INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Case No. ARB/07/30

CONOCOPHILLIPS PETROZUATA B.V.
CONOCOPHILLIPS HAMACA B.V.
CONOCOPHILLIPS GULF OF PARIA B.V.

Claimants

v.

THE BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

RESPONDENT'S SUBMISSION ON THE PROPOSAL TO DISQUALIFY JUDGE KEITH AND MR. FORTIER

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I. INTRODUCTION

1. This submission of the Bolivarian Republic of Venezuela ("Respondent") is made in support of Respondent's proposal to disqualify Judge Keith and Mr. Fortier as arbitrators in this case.

2. Under Article 14 of the ICSID Convention, an arbitrator in an ICSID case must be a person "who may be relied upon to exercise independent judgment."[1] The requirement obviously relates to the particular case in question, not to cases in general. It is well established that the standard includes the concepts of both impartiality and independence[2] and that what is important is to avoid the appearance of dependence or bias in the mind of a reasonable third party observer.[3] Unfortunately, regardless of what

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

[2] Although the English version of Article 14(1) refers to "independent judgment," the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Since both versions are equally authentic, it is generally accepted that arbitrators must be both independent and impartial. *See Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, dated November 12, 2013 ("*Blue Bank*"), ¶ 58 and n. 37; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, dated December 13, 2013 ("*Burlington*"), ¶ 65 and n. 77.

[3] *Blue Bank*, ¶¶ 59-60 ("Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias. The applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party'."); *Burlington*, ¶¶ 66-67 ("Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias. The applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party'."); *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify a Majority of the Tribunal, dated December 13, 2013 ("*Repsol*"), ¶¶ 71-72 ("Articles 57 and 58 of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias. The applicable legal standard is an 'objective standard, based on a reasonable evaluation of the evidence, by a third party'.") (English translation by Respondent); *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, dated March 20, 2014, ¶¶ 54, 57 ("The Parties agree that the applicable legal standard is 'an objective standard based on a reasonable evaluation of the evidence by a third party' or, in other words, on the 'point of view of a reasonable and informed third person'. . . . In these cases [*Blue Bank*, *Burlington* and *Repsol*], Dr. Kim Yong Kim, the Chairman of the ICSID Administrative Council found that 'Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias'."). *See* **Appendix 1**, Antonio R. Parra, THE HISTORY OF ICSID (Oxford University Press 2012), p. 274 (Any implication that the standard for

may be the case in other circumstances, no reasonable third party observer evaluating the facts discussed herein would conclude that either Judge Keith or Mr. Fortier possesses the requisite impartiality in this case.

3. This submission sets forth in detail the factual basis for the proposals to disqualify Judge Keith and Mr. Fortier. In summary, the record shows the following:

- Mr. Fortier: With respect to Mr. Fortier, the basis for the proposal is twofold: (i) he has ongoing professional ties to Norton Rose OR LLP ("Norton Rose"), which without dispute is, through its Caracas office, the firm more adverse to Respondent than any other in the world and has represented ConocoPhillips in cases involving the same agreements at issue here; and (ii) he has, together with Judge Keith, exhibited an attitude towards Respondent that, in the reasonable evaluation of a third party, would raise doubts as to his ability to dispense justice in this case. Either ground alone should be sufficient to sustain the proposal to disqualify Mr. Fortier.

  Mr. Fortier survived the first proposal to disqualify him by resigning from Norton Rose at the end of 2011, but it has now come to Respondent's attention following the reports of the recent challenge to the decisions of the *Yukos* tribunals chaired by Mr. Fortier that he has maintained significant, substantive professional relationships with senior Norton Rose attorneys, including in cases involving issues directly relevant to this case. In addition, despite announcing that he was in the process of searching for new premises in 2011, he ended up where he started, on one of the same floors occupied by Norton Rose in Montreal, renting space from one of Norton Rose's clients. It is apparent that Mr. Fortier, who stated when he resigned from his firm as a result of the first disqualification proposal in 2011 that his decision was a "very emotional" one, retains both his

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disqualification under the ICSID Convention should require more than the "justifiable doubts" standard would be "a conclusion hardly consistent with 'the vital interest' that Aron Broches, addressing the ICSID Administrative Council in 1976, saw all Contracting States as having 'in the maintenance of the integrity of arbitral proceedings under the Convention.'"); **Appendix 2**, Karel Daele, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION (Kluwer Law International 2012), p. 225, ¶ 5.014 ("[T]he 'reasonable doubts' standard, as adopted for the first time by the ad Committee in *Vivendi v. Argentina I* in 2001, has been frequently applied over the last ten years."); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, dated October 3, 2001, 17(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 168 (Spring 2002), *available at* icsid.worldbank.org, ¶ 20. *See also* **Appendix 3**, *R v. Sussex Justices, Ex Parte McCarthy*, King's Bench Division (England and Wales), [1924] 1 KB 256, Judgment of Lord Hewart dated November 9, 1923, p. 3 (of the .PDF) ("[I]t is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done.").

emotional and professional ties to the firm, requiring his disqualification as arbitrator in this case.

The detailed facts and documents relating to this ground for disqualifying Mr. Fortier are set forth in the submissions filed in connection with the first proposal for his disqualification, dated October 5, 2011, and the earlier submissions on the pending proposal filed on February 6, 2015. They are reviewed in Sections II and III below.

- Judge Keith and Mr. Fortier together: A third party undertaking a reasonable evaluation of the record in this case would also see that Judge Keith and Mr. Fortier have a negative "general attitude vis-à-vis the Respondent," which was first revealed by Prof. Abi-Saab in his dissenting opinion dated March 10, 2014, and then again in Prof. Abi-Saab's dissenting opinion of February 19, 2015, delivered just before his unfortunate resignation for health reasons. The facts relating to this ground for disqualification of both Judge Keith and Mr. Fortier are reviewed in Sections IV and V below. They show that Judge Keith and Mr. Fortier have advanced the interests of Claimants in this case by "relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings," which the record shows included flagrant misrepresentations of fact, and "systematically" discrediting or ignoring the evidence of Respondent.

  The most recent manifestation of this partiality is the shocking decision of Judge Keith and Mr. Fortier, who was already subject to a disqualification proposal on the grounds summarized above, to withdraw the consent that Judge Keith acknowledges had been "plainly" given to Prof. Abi-Saab's resignation. That decision, which is unprecedented, was taken only after Prof. Abi-Saab had submitted his dissenting opinion to the Majority Decision of Judge Keith and Mr. Fortier on Jurisdiction and the Merits dated September 3, 2013 (the "Majority September 2013 Decision"), which exposed their partiality throughout this case.

  As a consequence of the purported denial of consent, or actually the purported withdrawal of consent already given, to Prof. Abi-Saab's resignation, the Secretary of the Tribunal announced that the Chairman of the ICSID Administrative Council would appoint a replacement arbitrator for Prof. Abi-Saab, which would deprive Respondent of its right to appoint the replacement arbitrator, a result that would penalize Respondent for events beyond its control, and constitute a gross denial of due process. Aside from the fact that ICSID, Judge Keith and Mr. Fortier knew full well that Mr. Fortier was subject to a disqualification proposal when he purported to participate in the decision to withdraw the consent to Prof. Abi-Saab's resignation, they also were surely aware that consent to a resignation for serious health reasons never has been and never can be legitimately denied. There simply is no rational explanation for the

purported withdrawal of the consent other than retaliation against Respondent for proposing the disqualification of Mr. Fortier and against Prof. Abi-Saab for the content of his dissenting opinion.

4. As a matter of procedure, Respondent requests that ICSID seek the recommendation of a third party with respect to these disqualification proposals due to the circumstances of this case. With respect to Mr. Fortier, Respondent notes that he is currently an External Member and Chair of the World Bank Group Sanctions Board. Respondent also submits that ICSID permitted a situation to develop whereby Judge Keith and Mr. Fortier were allowed to address the issue of Prof. Abi-Saab's resignation despite the fact that Mr. Fortier at the time was already subject to a proposal for disqualification. When Judge Keith and Mr. Fortier purported to withdraw their consent to Prof. Abi-Saab's resignation, ICSID indicated its intention to appoint a replacement arbitrator, despite Respondent's warning that "Claimants are trying to deprive Respondent of its right to appoint a replacement arbitrator" and that "[i]t would be scandalous for ICSID to assist Claimants in that effort. We are not simply talking about 'administrative decisions' here. We are talking about fundamental rights in a case of exceptional importance which the whole world is watching."[4]

5. There is ample precedent for the request to refer the disqualification proposals for a recommendation from outside of ICSID. As stated by Antonio Parra, the ICSID Secretariat has "sought the recommendation of the Secretary-General of the PCA [Permanent Court of Arbitration] for challenge decisions by the Chairman [of the ICSID Administrative Council] in cases where the Chairman or ICSID might be thought to have a conflict."[5] That is especially true where the arbitrator whose disqualification is

[4] E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 14, 2015 ("Respondent's March 14, 2015 E-mail"), ¶ 6.

[5] **Appendix 1**, A. R. Parra, THE HISTORY OF ICSID, p. 267.

requested has had a prior involvement with the World Bank. For example, in *Generation Ukraine v. Ukraine*, ICSID requested the recommendation of the Secretary-General of the PCA in the proposal to disqualify Dr. Jürgen Voss "in order to ensure the impartiality of the process," in light of the prior services that Dr. Voss had rendered in the World Bank.[6] The same approach was taken by ICSID in *Siemens v. Argentina* when deciding on the proposal to disqualify Dr. Andrés Rigo Sureda. There, ICSID again asked for the recommendation of the Secretary-General of the PCA, as Dr. Rigo Sureda had been a staff member of the World Bank.[7]

6. Respondent submits that a similar procedure should be adopted here, given Mr. Fortier's relationship with the World Bank and given ICSID's involvement in some of the events that have given rise to the disqualification proposals. However, in light of the positions of Mr. Fortier and Judge Keith as members of the PCA Financial Assistance Fund Board of Trustees and the fact that it was the PCA that recommended the appointment of Judge Keith as President of the Tribunal in this case, Respondent requests that the matter be referred to another third party having no present or past connection to Judge Keith, Mr. Fortier, the parties or their respective counsel.

7. Finally, before proceeding to the more detailed discussion of the disqualification proposals, Respondent wishes to note that the decision on the proposals should not be influenced by the advanced stage of these proceedings. As

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[6] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated September 16, 2003, ¶ 4.16.

[7] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated February 6, 2007, ¶ 36. *See also Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Request for the Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg, dated December 21, 2011 (Chairman of the ICSID Administrative Council sought the recommendation of the Secretary-General of the PCA).

stated in the IBA Guidelines on Conflicts of Interest in International Arbitration: "Disclosure or disqualification . . . should not depend on the particular stage of the arbitration. . . . While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards."[8] If this had been the beginning of the case and it had been disclosed that Mr. Fortier maintained close relationships, professional and otherwise, with the firm that has been more adverse to Respondent than any other in the world and that has actually represented ConocoPhillips in cases involving the same agreements as are at issue here, there would hardly be any doubt that he would have been disqualified. The same is obviously true of the appearance of a lack of impartiality during the course of the proceedings, which can be revealed at any stage. The fact that these circumstances have arisen later in the case does not justify a different result.

II. THE PRIOR PROPOSAL TO DISQUALIFY MR. FORTIER DUE TO HIS RELATIONSHIP WITH NORTON ROSE

8. To place the pending proposal to disqualify Mr. Fortier in proper perspective, it is necessary to review the earlier disqualification proposal that was based on his relationship with Norton Rose and his failure to disclose plans of Norton Rose's merger with Macleod Dixon LLP ("Macleod Dixon"), a firm which no one has contested was more adverse to Respondent than any other in the world.[9] Macleod Dixon had not

[8] Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 16, 2015 ("Respondent's February 16, 2015 Letter"), Annex 4, International Bar Association Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on October 23, 2014, *available at* www.ibanet.org, Explanation to General Standard 3(e) (at p. 9).

[9] *See* Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated October 5, 2011 ("Respondent's October 5, 2011 Letter"); Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, dated February 27, 2012, ¶ 62 ("As the Respondent says, there has been no contest in this

only advised many parties adverse to Venezuela, but its attorneys even represented ConocoPhillips subsidiaries in an arbitration against Petróleos de Venezuela, S.A. ("PDVSA"), Venezuela's state oil company, involving the very same Hamaca and Petrozuata Association Agreements as are at issue in this Arbitration.[10] As stated on Macleod Dixon's website, the firm had:

> Advised most Venezuelan private oil and gas investors during the process to migrate their participation agreements to minority equity participations in Empresas Mixtas with PDVSA, the Venezuelan NOC, between 2004 to 2007. Advice involved significant BIT/ICSID preparatory work, the filing of notices of disputes under BIT treaties and the negotiations of settlements.
>
> . . . .
>
> Advised clients in relation to their potential investment and ICC disputes arising from the migration process of the extra-heavy crude oil projects of the Orinoco Oil Belt to Empresas Mixtas during 2007. The advice involved significant BIT/ICSID preparatory work, the filing of notices of disputes under BIT treaties and the negotiation of settlements.[11]

9. Mr. Fortier himself pointed out in his October 4, 2011 e-mail to Ms. Kinnear what was obviously a conflict, stating:

> [T]he Caracas office of Macleod Dixon LLP, Despacho de Abogados miembros de Macleod Dixon, S.C., has provided in the past, and continues to provide today, legal services to one of the parties to this arbitration, namely ConocoPhillips Company. The Caracas office is also acting adverse to the interests of the Bolivarian Republic of Venezuela in certain matters, including one where the Bolivarian Republic of Venezuela is the respondent in an ICSID case filed by

proceeding to its proposition that there is no firm in the world more adverse to the Respondent and PDVSA and its affiliates than Macleod Dixon.").

[10] *See* Respondent's October 5, 2011 Letter, pp. 1-2; Letter from Respondent to Judge Keith and Prof. Abi-Saab dated October 24, 2011 ("Respondent's October 24, 2011 Letter"), pp. 1-2.

