents any principle of attribution, *quod non*, from applying as against the Italian State.").

[135] *See* Reply Memorial, ¶14.

Italian Republic submits, can the knowledge of the Italian judiciary be imputed to the State as a matter of fact.[136]

154. The Italian Republic contends that arbitrators have duties to make disclosure that is complete. The Italian Republic further contends that the parties appointing an arbitrator have duties of inquiry so that their appointments will be of persons acceptable as arbitrators in accordance with the ICSID Convention and Rules. The Italian Republic contends that, in contrast, a party in the position that the Italian Republic is in with respect to Dr. Poncet should be entitled to rely upon the information received from the arbitrator appointed by its adversary and does not have a duty of further inquiry. The Italian Republic further contends that, to the extent that it is viewed as having had some duty of inquiry regarding Dr. Poncet, its discharge of that duty should be assessed considering the disclosure that Dr. Poncet elected to make.[137]

155. The Italian Republic submits that academics and practitioners have "called for arbitrators to take their burden to disclose seriously. It should not be the task of the parties to find out about the arbitrators' activities."[138]

156. According to the Italian Republic, Rule 6(2) of the ICSID Arbitration Rules "does not limit disclosure to circumstances which would not be known in the public domain," and consequently "an arbitrator's disclosure ought to include even publicly available arbitral information."[139]

157. In any event, the Italian Republic contends that the qualities that the ICSID Convention mandates for all ICSID arbitrators are an essential component of the ICSID arbitral system and are not waivable by parties. Accordingly, the Italian Republic submits that it is incorrect for Rockhopper to argue the Italian Republic failed in a duty of inquiry regarding Dr. Poncet at the outset of the Arbitration. In the same vein, the Italian Republic contends that it would not be relevant even if the Italian Republic could be viewed as having had actual or constructive knowledge of the criminal proceedings against Dr. Poncet because the criminal proceedings took place in the Italian legal system.

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[136] *See* Reply Memorial, ¶15.

[137] *See* Reply Memorial, ¶¶17-26.

[138] Reply Memorial, ¶23.

[139] Reply Memorial, ¶53.

158. As the proceedings developed, the Italian Republic submitted that, in the event that the qualifications under Article 14(1) of the ICSID Convention are considered waivable (contrary to its principal position that the qualifications are not waivable), a waiver would stand only if and when a party, being aware of the circumstances that negate these qualities, had expressly stated willingness to have such a person act as arbitrator. In such a case, in the view of the Italian Republic, "what comes into operation is not a waiver due to a failure to object under Rule 27 of the ICSID Rules, but the principle of estoppel."[140]

159. According to the Italian Republic, the crimes for which Dr Poncet was prosecuted and convicted "evince moral turpitude"[141] and, "under Italian law, these crimes are considered crimes against the administration of justice."[142] The Italian Republic submits that Dr. Poncet's actions were connected to a broader criminal scheme cast against the backdrop of the *Banco Ambrosiano* bankruptcy,[143] which it describes in oral remarks as "one of the darkest moments in the life of the Italian Republic."[144]

160. According to the Italian Republic, the Court of Cassation annulled the judgment of conviction against Dr. Poncet only because the crimes ascribed were "extinguished by prescription." In the submission of the Italian Republic, the Court of Cassation's annulment of the judgment of conviction against Dr. Poncet due to prescription "did not result in his acquittal on the merits. Nor does such judgment alter, much less overturn, the finding by the courts on the merits that Dr. Poncet committed the acts of perjury and aiding falsification."[145]

161. Further according to the Italian Republic, a judgment of annulment based on prescription is independent of the actions of the accused. Instead, prescription is

> "linked to a natural occurrence, *i.e.*, the passage of time, which occurs after the commission of the unlawful and culpable act and before the final

[140] Reply Memorial, ¶6.

[141] Memorial on Annulment, ¶101.

[142] Memorial on Annulment, ¶102.

[143] The Italian Republic submits that Dr. Poncet acted with "Lucio Gelli, Mario Ceruti, and Roberto Calvi (then President of *Banco Ambrosiano*) at the helm of the criminal activities." Memorial on Annulment, ¶83.

[144] *See* Hr. Tr. Day 1, 23:14-20 ("Another issue raised by Claimants is at paragraph 29 of the Rejoinder, and it deals with the discrepancies between the day Italy says it was tipped about Poncet's active involvement in one of the darkest moments in the life of the Italian Republic, and the day the Attorney General's office started an investigation in that respect.") (remarks of counsel for the Italian Republic).

[145] Memorial on Annulment, ¶89.

> conviction, and results only in the non-imposition of any criminal sanction provided for that specific offence. Prescription occurs when the criminal case against the accused has not been finally adjudged within a certain period of time. Once the statute of limitations has expired, the defendant is acquitted because the offence is deemed extinguished. Thus, when the statute of limitations intervenes, criminal proceedings become incapable of reaching their 'normal' epilogue, *i.e.*, the judgement on the charge and the criminal liability of the defendant."[146]

162. The Italian Republic submits that the Court of Cassation denied Dr. Poncet's appeals of his convictions on the merits, including on the basis that he had been unable to cross examine a witness (Mr. Delaney) who had testified against him. The Italian Republic disagrees with Rockhopper's argument that the Court of Cassation, if not for the availability of prescription, would have remanded Dr. Poncet's case for new trial due to the lower court's reliance on hearsay evidence.[147]

163. The Italian Republic submits that the decision of the unchallenged arbitrators in *VC Holding II S.à.r.l. and others v. Italian Republic* ("***VC Holding***") rejecting their challenge to Dr. Poncet's appointment by the claimants in that case should be accorded no persuasive weight.[148] The unchallenged members of the *VC Holding* tribunal applied "an extremely formalistic test" and "refused to delve into the legal consequences of the Court of Cassation's annulment of Dr. Poncet's conviction under Italian law," the Italian Republic contends.

164. The Italian Republic does not dispute that, where it asserts the existence of a particular fact, it bears the burden of proving that fact.[149]

(2) Rockhopper's Contentions

165. Rockhopper submits that the Italian Republic has engaged in two improper tactics. The impropriety of each of the tactics, in Rockhopper's submission, is an independently sufficient reason to bar the Committee from considering the criminal proceedings against Dr. Poncet, or his exclusion of them from his Rule 6 disclosure, as grounds for annulment.

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[146] Memorial on Annulment, ¶96.

[147] Reply Memorial, ¶¶28-34.

[148] Reply Memorial, ¶59.

[149] Reply Memorial, ¶11.

166. First, Rockhopper contends that the Italian Republic should not have waited to lose the Arbitration "to type Dr. Poncet's name into Google."[150] Rockhopper submits that the Italian Republic's account of its late discovery of the criminal proceedings is "unconvincing" and part of an improper strategy that should not be tolerated.[151]

167. Rockhopper submits that the documentary record shows that the Italian Republic's legal team made inquiry to the court system the day before the documents submitted by the Italian Republic say the anonymous tip about Dr. Poncet was received.

168. Rockhopper argues that, in addition to being unconvincing, the Italian Republic's account of having discovered the existence of the criminal proceedings against Dr. Poncet's should not matter. This is because the criminal convictions of Dr. Poncet were in the Italian Republic's own courts. This, Rockhopper submits, means that the Italian Republic must be deemed to have had knowledge from the outset of the Arbitration of the matters on the basis of which it now seeks annulment.

169. Rockhopper, relying on the ILC Articles on Responsibility of States for Internationally Wrongful Acts,[152] argues that knowledge of the criminal proceedings should be attributed to the Italian Republic, which includes its legal team for the Arbitration and makes irrelevant what the members of the team actually knew or did not know about the criminal proceedings.[153] Rockhopper argues that the Italian Republic, as the Respondent in the Arbitration, should be understood as having had "actual" or "constructive" knowledge of the actions of its own courts at all relevant times.[154]

170. Rockhopper argues that the IBA Guidelines prescribe that any party to an arbitration is required to make a reasonable effort to ascertain information that might affect the arbitrator's impartiality or independence.[155]

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[150] Rockhopper's Counter-Memorial on Annulment dated July 25, 2023 ("**Counter-Memorial**"), ¶81; Rockhopper's Rejoinder on Annulment dated January 12, 2024 ("**Rejoinder**") ¶27.

[151] Rejoinder, ¶28.

[152] *See, e.g.,* Rejoinder, ¶¶30-31.

[153] *See* Rejoinder, ¶31.

[154] Rejoinder, ¶28

[155] *See* Rejoinder, ¶21.

171. Rockhopper's second argument that the Italian Republic has engaged in improper tactics proceeds from the fact that, by the Italian Republic's own account, it received the anonymous tip about the criminal proceedings shortly following receipt of the Award. Rockhopper submits that it was procedurally available to the Italian Republic at that time to make an application to the Tribunal for its Revision of the Award pursuant to Article 51 of the ICSID Convention. The fact that the Italian Republic did not do so but instead requests annulment, Rockhopper submits, is a procedurally improper attempt to frustrate the proper consequence of the Award against it. Rockhopper submits that the Committee lacks the power pursuant to Article 52 to consider as an annulment ground information that properly may have been submitted only to the Tribunal as a ground for revision under Article 51.

172. In addition to the two arguments about improper tactics by the Italian Republic, Rockhopper argues that the Italian Republic has presented a narrative of the seriousness of the criminal proceedings and their annulment based on prescription that the Committee should not accept. Rockhopper characterizes Mr. Delaney as "a colourful character"[156] and Dr. Poncet as having conducted himself in connection with the failure of *Banco Ambrosiano* properly, as a lawyer, at all times. In addition to annulling his convictions, which Rockhopper acknowledges to be short of an acquittal, Rockhopper contends that the Court of Cassation went as far as it could to convey that there was no merit to the criminal claims against Dr. Poncet.

173. Rockhopper contends that an annulment applicant has succeeded in only one of 13 reported annulment proceedings in which Article 52(1)(a) has been invoked.[157] Rockhopper contends that the Italian Republic omitted in its Annulment Memorial any detailed discussion of the factual or legal reasoning of the *ad hoc* committee in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain* ("***Eiser***"),[158] the one case in which annulment was granted on the ground of Article 52(1)(a). Rockhopper's arguments largely follow what it describes as "the three-part legal standard"[159] adopted by the *ad hoc* committee in the *Eiser* decision.

[156] Counter-Memorial, ¶74.4.

[157] *See* Counter-Memorial, ¶30.

[158] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment (June 11, 2020), ("**Eiser**") (**RL-78**).

[159] Counter-Memorial, ¶33.

174. The first part of the *Eiser* test requires that parties must make prompt objection to the suitability of an individual to serve as an arbitrator. Rockhopper's arguments that the Italian Republic failed to do so have been summarized above.

175. Rockhopper argues that the facts underlying Italy's complaint against Dr. Poncet occurred almost three decades ago; that Dr. Poncet had no duty to disclose the annulled convictions rendered against him in Italy in 1996 because the IBA Guidelines prescribe that only facts occurred within three years from an arbitrator's appointment are relevant to analyzing whether there is an Orange List or a Red List conflict, and that Italy has not demonstrated how or why there is – or even could be – an "antagonistic and adversarial relationship" between Dr. Poncet and Italy based on his annulled criminal convictions in Italy.[160]

176. Rockhopper argues that the third part of the three-part *Eiser* test requires that a proponent of annulment based on improper constitution of a tribunal must show that the improper constitution of the tribunal had a material effect on the award. This, Rockhopper contends, the Italian Republic cannot do because the view that Dr. Poncet harbours some grudge or grievance toward Italy is speculation and that, to the contrary, Dr. Poncet should be regarded as feeling gratitude toward Italy.[161]

177. Rockhopper submits that, despite the Individual Opinion, the Award was unanimous, meaning that the other two arbitrators as to whom the Italian Republic has raised no objection came to the same result as Dr. Poncet.

178. Rockhopper submits that Dr. Poncet's behaviour during the Arbitration was exemplary and that similarly Dr. Poncet was said by the two unchallenged arbitrators in *VC Holding* to have been only helpful to them in their consideration of the proposal by the Italian Republic for Dr. Poncet's disqualification.

179. Rockhopper argues that the unchallenged arbitrators who rejected the Italian Republic's proposal to disqualify Dr. Poncet in *VC Holding* are highly regarded and that this Committee should view the criminal proceedings in the same way as they did.[162] Rockhopper submits that, because one of the

[160] Counter-Memorial, fn 186, ¶83.3.

[161] *See, e.g.*, Hr. Tr. Day 2, 422:19-423:24 (remarks of Rockhopper's counsel).

[162] *See* Hr. Tr. Day 1, 138:3-139:12 (remarks of Rockhopper's counsel).

unchallenged arbitrators in *VC Holding* had served as President of the *Rockhopper* Tribunal, the dismissal of the proposal for Dr. Poncet's disqualification in *VC Holding* should be regarded as evidence that Dr. Poncet did not lack impartiality in the Arbitration brought by Rockhopper.[163]

180. Rockhopper maintains that the burden of proof is always on the party seeking annulment regarding the annulment grounds upon which it relies[164] and that the Italian Republic has the burden to prove that the knowledge of its courts should not be attributed to it in this proceeding.[165]

B. THE LEGAL FRAMEWORK

181. The first sub-part of this section sets forth Article 52 of the ICSID Convention, the function of annulment in the ICSID system and the powers of *ad hoc* committees.

182. The next several sub-parts address the provisions of the Convention and other authorities that are relevant for consideration of a claim for annulment pursuant to the Article 52(1)(a) ground that the tribunal was not properly constituted. The matters addressed include the requirements for the establishment of a tribunal pursuant to the ICSID Convention, and the legal framework for parties to propose the disqualification of arbitrators. Particular attention is then given to the considerations that are necessary when, as in this case, objection to the qualifications of an arbitrator is made for the first time only as a basis for annulment after an award has been rendered.

183. The last sub-part discusses the considerations that are necessary when a serious departure from a fundamental rule of procedure is said to be an additional ground for annulment pursuant to Article 52(1)(d) on the same facts contended to warrant annulment pursuant to Article 52(1)(a).

(1) Article 52 and the Function of Annulment in the ICSID System

184. Article 52 of the ICSID Convention states in relevant part as follows:

> "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

[163] *See* Hr. Tr. Day 1, 138:3-139:12 (remarks of Rockhopper's counsel).

[164] *See* Rejoinder, ¶20.

[165] *See* Rejoinder, ¶32.

(a) that the Tribunal was not properly constituted.

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

[…]

"(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. […] The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

"(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

[…]

"(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter."

185. Article 52(1) establishes certain general principles regarding the nature of annulment proceedings, as the decisions of past *ad hoc* committees reflect. First is that the fundamental function of an annulment proceeding is to safeguard the integrity of the ICSID arbitral process. This concept is conveyed in the following often-quoted passage from the decision of the *ad hoc* committee in *MTD Equity Sdn.*

Bhd.and MTD Chile S.A v. Republic of Chile ("**MTD**")*:*

> "31. […] Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal."[166]

186. The *ad hoc* committee in *Hussein Nuaman Soufraki v. United Arab Emirates* ("***Soufraki***")*,* elaborated as follows on what it entails for an *ad hoc* committee to safeguard the fundamental integrity of ICSID arbitral proceedings:

> "23. In the view of the *ad hoc* Committee, the object and purpose of an ICSID annulment proceeding may be described as the control of the fundamental integrity of the ICSID arbitral process in all its facets. An *ad hoc* committee is empowered to verify (i) *the integrity of the tribunal* – its proper constitution (Article 52(1)(a)) and the absence of corruption on the part of any member thereof (Article 52(1)(c)); (ii) *the integrity of the procedure* – which means firstly that the tribunal must respect the boundaries fixed by the ICSID Convention and the Parties' consent, and not manifestly exceed the powers granted to it as far as its jurisdiction, the applicable law and the questions raised are concerned (Article 52(1)(b)), and secondly, that it should not commit a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) *the integrity of the award* – meaning that the reasoning presented in the award should be coherent and not contradictory, so as to be understandable by the Parties and must reasonably support the solution adopted by the tribunal (Article 52(1)(e)). Integrity of the dispute settlement mechanism, integrity of the process of dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism."[167]

187. Second is that Article 52 is to be interpreted neither restrictively nor liberally, but rather in accordance with the object and purpose of the ICSID Convention. The *ad hoc* committee in *Soufraki* addressed itself to this principle as well, stating as follows:

> "21. Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international

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[166] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (March 21, 2007), ("**MTD**"), ¶31 (**RL-134**).

[167] *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, (June 5, 2007), ("***Soufraki v. United Arab Emirates***"), ¶23 (emphasis added) (**RL-72**).

> law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty."[168]

188. Applying this principle, the *ad hoc* committee in *Amco Asia Corporation and others v. Republic of Indonesia* ("***Amco II***") stated that interpretation of Article 52 in accordance with its object and purpose precludes review of an award on its merits.[169] The *Amco II* committee further stated, however, that there should be no unwarranted refusal to give full effect to Article 52 within the limited but significant area for which it was intended.

189. The Committee agrees with the committee in *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* ("***EDF***") that there is no basis in the text of Article 52 for a presumption for – or against – the validity of an award. Further, reference to "presumption" in connection with the consideration that Article 52 requires may result in confusion. For example, when a decision of a tribunal is reasonably open to argument either way, that decision cannot be said to be a manifest excess of powers, as the committees in *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* ("***Klöckner***")[170] and *CDC Group plc v. Republic of Seychelles* ("***CDC***")[171] have observed. This does not derive, however, from a presumption that awards should be upheld. It derives from the substantive law as to what constitutes a manifest excess of powers within the meaning of Article 52.

190. It does not follow that requests for annulment should be denied in circumstances in which annulment is warranted. *Ad hoc* committees should be mindful also that characterizations of annulment as an "exceptional remedy" – like descriptions of the grounds for annulment as "narrow" and argument about "trends" away from annulment – are of little use when considering a particular case in light of the Article 52 requirements. Annulment is an exception to the ordinary enforceability of arbitral

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[168] *Soufraki v. United Arab Emirates*, ¶21 (**RL-72**).

[169] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award, (December 17, 1992) ("***Amco II***"), ¶1.17 (**CL-279**).

[170] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No. ARB/81/2 (May 3, 1985) ("***Klöckner***") (**RFAA-4/RL-111**).

[171] *CDC Group plc v. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision on the Application for Annulment, (June 29, 2005) ("***CDC***") (**RL-83**).

awards. But annulment is a remedy, although "exceptional" in that sense, having its proper place. Due respect for the ICSID system requires annulment to be ordered in appropriate circumstances.

191. Third is that an award may be annulled only on one (or more) of the five grounds set out in Article 52. This is clear from the text of Article 52. The primary function of an *ad hoc* committee in the ICSID system is to determine whether or not one or more of the five grounds provided in Article 52 has been established. An *ad hoc* committee does not have competence to go beyond the five specified grounds in deciding whether or not to annul an award. Accordingly, it is not the function of an *ad hoc* committee to decide whether it agrees with a tribunal's reasoning or conclusions. This rule is so frequently recited in annulment decisions that there is no need to include citations, even if prior *ad hoc* committees have sometimes failed to abide by it.

192. In this context, the Committee observes that it is usual in ICSID arbitrations for disputes to be submitted to tribunals composed of arbitrators chosen by the parties themselves. Due respect for party autonomy accordingly requires *ad hoc* committees to be mindful of the limited but important function that Article 52 prescribes. The Committee agrees that

> "[i]t would fly in the face of the reasonable expectations of the parties to consider that three other arbitrators, none named by the parties, but chosen by the Chairman of ICSID's Administrative Council…to sit as members of an ad hoc committee, should be in a position to substitute their views of a dispute for those of the initial arbitral tribunal."[172]

193. Fourth is that an *ad hoc* committee has discretion whether or not to annul the award even when one or more of the grounds for annulment specified in Article 52 has been established. This discretion is pursuant to Article 52(3) of the ICSID Convention, which states that an *ad hoc* committee "shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)." Article 52(3) does not say that an *ad hoc* committee must or shall annul the award or any part thereof when a ground specified in paragraph (1) has been established. *Ad hoc* committees have considered their discretion under Article 52(3) to require that they take account of relevant circumstances, including the gravity of the annullable error and whether or not there had been, or could have been, a

[172] Jan Paulsson, ICSID's Achievements and Prospects, *ICSID Review - Foreign Investment Law Journal*, Volume 6, Issue 2, Fall 1991, pages 380–389, page 392 (**CL-332**).

material effect upon the outcome of the case. *Ad hoc* committees have also considered the importance of the finality of awards and fairness to both sides.

194. Rockhopper maintains that the burden of proof is always on the party seeking annulment. The Italian Republic does not dispute that it bears the burden of proving the fact when it asserts the existence of that fact.[173]

(2) The Analysis Required When Improper Constitution of a Tribunal is Claimed as a Ground for Annulment

a. The Requirement of Article 40(2) that All Arbitrators Must Possess the Qualities Required by Article 14(1) for Members of the ICSID Panel of Arbitrators

(i) The Relevant Provisions of the Convention

195. Article 14(1) of the ICSID Convention requires that individuals designated to serve on the Panels of Conciliators and Arbitrators shall be "persons of high moral character" who "may be relied upon to exercise independent judgement." Article 14(1) is in full as follows:

> "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

196. Article 40(2) of the ICSID Convention requires that:

> "Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14."

Thus, every member of an arbitral tribunal proceeding under the ICSID Convention must be a person "of high moral character." Every member of an arbitral tribunal proceeding under the ICSID Convention also must be a person "who may be relied upon to exercise independent judgement." The third requirement is "recognized competence" in one of several fields, with the field of law being of particular importance for persons on the Panel of Arbitrators. The Italian Republic has not questioned Dr. Poncet's recognized competence in the field of law.

[173] Reply Memorial, ¶11; Rejoinder, ¶20.

197. Article 40 is one of four articles that comprise Section 2 of the ICSID Convention, which is entitled "Constitution of the Tribunal." Article 37 requires that arbitral tribunals be constituted as soon as possible after registration of requests for arbitration pursuant to Article 36. Article 37 also specifies the number of arbitrators and the manner of their appointment. Article 38 provides for the appointment of arbitrators by the Chairman of the ICSID Administrative Council if the tribunal has not been constituted within 90 days of notice to the parties of registration of a request for arbitration. In such instances, Article 38 prohibits the appointment of any person having the same nationality as a party to the dispute. Article 39 provides that, absent agreement of the parties, neither a sole arbitrator nor the majority of the arbitrators on a tribunal may have the same nationality as a party to the dispute. Article 40, in addition to requiring that any arbitrator appointed by a party from outside the Panel of Arbitrators must have the same qualifications of high moral character and reliability for exercise of independent judgment as members of the Panel of Arbitrators, prohibits the appointment of an arbitrator from outside the Panel of Arbitrators when an appointment by the Chairman of the ICSID Administrative Council is made pursuant to Article 38.

(ii) The Required "High Moral Character"

198. Although many sets of rules governing many types of arbitrations require arbitrators to be "independent and impartial" (discussed below), it is not usual for arbitrators also to be required to possess "high moral character", as Articles 14 and 40 of the ICSID Convention require. This is a requirement that is common, however, for judges who sit on international adjudicative bodies. For example, Article 2 of the Statute of the International Court of Justice[174] states as follows regarding the composition of the ICJ:

> "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

[174] Statute of the International Court of Justice, Art. 2 (**RL-103**).

199. Similarly, the European Convention on Human Rights[175] states at Article 21(1) that judges of the European Court of Human Rights ("**ECtHR**")

> "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."

(iii)The Required "Reliability for the Exercise of Independent Judgement"

200. Specialists in arbitration note that the ICSID Arbitration Rules differ from the rules of many arbitral institutions in that they do not expressly state that arbitrators must be both independent and impartial. In the present case, the 2006 version of the ICSID Arbitration Rules applies[176] and the requirement under Rule 6is that each arbitrator must provide a statement disclosing his or her past and present professional, business and other relationships (if any) with the parties, and any other circumstance that might cause his or her "reliability for independent judgment to be questioned by a party." The express reference of Rule 6, in keeping with the formulation of Article 14, is to only independence, not impartiality.

201. Although often recited together, "independence" and "impartiality" can be thought of as distinct. "Independence" can be thought of as concerning financial, commercial and other relationships. An employee typically is not "independent" of his or her employer. Accordingly, independence has fundamentally to do with the absence of any external control,[177] including in particular the absence of relations with a disputing party.

202. Impartiality can be thought of as a condition of the mind. Impartiality has to do with the exercise of judgment without bias or predisposition. The two concepts are linked: an arbitrator is more likely to favor a party if he or she is not independent of that party. In this sense, a lack of independence may be the cause of partiality. It is also the case, however, that partiality may result for reasons other than a lack of independence. Bias against a particular group of people is an example of a lack of impartiality

[175] European Convention on Human Rights, Art. 21(1) (**RL-118**).

[176] Under Article 44 of the ICSID Convention, arbitration proceedings shall be conducted, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. Accordingly, the 2006 ICSID Arbitration Rules are applicable in this proceeding notwithstanding the fact that 2022 ICSID Rules and Regulations, which include updated rules for arbitration, came into force on July 1, 2022.

[177] *See Eiser*, ¶206.

that typically does not have to do with a lack of independence. The distinction between "independence" and "impartiality", which is not always a sharp one, has to do with the difference between a state of affairs and a state of mind.

203. It has sometimes been said that an individual may be independent of the parties and have no bias or predisposition regarding any party but still lack the impartiality necessary to serve as an arbitrator as a result of having formed views relating to matters that will have to be decided. Such "issue conflict" has been contended to have resulted from an arbitrator's past representation as counsel of a client in a situation similar to the case at hand,[178] an arbitrator having previously sat in a case involving some of the same facts or legal issues,[179] and an arbitrator's academic writing relating to a matter that will have to be decided.[180] These are all situations in which there has been said to be a prejudgment having to do with the matters to be decided in the case, as opposed to a prejudgment having to do with the parties to the case.

204. The Committee is satisfied that Article 14 of the ICSID Convention requires impartiality of arbitrators regarding the parties before them, as well as independence from them, even though the requirement that arbitrators be impartial is not explicitly stated in the same way as in some other arbitration rules. The statement that arbitrators must be persons "who may be relied upon" to "exercise independent judgment" conveys that the arbitrator must be free from favoritism, or animus, that could bear upon the decision making in the case, whether due to the arbitrator's relationship with a party or some other circumstance giving rise to concern about possible bias or pre-disposition.

