

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the proceeding between

**HYDRO S.R.L. AND OTHERS**

and

**REPUBLIC OF ALBANIA**

**ICSID Case No. ARB/15/28 – Revision**

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**DECISION ON THE RESPONDENT’S PROPOSAL FOR DISQUALIFICATION OF  
DR. CHARLES PONCET**

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*Unchallenged Arbitrators*

Mr. Robert Anderson KC

Mr. Grant Hanesian

*Secretary of the Tribunal*

Mr. Francisco Abriani

*Date:* December 1, 2022

## REPRESENTATION OF THE PARTIES

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## **I. PROCEDURAL HISTORY**

1. On April 22, 2022, the Republic of Albania filed an Application for Revision of the Award rendered on April 24, 2019, in *Hydro S.r.l. and others v. Republic of Albania* (ICSID Case No. ARB/15/28).
2. On May 9, 2022, the Secretary-General registered the Application for Revision. In the Notice of Registration, the Secretary-General informed the Parties that it would transmit the Application for Revision to the members of the original Tribunal and request them to inform ICSID whether they were willing to take part in the revision proceedings.
3. On May 12, 2022, the Secretary-General informed the Parties that Dr. Charles Poncet had expressed his willingness to take part in the revision of the award, but that Dr. Michael Pryles AO PBM and Mr. Ian Glick KC had informed ICSID that they were unfortunately not in a position to act in the revision proceedings. As a result, the Secretary-General informed the Parties that the Tribunal could not be reconstituted in accordance with ICSID Arbitration Rule 51(2) and invited the Parties to proceed to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original Tribunal.
4. On May 17, 2022, the Claimants requested an explanation of why Dr. Michael Pryles and Mr. Ian Glick are “not in a position to act in the revision proceedings.”
5. On May 20, 2022, ICSID informed the Parties that Dr. Pryles and Mr. Glick had confirmed that they decline to participate in the revision proceedings, and reiterated the invitation to the Parties to proceed to constitute a new Tribunal.
6. On August 3, 2022, following appointment by the Respondent, Mr. Robert Anderson KC accepted his appointment as arbitrator.
7. On August 10, 2022, following appointment by the Claimants, Dr. Charles Poncet accepted his appointment as arbitrator.

8. On August 23, 2022, the Respondent submitted a letter proposing the disqualification of Dr. Charles Poncet.
9. On August 24, 2022, ICSID noted that in this case the tribunal had not yet been constituted, and that, accordingly, the Centre could not take any action on the disqualification proposal submitted by the Respondent in accordance with Chapter V of the ICSID Convention and ICSID Arbitration Rule 9. ICSID further informed the Parties that the Respondent's letter would be transmitted to Dr. Poncet and Mr. Anderson KC for their information only.
10. On October 17, 2022, following appointment by the Chairman of the ICSID Administrative Council pursuant to Article 38 of the ICSID Convention, Mr. Grant Hanessian accepted his appointment as arbitrator in this case. On the same date, ICSID informed the Parties that the Tribunal was deemed to have been constituted, and the proceeding to have begun, as of October 17, 2022, pursuant to ICSID Arbitration Rule 6.
11. On October 18, 2022, the Respondent filed a Proposal for Disqualification of Dr. Poncet pursuant to Article 57 of the ICSID Convention.
12. On October 19, 2022, ICSID acknowledged receipt of the Respondent's Proposal for Disqualification and informed the Parties that the proceeding was suspended as of October 18, 2022, pursuant to Rule 9 of the ICSID Arbitration Rules, except insofar as the payment of the advance requested by the Centre on October 18, 2022 was concerned.
13. On October 25, 2022, the Unchallenged Arbitrators adopted a schedule for submissions on the Respondent's Proposal for Disqualification.
14. On October 27, 2022, the Claimants submitted their Opposition to the Proposal for Disqualification.
15. On October 28, 2022, ICSID wrote to the Parties on behalf of Dr. Poncet, informing them that Dr. Poncet will not express views as to the merits of the Respondent's Proposal for Disqualification, and that Dr. Poncet had stated that he is independent and impartial, and will remain so throughout the proceeding.

16. On November 4, 2022, the Respondent submitted Further Observations on the Proposal for Disqualification of Dr. Poncet. On the same date, the Claimants indicated that they did not have further observations regarding the Respondent’s Proposal for Disqualification.