[11] Respondent's October 5, 2011 Letter, Exhibit A, Macleod Dixon, *Latin America Practice*, accessed October 5, 2011, *available at* www.macleoddixon.com, pp. 3-4 of 5.

> Universal Compression International Holdings S.L.U. against Venezuela. I understand that the Caracas office is also acting on behalf of ConocoPhillips Company in ICC cases involving the Venezuelan state-owned petroleum company, Petroleos de Venezuela, S.A.[12]

The latter case was the one involving the Hamaca and Petrozuata Association Agreements.

10. As Respondent pointed out in its October 24, 2011 letter, Norton Rose's chief executive, Mr. Peter Martyr, had reportedly stated that "Macleod Dixon's Latin America presence was a major influence in our decision to merge."[13] Norton Rose targeted Macleod Dixon as a merger candidate because, as stated in the same article, "Latin America is an increasingly influential region for Norton Rose's clients in the energy and infrastructure, mining and commodities sectors."[14] It also noted that "Macleod Dixon's Caracas office is one of the largest firms in Venezuela, providing a full service offer and pulling in some of the country's major transactions in the oil sector and beyond," and that "[t]he Caracas office has positioned itself as a hub for Macleod's work in Latin America."[15]

11. Indeed, Macleod Dixon's Caracas office, the center of an extensive practice directly adverse to Respondent and PDVSA and its affiliates in precisely these types of matters, played a key role in bringing about the law firm merger, and Norton Rose's international arbitration expertise based in Montreal was a key motivation for

[12] E-mail from Mr. Fortier to Meg Kinnear, Secretary-General of ICSID, dated October 4, 2011 ("Mr. Fortier's October 4, 2011 E-mail"), p. 1.

[13] Respondent's October 24, 2011 Letter, p. 2. *See* Respondent's October 5, 2011 Letter, p. 2; *id*., Exhibit B, Joe Rowley, *Latin America "Major Influence" in Norton Rose/Macleod Merger*, LATIN LAWYER, October 5, 2011, *available at* www.latinlawyer.com, p. 1 of 2.

[14] Respondent's October 5, 2011 Letter, Exhibit B, J. Rowley, *Latin America "Major Influence" in Norton Rose/Macleod Merger*, LATIN LAWYER, October 5, 2011, *available at* www.latinlawyer.com, p. 1 of 2.

[15] *Id*.

Macleod Dixon. Mr. Fortier, who was the Chairman Emeritus of Norton Rose, was highlighted in the press at the time of the merger, and a prominent Macleod Dixon arbitration partner was quoted as saying that "[w]e have already started to work together on some files."[16] That particular Macleod Dixon partner was one of the lawyers in Venezuela representing clients in matters adverse to Respondent or PDVSA and its affiliates, including in the above-mentioned arbitration against PDVSA. In the latter case, Macleod Dixon was co-counsel for the ConocoPhillips claimants with Freshfields Bruckhaus Deringer, Claimants' lead counsel in this case, and continued in that capacity as part of Norton Rose after the merger.

12. Mr. Fortier advised the parties in this case of the impending merger only after Respondent had learned about it on the internet. At that time, notwithstanding the obvious conflict arising from the foregoing facts, he stated: "I am convinced that the facts which are the object of this disclosure have no bearing whatsoever on my ability to exercise independent judgment in the present arbitration."[17] However, whatever Mr. Fortier may have thought or said about the matter, there could be no doubt that any objective third-party observer would have been deeply troubled by the fact that Mr. Fortier was a partner of Norton Rose under the circumstances. Mr. Fortier himself must have come to appreciate that point, as he took the extraordinary step, after Respondent filed its proposal for disqualification, of resigning from Norton Rose effective at the end of 2011, notwithstanding his earlier insistence that the merger did not present any issue of conflict.[18]

[16] *Id*.

[17] Mr. Fortier's October 4, 2011 E-mail, p. 1.

[18] Letter from Mr. Fortier to Judge Keith and Prof. Abi-Saab dated October 18, 2011 ("Mr. Fortier's October 18, 2011 Letter").

13. Respondent never accepted that resolution as satisfactory, pointing out that the failure to disclose the intention to merge until it had already been publicly announced gave rise to concerns that were not allayed by Mr. Fortier's resignation from his firm.[19] Respondent also expressed concern that Mr. Fortier had stated at the time that his decision to separate from his firm, which came as a result of Respondent's proposal for disqualification, was a "very emotional" one given that the firm had been his home for more than 50 years.[20] As Respondent pointed out, it would be unfair to place Respondent in the position of having as an arbitrator in such an important case a person who has been forced to take such an emotional decision: "Quite naturally, the perception of conscious or unconscious bias is exacerbated in such a situation."[21]

14. In their submissions opposing the proposal for Mr. Fortier's disqualification, Claimants emphasized the severing of all ties between Mr. Fortier and Norton Rose, stating that he would "have no financial or professional ties" to the firm

[19] Respondent's October 24, 2011 Letter, pp. 3-4 ("[S]uch mergers do not happen overnight. They are the product of extensive discussion, negotiation and due diligence over a period of many months, covering, *inter alia*, the significant practice areas, client representations and sources of business of the respective firms. According to the press, discussions between Norton Rose and Macleod Dixon date back almost a year. . . . This process undoubtedly would have uncovered at a relatively early stage the breadth and significance of the matters adverse to the Respondent and PDVSA and its affiliates being handled by Macleod Dixon. We believe that disclosure should have been made at that time, as Respondent clearly would have considered the fact that Mr. Fortier's firm was seeking a strategic merger with a law firm whose Caracas office is so heavily invested in matters adverse to Respondent and PDVSA and its affiliates to be a 'circumstance that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party.' Presumably, there have been deliberations of the Tribunal over the last year. Respondent finds deeply troubling the prospect that Mr. Fortier was involved in such deliberations when such a clear, undisclosed conflict already existed. A decision on the matters at issue in this case might have had a significant impact on an important segment of the business targeted by Norton Rose in the merger discussions. This problem, which arose not after the merger vote but at a much earlier time when Norton Rose embarked on its strategy of pursuing a merger with Macleod Dixon, is not removed by Mr. Fortier's resignation at this time.").

[20] *Id*., p. 6 (citing Letter from Mr. Fortier to Judge Keith and Prof. Abi-Saab dated October 21, 2011, attachment, Norton Rose, Press Release, *Revered International Arbitrator, Yves Fortier, Leaving Norton Rose OR to Establish Independent Practice*, October 21, 2011, p. 1).

[21] *Id*.

after December 31, 2011.[22] The co-arbitrators quoted that language in their decision denying disqualification.[23] However, it turns out that Mr. Fortier did not in fact sever all professional ties with Norton Rose and apparently continues to maintain such ties today as a matter of routine use of Norton Rose in his arbitrations. His explanation has been that in October 2011, when he announced his resignation from Norton Rose, he stated: "There are members of Norton Rose OR who have assisted me in certain files in which I serve as an arbitrator – e.g. by acting as Administrative Secretary to the Tribunal – whom I may continue to call upon for assistance after 1 January 2012."[24] Unbeknownst to Respondent and presumably Prof. Abi-Saab and even Judge Keith, Mr. Fortier apparently considered that disclosure to be a license to maintain an ongoing, substantive professional relationship with Norton Rose senior attorneys, including in cases involving the same issues as are at issue here.

III. THE PENDING PROPOSAL TO DISQUALIFY MR. FORTIER DUE TO HIS ONGOING RELATIONSHIP WITH NORTON ROSE

15. The triggering event for the pending proposal to disqualify Mr. Fortier, filed on February 6, 2015, was the publication of the news reports on January 27, 2015 of Russia's challenge to the decisions of the *Yukos* tribunals chaired by Mr. Fortier.[25] The challenge was based in part on the extensive involvement of Mr. Martin Valasek, a

[22] Claimants' Reply to Respondent's Disqualification Proposal, dated October 25, 2011, ¶ 7.

[23] Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, dated February 27, 2012, ¶ 38.

[24] Mr. Fortier's October 18, 2011 Letter, p. 2.

[25] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226 (UNCITRAL), Final Award dated July 18, 2014, *available at* www.pca-cpa.org; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227 (UNCITRAL), Final Award dated July 18, 2014, *available at* www.pca-cpa.org; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228 (UNCITRAL), Final Award dated July 18, 2014, *available at* www.pca-cpa.org (together, "*Yukos*" or the "*Yukos* cases").

partner of Norton Rose, in assisting Mr. Fortier in the *Yukos* cases.[26] That assistance apparently went far beyond the role of an administrative secretary and was argued by Russia to be the equivalent of participation in the deliberations of the tribunal as a "fourth arbitrator."[27] The *Yukos* tribunal had two administrative secretaries provided by the PCA, meaning that Mr. Valasek's function must have been of a much different nature. Indeed, according to the published reports, he billed over 3,000 hours and charged over US$1 million doing work other than the services of an administrative secretary.[28]

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[26] *See* Letter from Respondent to the Tribunal dated January 29, 2015 ("Respondent's January 29, 2015 Letter"); *id*., Annex A, Alison Ross, *Yukos Moves to the Dutch Courts*, GLOBAL ARBITRATION REVIEW, January 27, 2015, *available at* globalarbitrationreview.com; *id*., Annex B, Alison Ross, *Was the Tribunal's Assistant the Fourth Yukos Arbitrator?*, GLOBAL ARBITRATION REVIEW, January 27, 2015, *available at* globalarbitrationreview.com. Claimants and Mr. Fortier both noted that the fact that Mr. Valasek was assisting Mr. Fortier in the *Yukos* cases could be discerned from public documents, including the July 2014 *Yukos* awards, as if it were Respondent's obligation to have conducted an ongoing investigation into Mr. Fortier's relationship with Norton Rose. Of course, that is not Respondent's obligation, and Respondent was not aware of the ongoing connection with Norton Rose until publication of the articles concerning Russia's challenge to the *Yukos* awards.

[27] Mr. Fortier has also maintained professional ties with other senior attorneys of Norton Rose. *See, e.g.*, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, and *Border Timbers Limited, Border Timbers International (Private) Limited and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 4 dated March 16, 2013 (two pending cases in which Alison G. FitzGerald, of Counsel at Norton Rose, is the assistant to the tribunals chaired by Mr. Fortier). In *Occidental v. Ecuador*, Renée Thériault, another senior lawyer of Norton Rose, acted as assistant to the tribunal until she resigned from Norton Rose in December 2011 to join the Supreme Court of Canada. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award dated October 5, 2012, ¶¶ 15, 17, 94. *See* Respondent's February 16, 2015 Letter, p. 1 and n. 1; ¶ 20 and n. 40, *infra*.

[28] Respondent's January 29, 2015 Letter, Annex B, A. Ross, *Was the Tribunal's Assistant the Fourth Yukos Arbitrator?*, GLOBAL ARBITRATION REVIEW, January 27, 2015, *available at* globalarbitrationreview.com, pp. 2-3 of 4. According to Russia's application to set aside the *Yukos* awards: "The very much larger number of hours Mr Valasek spent on the Arbitrations compared to the members of the Tribunal cannot be justified or explained on the basis that he was required to perform administrative functions, as might have been anticipated based on the role the Chairman represented the assistant would play, because he did not have any significant administrative responsibilities. Rather, the Secretariat fully handled the administrative organisation of the Arbitrations. As noted, the Tribunal appointed Mr Brooks Daly and Ms Judith Levine as administrative secretary and assistant administrative secretary, respectively, and a number of other employees of the Secretariat assisted them in these administrative duties and attended hearings. The Secretariat charged a total of 5,232.1 hours for these services, for which it was paid EUR 866,552.60. In addition, the Secretariat was paid EUR 996,780 for other costs, including the fees for stenographers, translators, costs for meeting rooms and travel expenses. This means that Mr Valasek did not have to occupy himself with administrative activities. The Tribunal, through the Secretariat, effectively confirmed that Mr Valasek participated in the substantive work and deliberations of the

16. Significantly, the *Yukos* cases involved a number of issues of relevance to this case, including the proper interpretation of the *Chorzów Factory* decision and the question of whether the valuation date in expropriation cases should be moved from the date of dispossession. Mr. Valasek is known for his views on such issues, which coincide with the views of Claimants in this case.[29] In fact, one of his articles has already been cited by Claimants in this case against Respondent.[30] The co-author of that article, Pierre Bienvenu, is also a partner at Norton Rose and the co-head of its international arbitration practice.[31] In another article, Mr. Valasek thanked Alison

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Tribunal, which the Tribunal members were obligated to perform personally. In particular, when the Secretariat refused a request from counsel for the Russian Federation for further details regarding the hours worked by the assistant, it did so on the basis that disclosing any further details would invade the confidentiality of the Tribunal's deliberations: 'The PCA has consulted the Tribunal regarding the Respondent's request of 9 September 2014. In the view of the Tribunal, the attached Statement of Account provides the Parties with the appropriate level of detail while assuring the confidentiality of the Tribunal's deliberations.' By invoking the confidentiality of deliberations as the basis for refusing to provide further information about the assistant's role, the Tribunal effectively confirmed, or at least has prevented anyone from denying, what the time analysis and the invocation of the confidentiality of deliberations imply. The necessary implication of this reliance on '*the confidentiality of the Tribunal's deliberations*' is that a third party, Mr Valasek, participated in the Tribunal's deliberations concerning the parties' evidence and submissions and participated in the drafting of the Final Awards. Such participation is in violation of the Tribunal's mandate to perform these functions personally, to the exclusion of any other persons." Respondent's February 16, 2015 Letter, Annex 2, Writ of Summons dated November 10, 2014, filed by the Russian Federation with the District Court in The Hague on January 28, 2015, *available at* old.minfin.ru/en, ¶¶ 499-501 (emphasis in original).

