

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES
WASHINGTON, D.C.**

IN THE ARBITRATION PROCEEDING BETWEEN

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

and

BOLIVARIAN REPUBLIC OF VENEZUELA
RESPONDENT

ICSID Case No. ARB/07/30

**DECISION ON THE PROPOSAL TO DISQUALIFY
L. YVES FORTIER, Q.C., ARBITRATOR**

Issued by

Judge Kenneth J. Keith
Professor Andreas Bucher

SECRETARY OF THE TRIBUNAL
Mr. Gonzalo Flores

Date: March 15, 2016

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TABLE OF CONTENTS

A. PROCEDURAL BACKGROUND..... 1

1. The Arbitration Proceeding..... 1

2. Respondent’s Fifth Proposal to Disqualify L. Yves Fortier 1

B. THE PARTIES’ ARGUMENTS AND MR. FORTIER’S EXPLANATIONS. 4

1. Respondent’s Proposal of February 26, 2016..... 4

2. Claimants’ Reply of March 2, 2016..... 5

3. L. Yves Fortier’s Explanations of March 4, 2016 6

4. Respondent’s Additional Observations of March 8, 2016..... 7

5. Claimants’ Additional Observations of March 8, 2016..... 9

C. THE TRIBUNAL’S REASONS..... 9

D. COSTS 10

E. DECISION..... 11

A. PROCEDURAL BACKGROUND

1. THE ARBITRATION PROCEEDING

1. The Decision issued on December 15, 2015, on the Respondent's proposal for disqualification of Mr. Yves L. Fortier of November 6, 2015, summarizes the earlier phases of the proceeding up to August 2015 (the "[Decision on the Fourth Proposal for Disqualification](#)").¹

2. The Respondent's fourth proposal was based on the ground that Mr. Fortier had made incomplete, inaccurate and/or misleading statements concerning his relationship with Norton Rose attorneys (the "**Fourth Proposal for Disqualification**"). This proposal was rejected.

3. On February 9, 2016, the Tribunal issued a majority decision on the Respondent's Second Request for Reconsideration (the "[Decision on Respondent's Second Request for Reconsideration](#)"). The Request was rejected. Prof. Bucher appended a [dissenting opinion](#).

4. On February 24, 2016, the Tribunal held an organizational hearing with the parties in Washington, D.C.

2. RESPONDENT'S FIFTH PROPOSAL TO DISQUALIFY L. YVES FORTIER

5. In its submission of February 19, 2016, the Respondent brings to the attention of the Tribunal a passage of the award in *Bernhard von Pezold and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), a case chaired by Mr. Fortier.² The relevant passage reads as follows:

Following a proposal by the Tribunals during the Joint First Session that Ms. Renée Thériault serve as assistant to the Tribunals in these two proceedings, and the Parties' subsequent agreement thereto, Ms. Thériault was appointed to serve as

¹ See Decision on the Fourth Proposal for Disqualification, ¶¶ 1-13.

² Respondent's Reply Brief on Items 3-6 of the Agenda for the February 24, 2016 Hearing, ¶¶ 45-47.

Assistant to the two Tribunals. In February 2012, with the agreement of the Parties, Ms. Alison FitzGerald replaced Ms. Thériault to serve as Assistant to the two Tribunals.³

6. The Respondent asserts that this passage appeared to be irreconcilable with Mr. Fortier's statement of April 16, 2015 in this case (the "**April 16 Statement**"), and called on Mr. Fortier for explanations. The April 16 Statement reads as follows:

The only other Norton Rose lawyer who has continued to serve, after 31 December 2011, as Assistant to an ICSID arbitral tribunal which I chair and who continues to do so today is Ms. Alison Fitzgerald who works in the Ottawa office of Norton Rose. These are the two Zimbabwe's cases referred to in footnote 27 of the Respondent's submission. These two related large cases have been proceeding in parallel since the tribunals were constituted. Ms. Fitzgerald was appointed as Assistant to the Tribunals prior to 31 December 2011 when she was a very junior lawyer with Ogilvy Renault. After I resigned from Norton Rose, it also made good practical and financial sense to have her continue as Assistant to these ICSID tribunals.

7. On February 25, 2016, Mr. Fortier replied to the Respondent, as follows:

Mesdames, Gentlemen,

I refer to the Respondent's Reply Brief of 19 February 2016 and paras. 45, 46 and 47 thereof.

What follows is the long form version of all pertinent incidents which led to the confirmation in February 2012 of Ms. Alison Fitzgerald as assistant to the two ICSID Zimbabwean tribunals which I chaired:

1. Upon my recommendation to my co-arbitrators, Ms. Renée Thériault of the Ottawa office of Ogilvy Renault was appointed, with the consent of the parties, as assistant to the two tribunals when they were constituted.
2. Ms. Renée Thériault fulfilled her duties as assistant to these tribunals until mid-December 2011 when she informed me that she had decided to leave active practice at the end of the month and join the Supreme Court of Canada as a research assistant.