## II. ALBANIA’S PROPOSAL FOR DISQUALIFICATION

17. In its submissions in support of its Proposal for Disqualification,<sup>1</sup> the Respondent does not argue that Dr. Poncet lacks independence or impartiality under Article 14(1) of the ICSID Convention, and emphasizes that it does not question or “cast doubt on Dr Poncet’s character or competence.”<sup>2</sup>
18. Rather, the Respondent contends that Rule 1(4) of the ICSID Arbitration Rules precludes the appointment of Dr. Poncet to the Tribunal in these revision proceedings.<sup>3</sup> ICSID Arbitration Rule 1(4) provides:
- No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.
19. The Respondent submits that ICSID Arbitration Rule 1(4) prohibits the Claimants’ appointment of Dr. Poncet in this revision proceeding as he “previously acted as a[n] .... arbitrator in [a] proceeding for the settlement of the dispute” as a member of the original Tribunal that rendered the Award in this case.<sup>4</sup>
20. The Unchallenged Arbitrators understand the Parties’ submissions to raise two principal issues: first, whether ICSID Arbitration Rule 1(4) applies to these revision proceedings; and second, if Rule 1(4) does apply to revision proceedings, whether that rule precludes

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<sup>1</sup> There is no issue as to the admissibility of the Proposal, which was submitted on October 18, 2022, one day after ICSID notified the Parties that the Tribunal was constituted in these revision proceedings. The Proposal was therefore made “promptly” as required by ICSID Arbitration Rule 9(1).

<sup>2</sup> Letter from the Respondent to ICSID, August 11, 2022, p. 1; *see also* the Respondent’s Proposal for Disqualification, ¶ 3.

<sup>3</sup> *See* the Respondent’s Proposal for Disqualification, ¶¶ 21-28.

<sup>4</sup> *See* the Respondent’s Proposal for Disqualification, ¶¶ 2(d), 22.

the appointment of Dr. Poncet to this Tribunal. The Parties' submissions on these points are summarized below, followed by our conclusions.

**(1) Albania's Position**

*a. Applicability of ICSID Arbitration Rule 1(4) to Revision Proceedings*

21. In arguing that ICSID Arbitration Rule 1(4) applies to revision proceedings, the Respondent first references Article 51(3) of the ICSID Convention<sup>5</sup>, regarding requests for revision, which states:

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 [IV of the Convention].<sup>6</sup>

22. The Respondent next observes that Section 2 of Chapter IV of the ICSID Convention provides, at Article 37(2)(b) titled "Constitution of the Tribunal", the mechanism for appointment of the "new Tribunal" under Article 51(3).<sup>7</sup> Article 37(2)(b) states:

Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

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<sup>5</sup> See the Respondent's Proposal for Disqualification, ¶¶ 6,20(c).

<sup>6</sup> The corresponding ICSID Arbitration Rule 51, titled "Interpretation or Revision: Further Procedures", states as follows:

1. Upon registration of an application for the interpretation or revision of an award, the Secretary-General shall forthwith:
  - (a) transmit to each member of the original Tribunal a copy of the notice of registration, together with a copy of the application and of any accompanying documentation; and
  - (b) request each member of the Tribunal to inform him within a specified time limit whether that member is willing to take part in the consideration of the application.
2. If all members of the Tribunal express their willingness to take part in the consideration of the application, the Secretary-General shall so notify the members of the Tribunal and the parties. Upon dispatch of these notices the Tribunal shall be deemed to be reconstituted.
3. *If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.* (Emphasis added.)

<sup>7</sup> See the Respondent's Proposal for Disqualification, ¶¶ 7, 20(e).

23. The Respondent then notes that Article 44 of the ICSID Convention provides that “any arbitration proceeding”, including this revision proceeding, shall be conducted “in accordance with the ICSID Arbitration Rules.”<sup>8</sup> Article 44 provides, in part:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section [Section 3 of Chapter IV concerning “Powers and Functions of the Tribunal] and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration.

24. Finally, the Respondent states that ICSID Arbitration Rule 53 provides that the ICSID Arbitration Rules apply generally to revision proceedings.<sup>9</sup> Rule 53 states:

The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.