[29] Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated February 6, 2015 ("Respondent's February 6, 2015 Letter"), Annex 15, Martin J. Valasek, *A "Simple Scheme": Exploring the Meaning of Chorzów Factory for the Valuation of Opportunistic Expropriation in the BIT Generation*, 4(6) TRANSNATIONAL DISPUTE MANAGEMENT (November 2007); *id*., Annex 16, Pierre Bienvenu and Martin J. Valasek, *Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES, VOL. 14, 231 (A. Jan van den Berg ed., Kluwer Law International 2009).

[30] **Ex. CL-306**, Pierre Bienvenu and Martin J. Valasek, *Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES, VOL. 14, 231 (A. Jan van den Berg ed., Kluwer Law International 2009). *See* Respondent's February 16, 2015 Letter, pp. 2-3.

[31] *See* ¶ 21 and n. 43, *infra*.

FitzGerald of Norton Rose and two economists at LECG for their contributions.[32] Ms. FitzGerald is currently assisting Mr. Fortier in two pending arbitrations.[33] Claimants' economic experts in this case from the beginning through the 2010 hearings were from LECG.

17. In a communication dated February 3, 2015, Mr. Fortier insisted that upon his resignation from Norton Rose he had ceased to have "any professional relationship with the firm."[34] He went on to refer to the fact that he had disclosed in October 2011 that "there were then members of Norton Rose OR LLP who assisted me in certain files in which I served as an arbitrator (principally as Chairman) and whom I have continued to call upon for assistance after 1 January 2012."[35] To be precise, what Mr. Fortier had

[32] Respondent's February 6, 2015 Letter, Annex 15, M. J. Valasek, *A "Simple Scheme": Exploring the Meaning of Chorzów Factory for the Valuation of Opportunistic Expropriation in the BIT Generation*, 4(6) TRANSNATIONAL DISPUTE MANAGEMENT (November 2007), p. 1.

[33] *See* n. 27, *supra*.

[34] *See* E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated February 3, 2015, forwarding communication from Mr. Fortier of the same date ("Mr. Fortier's February 3, 2015 E-mail"). Apparently, Mr. Fortier adopted a very narrow definition of the term "professional relationship," but there can be no dispute that the term is not limited to a partnership or employment relationship. It covers any working relationship, including one as substantial as the working relationship with Mr. Valasek and other senior attorneys of Norton Rose assisting Mr. Fortier in his cases. *See, e.g.*, *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated October 4, 2006, ¶ 10 (noting that Professor Crawford voluntarily resigned from the tribunal after the claimant raised concerns regarding his "professional relationship" with Freshfields, the firm representing the respondent in that case); Respondent's February 6, 2015 Letter, Annex 10, Jason Fry and Simon Greenberg, *The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases*, 20(2) ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 12 (2009), ¶ 51 ("In 2008, there were three instances in which an arbitrator's professional relationship with a counsel caused the Court to withhold confirmation. The most common scenario here is where the arbitrator is acting as co-counsel with one of the counsel in another matter."); *id.*, Annex 11, Nadia Darwazeh and Baptiste Rigaudeau, *Clues to Construing the New French Arbitration Law*, 28(4) JOURNAL OF INTERNATIONAL ARBITRATION 381 (2011), pp. 397-398 ("Case 33: The chairman had previously co-counseled with one of the parties' counsel in an unrelated international arbitration, which ultimately settled. The chairman had also advised the same counsel on issues arising out of the settlement agreement. The chairman had failed to disclose this professional relationship. The chairman commented in the context of the challenge proceedings that (i) he had terminated his involvement in the other arbitration; (ii) he would stop working with the party's counsel pending the conclusion of the arbitration; and (iii) his law firm would work with that party's counsel only with the permission of the other party. The court nevertheless decided to accept the challenge.").

[35] Mr. Fortier's February 3, 2015 E-mail.

said in 2011 was that "[t]here are members of Norton Rose OR who have assisted me in certain files in which I serve as an arbitrator – e.g. by acting as Administrative Secretary to the Tribunal – whom I may continue to call upon for assistance after 1 January 2012. In such event, I will make arrangements with Norton Rose Canada in order for the time of these individuals to be billed to me by Norton Rose Canada."[36]

18. On February 6, 2015, Respondent pointed out that the news reports of Mr. Valasek's role in the *Yukos* cases did not fit within the description of administrative assistance for which Mr. Fortier intended to be billed by the firm.[37] Mr. Fortier then argued that while he had in 2011 given "as an example of such assistance the role of Administrative Secretary," "[a]nother obvious example for any lawyer practicing in the field of international arbitration is, of course, the role of Assistant to the Tribunal which is precisely the role Mr. Valasek fulfilled for the Yukos Tribunals for nearly 10 years until the Final Awards were issued on 18 July 2014."[38] However, there is a vast difference between answering phone calls and maintaining files, which a partner in a major law firm, such as Mr. Valasek, presumably would not be doing, and legal research, analysis of the evidence, preparation of memoranda and drafts of opinions, and participation in a tribunal's deliberations.

19. On February 16, 2015, Respondent addressed Mr. Fortier's comments as follows:

[36] Mr. Fortier's October 18, 2011 Letter, p. 2 (emphasis added). *See* ¶ 14, *supra*.

[37] Respondent's February 6, 2015 Letter, p. 3.

[38] *See* E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated February 14, 2015, forwarding communication from Mr. Fortier dated February 13, 2015 ("Mr. Fortier's February 13, 2015 E-mail").

> It is not appropriate to sweep everything under the rug of a 2011 disclosure that administrative assistance may be called upon. Indeed, it is precisely to avoid these kinds of concerns that one should not maintain the kinds of professional relationships that give rise to the appearance of a lack of the requisite impartiality or independence. While we firmly believe that Maître Fortier should have been disqualified in 2011 because even the severance of ties that Claimants mistakenly argued would occur would not cure the problem arising at that time, we of course would have emphasized the inappropriateness of the continuing professional relationship with Mr. Valasek had it been disclosed in 2011, and we suspect that it would have been a matter of concern to you as well.[39]

20. Respondent also noted in its February 16, 2015 letter that in addition to the extensive professional ties maintained by Mr. Fortier with Mr. Valasek at Norton Rose, Mr. Fortier has maintained other similar professional relationships with senior Norton Rose attorneys.[40] Mr. Fortier has not detailed these relationships with Norton Rose, apparently because he considers them all covered by his above-quoted disclosure in October 18, 2011, which Respondent never accepted and which cannot constitute a blanket license to engage in whatever relationship short of partnership or employment that Mr. Fortier considers convenient while remaining an arbitrator in this case. Respondent therefore again requests that Mr. Fortier provide information on all of his other relationships with Norton Rose since January 1, 2012.

21. In addition to the foregoing, Mr. Fortier stated on November 17, 2011 that he was "in the process of searching for rental premises,"[41] but he ended up in the same

[39] Respondent's February 16, 2015 Letter, pp. 2-3.

[40] *Id*., p. 1 and n. 1. *See* n. 27, *supra*. In two other ICSID arbitrations chaired by Mr. Fortier, it is not clear whether he has called upon Norton Rose again. *Ampal-American Israel Corporation et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11; *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/11/8.

[41] Letter from Mr. Fortier to Judge Keith and Prof. Abi-Saab dated November 17, 2011, p. 2.

building in Montreal where he was previously located, on one of Norton Rose's floors, leasing from a landlord that is one of Norton Rose's clients.[42] As Respondent pointed out in its February 10, 2015 letter, an article in a Canadian magazine further reported on Mr. Fortier's ties to the firm, featuring a photo of Mr. Fortier in those premises and stating:

> [I]t may be known as Norton Rose Fulbright today, but the name Ogilvy Renault is still stamped on his heart. His [Mr. Fortier's] office, located in Place Ville Marie, in downtown Montreal, is still on the same floor as Norton Rose's reception area. "You're going to talk to Pierre Bienvenu [the co-head of international arbitration at Norton Rose]? Well, his office is just over there!" says Fortier of his friend, a senior partner at his former firm.[43]

Mr. Fortier's physical proximity to Norton Rose, on top of the fact of the ongoing professional and emotional ties between him and his former firm, reinforces the appearance of a lack of the requisite impartiality in this case.

22. To be clear, Respondent does not suggest that there is anything improper about Mr. Fortier's maintaining ties to Norton Rose. What is objectionable is maintaining those ties while continuing to serve as arbitrator in this case. The undisputed facts are that: (i) Mr. Fortier maintained professional, and obviously emotional, ties to Norton Rose after his resignation in 2011; (ii) Norton Rose, through its

[42] *See* Respondent's February 6, 2015 Letter, pp. 3-4; Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 10, 2015 ("Respondent's February 10, 2015 Letter"). Mr. Fortier, in his e-mail dated February 3, 2015 (*see* ¶ 17, *supra*), merely stated that "[s]ince 1 January 2012, I have pursued my career independently as an arbitrator and mediator in premises which I lease from Ivanhoé Cambridge at Suite 2822 at Place Ville Marie in Montreal." Ivanhoé Cambridge is the landlord of Norton Rose's building and a client of Norton Rose.

[43] Respondent's February 10, 2015 Letter, p. 6 (citing Respondent's February 6, 2015 Letter, Annex 14, Marc-André Séguin, *The Diplomat*, CANADIAN BAR ASSOCIATION NATIONAL MAGAZINE, January – February 2014, p. 1). The same Pierre Bienvenu co-authored, with Mr. Valasek, one of the articles on compensation for unlawful expropriation mentioned above. *See* n. 29, *supra*. Mr. Fortier has advised that his office is not in fact on the reception floor, but on another floor with Norton Rose. *See* Mr. Fortier's February 13, 2015 E-mail.

Caracas office, has been the firm more adverse to Respondent and its state companies than any other in the world, including representing ConocoPhillips companies against PDVSA in an arbitration involving the very same association agreements as are at issue in this case; and (iii) at least some of the professional ties maintained by Mr. Fortier with Norton Rose involved cases having key legal issues in common with this case and a partner of that firm whose published writings indicate that he has taken positions adverse to Respondent's position in this case and have in fact already been cited by Claimants against Respondent in the quantum phase of these proceedings.

23. All of the foregoing and the other facts reviewed in the briefing on the pending proposal to disqualify Mr. Fortier should themselves be sufficient to disqualify Mr. Fortier from further participation in this Arbitration. However, the unfairness of his continued participation in this Arbitration is underscored by the recent events commencing with the delivery by Prof. Abi-Saab of his February 19, 2015 dissent[44] to the Majority September 2013 Decision and Prof. Abi-Saab's resignation from the Tribunal.[45]

IV. THE PRIOR PROPOSAL TO DISQUALIFY JUDGE KEITH AND MR. FORTIER FOR LACK OF THE REQUISITE IMPARTIALITY

24. This is not the first time that Respondent has found it necessary to propose the disqualification of Judge Keith and Mr. Fortier together on grounds of the lack of the requisite impartiality in this case. The first such proposal was dated March 11, 2014. At the time, Respondent stated that the refusal of both Judge Keith

[44] Dissenting Opinion of Prof. Georges Abi-Saab to the Decision on Jurisdiction and the Merits, dated February 19, 2015 (the "Abi-Saab February 2015 Dissent"). The dissenting opinion was forwarded to the Parties by the Secretary of the Tribunal on February 20, 2015.

[45] *See* ¶¶ 28-40, *infra*.

and Mr. Fortier to reconsider the Majority September 2013 Decision on grounds that they had no power to reconsider their own decision, even though no final award had been rendered and even though new evidence had been presented that proved that Claimants had made material misrepresentations to the Tribunal upon which Judge Keith and Mr. Fortier had relied in reaching their unsustainable conclusion regarding Respondent's purported bad faith negotiation, could only be explained as being a product of bias against Respondent. That conclusion was confirmed by Prof. Abi-Saab's dissent from the decision of Judge Keith and Mr. Fortier refusing to reconsider their Majority September 2013 Decision, in which Prof. Abi-Saab exposed their attitude towards Respondent in the following terms:

> This reasoning (ground, *motif*) of the Majority Decision is revealing in more ways than one. Apart from a general attitude vis-à-vis the Respondent, it reveals an important error in the establishment of facts on the part of the Majority Decision, by assuming that the Confidentiality agreement was in effect in June 2007, while it had on record before it evidence to the contrary. . . .
>
> Thus, the Majority Decision committed a material error in establishing the facts. But worse still, it drew from it by inference, a grave legal consequence: not only that the Respondent has breached its confidentiality obligation by submitting to the Tribunal the Claimants offers of June and August 2007, when that obligation had not yet come into effect; but also, and *ex hypothesi*, that the Respondent would not have hesitated to do the same, *i.e.* submit to the Tribunal any proposition it would have made during the final period of negotiations, had they existed, in violation of its confidentiality obligation which indeed covered that final period. In other words, the Majority Decision predicated, not on the basis of positive proof, but by divination or sheer fiat, a presumption – drawn from a single misconceived instance involving an error of fact – of a constant pattern of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes.

. . . .