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[178] *See Eiser*, ¶213.

[179] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5 ("***Tidewater***"), Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010), ¶18 (**RL-156**). *See also*, *e.g. Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (February 25, 2008), ¶37.

[180] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic,* ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (August 12, 2010), ¶¶20-26 (**RL-124**). See also, e.g. *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India (I)*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (September 30, 2013), ¶22.

205. The Convention is equally authentic in English, French and Spanish,[181] and the Spanish version of Article 14(1) confirms its proper understanding. In Spanish, Article 14(i) provides that persons designated to serve on the ICSID Panel of Arbitrators be persons who must "*inspirar plena confianza en su imparcialidad de juicio*." This translates into English as *inspire full confidence in his impartiality of judgement*. The *ad hoc* committee in *EDF,* came to the same understanding of Article 14, referenced the Spanish version, and noted that the general practice for disputes under the ICSID Convention has been to require that all arbitrators may be relied upon to exercise independent judgement and inspire full confidence in their impartiality.[182]

206. Independence and impartiality should not be thought of as qualities required of arbitrators that can be assessed in a general or purely abstract way. As the *EDF* committee stated,

> "[…] what matters most is that an arbitrator can be relied upon to be independent and impartial in relation to the particular parties and issues arising in a given arbitration."[183]

207. Accordingly, independence and impartiality must be assessed case by case, taking account of any relationships and other circumstances pertinent for each particular case.

b. The Constitution of ICSID Arbitral Tribunals and the Disclosure that Rule 6 Requires Arbitrators to Provide upon Appointment

208. The first chapter of the ICSID Arbitration Rules is entitled "Establishment of the Tribunal" and consists of Rules 1 through 12. Rule 6, the heading of which is "Constitution of the Tribunal", is of particular relevance for the consideration of a request for annulment on the grounds of Article 52(1)(a).

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[181] The requirement as stated in the French text is that the person must be one who must "*offrir toute garantie d'indépendance dans l'exercice de leurs fonctions*", which is essentially the same as the English text. *See* ICSID Convention, Article 75 ("DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic […].")

[182] *See EDF International, S.A. et al. v. Argentine Republic,* ICSID Case No. ARB/03/23, Decision on Annulment (February 5, 2016) ("***EDF***"), ¶133 (**CL-420**) (an award may be annulled on the ground of improper constitution of the tribunal if "a reasonable third person with knowledge of all the facts, would consider there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality […]."). *See also, e.g., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic,* ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19 ("***Suez I***"), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007), ¶ 28 (**RL-123**).

[183] *EDF*, ¶126.

209. Rule 6 has only two parts. The first part of Rule 6 provides for the calculation of time limits by stating that a tribunal shall be deemed to be constituted and the proceedings begun on the date of notification to the parties that all arbitrators have accepted their appointments.

210. The second part of Rule 6 requires that each arbitrator shall sign a declaration in a specified form. The form of the required declaration is set forth in Rule 6. Further the declaration requires each arbitrator to provide a statement disclosing any information of two sorts if such information exists. First, the arbitrator must disclose his or her "past and present professional, business and other relationships (if any) with the parties." Second, the arbitrator must disclose "any other circumstance that might cause my reliability for independent judgement to be questioned by a party." Rule 6 specifies that an arbitrator failing to sign the required declaration by the end of the first session of the Tribunal shall be deemed to have resigned. Rule 6 is in full as follows:

> "(1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.
>
> "(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:
>
> 'To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.
>
> 'I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.
>
> 'I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.
>
> 'Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I

> assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.'
>
> "Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned."

211. Although, as will be discussed below, an "objective" – or reasonable third party – assessment is called for when an application for disqualification is decided pursuant to Article 57, the standard according to which an arbitrator must make the disclosure necessary for an ICSID tribunal to be properly constituted is different and broader. Rule 6 requires not only that the arbitrator must sign a Declaration in a specified form but also that a Statement be attached to disclose (a) any past and present professional, business and other relationships, if any, with the parties, and (b) "any other circumstance that **might cause** my reliability for independent judgement **to be questioned by a party**" (emphasis added). Because the perspective to be adopted in making disclosure is that of a party, the arbitrator must go beyond the arbitrator's own perspective. Disclosure must be of what "might cause" a party to question the arbitrator's reliability for independent judgment, which entails that the arbitrator may not limit disclosure to what the arbitrator believes appropriately *should* give rise to questions by a party.

212. Rule 6 is express that the arbitrator's duty of disclosure is a continuing obligation. This is consistent with the requirement of the ICSID Convention that arbitrators must continue to possess the qualities required by paragraph (1) of Article 40 over the entire durations of the arbitrations in which they serve.

213. The Committee agrees with the decision on a proposal for disqualification in *Tidewater v. Venezuela* that Rule 6(2) "does not limit disclosure to circumstances which would not be known in the public domain" but rather is "all encompassing" and does not distinguish "among categories of circumstances to be disclosed."[184] Accordingly, the duty of disclosure of arbitrators extends even to matters in the public domain, as well as confidential matters of which the parties, absent disclosure, could not be aware.

[184] *See Tidewater*, ¶46.

c. The Right of Parties to Propose Disqualification of Arbitrators in Accordance with Article 57 and the Resolution of Challenges in Accordance with Article 58

214. The framework for the disqualification of arbitrators is set forth in Chapter V of the ICSID Convention, which consists of Article 57 and Article 58. Article 57 provides that a party may propose the disqualification of any member of the tribunal based on any fact indicating a manifest lack of the qualities required by Article 14(1). A distinctive feature of the ICSID framework is that, pursuant to Article 58, decisions on applications to disqualify arbitrators typically are made by the other members of the tribunal. A proposal for the disqualification of an arbitrator therefore may not be made until all arbitrators have accepted their appointments and the parties have been notified in accordance with the first part of Rule 6. When the two unchallenged arbitrators are equally divided, or in the case of a proposal to disqualify a sole arbitrator or two or all three arbitrators, Article 58 provides that the Chairman of the Administrative Council will decide the challenge.[185]

215. Rule 9 of the Arbitration Rules is applicable when a party proposes disqualification of an arbitrator pursuant to Article 57. The first part of Rule 9 requires a party proposing disqualification of an arbitrator pursuant to Article 57 to do so "promptly." Rule 9 goes on to state that such a proposal shall be made "in any event before the proceeding is declared closed." This means that a proposal for disqualification will not be timely once the arbitral proceedings have been declared closed and that disqualification of an arbitrator ceases to be possible at that time.

216. Rule 9(3) provides that an arbitrator whose disqualification has been proposed "may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be."

217. When a party challenges the qualifications of an arbitrator under Article 57, it need not prove actual bias but only the appearance of bias. The test, however, is an objective one, meaning that it is not sufficient for an arbitrator to be disqualified simply because the party bringing the challenge believes or suspects the arbitrator to lack independence or impartiality. The two unchallenged members

[185] Pursuant to Article 4 of the ICSID Convention, the Administrative Council shall be composed of one representative of each Contracting State. Pursuant to Article 5, the President of the World Bank shall be the *ex officio* Chairman of the Administrative Council.

explained as follows in deciding a proposal for disqualification of the third member in the *Suez* arbitration:

> "38. After analyzing Argentina's various contentions in its Proposal, we find only Argentina's belief, unsubstantiated by objective evidence, that the award in the *Aguas del Aconquija* case, because of alleged improper findings of fact, is sufficient to demonstrate Professor Kaufmann-Kohler's lack of independence and impartiality. Paragraph 47 of Argentina's Proposal states: 'Based on all the considerations hereinabove stated, the Republic of Argentina asserts that it is manifest that Mrs. Kaufmann-Kohler may not be relied upon to exercise independent judgment with respect to the Claimants' claim.'
>
> "39. Although Argentina does not ask the question specifically in its Proposal, the above-quoted statement raises the question of whether, in applying the standards of Article 14 of the Convention to challenges, one is to use a subjective standard based on the belief of the complaining party or an objective standard based on a reasonable evaluation of the evidence by a third party. In other words, when the English version of article 14 calls for a person '…who may be relied upon to exercise independent judgment' and the Spanish versions requires one '...who inspires full confidence in his impartiality of judgment' are we to look only to the challenger's belief or lack thereof in the presence of that quality or are we to require a showing of evidence that a reasonable person would accept as establishing the absence of the qualities required by Article 14? We have concluded that an objective standard is required by the Convention."[186]

218. Article 57 states that the lack of the qualities required by Article 14 must be "manifest", which has been understood to mean that the lack of qualification must be capable of being perceived, not that the lack of qualification must be egregious, for an application to disqualify an arbitrator to be granted.[187] The two unchallenged arbitrators in *SGS v. Pakistan*, in deciding a challenge pursuant to Article 57, gave the following explanation of their analysis of an application pursuant to Article 57 for the disqualification of the third member of the arbitral tribunal:

> "[20] The standard of appraisal of a challenge set forth in Article 57 of the Convention may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such a nature as to 'indicat[e] a manifest lack of the qualities required by' Article 14(1). The party challenging an

[186] *Suez I*, ¶¶38-39.

[187] *See Eiser*, ¶51 ("the lack of the required qualities must be 'evident' or 'obvious' but does not need to be 'self-evident') (collecting decisions on proposals to disqualify arbitrators).

> arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made. The first requisite that facts must be established by the party proposing disqualification, is in effect a prescription that mere speculation or inference cannot be a substitute for such facts. The second requisite of course essentially consists of an inference, but that inference must rest upon, or be anchored to, the facts established. An arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences."[188]

d. The Analysis Required When an Arbitrator's Alleged Lack of Qualification Comes to Light Only After an Award Has Been Rendered

219. According to ICSID's recently published Updated Background Paper on Annulment,[189] there have been 16 cases leading to decisions in which improper constitution of a tribunal under Article 52(1)(a) has been raised as a ground for annulment.[190] That is a small number of cases by reference to the 194 annulment proceedings that had been instituted when the Updated Background Paper On Annulment was published.[191] As will be discussed below, this case is further unusual because in only 3 of the 16 cases have the facts said to show the arbitrator's lack of qualification been considered for the first time in the annulment proceeding, without there having been a challenge to the arbitrator in the underlying arbitration.

(i) The Mode of Analysis That Is Used When, as Is Typical, Annulment Is Requested on a Ground Other than Article 52(1)(a)

220. When annulment is requested on grounds other than Article 52(1)(a) – which is to say, in almost every annulment proceeding – the subject matter for the annulment committee to evaluate is the decision-making process that resulted in the tribunal's award. This is why, in probably every annulment decision since it was first said in *MTD*, there is at least one repetition of the statement that "an annulment is not an appeal." This is a way of conveying that it is not the function of an *ad hoc* committee to look at a decision that an arbitral tribunal made and then to render opinions of its own

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[188] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify an Arbitrator (December 19, 2002), ¶20.

[189] Issued date: March 2024.

[190] *See* Updated Background Paper on Annulment, ¶85. *See also* Annex 2 to Updated Background Paper on Annulment (setting forth grounds asserted in annulment proceedings).

[191] *See* Updated Background Paper on Annulment, page 96.

of whether the decision was "right" or "wrong", from the standpoint of whether the committee itself would have made a different decision on the same facts and laws. Article 52 of the ICSID Convention has been described as a "control mechanism" that "ensures that a decision has remained within the framework of the parties' agreement to arbitrate."[192]

221. Whether a tribunal has "manifestly exceeded its powers" under Article 52(1)(b) comes down most often to whether the tribunal disregarded the way the parties had framed and argued their case by deciding points that had not been submitted to it. This can be expressed as a failure to abide by the parties' agreement to arbitrate, or as exceeding the terms of reference for the arbitration.

222. Whether there "has been a serious departure from a fundamental rule of procedure" under Article 52(1)(d) quite obviously has to do with procedural matters. Examples of fundamental rules of procedure that *ad hoc* committees have identified include equal treatment of parties,[193] the right to be heard[194] and treatment of evidence and burden of proof.[195]

223. It may not be as immediately apparent that whether "the award has failed to state the reasons on which it is based", as Article 52(1)(e) requires, concerns procedure. But the legal method is fundamentally about proceeding from competing submissions about facts and law to a decision as to which of the competing submissions is the better one. Accordingly, when the award does not "enable one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion" – the test formulated by the *ad hoc* committee in *MINE*[196] and frequently referenced in subsequent annulment decisions – there has been a failure of the decision-making process. When the ICSID Convention was being drafted, a failure to state the reasons for the award initially was conceived for that reason to be

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[192] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (December 30, 2015), ¶41 (**RL-75**).

[193] *See Amco II*, ¶¶9.07-9.08.

[194] *See Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment (December 23, 2010) ("***Fraport***"), ¶197 (**RL-86**).

[195] See *Amco Asia Corporation, et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment (May 16, 1986) ("***Amco I***"), ¶¶87-88 (**RL-113**).

[196] *Maritime International Nominees Establishment v. Republic of Guinea,* ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award (December 22, 1989) ("***MINE***"),¶5.09 ("[…] the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.") (**RFAA-6/RL-88).**

an example of a serious departure from a fundamental rule of procedure.[197] It became a stand-alone annulment ground later in the drafting process.

(ii) The Two Lines of Decisions that Have Emerged in Annulment Cases on the Ground of Article 52(1)(a)

224. Whether the tribunal was properly constituted is not a matter about which arbitrators make decisions in awards. A request for annulment on the ground of Article 52(1)(a) therefore requires different considerations than when a request for annulment is based on one or more of the three grounds that are frequently invoked in annulment proceedings. The relatively few cases that have included requests for annulment on the ground of Article 52(1)(a) have generated two distinct lines of decisions.

225. The first line of decisions began in 2009 with the decision of the *ad hoc* committee in *Azurix Corp. v. Argentine Republic* ("***Azurix***").[198] The decisions of the *ad hoc* committees in *OI European Group B.V. v. Bolvarian Republic of Venezuela*,[199] and *Victor Pey Casado and Foundation President Allende v. Republic of Chile* ("***Pey Casado II***")[200] follow in this line.

226. The second line of decisions began with the decision in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ("***Vivendi II***"), which the *ad hoc* committee issued in 2010.[201] The approach taken by the committee in *Vivendi II* was substantially elaborated in the 2016 annulment decision in *EDF*. The other decisions in the *Vivendi II-EDF* line include *Suez I,*[202] and *Eiser*. The decision in *Eiser* is the most recent Article 52(1)(a) decision and the first to annul an award on the ground that a tribunal was not properly constituted.

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[197] The remaining ground for annulment, Article 52(1)(b), is "that there was corruption on the part of a member of the Tribunal." Thankfully, it does not appear that Article 52(1)(b), has ever been invoked in a request for annulment.

[198] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment (September 1, 2009) ("***Azurix***") (**CL-77/RAA-11**).

[199] *See OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment (December 6, 2018) ¶¶99, 104-105, 108 ("[…] this Committee is respectfully unable to share the holding and conclusions of the committees in *Vivendi II* and *EDF* and instead prefers those of the *Azurix* committee.") (**CL-315**).

[200] *See Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment (January 8, 2020) ("***Pey Casado II***"), ¶190 (**CL-300**).

[201] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Request for Annulment (August 10, 2010) ("***Vivendi II***") (**RL-76**).

[202] *See Suez I*, Decision on Annulment (May 5, 2017) (**RL-79**).

227. The disagreement that has split the jurisprudence into two lines is encapsulated by a distinction that the *Pey Casado II* committee made between the "constitution" of arbitral tribunals and the "composition" of arbitral tribunals. By "constitution" the *Pey Casado II* committee meant the mechanical process by which tribunals are established, while by "composition" it meant the qualifications of the members of tribunals.[203] The decisions that like *Pey Casado II* are in the *Azurix* line have understood Article 52(1)(a) to allow consideration of only the former matter. The understanding of the line of decisions that began with *Vivendi II* is that proper constitution of tribunals within the meaning of Article 52(1)(a) entails that members must possess the qualities stated in paragraph (1) of Article 14. In this annulment proceeding, Rockhopper has aligned itself with *Azurix* and the decisions following it.

228. In *Azurix*, the party that lost in the arbitration and was seeking annulment of the award had proposed the disqualification of the president of the tribunal pursuant to Article 57 of the ICSID Convention. The contention had been that the president lacked the reliability for independent judgment required by paragraph (1) of Article 14 for "seven main reasons,"[204] having to do with membership on tribunals in other arbitrations against the same State and a concluded consultancy for a law firm that had represented clients adverse to the State, among other matters. In accordance with Article 58, the proposal for disqualification of the president had been heard, and denied, by the other two members of the tribunal prior to the issuance of the award.

229. In deciding the application for annulment pursuant to Article 52(1)(a) for improper constitution of the tribunal, the committee in *Azurix* ruled that the procedure for challenging arbitrators on the grounds of lack of the qualities required in Article 14(1) was set forth in provisions of the ICSID Convention other than Article 52 – namely, Article 57 and Article 58. Accordingly, the committee concluded that when, as in that case, there had been a proposal for disqualification pursuant to Article 57 that was decided pursuant to Article 58, annulment on the ground of Article 52(1)(a) would be possible only in the event of a failure to comply properly with the procedure set forth in Articles 57 and 58. The decision of the committee in *Azurix* states in relevant part as follows:

[203] *See also Eiser*, ¶165 (making the same distinction less alliteratively with the terms "eligibility" and "qualification.").

[204] *Azurix*, ¶252 (describing Argentina's contentions in its reply on annulment).

"277. Argentina contends that there has been non-compliance with only one of the provisions relating to the constitution of the Tribunal, namely the first sentence of Article 57.

"278. The first sentence of Article 57 states that '[a] party may propose to a ... Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14'. Article 58 then sets out the procedure for a decision on such a proposal for disqualification.

"279. Article 52 does not state that 'any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14' will constitute a ground of annulment. Rather, the ground of annulment in Article 52(1)(a) is that the tribunal was 'not properly constituted'. The procedure for constituting the tribunal, including the procedure for challenging arbitrators on grounds of a manifest lack of the qualities required Article 14(1) [sic], is established by other provisions of the ICSID Convention. If the procedures established by those other provisions of the ICSID Convention have been properly complied with, the Committee considers that the tribunal will be properly constituted for the purposes of Article 52(1)(a).

"280. It must follow from this that if a party proposes the disqualification of an arbitrator under the first sentence of Article 57 of the ICSID Convention, and if that proposal is rejected in accordance with the procedure established in Article 58 of the ICSID Convention and ICSID Arbitration Rule 9 for deciding such proposals, then it cannot be said that the tribunal was 'not properly constituted' by reason of non-compliance with the first sentence of Article 57. The Committee considers that Article 52(1)(a) cannot be interpreted as providing the parties with a *de novo* opportunity to challenge members of the tribunal after the tribunal has already given its award. A Committee would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention."[205]

[205] *Azurix*, ¶¶277-280.

230. The *Azurix* committee gave as an example of a failure properly to comply with the procedure for challenging members of the tribunal that might be a basis for annulment pursuant to Article 52(1)(a) a situation in which

> "a decision on a proposal for disqualification was purportedly taken by a person or body other than the person or body prescribed by Article 58."[206]

231. The *Azurix* committee continued in *obiter dicta* to set forth its view of the analysis that Article 52(1)(a) would require if, contrary to the facts of the case it was considering, there had not been a proposal for disqualification pursuant to Article 57 in the underlying arbitration. The *Azurix* committee said that, in such an instance, there would be no basis for annulment on the ground that Articles 57 and 58 had not been properly complied with.

232. Going further, the *Azurix* committee also said that there could be no basis for annulment pursuant to Article 52(1)(a) if a party became aware of grounds for disqualification only after the award had been rendered. The reasoning of the *Azurix* committee was because Rule 9(1) of the Arbitration Rules prohibits a party from proposing disqualification pursuant to Article 57 after the close of the arbitral proceedings, which is an event that precedes the issuance of the award. Accordingly, in the reasoning of the *Azurix* committee, the only possible remedy available to a party learning of new facts only after the issuance of the award would be to apply to the arbitral tribunal for revision of the award pursuant to Article 51.[207] The *Azurix* decision states as follows:

> "281. This means that if a party never proposed the disqualification of a member of a tribunal under Article 57 of the ICSID Convention (with the

[206] *Azurix*, ¶282.

[207] Article 51 states as follows:

> (1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.
>
> (2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.
>
> (3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.
>
> (4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

> consequence that there was never any decision under Article 58), there would be no basis for seeking annulment on the ground that the provisions of Article [sic] 57 and 58 were not properly complied with. In the event that the party only became aware of the grounds for disqualification of the arbitrator after the award was rendered, this newly discovered fact may provide a basis for revision of the award under Article 51 of the ICSID Convention but, in the Committee's view, such a newly discovered fact would not provide a ground of annulment under Article 52(1)(a). If no proposal for disqualification is made by a party under Article 57, there will be no decision under Article 58, and in such a case there can (in the Committee's view) be no basis for contending that the tribunal was not properly constituted by reason of any failure to comply with Article 57 or Article 58."

233. The *Vivendi II* committee decided an Article 52(1)(a) request for annulment in the circumstances that the *Azurix* committee addressed as a hypothetical matter. In *Vivendi II*, the State party contended that it had become aware only after the arbitral award against it had been rendered[208] that the president of the tribunal had served during the arbitration as a member of the Board of Directors of the Swiss bank UBS, which at the time of the arbitration owned 2.38 percent of Vivendi, making UBS Vivendi's single largest shareholder.[209] The State contended in the annulment proceeding that UBS's ownership stake in Vivendi called into question the president's reliability for independent judgement in the case and should have been disclosed.[210] The president's explanations included that the facts had not been known to her.[211]

234. The *Vivendi II* committee began its analysis by stating its agreement with the observation of the applicant that the purpose of Article 52(1) was to protect the integrity of the system of ICSID arbitration. The committee then proceeded to the factual allegations of the parties regarding the arbitrator's qualifications for the case "in light of this paramount policy consideration"[212] without expressly discussing the applicable provisions of the ICSID Convention, eventually denying the request for annulment. Although the *Vivendi II* decision was issued 11 months after the decision of

[208] *See Vivendi II*, ¶22.
[209] *See Vivendi II*, ¶20.
[210] *See Vivendi II*, ¶77.
[211] *See Vivendi II*, ¶116.
[212] *See Vivendi II*, ¶200.

the committee in *Azurix*, the only citation to the *Azurix* case in the *Vivendi II* decision is to the award in the underlying arbitration.[213]

235. It is helpful when reading quotations from the *Vivendi II* annulment decision to know that, prior to the writing of the decision, the disqualification of the same arbitrator had been proposed and denied in two arbitrations, also based on the arbitrator's membership on the UBS Board of Directors. This caused the *Vivendi II* committee to remark as follows with reference to an expert report and to the two arbitrations in which proposals for the arbitrator's disqualification had already been considered (footnotes omitted):

> "208. In this connection, the *ad hoc* Committee noted the claim contained in Professor Mistelis' Report that there has been a demonstrable inclination of international arbitrators to raise the threshold for a challenge of their fellow arbitrators. This was not contested in cross-examination or commented upon by the parties after they were invited to do so.
>
> "209. It may be that such an attitude more easily results amongst arbitrators who are called upon to determine a challenge in respect of an arbitrator with whom they sit. This is the procedure under Article 58 of the ICSID Convention.
>
> "210. *Ad hoc* Committees are not in a similar position.
>
> "211. In this case, the difference in roles may also have a bearing on the discussion concerning the effect of the decisions in the earlier *EDF v. Argentina* and *Suez v. Argentina* cases and particularly on any *res judicata* effect of any conclusions reached therein on the present issue."[214]

236. The *EDF* decision on annulment was rendered after the committees in *Azurix* and *Vivendi II* had taken their conflicting views as to whether an arbitrator's lack of qualification was a matter that could be considered when annulment was requested on the ground that the tribunal had not been properly constituted. The *EDF* committee answered that question in the affirmative as the *Vivendi II* committee had. In so doing, the *EDF* committee gives extensive treatment to the relevant provisions of the Convention and disagreed with the *Azurix* decision in several respects. Three of the disagreements are highlighted below. In *EDF*, the request for annulment on the ground of Article 52(1)(a) was with

[213] *See Vivendi II*, ¶122 and n.48.

[214] *Vivendi*, ¶¶208-211.

respect to the same arbitrator whose Board Membership was considered in *Vivendi II* and a second arbitrator who was also contended, for different reasons, to have lacked reliability for independent judgement.

(iii) Whether the Qualifications of Arbitrators May Be Considered in Annulment Proceedings

237. As already indicated, the first and most fundamental of the disagreements between the *EDF* and *Azurix* committees is whether the proper constitution of a tribunal within the meaning of Article 52(1)(a) requires each member to possess the qualities required by paragraph (1) of Article 14. In coming to the view that proper constitution does, with which this Committee agrees, the *EDF* committee relied upon the fact that Article 40 is part of Section 2 of the ICSID Convention, which is entitled "Constitution of the Tribunal." In this Committee's opinion, because the annulment ground set forth in Article 52(1)(a) is that "the Tribunal was not properly constituted", it should be understood to refer to the section of the Convention entitled "Constitution of the Tribunal", which is Chapter IV, Section 2. Because Chapter IV, Section 2 of the Convention includes at Article 40(2) the requirement that all arbitrators must possess the qualities of high moral character and reliability for independent judgment specified in paragraph (1) of Article 14, a tribunal should not be understood to have been properly constituted within the meaning of Article 52(1)(a) when one or more of the arbitrators composing the tribunal did not possess the qualities of high moral character or reliability for independent judgment. This is essentially the same reasoning that the *EDF* committee uses at paragraphs 125 and 126 of its decision.