25. The Parties not having otherwise agreed, the Respondent concludes that Article 44 of the ICSID Convention and ICSID Arbitration Rule 53 require that ICSID Arbitration Rule 1(4) apply to the composition of the Tribunal in these revision proceedings.<sup>10</sup>

26. The Respondent submits that the provisions in Article 51(3) of the ICSID Convention and ICSID Arbitration Rule 51(2) permitting reconstitution of the *entire* original tribunal for revision proceedings is an explicit exception to Rule 1(4)<sup>11</sup> and that these provisions, read together, permit reconstitution only of the entire original tribunal and not part of the original tribunal.<sup>12</sup>

27. The Respondent argues that there are good reasons for this choice by the drafters of the ICSID Convention and ICSID Arbitration Rules. The Respondent submits that a partially reconstituted tribunal, unlike a fully reconstituted tribunal: (1) requires that some tribunal members familiarize themselves with the case, reducing any procedural efficiencies that may be obtained by reconstituting the entire original tribunal; (2) leads to a perception that

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<sup>8</sup> See the Respondent’s Proposal for Disqualification, ¶¶ 8, 10, 20(a), 21.

<sup>9</sup> See the Respondent’s Proposal for Disqualification, ¶¶ 2(c), 11, 20(b), 21.

<sup>10</sup> The Respondent’s Proposal for Disqualification, ¶ 21.

<sup>11</sup> The Respondent’s Proposal for Disqualification, ¶ 24-25; The Respondent’s Further Observations, ¶¶ 15-17.

<sup>12</sup> The Respondent’s Proposal for Disqualification, ¶¶ 26 and 28.

original member(s) of the tribunal will have greater influence on the outcome of revision proceedings than new member(s) of the tribunal; and (3) by agreeing to arbitrate under the ICSID Arbitration Rules, the parties consented to the application of ICSID Arbitration Rule 51(2)—permitting reconstitution of the *entire* original tribunal—but did not consent to a *partial* reconstitution of the original tribunal.<sup>13</sup>

28. For the Respondent, therefore, the ICSID Convention and ICSID Arbitration Rules provide that “either all members of the original tribunal hear the application for revision, or none of them do.”<sup>14</sup>
29. Regarding the Claimants’ argument that ICSID Arbitration Rule 1 (including Rule 1(4)) applies only where the ICSID Arbitration Rules expressly state that it so applies—as under ICSID Arbitration Rule 7 (regarding replacement of arbitrators prior to constitution of the tribunal) and ICSID Arbitration Rule 11 (regarding filling vacancies on tribunals),<sup>15</sup> the Respondent argues that ICSID Arbitration Rule 1 by its terms applies only to “the formation of a new tribunal as a whole.”<sup>16</sup> ICSID Arbitration Rules 7 and 11, by contrast, concern the appointment of a single member of a tribunal. The Respondent argues that the explicit reference to Rule 1 in Rules 7 and 11 is therefore necessary and appropriate to

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<sup>13</sup> The Respondent’s Proposal for Disqualification, ¶¶ 25-26.

<sup>14</sup> The Respondent’s Proposal for Disqualification, ¶ 28.

<sup>15</sup> ICSID Arbitration Rules 7 and 11 provide:

**Rule 7 - Replacement of Arbitrators**

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

**Rule 11 - Filling Vacancies on the Tribunal**

(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.

(2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:

(a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or

(b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.

(3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, mutatis mutandis, 6(2).

<sup>16</sup> The Respondent’s Further Observations, ¶ 65.

make clear that any vacancies on a tribunal are subject to the same limitations as are applicable to the tribunal as a whole—including the limitations in Rule 1(4).<sup>17</sup>

30. Regarding the Claimants’ argument that Article 52(3) of the ICSID Convention—which specifically prohibits original tribunal members from participating in annulment proceedings—demonstrates that Rule 1(4) does not apply to specific ICSID Arbitration Rules unless explicitly referenced, the Respondent argues that Rule 1(4) would not apply to annulment proceedings in any event since requests for annulment are determined by an “*ad hoc* Committee”, not a “Tribunal”, the term used in ICSID Arbitration Rule 1(4), and that such committees are “a completely different and *sui generis* body with no other analogue in international law or dispute resolution procedures.”<sup>18</sup> The Respondent further notes that the provisions of Article 52(3) of the ICSID Convention and ICSID Arbitration Rule 52 prohibiting original tribunal members from sitting on an annulment committee cannot be waived, unlike the provisions of ICSID Arbitration Rule 1(4).<sup>19</sup>