³ *Bernhard von Pezold and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Award, July 28, 2015, ¶ 21.

3. I thus recommended to my co-arbitrators that Ms. Thériault be replaced by her colleague, Ms. Alison Fitzgerald, also a young lawyer at the Ottawa office of Ogilvy Renault with whom I had worked previously.
4. My co-arbitrators readily endorsed my recommendation before the end of December 2011.
5. As you will recall, I resigned as a partner at Ogilvy Renault effective 31 December 2011 and at that time was making arrangements to leave my office and pursue my career as an independent arbitrator. There were thus a number of matters, such as the formalization of Ms. Fitzgerald's appointment as a successor to Ms. Thériault, which I did not consider pressing. Accordingly, those matters went on a list of "things to do" in early 2012.
6. At the end of an extended Christmas vacation, on 2 February 2012, through the secretary of the tribunals, I informed the parties of Ms. Thériault's departure from active practice in December and proposed, on behalf of the tribunals, that her former colleague at Ogilvy Renault (at that time Norton Rose OR), Ms. Alison Fitzgerald, be appointed in her place and stead subject to the same terms and conditions. All parties agreed and I note that the formalization of Ms. Fitzgerald's appointment took place in February 2012.

I sincerely hope that these explanations are helpful.

8. On February 26, 2016, the Respondent proposed the disqualification of Mr. Fortier (the "**Proposal**" or "**Respondent's Submission of February 26, 2016**").
9. On the same date, the Secretary of the Tribunal confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Proposal.
10. The following day, the President of the Tribunal, having consulted with Professor Bucher, set a timetable for the parties' submissions and for Mr. Fortier's explanations.
11. The Claimants filed a submission on March 2, 2016 ("**Claimants' Reply of March 2, 2016**") and Mr. Fortier furnished his explanations on March 4, 2016 ("**Mr. Fortier's Explanations of March 4, 2016**").
12. On March 8, 2016, both parties submitted additional observations on the Proposal ("**Respondent's Additional Observations**" and "**Claimants' Additional Observations**", respectively).

B. THE PARTIES' ARGUMENTS AND MR. FORTIER'S EXPLANATIONS**1. RESPONDENT'S PROPOSAL OF FEBRUARY 26, 2016**

13. The Respondent makes its Proposal pursuant to Articles 14(1) and 57 of the ICSID Convention. According to the Respondent, the "entire background" of its Proposal "has already been fully briefed, as have the applicable legal principles".⁴

14. The Respondent recalls its continued concern about Fortier's relationship with Norton Rose attorneys. It refers, in particular, to Mr. Fortier's April 16 Statement, which he reaffirmed on June 1, 2015. It contends that the "plain meaning" of such statement was that "Ms. FitzGerald was not only appointed before Mr. Fortier left Norton Rose on December 31, 2011, but also that she must have been appointed before June 1, 2011, as Ogilvy Renault merged into Norton Rose on that date."⁵

15. The Respondent claims that "[i]t is clear that Ms. FitzGerald was not actually appointed as assistant to the Zimbabwe tribunals until after Mr. Fortier left Norton Rose, even if he had discussed it with his co-arbitrators a few days before he left that firm, and of course it is clear that Ms. FitzGerald was not appointed when she was at Ogilvy Renault, a firm that merged out of existence on June 1, 2011."⁶ Respondent notes that "Ms. FitzGerald's appointment came not only after Mr. Fortier had left Norton Rose, but also during the pendency of the first proposal to disqualify him in this case."⁷

16. In the Respondent's view, "it is apparent that there was no 'practical' or 'financial' reason whatsoever for Ms. FitzGerald or any other Norton Rose attorney to be appointed as assistant in the Zimbabwe cases."⁸

⁴ Respondent's Submission of February 26, 2016, p. 2.

⁵ *Id.* at ¶ 3.

⁶ *Id.* at ¶ 7.

⁷ *Id.*

⁸ *Id.* at ¶ 8.

17. Finally, Respondent asserts that “this proposal is based on the fact that the disclosure made and reaffirmed in 2015 in response to two direct inquiries was materially incorrect.”⁹

2. CLAIMANTS’ REPLY OF MARCH 2, 2016

18. In their reply of March 2, 2016, the Claimants oppose the Respondent’s Proposal.

19. They reject the Respondent’s invocation of the “entire background”, arguing that Respondent’s allegations in support of previous proposals have already been rejected and cannot be revisited in this proceeding.