(iv) The Standard of Appraisal to Be Used When a Proposal for Disqualification Was Decided in the Underlying Arbitration

238. A second disagreement between the *ad hoc* committees in *Azurix* and *EDF* concerns the analysis that is appropriate on annulment when a proposal for the disqualification of an arbitrator was made pursuant to Article 57 and denied pursuant to Article 58 in the underlying arbitration. Although there was no proposal for disqualification in the Arbitration underlying this annulment proceeding, the decisions on this matter aid in understanding the supervisory role of *ad hoc* committees whenever the qualifications of an arbitrator are raised in an annulment request. In the understanding of the *EDF* committee, the *Azurix* committee had concluded that the only role for an *ad hoc* committee when a proposal for disqualification had been decided pursuant to Article 58 during the arbitration was to

analyze whether there had been a serious departure from a fundamental rule of procedure in the making of that decision.[215] The *EDF* committee agreed that Article 52(d) would be applicable if there had been a serious departure from a fundamental rule of procedure in the decision on a proposal for disqualification. But the *EDF* committee also said that allegations such as that should be extremely rare, and the *EDF* committee considered the annulment request pertaining to the arbitrator whose appointment had been challenged even though only Article 52(1)(a) had been invoked.[216]

239. The *EDF* committee concluded that examining only whether there had been a serious departure from a fundamental rule of procedure in the manner in which the remaining members (or Chairman of the ICSID Administrative Council) had dealt with a proposal for disqualification would be "incompatible" with "the duty of an *ad hoc* committee to safeguard the integrity of the arbitral procedure."[217] The *EDF* committee therefore rejected the approach it described in *Azurix*, but the *EDF* committee also rejected the argument of the proponent of the annulment that the outcome of the proceedings under Articles 57 and 58 should be entirely disregarded in favor of *de novo* review of the challenged arbitrator's independence and impartiality by the committee.[218] The *EDF* committee referred to the "supervisory role" that *ad hoc* committees are intended to perform in the ICSID system, stating as follows:

> "143. Moreover, it must be recalled that annulment proceedings are not an appeal (se Part III, above). The role of an *ad hoc* committee in proceedings for the annulment of an award is not to determine whether the tribunal was correct in the decisions that it took; it is a supervisory role, limited to determining whether or not one of the grounds of annulment has been made out. The fact that questions as to whether or not a member of the tribunal which issued the award possessed the requisite qualities of independence and impartiality goes to a matter of fundamental importance does not alter the relationship between the role of the *ad hoc* committee and that of the body entrusted with making the original decision."[219]

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[215] *See EDF*, ¶118 ("Since the role of annulment was strictly limited under the Convention and Articles 57 and 58 created a machinery for the resolution of challenges to arbitrators, the *Azurix* Committee concluded that an *ad hoc* committee was limited to examining whether or not there had been a serious departure from a fundamental rule of procedure in the way in which the challenge has been addressed.").

[216] *See EDF*, ¶122.

[217] *EDF*, ¶141.

[218] *See EDF*, ¶142.

[219] *EDF*, ¶143.

240. The *EDF* committee concluded as follows:

> "145. […] While a committee is not bound to uphold the decision of the remaining members of the tribunal (or the Chairman of the Administrative Council), nor can it simply disregard that decision. It is limited to the facts found in the original decision on disqualification. Moreover, commensurate with the principle that an *ad hoc* committee is not an appellate body, it may not find a ground of annulment exists under either Article 52(1)(a) or 52(1)(d) unless the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision."[220]

(v) Whether Annulment Is an Available Remedy When Disqualification Was Not Proposed in the Underlying Arbitration

241. A third disagreement between the *EDF* and *Azurix* tribunals – directly relevant for this annulment proceeding – is whether an *ad hoc* committee may annul an award on the ground that a tribunal was not properly constituted due to an arbitrator's lack of the required qualities in the absence of a proposal for disqualification pursuant to Article 57 and a decision pursuant to Article 58 that could be considered by an *ad hoc* committee. For the reasons already discussed, this Committee's opinion is that Article 52(1)(a) does confer that competence. If facts coming to light only after the issuance of an award that call into question whether the tribunal was constituted in conformity with the ICSID Convention were excluded from annulment proceedings, there would be a serious deficiency in the capability of *ad hoc* committees to assure "the fundamental integrity of the ICSID arbitral process in all its facets."[221]

(vi) The Three-Step "*Eiser* Test" and the Way in Which the Concerns of the Third Step Are Considered

242. In *Eiser v. Kingdom of Spain*, the only case in which an award has been annulled on grounds of Article 52(1)(a), the committee articulated a "three-step test,"[222] which it described as like the

[220] *EDF*, ¶145.

[221] *Soufraki*, ¶23.

[222] *See Eiser*, ¶180.

approach taken by the *EDF* committee.[223] The following is the *Eiser* committee's "three-step test to determine whether annulment is warranted":

> "a) was the right to raise this matter waived because the party concerned had not raised it sufficiently promptly?
>
> "b) if not, has the party seeking annulment established that a third party would find an evident or obvious appearance of lack of impartiality or independence on the part of an arbitrator on a reasonable evaluation of the facts of the case (the *Blue Bank* standard)? and
>
> "c) if so, could the manifestly apparent lack of impartiality or independence on the part of that arbitrator have had a material effect on the award?"[224]

243. The Committee next addresses each part of *Eiser*'s three-step test. The Committee's opinion is that the concerns of the third part of the *Eiser* test are likely to be present in almost every case in which the first two steps of the test are satisfied. For that reason, the Committee has reservations about the usefulness of regarding the evaluation of those concerns as the third step of a three-step test and sets forth an alternative way for taking the concerns into account.

244. First, this Committee fully agrees with the *Eiser* committee that a decisive initial question for an annulment committee asked to consider new facts should be why they are coming up at such a late stage. The Committee does not think it useful in the circumstances of the current case, however, to give attention commensurate with the Parties' pleadings to Rule 27 ("Waiver") of the Arbitration Rules. Even if certain aspects of the Convention should be viewed as so fundamental as to be "unwaivable" by a party, or at least not waivable except upon the satisfaction of conditions about which two sides can disagree in memorials,[225] a party should not expect to be able to make a strategic decision to hold an objection to an arbitrator in reserve pending the outcome of the case and then, only after losing, to spring forth with the withheld objection. Claims that are raised in bad faith may be held to be inadmissible. The decision denying annulment in *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic* is instructive in noting that the annulment applicant could offer

[223] *See Eiser*, ¶¶144, 180.

[224] *Eiser*, ¶180.

[225] *Compare, e.g.,* Memorial on Annulment, ¶¶78-79 *and* Reply Memorial, ¶¶4-6 *with* Rejoinder, ¶¶19-20, 28.

no reasonable explanation as to why a claim that the tribunal had not been properly constituted had not been made before the issuance of the award in favor of the other side.[226]

245. Second, the core of the matter in a case like this one, assuming a committee is able to reach it due to an absence of waiver or bad faith, is how the claim that new facts show that the tribunal was not properly constituted should be evaluated. As has been explained, the Committee is satisfied that a tribunal will not be properly constituted under Article 52(1)(a) unless all members possess the qualities specified in paragraph (1) of Article 40. High moral character is a quality that a person may either possess or not possess. Reliability for the exercise of independent judgement, in contrast, has to be considered case-by-case. The assessment of an arbitrator's relationships and other circumstances must

[226] In *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on Annulment (May 11, 2010), ¶120 ("***Transgabonais***") (**RL-96**), the *ad hoc* committee ruled that request pursuant to Article 52(1)(a) to be inadmissible because it was raised only during oral argument and had not been part of the written proceedings, stating as follows:

> "*Cela étant, il convient de se pencher d'abord sur une question préalable : un recours en annulation fondé sur un vice dans la composition du Tribunal, est-il recevable à ce stade de la procédure ? Transgabonais soutient qu'il s'agit là d'un motif d'annulation soulevé tardivement, en dehors du délai des 120 jours suivant le prononcé de la Sentence arbitrale, et qui doit donc être rejeté comme irrecevable pour non-observation des conditions prescrites à l'article 52(2) de la Convention de Washington en combinaison avec les articles 50(1)(c)(iii) et 50(3)(b)(i) du Règlement d'arbitrage. Force est de constater que la demande en annulation pour le motif d'un vice dans la constitution du Tribunal au sens de l'article 52(1)(a) n'a pas été mentionnée, ni dans la procédure d'arbitrage elle-même, ni dans la Demande en annulation, ni dans les écritures déposées par le Gabon devant le Comité, mais est apparue pour la première fois lors de la procédure orale devant celui-ci. Dans ces circonstances, Transgabonais était en droit de demander son rejet formel par le Comité ad hoc. Les délais qui ont été incorporés dans la Convention et le Règlement existent pour de bonnes raisons, ils garantissent le maintien de l'ordre au sein du système d'arbitrage CIRDI, et aucun fait nouveau n'a été allégué par le Gabon pour justifier le fait qu'il n'a pas invoqué ce prétendu grief relatif à la composition du Tribunal à un stade antérieur de la procédure, et notamment devant le Tribunal arbitral lui-même, alors même qu'il lui était connu. Le Comité déclare donc ce grief irrecevable*."

Free translation:

> "That being said, it is appropriate to first consider a preliminary question: is an action for annulment based on a defect in the composition of the Tribunal admissible at this stage of the proceedings? Transgabonais maintains that this is a ground for annulment raised late, outside the 120-day period following the delivery of the Arbitral Award, and which must therefore be dismissed as inadmissible for failure to comply with the conditions prescribed in Article 52(2) of the Washington Convention in conjunction with Articles 50(1)(c)(iii) and 50(3)(b)(i) of the Arbitration Rules. It must be noted that the application for annulment on the grounds of a defect in the constitution of the Tribunal within the meaning of Article 52(1)(a) was not mentioned, either in the arbitration proceedings themselves, in the Application for Annulment, or in the written submissions filed by Gabon before the Committee, but appeared for the first time during the oral proceedings before the Committee. In these circumstances Transgabonais was entitled to request its formal dismissal by the *ad hoc* Committee. The time limits that have been incorporated in the Convention and the Rules exist for good reasons, they ensure the maintenance of order within the ICSID arbitration system, and no new fact has been alleged by Gabon to justify its failure to raise this alleged complaint relating to the composition of the Tribunal at an earlier stage of the proceedings, and in particular before the Arbitral Tribunal itself, even though it was known to it. The Committee therefore declares this complaint inadmissible."

be in relation to the dispute that the arbitrator has been asked to decide and the particular parties to that dispute.

246. As set forth above, although Rule 6 requires disclosure to be made by the application of a standard taking account of the perspective of a party, the assessment of whether an arbitrator possesses the qualities required by paragraph (1) of Article 40 is an objective appraisal, meaning that the arbitrator's relationships and other circumstances are considered from the perspective of a reasonable third party.

247. The decisions in *Eiser*, *EDF* and the earlier *Vivendi II* are the only ones in which an *ad hoc* committee has considered an Article 52(1)(a) request based on evidence that came to light after the award was issued. There have been three additional annulment cases leading to decisions in which annulment has been sought pursuant to Article 52(1)(a) based on facts that had not been put forward in the underlying arbitration, but in two of those cases the committees ruled there to have been waiver by the applicant for annulment,[227] and in the third case the Article 52(1)(a) request was ruled inadmissible,[228] with the result that the committees did not proceed to consideration of the facts.

248. This case appears to be the first annulment proceeding in which an arbitrator has been contended to lack high moral character. No reason has been given by either of the Parties for a challenge to an arbitrator's possession of high moral character to be appraised differently than a challenged based upon lack of reliability for the exercise of independent judgement.

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[227] *See Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment (November 21, 2018) ("***von Pezold***") (**CL-336**); *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Annulment (November 21, 2018) ("***Border Timbers***") (**CL-340**). The State respondent and the respective parties in each of these two proceedings agreed that the underlying arbitrations would be heard together but not be formally consolidated, and the *ad hoc* committees, made up of the same individuals in each case, decided to continue to hear the two cases together but to issue separate decisions. See *Border Timbers*, ¶¶9-10.

An identical request pursuant to Article 52(1)(a) was made in each annulment proceeding, and the decisions were in substance the same. The following is from the decision in the *von Pezold* annulment (internal citations omitted) and the corresponding paragraphs of the decision in the *Border Timbers* annulment decision have the same numbers:

> "264. The Applicant's third ground of annulment is based on the same alleged facts as the second ground—Mr Fortier's involvement with the World Bank Sanctions Board, which according to the Applicant was incompatible with his function as President of the Tribunal. According to the Applicant, Mr Fortier not only was perceived as being partial as a result of his function, he also acted *de facto* in a partial manner, in particular during the hearing. According to the Applicant, this calls for annulment of the Award on the basis that the Tribunal was not properly constituted under Article 52(1)(a) of the ICSID Convention.
>
> "265. The Respondents argue that Zimbabwe could have invoked Article 57 of the Convention and accordingly could have proposed the disqualification of Mr Fortier at any time after the date when it became aware of the alleged manifest lack of impartiality, until the closure of the proceedings on 3 February 2015; however, it failed to do so. Having thus failed to comply with ICSID Arbitration Rule 9(1), which requires a party to raise its proposal for disqualification 'promptly,' the Applicant must be deemed to have waived its right to challenge, in accordance with ICSID Arbitration Rule 27.
>
> "266. The Committee agrees that ICSID Arbitration Rules 9(1) and 27 are indeed the relevant provisions in this context. Consequently, insofar as the Applicant relies in support of its application on the mere fact of Mr Fortier's function as chairperson of the Sanctions Board (said to be incompatible with his function as President of the Tribunal), the annulment application stands to be dismissed on the same basis as the Applicant's second ground of annulment—the Applicant must be considered to have waived its right to seek disqualification under ICSID Arbitration Rule 27."

[228] *See Transgabonais*, ¶120.

249. Third, whether to annul the award when a ground for annulment has been established is a matter that the ICSID Convention places within the discretion of *ad hoc* committees. This entails that awards should be annulled when one or more of the grounds for annulment has been established only if the circumstances of the particular case warrant annulment. Accordingly, the *EDF* committee articulated a third consideration that in its opinion would be appropriate in circumstances in which a committee had found, in the absence of waiver by the proponent of annulment, that a tribunal had not been properly constituted in accordance with Article 52(1)(a) due to an arbitrator's undisclosed lack of independence and impartiality discovered only after the award had been issued. The *EDF* committee expressed the consideration as follows:

> "[…] could the lack of impartiality or independence on the part of the arbitrator – assuming for this purpose that the doubts were well-founded – have had a material effect on the award?"[229]

250. This Committee endorses the logic of the *EDF* and *Eiser* committees. The Committee is of the opinion for reasons set forth below, however, that textual analysis of the award of the sort that the *Eiser* committee used ordinarily should not be necessary to determine whether there has been an effect warranting annulment in a circumstance in which a tribunal member has been found to have lacked the qualities required by paragraph (1) of Article 40.

251. In *Eiser*, the applicant's argument for annulment on the grounds of Article 52(1)(a) was that, after the award had been issued, it discovered facts that it contended to show one of the arbitrators to have had a long-standing relationship with the Brattle Group, the claimants' damages expert in the arbitration.[230] The *ad hoc* committee accepted the applicant's argument that, due to the relationship with the Brattle Group, the arbitrator lacked the independence and impartiality that paragraph (1) of Article 40 requires. This conclusion, reached after a highly fact-intensive analysis, is not one about which this Committee expresses a view.

252. At page 85 of its decision, the *Eiser* committee posed the question "whether the lack of impartiality or independence on the part of" the arbitrator "may have had a material effect on the Award", which it discusses at paragraphs 244-56. This is the part of the decision in which the committee, having come

[229] *EDF*, ¶136.

[230] *See Eiser*, ¶45.

to the view that the tribunal was not properly constituted, considers whether its discretion should be exercised to annul the award. It does not appear to this Committee, however, that the *Eiser* committee's discussion of the award added force to its conclusions. This is why the Committee has reservations about the *Eiser* committee's assessment that the third type of concerns identified by the *EDF* committee should be evaluated by reviewing the award as the third step of a three-step test.

253. Take for example that the award of the tribunal in the *Eiser* arbitration adopted "in its entirety" the Brattle Group's discounted cash flow model and its calculations in awarding damages. The *Eiser* committee emphasizes this point at two places in this section of its decision.[231] It is implicit in the discussion of the *Eiser* committee that the arbitrator it had found to lack the requisite qualifications due to his relationship with the Brattle Group was a proponent of the Brattle Group's model and calculations.[232] The only basis for that assumption, which is the point of departure for what comes next in the Committee's award, however, is the existence itself of the prior relationship between the arbitrator and the Brattle Group. Nor is there anything in the discussion in the *Eiser* annulment decision from which it can be concluded that the two other arbitrators did not, independently, have the same view about adopting the Brattle Group's model and calculations that the *Eiser* committee attributes (by implication from the existence of the prior relationship) to the arbitrator who had the undisclosed prior relationship with the Brattle Group. The most one can conclude from the discussion in the *Eiser* decision is that the arbitrator *might* have agreed with the Brattle Group's model and calculations; that, if so, this *might* have been on account of his prior relationship with the Brattle Group; that he *might* have advocated for the adoption of the model and calculations of the Brattle Group by his fellow arbitrators; that, if the arbitrator did advocate the adoption of the model and calculations of the Brattle Group, the other two arbitrators *might* otherwise not have favored the adoption of the Brattle Group's model and calculations in the absence of the advocacy of their colleague; and that, if the two other arbitrators had been persuaded by the advocacy of their colleague, they *might* not have been had they

[231] *See Eiser*, ¶¶247-248 ("The Committee further notes that the Tribunal adopted Mr. Lapuerta's model for damages in its entirety."), ("The Committee also cannot ignore the fact that the Tribunal adopted the damages model proposed by Brattle.").

[232] *See Eiser*, ¶247 ("The Committee now turns to the damages section of the Award since there, in particular, the relationship of Dr. Alexandrov and Mr. Lapuerta is of particular significance. The Committee begins with the fact, as stated previously, that both Mr. Lapuerta and Dr. Alexandrov failed to disclose their relationship. Upon examination of the Award, the Committee sees nothing there which could signal or suggest that Mr. Lapuerta's damages report had no material effect on the reasoning or findings in the Award. The Committee further notes that the Tribunal adopted Mr. Lapuerta's model for damages in its entirety.").

known about his relationship with the Brattle Group. This, in the end, is all that the *Eiser* committee did conclude, as its following statement makes clear:

> "251. It is not possible for the Committee to conclude that, had the relationship been disclosed, the arbitrators would have remained unanimous in their adoption of the Brattle model."[233]

254. This Committee does not have a problem with the conclusion stated by the *Eiser* committee but rather does not see how the analysis of the award helped the committee in coming to it. The substance of the *Eiser* committee's conclusion is merely that there is no way for an *ad hoc* committee to know with any confidence what may have been the effect on the other arbitrators of a disclosure that was never made, and thus that there is no excluding the possibility that a decision of the tribunal might have been different had disclosure been made. In all but the rarest cases, how could it be otherwise?

255. An award, like any opinion resulting from any legal process, is supposed to tell the reader what the decision-maker decided and why the decision-maker made the decision that it did. It is not the purpose of an award to set forth how the individuals who made up the tribunal came to the views and positions of their own that allowed the tribunal to issue its decisions on behalf of them all (subject possibly to separate opinion and/or dissent). The privacy of arbitral deliberations makes it unlikely that an *ad hoc* committee will be able to gain much insight into the thinking of individual members of an arbitral tribunal in some other way.

256. In identifying the concern that became the third step of the *Eiser* test, the *EDF* committee posited a case "where the facts affecting the arbitrator's lack of independence or impartiality only came into existence after the award had been finalised but before it was actually rendered,"[234] meaning that the arbitrator was independent and impartial at the time the case was decided. Other examples of situations in which bias on the part of an arbitrator could safely be said to have had no prospect of having affected the award do not come quickly to mind. In any event, even in the circumstances the *EDF* committee posited, examining the award would be of no use. A lack of independence or impartiality that comes

[233] *Eiser*, ¶251.

[234] *See EDF*, ¶134.

into existence only after an award is finalized is not something that a committee will be able to discern from reviewing the text of the award.

(3) The Analysis Required When a Serious Departure from a Fundamental Rule of Procedure is a Claimed Additional Ground for Annulment on the Same Facts

257. The following explanation from the first annulment decision in *Vivendi* is frequently quoted[235] regarding the availability of annulment on the ground that there has been a serious departure from a fundamental rule of procedure:

> "83. […] Under Article 52(1)(d), the emphasis is clearly on the term 'rule of procedure,' that is, on the manner in which the Tribunal proceeded, not on the content of its decision."[236]

258. The establishment of this ground of annulment requires that the rule of procedure from which a serious departure has been contended to have occurred must be "fundamental." In addition, the departure from a rule of procedure that is fundamental must be "serious." Because those two words are used in this ground, *ad hoc* committees have proceeded on the basis that, for there to be an annullable error within the ambit of Article 52(1)(d), the rule of procedure at issue must be fundamental, and the departure from that rule must have been serious.

259. The *ad hoc* committee in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, said that the requirement that the rule of procedure from which a serious departure has been claimed must be fundamental is "intended to denote procedural rules which may properly be said to constitute 'general principles of law,' insofar as such rules concern international arbitral procedure."[237] In this vein, the *ad hoc* committee in *Continental Casualty Co. v. Argentine Republic* explained that not all rules of procedure contained in the ICSID Arbitration Rules fall under this concept.[238]

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[235] *See, e.g.*, *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Applications for Partial Annulment (September 16, 2011) ("***Continental Casualty***"), ¶95 (**CL-310**); *Azurix*, ¶49; *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment (July 30, 2010) ("***Enron***"), ¶70.

[236] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) ("***Vivendi I***"), ¶83 (**RFAA-7/RL-71**).

[237] *Fraport*, ¶187.

[238] See *Continental Casualty*, ¶96 n.49.

260. For the departure from a fundamental rule of procedure to have been serious, it must have "caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."[239] It has also been said that a departure was serious if it was "such as to deprive a party of the benefit of protection which the rule was intended to provide."[240]

261. As is indicated by the often-quoted references in the *Vivendi I* annulment decision to the manner in which "the Tribunal proceeded", most of the thinking about Article 52(1)(d) and its proper application has been in cases in which the applicant for annulment objected to some decision by the tribunal relating to the conduct of the arbitral proceedings. In describing the analysis in which *ad hoc* committees have engaged to determine whether a serious departure from a fundamental rule of procedure had occurred, the Updated Background Paper on Annulment states as follows:

> "106. The task of determining whether an alleged fundamental rule of procedure has been seriously breached is usually very fact specific, involving an examination of the conduct of the proceeding before the Tribunal."[241]

262. In *Perenco Ecuador Limited v. Republic of Ecuador*,[242] the *ad hoc* committee expressed the view that if a party is aware of a departure from a fundamental rule of procedure but does not positively oppose the departure during the arbitration, the party should be deemed to have waived its right to request annulment on that basis.[243]

263. In many of the cases in which a request for annulment has been made pursuant to Article 52(1)(a), there has been discussion of the relationship of a rule of procedure from which there has been a contended departure and the integrity and fairness of the arbitral process with which annulment proceedings are concerned. Distinctions have been made between rules of procedure respecting

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[239] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment (February 5, 2002) ("***Wena***"), ¶58 (**CL-280/RL-16**) (quoted in *Continental Casualty*, ¶96; *Azurix*, ¶51; *Enron*, ¶71).

[240] *MINE*, ¶5.05 (quoted in *Continental Casualty*, ¶96; *Azurix*; ¶52; *Enron*, ¶71.)

[241] Updated Background Paper on Annulment, ¶106.

[242] *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment (May 28, 2021) ("***Perenco***") (**RL-92**).

[243] *Perenco*, ¶139.

principles of natural justice such as a party's right to be heard,[244] and what the Updated Background Paper on Annulment calls "ordinary" arbitration rules.[245] In addition to the right to be heard, examples of fundamental rules of procedure identified by *ad hoc* committees include the treatment of evidence and the burden of proof,[246] and deliberations among members of a tribunal.[247] In many of the decisions of *ad hoc* committees cited in this paragraph, the identifications of fundamental rules of procedure have been in *obiter dicta*, and many rules of procedure in addition to the rule at issue in the case are usually included in those discussions. For this reason, one can question how much real force it gives to an argument that a rule of procedure should be regarded as fundamental to say that some large number of annulment decisions have recognized it to be.

264. In any event, there have been at least eight cases leading to a decision in which an *ad hoc* committee has identified an independent and impartial tribunal as a fundamental rule of procedure.[248] In only one of these cases, *Eiser*, the *ad hoc* committee found there to have been a serious departure from this fundamental rule of procedure on the same facts that it concluded there had not been a proper constitution of the tribunal.[249] The *EDF* and *Vivendi II* annulment proceedings, in which the requests for annulment on this ground were denied, are the only other of the eight in which the applicant for annulment had claimed there to have been a departure from this rule of procedure.

265. In the following passage, the *EDF* committee expresses the opinion that *ad hoc* committees have the power to annul on the ground of Article 52(1)(d) based on an arbitrator's lack of required

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[244] *See, e.g., Amco II*, ¶¶9.05-9.10; *Fraport*, ¶197; *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment (December 18, 2012) ("***Pey Casado I***"), ¶¶261-271 (**RL-89**); *Tidewater*, Decision on Annulment (December 27, 2016), ¶149; *von Pezold*, ¶243.

[245] Updated Background Paper on Annulment, ¶104.

[246] *See, e.g., Amco I*, ¶¶90-91; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment (February 1, 2016) ("***Total***"), ¶¶309, 314 (**CL-288**); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment (December 28, 2018), ¶88.

[247] *See, e.g.*, *Klöckner I*, ¶84; *Total*, ¶¶309, 314; *Cyprus Popular Bank Public Co. Ltd. V. Hellenic Republic*, Decision on Annulment (November 30, 2022), ¶297; *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Decision on Annulment (February 2, 2018) ("***Venoklim***"), ¶219 (**CL-339-SP**).

[248] *See Klöckner I*, ¶95; *Wena*, ¶57; *CDC*, ¶¶51-55; *EDF*, ¶¶123-125; *Total*, ¶¶309, 314; *Valores Mundiales*, ¶142; *Venoklim*, ¶216; *Eiser*, ¶239.