***b. Application of ICSID Arbitration Rule 1(4) to Revision Proceedings***

31. As to the application of ICSID Arbitration Rule 1(4) in revision proceedings, the Respondent says the rule is “clear on its face”<sup>20</sup> prohibiting the appointment of Dr. Poncet since he “previously acted as....arbitrator in any proceeding for the settlement of the dispute” by serving on the original tribunal.
32. The Parties have focused on two aspects of the text of Rule 1(4): first, whether a revision proceeding concerns the same “dispute” that was before the original tribunal; and second, whether an original tribunal acted in a “proceeding” that was “previous” to a revision proceeding.
33. Regarding the first issue, the Respondent argues that revision proceedings involve the same “dispute” that was before the original Tribunal.<sup>21</sup> The Respondent notes that the word

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<sup>17</sup> *Id.*

<sup>18</sup> The Respondent’s Further Observations, ¶ 20.

<sup>19</sup> The Respondent’s Further Observations, ¶¶ 23, 62-63.

<sup>20</sup> The Respondent’s Proposal for Disqualification, ¶ 27.

<sup>21</sup> The Respondent’s Further Observations, ¶¶ 85-93.

“dispute” is not mentioned in Article 51 of the ICSID Convention, nor in ICSID Arbitration Rules 50 and 51, and that these provisions do not require a party seeking revision to identify any “dispute” between the parties as to whether the award should be revised, but rather to state:

the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence 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.<sup>22</sup>

34. Thus, in the Respondent’s view, a revision request “reopens” the same dispute that was before the original Tribunal to permit a party to introduce additional, decisive and newly discovered facts.<sup>23</sup>
35. Regarding the second issue, the Respondent states that revision proceedings are a new proceeding, rather than a continuation of the proceeding before the original Tribunal<sup>24</sup>— and that the original Tribunal proceeding is therefore “previous” to the revision proceeding. The Respondent stresses that the original Tribunal is *functus officio*.<sup>25</sup>
36. The Respondent also cites the practice of the International Court of Justice (“ICJ”). The Respondent notes that when an application for revision is received by the ICJ “the case receives a new name and is listed separately in the Court’s General List and on its website” and a party to a ICJ revision proceeding may select a new *ad hoc* judge.<sup>26</sup>
37. The Respondent cites commentaries by Prof. Dr. Christoph Schreuer and others in support of its position regarding the meaning of the word “dispute” in ICSID Arbitration Rule1(4).<sup>27</sup> The Respondent particularly relies on an article by Ms. Jessica Joly-Hébert

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<sup>22</sup> ICSID Arbitration Rules, Rule 50(1)(c)(ii).

<sup>23</sup> The Respondent’s Proposal for Disqualification, ¶ 34.

<sup>24</sup> The Respondent’s Further Observations, ¶¶ 75-84.

<sup>25</sup> The Respondent’s Further Observations, ¶¶ 71, 75.

<sup>26</sup> The Respondent’s Further Observations, ¶ 77.

<sup>27</sup> The Respondent’s Further Observations, ¶¶ 86-87. Prof. Schreuer’s treatise states:

The institution of a procedure for revision does not require the existence of a dispute between the parties. There is no need for prior communication between the parties demonstrating a difference of opinion. In view of the award’s *res judicata* effect, a party has a right to revision even if there is no

stating that interpretation proceedings at the ICJ concern a “new dispute” between the parties as to the meaning of the award, while ICJ revision proceedings do not involve a “new dispute”.<sup>28</sup>

38. The Respondent notes that Dr. Aaron Broches (former General Counsel to the World Bank and Chairman of the ICSID Convention’s Drafting Committee) has observed that the ICJ Statute directly inspired the provisions of the ICSID Convention and ICSID Arbitration Rules regarding revision and interpretation proceedings.<sup>29</sup>

39. In respect of the Claimants’ arguments that in the *Wena* and *Micula* cases<sup>30</sup> members of the original tribunals were appointed to interpretation tribunals, and the provisions of the ICSID Convention and ICSID Arbitration Rules concerning constitution of tribunals in interpretation and revision proceedings (Articles 50 and 51 of the ICSID Convention and

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disagreement as to the existence and relevance of new facts. This is also reflected in the different texts of Arts 50 [on interpretation] and 51, as Art. 50(1) expressly states that either party may submit an application for the interpretation of an award “if any dispute shall arise between the parties as to the meaning or scope of an award”. No such wording has been included for Art. 51. (Emphasis in original.)