20. They contend that Respondent has failed to articulate, much less satisfy, the legal standard for disqualification under Article 57 of the ICSID Convention. An “alleged date mistake” in Mr. Fortier’s disclosures could not possibly show a manifest lack of “the ability to act impartially and independently”.¹⁰

21. In the Claimants’ view, Mr. Fortier’s explanations are straightforward. Ms. Fitzgerald was appointed prior to December 31, 2011, but she did not “replace” Ms. Renée Thériault as assistant until February 2012, when her appointment was formalized. It is clear, they say, that when making these statements “Mr. Fortier was plainly using the term ‘Ogilvy Renault’ as shorthand when referring to legacy Ogilvy Renault attorneys.”¹¹ That is why Mr. Fortier referred to his own resignation as having been from “Ogilvy Renault”.¹²

22. The Claimants conclude requesting that the Tribunal promptly rejects the proposal and order the Respondent to bear the Claimants’ costs in addressing this proposal.

⁹ *Id.* at ¶ 8.

¹⁰ Claimants’ Reply of March 2, 2016, p. 2.

¹¹ *Id.*

¹² *Id.*

3. L. YVES FORTIER'S EXPLANATIONS OF MARCH 4, 2016

23. Mr. Fortier furnished his explanations on March 4, 2016, as follows:

Dear Sirs,

In accordance with the schedule which you have fixed, I now provide my explanations to the Respondent's new proposal of 26 February 2016 to disqualify me.

1. I have seen paragraph 45, 46 and 47 of the Respondent's Reply Brief of 19 February 2016.
2. As then requested by the Respondent, I submitted detailed explanations to the Respondent on 25 February 2016. I would be grateful if those explanations were incorporated to the present submission.
3. I have also seen the Claimants' submission of 2 March 2016.
4. In its proposal of 26 February 2016, the Respondent alleges that the disclosures which I made (and reaffirmed) on 16 April 2015 with respect to the appointment of Ms Alison Fitzgerald as assistant to the two Zimbabwe ICSID tribunals which I chaired were incorrect.
5. For the sake of clarity, I reconfirm the following:
 - (i) Ogilvy Renault changed its name to Norton Rose OR LLP on 1 June 2011. It was not "merged out of existence on June 1, 2011". (See para. 7 of Respondent's letter of 26 February 2016).
 - (ii) I severed all of my professional ties with Norton Rose OR LLP as of 31 December 2011.
 - (iii) Macleod Dixon joined Norton Rose OR LLP on 1 January 2012 when Norton Rose OR LLP changed its name to Norton Rose Canada LLP.
6. It would have been more accurate for me to add in my explanations of 16 April 2015, after "Ogilvy Renault" "whose name had been changed to Norton Rose OR LLP on 1 June 2011".
7. I note that in para. 5 of my explanations of 25 February 2016, I wrote that "[...] I resigned as a partner at Ogilvy Renault effective 31 December 2011". Again, it would have been more accurate for me to write that "I resigned as a partner at Ogilvy Renault which had changed its name to Norton Rose OR LLP on 1 June 2011, effective 31 December 2011 [...]".

8. When I was appointed to this Tribunal, I was independent and impartial. I have always been and will remain independent and impartial until the end of the present proceedings.
9. I reiterate my profound conviction that I am today, always have been and will remain able to exercise independent judgment in the present arbitration.
10. I note that the Respondent calls upon me to resign voluntarily (para. 10). In view of the facts which are before you, I see no reason to voluntarily withdraw as arbitrator.

4. RESPONDENT'S ADDITIONAL OBSERVATIONS OF MARCH 8, 2016

24. In its Additional Observations, the Respondent rejects the Claimants' comments on the relevance of the "entire background" for the adjudication of this Proposal. It argues, by reference to commentaries, that it is "well established that the factual background of the earlier challenges is relevant in assessing the particular inaccurate disclosures on which this proposal is based."¹³ Here, it says, the "Respondent has presented new facts which should leave no lingering question that there has been a 'pattern' of non-disclosure, or simply inaccurate disclosure, raising doubts as to Mr. Fortier's impartiality in this case".¹⁴

25. Even without the factual background of this case, the Respondent continues, Mr. Fortier's statement of April 16, 2015, reaffirmed on June 1, 2015, was materially inaccurate because it created an impression of "lesser ties to Norton Rose than actually existed", a point of paramount importance and with respect to which the Respondent has made repeated requests for disclosure.¹⁵

26. The Respondent then addresses the legal standard for disqualification. It refers to the recent decision in *EDF v. Argentina*,¹⁶ which, in the Respondent's view, stresses the

¹³ Respondent's Additional Observations, ¶ 2.