[249] *See Eiser*, ¶240 (stating with respect to "***b) Whether there had been a departure from a fundamental rule of procedure"*** that "As explained in Section IV.A.2.b)(3) of this Decision, the Committee is of the view that to an independent third party observer, based on an objective assessment of all the facts, it would be manifestly apparent that Dr. Alexandrov lacked impartiality" (emphasis in original)).

qualifications, whether or not there had been proceedings pursuant to Articles 57 and 58 in the underlying arbitration. The *EDF* committee's full statement is as follows:

> "123. Article 52(1)(d) gives a committee power to annul an award where there has been a *serious* departure from a *fundamental* rule of procedure. It is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal. The Committee accordingly considers that, in principle, an *ad hoc* committee can examine under Article 52(1)(d) not only allegations that the procedure by which a challenge to an arbitrator was determined was flawed but, more importantly, allegations that the lack of independence and impartiality of an arbitrator meant that there was a serious departure from a fundamental rule of procedure in the arbitration as a whole."[250]

266. The Eiser committee stated that it "subscribes to the EDF committee's views", citing this paragraph.[251]

267. The *Eiser* Committee also referred to the lack of disclosure by the arbitrator of his relationship with the Brattle Group in finding that there had been a serious departure from a fundamental rule of procedure. The decision states as follows:

> "241. In this case, the Committee is of the opinion that in the facts and circumstances of this case, Dr. Alexandrov's absence of disclosure, deprived Spain of the opportunity to challenge him in the arbitration proceedings. Consequently, it also deprived Spain from seeking the benefit and protection of an independent and impartial tribunal which the right to challenge is intended to provide. This affected Spain's right of defense and fair trial, as well. This failure cannot be regarded as a mere inconsequential error or omission or something insignificant having no bearing on the outcome of the proceedings before the Tribunal.
>
> "242. Accordingly, the Committee cannot but conclude that there has also been a departure from a fundamental rule of procedure."[252]

[250] *EDF*, ¶123 (emphasis in original).

[251] *See Eiser*, ¶239.

[252] *Eiser*, ¶¶241-242.

C. THE FACTUAL MATTERS

(1) The Criminal Proceedings in Italy

268. The Italian Republic claims that the Tribunal was not properly constituted due to Dr. Poncet's exclusion from his disclosures upon being appointed to the Tribunal, of his criminal prosecutions in Italy that arose from his representation as a lawyer of Marco Ceruti in connection with the failure of *Banco Ambrosiano*, a notorious scandal from the 1980s and 1990s. The Italian Republic further claims that the criminal proceedings against Dr. Poncet, which resulted in criminal convictions by the *Pretura Circondariale di Milano* ("**Milan Trial Court**") and were affirmed on intermediate appeal by Milan Court of Appeal and that subsequently were annulled by Italy's Court of Cassation by application of Italy's time bar rules, demonstrate his lack of the necessary qualifications to serve as an arbitrator in an ICSID case against Italy.

a. The Failure of Banco Ambrosiano

269. The following are background facts relating to *Banco Ambrosiano* and the Italian Criminal proceedings sufficient to understand the Italian Republic's request for annulment based on Dr. Poncet's disclosure and involvement in criminal proceedings in Italy.

270. *Banco Ambrosiano* was an Italian bank established in 1896 that collapsed in 1982. The Vatican-based Institute for the Works of Religion – commonly known as "the Vatican Bank" – was *Banco Ambrosiano*'s main shareholder. The unravelling began when auditors uncovered USD 1.4 billion in questionable loans to corporations based in Panama. As part of the scandal that ensued, the Vatican Bank was accused of funnelling covert United States funds to the Polish trade union Solidarity and the Nicaraguan right-wing rebel group *Contras* through *Banco Ambrosiano*. The Chairman of *Banco Ambrosiano* at the time of its collapse, Roberto Calvi, who was known as "God's Banker" for his ties to the Vatican, was found hanged under Blackfriars Bridge in London in 1992.

271. Dr. Poncet's client in connection with the failure of *Banco Ambrosiano* was Marco Ceruti. The Italian authorities contended in connection with the failure of *Banco Ambrosiano* that Mr. Ceruti had engaged in fabricated commercial transactions with Licio Gelli. Mr. Gelli reportedly was for decades the grandmaster of a masonic lodge known as "Propaganda 2" or "P2", which the press reports have described as a once powerful secret organization with links to Italian politicians, right wing extremists

and the *Mafia*, and as having been involved in other 20th Century Italian scandals in addition to *Banco Ambrosiano*.[253] Mr. Gelli was sentenced to 12 years in jail for fraud in connection with the collapse of *Banco Ambrosiano*. Mr. Gelli was also found guilty of obstructing justice during investigation into the 1980 explosion of a bomb at a Bologna train station that killed 85 people.[254]

272. At the Hearing,[255] counsel for Rockhopper took issue with the statement of counsel for the Italian Republic that Dr. Poncet had "active involvement" in "one of the darkest moments" of the Italian Republic. Counsel for the Italian Republic later took issue with the statement of counsel for Rockhopper that the matter was the "bankruptcy of a small bank", that "many things would appear to be darker in the history of the Republic than this little affair" and that the Italian Republic was trying "to elevate this to something it is not."

b. The Criminal Charges and Dr. Poncet's Conviction and Sentencing in the Milan Trial Court

273. The facts based on which Dr. Poncet was charged and the procedural history of the Italian criminal proceedings up to its date are extensively set forth in Exhibit R-23. That exhibit is a 73-page document the translated title of which is "Sentence"[256] that the Milan Trial Court filed with the Registrar on December 12, 1996. The following is a high-level description of the charges against Dr. Poncet and his conviction and sentence as set forth in the Sentence. Because Mr. Delaney's testimony and its significance to Dr. Poncet's convictions has been a matter of dispute between the Parties, portions of the Sentence pertaining to Mr. Delaney are block quoted below. The Committee does not address in this section of the Decision, however, the Parties' conflicting positions regarding the significance of Mr. Delaney's testimony in the Italian criminal proceedings and the bearing that it should have on the consideration of the request for annulment.

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[253] Crispian Balmer, *Italy's murky masonic leader Gelli, linked to decades of plots, dies*, Reuters, December 16, 2015 (**R-12**). *See also* Hr. Tr. Day 2, 305:1- 308:3 (remarks of counsel for the Italian Republic).

[254] *See, e.g.*, Crispian Balmer, *Italy's murky masonic leader Gelli, linked to decades of plots, dies*, Reuters, December 16, 2015 (**R-12**).

[255] *See* Hr. Tr. Day 1, 23:14-20 (remarks of counsel for the Italian Republic); Hr. Tr. Day 1, 145:23-146:10 (remarks of Rockhopper's counsel); Hr. Tr. Day 2, 305:16-25 (remarks of counsel for the Italian Republic).

[256] The Italian Republic stated as follows regarding the use of the term "Sentence" for the document: "while in the common law system it's a synonym of a punishment assigned to a defendant that has been found guilty, in Italian law it is a synonym of 'decision' in general, regardless of the outcome of the proceedings." Italy's Annulment Closing Presentation, page 14 (**RD-2**).

274. Prior to being found hanged in London, Mr. Calvi had been tried and convicted in Italy for financial crimes relating to *Banco Ambrosiano* and his passport had been confiscated. The Italian authorities charged that Dr. Poncet's client Mr. Ceruti, along with Mr. Calvi and Mr. Gelli, bribed Italian officials to have Mr. Calvi's passport returned.[257]

275. The criminal charges against Dr. Poncet arose from what Italian authorities contended to be Dr. Poncet's participation along with other persons in the fabrication of documents to facilitate false testimony by Mr. Ceruti about the use of money received from *Banco Ambrosiano*. In the description of the Sentence, the documentation was falsified to make it appear that money received by Ceruti from Mr. Gelli, through *Banco Ambrosiano*, would be used to purchase jewels or artwork and not, as the authorities charged, to bribe officials to have Mr. Calvi's passport returned.

276. Dr. Poncet was tried along with three co-defendants. Frank Hogart, one of the co-defendants, gave testimony supported by the documents Dr. Poncet was alleged to have fabricated. One of the charges against Dr. Poncet was aiding and abetting Mr. Hogart's false testimony. The other co-defendants were Raffaele Conte and Neville Munson.

277. In a section of the Sentence entitled "the preliminary phase to the opening of the hearing" the Sentence addresses, among other matters, the collection of documentary evidence. It then has the following to say regarding a cross-examination of Mr. Delaney in London during which he had invoked his right against self-incrimination when asked about earlier statements. The proceedings in Italy had been substantially delayed so that Mr. Delaney could be examined abroad. The Sentence explains as follows:

> "At the request of Poncet's and Hogart's English lawyers, an authentic copy of all the documentation received from the witnesses Hopper and Pryke was sent to London, as well as (to clarify the whole affair) the report of the rogatory interrogation given by Delaney during the trial Annibaldi + 32 and the translation of the introductory exposition by the P.M.
>
> "On 1 October 1996, the first rogatory in the history of the United Kingdom was held in public hearing at the Central Criminal Court, Old Bailey (at least as reported by the officials of the British Court and the Ministry of Grace and Justice): notified of his rights and consulted by Common

[257] Memorial on Annulment, ¶85.

> Sergeant Neil Denison and this court, in the presence of the P.M. and of all the Italian and English defending lawyers, his and Munson's, Hogart's, Poncet's and Conte's (as for the latter in replacement), Christopher Antony Delaney denied the previous consent to the examination, availing himself of the right not to answer.
>
> "The trial investigation would have ended in the early months of 1996, not insignificant sums of money and a lot of precious time of the Milan Magistrate's Court would have been saved if a different declaration of intent had been received earlier: but so be it, Delaney has undoubtedly exercised a his [sic] irrepressible right.
>
> "However, this judge considers it necessary to clarify some issues.
>
> "First, it should be borne in mind that Delaney's examination, once the declarations pursuant to Article 238 of the Italian Criminal Code have been acquired, could not fail to be ordered, since it is a right of the parties who had requested it, as provided for by the last paragraph of the same Article."[258]

278. A section of the Sentence entitled "the legal classification of the facts" begins with a three-page discussion pertaining generally to the defendants as a group. There then comes a subsection entitled "the role of each of the defendants" in which evidence pertaining to each of them is separately addressed. The discussion pertaining to Dr. Poncet covers 9 pages. It includes consideration of Mr. Delaney's statements at two places. For understanding the following first discussion of Mr. Delaney's statements, it is useful to know that the "defensive line of law" attributed to Dr. Poncet at the beginning of the passage refers to the fact that Dr. Poncet took the position at his trial that, although he may have participated in the creation of documents that were false, he had not known the documents to be false when he did so:

> "The defensive line of law[yer]. Poncet was simple and straightforward: the only evidence against him would derive from Delaney's summons. Because, even if it were true that the documents produced were false, it is equally true that he was unaware of the circumstance. Equally there is no evidence of concertation for the production of those documents in court, and for the citation of the witnesses.

[258] *Pretura Circondariale di Milano* ("**Milan Trial Court**"), *Sentenza* 7402/96 (December 12, 1996) (**R-23**), pages 12-13.

> "And then it must be said immediately that the proof of Poncet's responsibility is above all documental and is found in that 'work program' drawn up by Delaney and seized in Jersey.
>
> "The initials of his name (C.P.) appear in point 15, where reference is made to the information received by Frank Hogart at the Swiss Julius Bank on Ceruti's account and to the need to prepare a 'confidentially agreement'); at point 17, which is worth transcribing in full: 'copy of the contract - prepare suitable drafting - C.P.': with pencils on the same line is then added:
>
> "'OK - prepared by C.P.'; and finally point 32, relating to the option contract to be prepared.
>
> "The aforementioned contract was attached to the file of documents filed by Conte in the Annibaldi + 32 proceeding.
>
> "That would be enough to affirm the accused's responsibility for the offense of aiding and abetting. Furthermore, since he had been indicated as a witness to give probative support to that documentation he had contributed to create (and not for reasons dependent on his will he was not heard, but by decision of the judging panel), he would also consider the participation in the crime of perjury committed by Hogart as proven.
>
> "But there is much more to be borne by him."[259]

279. In the next block quotation, emphasis has been added to the part in which the trial court turns again to analysis of Mr. Delaney's statements, which comes at the end but must be read in the context of the preceding material to be understood. It is also useful to know that the beginning of the block quotation contains a reference to the court's analysis, which is not quoted, of some documents produced from Dr. Poncet's files to which numbers 1-11, 13, 15 and 22 were assigned. The second reference to Mr. Delaney's testimony is as follows:

> "From a careful examination of all the documentation produced by the defense, therefore, once again, Poncet's full responsibility emerges.
>
> "He was, as is now evident, the dominus in relation to the trial of Banco Ambrosiano, he kept the links between the lawyers, between them and the client, was informed directly (in addition to Ceruti, not for Ceruti) of

[259] Milan Trial Court*, Sentenza* 7402/96 (December 12, 1996) (**R-23**), page 57.

everything that happened before in preliminary investigation and then in the trial.

"This function of him is also made evident by the documentation concerning him produced by P.M. and from the testimonies of Biondi and Tonani.

"He will first examine the documentation, in chronological order in order to facilitate understanding.

"These are communications between lawyers: in this regard, it should be borne in mind that, since no searches and no seizures were carried out during the investigation phase, the letters are that part of the documentation in his possession that each, accused or witness, has deemed convenient or necessary to produce.

[Discussion of documentary evidence and testimony of witnesses other than Mr. Delaney omitted.]

"If Delaney's statements are added to everything that has been meticulously reported and analyzed up to now (according to which there were a series of meetings between him, Hogart, Ceruti and Poncet to prepare the false dossier, of which Poncet specifically prepared purchase option, a dossier that was later authenticated by him in Jersey, at the notary Geof Corn Wall, there is absolutely no doubt of Charles Poncet's heavy responsibility in the whole affair, and to conclude conclusively [sic] not only that he contributed to the formation of the false documents, but also that he participated in the collegial decision to produce them in court, offering to testify as a false witness (or in any case accepting this possibility) together with Frank Hogart.

"The behavior of law[yer]. Poncet was therefore of considerable gravity."[260]

280. The court's conclusion that Dr. Poncet was "the dominus in relation to the trial of Banco Ambrosiano" in that Dr. Poncet "kept the links between the lawyers, between them and the client" and "was informed directly (in addition to Ceruti, not for Ceruti) of everything that happened" is a reference to a position that Dr. Poncet had taken as a defense to the charge of aiding and abetting. Dr. Poncet's defense was that his work for Mr. Ceruti, for whom he had been "a legal advisor for many years" and "also a friend," in connection with *Banco Ambrosiano* was "to have dealt only with rogatory" (a

[260] Milan Trial Court*, Sentenza* 7402/96 (December 12, 1996) (**R-23**), pages 62-65.

reference to matters outside Italy), "as a 'post office box,'" and "absolutely not with the defensive line to be adopted in the trial for the bankruptcy of the Ambrosiano."[261] With respect to these claims, the Sentence concludes as follows:

> "Then all the letters in the documents, coming from Poncet or addressed to him, and produced by the prosecution and the defense must be examined: nothing emerges from them that is clearly in support of the defensive thesis, but rather a decisive strengthening of the accusatory one."[262]

281. Dr. Poncet was found guilty of two crimes. First, Dr. Poncet was convicted for violation of Article 378 of the Italian Penal Code ("Personal Aiding and Abetting"). Second, Dr. Poncet was convicted for aiding and abetting the violation by Mr. Hogart of Article 372 of the Italian Penal Code ("False Testimony"). Dr. Poncet was sentenced to two years of imprisonment. The decision in full was as follows:[263]

> "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 articles438 et seq, c.p.p. to Conte Raffaele,
>
> "sentences
>
> "MUNSON NEVILLE to one year of imprisonment;
>
> "HOGART FRANI [sic] and PONCET CHARLES to two years of imprisonment;
>
> "CONTE RAFFAELE to sixteen months of imprisonment;
>
> "as well as all jointly and severally to the payment of legal costs;

[261] Milan Trial Court, *Sentenza* 7402/96 (December 12, 1996) (**R-23**), page 58.

[262] Milan Trial Court, *Sentenza* 7402/96 (December 12, 1996) (**R-23**), page 58.

[263] Milan Trial Court, *Sentenza* 7402/96 (December 12, 1996) (**R-23**), page 74.

> "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."

c. The Affirmation of the Convictions and Sentence in the Milan Court of Appeal

282. The Milan Court of Appeal affirmed Dr. Poncet's convictions in a 14-page decision filed with the Registrar on March 18, 1999.[264] The Milan Court of Appeal extensively reviewed the factual findings of the trial court by reference to the challenges Dr. Poncet had asserted. The Milan Court of Appeal also rejected Dr. Poncet's request in the alternative for his sentence to be reduced to the statutory minimum penalty. Dr. Poncet's request in the alternative was based on the claimed extenuating circumstance that he had not previously been convicted of any crime. The denial of the request for a reduced sentence was due to what the Milan Court of Appeal described as the gravity of Dr. Poncet's conduct as a lawyer aimed at subverting the administration of justice.

283. The decision of the Milan Court of Appeal begins with the following summary of Dr. Poncet's plea on appeal:

> "* Mr **CHARLES PONCET**, who appealed also against all the orders issued during the preliminary acts and the trial of first instance, pleaded for:
>
> "** full acquittal;
>
> "** in the alternative, a reduction of sentence to the minimum statutory penalty subject to application of general extenuating circumstances;

[264] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999) (Rockhopper's unofficial translation) (**C-208**). The translation submitted by the Italian Republic is also on the record as Exhibit **R-24**.

** in any case, partial repetition of the trial."[265]

284. The Milan Court of Appeal next summarizes over 6 pages Dr. Poncet's positions disputing the factual findings of the trial court, including the following which is presented as Dr. Poncet's explanation of his role in the preparation of the false documentation for the financial transaction involving the *Banco Ambrosiano* funds:

> "in summary: Mr Poncet, who had been Mr Ceruti's lawyer since 1981, reported that in January 1986 his client told him of the request for explanations from the English liquidators of Banco Ambrosiano and the consequent need to justify the provenance of money from Mr Gelli. He asked him to contact the then representatives of the seller of the valuables. There followed four meetings, as a result of which Mr Poncet collected the dossier containing the documentation, which was then certified, together with the entire file of notes delivered to him by Mr Delaney – Exhibit no. 6; in December 1988, Mr Poncet sent the dossier to counsel Rabello in Brazil – Exhibit no. 7 – at his request, and from that moment on he no longer dealt with the documentation."[266]

285. The following is the position attributed to Dr. Poncet regarding the trial court finding that he was the "*dominus*" in relation to the trial of *Banco Ambrosiano*:

> "as to Mr Poncet's participation in the defence team and his alleged role as '*dominus*' (master) of the overall case, the conjectures of the judge of first instance were disproved by Mr Biondi's testimony – 'Mr Poncet was not included in the defence team ...Mr Conte ... would keep us in touch' –, and by Mr Tonani's testimony – ' …in substance he was the intermediary between the client and the criminal lawyers' –, which confirmed that the defendant was uninvolved in the decisions made by the defence team, and highlighted – especially Mr Tonani – his quite different role of mere 'go-between' for contacts with Mr Ceruti and at the explicit request of the client."[267]

[265] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 1 of the PDF (emphasis in original) (**C-208**).

[266] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 1 of the PDF (**C-208**).

[267] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 2 of the PDF (ellipses in original) (**C-208**).

286. The following is the position attributed to Dr. Poncet as to the inadequacy of the reasoning of the trial court and its reliance upon Mr. Delaney's testimony:

> "in fact, the reasoning of the appealed judgement with regard to Mr Poncet's alleged liability was quite flimsy, as it simply stated – on the assumption of the previous arguments and of Mr Delaney's statements – that Mr Poncet had concurred not only to the formation of the false documents but also to the collective decision to produce them at trial, and what's more, had volunteered to testify as a false witness together with Mr Hogart, and that, since he had been named as a witness to give evidential support to the documentation that he had concurred to create, participation in perjury committed by Mr Hogart could also be considered proven'."[268]

287. The following is the position attributed to Dr. Poncet regarding the appearance of the initials "CP" in the documentation of the case:

> "moreover, the Lower Court Judge identified proof of Mr Poncet's liability also in the so-called 'work program' drawn up by Mr Delaney that was seized in Jersey, on the assumption that the initials of his name appeared repeatedly; however, those initials could well indicate, for example, 'Cabot Paula', Mr Delaney's secretary, and, if indeed they were indicative, there would have been no reason for Mr Delaney to use a precautionary expression – 'probably' – to link Mr Poncet with the drafting of a document."[269]

288. Dr. Poncet's legal positions are summarized next, including the following regarding the testimony of Mr. Delaney:

> "in fact, through the reform, the legislator intended to restore to their most incisive form the principle of orality and the adversarial principle in the taking of evidence, including with regard to expert witnesses, and the necessary conditions to permit the entry of the statements made by Mr Delaney in different proceedings were definitely not met, since Mr Poncet's defence counsels had undisputedly not participated in the taking of evidence in virtue of those letters rogatory, and had not consented to their use in the instant proceedings; on the contrary, they had raised a question of constitutional legitimacy in this regard;

[268] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 3 of the PDF (**C-208**).

[269] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 4 of the PDF (**C-208**).

> "nor could the operation of the new legislation be excluded because the acquisition had been made pursuant to the previous regulations, or because the transitional provisions envisaged nothing with reference to Section 238 ICCP; on this point, the defence reported the reasoning of the judgement dated 25 February 1998 by the Joint Divisions of the Supreme Court – which was annexed –, confirming the immediate applicability of the provisions that sanctioned that the records of statements made in other proceedings by persons accused of a related offence may not be used if the conditions required by sub-paragraph 2-bis of Section 238 ICCP are not met and if there is no consent by the parties; it followed that Mr Delaney's statements were no longer usable in the appeal trial, a trial on the merits where it is certainly not possible to resort to evidence whose use is prohibited by the current procedural law;
>
> "besides, and in this regard, the appealed judgement was also to be challenged from a different viewpoint, which had already been highlighted and disregarded during the first instance proceedings; in fact, the statements dated 13 February 1992 were made by Mr Delaney as a witness without him having been cautioned that he had the right to remain silent – which resulted in the paradox that they could be used in the proceedings against the current defendants –, and the Lower Court Judge, while acknowledging that the fundamental guarantees for the defence provided for by the Italian legal system had not been observed, argued in the judgement that 'the relevance of such "forced" non-observance and its consequences on the probative level only needed to be evaluated on a case by case basis' – which relevance was undoubtedly evident given the procedural use of those statements."[270]

289. The decision of the Milan Court of Appeal then proceeds to make findings on the positions attributed to Dr. Poncet. With respect to the trial court finding that Dr. Poncet was the *dominus* of the *Banco Ambrosiano* defense team, the Milan Court of Appeal stated as follows:

> "however, even if Mr Poncet does not formally appear to have followed up Mr Ceruti's position in the affair on the Italian front – but it is certainly not the formal role of defence counsel that matters, nor, contrary to what was claimed by the defence, was it ever even hypothesised that he participated in the defence team – there are many pieces of evidence proving his role as *dominus* (master), or in any case as coordinator of Mr Ceruti's defence team, his contribution to the formation of the false documents and his participation in the decision to use them at trial – what's more, expressing

[270] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), pages 6-7 of the PDF (**C-208**).

his willingness to testify as a confirmatory witness together with Mr Hogart and Mr Munson."[271]

290. The Milan Court of Appeal stated as follows with respect to Dr. Poncet's preparation of the false documentation and the use of the initials "C.P.":

> "in terms of his involvement in the preparation of the dossier, the documentary evidence that can be inferred from what was referred to by Mr Delaney, and in the trial, as 'the work program' – the five register sheets containing annotations in chronological order that were seized in Jersey and produced by Mr Hopper – is certainly decisive, since the initials of his name appeared in the annotation in which reference was made, among other things, to the need to prepare 'a confidentiality agreement', in another one in which, always in reference to the appropriate drafting of a copy of the agreement, the following was acknowledged ... 'O.K. prepared by C.P' [sic], and in yet another one relating to the option contract to be drawn up; then, that those initials are absolutely equivocal, as they may identify anyone, is an unfounded defence argument, if only one considers the contents of the activity to which the annotation referred – preparation of a suitable draft of an agreement/contract – and the necessary specific expertise required, as well as the 'confidentiality' of the annotation and concurrent indication of other initials."[272]

291. The Milan Court of Appeal stated as follows regarding Dr. Poncet's knowledge of the falsity of the documentation he had prepared:

> "and an unequivocal confirmation of his participation in the forgery follows from his possession of a copy of the dossier which was allegedly delivered to him by Mr Delaney on 28 November 1988, and which substantially consisted of a copy of those same documents that were seized at Merlin, all of which, however, lacked the signature and authentication by the Jersey notary public – Exhibit 6; as was already pointed out by the judge of first instance, precisely because of the lack of those data, this cannot be the same dossier that was produced by counsel Conte at trial as an annex to his brief – which dossier had been sent to him from Brazil, where it had been sent by Mr Poncet – or, in whole or in part, the one that was sent to Mr Tonani, so it must be inferred, at least, that different documents were available. This circumstance is relevant both as further confirmation of their falsity and in terms of the defendant's awareness of such falsity – certainly not, as was claimed by the defence, in terms of the fact that the documentation

[271] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 9 of the PDF (**C-208**).

[272] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 9 of the PDF (**C-208**).

> 'managed' by Mr Poncet with Mr Delaney and Mr Hogart did not coincide with the false documentation produced at trial."[273]

292. The Milan Court of Appeal considered Dr. Poncet's presence at numerous meetings to be evidence of his knowledge of the falsity of the documentary and testimonial evidence, explaining as follows:

> "then there were numerous meetings with Mr Ceruti's Italian defence counsels; in fact, Mr Poncet admitted at least two meetings with Mr Biondi and Mr Tonani between May 1987 and January 1988, and a meeting with Messrs Ceruti, Conte and Carcasio in Madrid in September 1990, and, according to Mr Biondi and Mr Tonani, he was also present at other meetings held in Madrid, Marbella and New York – Tonani; therefore, his assiduous presence is certainly not justifiable as a mere go-between for contacts between Mr Ceruti and his defence counsels […], and on the occasion of contacts that did not require any additional 'outsiders', other than because they were directly involved in defence decisions;
>
> "on the other hand, the admitted meeting with Mr Ceruti and his lawyer Mr Conte in September 1990, when the dossier formation activity had been completed and the trial phase of the Banco Ambrosiano proceedings was already underway, is particularly significant, hence his presence at that meeting – Mr Biondi's and Mr Tonani's absence was meaningful – could not have any justification other than his possible testimony; this meeting can therefore be identified as the moment of concertation among Messrs Poncet, Conte and Ceruti, who was the beneficiary of the whole operation, with regard to both the production of the documents and the identification of the witnesses to be named – concertation of which, according to the defence, there allegedly is no evidence."[274]

293. The Milan Court of Appeal did not accept the alternative explanation that Dr. Poncet had provided for his presence at meetings, stating as follows:

> "on the other hand, the justification generically given for all the meetings with the Italian lawyers – the question of the Swiss Rogatory Commission – does not seem to be compatible, timewise – October 1991 for the one relating to Mr Ceruti's accounts with UBS;
>
> "on the other hand, the admitted meetings with Mr Hogart and Mr Delaney in order to acquire the documents are just as numerous – at least four –, and their repetition, which can hardly be justified by a mere activity of collection

[273] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), pages 9-10 of the PDF (**C-208**).