SW Schill (gen. ed.), Schreuer’s Commentary on the ICSID Convention, vol II (3rd ed: CUP 2022) (“**Schreuer**”), Art. 51, ¶ 11 (**RL-21**).

<sup>28</sup> The Respondent’s Proposal for Disqualification, ¶ 38; the Respondent’s Further Observations, ¶ 86 citing J. Joly-Hébert, ‘Distinguishing Interpretation and Revision Proceedings at the International Court of Justice’ (2020) 19 LPICT 200, 227 (**RL-15**). Ms. Joly-Hébert states, regarding ICJ revision and interpretation proceedings, that:

“[A] new dispute is not required for revision proceedings to be admitted [...]. The objective [of revision] proceedings is to ‘correct’ a judgment or to modify it in light of the discovery of a new fact of importance. Consequently, one cannot deny the strong connection that continues to operate between original and revision proceedings.”

The Respondent submits that Ms. Joly-Hébert’s article should be relied on solely for the purpose of understanding the differences between revision and interpretation proceedings and points to the fundamental differences between composition of panels at ICSID and the ICJ —particularly (i) the permanent character of the ICJ; (ii) that ICJ tribunals consist of 15 permanent judges, with each state before it in a particular case being permitted to add an additional ad hoc judge in the event they do not have a judge of their nationality on the bench, rather than the three arbitrators in an ICSID proceeding; and (iii) the absence of information asymmetry—to assert that the ICJ’s practice of partially reconstituting the original panel for revision proceedings is not analogous to ICSID practice. The Respondent’s Further Observations, ¶¶ 39-45.

<sup>29</sup> The Respondent’s Proposal for Disqualification, ¶ 36, citing A. Broches, ‘Observations on the Finality of ICSID Awards’, in *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Brill 1995) 295, 296-297 (**RL-16**).

<sup>30</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Interpretation, October 31, 2005 and *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20.

ICSID Arbitration Rules 50 and 51) are virtually identical, the Respondent has two responses.

40. First, regarding the *Wena* and *Micula* cases, the Respondent notes that there is no indication that any party objected to the partial reconstitution of the original tribunal.<sup>31</sup> As stated previously, the Respondent argues that ICSID Arbitration Rule 1(4) can be waived by the parties, and the Respondent states that this occurred in these two interpretation proceedings.
41. Second, the Respondent argues that ICSID Arbitration Rule 1(4) is not applicable to interpretation proceedings in any event because, as previously discussed, such proceedings, unlike revision proceedings, do not involve the same “dispute” that existed before the original Tribunal.<sup>32</sup>
42. The Respondent notes that some commentators, including Professor Schreuer, have concluded that partial reconstitution of original tribunals is permitted in both ICSID interpretation and revision cases.<sup>33</sup> Reflecting on the *Wena* interpretation proceeding, the Scheuer treatise states:

In constituting a new Tribunal, *Wena* exercised its right to appoint one of the arbitrators from the original Tribunal.

...

There is no reason why some or one of the arbitrators who served on the original tribunal should not be appointed to a reconstituted tribunal for purposes of interpreting the award.... Therefore, it is possible, and may even be advisable, to appoint the remaining original arbitrators even if one arbitrator becomes unavailable.

...

Art. 51(3) [concerning revision proceedings] is identical to the first two sentences of Art. 50(2) [concerning interpretation proceedings]. The questions surrounding the reconvening of the tribunal or the constitution of a new tribunal are examined in the context of Art. 50(2) dealing with interpretation (see Art. 50, paras. 39–50). The observations made there are also relevant to Art. 51(3) dealing with revision.<sup>34</sup>

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<sup>31</sup> The Respondent’s Further Observations, ¶ 31.

<sup>32</sup> The Respondent’s Proposal for Disqualification, ¶¶ 33-44; the Respondent’s Further Observations, ¶¶ 24-29.

<sup>33</sup> The Respondent’s Proposal for Disqualification, ¶ 42.

<sup>34</sup> Schreuer, Art. 50, ¶¶ 46, 49, Art. 51, ¶ 39.