> It is worth noting in this regard that, in order to reach its conclusions concerning the final period of negotiations, the Majority Decision, having admitted possessing no evidence at all for that period, had to make a leap of faith, encompassing three steps, a) relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings, insisting that they did not receive any offer beyond the initial one concerning the Petrozuata and the Hamaca projects. But in order for this version to prevail, the Majority Decision had to neutralize any contradictory evidence by b) shedding away as lacking credibility the general statements of Dr. Mommer in his written and oral testimonies that Venezuela was always willing to pay just compensation, and that the negotiations failed because of the intransigent and exaggerated demand of the Claimants; as well as c) denying any legal significance and effect to "whatever confidentiality agreement there was".
>
> . . . .
>
> In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence.
>
> It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.[46]

25. Respondent pointed out in the disqualification proposal referred to above that if Prof. Abi-Saab, one of the world's most distinguished international lawyers, the 2013 co-recipient (with Sir Elihu Lauterpacht) of the Hague Prize for International Law

[46] Dissenting Opinion of Prof. Georges Abi-Saab to the Decision on Respondent's Request for Reconsideration, dated March 10, 2014 (the "Abi-Saab Reconsideration Dissent"), ¶¶ 16-17, 22, 66-67 (emphasis added).

for his contributions to the development of international law, and the person with the best opportunity to observe the attitude of Judge Keith and Mr. Fortier towards Respondent up close, so emphatically indicated their negative "general attitude vis-à-vis the Respondent" and their "relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings," then surely any other reasonable third party would at least have serious doubts as to the impartiality of Judge Keith and Mr. Fortier in this case.[47]

26. At the time, Respondent summarized the reasons that a third party observer would have doubts about the impartiality of Judge Keith and Mr. Fortier as follows:

- Their ruling on a critical issue (the legality of the nationalization) in the Majority September 2013 Decision was based on obvious factual errors, impermissible inferences drawn from a lack of evidence, and material misrepresentations of fact made by Claimants. Those conclusions were not merely a matter of argument; they were a matter of fact based on the statements in the Majority September 2013 Decision itself and the uncontested documents in the record, including Claimants' own internal valuations, which left no doubt as to the reasonableness of the compensation offers made by Respondent, and U.S. Embassy cables reporting conversations with ConocoPhillips' own negotiators and unequivocally confirming the veracity of Respondent's position and the falsity of the representations Claimants made to this Tribunal.[48]

[47] *See* Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014; Letter from Respondent to the Chairman of the ICSID Administrative Council dated March 30, 2014, ¶ 10; Letter from Respondent to the Chairman of the ICSID Administrative Council dated April 14, 2014, pp. 6-7. It may also be noted that Claimants' lead counsel in this case, Freshfields, thought enough of Prof Abi-Saab to appoint him as arbitrator in *Micula v. Romania*. *See Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award dated October 11, 2013, ¶¶ 9, 39.

[48] Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, ¶ 49 (first bullet). *See* n. 52, *infra*. The record that was never disputed by Claimants showed, *inter alia*, that ConocoPhillips' internal documents reflected a value of the nationalized interests shortly before the nationalization that was actually less than the offer Venezuela made to them in a good faith effort to reach agreement on compensation. Nevertheless, Claimants represented to this Tribunal that Venezuela had only offered 5% of fair market value and had "made it clear that it would not offer compensation based on Fair Market Value." Apart from the documents in the record at that time that the majority completely overlooked, the U.S. Embassy cables published after the 2010 hearings in this case revealed that ConocoPhillips' chief negotiators had told the Embassy the opposite of what Claimants represented to

- The inference of bad faith drawn by Judge Keith and Mr. Fortier violated the well-established standard that "[a] finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion,"[49] a standard they themselves acknowledged in the portion of the Majority September 2013 Decision dealing with Claimants' conduct, where they noted "how rarely courts and tribunals have held that a good faith or other related standard is breached."[50]

- Judge Keith and Mr. Fortier based their ruling on the legality of the nationalization on a ground that was not even argued by Claimants (bad faith negotiation), without any warning to Respondent or affording it the opportunity to respond, despite the fact that Respondent on many occasions had urged the Tribunal to hold a short hearing if any point was causing it concern.[51]

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this Tribunal. *See* **Ex. R-313**, Letter from Respondent to the Tribunal dated September 8, 2013 ("Respondent's September 8, 2013 Letter"), with attachments; Respondent's First Brief on Reconsideration dated October 28, 2013, ¶¶ 35-42; Respondent's Second Brief on Reconsideration dated November 25, 2013, ¶¶ 30-45, 60-68; Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, ¶¶ 7-15.

[49] **Ex. R-313**, Respondent's September 8, 2013 Letter, Annex 6, *Tacna-Arica Question (Chile, Peru)*, Opinion and Award dated March 4, 1925, 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 921 (2006), p. 930. *See* Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, n. 16.

[50] Decision on Jurisdiction and the Merits dated September 3, 2013, ¶ 275. *See* Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, n. 17 and ¶ 49 (second bullet).

[51] Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, ¶¶ 5, 49 (third bullet) and nn. 8, 9. *See* **Ex. R-373**, International Law Association, Rio de Janeiro Conference (2008), *Final Report: Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, *available at* www.ila-hq.org, Recommendation 8 ("Before reaching their conclusions and rendering a decision or an award, arbitrators should give parties a reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties, or any of them, or that are based on legal issues not raised by or with the parties."); Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, Appendix A, *Interbulk Ltd. v. Aiden Shipping Co. Ltd. (The "Vimeira")*, Court of Appeal (England), Judgment dated March 21-23, 1984, 2 LLOYD'S LAW REPORTS 66 (1984), pp. 74-75 ("There is plain authority that for arbitrators so to decide a case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct . . . . In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal."); *id*., Appendix B, *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd*, Queen's Bench Division (Commercial Court) (England), Judgment dated May 23, 1985, 2 ESTATES GAZETTE LAW REPORTS 14 (1985), p. 15 ("It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance.").

- After the Majority September 2013 Decision, the Tribunal was presented with the detailed reports of the U.S. Embassy in Caracas based on conversations with Claimants' own lead negotiators, which demonstrated beyond doubt that the factual premises upon which Judge Keith and Mr. Fortier had based their Majority September 2013 Decision were false and that Claimants had made misrepresentations to the Tribunal upon which Judge Keith and Mr. Fortier uncritically relied.[52]

- Judge Keith and Mr. Fortier denied Respondent's Application for Reconsideration of the Majority September 2013 Decision, as well as even the application for a short hearing on the issue of the Tribunal's power to reconsider, without any analysis or even mention of the facts or evidence demonstrating beyond doubt that the Majority September 2013 Decision was based on false factual premises and misrepresentations.[53]

- Judge Keith and Mr. Fortier also refused to grant Respondent's request to call upon Claimants to either correct the record or explain why correction was unnecessary.[54] The only way to avoid correcting the record was either to refute the evidence or to say that the facts do not matter. The former could not be done; the latter is an absurd proposition in any case.[55]

- Judge Keith and Mr. Fortier did not address the extensive and dispositive legal authorities cited by Respondent in its two rounds of briefs on the issue of the Tribunal's power to reconsider the Majority September 2013 Decision. In effect, Judge Keith and Mr. Fortier were saying that no matter how egregious the circumstances may be, a tribunal may never review its own interim decision even though the case remains pending before it. That unprecedented ruling could only be explained as a product of an unwavering determination on the part of Judge Keith and Mr. Fortier to stick to their position no matter what the facts actually show, no matter what new evidence may be presented, and no matter what

[52] Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, ¶¶ 10-15, 49 (fourth bullet) and nn. 25, 26; **Ex. R-313**, Respondent's September 8, 2013 Letter, Annex 4, Cable dated April 4, 2008, *ConocoPhillips Briefs Ambassador on Compensation Negotiations*, ¶¶ 2-5; *id*., Annex 5, Cable dated May 23, 2008, *Update on ConocoPhillips Negotiations*, ¶¶ 5, 9.

[53] Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, ¶ 49 (fifth bullet).

[54] *See* International Bar Association Guidelines on Party Representation in International Arbitration, adopted by a resolution of the IBA Council on May 25, 2013, *available at* www.ibanet.org, Guidelines 9-10 ("A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal. In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission."). *See also* Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, n. 38.

[55] Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, ¶ 49 (sixth bullet).

misrepresentations of fact may have been made to them causing them to make their original incorrect decision.[56]

- As made clear by Prof. Abi-Saab, Judge Keith and Mr. Fortier evinced a negative "general attitude vis-à-vis the Respondent" which must have colored their inexplicable decision on the Application for Reconsideration.[57] Prof. Abi-Saab also stated that "the Majority Decision predicated, not on the basis of positive proof, but by divination or sheer fiat, a presumption – drawn from a single misconceived instance involving an error of fact – of a constant pattern of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes."[58] Dictionaries define "fiat" as an "arbitrary" order or edict. Arbitrariness, "divination," "a presumption . . . of a constant pattern of conduct" in violation of obligations and "relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings" are certainly not the hallmarks of impartiality.[59]

- Judge Keith and Mr. Fortier not only refused to address any of the facts or legal authorities cited by Respondent, but they also had nothing to say about the observations of Prof. Abi-Saab concerning their negative "general attitude" towards Respondent and their manner of deciding the issue of good faith negotiation or his comment that no "self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence."[60]

27. The Chairman of the ICSID Administrative Council rejected the proposal to disqualify Judge Keith and Mr. Fortier, although he did not dispute that Respondent had put forward the correct standard. The expressed reason for rejecting the proposal was nothing more than the conclusory statement that "the Tribunal adopted a reasonable procedure that was within its discretion to regulate the conduct of the proceeding.

[56] *Id*., ¶ 49 (seventh bullet).

[57] Abi-Saab Reconsideration Dissent, ¶ 16. *See* ¶ 24, *supra*.

[58] Abi-Saab Reconsideration Dissent, ¶ 17. *See* ¶ 24, *supra*.

[59] Respondent's Memorial in Support of Proposal to Disqualify Arbitrators, dated March 21, 2014, ¶ 49 (eighth bullet).

[60] *Id*., ¶ 49 (ninth bullet); Abi-Saab Reconsideration Dissent, ¶¶ 16, 66-67.

Similarly, there is nothing in the reasoning or conclusions of the Decision on Reconsideration that suggests an absence of impartiality."[61] The Chairman did not support that conclusory statement with any facts or analysis of what actually happened in this case and did not even mention the observations of Prof. Abi-Saab. Respondent's request for a hearing on the matter was also ignored.[62]

V. THE NEW PROPOSAL TO DISQUALIFY JUDGE KEITH AND THE ADDITIONAL GROUNDS FOR THE DISQUALIFICATION OF MR. FORTIER

28. The recent events surrounding the resignation of Prof. Abi-Saab have once again shown that Judge Keith and Mr. Fortier should not continue as arbitrators in this case and have left Respondent no choice but to again propose their disqualification on grounds of the lack of the requisite impartiality. Those events began with the delivery on February 19, 2015 by Prof. Abi-Saab of his dissent to the Majority September 2013 Decision.[63] That dissent, which shows in no uncertain terms why the Majority September 2013 Decision could not possibly withstand scrutiny in any

[61] Decision on the Proposal to Disqualify a Majority of the Tribunal, dated May 5, 2014, ¶ 55.

[62] The Chairman's decision seems to fit within the comment of a recent draft report of an ICCA task force on issue conflict in investment arbitration, which states: "This section examines publicly known challenge decisions in the context of international investment arbitration where the challenging party alleges some form of inappropriate predisposition by an arbitrator. The reasons for the resulting decision are not always explained; indeed, some challenge decisions seem unreasoned and peremptory." International Council for Commercial Arbitration (ICCA) and American Society of International Law (ASIL), REPORT OF THE ICCA-ASIL JOINT TASK FORCE ON ISSUE CONFLICTS IN INVESTOR STATE ARBITRATION, Discussion Draft dated March 10, 2015, *available at* www.arbitration-icca.org, ¶ 97. *See also* **Appendix 4**, Baiju S. Vasani and Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, 30(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 194 (Winter 2015), p. 208 ("Furthermore, the generality of the standard adopted by Dr Kim and his failure to fully explain his application of that standard (in any of his decisions in *Blue Bank*, *Burlington*, *Repsol*, *Abaclat* and *ConocoPhillips II*) is equally disappointing. In each written decision, while Dr Kim provides a consistent formulation of parameters he seeks to apply, he devotes little more than approximately a page in each case (or sometimes less) to applying this test to the facts and grounds for disqualification at issue.").

[63] Abi-Saab February 2015 Dissent.

annulment proceeding, no doubt will be studied in law schools around the world as a model for the correct application of basic international law principles to actual cases.

29. For present purposes, however, what are noteworthy are the many parts of that dissent making clear, once again, that Judge Keith and Mr. Fortier appeared determined to reach a result against Respondent regardless of what the record showed. Thus, for example, Prof. Abi-Saab stated the following:

- "The cardinal error of the Majority Decision, in my submission, is precisely to have evacuated completely these compensation clauses from its reasoning, for no valid objective reason, in order to reach the conclusion it seeks, as shall be shown below."[64]

- "Two reasons impel me to revisit this process. The first is that the Majority's narrative is rather selective, relying very heavily and uncritically on the pleadings and testimonies of the Claimants and their witnesses, while passing over certain elements of significance for the proper understanding of the position of the Respondent and his main witness, Dr. Mommer."[65]

- "The Majority, however, hastens to dismiss Dr. Mommer's response by adding immediately: 'Against that general denial, made only at the hearings and not in the two rounds of written testimony, the Tribunal notes the contrary written testimony of Mr. Lyons'. This perfunctory account by the Majority of Dr. Mommer's response is both incomplete and incorrect. It is so fragmentary as to verge on misrepresentation when it encapsulates Dr. Mommer's response in

[64] *Id*., ¶ 39 (emphasis added). The conclusion that Judge Keith and Mr. Fortier sought to reach was that the 2007 nationalization was unlawful because Respondent did not negotiate compensation in good faith, even though: (i) not even Claimants had argued that Respondent had negotiated in bad faith; (ii) the record existing as of the date of the Majority September 2013 Decision showed exactly the contrary; (iii) ConocoPhillips' own negotiators reported exactly the contrary to the U.S. Embassy, as made clear in the U.S. Embassy cables presented to the Tribunal in support of Respondent's Application for Reconsideration of the Majority September 2013 Decision; and (iv) those cables, which Judge Keith and Mr. Fortier simply ignored, led Prof. Abi-Saab to note that their content "reveals, once verified by the Tribunal to be true (but its veracity was not contested by the Claimants, only its relevance and admissibility), that if there was bad faith, it is not attributable to the Respondent, but to the Claimants who misled the Majority by their misrepresentations, in full awareness of their falsity." Abi-Saab Reconsideration Dissent, ¶ 65.