[274] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 10 of the PDF (**C-208**).

> of original documentation – but Mr Poncet does not seem to see the anomaly –, is clearly indicative of the need to coordinate the individual contributions – as was confirmed, on the other hand, by the various documentation seized at Merlin."[275]

294. The Milan Court of Appeal also did not accept Dr. Poncet's argument that the trial court had confused the chronology of the preparation of documentation and meetings involving Dr. Poncet, stating as follows after summarizing various events:

> "therefore, the allegation that the judge of first instance mixed up meetings concerning the documents and other meetings with the Italian lawyers in which only letters rogatory and revocation of the arrest warrant were discussed is only a suggestive defence assumption."[276]

295. The Milan Court of Appeal also stated as follows regarding Dr. Poncet's knowledge of the falsity of the documents that he prepared for use at trial:

> "[…] Mr Poncet's defence does not take a stance on the recently substantially recognised version of the 'reconstruction' of original documents – because, regardless of whether or not the underlying relationship existed, reconstructing documents without even being in possession of the originals nevertheless classifies the result as false, when those documents must be and are produced in criminal proceedings without informing the Bench that this is a 'reconstruction'."[277]

296. In the view of the Milan Court of Appeal, there were "evident inconsistencies in Mr Poncet's story", about which it said the following:

> "then there are evident inconsistencies in Mr Poncet's story: he admitted that he knew from Mr Ceruti that the sums deposited in his Swiss accounts came from Mr Gelli, and that he learnt from the prosecution's documents that that money possibly came from the coffers of Banco Ambrosiano, hence he was well aware, and from the outset, of the terms of the charge against Mr Ceruti; in fact, he did not consider the moment in which Mr Ceruti 'took action' – even if only on the occasion of the letters rogatory in Brazil – to offer evidence that should and could have been offered from the very first moment, nor did he consider that that documentation had never been produced, even though the Brazilian and Italian defence counsels had

[275] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 10 of the PDF (**C-208**).

[276] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 11 of the PDF (**C-208**).

[277] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), pages 11-12 of the PDF (**C-208**).

> been in possession of it since December 1988/January 1989; he did not see the undoubted anomalies – in terms of number of players and time used – of that document recovery activity, nor the inadequacy of the overall documentation with respect to the relationship that it was intended to prove, nor, again, the fact that it was only available from Mr Delaney, and not also from Mr Ceruti or his associate Mr Gelli."[278]

297. The stated conclusion of the Milan Court of Appeal was as follows:

> "in conclusion, as proof of Mr Poncet's awareness of the falsity of the documentation, the defendant's ascertained role placed him in a position to know – immediately and from 'close up' – Mr Ceruti's legal affairs, the exact terms of the charges, the evolution of those affairs and the defence actions taken, and led him to be Mr Hogart's and Mr Delaney's direct and active interlocutor with regard to the documentation that was supposed to attest the commercial 'transaction' between Mr Ceruti and Mr Hogart on behalf of Mr Gelli; hence, it is self-evident that Mr Poncet, a well-known lawyer, was in a position to see all the inconsistencies affecting the 'transaction' and highlighting its fictitious nature, as well as all the aspects of that documentation, which had become materially available to him, which revealed its falsity."[279]

d. Dr. Poncet's reported waiver of the statute of limitations and vow to "fight until the end" to prove his innocence.

298. An article in the Swiss newspaper *Le Temps*[280] reported the Milan Court of Appeal's affirmation of Dr. Poncet's convictions and sentence. The decision of the Milan Court of Appeal does not appear to have been available to *Le Temps* at the time of its report.

299. The article quotes Dr. Poncet's description of the trial court decision as "revolting." It quotes Dr. Poncet as having stated "I will fight until the end" and reported as follows:

> "The Geneva lawyer had expressly waived the right to invoke the limitations period – which will be acquired in a few months – in the hope of proving his innocence by, in particular, rehearing witnesses on appeal."[281]

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[278] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 12 of the PDF (**C-208**).

[279] Milan Court of Appeal, *Sentenza* 328/99 (March 18, 1999), page 13 of the PDF (**C-208**).

[280] Denis Masmejan, *Charles Poncet's sentence confirmed on appeal in Milan*, Le Temps, February 9, 1999 (**C-186**).

[281] Denis Masmejan, *Charles Poncet's sentence confirmed on appeal in Milan*, Le Temps, February 9, 1999 (**C-186**).

e. The Application of the Statute of Limitations and the Annulment of Dr. Poncet's Convictions in the Court of Cassation

300. Dr. Poncet appealed his convictions to Italy's Court of Cassation. In a 7-page decision filed with the Registrar on December 15, 1999, the Court of Cassation annulled Dr. Poncet sentence "because the crimes ascribed are extinguished by prescription."[282]

301. In its decision, the Court of Cassation ruled that the application of the time bar was required because the legal proceedings against Dr. Poncet had not been completed within the 7-1/2-year time frame required by Italian law. The Court of Cassation stated as follows:

> "As correctly pointed out by the Procuratòre [sic] 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." [283]

302. In the written and oral proceedings, both sides have sometimes used the word "prescription" and sometimes used "statute of limitations" to refer to Italy's time bar rules. Counsel for the Italian Republic has explained that Italy's time bar rules operate differently than statutes of limitations do in many other countries in that, unlike statutes of limitation elsewhere, time bars are not tolled in Italy by the commencement of criminal proceedings,[284] and Rockhopper's understanding is essentially the same.[285] This means that criminal convictions are annulled by operation of prescription if appellate proceedings are not completed within the time periods specified for the crimes charged, and

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[282] Court of Cassation, *Sentenza* 1774/99 (November 23, 1999), page 7 (**R-25**).

[283] Court of Cassation, *Sentenza* 1774/99 (November 23, 1999), page 4 (**R-25**).

[284] Hr. Tr. Day 1, 34:19-24 ("[…] Italy is one of the more lenient types of jurisdictions when it comes to the prosecution of individuals, so that when the prosecution starts the statute of limitation is not stopped, if you see what I mean. There is no suspension of time limits. So the time keeps running.") (remarks of counsel for the Italian Republic).

[285] Counter-Memorial, ¶74.13 ("Under Italian law, the Court of Cassation and the Constitutional Court have firmly characterised rules on limitations periods to be 'substantive' rather than procedural in nature. If the state does not achieve conviction within the time set by the statute of limitations, the crime is considered legally 'extinguished' (*causa di estinzione del reato*) and the accused is "excluded" from criminal liability. In contrast to many common law systems (such as the United States, where statutes of limitations are considered procedural rules), the Italian legal system considers that the statute of limitations is a crucial, substantive safeguard that intervenes to prevent a person from being prosecuted for an indefinite length of time.").

Rockhopper does not dispute that the passage of time while Dr. Poncet's appeal was pending is the reason his convictions were annulled.[286]

303. The Parties disagree, however, about how the decision of the Court of Cassation should be understood with respect to other grounds that Dr. Poncet had put forward as part of his appeal, and the implications for the consideration of the Italian Republic's request for annulment. On appeal to the Court of Cassation, Dr. Poncet had put forward the following 8 grounds, described as "defenses":

> "(a) failure to take decisive evidence and flaw to state reasons with allusion [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 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 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

[286] Hr. Tr. Day 1, 148:11-12 ("[…] we accept straight away that the Supreme Court chucked this out on the basis of the limitation […].") (remarks of Rockhopper's counsel).

> "(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."[287]

304. The Parties are in agreement that, between the time that the sentence of the trial court against Dr. Poncet was handed down and the time that the appeal came before the Court of Cassation, the Italian Constitutional Court had ruled that a person could not be convicted based on statements made by another individual who had not been cross examined in the absence of consent by the person against whom the statement was to be used.[288] Rockhopper describes this as a change that brought Italy's criminal justice system in line with prevailing Western European legal norms and the EU Convention on Human Rights.[289] Ground "(b)" of the defenses Dr. Poncet asserted before the Court of Cassation referred to this change of Italian law as he submitted it to pertain to the testimony of Mr. Delaney. The decision of the Court of Cassation states as follows with respect to Ground "(b)":

> "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)."[290]

305. The Italian Republic submits that, because Italian law is distinctive in that statutes of limitation continue to run while criminal proceedings are being prosecuted and appealed, a conviction may be subject to annulment for reason of prescription at a time when a defense on the merits has been presented. For that reason, Article 129 of the Italian Code of Criminal Procedure is a rule of lenity[291]

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[287] Court of Cassation, *Sentenza* 1774/99 (November 23, 1999), pages 2-3 (**R-25**)

[288] *See* Court of Cassation, *Sentenza* 1774/99 (November 23, 1999), pages 4-5 **(R-25)** (*citing* Decision No. 361/98 of the Italian Constitutional Court from October 1998 on this point as well as Articles 500(2)(bis) and 4 of the Italian Code of Criminal Procedure (*Codice di Procedura Penale*)).

[289] *See* Counter-Memorial, ¶74.8.

[290] Court of Cassation, *Sentenza* 1774/99 (November 23, 1999), page 5 **(R-25)**.

[291] *See* Italian Code of Criminal Procedure, Article 129 (**CL-323**).

requiring that, when a valid defense on the merits has been presented, courts are obligated to dismiss on the basis of such a defense – which the Italian Republic describes as an "acquittal" or "full acquittal"[292] – rather than due to the application of a statute of limitations. In the submission of the Italian Republic, it therefore should be understood from the decision of the Court of Cassation that, because Dr. Poncet's convictions were annulled by prescription, the factual findings regarding Dr. Poncet were not called into question. The Italian Republic's submission in its Memorial is as follows:

> "98. Article 129, in other words, establishes a rule of lenity in favor of the accused such that, between an acquittal on the merits, on the one hand, and the extinction of the offence on the ground of prescription, on the other, the Court of Cassation could and should have acquitted Dr. Poncet on the merits (the more favourable judgment), if it had found Dr. Poncet innocent of the crimes charged against him. Yet, as already established above, the Court of Cassation ruled ***exclusively*** on the extinguishment of the crimes due to prescription. Given the mutually exclusive nature between prescription and acquittal, with the latter being a more favorable outcome, **the Court's judgment based on prescription logically means that the Court of Cassation found no basis for Dr. Poncet's acquittal on the merits.**
>
> "99. The Court of Cassation's declaration of prescription is, thus, a purely procedural issue, which in no way undermines the finding of facts made by the Court of Milan and confirmed in its entirety by the Court of Appeal. In even simpler terms, the judgment of conviction against Dr. Poncet was annulled not because the Court of Cassation found that he was innocent. He only narrowly escaped criminal liability due to the natural passage of time."[293]

306. Rockhopper presents a different understanding of the Court of Cassation's decision. Referring to the same provision of Italian law upon which the Italian Republic relied,[294] Rockhopper submits that, where there are several possible grounds for excluding criminal liability and acquitting a defendant, the Court of Cassation is required to invoke the ground that does not require further referral back to the lower courts.[295] Rockhopper's argument about the decision of the Court of Cassation is as follows:

[292] Memorial, ¶¶95-98; Reply, ¶¶35-38; Hr. Tr. Day 1, 31:10-32:20 (remarks of counsel for the Italian Republic).

[293] Memorial, ¶¶98-99 (emphasis and brackets in original)

[294] *See* Counter-Memorial, ¶74.11 n.159.

[295] Counter-Memorial, ¶74.11.

> "75.2 The Court of Cassation raised grave doubts about the underlying conviction of Dr Poncet, which was based on hearsay (and double hearsay) evidence from an individual who was not subject to challenge or cross-examination, and which, therefore, violated Italian constitutional law.
>
> "75.3 The only reason the Court of Cassation relied upon prescription to overturn Dr Poncet's conviction – rather than the violations of constitutional rights and due process it identified had occurred in the lower court proceedings – was because when multiple grounds for overturning a judgment are present, and at least one such ground will result in final, outright dismissal (*i.e.*, does not require a remand for further proceedings), the Court of Cassation is strictly required to rely upon the ground that will result in immediate dismissal under Italian law. Because prescription is a ground that results in a final, outright dismissal, and it was available to the Court of Cassation, it was obliged to rely on prescription.
>
> "75.4 While 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."[296]

(2) The Disclosure Dr. Poncet Provided in the Arbitration

307. On June 26, 2017, Dr. Poncet submitted to the ICSID Secretariat a signed Declaration and an attached Statement under Rule 6(2) of the ICSID Arbitration Rules.[297] That Declaration was sent by the Secretariat to the Parties by email the following day. As Rule 6(2) requires, the Declaration that Dr. Poncet signed includes the following language:

> Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.

[296] Counter-Memorial, ¶¶75.2-75.4 (footnotes omitted).

[297] Dr. Poncet's Declaration in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, June 26, 2017 (**R-27**).

308. At the bottom of the Declaration, Dr. Poncet checked the box to indicate that a Statement was attached to the Declaration. In the Statement, Dr. Poncet states that he is a citizen of Switzerland only and adds that "my late mother was Italian" and that he might qualify for Italian citizenship if he were to apply.[298] The Statement is in full as follows:

> "I am and intend to remain completely independent in this case as in other in which I have the honor to serve.
>
> "I have been appointed as arbitrator in case ARB/16/39, which concerns the same Respondent (the Italian Republic).
>
> "My appointment in case ARB/16/39 originates from the same law firm (King & Spalding). I have no business or other relationship with King & Spalding. I have never met Mr. Thomas K. SPRANGE QC, Mr. Ben WILLIAMS, Ms. Flora JONES, and Mr. Viren MASCARENHAS.
>
> "I am a citizen of Switzerland only but my late mother was Italian and I might qualify for Italian citizenship if I were to apply.
>
> "The circumstances described above do not impact my ability and determination to opine in a completely independent manner in this case."

(3) The Dismissals of Proposals for Dr. Poncet's Disqualification in Other Arbitrations

a. VC Holding v. Italy

309. *VC Holding* is the arbitration to which Dr. Poncet referred in his Statement. That Arbitration was still pending at the time when, following the issuance of the award in the *Rockhopper* arbitration, the Italian Republic says it received the anonymous tip about the criminal proceedings against Dr. Poncet. In addition to requesting annulment on the basis of the criminal proceedings in this case on October 20, 2022, the Italian Republic on the same day[299] proposed the disqualification of Dr. Poncet from the *VC Holding* pursuant to Article 57 of the Convention and Rule 9 of the ICSID Arbitration

[298] Letter from ICSID to the Parties attaching the Signed Declaration of Acceptance of Appointment under ICSID Arbitration Rule 6(2) and Accompanying Statement of Disclosure from Dr. Poncet, June 28, 2017 (**C-184**).

[299] *See* Hr. Tr. Day 2, 282:20-25 ("Once Italy became of the revelations of Poncet troubles -- became aware of the revelations of Poncet's troubles with Italian justice, Italy took prompt and decisive action to challenge the Award and sought disqualification in the arbitration concerning VC Holding on 20 October 2022") (remarks of Italian Republic's counsel).

Rules.[300] On April 21, 2023, that proposal was dismissed under Article 58 by the president of the *VC Holding* tribunal (who had also been president of the Rockhopper tribunal)[301] and the other unchallenged arbitrator ("**The Decision of the Unchallenged Arbitrators in *VC Holding***").

310. Because his co-arbitrators in *VC Holding* were considering a disqualification application pursuant to Rule 9 of the Arbitration Rules, Dr. Poncet was entitled to furnish explanations pursuant to Rule 9(3). Dr. Poncet submitted two sets of explanations following the first round of exchanges by the parties,[302] and a third set of explanations following comments from the parties.[303]

311. The Decision of the Unchallenged Arbitrators in *VC Holding* includes a section summarizing Dr. Poncet's explanations. According to the summary, Dr. Poncet "states that he 'fail[s] to see the relevance'" in "the context of challenge proceedings against" him "of a reference to a false accusation, brought by a rogue individual […]."[304] The summary quotes Dr. Poncet as having described himself as "puzzled" by "'the suggestion that [he] should have disclosed anything […]."[305] The summary also quotes Dr. Poncet as having stated that he "is grateful that the Italian Supreme Court corrected the wrong decisions of the lower courts in this matter.'"[306]

312. The Decision of the Unchallenged Arbitrators summarizes Dr. Poncet's explanations regarding the Italian criminal proceedings as follows:[307]:

> "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

[300] *VC Holding II S.à.r.l. and others v. Italian Republic*, ICSID Case No. ARB/16/39, Decision on the Proposal for the Disqualification of Dr. Charles Poncet (April 21, 2023) ("**Decision of the Unchallenged Arbitrators in *VC Holding***"), ¶5 (**CL-322**).

[301] As set forth above in the summary of the procedural history of the Arbitration, the Italian Republic appointed Prof. Dupuy in the *Rockhopper* arbitration, and Mr. Reichert was appointed President by agreement of Dr. Poncet and Prof. Dupuy. The Italian Republic appointed Prof. Brigitte Stern in the *VC Holding* arbitration, and Mr. Reichert was appointed President by agreement of Dr. Poncet and Prof. Stern. *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶3. The same law firm that represents Rockhopper in the underlying arbitration and annulment proceeding represents the claimants in the *VC Holding* arbitration. *See* Decision of the Unchallenged Arbitrators in *VC Holding*, page i. *In VC Holding*, a group of German, British and Luxembourgian investors have contended that the Italian Republic breached the Energy Charter Treaty in adopting an energy plan calling for reductions in tariffs paid to investors in renewable energy.

[302] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶8.

[303] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶10.

[304] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶25 (brackets in original).

[305] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶25 (brackets in original).

[306] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶25.

[307] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶¶26-27 (footnotes omitted; brackets in original).

> 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 Licio 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. 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.
>
> "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.
>
> "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."

313. In the section of the Decision of the Unchallenged Arbitrators under the heading "Respondent's Arguments", there are two paragraphs that set forth the basis on which the Italian Republic proposed Dr. Poncet's disqualification. These are the same as the Italian Republic's objections in this annulment proceeding, the two paragraphs are as follows:[308]

> "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."

[308] Decision of the Unchallenged Arbitrators in *VC Holding*, ¶¶12, 14 (emphasis added).

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> "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."

314. Under the heading "Introduction to the Analysis of the Unchallenged Members", however, the decision states that the Italian Republic proposed the disqualification of Dr. Poncet "on two bases", namely lack of high moral character and failure to make adequate disclosure. The paragraph from the Decision of the Unchallenged Arbitrators is as follows:[309]

> "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**; 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.' 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."[310]

315. In Section "**2. High Moral Character**" of the Decision of the Unchallenged Arbitrators, the first paragraph makes a distinction between "predicate facts", on the one hand, and "their underlying substance, if any", on the other.[311] The Decision of the Unchallenged Arbitrators states that there "are three such predicate facts, namely, decisions of Italian Courts." The next paragraph identifies what in

[309] Decision of the Unchallenged Arbitrators in *VC Holding,* ¶31 (footnotes omitted, emphasis added).

[310] The section headed "**ANALYSIS**" contains four numbered sections:

> "1. Introduction to the Analysis of the Unchallenged Members"
>
> "2. High Moral Character"
>
> "3. Disclosure"
>
> "4. Subsidiary Matters"

[311] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶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.").

the view of the unchallenged arbitrators "is in dispute" "insofar as the Respondent's Proposal is concerned", which is stated as follows:[312]

> "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."

316. The analysis insofar as the Respondent's Proposal was concerned accordingly was confined to the decisions of Italian Courts (the "three such predicate facts") and excluded the "underlying substance" "if any" of the court decisions.

317. The decision turns next to what had been identified as "(a)" of what is in dispute, which the unchallenged arbitrators had described as "characterization of what it was" the Court of Cassation "did in substance." After an extensive block quotation of the Court of Cassation decision, paragraph 36 of the Decision of the Unchallenged Arbitrators states that the judgement had "brought the 'legal peril' for Charles Poncet to an end."[313] The analysis of the unchallenged arbitrators of the characterization of what it was the Court of Cassation did in substance is at paragraphs 37-39 of the decision. The analysis in full is as follows:[314]

> "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

[312] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶33 (emphasis added).

[313] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶36.

[314] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶¶37-39 (emphasis in original, italics in original).

> 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."

318. Paragraph 40 of the Decision contains the unchallenged arbitrators' conclusion as to part "(b)" of what they had identified as in dispute insofar as the Respondent's Proposal was concerned, that is, whether "the matters relied upon by the Respondent" manifestly indicate that Dr. Poncet did not possess high moral character. The unchallenged arbitrators answer as follows based on the characterization in substance of the effect of the primary predicate fact (that is, that "**the conviction against Charles Poncet was annulled**" in the Court of Cassation) and the other two predicate facts, which were the lower court decisions that were annulled:[315]

> "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."

319. In Section **"3. Disclosure"** of the Decision of the Unchallenged Arbitrators, the ruling was that the finding that the decisions of the Italian courts did not establish Dr. Poncet's lack of high moral character eliminated a necessary predicate for objection to the adequacy of Dr. Poncet's disclosure. The reasoning is contained in paragraph 43, which is as follows:[316]

> "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.' Given the earlier finding that the

[315] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶40.

[316] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶43.

> 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."

320. As described above, the Decision of the Unchallenged Arbitrators was structured such that the claim that there was good reason to doubt Dr. Poncet's reliability for the exercise of independent judgement was not directly considered as a ground for Dr. Poncet's disqualification. Instead, the Decision of the Unchallenged Arbitrators addresses what they described as "the Respondent's *rationale*"[317] for that argument after the ruling that the necessary predicate for objection to the adequacy of Dr. Poncet disclosure had not been established.

321. In the view of the unchallenged arbitrators, the Italian Republic's contention that a person who has been prosecuted and sentenced to jail by the judiciary of a State is not able to exercise independent judgement in proceedings involving that same State[318] "does not fully reflect the position as of the moment of acceptance by Charles Poncet of his appointment" to the tribunal.[319] The reasoning was as follows:[320]

> "The judiciary at the highest level within the Respondent pronounced this annulment so it is a matter of considerable doubt whether ***a cognizable and manifest link*** could be made **between** an alleged inability to exercise independent judgement on the part of Charles Poncet and ***the very judiciary (at the highest level)*** which ***brought his 'legal peril' to an end.***"

322. The unchallenged arbitrators ended their analysis with the following explanation:[321]

> "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

[317] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶45.

[318] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶44 (*citing* the Italian Republic's Disqualification Proposal (October 20, 2022), ¶21).

[319] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶45.

[320] Decision of the Unchallenged Arbitrators in *VC Holding*, ¶45 (emphasis added)

[321] Decision of the Unchallenged Arbitrators in *VC Holding*, ¶45.

> facts are that such earlier conviction by a Milanese magistrate was annulled."

323. Section "**4. Subsidiary Matters"** of the Decision of the Unchallenged Arbitrators characterized as "not well-founded" an argument by the Italian Republic that Dr. Poncet's reaction to the proposal for his removal was itself grounds for his removal, stating as follows:

> "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."[322]

324. Under the heading "CONCLUSION", the Unchallenged Arbitrators stated that they were "not persuaded by the propositions advanced by the Claimants that the Respondent should have known about these matters", elaborating as follows:

> "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."[323]

b. Zeph Investments v Australia

325. Rockhopper asked for and received from the Committee, with the Italian Republic's agreement,[324] an extension of time for the filing of its Rejoinder so that Rockhopper could address a case in which a challenge to Dr. Poncet had been rejected. In the *Zeph Investments* arbitration,[325] Dr. Poncet had been appointed by the claimants in an arbitration against Australia that arose under a free trade agreement. In that case, the challenge against Dr. Poncet was decided by Dr. Hab. Marcin Czepelak on behalf of the appointing authority, the Secretary-General of the Permanent Court of Arbitration.

326. Australia had sent its notice of challenge against Dr. Poncet on June 13, 2023,[326] about six weeks after the *VC Holding* decision. It appears from the decision denying the challenge that Australia's positions

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[322] Decision of the Unchallenged Arbitrators in *VC Holding*, ¶50.

[323] Decision of Unchallenged Arbitrators in *VC Holding*, ¶52.

[324] *See* email from Rockhopper to Italy, November 29, 2023. *See also* Hr. Tr. Day 1,160:10-24 (the *Zeph* decision is "extremely helpful" as "a mini trial or a mini review […]."") (remarks of Rockhopper's counsel).

[325] *Zeph Investments Pte. Ltd v. the Commonwealth of Australia*, PCA Case No AA917, Decision on the Challenge to Dr. Charles Poncet (September 26, 2023) ("***Zeph Investments***"), ¶ 67 (**CL-422**).

[326] See Zeph Investments, ¶5.

were similar to, and explanations provided by Dr. Poncet essentially identical to, those in *VC Holding*. As summarized by Dr. Czepelak, the claimants' first argument was that the grounds asserted by Australia were "'materially identical'" to those that had decided in *VC Holding* and that the rejection of disqualification by the unchallenged arbitrators in *VC Holding* "should be followed by the Secretary-General 'without the need to re-examine the very same matters [already] considered and determined'."[327] The claimants' second argument was "echoing the decision of the unchallenged arbitrators in" *VC Holding* 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'."[328]

327. In Dr. Czepelak view, Dr. Poncet's impartiality was to be decided based on the factual circumstances from the late 1980s and early 1990s underlying the Italian criminal charges against Dr. Poncet. Dr. Czepelak viewed "what followed as a matter of Italian law and procedure" in the decisions of the Italian courts as not independently reflecting upon Dr. Poncet's ability to function impartially as an arbitrator in the case. Dr. Czepelak's stated the matter he was to decide as follows:

> "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)."[329]

328. Dr. Czepelak did view the judgments of the Italian courts as relevant "in that they are the (sole) evidence before me of Dr. Poncet's alleged conduct."[330] Ultimately, Dr. Czepelak dismissed the challenge to Dr. Poncet, stating as follows:[331]

> "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, the very significant passage of time (now more than 30 years) since the alleged conduct, and the fact that, as the Respondent

[327] *See Zeph Investments*, ¶50 (*quoting* the claimants; brackets in original).