43. Another commentator makes the same point and does not distinguish between interpretation and revision proceedings. Citing to the *Wena* interpretation case, Ms. Angeline Welsh states:

The new Tribunal [constituted under Rule 51(3)] is to be appointed by the same method as the original Tribunal with the same number of arbitrators, and it is open to the parties to appoint members of the original Tribunal.<sup>35</sup>

44. The Respondent submits that the analysis of these authors is “incomplete and unpersuasive”, arguing that they do not consider ICSID Arbitration Rule 1(4) and overlook the distinction between revision and interpretation proceedings.<sup>36</sup> The Respondent notes that Dr. Broches has written that interpretation tribunals may be “composed in part, or entirely, of arbitrators other than those who rendered the award”<sup>37</sup> but does not repeat this statement when discussing revision tribunals. Reflecting generally on the authorities referenced by the Claimants, the Respondent emphasizes that “the situation before the Unchallenged Members has never before occurred in ICSID’s history and so has therefore never been considered in previous decisions or given direct consideration in the scholarship.”<sup>38</sup>

## **(2) Hydro S.r.l. and others’ Position**

### ***a. Applicability of ICSID Arbitration Rule 1(4) to Revision Proceedings***

45. The Claimants submit that ICSID Arbitration Rule 1(4) is not applicable to the constitution of a tribunal in revision proceedings.

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<sup>35</sup> Welsh, “Rule 51 – Interpretation or Revision: Further Procedures,” in J Fouret et al. (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar 2019) 1284, ¶ 27.50 & n. 75 (CAR-9).

<sup>36</sup> The Respondent’s Further Observations, ¶¶ 32-35.

<sup>37</sup> A. Broches, ‘Observations on the Finality of ICSID Awards’, in *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Brill 1995) 295, 297 (RL-16).

<sup>38</sup> The Respondent’s Further Observations, ¶ 13.

46. The Claimants assert that where Rule 1(4) is applicable, the Rules expressly so state, as is the case with respect to ICSID Arbitration Rules 7 and 11,<sup>39</sup> and that there is no such reference in ICSID Arbitration Rule 51.<sup>40</sup>
47. Contrasting ICSID Convention Article 52(3), relating to annulment proceedings, which specifically prohibits members of the original tribunal from sitting in annulment proceedings, with the provisions in Article 51 of the ICSID Convention and ICSID Arbitration Rule 51 relating to revision and interpretation proceedings, the Claimants submit that if the drafters intended to preclude the appointment of members of the original tribunal in interpretation and revision proceedings they would have expressly so stated.<sup>41</sup>
48. The Claimants thus contend that the ICSID Convention and the ICSID Arbitration Rules do not exclude members of the original tribunal from participating in a revision tribunal.<sup>42</sup>

***b. Application of ICSID Arbitration Rule 1(4) to Revision Proceedings***

49. As to the application of ICSID Arbitration Rule 1(4) to Rule 51(3) on revision proceedings, the Claimants submit that both practice and authorities reject the Respondent's position.<sup>43</sup>
50. As to the meaning of the word "dispute" in ICSID Arbitration Rule 1(4), the Claimants argue that revision proceedings involve a different "dispute" than that before the original tribunal. The Claimants state that "[a]ppplied to a revision proceeding, 'the dispute' referenced in [Rule 1(4)] is whether an award should be revised, not the underlying dispute resolved in the award".<sup>44</sup>
51. As to the meaning of the words "previously" and "proceeding" in ICSID Arbitration Rule 1(4), the Claimants submit that the original arbitration is not a proceeding separate and "previous" to the revision proceeding, and that the revision proceeding is merely a

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<sup>39</sup> The Claimants' Opposition, ¶¶ 72-76.

<sup>40</sup> *Id.* at ¶ 77.

<sup>41</sup> The Claimants' Opposition, ¶¶ 37-38.

<sup>42</sup> The Claimants' Opposition, ¶¶ 39-41.

<sup>43</sup> The Claimants' Opposition, ¶¶ 42-54.