[65] Abi-Saab February 2015 Dissent, ¶ 40 (emphasis added).

the sheepish and defensive phrase that 'he did not think that he had said' what Mr. Lyons attributed to him."[66]

- "Apart from the serious legal problem raised by the cavalier manner in which the Majority jumps to this conclusion, the conclusion in itself is patently absurd. . . . The insinuation and the assumption it carries – of a pattern of conduct revealing bad faith on the part of Venezuela – is made by the Majority without proving at any length its substance as expected and required by international law for the grave accusation of bad faith, according to the exacting standard of proof restated by the Tribunal itself earlier in the same Decision when the allegation of bad faith was addressed to the Claimants."[67]

- "How can anyone (not to mention seasoned arbitrators) jump from the mere making of the very first offer of compensation by Venezuela to the conclusion that, from the starting blocks, Venezuela was not negotiating in good faith? A conclusion that requires the scrutiny of the whole process of negotiations over compensation, not merely the first act or shot in such a process. Apparently, in its haste to reach the conclusion it seeks, the Majority put the cart before the horse."[68]

- "Most of these findings and assumptions of law and fact either cover serious errors or are unwarranted, unproven or even proven wrong by other elements in the file, as amply shown in what follows."[69]

- "It would have been legally more judicious and much easier for all concerned had the Tribunal followed the objective road by putting the question in terms similar to the ones above (*i.e.* was the offer illusory?). But the Majority chose another subjective road in the way it drafted the question (*i.e.* did Venezuela negotiate in good faith?); making the answer turn on the proof of bad faith, a well neigh impossible task in the absence of direct evidence. This led the Majority to overload the question artificially with conditions and qualifications, leading – but only by presumption, conjecture and indirect inference – to the negative answer it seeks to reach."[70]

[66] *Id*., ¶¶ 80-81 (emphasis added).

[67] *Id*., ¶ 94 and n. 44 (emphasis added).

[68] *Id*., ¶ 96 (emphasis added).

[69] *Id*., ¶ 110.

[70] *Id*., ¶ 121 (emphasis added).

- "Apart from being wrongly put, by positing on charge of the Respondent an obligation that does not exist either in the BIT or in international law, the title-question of the Majority is a 'leading one', because it subsumes or at least insinuates the negative answer it seeks to reach; and this through the last clause of the question 'reference to the standard in Article 6/c of the BIT', when the main contention between the parties is precisely on the determination of the proper standard of compensation as applicable law *in casu* and/or on the interpretation of this standard."[71]

- "However, the point to be noted here is different, namely that, regardless of the correct or erroneous character of the above finding, it reveals the position of the Majority on another important aspect of the issue. It is that the Majority adopts axiomatically, *i.e.* as a given, hence as a presumption, without any further proof than the assertion of the Claimants, their interpretation (or characterization) of the compensation clauses as not being intrinsic determinants of the market value of the protected investment."[72]

- "This presumption (being the third prong of the legal presumption carried by the title-question), is patently false, for the reasons expounded above. But it is an essential stepping stone in the logical scheme of the Majority to attain the result it seeks to reach. For without presuming, implicitly, that the compensation clauses are not an intrinsic determinant of the market value of the protected investment, it would have been impossible for the Majority to skip or by-pass a logically essential first step. This prior missed step is examining whether the initial offer of Venezuela was *prima facie* "illusory", *i.e.* grossly inadequate, or not; hence whether it could serve as a reasonable basis of discussion or negotiations (*i.e.* taking the objective route), rather than jumping directly into the subjective quagmire of fathoming intentions, by inquiring into whether Venezuela was negotiating in good faith or not."[73]

- "Indeed this presumption that the compensation clauses are not part of the equation determining the market value of the protected investment, allowed the Majority to exclude them at the outset from being taken into consideration. By so doing, the Majority was also able to make another implied determination, again on the basis of the mere assertion of the Claimants, hence by way of presumption, (to be dealt with in the next section), namely, that the initial compensation offer of Venezuela (barring the effect of the

[71] *Id*., ¶ 123 (emphasis added).

[72] *Id*., ¶ 139 (emphasis added).

[73] *Id*., ¶ 140 (emphasis added, internal citations omitted).

compensation clauses) was illusory. Together, these two implied presumptions served as a jumping rod for the Majority's leap of faith (faith in the Claimants assertions, without any further verification), into the long and wrong subjective detour leading to its (submittedly erroneous) finding that Venezuela from the outset, *i.e.* at least from its initial offer, was not negotiating in good faith."[74]

- "It is true that the Tribunal did not have before it information about the contents of these offers and moves. But that does not allow the Majority in logic or in law to feign ignoring that they took place and presume they never existed, in order to reach the result it seeks, namely a determination of fact that Venezuela not only did not move, but also implicitly that it never intended to move, from its initial position, and was thus negotiating all along in bad faith."[75]

- "This reasoning of the Majority is revealing in more ways than one. Apart from a general attitude vis-à-vis the Respondent and particularly its principal witness, Dr. Mommer, it reveals an important *error in the establishment of facts* on the part of the Majority, by assuming that the Confidentiality Agreement was in effect in June 2007 (the date of the first counter-offer by ConocoPhillips, revised in August 2007), whilst it had on record before it evidence to the contrary."[76]

- "Besides, the Majority's position is that it found 'no evidence at all' in the record before it that Venezuela invoked the compensation clauses during the negotiations. This record is composed basically (if one goes by the references in the Decision, and apart from the pleadings of the Parties) of the written and oral testimonies of Dr. Mommer and Mr. Lyons, including the annexed ConocoPhillips' trigger letters and the letters of 12 April 2007. But as the Majority went to enormous trouble to do away with Dr. Mommer's testimony, it relied exclusively on the Claimants' narrative of the negotiations."[77]

- "This statement is a rare (perhaps unique) example in the annals of judicial and arbitral decisions, of wishing away (by fiat? or magic?) cumbersome or embarrassing evidence. In fact, what the Majority is saying in this seemingly off-handed remark, is that Dr. Mommer's first hand testimony (he being the chief negotiator for Venezuela), that the failure to take into consideration the compensation clauses

[74] *Id*., ¶ 141 (emphasis added).

[75] *Id*., ¶ 208 (emphasis added).

[76] *Id*., ¶ 214 (emphasis added and in original).

[77] *Id*., ¶ 225 (emphasis added).

was the main reason for Venezuela's rejection of ConocoPhillips' counter-offer, should not be taken to mean that this reason was ever expressed or given in the negotiations with ConocoPhillips to explain or justify this rejection."[78]

- "A glaring example of the temperamental way of the Majority in handling proof, is the variable geometry it showed in dealing with the issue of good faith in two different parts of the Decision. In examining, under jurisdiction, a preliminary objection based on the concept of 'corporations of convenience', the Tribunal starts its analysis with the following sentence: 'It [the Tribunal] will do that bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one'. . . . However, when it came to the proof of bad faith of the Respondent in the negotiations over compensation, the Majority relies exclusively on inference from hypothetical premises extrapolated from partly erroneous findings of fact, as abundantly shown above."[79]

- "This unsolicited defense of the attitude of the Claimants claiming much beyond the market value of the assets in the negotiations, by invoking that they didn't know they had no right to that addition, strongly contrasts with the highly suspicious attitude towards the Respondent. For had the Majority had the same solicitude towards the Respondent, it could have found a parallel excuse on their behalf: that even if Dr. Mommer, had really said that Venezuela would not pay market value (which he forcefully rejected), such a statement could be explained by the fact that he was thinking of the compensation clauses in the Agreements (which he probably was) as qualifying the market value (and which are not ruled upon yet anyway, in contrast to the claim of compensation for royalty and tax charges which was dismissed by the Tribunal)."[80]

- "To recapitulate briefly, the Majority in reconstituting in its analysis the process of negotiations, limited itself to the documentary evidence put before it specifically for that purpose. And as the Claimants, since their trigger letter of January 2007 were clearly preparing a litigating file, while Venezuela was, probably for the same reason, suspicious of epistolary negotiations, the Majority relied heavily on ConocoPhillips' sources. All it had before it from the Venezuelan side were the testimonies of Dr. Mommer; and even the letters appended thereto were letters from ConocoPhillips,

[78] *Id*., ¶ 236 (emphasis added).

[79] *Id*., ¶¶ 269(a), 271 (emphasis added).

[80] *Id*., ¶ 274 (emphasis added).

not from Venezuelan sources. And it is these testimonies of Dr. Mommer that the Majority systematically discredited, and where it could not, it discarded as irrelevant."[81]

- "Thus, in discrediting Dr. Mommer's refutal of the statement attributed to him that Venezuela will not pay market value, the Majority restates his response as 'he did not think he had said [so]'. Then the Majority immediately discredits this testimony by describing it as a 'general denial, made only at the hearings and not in the two rounds of written testimony'. This expeditive dismissal is based on two basic errors. In the first place, the Majority suddenly forgets a paragraph in Dr. Mommer's first 'Direct Testimony', filed almost a year before the oral hearings, that the Majority reproduces in the Decision, three pages before, in which he generally but firmly rejects such allegations. The second error is in reporting Dr. Mommer's answers in cross-examination, which verges on misrepresentation of his twice forceful answers, first politely 'I don't think I ever said something like that', then more directly 'I think that witness statement [Lyons'] is incorrect'."[82]

- "Then again, in trying to prove that the Confidentiality Agreement would not have restrained Venezuela from submitting to the Tribunal any new proposals it would have made during the second period of negotiations, had it made any; the Majority gives as proof the fact that Dr. Mommer submitted as annexes to his first testimony the two letters of ConocoPhillips containing their counter-offers of June and August 2007. The Majority was thus assuming that these counter-offers were covered by the Confidentiality Agreement, and were submitted all the same. It extrapolates from this a presumption of a constant course of conduct on the part of Venezuela that it would not hesitate to act in violation of its obligations, in order to advance its interests. But all that hypothetical construction is built on an error of fact, as the Confidentiality Agreement had not been concluded yet when the two letters of ConocoPhillips were sent in June and August 2007."[83]

- "All these inferential acrobatics and liberties taken with the rules of evidence and procedure were necessary for the Majority to eliminate the main obstacle to attain the result it sought to reach, namely that the initial offer of Venezuela was wanting and that no other effort was made later on."[84]

[81] *Id*., ¶ 276 (emphasis added).

[82] *Id*., ¶ 277 (emphasis added).

[83] *Id*., ¶ 278 (emphasis added).

[84] *Id*., ¶ 280 (emphasis added).

- "The Majority centered its decision on an issue that had not been raised or addressed by the Parties, and to which their attention was not drawn by the Tribunal to illicit their opinion. In particular, the Respondent, who was found responsible for a most serious internationally wrongful conduct on that basis, was not given the opportunity to present its position on the matter. By proceeding in this manner, the Majority commited a serious violation of the procedural rights of the Parties, particularly Respondent, and of the fundamental principle of even handedness and equality of arms between the Parties; that which constitutes a serious departure from due process."[85]

30. Respondent obviously agrees with the impeccable legal analysis of Prof. Abi-Saab. Indeed, one cannot read his dissenting opinion and fail to appreciate the fundamental errors of fact and law embedded in the Majority September 2013 Decision. But that is not the point of this proposal for disqualification. What are material now are Prof. Abi-Saab's repeated references to the attitude of Judge Keith and Mr. Fortier towards Respondent and its principal witness,[86] their penchant for accepting as true anything Claimants and their witnesses said irrespective of what the record showed, and the presumptions and assumptions they adopted to "attain the result it [the majority] seeks to reach."[87] Those observations, which permeate the 95-page dissent, echo what Prof. Abi-Saab had said in his dissent from the decision of Judge Keith and Mr. Fortier denying Respondent's Application for Reconsideration. There, Prof. Abi-Saab had already noted the majority's "general attitude vis-à-vis the Respondent" and its "relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings."[88]

[85] *Id*., ¶¶ 284-285 (emphasis added).

[86] *See* ¶ 26 and n. 52, *supra*.

[87] *See* ¶ 28, *supra*.

[88] Abi-Saab Reconsideration Dissent, ¶¶ 16, 22. *See* ¶¶ 24-25, *supra*.

31. Prof. Abi-Saab's observations are not merely expressions of disagreement with the Majority September 2013 Decision; they are an undeniable indication that something was very wrong in the manner in which that decision and the majority's decision on the Application for Reconsideration were reached. If the majority had a general attitude of hostility vis-à-vis Respondent and a predisposition to rely exclusively and uncritically on Claimants' unproven allegations, then obviously Respondent had no chance of obtaining justice in this case, no matter what the evidence showed and no matter what the law is, except on those issues on which no one, no matter how partial, could avoid a conclusion in favor of Respondent.[89]

32. Immediately following the submission of his dissent, Prof. Abi-Saab submitted his resignation as a result of serious and persistent health issues.[90] No one can dispute the health reasons for Prof. Abi-Saab's resignation.[91] In addition, no one disputes that there is absolutely no precedent for denying consent to a resignation under such circumstances.[92]

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[89] As stated earlier, Prof. Abi-Saab was in the best position to observe the attitude of Judge Keith and Mr. Fortier up close. *See* ¶ 25, *supra*. Indeed, in opposing the first proposal to disqualify Mr. Fortier, Claimants argued: "Had the recent negotiations between Norton Rose and Macleod Dixon affected Maître Fortier's position in this case, his co-arbitrators Sir Kenneth Keith and Prof. Georges Abi-Saab would be aware of it." Claimants' Reply to Respondent's Disqualification Proposal, dated October 25, 2011, n. 1. That is precisely the point here.

[90] Letter from Prof. Abi-Saab to Judge Keith and Mr. Fortier dated February 20, 2015.