[328] *See Zeph Investments*, ¶51 (*quoting* the claimants' use of language taken directly from the *VC Holding* decision, quoted herein above at ¶317).

[329] *Zeph Investments*, ¶61 (emphasis in original).

[330] *Zeph Investments*, ¶62.

[331] In *Zeph Investments,* there was no requirement that arbitrators must possess high moral character.

> 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, 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."[332]

D. ANALYSIS

329. The Italian Republic claims that the Tribunal was improperly constituted under Article 52(2)(a) due to Dr. Poncet's lack of the qualities required to serve as an arbitrator in the dispute and his incomplete disclosure. For the reasons stated at paragraphs 223-256, the Committee has concluded that it has competence to consider these claims based on evidence that the Italian Republic contends to have come to light since the Award was issued. The Committee is not persuaded that the only procedural option available under the Convention to a party discovering after the issuance of an award that the tribunal had not been properly constituted is to seek the award's revision pursuant to Article 51. In this case, the Italian Republic's claim is not merely that the Award should be revised, a remedy that Article 51 empowers the tribunal that rendered the award to provide. The Italian Republic's claim is that that newly discovered facts show the proceedings from which the Award resulted to have been tainted irredeemably from the outset, which the Committee accepts would provide a basis for annulment if established.

330. The Italian Republic contends that whether it should be precluded from raising Dr. Poncet's lack of qualification at this late stage of the proceedings must be evaluated in light of the disclosure that Dr. Poncet provided in the Arbitration, which did not include the criminal proceedings. For that reason, the Committee begins with consideration of the criminal proceedings in Italy and Dr. Poncet's omission of those proceedings from the Statement that he provided at the outset of the Arbitration pursuant to ICSID Arbitration Rule 6. The Committee then considers whether the Italian Republic's failure to propose Dr. Poncet's disqualification earlier in the proceedings should make Dr. Poncet's participation in the case unavailable as a basis for annulment of the Award.

[332] *Zeph Investments*, ¶67 (brackets in original).

331. It is established both in ICSID practice and more generally that a party bears the burden of proof with regard to any fact the existence of which the party asserts.[333] In this case, both sides agree that the Italian Republic bears the burden of proof regarding Dr. Poncet's alleged lack of the qualities specified in Article 14(1) and the alleged insufficiency of his disclosure as well as its good faith in raising Dr. Poncet's disclosure and qualifications only after the Award was rendered.

(1) The Omission of the Criminal Prosecution from Dr. Poncet's Disclosure

332. The Italian Republic claims that Dr. Poncet failed to include the Italian criminal proceedings against him, as Rule 6 required him to do, with the result that Italy was deprived of the opportunity to propose his disqualification in the underlying arbitration and its "right of defense and fair trial."[334] Rockhopper's primary opposition has been that, because Dr. Poncet's criminal conviction in Italy was annulled due to the statute of limitations, there was nothing to be disclosed, and that Dr. Poncet therefore reasonably understood himself to have nothing to disclose.[335]

333. Given the language of Rule 6(2) of the ICSID Arbitration Rules, which Dr. Poncet re-stated in his signed Declaration, the Committee is unable to accept Rockhopper's position. Rule 6(2) broadly requires disclosure of "past and present professional, business and other relationships" and "any other circumstance" that "might cause" the arbitrator's reliability for the exercise of independent judgment in the case "to be questioned by a party," which is a standard requiring the arbitrator to take into account the perspective of a party that is discussed above at paragraphs 210-213.

334. This case does not present the situation that most often arises when there is incomplete disclosure by an arbitrator, which is inadvertent omission and subsequent acknowledgement by the arbitrator that the omitted matter should have been disclosed. Instead, the problem with the disclosure in this case appears to have resulted from Dr. Poncet's decision not to include the criminal proceedings as part of

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[333] *See, e.g.*, *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Decision on Proposal to Disqualify Dr. Stanimir A. Alexandrov (September 7, 2011), ¶56 (discussing burden of proof in relation to application to disqualify an arbitrator).

[334] *See, e.g.,* Memorial on Annulment, ¶118.

[335] *See, e.g.*, Counter-Memorial, ¶71 ("Italy contends that the underlying arbitration violated its 'right to a fair trial', because, nearly thirty years ago in 1996, Dr Poncet was convicted (but then acquitted) by Italian courts of the crimes of aiding and abetting and perjury in proceedings related to the 'criminal scheme' of the *Banco Ambrosiano* bankruptcy, yet did not disclose such convictions when he accepted his appointment to the *Rockhopper* tribunal. Italy's allegations about Dr Poncet are based on a misrepresentation of the relevant history, including, crucially, its own Court of Cassation's November 1999 decision annulling the convictions of Dr Poncet. Italy's allegations are wholly without merit.") (emphasis in original).

his Rule 6 declaration, and he has said that he does not understand the suggestion that there should have been disclosure.

335. Dr. Poncet's explanation to the unchallenged arbitrators in *VC Holding* was that he "fail[ed] to see the relevance" of his criminal prosecution by Italy "in the context of challenge proceedings against" him in a case that would require him to make judgements about Italy's official actions. Dr. Poncet was "puzzled," he told the unchallenged arbitrators, "by the suggestion that [he] should have disclosed anything in this respect." Dr. Poncet then proceeded to provide the following further explanations, each of which is essentially a restatement of a position that Dr. Poncet's lawyers advanced on his behalf during the criminal proceedings that the Italian courts did not accept.

336. *First*, Dr. Poncet characterizes the criminal proceedings as "'a reference to a false accusation, brought by a rogue individual'",[336] meaning Mr. Delaney. Dr. Poncet gives the explanation that Mr. Delaney "'wrongly claimed that [Dr. Poncet] was implicated in the process'" and that he "demanded to confront Mr. Delaney with the false accusations he had made" but that Mr. Delaney "'refused to answer any questions and invoked his right to remain silent.'"[337] The trial court's discussion of this matter was as follows:

> "The defensive line of law[yer]. Poncet was simple and straightforward: the only evidence against him would derive from Delaney's summons. Because, even if it were true that the documents produced were false, it is equally true that he was unaware of the circumstance. Equally there is no evidence of concertation for the production of those documents in court, and for the citation of the witnesses.
>
> "And then it must be said immediately that the proof of Poncet's responsibility is above all documental and is found in that 'work program' drawn up by Delaney and seized in Jersey.
>
> "The initials of his name (C.P.) appear in point 15, where reference is made to the information received by Frank Hogart at the Swiss Julius Bank on Ceruti's account and to the need to prepare a 'confidentially [sic] agreement'); at point 17, which is worth transcribing in full: 'copy of the

[336] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶25 (quoting Dr. Poncet's explanations).

[337] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶27 (quoting Dr. Poncet's explanations).

> contract - prepare suitable drafting - C.P.': with pencils on the same line is then added:
>
> "'OK - prepared by C.P.'; and finally point 32, relating to the option contract to be prepared.
>
> "The aforementioned contract was attached to the file of documents filed by Conte in the Annibaldi + 32 proceeding.
>
> "That would be enough to affirm the accused's responsibility for the offense of aiding and abetting. Furthermore, since he had been indicated as a witness to give probative support to that documentation he had contributed to create (and not for reasons dependent on his will he was not heard, but by decision of the judging panel), he would also consider the participation in the crime of perjury committed by Hogart as proven.
>
> "But there is much more to be borne by him."[338]

337. <u>*Second*</u>, Dr. Poncet gives the explanation that "he represented 'a Mr. Marco Ceruti in an international judicial assistance case'" and describes Mr. Ceruti as being someone "whom he recalls being 'one of the suspects in the Banco Ambrosiano scandal.'"[339] The trial court's discussion of this matter was as follows:

> "The accused claimed to have dealt only with rogatory, absolutely not with the defensive line to be adopted in the trial for the bankruptcy of the Ambrosiano, and that he then acted, for his client affected by an international arrest warrant, as a 'post office box' […]
>
> "The defense thesis is disproved by many elements.
>
> "First, it is necessary to take into account the fact that Poncet met Ceruti's Italian defenders more than once, as agreed by himself, as well as declared by Biondi and Tonani. Nor is it worth refuting the thesis according to which lawyers Biondi and Tonani went to his office in Geneva exclusively to make a phone call from there to Ceruti in Brazil. However, he saw them, in the span of about two years, certainly also in Marbella, Madrid, New York (only Tonani), both before and after Ceruti's interrogation in rogatory in Brazil.

[338] Milan Trial Court*,* *Sentenza* 7402/96 (December 12, 1996), page 57 (**R-23**).

[339] *See* Decision of the Unchallenged Arbitrators in *VC Holding*, ¶26(quoting Dr. Poncet's explanations).

> "He then brought together (and this is another decisive circumstance) Lino Carcasio (a individual who is not neutral with respect to the events of Banco Ambrosiano and Loggia P2, as we shall see later) with the lawyer. Raffaele Conte, who was indicated by Ceruti to Biondi and Tonani as their trial substitute, in place of law[yer]. Pezzotta: further demonstrating that he was actively involved in the Italian trial against Ceruti, not only with the rogatory in Switzerland or Brazil (where Ceruti was also assisted by at least two lawyers, law[yer]. Rabello and law[yer]. Jezer Menezes dos Santos).
>
> "And again: it is absolutely undisputed that Poncet met Hogart and Delaney at least four times, and personally withdrew the documents from Delaney, in Jersey: yes, it has already been said, but it must be repeated: it was necessary to appoint a lawyer of the caliber of Poncet simply to collect papers?
>
> "Then all the letters in the documents, coming from Poncet or addressed to him, and produced by the prosecution and the defense must be examined: nothing emerges from them that is clearly in support of the defensive thesis, but rather a decisive strengthening of the accusatory one."[340]

338. *Third*, Dr. Poncet gives an explanation based on what he says was "'Mr. Ceruti's 'version of the events'."[341] The trial court's discussion of this matter was follows:

> "From a careful examination of all the documentation produced by the defense, therefore, once again, Poncet's full responsibility emerges.
>
> "He was, as is now evident, the dominus in relation to the trial of Banco Ambrosiano, he kept the links between the lawyers, between them and the client, was informed directly (in addition to Ceruti, not for Ceruti) of everything that happened before in preliminary investigation and then in the trial.
>
> "This function of him is also made evident by the documentation concerning him produced by! P.M. and from the testimonies of Biondi and Tonani.
>
> "He will first examine the documentation, in chronological order in order to facilitate understanding. These are communications between lawyers: in this regard, it should be borne in mind that, since no searches and no seizures were carried out during the investigation phase, the letters are that

[340] Milan Trial Court, *Sentenza* 7402/96 (December 12, 1996), page 55 (**R-23**).

[341] *See* Decision of Unchallenged Arbitrators in *VC Holding*, ¶26 (quoting Dr. Poncet's explanations).

part of the documentation in his possession that each, accused or witness, has deemed convenient or necessary to produce."[342]

339. Dr. Poncet is, of course, entitled to maintain each of the views that he has advanced as explanations of matters that were at issue in the criminal proceedings. The Committee does not make any judgement about those views as such. Notwithstanding Dr. Poncet's own views and his conclusion based on them that the criminal proceedings did not need to be disclosed, however, Rule 6 required Dr. Poncet to disclose his relationships and other circumstances that might cause his reliability for the exercise of independent judgment "to be questioned by a party." From the perspective of a party, Dr. Poncet's disclosure of his criminal prosecution in the host State for grave offenses was to be expected at the outset of the *Rockhopper* arbitration, in the Committee's judgement.

340. After the Milan Court of Appeal rejected his appeal and request for leniency in sentencing, Dr. Poncet reportedly told *Le Temps* that he had waived the statute of limitations and intended to fight to the end to prove his innocence (discussed above at paragraphs 298-299). These reported statements demonstrate Dr. Poncet's recognition of the effect that the decisions of the Italian court and his criminal convictions could have on impressions that other people would form of him. Subsequently, however, Dr. Poncet apparently changed his mind and elected, as was his right under Italian law, to allow the statute of limitations to be applied while his appeal was pending in the Court of Cassation. The result was that the passage of time barred further legal proceedings on the merits of Italy's case against Dr. Poncet. This sequence of events reinforces the Committee's opinion that Dr. Poncet should have recognized that disclosure of the criminal proceedings would be required if he accepted Rockhopper's appointment to serve on the arbitral Tribunal. The Committee has taken account of Dr. Poncet's professed inability to understand Italy's concern about the omission of the criminal prosecution from his disclosure in considering the impartiality of Dr. Poncet's judgement involving Italy. Dr. Poncet's failure to disclose the Italian criminal proceedings does not appear to have been the sort of inadvertent omission that ordinarily is not given weight in the assessment of an arbitrator's impartiality.

[342] Milan Trial Court, *Sentenza* 7402/96 (December 12, 1996), page 59 (**R-23**).(consideration of documentation between lawyers in chronological order is on pages 59-62).

341. Even had the outcome of the criminal proceedings against Dr. Poncet been vindication of the fullest possible kind, a State that had criminally prosecuted an individual might be expected to have concern, whether or not justified in the assessment of the individual himself, about the disposition of the individual as an arbitrator of serious legal claims against it by foreign investors. In this case, the annulment of Dr. Poncet's convictions was by application of a statute of limitations and other grounds for appeal that he had advanced were not accepted. This is a further and important reason why, given the particular facts of this case, the Italian Republic might have concerns about Dr. Poncet's reliability for the exercise of independent judgment about the functioning of organs of the Italian State.

342. Dr. Poncet did include in his Rule 6 disclosure that, although he himself is Swiss and has no other nationality, his late mother was an Italian citizen.[343] The Italian Republic contends it to have been "rather curious" that Dr. Poncet did not also include his involvement in criminal proceedings along with such information.[344] Rockhopper argues Dr. Poncet's family background to be a fact that should cause the Italian Republic to view his inclusion on the Tribunal favorably.[345] In the Committee's view, because Article 39 prohibits a majority of the tribunal from having the nationality of one of the parties without the agreement of both parties, Dr. Poncet may be understood as having taken into account the perspective of a party in disclosing that his late mother was Italian and that he might therefore be eligible for Italian citizenship. In any event, the Committee believes that Dr. Poncet, applying that standard, should have understood that his involvement in Italian criminal proceedings also needed to be disclosed.

343. Disclosure according to the standard that Rule 6 requires has the function of allowing parties to exercise their rights to propose disqualification of arbitrators pursuant to Article 57, and that right is important for the integrity of ICSID arbitrations irrespective of the outcome of a challenge in a

[343] *See* Letter from ICSID to the Parties attaching the Signed Declaration of Acceptance of Appointment under ICSID Arbitration Rule 6(2) and Accompanying Statement of Disclosure from Dr. Poncet, June 28, 2017 (**C-184**).

[344] *See* Hr. Tr. Day 2, 283:7-18 ("A well experienced arbitrator like Poncet forgot to mention he was involved in criminal proceedings in Italy, and this is rather curious given that he actually remembered in this same proceeding to disclose the Italian nationality of his late mother, a factor said to be less relevant to the arbitration dispute.") (remarks of Italian Republic's counsel).

[345] *See* Hr. Tr. Day 2, 422:19-423:8 ("I think you and I agree with you, Italy that they take two positions; look at these horrendous things he apparently did and weren't directly overturned, and second of all, he must hold a grudge against Italy and therefore be disposed against them. On that second point, I have two things to say. The first is -- and it's one of the reasons, actually I think it's in both decisions that have already been decided -- why would he be upset with Italy? Italy solved this problem for him by a very important Supreme Court decision. To me, if I have an Italian grandmother and the Italian system has done me solid by sorting out something, I am going to be pretty pleased rather than despondent.") (remarks of Rockhopper's counsel).

particular instance. The disclosure that Rule 6 requires each arbitrator to make is provided to the other tribunal members as well as the parties. Rule 6 disclosure for that reason may have bearing upon the consideration of a case even in the absence of a proposal for the disqualification.

344. Rockhopper argues that Dr. Poncet had no obligation to disclose the criminal proceedings because they ended nearly 20 years ago. Rockhopper refers to much shorter periods of time, generally just a few years, for various types of disclosure that are specified in the IBA Guidelines on Conflict of Interest.[346] The Committee does not understand the IBA Guidelines to support the concept of a cutoff date for the disclosure of past relationships and circumstances that ICSID arbitrators are required to make, without reference to time frames, in accordance with Rule 6. There is no inconsistency between Rule 6 and the IBA Guidelines in this respect. The IBA Guidelines do not purport to be exhaustive. They are useful in the types of situations that are likely to come up involving arbitrators. Dr. Poncet's situation in this case did not fall into that category.

345. General Standard 3 of the IBA Guidelines is headed "Disclosure by the Arbitrator" and states as follows:

> "If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules), and the co-arbitrators, if any, prior to accepting their appointment or, if thereafter, as soon as the arbitrator learns of them. Subject to the arbitrator's duty to investigate under General Standard 7(d), in determining whether facts or circumstances should be

[346] The IBA Guidelines are a series of general standards meant to provide uniformity in the approach of arbitrators when faced with a conflict of interest. These are described as "General Standards regarding Impartiality, independence and Disclosure." In addition, the IBA Guidelines contain a section entitled "Practical Application of the General Standards."

The practical application section provides examples of specific situations that do, or do not, warrant disclosure by an arbitrator or the disqualification of an arbitrator. These situations are organized into four lists, as follows: First, a "non-waivable red list": circumstances that objectively present a conflict of interest, and in which an arbitrator cannot act, even with the consent of all parties. Such situations include a direct financial interest in the outcome of the arbitration and a significant business relationship with a party. Second, a "waivable red list"": serious situations in which an arbitrator cannot act unless the parties knowingly agree to waive the conflict. An example is a situation in which an arbitrator advises one of the parties but does not derive significant financial income from the engagement. Third, an "orange list": matters that, depending upon the facts, may lead to justifiable doubts regarding the arbitrator's independence and impartiality. Examples are a past relationship with a party and the involvement of the arbitrator's law firm with one of the parties. Fourth, a "green list": matters where there is, objectively, no apparent or actual conflict of interest, and as a result, no need for disclosure. Memberships in professional organizations and academic advisory boards are examples.

> disclosed, an arbitrator should take into account all facts and circumstances known to the arbitrator."[347]

346. The IBA Guidelines contain an "Explanation to General Standard 3", which states in part (emphasis added):

> "The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. **For its part, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure**."[348]

347. The IBA Guidelines are not applicable in the absence of party agreement in cases arising under the ICSID Convention. General Standard 3 nonetheless may be useful in informing the understandings of ICSID arbitrations about the expectations that parties are likely to have for disclosure provided by arbitrators.

348. An arbitrator in an ICSID case cannot rely on arbitrary time limits in considering whether present or past business or personal relationships or other circumstances might cause a party to question his or her reliability for independent judgement in the case at hand. Any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favor of disclosure. For this reason, an arbitrator must decline an appointment in a situation in which the arbitrator is unwilling to provide necessary disclosure. An arbitrator may need to decline an appointment if secrecy or confidentiality obligations would prevent necessary disclosures from being provided, or to resign if facts that so warrant were not recalled or disclosed when an appointment was accepted but subsequently are brought forth by a party.

349. As discussed above, Dr. Poncet's decision to accept the appointment in the Rockhopper case without including his criminal prosecution in Italy was not a choice Rule 6 allowed him to make, given the circumstances of the annulment of his criminal convictions. Rule 6 is distinctive in the specific form of the declaration required, but the substance of the disclosure it requires is standard in the practice of arbitration. Rule 6 is an allocation of burdens in a way reflecting that arbitrators are in the best position

[347] IBA Guidelines on Conflict of Interest in International Arbitration ("**IBA Guidelines**"), General Standard (3)(a).

[348] IBA Guidelines, Explanation to General Standard 3, subpart (a) (emphasis added).

to know about their own relationships and to assess the circumstances of their personal and professional lives that may appear to be relevant to a party. Rules like this may be thought of as promoting efficiency. They relieve parties of the need to investigate what arbitrators readily know.

350. These considerations regarding Rule 6 have been relevant for the Committee's determination that the Article 52(1)(a) annulment standard has been satisfied because the terms of the Convention do not expressly require disclosure by arbitrators. In the Committee's view, however, disclosure is a usual and necessary requirement for the arbitral system, as Rule 6 exemplifies. For that reason, a tribunal is not properly constituted when an arbitrator's disclosure is made in such a way that the parties' reasonable expectations are frustrated, with the result that they are effectively deprived of procedural rights to challenge the arbitrator. This conclusion is reinforced by the fact that rules requiring arbitrators to disclose the relationships and other circumstances of their backgrounds are in substance duties to warn. It is a bedrock principle in many areas of law such as freedom of navigation and environmental and climate law that the party with greater access to knowledge of perils has a duty to inquire and to warn. That principle is applicable in the circumstances of this case. In the Committee's view, the defectiveness of Dr. Poncet's disclosure provides a basis for annulment.

351. In ICSID arbitrations, the requirement of the Convention that arbitrators must be persons of high moral character also reinforces this understanding of what is required of members for a tribunal to be properly constituted. The qualities specified in paragraph (1) of Article 14 have to entail that the interests of parties will be considered and put before an arbitrator's own interest when an appointment is accepted. For this reason, parties to ICSID arbitrations have a right to expect that an individual who accepts an appointment to serve as an arbitrator will fully disclose relationships and circumstances to ensure the integrity of the proceedings.

(2) Dr. Poncet's Qualifications to Serve on the Tribunal

352. In the underlying Arbitration, paragraph (1) of Article 14 was applicable to Dr. Poncet because Article 40 operates to ensure that all arbitrators appointed to decide a dispute arising under the ICSID Convention must possess high moral character and be reliable for the exercise of independent judgment, whether or not they are members of the ICSID's Panel of Arbitrators.

353. There have been two strands of argument by the Italian Republic that Dr. Poncet does not possess the qualities required by (1) of Article 14. First, the Italian Republic has characterized the criminal charges against Dr. Poncet as relating to his subverting the administration of justice as a lawyer and thus calling into question his reliability for the exercise of the independent judgment required of arbitrators, as well as his moral character more generally. Second, the Italian Republic has argued that what it describes as Dr. Poncet's "entanglement with the Italian criminal system"[349] gives rise to legitimate concerns that Dr. Poncet may feel himself to have been ill-treated by Italy and thus that his judgment may be affected by grievance. Rockhopper's primary opposition to both strands of the Italian Republic's argument has been that Dr. Poncet's criminal convictions were annulled in the Court of Cassation. As a result, in Rockhopper's view, Dr. Poncet had nothing to disclose and Italy's arguments that the Tribunal was not properly constituted with him as a member "are wholly without merit."[350]

354. Rockhopper also has made submissions about Dr. Poncet's state of mind regarding Italy. First, Rockhopper argues that Dr. Poncet should be understood to feel only gratitude toward Italy because his criminal convictions ultimately were annulled. Second, Rockhopper submits that the dismissal of a proposal for Dr. Poncet's disqualification in another arbitration against Italy, because one of the two arbitrators who dismissed that challenge previously had served as president of the *Rockhopper* Tribunal, is evidence that Dr. Poncet is not actually biased against Italy.

355. With respect to this last point, it should be recalled that Dr. Poncet was appointed by the claimants, represented in each case by King & Spalding, in both the *Rockhopper* arbitration and the *VC Holding* arbitration. The Italian Republic appointed a different arbitrator for each case. In each of the two arbitrations, Dr. Poncet together with the arbitrator appointed by the Italian Republic selected Mr. Reichert as president. The Italian Republic simultaneously requested annulment of the Award in the *Rockhopper* arbitration and Dr. Poncet's disqualification from the tribunal in the *VC Holding* arbitration. Mr. Reichert was one of the two unchallenged arbitrators who decided the Italian Republic's challenge to Dr. Poncet in the *VC Holding* arbitration.

356. In an annulment proceeding, an *ad hoc* committee does not perform the same function as two arbitrators presented with a proposal for the third arbitrator's disqualification based on these same

[349] *See* Reply Memorial, ¶52.

[350] *See* Counter-Memorial, ¶71.

requirements. An arbitrator cannot be disqualified from participating in an arbitration that has already been concluded, and Rule 9(3), which allows an arbitrator whose disqualification has been requested to furnish explanations, is not applicable. In the Committee's view, when annulment is requested on the ground of Article 52(1)(a) based on facts that came to light only following the rendering of an award, the tribunal should be considered to have been not properly constituted if an objective third party, knowing all the facts, would consider there to be reasonable grounds for doubt than an arbitrator possessed the qualities that paragraph (1) of Article 40 requires. This standard of appraisal is in substance the same as the *EDF* committee articulated and the *Eiser* committee also used.[351]

a. The Italian Court Decisions and How Article 52(1)(a) Requires Them to Be Taken into Account

357. Rockhopper's pleadings indicate that, as an initial matter, a reconciliation should be made between the usual expectations about the type of analysis that an *ad hoc* committee will use in evaluating an annulment request, and the analysis that is required for the Italian Republic's annulment claims based upon Dr. Poncet's qualifications and disclosure. In its initial written submission, Rockhopper stated that annulment committee practice and jurisprudence "have confirmed the following key principles", the second of which is that "the annulment record is limited to the record available in the underlying arbitration."[352] In a footnote to that key principle, Rockhopper stated as follows: "The exception is where the annulment ground itself relates to allegedly new facts, *e.g.*, as Italy alleges with respect to the Poncet issue."[353] Returning to the matter of "new facts" in its second written submission, however, Rockhopper contended that the Committee "must disregard" what it referred to as "Italy's thinly veiled attempt" to "obtain a *de novo* review on appeal of the Poncet Issue", because "ICSID awards are not subject to any appeal under the Convention (see Article 53(1))."[354] Rockhopper's conclusion was that "for this reason alone" Italy's invitation for the Committee to "act as an appellate body and delve into

[351] See *EDF*, ¶111 ("In the opinion of the Committee, the standard applied under Article 14(1) is whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality.")

[352] Memorial on Annulment, ¶14. *See generally MTD*, ¶31 ("Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.")

[353] Counter-Memorial, ¶14 n.13.

[354] Rejoinder, ¶48 n.80.

the minutiae of the facts and legal consequences" of the criminal proceedings against Dr. Poncet was "improper."[355]

358. It is unusual for the records in annulment proceedings to include any materials that were not part of record in the underlying arbitration (apart from jurisprudence and other legal authorities pertaining to the annulment grounds themselves). This is because, as discussed above at paragraphs 220-223, the subject matter of annulment proceedings is almost always the decision-making process of the tribunal in the underlying arbitration. The function of proceedings under Article 52(1) is not to correct decisions that arbitrators were entitled to make. It certainly is not to correct arbitrators' decisions based on facts that were not available to them.