<sup>44</sup> Letter from Debevoise & Plimpton LLP to Omnia Strategy LLP dated August 12, 2022, p. 2.

continuation of the original arbitration.<sup>45</sup> The Claimants state that the sole example of a “previous” “proceeding” provided by commentators is a failed conciliation or “aborted arbitration.”<sup>46</sup>

52. The Claimants point to the *Wena* and *Micula* interpretation proceedings under ICSID Arbitration Rule 51(3), where the original tribunal was partly reconstituted, and stress that legal authorities unanimously recognize that the same rules apply to the constitution of the tribunal in interpretation and revision proceedings.<sup>47</sup> In particular, the Claimants note Prof. Schreuer’s views that the same text applies in the same way to both interpretation and revision,<sup>48</sup> and therefore, that the original tribunal may be partly reappointed.<sup>49</sup>
53. The Claimants assert that there is no basis to distinguish interpretation and revision proceedings as the Respondent suggests.<sup>50</sup> The Claimants refute the Respondent’s reliance on Dr. Broches’ article to prove interpretation and revision proceedings should be distinguished, arguing that the Permanent Court of Justice and ICJ authorities Dr. Broches relies on<sup>51</sup> concern and apply equally to both interpretation and revision proceedings.<sup>52</sup> The Claimants also submit that Ms. Joly-Hébert’s article directly contradicts the Respondent’s

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<sup>45</sup> The Claimants’ Opposition, ¶¶ 78-80.

<sup>46</sup> The Claimants’ Opposition, ¶ 69, *citing* 1968 ICSID Arbitration Rules, 1 ICSID Reports 113, Rule 1, Note I (“If a dispute first submitted to conciliation, under the auspices of the Centre or otherwise, is not settled thereby, the next step may be arbitration . . . or arbitration under the Convention may follow on some other, inconclusive, arbitration proceeding.”); G Burn & E Lindsay, ‘ICSID Rules, Rule 1 – General Obligations’, in J Fourret et al. (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar 2019) ¶ 21.22 (“Rule 1(4) . . . provides that a person who previously acted as either a conciliator or an arbitrator in proceedings to settle the same dispute brought to arbitration may not be appointed to the Tribunal.”).

<sup>47</sup> The Claimants’ Opposition, ¶¶ 44-54.

<sup>48</sup> The Claimants’ Opposition, ¶ 48 *citing* C. Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed: CUP 2009), Art. 51, ¶ 33 (RL-17).

<sup>49</sup> The Claimants’ Opposition, ¶ 47 *citing* C. Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed: CUP 2009), Art. 50, ¶ 40 (CAR-6).

<sup>50</sup> The Claimants’ Opposition, ¶¶ 55-67.

<sup>51</sup> The Claimants’ Opposition, ¶ 51 *citing* Broches, p. 297 n.5.

<sup>52</sup> The Claimants’ Opposition, ¶ 51 and note 73, the authorities being: S. Rosenne, *The Law and Practice of the International Court* (1965), p. 428 n.2 (“in dealing with a case of interpretation, the Court need not be composed of the same judges as rendered the judgment to be construed”). In turn, footnote 2 of the Rosenne commentary cites Elaboration of the Rules of Court of March 11th, 1936, P.C.I.J. (ser. D), third addendum to No. 2, pp. 334–335 (*travaux préparatoires* discussing PCIJ Rules of Court article concerning the composition of the Court for interpretation and revision).

position, as it makes clear that in ICJ revision practice, parties may appoint the same judges as on the original panel.<sup>53</sup>

54. In response to the Respondent’s policy arguments, the Claimants submit that members of the original tribunal are often best placed to make determinations on the issues involved in revision and interpretation proceedings.<sup>54</sup> The Claimants also assert that the ICSID Convention and the ICSID Arbitration Rules do not consider that there is a serious risk of information asymmetry where it is necessary to replace members of the original tribunal under ICSID Arbitration Rules 7 and 11.<sup>55</sup>
55. Therefore, the Claimants argue that Rule 1(4) is inapplicable as two of its requirements are not met: members of the original tribunal have not acted (i) in a previous separate proceeding or (ii) with respect to the same dispute.<sup>56</sup>

### III. ANALYSIS

56. As to the applicability of ICSID Arbitration Rule 1(4) to revision proceedings—apparently a question of first impression—we agree with the Respondent’s analysis of the relevant provisions of the ICSID Convention and ICSID Arbitration Rules. We find no basis in the text or structure of the ICSID Convention and ICSID Arbitration Rules to hold that ICSID Arbitration Rule 1, titled “General Obligations”, does not generally apply to all ICSID Arbitration Rules concerning constitution of arbitral tribunals—including ICSID Arbitration Rule 51 regarding the constitution of revision and interpretation tribunals.