[91] On March 26, 2013, Judge Keith advised the parties in this case that the decision on jurisdiction and the merits would be delayed at least in part due to such reasons. Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 26, 2013. Several months later, the Secretary-General of ICSID noted that the Prof. Abi-Saab's health issues "had a considerable effect on the timing of the Tribunal's deliberations." Letter from Meg Kinnear, Secretary-General of ICSID, to the Parties dated June 3, 2013, p. 1. ICSID's cover letter attaching the Majority September 2013 Decision then stated that "Professor Abi-Saab's ill health has prevented him from appending a written dissenting opinion for the time being, but it will follow in due course." Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated September 3, 2013, p. 2.

[92] Consent to a resignation for health reasons is given "as a matter of course." *See* **Appendix 1**, A. R. Parra, THE HISTORY OF ICSID, p. 163.

33. Article 56(3) of the ICSID Convention provides that where consent to the resignation of a party-appointed arbitrator is denied, the resulting vacancy will be filled by the Chairman of the ICSID Administrative Council. It is universally recognized that the purpose of that provision is to prevent a party and its party-appointed arbitrator from obstructing or frustrating the proceeding by orchestrating a resignation; it is not to penalize a party be depriving it of the right to appoint a replacement arbitrator when the arbitrator it appointed resigns for serious health reasons. While that is true under any circumstances, it is particularly true in this case, where the last thing Respondent would have wanted was to see an arbitrator of such integrity and intellect as Prof. Abi-Saab resigning from this Tribunal.

34. The following excerpts from the *travaux préparatoires* of the ICSID Convention and the commentary on the subject leave no doubt as to the object and purpose of Article 56 of the ICSID Convention and the inappropriateness of denying, or purporting to deny, consent to Prof. Abi-Saab's resignation:

- *Travaux* of the ICSID Convention: "As a protection against resignation of a Panel member under pressure of the party which had appointed him, a vacancy created by resignation without the consent of his fellow members will be filled not by the appointing party but by the President."[93]

- *Travaux* of the ICSID Convention: "Mr. HETH (Israel) proposed that where an arbitrator appointed by the State is to be replaced under Article 59(2), the appointing State should have the right to appoint his replacement in the first place. After hearing the explanation of the Chairman [Mr. Broches] that this was designed to prevent

[93] **Appendix 5**, *Working Paper in the Form of a Draft Convention Prepared by the General Counsel and Transmitted to the Executive Directors*, dated June 5, 1962, in HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, VOL. II, PART 1, 19 (ICSID 2006), Commentary to Article VII, Section 5 (at p. 45).

collusion between parties and arbitrators appointed by them, he withdrew his proposal."[94]

- *Travaux* of the ICSID Convention: "Mr. Broches replied that the purpose of the provision was to prevent the possibility of collusion between the party and the arbitrator appointed by him. If a party could prevail upon an arbitrator to resign in the course of the proceedings without cause he would be able to frustrate or slow down the proceedings. Obviously, if the resignation was for good cause, the other members of the tribunal would consent. . . . Mr. Khosropur pointed out that, if there was a good cause or purpose for the resignation, the tribunal would undoubtedly consent. Therefore he was in favor of retaining the provision as it was. Mr. Machado was also in favor of retaining the existing text. The purpose of this provision was to ensure that proceedings be conducted in good faith."[95]

- Notes to the ICSID Arbitration Rules: "The intention of this provision is to lessen the possibility of a party inducing an arbitrator appointed by it to resign, so as either to enable his replacement by a more tractable person or merely to delay the proceeding."[96]

- Reed, Paulsson and Blackaby: "The vacant position is usually filled by the same process used to appoint the original arbitrator. However, if the vacancy occurred because an arbitrator resigned without the consent of the tribunal (as theoretically could happen if an unscrupulous party-appointed arbitrator resigned for tactical purposes) or if the vacancy has not been filled within 45 days and the parties so request, the Chairman of the Administrative Council appoints a replacement from the Panel of Arbitrators."[97]

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[94] **Appendix 6**, *Summary Proceedings of the Legal Committee Meeting on December 10, 1964*, dated January 5, 1965, in HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, VOL. II, PART 2, 868 (ICSID 2006), Discussion on Articles 59, 60 and 61 (at p. 872).

[95] **Appendix 7**, *Memorandum of the Meeting of the Committee of the Whole on February 23, 1965*, dated February 25, 1965, in HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, VOL. II, PART 2, 989 (ICSID 2006) ("February 23, 1965 Meeting of the Committee of the Whole"), Discussion on Chapter V – Replacement and Disqualification of Conciliators and Arbitrators, ¶¶ 29, 32-33 (at p. 992) (emphasis added).

[96] **Appendix 8**, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 1968*, 1 ICSID REPORTS 63 (1993), Note D to Rule 8 (at pp. 75-76).

[97] **Appendix 9**, Lucy Reed, Jan Paulsson and Nigel Blackaby, GUIDE TO ICSID ARBITRATION (2nd ed., Kluwer Law International 2011), p. 137.

- Lalive: "[T]he withdrawal of an arbitrator according to instructions from the government party presents serious difficulties . . . . The World Bank Convention system, for its part, eliminates those difficulties, and it would seem appropriate to discourage the State from resorting to such behavior."[98]

No one can seriously contend that any of the abuses referred to in the *travaux* or in the above-cited commentary is remotely relevant to this case.

35. The following bizarre events have occurred since Prof. Abi-Saab's resignation:[99]

- On February 21, 2015, Claimants wrote to the Secretary-General of ICSID, proclaiming that the resignation was "shocking" and making the nonsensical assertion that Respondent would "welcome the grave disruption" caused by the withdrawal.[100] Claimants did recognize that Prof. Abi-Saab's resignation came while "the proceeding is suspended pending the outcome of [Mr. Fortier's] challenge."[101] In fact, their suggestion was that "[a]s a first and essential step" Respondent's proposal to disqualify Mr. Fortier should be submitted "immediately" to the Chairman of the Administrative Council for his "urgent decision."[102] Claimants also revealed a strategy designed to deprive Respondent of the right to appoint a replacement arbitrator under Article 56 of the ICSID Convention, requesting "that ICSID disclose whether the Tribunal has consented to Professor Abi-Saab's resignation" and "if so to provide us with a copy of that instrument," or if such an instrument did not exist, to be accorded time to present their views on whether consent could properly be given under the "unusual circumstances here."[103]

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[98] **Appendix 10**, Pierre Lalive, *Procedural Aspects of Arbitration between States and Foreign Investors under the Convention of March 18, 1965, on the Settlement of Investment Disputes between States and Nationals of Other States (Aspects Procéduraux de l'Arbitrage entre un État et un Investisseur Étranger dans la Convention du 18 Mars 1965 pour le Règlement des Différends Relatifs aux Investissements entre États et Ressortissants d'Autres États)*, in INVESTISSEMENTS ÉTRANGERS ET ARBITRAGE ENTRE ÉTATS ET PERSONNES PRIVEES: LA CONVENTION B.I.R.D. DU 18 MARS 1965, 111 (Éditions A. Pedone 1969), p. 120.

[99] Respondent, in its letter to the Secretary-General of ICSID dated March 25, 2015 ("Respondent's March 25, 2015 Letter"), attached the parties' correspondence from February 21 through March 25, 2015, as Annexes 1-36. Many of these documents are referred to below.

[100] Letter from Claimants to Meg Kinnear, Secretary-General of ICSID, dated February 21, 2015 ("Claimants' February 21, 2015 Letter"), p. 1.

[101] *Id*.

[102] *Id*.

[103] *Id*., pp. 1-2.

- On February 23, 2015, Respondent expressed its "regret that Prof. Abi-Saab, a man of great distinction and wisdom, has had to resign as arbitrator for health reasons" and thanked him "for his invaluable contributions to this case." Respondent also reiterated that "the notion that Respondent 'will welcome the grave disruption thus threatened' is the kind of utter nonsense that we are used to hearing from Claimants."[104] After all, it was Prof. Abi-Saab who had recognized the absurdity of the idea that Respondent had negotiated compensation in bad faith; it was Prof. Abi-Saab who had recognized that the U.S. Embassy cables had demonstrated that if anyone had acted in bad faith, it was Claimants, not Respondent; it was Prof. Abi-Saab who had recognized that the Majority September 2013 Decision was completely unsustainable on legal grounds; it was Prof. Abi-Saab who had recognized that Judge Keith's and Mr. Fortier's decision refusing to even examine the irrefutable evidence justifying reconsideration of the Majority September 2013 Decision, including the U.S. Embassy cables demonstrating that it had been based on manifestly false premises, was without any foundation; and it was Prof. Abi-Saab who had revealed that Judge Keith and Mr. Fortier had a negative "general attitude vis-à-vis the Respondent" and were "relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings" while "systematically discredit[ing]" the testimony of Respondent's principal witness. Finally, Respondent suggested as a practical way forward in this unprecedented situation that it promptly proceed with the appointment of a replacement arbitrator for Prof. Abi-Saab, indicating that it expected to make a selection within 30 days, hardly an unusual time period for such an important decision in a case of this magnitude and significance.[105]

- That same day, the Secretary of the Tribunal wrote on behalf of the Secretary-General of ICSID, inviting the parties to "submit any observations that they may have concerning Professor Abi-Saab's resignation."[106] In response, Respondent observed that there was no basis in Article 56 of the ICSID Convention or the ICSID Arbitration Rules and no precedent in ICSID practice for such a request. Respondent then asked that the Secretary of the Tribunal advise as to the purpose and basis for its invitation to the parties to comment on Prof. Abi-Saab's resignation for health reasons.[107]

[104] First E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated February 23, 2015 (Annex 3 to Respondent's March 25, 2015 Letter).

[105] *Id*.

[106] E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated February 23, 2015.

[107] Second E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated February 23, 2015 (Annex 5 to Respondent's March 25, 2015 Letter).

- On February 24, 2015, the Secretary of the Tribunal informed the parties, without elaboration, that the purpose of the invitation was to offer the parties an opportunity to comment on this matter and that "[t]he President of the Tribunal considers that such observations could be of assistance to the Tribunal."[108] The Secretary's e-mail clarified neither the legal basis for soliciting these comments from the parties nor the relevance of seeking the parties' observations when Prof. Abi-Saab's resignation was the result of ill health and when, as all parties recognized, the resignation came while "the proceeding is suspended pending the outcome of [Mr. Fortier's] challenge."[109] The Secretary requested the parties to simultaneously transmit their observations on February 25, 2015.

- Respondent maintained its objection to this procedure, stating that "we still do not see any basis for the parties to comment on Prof. Abi-Saab's health reasons for resigning."[110] The reason for Respondent's objection was threefold: (i) there was no dispute as to the existence of the health reasons for Prof. Abi-Saab's resignation; (ii) there was obviously no precedent or rational basis for anyone to dispute a resignation for health reasons; and (iii) there was no basis for "the Tribunal" to be considering anything at that point in time, in light of the fact that the proposal to disqualify Mr. Fortier based on his ongoing relationship with Norton Rose, filed on February 6, 2015, was still pending and that the entire proceeding was suspended.

- Nonetheless, on February 25, 2015, Respondent filed its observations in accordance with the Secretary's invitation.[111] Reiterating that there was no basis for the Tribunal or for ICSID to seek the parties' observations on an arbitrator's resignation for reasons of ill health, Respondent pointed out that the only relevant issue of substance was whether Mr. Fortier, who remained subject to the pending challenge, could participate in the consideration of Prof. Abi-Saab's resignation.[112] Respondent also reiterated its objection to Claimants' silly suggestion that Respondent

[108] E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated February 24, 2015.

[109] Claimants' February 21, 2015 Letter, p. 1.

[110] E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated February 24, 2015.

[111] E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated February 25, 2015 ("Respondent's February 25, 2015 E-mail").

[112] Respondent did add that the matter was likely "academic," given the obvious legitimacy of Prof. Abi-Saab's reasons for withdrawing from the Arbitration. *Id*. As the *travaux* of the ICSID Convention make clear: "Obviously, if the resignation was for good cause, the other members of the tribunal would consent. . . . Mr. Khosropur pointed out that, if there was a good cause or purpose for the resignation, the tribunal would undoubtedly consent." **Appendix 7**, February 23, 1965 Meeting of the Committee of the Whole, Discussion on Chapter V – Replacement and Disqualification of Conciliators and Arbitrators, ¶¶ 29, 32 (at p. 992). As noted earlier, there has never been a case of denying consent to a resignation for health reasons, which is the most legitimate ground of all for resignation. *See* n. 92, *supra*.

somehow would be pleased by the resignation of Prof. Abi-Saab, "one of the world's most distinguished international lawyers, particularly one who has written two powerful opinions confirming the correctness of Respondent's position on central issues in this case."[113]

- Claimants submitted their "observations" on Prof. Abi-Saab's resignation in an offensive seven-page letter.[114] The letter included a series of statements about matters having absolutely no relevance to the resignation, including the merits of Respondent's pending challenge to Mr. Fortier and the views of Respondent and Respondent's counsel on the system of investor-state arbitration.[115] Claimants' strategy in this letter was twofold. First, they confirmed their position that the challenge to Mr. Fortier should be referred to the Chairman of the ICSID Administrative Council for decision. Second, Claimants advanced their theory that Prof. Abi-Saab's resignation should not be accepted because he "resign[ed] without seeking the consent of the remaining Tribunal members."[116] To support their assertion that it would not be appropriate to consent to Prof. Abi-Saab's resignation, Claimants drew particular attention to Prof. Abi-Saab's dissent to the Tribunal's 2014 decision on reconsideration, which stated that the decision by Judge Keith and Mr. Fortier "'makes mockery not only of ICSID arbitration but of the very idea of adjudication.'"[117] Claimants also sought to cast doubt on the sincerity of Prof. Abi-Saab's health issues, stating that ICSID should reject resignations from arbitrators "who found things not going 'their' party's way" and "sabotaged the proceedings by resigning for difficult-to-verify reasons."[118] They went on to state that Prof. Abi-Saab's resignation letter failed to identify any "particular event of medical significance" giving rise to the withdrawal.[119]

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[113] Respondent's February 25, 2015 E-mail.