359. When, as here, an arbitrator's disclosure and qualifications are said to be called into question by newly discovered facts, however, there is no risk of second guessing the tribunal to be guarded against. There is nothing to second guess. In a case like this one, annulment is not an appeal in an even more fundamental sense than in most annulment proceedings – with respect to the Article 52(1)(a) request, it is not just that the tribunal's decision is not to be reviewed for its substantive correctness. There is no decision in the underlying arbitration to be reviewed at all.

360. The fact that most grounds for annulment require *ad hoc* committees to consider the decision-making of the tribunal in the underlying arbitration, rather than directly to consider the underlying facts, does not mean that an *ad hoc* committee is unable to consider facts that were not part of the underlying arbitration when the claimed ground for annulment requires them to be considered. As the *EDF* committee observed, in a case like this one, "an *ad hoc* committee has to approach the matter *de novo*"[356] in the sense that there can be no prior rulings to be considered, according to any standard, when the matters requiring decisions were not at issue in the underlying arbitration. When, as here, facts that are contended to have come to light only after an award was rendered are claimed to establish that the tribunal was not properly constituted, an *ad hoc* committee rules on the Article 52(1)(a) claim as a first-instance decision-maker on new facts, rather than as *ad hoc* committees typically do when

[355] Rejoinder, ¶48 n.80.

[356] *See EDF*, ¶88.

annulment is requested on one or more of the three grounds that are relied upon in most annulment proceedings.

361. The adage that "annulment is not an appeal" does not prevent the Committee from considering the decisions of the Italian courts, as Rockhopper has argued. The decisions of Italian courts exist and, because they exist, the decisions as such are facts. The decisions have effects in the Italian legal order, and those effects are facts as a matter of international law. The decisions of the Italian courts are also facts that evidence what Dr. Poncet experienced in Italy. Considering these facts and assessing the effect they should be viewed as having had on Dr. Poncet's reliability for the exercise of independent judgment in an arbitration involving Italy will not transform this Committee, impermissibly, into an Italian court of appeals. It is for Italian courts to make decisions on criminal law matters arising under Italian law, not for ICSID arbitral tribunals or *ad hoc* committees. Considering the Request for Annulment does not require the Committee to review the decisions of the Italian courts as an appellate court might a decision of a lower court, contrary to Rockhopper's submission. Rather, the Committee takes account of the decisions of the Italian courts in deciding whether grounds for annulment under Article 52(1)(a) have been established.

362. In the circumstances of the current case, how and why Dr. Poncet's convictions were annulled may be relevant for the assessment of his reliability for independent judgment involving Italy. By way of illustration, whether or not it is a correct characterization, the Italian Republic's position in this case has been that the application of the statute of limitations in the Court of Cassation was a "technicality."[357] There are some people for whom it would be infuriating to be in a position in which that might be said after having endured a long criminal prosecution. This may be true even if there is also relief or even gratitude that an ordeal has come to an end.

b. The Claim that there are Reasonable Grounds to Question Dr. Poncet's Reliability for the Exercise of Independent Judgment in Rockhopper's Case against Italy

363. The impartiality that Article 14(1) entails and that Article 40 requires all arbitrators to have in each ICSID case is a quality of mind having to do with the absence of predispositions and prejudices. It follows that impartiality may have to do with an individual's past and present relationships and other

[357] *See* Reply Memorial, ¶64 ("As a matter of record, Dr. Poncet only managed to avoid serving time in prison because of a mere technicality arising out of a statute of limitations under Italian law.")

circumstances. For these reasons, impartiality has to be assessed case-by-case, depending upon the parties and matters involved. In this case, unlike *Zeph Investments*, Dr. Poncet's reliability for the exercise of independent judgment is questioned in relation to the State that prosecuted him and sentenced him to prison.[358] Accordingly, the questions that Dr. Czepelak identified as being relevant for the analysis of Dr. Poncet's impartiality as an arbitrator in a case involving Australia are different than the questions that this Committee believes to be presented by Dr. Poncet's appointment in an arbitration against Italy. Bearing in mind the discussion of the applicable legal standard at paragraphs 181 to 267 above, the effects on Dr. Poncet's state of mind toward Italy and its institutions that may have resulted from his experience of the Italian criminal proceedings are relevant for the assessment of his reliability for the exercise of independent judgment in Rockhopper's case against the Italian Republic.

364. All Parties agree that it is an important consideration for the analysis of Italy's Request for Annulment that Dr. Poncet's criminal convictions were annulled in the Court of Cassation. Dr. Poncet, due to the annulment, has no criminal record in Italy. This is because, as a result of the Court of Cassation's annulment decision, the prior decisions of the trial court and of the intermediate appellate court have no legal consequence in Italy. Within the Italian legal order, it is as if the decisions of the lower courts had never been made in the first place. If the question at hand were the legal consequences for Dr. Poncet of the legal proceedings in Italy, given the annulment of his convictions by application of the statute of limitations in the Court of Cassation, it would be appropriate to concentrate on just what finally happened, rather than his criminal prosecution and the trial and appellate decisions. But the standard under the Convention is not that an arbitrator is entitled to accept every offer of appointment, provided that a search of the criminal records database of the State that is the respondent in the case does not show criminal convictions.

[358] *See, e.g.,* Hr. Tr. Day 1, 57:10-58:5 ("A third person would reasonably believe that Dr Poncet, having been previously prosecuted and convicted by the Italian judiciary, might be predisposed against Italy. It does not matter that Dr Poncet's conviction was annulled by the Italian Supreme Court. The Italian state prosecuted Dr Poncet for a criminal wrongdoing and two levels of the Italian court system found him guilty. Most importantly, Poncet was never acquitted. Therefore the Italian courts never vindicated his innocence, nor repaired his reputation. The Italian judiciary [limited itself to annulling] because of *prescrizione* and the decision of the Court of Appeal that had confirmed Poncet's conviction, therefore suggesting that Poncet can only be grateful to the Italian courts for eventually acquitting him is plainly wrong. The Italian courts sent him to jail. It was the mandatory application of an Italian statute of limitation that provided the escape, certainly not a favorable review of Dr Poncet's conduct.") (remarks of counsel for the Italian Republic).

365. The annulment decision of the Court of Cassation does not change matters of historical fact. The collapse of *Banco Ambrosiano* and the proceedings that followed had national significance in Italy. There was worldwide attention due to the questions that were raised about the functioning of Italian institutions and the exercise of power over them. The criminal charges against Dr. Poncet were that he had knowingly created false documentary evidence and aided and abetted perjury to cover up bribery by principal players in *Banco Ambrosiano's* collapse. The Italian Republic's case was that, as a lawyer, Dr. Poncet had engaged in an attempted subversion of the administration of justice.

366. An Italian trial court, affirmed on appeal, found that Dr. Poncet had committed the acts with which he had been charged. The trial court and intermediate appellate court rejected Dr. Poncet's defense that, although he may have participated as a lawyer in the creation of false evidence, he had not been aware in doing so that the transactions he documented had been fabricated. With respect to Dr. Poncet's knowledge of the fictitiousness of the transaction he documented, the Italian trial and appellate courts found that documentary and the other oral evidence of multiple witnesses supported the conclusion that a lawyer of Dr. Poncet's experience would have had to understand the transaction purportedly documented to have been a fabrication, rejecting Dr. Poncet's contrary arguments.

367. Ultimately, after nearly a decade of investigation and court proceedings, the Italian equivalent of a statute of limitations ran out while Dr. Poncet's final appeal of his convictions was still pending. Accordingly, the Italian Court of Cassation applied the time bar and annulled Dr. Poncet's criminal convictions.

368. In its decision, the Court of Cassation also explained that, due to changes in Italian law that occurred while Dr. Poncet's was appealing his convictions, there would have had to be remand had his convictions not been annulled by application of the time bar. This was on account of Mr. Delaney's refusal to answer questions, which had frustrated Dr. Poncet's right to confront the evidence against him at trial. In this annulment proceeding, there has been heated disagreement between the two sides as to whether the Court of Cassation should be understood to have communicated grave doubts about the merits of Dr. Poncet's convictions (Rockhopper's position), or whether the Court of Cassation would have had to acquit Dr. Poncet if such doubt existed (the Italian Republic's position).

369. It is not the function of this annulment proceeding to get to the bottom of whether Dr. Poncet knew, or did not know, that documents and testimony that he prepared in connection with the collapse of

Banco Ambrosiano decades ago pertained to a transaction that had been falsified. The Committee wants it to be clear that it would be a mistake for this Decision to be regarded as an attempt to do that.

370. The question of concern to the Committee, which agrees with the approach of the *EDF* committee in this regard, is whether the Italian Republic, as the party seeking annulment, has established facts, the existence of which would cause a reasonable person, with knowledge of all the facts, to consider that there were reasonable grounds for doubting that Dr. Poncet possessed the reliability for the exercise of independent judgment in the underlying Arbitration that the ICSID Convention requires. In the Committee's view, the Italian Republic has carried its burden in the current case. An objective observer, taking account of all the facts about Dr. Poncet's criminal prosecution in Italy, could have concerns that Dr. Poncet may be affected by biases or prejudgements regarding the Italian State and the operation of its organs that call into question his reliability for the exercise of independent judgement as an arbitrator of Rockhopper's claims against the Italian Republic. The legal effect of the Court of Cassation's decision matters, but how the criminal proceedings may have affected Dr. Poncet as a person also matters. When assessing the disposition of an individual toward a State that has criminally prosecuted him, the individual's experiences involving the State's prosecutors and trial and intermediate courts may continue to be relevant considerations even if the State's judiciary, at its highest level, has annulled the individual's convictions.

371. Rockhopper makes two arguments in this respect. First, it notes that, however Dr. Poncet's reliability for the exercise of independent judgment may appear to an objective observer on account of the criminal proceedings, there is reason to believe that Dr. Poncet, in fact, was not actually biased against Italy. In this context, Rockhopper relies upon Dr. Poncet's statement in *VC Holding* about his being "grateful" that the Italian Supreme court corrected the wrong decisions of the lower courts.[359] The Italian Republic's response that an individual "who owes a debt of gratitude to a disputing party does not and cannot inspire "***full confidence***"[360] is a fair counterpoint. For that reason, the exchange illustrates the malleability of arguments[361] about the subjective mental states of other individuals,

[359] *See* fn 345.

[360] *See* Reply Memorial, ¶64 (emphasis in original).

[361] At the hearing, a second component of Rockhopper's argument that Dr. Poncet was not actually biased toward Italy was that his only grudge was against Mr. Delaney. *See* Hr. Tr. 423:9-24 ("The second thing is -- and I'm going to show you evidence on this to back up what I'm saying -- the only grudge that someone like Dr Poncet has is against Dr Delaney. It is not the Italian

which is one reason why the independence and impartiality of arbitrators is assessed using an objective standard.

372. Rockhopper's second argument on this point is that, because one of the two unchallenged arbitrators who denied the proposal for Dr. Poncet's disqualification in *VC Holding*, namely Mr. Reichert, had been president of the Tribunal in the *Rockhopper* arbitration, the rejection of the challenge in *VC Holding* should be regarded as "very good evidence" that Dr. Poncet was not actually biased against Italy in the Arbitration underlying this annulment proceeding. Rockhopper made this argument as follows at the hearing:

> "Now, a bare assertion based on speculation that someone has a grudge isn't evident or obvious appearance of lack of impartiality or independence, and I will come on to very good evidence that we do have that suggests the contrary is true, and you may recall that the *VC Holdings* [sic] decision which rejected similar arguments was chaired by Klaus Reichert and Professor Stern, and what we will say on that is that if Mr Reichert had been informed of what he had heard formed the view in that case that Dr Poncet had a grudge against Italy or he had seen anything during the course of this case, there is no doubt he would have reached a different view because he would have said to himself, I am satisfied there is a lack of impartiality or independence or moral character because sitting in an Italy case he did these things, but he didn't."[362]

373. Rockhopper's position is that, even if there would appear to an objective third party to be good reasons for concerns about Dr. Poncet's qualifications as an arbitrator for the *Rockhopper* case, that should not matter if there is good enough evidence – which Mr. Reichert's participation in the dismissal of the disqualification motion in *VC Holding* is said to be – that Dr. Poncet actually is not biased against the Italian Republic in the way that he appears to be. The predicate for Rockhopper's argument thus is

court system that's at fault. It is all Delaney. Delaney threw him under a bus on the basis of no evidence and then disappeared and then took the fifth. And I will show you three or four contemporaneous pieces of evidence where he aims his ire at Mr Delaney. So let's assume this was a dispute between Mr Delaney or Mr Delaney's estate and Rockhopper who had been appointed, then I take your point, you probably should say, well, I hate Delaney because he wrongly accused me of something. It's not Italy, it's Delaney.") (remarks of Rockhopper's counsel).

[362] Hr. Tr. Day 1, 137:21-138:13 (remarks of Rockhopper's counsel). *See also* Hr. Tr. Day 1,139:5-12 ("[…] Mr Reichert's involvement in *VC Holdings* [sic] is important because if he honestly thought that something happened during the Rockhopper case that suggests to me with the benefit of hindsight, knowing all of this, that Dr Poncet influenced me and my fellow arbitrator on something, you would expect to hear about it in *VC Holdings* [sic], but you don't.") (remarks of Rockhopper's counsel).

that the appearance of bias is merely a proxy for actual bias and that the appearance of bias does not matter in and of itself. The Committee does not agree.

374. It is true that the "appearance of bias" is sometimes used in arbitrations merely as an expedient, whether for the sake of a type of practicality, or due to the difficulty inherent in making judgements about states of mind. For example, in some situations in which actual bias has been detected, an arbitrator may be disqualified for the "appearance" of bias as a fig leaf. In that way, what is true but more uncomfortable to say can be avoided.

375. In a similar vein, the IBA Guidelines are based upon situations that give rise to an appearance of bias due to the difficulty of establishing actual bias. The IBA Guidelines use lists of various circumstances that correlate with green, orange and red levels of concern about the existence of a possible conflict of interest. The lists are useful because whether actual favoritism has resulted is more difficult to know than how many times a particular law firm has appointed a particular arbitrator over a stated period.

376. But the appearance of independence and impartiality of arbitrators also matters in and of itself and must be maintained if there is to be confidence in arbitration. For that reason, the rule that an arbitrator may not sit in a case when there is justifiable reason for the arbitrator's impartiality to be questioned cannot be avoided by arguing that another tribunal member has inferred a lack of actual bias from observing the arbitrator's conduct in private. More particularly, the decision of the Unchallenged Arbitrators does not purport to be based on Mr. Reichert's assessments of Dr. Poncet's conduct in the *Rockhopper* arbitration, and there are reasons why a third party might discount the subjective assessments of a co-arbitrator in considering whether there is reason to doubt an arbitrator's suitability as a tribunal member.[363]

377. It is particularly important for arbitrators in ICSID cases not only to possess, but also to be seen by others to possess, the quality of judgement necessary to rule fairly on the facts and law. In contrast with most arbitrations arising out of commercial contracts, which tend to be of concern principally to the private parties to them, treaty-based arbitrations have a public quality. Arbitrators in ICSID cases pass judgement on the acts of States. The review of acts of States by arbitrators in ICSID cases often touches upon sensitive and contentious areas of sovereign prerogative such as environmental

[363] *See generally Vivendi II* (referring to expert report of Professor Mistelis; discussed above at paragraph 235).

protection and energy transition, as was the case in the Arbitration subject to this annulment proceeding. Decisions of arbitrators in treaty-based arbitrations are, in effect, allocations of public funds when damages are awarded to investors. That is true of the Award against the Italian Republic and in favor of Rockhopper. The architects of the ICSID system incorporated language from the Statute of the International Court of Justice to articulate the qualities to be required of members of the ICSID Panel of Arbitrators[364] and, by virtue of Article 40, every arbitrator in every ICSID arbitration. Because tribunals in cases that are brought pursuant to the ICSID Convention rule on matters of public importance and effectively allocate public funds when States are ordered to pay damages, the ICSID Convention requires every arbitrator to be seen to have the independence and impartiality that are required for there to be public confidence in the awards of ICSID tribunals.

c. Italy's Argument Regarding Dr. Poncet's Moral Character

378. High moral character, as a concept, can be contested. It can mean different things to different people. The meaning may change over time and across cultures.

379. The ICSID Convention took the term "high moral character", as a requirement for inclusion on the Panels of Arbitrators or the Panel of Conciliators, from the Statute of the International Court of Justice,[365] which aids in understanding what it entails for arbitrators in ICSID cases. It has been common ground in this proceeding that the possession of high moral character has to do with a disposition to think, feel and behave in an ethical versus unethical manner. The Committee understands Article 40 of the Convention to require arbitrators to be individuals who will do what is right, and not do what is wrong, even when there might be utility in doing otherwise. Fundamental for the possession of high moral character by an ICSID arbitrator is concern for the interests of others that can come at the expense of one's own interests.

380. The Italian Republic does not argue only that the criminal proceedings in Italy against Dr. Poncet gives rise to justifiable questions about his reliability for the exercise of independent judgment regarding the

[364] *See* ICSID, *History of the ICSID Convention*, 728 (Vol. II-2 2006): "Mr. BROCHES (Chairman) said that the phrase came out of one of the documents concerning the International Court of Justice […]." (**RL-0084a**). *See also* ICSID, *History of the ICSID Convention,* 729 *(*Vol. II-2 2006) ("Mr. BROCHES (Chairman) canvassed the views of the meeting and announced that the majority appeared to favor the retention of this phrase in the Draft"), *and* 970 ("Mr. Woods said that there was a substantial majority in favor of leaving the reference to 'high moral character' as it stood.") (**RL-0084a**).

[365] *See* Christoph H. Schreuer, *The ICSID Convention, A Commentary* 4 (Christopher H. Schreuer et al. eds., 2nd ed. 2009) (**RL-81**).

State that criminally prosecuted him. The Italian Republic further argues that the criminal proceedings establish Dr. Poncet's lack of high moral character, and thus his lack of qualification to serve as an arbitrator in any ICSID arbitration involving any State. To this end, the Italian Republic suggests that the high moral character that the Convention requires of arbitrators is higher than that of the average person.[366]

381. Italy's primary claim by reference to Article 40 of the Convention is that the convictions of Dr. Poncet compel the conclusion that he lacks high moral character even though the convictions were annulled as a matter of Italian national law. The crux of the Italian Republic's argument that the conviction should be given such effect notwithstanding their annulment is that the annulments resulted from application of the statute of limitations — that is, the annulments of Dr. Poncet's convictions were "linked to a natural occurrence, *i.e.*, the passage of time", as the Italian Republic puts it at paragraph 96 of the Memorial on Annulment — rather than acceptance of Dr. Poncet's version of events or the legal grounds he advanced in his appeals.

382. The Committee is not prepared to give the effect that the Italian Republic urges to convictions that were annulled in the Court of Cassation, whatever the reason for the annulments. In the Committee's view, the presumption of innocence forecloses the acceptance of positions that the Italian Republic has urged in this annulment proceeding.

383. Further, Italy has not established that the Committee should draw a conclusion of its own that Dr. Poncet is unsuitable to serve as an ICSID arbitrator in any case based on the facts underlying the annulled convictions. There are many reasons why the Committee should not do so. For example, Italy has not even attempted to make a presentation of the facts of decades ago in a manner that would allow an independent assessment of them to be made. The Committee also does not believe that the criminal convictions that have been annulled, whatever the reason, with the result that the individual

[366] The Italian Republic submits as follows: ("It is not basic morals that the ICSID Convention expects of its arbitrators. It is high morality, the morality of ICSID arbitrators is expected to be higher than the morality expected of or desired from the average person. It is also higher than the morality expected of commercial arbitrators, who must perform their duty lawfully, of course, but are not required to possess high moral character.") Hr. Tr. Day 1, 29:21-30:4 (remarks of counsel for the Italian Republic).

in question has no criminal record, should be viewed, as argued by Italy,[367] as analogous to an administrative or quasi-judicial proceeding that has resulted in disciplinary action.

384. The Committee notes for the sake of completeness Rockhopper's presentation of other matters that it says should be given weight in an assessment of Dr. Poncet's character, including that Dr. Poncet has had a long, varied and distinguished career during the many years since the collapse of *Banco Ambrosiano* and the criminal proceedings against him relating to the aftermath. Dr. Poncet's work as a lawyer has included service as an arbitrator in many ICSID arbitrations and other significant international disputes.

385. The Committee also notes that its considerations have not been colored by articles from *Il Giornale*[368] and *Global Arbitration Review*[369] that are in the record in this proceeding but that the Italian Republic

[367] *See* Memorial on Annulment, ¶105 (*relying* upon Council of Europe, *The Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights: A short guide on the Panel's role and the minimum qualifications required of a candidate*, p. 7 (**RL-121**), for the proposition that "'the absence of conviction for crimes [has] been mentioned as [a] key component[]'" of 'high moral character'" (brackets in original), *and* Advisory Panel, Fourth activity report for the attention of the Committee of Ministers, ¶ 40 (**RL-122**) ("Of course the Panel must assume that a judge or jurist presented as a candidate by a Government is of high moral character, absent any objective element, such as a record of a disciplinary or criminal offence, in the material provided to it."); Memorial on Annulment, ¶106 (*arguing* that, at the ICC, the Bureau of the Assembly of States Parties has established a due diligence process to receive, review, and report allegations and concerns "with respect to the high moral character of any of the shortlisted candidates" for ICC Registrar, involving not only a "background check of criminal … records" of the candidates but is broad enough to cover allegations of "misconduct" including "ethical or legal breaches of a serious nature" and *relying* upon ICC Bureau of the Assembly of State Parties, *Proposal by the Presidency on Due Diligence Process for Candidates for Registrar* (June 2022), ¶¶6, 16 (**RL-116**)).

[368] The Decision of the Unchallenged Arbitrators in *VC Holding* sets forth at paragraph 30 Dr. Poncet's criticism of Italy's counsel for what he said were misleading and incomplete submissions regarding a matter reported in *Il Giornale*. The Decision of the Unchallenged Arbitrators says that "Respondent states that the Claimants have 'unearthed an additional investigation on Dr. Poncet in Italy'" (Decision of the Unchallenged Arbitrators in *VC Holding*, ¶15), but that no "inference of any kind is established in connection with the high moral character of Charles Poncet" and that "the few media reports we have seen indicate nothing other than Charles Poncet discharging his professional duties as a lawyer in the ordinary course" (Decision of the Unchallenged Arbitrators in *VC Holding*, ¶51). The article, dated September 19, 2009, is one that Rockhopper submitted into the record in this proceeding to show that the criminal proceedings against Dr. Poncet in connection with Banco *Ambrosiano*, which the *Il Giornale* article references in a context paragraph, were reported as late as 2009 (*see* Paolo Stefanato, *Margherita Agnelli: indagate ex legali*, Il Giornale, September 19, 2009 (**C-187**)). Rockhopper made that submission in support of its argument that Italy should be deemed to have waived any argument based on objection to Dr. Poncet's qualifications. (*See* Counter-Memorial, ¶72.4 n.126; Rejoinder, ¶32 n.56.). In this case, the other matter reported by *Il Giornale* has not been submitted to be relevant for the assessment of Dr. Poncet's possession of the qualities specified in Article 14(1).

[369] The Supplemental Submission of the Italian Republic regarding *Zeph Investments* submitted at paragraph 13 that a premise of the dismissal of the challenge in that arbitration – that there had never been "any 'issue of integrity'" in Dr. Poncet's performance of his duties as arbitrator (*quoting Zeph Investments*, ¶67) – was not correct. The Italian Republic submitted a media report about a decision in which Dr. Poncet was disqualified from sitting as an arbitrator in an ICC arbitration, *Crescent Petroleum v. National Iranian Oil Company (see* Sebastian Perry, *Poncet disqualified from Iranian mega-case after "burkini" remarks*, Global Arbitration Review, November 30, 2023. (**R-43**)) for reasons not having to do with any of the matters at issue

has not directly relied upon for its argument that Dr. Poncet lacks high moral character. The Italian Republic's submission of the first article was for the stated purposes of showing that the criminal proceedings involving Dr. Poncet, which were mentioned in the article as contextual information, were publicly reported. The Italian Republic's submission of the second article was for the stated purpose of showing that Dr. Czepelak was incorrect in stating that no issue of integrity had been raised in connection with Dr. Poncet's performance of arbitral duties during the years since the annulment of his criminal convictions in Italy.

(3) Whether Italy Should Be Precluded from Requesting Annulment

386. Rule 9 of the Arbitration Rules states as follows:

> "A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor."

387. Rule 27 of the Arbitration Rules states as follows:

> "A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceedings, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object."

388. For the reasons set forth above at paragraphs 214-247, the Committee does not understand the wording of Rule 9 to preclude the consideration of an application for annulment on the basis that a tribunal was not properly constituted due to the lack of qualification of an arbitrator when the facts on which such a request came to light only after the close of the proceedings. This understanding of Article 52(1)(a) is consistent with the function of *ad hoc* committees to safeguard the integrity of arbitral proceedings and aligns this Committee with the decisions beginning with *Vivendi II* and departing from the reasoning of *Azurix*. The question remains, however, whether a party claiming to have learned of facts

in the proceeding. The Italian Republic has not presented the reported matter as part of its claim that Dr. Poncet does not possess the qualities specified in Article 14(1). (*See* Hr. Tr. Day 1, 56:7-14 (remarks of counsel for the Italian Republic).

only after the rendering of an award knew, or should have known, of those facts while the arbitral proceedings were being conducted.

389. It is commonly said that disclosure by arbitrators provides parties with the opportunity to challenge their appointments. But disclosure by arbitrators is also a way of ensuring the parties cannot engage in procedural abuse by withholding challenges. A party receiving full and complete disclosure from an arbitrator is on notice. Such a party must either promptly seek the arbitrator's disqualification, or forfeit the right later to raise the qualification of the arbitrator in a challenge to the award or to resist its enforcement. In the underlying arbitration in this case, however, Dr. Poncet's Rule 6(2) Statement did not disclose his involvement in criminal proceedings in Italy, with the result that the Italian Republic cannot be said to have been provided with notice of the relevant facts at the outset of the Arbitration.