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<sup>53</sup> The Claimants’ Opposition, ¶¶ 52-53 *citing* Joly-Hébert, p. 223:

“For practical and strategic reasons, parties may want to select, if possible, the judge ad hoc who sat in the original proceedings as he or she would be familiar with the factual and legal issues of the case, but there is no rule imposing such a choice.”

<sup>54</sup> The Claimants’ Opposition, ¶¶ 56-61.

<sup>55</sup> The Claimants’ Opposition, ¶ 66.

<sup>56</sup> The Claimants’ Opposition, ¶ 86.

57. However, as to the application of ICSID Arbitration Rule 1(4) to the constitution of revision tribunals—also a question of first impression—we agree with the Claimants that Rule 1(4) does not preclude Dr. Poncet’s appointment to the revision Tribunal.
58. We begin by stating that we find no basis in the ICSID Convention or ICSID Arbitration Rules to distinguish an arbitrator’s eligibility for appointment to an interpretation tribunal from an arbitrator’s eligibility for appointment to a revision tribunal. The constitution of interpretation and revision tribunals are treated identically in Articles 50 and 51 of the ICSID Convention and in ICSID Arbitration Rule 51. The original tribunals are *functus officio* in both cases.
59. As the Parties have noted, there have been two interpretation proceedings, the *Wena* and *Micula* cases, in which the original tribunals were partially reconstituted. We accept the Respondent’s argument that the provisions of ICSID Arbitration Rule 1(4) may be waived by the parties and note that we have not been presented with evidence that any party objected to the appointment of the original arbitrators to the interpretation panels in those cases.
60. However, we do not agree with the Respondent that ICSID Arbitration Rule 1(4) prohibits a partial reconstitution of a revision panel. As discussed above, the partial reconstitution of the original tribunals in the *Wena* and *Micula* interpretation cases has been noted approvingly by commentators, and we have not been made aware of any commentary on the interpretation and revisions provisions in the ICSID Convention or ICSID Arbitration Rules that suggests that ICSID Arbitration Rule 1(4) prohibits partial reconstruction of the original tribunal in either case.
61. We interpret ICSID Arbitration Rule 1(4) consistently with this practice and commentary. We hold that that (i) the reference in Rule 1(4) to any “person who had previously acted as a conciliator or arbitrator in any proceeding” refers to persons who acted in such proceedings prior to commencement of the ICSID case that gives rise to the revision request; (ii) Dr. Poncet, as a member of the original Tribunal in this case, did not act in “proceedings” “previous[.]” to these revision proceedings; and therefore (iii) Dr. Poncet is

not prohibited by ICSID Arbitration Rule 1(4) from serving as arbitrator in these revision proceedings.

62. Although we understand that this is merely an administrative practice, we note that these revision proceedings bear the same ICSID case number as the original proceedings and are listed with the original proceeding on ICSID's website, and not as a separate case with a separate number, as is the case with ICJ revision proceedings. Our interpretation of ICSID Arbitration Rule 1(4) harmonizes ICSID Convention Articles 50 and 51 and ICSID Arbitration Rules 1 and 50 to 53 and is consistent with the practice and commentary.
63. We have considered the policy arguments advanced by the Respondent for interpreting ICSID Arbitration Rule 1(4) to prohibit partial reconstitution of original tribunals in revision proceedings, but we note the Claimants' arguments that the ICSID Convention and ICSID Arbitration Rules permit filling of tribunal vacancies (ICSID Arbitration Rule 11) without regard for any "asymmetry of information" that may exist when a new arbitrator joins an existing tribunal.
64. The Proposal to Disqualify Dr. Poncet is dismissed.

#### **IV. COSTS**

65. Both Parties have requested, or indicated an intent to request, their costs incurred in connection with Respondent's Proposal for Disqualification.<sup>57</sup> The question of costs will be determined at a later stage.

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<sup>57</sup> The Claimants' Opposition, ¶ 88; the Respondent's Further Observations, ¶¶ 94-97.

**V. DECISION**

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

- a. The Proposal to Disqualify Dr. Charles Poncet is dismissed.
- b. A decision on the costs arising from the Proposal will be taken at a later stage.

[Signed]

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Mr. Grant Hanessian  
Arbitrator

[Signed]

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Mr. Robert Anderson KC  
Arbitrator