[114] Letter from Claimants to Meg Kinnear, Secretary-General of ICSID, dated February 25, 2015 ("Claimants' Letter dated February 25, 2015").

[115] It is true that many states, as well as Respondent's counsel, have voiced criticisms of the system of investor-state arbitration. *See* **Appendix 11**, George Kahale, III, *Keynote Address*, Eighth Annual Juris Investment Treaty Arbitration Conference, in 8 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 191 (I. A. Laird *et al.* eds., JurisNet, LLC 2015); **Appendix 12**, George Kahale, III, *Is Investor-State Arbitration Broken?*, 9(7) TRANSNATIONAL DISPUTE MANAGEMENT (December 2012). What is mind-boggling is why anyone would consider that relevant to the path forward in this case following Prof. Abi-Saab's resignation. Indeed, a reasonable and objective observer would easily conclude that this situation is but another manifestation of the legitimacy of the criticisms to which Claimants refer in making their frivolous argument that Respondent should not have the right to appoint a replacement arbitrator following the unfortunate resignation of Prof. Abi-Saab for health reasons.

[116] Claimants' Letter dated February 25, 2015, p. 3.

[117] *Id*., p. 5 (quoting Abi-Saab Reconsideration Dissent, ¶ 67).

[118] *Id*., pp. 4-5.

[119] *Id*., p. 6.

- On February 26, 2015, Respondent replied to Claimants' letter, stating: "In order for the parties to have an equal opportunity to make observations, they must have a clear understanding of what it is they are supposed to be commenting on. That obviously was not the case here. If anyone is going to take seriously the long and insulting letter submitted by Claimants yesterday, which we doubt, Respondent would like the opportunity to respond."[120] In response, Claimants urged the Secretary of the Tribunal to ignore Respondent's request.[121]

- Respondent wrote once more on February 26, 2015, seeking clarity on the procedure to be followed in this unprecedented situation.[122] In Respondent's view, the resignation of Prof. Abi-Saab entitled Respondent to appoint a new arbitrator, who, once appointed, would decide with Judge Keith upon the challenge to Mr. Fortier. Respondent also renewed its insistence that if the insulting allegations in Claimant's letter were to be considered, then Respondent should have an opportunity to respond.[123] Respondent's observations in this letter were never addressed, and its request for clarification was never answered.

- On March 4, 2015, the Secretary of the Tribunal wrote to the parties on instructions from Judge Keith, reporting that Judge Keith and Mr. Fortier had "decided not to consent" to Prof. Abi-Saab's resignation, but failing to explain how Mr. Fortier, who was and remains the subject of a pending proposal for disqualification, could participate in that decision. The letter did not set forth any reasoning for the decision of Judge Keith and Mr. Fortier, and actually quoted Judge Keith acknowledging that he and Mr. Fortier at some point "plainly did consent" to Prof. Abi-Saab's resignation and that they had "urged Professor Abi-Saab to complete his dissent and then, as he had himself indicated, to resign from the Tribunal so that the Respondent could appoint a replacement arbitrator." Nevertheless, Judge Keith went on to say that the consent that had "plainly" been given somehow did not cover "a resignation in late February when the quantum hearing was only seven weeks away and a challenge to one of the arbitrators was pending."[124]

[120] First E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated February 26, 2015 (Annex 12 to Respondent's March 25, 2015 Letter).

[121] Letter from Claimants to Gonzalo Flores, Secretary of the Tribunal, dated February 26, 2015.

[122] Second E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated February 26, 2015 (Annex 15 to Respondent's March 25, 2015 Letter).

[123] *Id*.

[124] Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 4, 2015, p. 2. The implication of this statement was that somehow there were conditions attached to the consent, as if the consent were some sort of contract document containing a series of conditions to closing or an expiration date. Of course, that was not the case. There were no "conditions," and it is unacceptable to suggest

- That same day, Respondent recorded its objections to this procedure, stressing that it could not accept a denial of its fundamental right to appoint an arbitrator.[125] Respondent noted the unprecedented nature of rejecting a resignation for health reasons, especially when Judge Keith and Mr. Fortier "plainly did consent" earlier to the resignation. Respondent requested that a copy of any "documents reflecting the consent that Judge Keith and Mr. Fortier gave to the resignation" be provided to the parties, while pointing out that "[i]n any event, we fail to understand why legitimate health reasons that would have justified a resignation at December 31, 2014 somehow become inadequate if the resignation does not occur until February 20, 2015."[126]

  With respect to the suggestion that the pendency of the proposal to disqualify Mr. Fortier could in any event be considered relevant to the issue of consent to Prof. Abi-Saab's resignation, Respondent pointed out the following: "[A]side from the fact that an arbitrator subject to a disqualification proposal should not be consenting or taking action on anything until that proposal is resolved, it would obviously be inappropriate to take the existence of the proposal into consideration in determining the issue of consent to Prof. Abi-Saab's resignation for health reasons. If our interpretation of the last paragraph of the statement from Judge Keith is incorrect and if what Judge Keith is really saying is that he and Mr. Fortier consented late last year, but subject to a time limit, and now they are neither consenting nor denying consent because the disqualification

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that the filing of a proposal to disqualify Mr. Fortier in February 2015 could have any bearing on the issue of consent, much less the issue of withdrawal of consent already "plainly" given.

[125] Letter from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 4, 2015 ("Respondent's March 4, 2015 Letter"), ¶ 2.

[126] *Id*., ¶ 3. The March 4, 2015 letter from the Secretary of the Tribunal had indicated that Prof. Abi-Saab had originally intended to resign by the end of 2014. Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 4, 2015, p. 2. As can be seen from Prof. Abi-Saab's subsequent communication, "none of [the exchanges with my colleagues] indicated that beyond a certain date the acceptance of the resignation would be withdrawn." *See* ¶ 36, *infra*. In fact, Judge Keith continued to press Prof. Abi-Saab to complete his dissent and resign in 2015. As Respondent pointed out in its March 4 letter, even before learning of the exchanges that had occurred after December 31, 2014: "With respect to the timing of the quantum hearing, if Prof. Abi-Saab had resigned at the end of 2014, as Judge Keith and Mr. Fortier apparently would have preferred, and Respondent had been granted the normal time period to appoint a replacement, there is simply no way in which anyone could reasonably have expected the quantum hearing to take place on April 13, 2015, unless the replacement arbitrator would have gone into the hearing wholly unprepared. That is not a serious way to conduct a hearing. No one could be expected to even read, much less study the massive file in this case and be prepared to act as an arbitrator in a hearing within such a short period. Again, if the resignation would have been acceptable on December 31, 2014, it cannot have become unacceptable on February 20, 2015 on the ground of delaying the hearing, as in both cases postponement of the hearing was inevitable." Respondent's March 4, 2015 Letter, ¶ 4.

proposal is pending and the case has been suspended, then we do not understand why ICSID is treating this situation as a denial of consent."[127]

Respondent further noted that the situation contemplated by Note D to Rule 8 of the ICSID Arbitration Rules[128] does not fit this case since: (i) it was obvious that the last thing Respondent wanted was for Prof. Abi-Saab to resign and (ii) Respondent was very much looking forward to the hearing on quantum, which will, whenever it takes place, expose the lack of substance in Claimants' positions and the misrepresentations that have sent this case spiraling out of control.[129]

Respondent concluded that "[w]hat is happening here is that Respondent is being illegitimately denied the right to appoint an arbitrator and penalized for Prof. Abi-Saab's resignation for health reasons, pure and simple. That is unacceptable, and ICSID should not permit a replacement arbitrator to be appointed without the consent of Respondent."[130]

- During the following days, March 6-13, the Parties and the Secretary of the Tribunal exchanged a series of e-mails in which Respondent reiterated its requests that: (1) the documents indicating the exchanges among Judge Keith, Mr. Fortier and Prof. Abi-Saab regarding Prof. Abi-Saab's resignation, including the terms of the consent that Judge Keith indicated had plainly been given, be provided; (2) Prof. Abi-Saab be requested to provide his understanding of those exchanges; and (3) Judge Keith clarify whether he and Mr. Fortier were actually purporting to deny consent to the resignation now or simply saying that they are neither consenting nor denying consent because of the procedural status of the case.[131] Respondent's requests were ignored.

- On March 13, 2015, Claimants urged ICSID to immediately proceed to appoint an arbitrator on behalf of Respondent on the ground that "[w]hen administrative decisions have been made, the time for argument has ended," that "Venezuela has already received much more of an explanation than it was entitled to expect" and that no documents relating to the consent that Judge Keith said had been "plainly" given should be

[127] Respondent's March 4, 2015 Letter, ¶ 4.

[128] *See* ¶ 34 and n. 96, *supra*.

[129] *Id*., ¶ 5.

[130] *Id*., ¶ 7.

[131] E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 6, 2015; Letter from Claimants to Gonzalo Flores, Secretary of the Tribunal, dated March 6, 2015; E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 7, 2015; E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 12, 2015; E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 13, 2015; E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 13, 2015.

provided because "[a]n arbitral tribunal's internal deliberations and communications should be sacrosanct and immune from compelled disclosure."[132]

- On March 14, 2015, Respondent replied to Claimants' letter as follows:

> Claimants say that administrative decisions have been made that are "clearly within the authority of those who have made them, and in accordance with the Convention and the Rules." However, it should by now be obvious to all that we are in an unprecedented situation not covered by the Convention and the Rules. We also note that Claimants initially urged that ICSID proceed as a first step to decide the challenge to Mr. Fortier, which ICSID did not do, presumably indicating that the Convention and the Rules are not quite as clear as Claimants thought.
>
> Claimants also say that we are improperly seeking to compel disclosure of secret internal deliberations. We are not. Judge Keith said that he and Mr. Fortier at some point plainly did consent to Prof. Abi-Saab's resignation. We want to see that consent and whether any conditions were attached to it, and we want to see Prof. Abi-Saab's understanding of the consent Judge Keith said was plainly given. You may recall that on February 21, 2015, Claimants themselves asked to see any document containing a consent, so it appears that Claimants' objection to asking for such documents only applies when we are the ones making the request.
>
> In addition to seeking the documents relating to the consent, we asked for a clarification of exactly what Judge Keith was saying in his communication quoted in your March 4, 2015 letter. We do not think that the Rules prohibit seeking that clarification, particularly in these most unusual circumstances, where (i) Judge Keith said that consent was plainly given at some point by him and Mr. Fortier, (ii) at the moment, Mr. Fortier is not in a position to participate in any decision of the Tribunal, and (iii) the proceedings were supposed to be suspended upon the filing of the proposal to disqualify Mr. Fortier.

[132] Letter from Claimants to Gonzalo Flores, Secretary of the Tribunal, dated March 13, 2015, p. 1.

> Claimants say that if ICSID had proceeded immediately to decide the challenge to Mr. Fortier some time after their letter of February 21, and presumably then to determine the issue of whether there had been consent to Prof. Abi-Saab's resignation, and then to have the substitute arbitrator appointed, that "conceivably could have saved the long-scheduled final hearing date." That is utter nonsense. Even if the Chairman of the Administrative Council would have decided and rejected the challenge to Mr. Fortier the very next day, there is no way in the real world that a new arbitrator could have been appointed and prepared himself in time for the scheduled hearing in April. That should have been obvious even to Claimants.
>
> . . . .
>
> Claimants are trying to deprive Respondent of its right to appoint a replacement arbitrator. It would be scandalous for ICSID to assist Claimants in that effort. We are not simply talking about "administrative decisions" here. We are talking about fundamental rights in a case of exceptional importance which the whole world is watching.[133]

- Since Respondent's requests for clarification, necessary documents and information were being ignored, it wrote to Judge Keith, Mr. Fortier and Prof. Abi-Saab on March 17, 2015 "to seek directly the documents, information and clarifications that we have repeatedly and unsuccessfully sought through ICSID, namely: (i) the documents indicating the exchanges among Judge Keith, Mr. Fortier and Prof. Abi-Saab regarding Prof. Abi-Saab's resignation, including the terms of the consent that Judge Keith said was plainly given at some point in time; (ii) Prof. Abi-Saab's understanding of those exchanges; and (iii) clarification from Judge Keith of whether he and Mr. Fortier are purporting to deny consent to the resignation now or simply saying that they are neither consenting nor denying consent because of the procedural status of the case."[134]

- On March 23, 2015, the Secretary of the Tribunal communicated to the parties the response of Judge Keith and Mr. Fortier to Respondent's requests.[135] The two arbitrators refused to provide any documents or

[133] Respondent's March 14, 2015 E-mail, ¶¶ 1-4, 6. *See* ¶ 4, *supra*.

[134] E-mail from Respondent to Judge Keith, Mr. Fortier and Prof. Abi-Saab dated March 17, 2015.

[135] Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 23, 2015.

> information concerning their consent to Prof. Abi-Saab's planned resignation and any conditions attached thereto. Without any further elaboration, Judge Keith and Mr. Fortier asked ICSID to "reaffirm their decision of March 4, 2015 not to consent to the resignation of Professor Georges Abi-Saab." They again supplied no explanation as to how Mr. Fortier could even participate in this decision while he was the subject of a pending proposal for disqualification or why Respondent should be penalized for Prof. Abi-Saab's resignation for health reasons. Nor was there any explanation of the request that ICSID "reaffirm their decision." Nevertheless, the Secretary of the Tribunal announced that "the consequence of Judge Keith and Mr. Fortier's not consenting to Professor Abi-Saab's resignation is that his replacement will be appointed by the Chairman of the ICSID Administrative Council."[136]
>
> - That same day, Respondent replied to the Secretary of the Tribunal, stating: "As you know, we find this situation unacceptable for all the reasons we have previously communicated. We note that in the last paragraph of your letter of today you say that 'Judge Keith and Mr. Fortier have asked ICSID to reaffirm their decision of March 4, 2015 not to consent to the resignation of Professor Georges Abi-Saab.' We do not understand that sentence and do not think that ICSID can 'reaffirm' any such decision. We await Professor Abi-Saab's response to the requests made in our e-mail of March 17, 2015."[137]

36. On March 25, 2015, Prof. Abi-Saab, having reviewed the correspondence from February 21 through March 17, 2015, wrote to the Secretary-General of ICSID directly to address the circumstances of his resignation and the astonishing decision of Judge Keith and Mr. Fortier to withdraw their acceptance, which he felt "implie[d] a serious moral accusation which [he] cannot leave unanswered."[138] He wrote as follows:

> On Tuesday, March 17, I received an e-mail from Mr. George Kahale III, Counsel to Venezuela, which was addressed to the two members of the Tribunal and myself, in which he relates the exchanges between the Parties, and the Decision of ICSID concerning my resignation; none of which I had seen before. I was astonished to discover, in an annexed letter from Mr. Gonzalo Flores to the Parties, dated 4 March 2015, that President Keith and Maître Fortier had

[136] *Id*., p. 3.