390. Concern that the Italian Republic should have made its objection earlier in the proceeding nonetheless has been front and center for the Committee from the first reading of the Request for Annulment. The Italian Republic states that it became aware that Dr. Poncet had been prosecuted and sentenced in Italy for aiding and abetting perjury only after the Award became public as a result of an anonymous communication to the office of its Attorney General.[370] Whether or not a party can argue that an arbitrator failed to make disclosure that would have prompted earlier investigation,[371] it must be cause for concern whenever a party comes forward with what is in substance a challenge to an arbitrator only after losing an arbitration.

391. The Committee's concern about the timeliness of the Italian Republic's objection to Dr. Poncet was particularly great because, according to Rockhopper, a simple Google search of Dr. Poncet's name was all that would have been necessary for the lawyers representing the Italian Republic in the

[370] Request, ¶¶49-50. *See also above*, ¶150.

[371] Reply Memorial, ¶22 ("Here, there was no reason for Italy to investigate into Dr. Poncet's criminal dealings prior to the receipt of the anonymous complaint. Unlike the movant for disqualification in CEMEX, Italy did not have in hand any element that would have prompted it to investigate into Dr. Poncet at the time of his appointment, let alone formulate a challenge against him. Without any prompt.")

Arbitration to be aware that Dr. Poncet's had been prosecuted in Italy. The following is the statement from Rockhopper's Counter-Memorial:

> "81. […] Italy did not need an 'anonymous communication' to become aware of the convictions, **it simply needed to type Dr Poncet's name into Google**. Italy's claim about an alleged anonymous tip-off is highly convenient for Italy, since the tip-off call was allegedly received shortly after the Tribunal issued the Award in Rockhopper's favor which ordered Italy to pay compensation, and before the expiry of Italy's deadline to make an annulment application."[372]

392. The implication of Rockhopper's pleading was that the Committee should question the credibility of lawyers responsible for a serious dispute who professed not to have been aware of important facts that were so readily available. Rockhopper made this implication of its Counter-Memorial express at the Hearing, when it asked the Committee the following rhetorical question:

> "Do you find it plausible that no one from Italy in this entire case, during the course of it, googled Dr Poncet?"[373]

393. The record of the annulment proceedings does not establish it to be the case, however, that a simple internet search of Dr. Poncet's name would have turned up any information indicating the existence of the criminal prosecution, or any information indicating any involvement by Dr. Poncet in connection with the failure of *Banco Ambrosiano*. Rockhopper has submitted with its Counter-Memorial four newspaper articles reporting on Dr. Poncet's criminal convictions, three from the 1990s and one dated 2009.[374] The documentary record thus shows that Dr. Poncet's criminal convictions in Italy are matters of public record in the sense that there were press reports about them some years ago, but not that simply typing Dr. Poncet's name into Google would have turned them up.

394. Nor has Rockhopper used the Wayback Machine's digital archives to research and present evidence of copies of defunct webpages, as Rockhopper might have if a simple Google search of Dr. Poncet's name would have generated hits showing his criminal convictions in Italy. Rockhopper's counsel

[372] Counter-Memorial, ¶81 (emphasis added).

[373] Hr. Tr. Day 2, 453:23-25 (remarks of Rockhopper's counsel).

[374] *See* Counter-Memorial, ¶80 n.184.

confirmed at the hearing that Rockhopper was not able to say whether information about Dr. Poncet's criminal convictions had been available on the internet prior to their being set forth as part of the Italian Republic's Annulment Request.[375] The Rockhopper side itself had not searched Dr. Poncet's name using Google.[376]

395. Rockhopper also has argued that "[s]omething is clear [sic] off with Italy's version of events"[377] based on a discrepancy between two dates. It appears from contemporaneous documentation that Italy's Attorney General requested the full record of the cases involving Dr. Poncet in a letter dated September 29, 2022.[378] Rockhopper's submission is as follows:

> "Even more curiously, Italy's account of its Attorney General's Office receiving an 'anonymous communication' on 30 September 2022[50] about the Poncet Issue does not square with the fact that the Attorney General, Gabriella Palmieri Sandulli, signed the aforementioned letter to the Italian courts requesting the full record of the cases involving Dr Poncet <u>one day earlier</u>, on 29 September 2022."[379]

[375]The following exchange with Rockhopper's counsel occurred at the hearing (Hr. Tr. Day 2, 455:5-456:4): "MS KALNINA: When you say had they googled they would have found it out, of course today we google, there is plenty on Dr Poncet in light of the recent challenges, but those, I don't know how many, four years ago, would that have been the case?

MR SPRANGE: Yes. I can't reconstruct Google from five years ago --

MS KALNINA: I am surprised that you think that proceedings of 30 years ago would have been easily available on Google, given that this had not really been aired in other cases.

MR SPRANGE: It is not so much the proceedings, it is the press reports. So we have done it now and I accept now is different, but if you put Dr Charles Poncet and Italy in you certainly get things unrelated to the current challenges. My point is this, the burden is very much on them to show that they didn't have knowledge upon his appointment, and not only have they not discharged that burden, they have conceded to you today that there is no evidence that they didn't have knowledge and that is an important concession, so the next question is plausibility of them not knowing, and I only refer to two things on the plausibility of that."

[376] Hr. Tr. Day 2, 454:12-20 ("I did not google him because he is somebody I have been aware of for a long, long time. What I am saying is this, when I get thrust upon me a tribunal, so if somebody, a party-appointed tribunal member, or an annulment committee, or a tribunal appointed by an institution where you haven't made the choice, the first thing you do is you google, we appointed Poncet to an important case.") (remarks of Rockhopper's counsel).

[377] *See* Rejoinder, ¶29.

[378] Letter from Attorney General Sandulli to the Offices of the Secretaries of the President of the Court of Cassation, the Milan Trial Court, and the Milan Court of Appeal, Official Request on Charles Poncet Case, September 29, 2022, page 2 ("*Firmato digitalemente da GABRIELLE PALMIERI Data: 2022.09.29*") ("Signed digitally by Gabrielle Palmieri Date: 2022.09.29") (free translation provided by Rockhopper's counsel) (**R-18**).

[379] *See* Rejoinder, ¶29 (emphasis in original).

396. Footnote number "50" in the block quotation is to paragraph 82 of Italy's Memorial on Annulment, which states as follows:[380]

> "29. In the present case, Italy did not know and could not have known of the facts underlying its Request for Annulment insofar as it related to the qualities that Dr. Poncet does not possess until its receipt of an anonymous communication received by phone by a team member of *Avvocatura Generale dello Stato* on 30 September 2022. Italy then conducted urgent searches and checks to confirm the content of the communication,[119] including obtaining the relevant court judgments that prove Dr. Poncet's prior prosecution for and conviction of crimes involving moral turpitude."

397. Footnote "119" in the block quotation is to the letter dated September 29, 2022, from the Attorney General.

398. The lack of agreement is between the letter from the Attorney General, which is a piece of contemporaneous documentary evidence, and a statement written by a lawyer in a pleading characterizing earlier events, including the Attorney General's letter. This is something different than a date discrepancy between two documents purporting to be contemporaneous accounts prepared in the ordinary course. Further, in the lawyer's pleading, "30 September 2022" appears in the same paragraph as discussion of the Attorney General's letter, and the footnote states the date of that letter, which is "29 September 2022." It appears that there was a mistake made in the law office, and that is the explanation that the Italian Republic gave at the hearing.[381] The Committee is not persuaded that the reference to 30 September, rather than 29 September, in Italy's annulment memorial has the significance Rockhopper accords to it.[382]

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[380] Memorial on Annulment, ¶82.

[381] *See* Hr. Tr. Day 2, 277:20-278:3 ("It follows that the date indicated in the letter issued by the Attorney General takes precedence and overcomes any different dates that might have been indicated in other documents that don't enjoy such status. Hence the date indicated in the Application for Annulment in the Annulment Memorial, which is the result of a mere typographical error must have come from the date indicated in the public document.") (remarks of Italian Republic's counsel).

[382] The Italian Republic used September 30 in both the Request for Annulment and the Memorial on Annulment. *See* Hr. Tr. Day 2, 281:11-18 ("[…] once the 30th made it to the request for annulment, because we mention that date in the Request for Annulment and then in the Annulment Memorial, so emphatically we reproduce that that mistake went out, which is unfortunate of course but there is nothing else we can do.") (remarks of Italian Republic's counsel).

399. Rockhopper stated its alternative argument as to why the Italian Republic should be precluded from raising Dr. Poncet's criminal convictions as a basis for annulment as follows:

> "16. Further and in any event, Italy had constructive notice of Dr Poncet's annulled convictions when he was appointed to the Tribunal in May 2017, since those convictions emanated from Italy's own courts and were a matter of public record since the mid-1990s."[383]

Of course, within the abstraction that is a State, knowledge of whatever has occurred and been a matter of public record within it since the mid-1990's must exist and, in that sense, all such facts are known to the State. But, as a party to an arbitration brought by a foreign investor, a State may act by and through the individuals having responsibility for its defense. This is why Rule 6 of the ICSID Arbitration Rules makes it incumbent upon arbitrators to include relevant information in their disclosures, whether or not the information is public, as discussed above at paragraphs 208-213. Whether the Italian Republic should be viewed as having waived a right to object to an arbitrator's qualifications involves different considerations than the engagement of State responsibility for internationally wrongful acts, which is the subject matter of the ILC articles on State responsibility.

400. The judgement of the unchallenged arbitrators in *VC Holding* articulated the view that disclosure is a duty of arbitrators and that neither party has a duty of diligence regarding the arbitrator appointed by the other side. The unchallenged arbitrators explained as follows:

> "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, 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."[384]

The Committee agrees with these propositions as matters of principle, with the caveat that parties should be expected to act with the prudence that the circumstances of an arbitration require. When parties do not, there may be an absence of good faith that entails consequence. For example, a party

[383] Rejoinder, ¶16.

[384] Decision of the Unchallenged Arbitrators in *VC Holding*, ¶52.

should not be permitted to hold a known objection to an arbitrator's inclusion on a tribunal in reserve in case the award turns out to go against it.

401. The implications of Rockhopper's contrary argument reinforce this rationale for making arbitrators responsible for disclosure, as Rule 6 does, in investor-State arbitrations. For example, had Italian officials ordered a review of the records of the State's criminal courts upon receipt of Dr. Poncet's Rule 6 disclosure in order to confirm its completeness, the result presumably would have been actual knowledge of the deficiency of Dr. Poncet's disclosure on the part of the individuals responsible for Italy's defense. A proposal for Dr. Poncet's disqualification presumably would have followed at the beginning of the Arbitration, and this annulment proceeding would not have unfolded as it has. How frequently, however, should the review of court files to make sure an arbitrator has not failed to mention convictions for falsification of documentary evidence and aiding and abetting perjury be expected to be a fruitful exercise? If waiver is the consequence of a failure to review criminal court records for charges against arbitrators as a matter of course whenever a tribunal is constituted, what other steps should States also be expected to take to make sure that only arbitrators possessing high moral character and reliability for the exercise of independent judgment have been appointed in the cases against them?

402. In the Committee's assessment, the Italian Republic has established that it has acted with appropriate promptness in light of the knowledge in its possession regarding Dr. Poncet, including his disclosure upon being appointed as an arbitrator. Taking account of the facts and circumstances of the case, the Committee does not accept Rockhopper's submission that a failure of investigation on the part of the Italian Republic should operate as waiver of its right to seek annulment on the basis of omissions in Dr. Poncet's Rule 6(2) statement and his unsuitability as an arbitrator for a case against Italy. =

(4) Whether Annulment Is Warranted

403. A request for annulment on the ground of Article 52(1)(a) is a claim that the dispute resolution process as a whole was flawed, and the award is tainted for that reason. The Committee does not believe it necessary or useful in a case in which an unqualified arbitrator has participated for there to be an examination of the award to determine whether the unqualified arbitrator could have had an impact on the award, which the *Eiser* committee formulated as the third step of a three-step test. There may be a case in which, notwithstanding a serious lack of qualifications of an arbitrator coming to light after

the award was rendered, the result was so straightforward as to make it impossible as a practical matter that the biased arbitrator could have caused the result to be other than as was decided in the award. Even in such a case, it seems to this Committee that the taint resulting from the participation of an unqualified arbitrator in the rendering of the award would make it appropriate to consider whether the award should be annulled.

404. In any event, considering the third step of the *Eiser* test, the Committee observes that it can be safely supposed from the Award, which is subject to an Individual Opinion by the arbitrator appointed by the Italian Republic, that there were deliberations that may have involved compromises. The arbitrator appointed by the Italian Republic wrote that, had the Tribunal been required to decide only what the parties had primarily disagreed about in the Arbitration, which was whether Italy's regulation of coastal drilling constituted violations of the fair and equitable treatment guarantee of the ECT, he at least would have rejected Rockhopper's position.[385]

405. Further, not all the matters decided in the Award are so obvious that it can be said that each arbitrator would have reached the same decisions about them on his own. Importantly, this is clear from the pains that the Tribunal takes to explain why it was able to decide that Italy had committed a direct expropriation based on its consideration of one narrow sequence of events, in isolation from what Rockhopper had presented as a larger "factual matrix." That was not a way in which either of the sides had thought about the subset of events in their written or oral pleadings. Excerpts from the Award that allow this to be understood are set forth at paragraphs 119-125 above. The Committee expresses no opinion about whether the decisions the Tribunal made were "right" or "wrong." Doing so is not the function of an *ad hoc* committee. The possibility cannot be excluded, however, that the Award might have been different had the Tribunal been properly constituted without Dr. Poncet as a member, which is a determination the *Eiser* committee believed appropriate for an *ad hoc* committee to make in considering whether to exercise its discretion to annul.

[385] Individual Opinion, page 4 (footnote omitted)."As for the intrinsic profitability of the project itself, this was all the more worrying as other companies had already given up on an operation[4]; this explains the relatively low price at which Rockhopper was able to make its investment in the site in question as late as 2014. Therefore, there was in my view no doubt that the Claimant could not seriously claim that its expectations were legitimate. If the Tribunal had only had to determine whether Italy was liable on this basis alone, I would certainly have answered in the negative. In any event, as already stated, the question of fair treatment was only relevant to establishing Italy's liability if this country had not expropriated the investment concerned under illegal conditions.")

406. The Committee's opinion is that the Award should be annulled because the entire proceeding is affected when, as in this case, a tribunal is not properly constituted due to justifiable concerns about the independence and impartiality of a member. When, as in this case, there is good reason to question the reliability for the exercise of independent judgment of a member of an ICSID tribunal, the award, inescapably, is tainted. Exceptional circumstances weighing against the conclusion that the Award should be annulled have not been presented in this case, and the exercise of discretion not to annul the Award would not be warranted.

(5) The Claimed Additional Ground for Annulment

407. Article 52(1)(d) empowers an *ad hoc* committee to annul an award where there has been a serious departure from a fundamental rule of procedure. As set forth above at paragraphs 257-267, the consideration of a claim on the ground of Article 52(1)(d) requires the identification of a rule of procedure that is "fundamental" and, if that is accomplished, assessment of whether there has been a departure from that rule that is "serious."

408. The Italian Republic has used Article 52(1)(d) as a makeweight and rhetorical device, rather than arguing the additional ground in a rigorous way. For example, the Italian Republic contends that "absence of disclosure" deprives the party of the opportunity to challenge an arbitrator "and for that reason, constitutes a serious departure from a fundamental rule of procedure."[386] This is mostly a statement about a departure. The rule – regarding arbitrator challenges – to which the Italian Republic refers in only a general way has not been established to be a fundamental rule of procedure.

409. The Italian Republic also asserts that the same facts that show that the Tribunal was not properly constituted also establish Article 52(1)(d) as an additional ground for annulment.[387] The Committee is not satisfied, however, that the Italian Republic has established the sufficiency of findings regarding Article 52(1)(d) for a further ruling that there was also a serious departure from a fundamental rule of

[386] *See* Reply Memorial, ¶54.

[387] The Italian Republic has adopted the same approach to Article 52(1)(d) that the applicant for annulment used in the *EDF* case. The *EDF* committee described the applicant's contention as being "that in practice it makes no difference" whether the qualifications of the arbitrator were considered "under Article 52(1)(a) or (d) (or both) […]" *See EDF*, ¶120. The *EDF* committee accepted for purposes of its analysis that it may well make no difference (*see* EDF, ¶121), but then ruled that the factual showing fell short to establish any ground for annulment (*see EDF*, ¶¶147-164 [regarding Professor Kaufmann-Kohler], ¶¶165-175 [regarding Professor Remón]), with the result that the applicant's request pursuant to Article 52(1)(d) required little particularized attention.

procedure. The Committee has found that Dr. Poncet excluded from his disclosure information that he was required to disclose, and that Italy had established good cause for concern that Dr. Poncet lacked reliability for the exercise of independent judgment in the underlying Arbitration. The analysis of the claim that the tribunal was not properly constituted did not require the Committee to conclude, for example, that the Tribunal that heard the underlying Arbitration made decisions that were affected by bias.[388]

410. Taking account of Italy's articulation of its claim and the decidedly secondary attention that Article 52(1)(d) has received in the written and oral proceedings, the Committee does not believe that Italy has satisfied its burden on the additional annulment ground.

E. CONCLUSIONS

411. When Rockhopper asked Dr. Poncet whether he wished to be appointed to arbitrate its claims against Italy, Dr. Poncet had the option of simply declining. Dr. Poncet also had the option of accepting the appointment and making a disclosure including the fact that there had been criminal proceedings against him in Italy. In the view of this Committee, it was not an option for Dr. Poncet to exclude the criminal proceedings from his disclosure but to continue with the appointment anyway, but that is what Dr. Poncet did.

412. Dr. Poncet failed to abide by the required standard when he excluded from his disclosure facts sufficient to make the Parties aware that he had been prosecuted in Italy for work as a lawyer in connection with the failure of *Banco Ambrosiano*. By excluding that important information from his disclosure, Dr. Poncet frustrated the reasonable expectations of parties to an ICSID arbitration and deprived the Italian Republic of its procedural rights.

413. Although Dr. Poncet has no criminal record in Italy and more than 20 years have passed, he was criminally prosecuted and convicted in the host State for his work as a lawyer in connection with a notorious matter having national consequence. The annulment of his convictions by application of a

[388] *See EDF*, ¶123 ("It is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal."). The Committee agrees with the thrust of the *EDF* committee's *dictum*. The Italian Republic has not established, however, the existence of a fundamental rule of procedure reflecting the principle of decision maker impartiality that is applicable when, as in this case, there is reason to question whether bias of one member affected the confidential deliberations of a three-member tribunal, as opposed to a situation in which evidence directly establishes that a trial judge or arbitral tribunal made rulings that improperly favored one side.

statute of limitations was a result that fell short of what Dr. Poncet had reportedly vowed to the press he would fight to the end to achieve.

414. Taking into account not only the Italian criminal charges but also the circumstances of the long criminal proceedings, the statements about them that Dr. Poncet made contemporaneously and his recent explanations, as well as other relevant facts, the Committee's conclusion is that an objective observer may have reasonable concerns that Dr. Poncet's experience with the Italian justice system has affected him in a way bearing upon his exercise of independent judgment involving Italy. For this reason, as well as Dr. Poncet's decision to exclude the criminal proceedings from his disclosure, the Tribunal was not properly constituted with Dr. Poncet as a member.

415. The ground for annulment stated in Article 52(1)(a) has been established. The arbitral proceedings as a whole are affected when, as in this case, there has been a serious defect in the constitution of the tribunal. Taint of the award inescapably results. Annulment is warranted for these reasons, and no exceptional circumstance militating against that result has been presented in this proceeding.

416. Having decided that the Tribunal was not properly constituted and that annulment on the ground of Article 52(1)(a) is warranted, the Committee will not consider other grounds for annulment that the Italian Republic has advanced. The Committee does not wish to add to the costs of these proceedings when doing so could have no effect on the disposition of the Request for Annulment. Discussion of matters that may arise in the event of further arbitral proceedings between Rockhopper and the Italian Republic is unnecessary.

V. COSTS

417. The ECT does not contain provisions regarding the allocation of costs in disputes between an investor and a contracting State.

418. Article 61(2) and Article 52(4) of the ICSID Convention and Rule 47(1) and Rule 53 of the ICSID Arbitration Rules give the Committee discretion regarding the allocation of costs.

419. Article 61(2) of the ICSID Convention provides as follows:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in

> connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

420. Arbitration Rule 47(1)(j) prescribes that the award shall be in writing and shall contain "any decision of the Tribunal regarding the cost of the proceeding."

421. Pursuant to Article 52(4) of the ICSID Convention and Arbitration Rule 53, Article 61(2) and Arbitration Rule 47(1)(j) apply *mutatis mutandis* to annulment proceedings.

422. Regulation 15(2) of the ICSID Administrative and Financial Regulations provides that:

> "In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless a different division is agreed to by the parties or ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal's final decision on costs pursuant to Article 61(2) of the Convention."

423. Regulation 15(5) of the ICSID Administrative and Financial Regulations provides that:

> "This Regulation shall apply to applications for annulment of an Award, except that the applicant shall be solely responsible for making the payments requested by the Secretary-General."

424. Article 61(2) of the ICSID Convention grants discretion to the Committee to allocate expenses incurred by the parties in connection with annulment proceedings, fees and expenses of the members of the Committee, and charges for the use of the facilities of the Centre.

425. Regulations 15(2) and 15(5) of the ICSID Administrative and Financial Regulations recognize this discretion.

426. Accordingly, the Committee has the discretion either to apply the "costs follow the event" principle (*i.e.,* the "loser pays" principle) or to apportion fees and expenses of the parties, fees and expenses of the members of the Committee and charges for the use of the facilities of the Centre differently.

427. In connection with the proceedings on the stay of enforcement of the Award, the Committee informed the Parties that it would consider the allocation of costs incurred in connection with the Application for continuation of the stay as part of the final decision on annulment.

428. On September 9, 2024, the two sides submitted statements of their legal fees and expenses. The Italian Republic's submission was as follows:[389]

Legal fees	€ 400.000	$ **442.429,00**
Costs paid to ICSID	18.10.2022 € 25.633,25 - $ **25.000,00** 15.11.2022 € 240.250,00 - $ **250.000,00** 19.10.2023 € 166.073,25 - $ **175.000,00** September 2024 (*ongoing payment*) $ **200.000**	$ **650.000,00**
Mr. Di Pietro consulting contract	€ 300.000	$ **331.712,00**
Translations	€ 10.000	$ **11.057,00**
Travelling expenses	€ 8.678,30	$ **9.568,10**
TOTAL		$ **1.444.766,10**

429. Rockhopper submission was as follows:[390]

Rockhopper's Legal Costs

Type of Cost Incurred	**Amount (GBP)**
K&S Fees (Annex 1)	1,850,000.00
U&N Fees (Annex 2)	62,038.14
Disbursements and Expenses (Annex 3)	17,445.75
Total	**1,929,483.89**

430. The arguments in favor of a loser pays approach are not present in this case as they frequently are. It is true that Rockhopper chose to bring the underlying arbitration, and Rockhopper appointed Dr. Poncet. But this annulment decision has little to do with the underlying arbitration claims. The

[389] Italy's Submission of Costs, page 1 (emphasis in original).

[390] Statement of Costs, ¶24 (emphasis in original).

ruling is that the tribunal that heard the arbitration was not properly constituted because there are good reasons for concern about the suitability of Dr. Poncet as an arbitrator in this case. Rockhopper has, as a practical matter, had no choice but to defend the claim that the Award in its favor should be annulled based on the facts relating to Dr. Poncet that he had elected not to disclose.

431. The Committee has taken into account the fact that, as counsel for Rockhopper explained at the hearing, Rockhopper and its lawyers had not been informed by Dr. Poncet of the criminal proceedings and did not become aware of them until receiving the Italian Republic's Request for Annulment.[391] Rockhopper stated in its post-hearing brief that, had it been aware of the criminal proceedings prior to the Italian Republic's Request for Annulment, it would have considered whether disclosure to the Italian Republic was called for.[392]

432. Considering the circumstances of this case, the Committee decides that each side will pay one-half the costs of the annulment proceedings, including the costs of proceedings regarding the stay of enforcement of the Award, and each side will pay its own legal fees and expenses. Accordingly, because the Italian Republic has paid all of the advances for the annulment proceeding, Rockhopper will have a reimbursement obligation.

433. The costs of the annulment proceedings, including the fees and expenses of the Committee, ICSID's administrative fees, and direct expenses, ae as follows:

Committee Members' fees and expenses	US$ 515,393.39
ICSID's administrative fees	US$ 146,000
Direct expenses (estimated)[393]	US$ 58,592.05
Total	**US$ 719,985.44**

[391] The following exchange occurred at the Hearing:

"MS KALNINA: On this point, did you know about the allegedly criminal past? MR SPRANGE: No. Of course not." (Hr. Tr. Day 2, 417:17-19). *See also* Hr. Tr. Day 2, 454:8-10 (confirming lack of knowledge prior to Dr. Poncet's appointment) (remarks of Rockhopper's counsel).

[392] *See* Rockhopper's Post-Hearing Brief, ¶35 ("For the avoidance of doubt, Rockhopper first learnt of Dr Poncet's annulled conviction on 20 October 2020, when it received Italy's Request for Annulment. If it had known of the annulled conviction sooner, it would have considered whether it was necessary to disclose it").

[393] This amount includes estimated charges relating to the dispatch of this Decision (courier, printing and copying).

434. The above costs have been paid out of the advances made by the Italian Republic pursuant to Regulation 15(5) of the ICSID Administrative and Financial Regulations.[394]

VI. DECISION

435. For the reasons stated above, the Committee unanimously decides as follows:

(1) the Award of August 23, 2022, in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, is annulled in its entirety;

(2) each side shall bear half of the costs of the annulment proceedings, including the costs of the proceedings regarding the stay of enforcement, which amount to **US$ 719,985.44**, as set out in paragraph 433 above, and each side shall pay its own legal fees and expenses; and

(3) Rockhopper shall reimburse the Italian Republic in the amount of US$ 359,992.72, because the Italian Republic has advanced all of the costs of the annulment proceedings.

[394] The remaining balance will be reimbursed to the Applicant.

Carita Wallgren-Lindholm
Member of the *ad hoc* Committee

Date: May 31, 2025

Eva Kalnina
Member of the *ad hoc* Commitee

Date: May 31, 2025

Michael Nolan
President of the *ad hoc* Committee

Date: May 31, 2025