[137] E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 23, 2015.

[138] E-mail from Prof. Abi-Saab to Meg Kinnear, Secretary-General of ICSID, dated March 25, 2015.

withdrawn their acceptance to my resignation and that in consequence ICSID itself is proceeding to appoint a replacement for me.

I am not going to discuss here the legality of any decision taken by President Keith and Maître Fortier, while the latter is subject of a motion of disqualification and the procedure is suspended. However, the withdrawal of acceptance implies a serious moral accusation which I cannot leave unanswered, which is the modicum of fairness mandated under any legal system of procedure.

To start, two preliminary points. The first is that I consider (and I think all jurists agree) that legal "motivation" or reasoning is an essential part of any judicial or arbitral decision; that it is a paramount duty of anyone who participates in taking such a decision to ascertain that it is adequately motivated; and that if he or she does not agree with either the outcome or the reasoning of the majority, he has diligently to explain his reasons. This paramount obligation is even more exacting in international law, where there is no general appellate jurisdiction; and still more so if one is part of an appellate chamber whose function is to control the proper interpretation of the law. I have abided by this professional and moral categorical imperative throughout my professional life, without any exception, whether on the bench of the ICJ as judge ad hoc, that of the ICTY, or the Appellate Body of the WTO or the diverse arbitration tribunals in which I happened to participate.

The other, crucial, point is that of my health situation, of which I am diffident to speak, but have no alternative, given that it is the cause of my resignation. My problems started in 2010, with a banal cataract operation. I had accepted to replace my old and regretted friend Ian Brownlie in the ConocoPhillips arbitration just before that operation, which unfortunately triggered serious complications ending up with a heavy brain surgery, end of November 2012.

The operation, though successful, required a very long period of recuperation in clinic and at home, that took me to the middle of the Summer of 2013, during which I couldn't do much. But no sooner had I started to hope for a return to normalcy, than I started to feel unwell again (albeit with different symptoms). It was at that juncture that the ConocoPhillips Tribunal embarked on the last round of deliberations over the decision of jurisdiction and some

aspects of the merits. I managed to participate in the deliberations, but was not in shape to write an opinion. This is why I consented to the Decision of 3 September 2013 being delivered without my dissenting opinion, while insisting to mention that such opinion would follow suit.

A severe crisis broke out almost immediately thereafter, at the beginning of October, leading to several weeks in intensive care and hospital, where finally a tenacious case of an "auto-immune" disease was diagnosed. It responded only to a heavy treatment on the basis of cortisone, with telling side effects. I am still following this treatment under the strict supervision of the Geneva University Hospital. All this can be ascertained if need be.

The strict orders of my doctors, when I left hospital towards the end of 2013, was to stop forthwith all professional and other stressful activities. But I subjected them to the proviso "as soon as I can"; given my professional and moral categorical imperative described above. And indeed, I managed within a reasonable period to terminate two of my three arbitral commitments, one which was nearing the end and the other by resigning after the preliminary objection phase; but not without appending in both cases a short separate opinion. But these were cases involving much less and simpler issues than the ConocoPhillips one, which was moreover interrupted by the request for reconsideration that took more than six months to be pleaded and decided upon; a decision to which I also appended a dissenting opinion.

These activities took their toll on my physical condition whose evolution has not been either linear or always in the right direction. In the circumstances, I made known to my co-arbitrators my desire of resigning before the active phase of the quantum round, once I have terminated my dissenting opinion to the 3 September 2013 Decision, in order to avert the serious risk of my not being able to hold on until the end of the case. This was also made known to ICSID, through the Secretary of the Tribunal, Mr. Gonzalo Flores. It was in that context that acceptance to my resignation was clearly given.

I apologize for having to describe in such detail those unfortunate developments of my health condition, in order to explain how, much to my regret, my work was slowed down; that which prevented me from abiding by the time limits I fixed to myself for submitting my dissenting opinion followed

by resignation. But I must emphasize that at no time, during my exchanges with my colleagues, particularly President Keith, was either the principle of my resignation or its acceptance by my co-arbitrators put into question.

Turning to the surprise "withdrawal" of consent, I have to mention first that I received on the 19th of March 2015 an e-mail from President Keith, which he described as "a reaction in part to Mr. Kahale's e-mail of 18 March" and in which he informed me that "in terms of what I did say to the Parties in early March, I recall" a series of e-mails he had addressed to me. This is why I am going to recall some of them as well, the same as some of my own e-mails to him, while of course avoiding anything that touches the deliberations over the contentious issues before the Tribunal.

As I mentioned above, throughout my exchanges with my colleagues, and particularly with President Keith, all the messages I received, without exception, spurred me to "finish the opinion and then resign"; and none of them indicated that beyond a certain date the acceptance of the resignation would be withdrawn, or even contemplated (not to say asked me) to stay on, whether in general or if I did not resign by a certain date.

On 11 January 2015, I reported to President Keith in an e-mail, in which I wrote in part: "I am in the process of editing the opinion and expect sending it to typing by the end of the coming week. Anyway, this Opinion drained the few drops of energy that were left to me while struggling with a vicious illness during the last two (worst) years of my life. Having exacted such a heavy toll, I am not prepared to abandon ship before delivering it, even at the price of sticking it out through the hearings on quantum. But I cannot guarantee how long I can hold on, as it does not depend on me".

It is true that President Keith, in his answer, wrote "I must insist that you complete and submit your dissent by Friday 6 February [the date of the end of his term on the ICJ]. The next step is for you to resign at that point". But he did not write that otherwise, the acceptance of the resignation would be withdrawn. Nor did he envisage the possibility I alluded to of my staying on. On the contrary, he emphasized that "I am sure that from your own and Rosemary's point of view and in terms of your health that it is necessary for this burden to be lifted".

> And as I was furtively trying to finalize the Opinion, he wrote on 8 February: "The bigger issue for me is my failure through the lengthy period to get Georges to complete and deposit his dissent from the decision of September 2013 and to follow that with his resignation".
>
> But when I resolved the issue in the manner required a few days later (I wrote to President Keith, the day following my resignation "Please forgive my long silence. But I did not want to write before I fulfil the promise I made to you"), this issue – which was on 8 February "the failure to obtain my resignation" – suddenly was transformed into the fact that I resigned.
>
> No fundamental change of circumstance took place between 6 and 20 February that can justify such a turn about. It would not have made any difference on the practical consequences of my resignation, particularly on the course of the proceedings, if it took place on 6 rather than 20 February. In other words, there is nothing that justifies the withdrawal of acceptance; unless it be a reaction to the dissenting opinion itself; which has nothing to do with the grounds on which the acceptance of the resignation or its withdrawal should be based.
>
> I apologize for the length of this message. But it concerns a matter of the highest importance, as it touches on honour. And one cannot remain silent on these matters.[139]

37. Prof. Abi-Saab's communication shows how ludicrous Claimants' observations on his resignation were, how profoundly disturbing are the actions of Judge Keith and Mr. Fortier in purporting to withdraw the consent to Prof. Abi-Saab's resignation that they had previously "plainly" given, thereby purporting to deny Respondent the right to appoint a replacement arbitrator, and how inappropriate ICSID's actions have been in allowing this entire scandalous situation to develop. In particular, Prof. Abi-Saab's communication shows the following: (i) there is no doubt that Prof. Abi-Saab has suffered from severe health problems, of which Judge Keith, Mr. Fortier and

[139] *Id*.

ICSID were all well aware; (ii) Judge Keith, Mr. Fortier and ICSID have also long been aware that Prof. Abi-Saab intended to resign for health reasons after fulfilling what he saw as a moral obligation to complete his dissenting opinion to the Majority September 2013 Decision; (iii) Judge Keith and Mr. Fortier unquestionably consented to the proposed resignation, although they urged Prof. Abi-Saab to finish his dissent as rapidly as possible; (iv) none of the exchanges on the issue of Prof. Abi-Saab's delivery of his dissenting opinion or resignation "indicated that beyond a certain date the acceptance of the resignation would be withdrawn"; (v) at some point in early 2015, Judge Keith wrote to Prof. Abi-Saab to request the delivery of the dissenting opinion by February 6, 2015, stating that "the next step is for you to resign at that point" and advising that "in terms of your health . . . it is necessary for this burden to be lifted," but never saying that if the February 6 date slipped the consent that had previously been given to Prof. Abi-Saab's resignation would be withdrawn; and (vi) upon reviewing Respondent's e-mail of March 17, 2015 and, in particular, the March 4, 2015 letter from the Secretary of the Tribunal that was attached, Prof. Abi-Saab was "astonished" to discover that Judge Keith and Mr. Fortier had purported to withdraw their prior consent to his resignation.

38. On March 30, 2015, the Secretary-General of ICSID responded to Prof. Abi-Saab's communication as follows:

> Thank you for your email of March 25, 2015. The decision referred to in your email was adopted by the Tribunal following your resignation on February 20, 2015. Given your longstanding relationship with the Centre, I am sure you will understand that the Secretariat plays no role in these decisions, respectful of the independence of the arbitrators and their autonomy to make decisions. I hope that your

> health issues are now behind you and wish you a full recovery.[140]

The Secretary-General quite appropriately acknowledged in this communication the health issues that led to Prof. Abi-Saab's resignation, but her reference to "the independence of the arbitrators and their autonomy to make decisions" did not explain how that general principle could apply to an arbitrator, such as Mr. Fortier, who was subject to a proposal for disqualification and in no position to take any decision as part of the Tribunal – whether to deny consent or to withdraw a consent that had previously been "plainly" given – or why ICSID appeared to endorse his continued participation in decisions of the Tribunal under such circumstances. Nor does it offer any explanation of how Judge Keith, either on his own or in consultation with Mr. Fortier, could act under such circumstances to withdraw the consent that he said was "plainly" given.

39. Respondent is mindful of the distinction between disagreement on issues of fact or law, on the one hand, and lack of the requisite impartiality, on the other. But if the line was not crossed before, it certainly has been crossed now. To be clear, Respondent's objection to the continuation of Judge Keith and Mr. Fortier in this case is not grounded on mere disagreements with their fact findings or legal conclusions; it is grounded on the justifiable doubts, which any third party undertaking a reasonable evaluation of the record would share, that whatever may be the case in other circumstances, they are unable to view this case with the requisite impartiality. The events reviewed above are only the most recent manifestation of that fact.

40. Sifting through the details of this sad story, the following conclusions are inescapable: (i) Judge Keith and Mr. Fortier purported to take action regarding Prof. Abi-

[140] E-mail from Meg Kinnear, Secretary-General of ICSID, to Prof. Abi-Saab dated March 30, 2015.

Saab's resignation even though the proceedings at that time had been suspended due to the proposal to disqualify Mr. Fortier in light of his ongoing professional and emotional ties to Norton Rose; (ii) Judge Keith and Mr. Fortier, at the time when both were able to grant consent to the resignation, "plainly did consent" and then attempted to withdraw the consent after the proposal for disqualification was made and after Prof. Abi-Saab's dissent demonstrating the lack of impartiality of Judge Keith and Mr. Fortier; and (iii) the only reasons put forward by Judge Keith and Mr. Fortier, namely, that the resignation came "when the quantum hearing was only seven weeks away and a challenge to one of the arbitrators was pending," is nonsensical and smacks of retaliation against Respondent for challenging Mr. Fortier and against Prof. Abi-Saab for documenting in meticulous detail the negative "general attitude vis-à-vis the Respondent" of Judge Keith and Mr. Fortier and their penchant for "relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings." When the foregoing is viewed in light of the history of these proceedings, including the facts and circumstances surrounding the earlier proposals for disqualification reviewed above, it is clear that Judge Keith and Mr. Fortier should not continue to serve as arbitrators in this case.

VI. CONCLUSION

41. Respondent continues to urge Judge Keith and Mr. Fortier to voluntarily withdraw as arbitrators in this case. However, if that does not occur, then, for the reasons set forth herein:

- Mr. Fortier should be disqualified from continuing to act as arbitrator in this case because (i) he has ongoing professional and emotional ties to Norton Rose and (ii) he has, together with Judge Keith, exhibited an attitude

towards Respondent which in the reasonable evaluation of a third party would give rise to the appearance of a lack of the requisite impartiality.

- Judge Keith should be disqualified from continuing to act as arbitrator in this case because he has, together with Mr. Fortier, exhibited an attitude towards Respondent that in the reasonable evaluation of a third party would give rise to the appearance of a lack of the requisite impartiality.

- ICSID should seek the recommendation on the foregoing of a competent and reputable third party with no present or past connection to Judge Keith, Mr. Fortier, the parties or their respective counsel.

42. Because of the importance of this matter, Respondent requests a hearing on the proposals for disqualification.

VII. RESERVATION OF RIGHTS

43. Respondent reserves the right to submit such additional evidence and arguments as it may deem appropriate to complement or supplement this submission or to respond to any argument or observation submitted by Claimants, Judge Keith or Mr. Fortier.

April 2, 2015

Respectfully submitted,
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