¹⁴ *Id.* at ¶ 3.

¹⁵ *Id.* at ¶ 4.

¹⁶ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2016.

“necessity of considering all of the facts relevant to the issue of impartiality”¹⁷ and to assess such facts “with reference to the particular case at hand”.¹⁸

27. In relation to the Claimants’ opposition to the Proposal, the Respondent rejects the Claimants’ portrayal of the facts as an “alleged date mistake” as well as their contention that Mr. Fortier had used the term Ogilvy Renault as a shorthand to refer to Norton Rose.

28. Turning to Mr. Fortier’s Explanations of March 4, 2016, the Respondent contends that “Ogilvy Renault did not just undergo a name change on June 1, 2011; it ceased to be a stand-alone, independent firm, and brought itself under the Norton Rose umbrella.”¹⁹ That is how the legal community reported this transaction and that is, too, how Mr. Fortier referred to it until recently.

29. The Respondent further contends that “there were no ‘practical’ or ‘financial’ reasons for appointing Ms. FitzGerald rather than another person unrelated to Norton Rose.”²⁰ Nor have the Claimants or Mr. Fortier attempted to explain this.

30. The Respondent concludes by summarizing its allegations as follows:

The record shows that the answers to Respondent’s inquiries have always been dribbled out and have been incomplete, misleading and/or inaccurate. Even with respect to Ms. FitzGerald, Mr. Fortier made no disclosure, despite repeated requests by Respondent for disclosure of all relationships with Norton Rose, until Respondent itself discovered that Ms. FitzGerald had acted as Assistant in the Zimbabwe cases. Then, in response to the direct question concerning Ms. FitzGerald, Mr. Fortier informed Respondent that Ms. FitzGerald was appointed when she was a “very junior lawyer with Ogilvy Renault” and that it made “good practical and financial sense to have her continue” in that capacity, even though she was not appointed when she was a very junior lawyer at Ogilvy Renault, she was not continuing anything after December 31, 2011 as she was not even appointed until February of 2012, and there in fact were no “practical” or

¹⁷ Respondent’s Additional Observations, at ¶ 5.

¹⁸ *Id.* at ¶ 6.

¹⁹ *Id.* at ¶ 10.

²⁰ *Id.* at ¶ 13.

"financial" reasons whatsoever for appointing her rather than a non-Norton Rose attorney. (footnote omitted).²¹

31. In conclusion, the Respondent state that “a reasonable third party with knowledge of all the facts would consider that there are reasonable grounds for doubting whether Mr. Fortier has the requisite impartiality in this case.”²²

5. CLAIMANTS’ ADDITIONAL OBSERVATIONS OF MARCH 8, 2016

32. The Claimants, in their Additional Observations, state that Mr. Fortier’s Explanations of March 4, 2016 confirm that the Respondent's Proposal is “patently baseless”, requiring thus “no further comment” from them.²³

C. THE TRIBUNAL’S REASONS

33. The Respondent states that the legal standard for disqualification is “well established”.²⁴ The Two Members recall as well the interpretation of Article 14 read with Article 57 given in their Decision of December 15, 2015.²⁵ The standard is whether a reasonable third person, with knowledge of all the facts, would conclude, on an objective basis, that the arbitrator is manifestly lacking in the ability to act impartially.

34. The “new facts” on which the Respondent relies concern the appointment of Ms. Alison Fitzgerald as assistant to two tribunals chaired by Mr. Fortier. It highlights the fact that in its view Mr. Fortier had twice made statements which in the light of the most recently available information were “inaccurate and each of the inaccuracies tended to create the impression of lesser ties to Norton Rose than actually existed and to support the notion that Mr. Fortier had severed all ties with Norton Rose upon his resignation from that firm, which clearly was not the case”.²⁶ The Two Members recall that in his letter of April

²¹ *Id.* at ¶ 16.

²² *Id.*, p. 10.

²³ Claimants’ Additional Comments, p. 1.

²⁴ Respondent’s Additional Observations, ¶ 5, referring to the *EDF* case. See also ¶ 26 above.

²⁵ See Decision on the Fourth Proposal for Disqualification, ¶ 35.

²⁶ Respondent’s Additional Observations, ¶ 4.

16, 2015 (confirmed in his letter of June 1, 2015), Mr. Fortier stated that Ms. Fitzgerald “continued to serve, after 31 December 2011, as Assistant to an ICSID arbitral tribunal which I chair and continues to do so today [She] was appointed as Assistant to the Tribunal prior to 31 December 2011. . . [She] has billed ICSID directly for [that] work”. Mr. Fortier’s explanations make it clear that Ms. Fitzgerald’s appointment was not concluded in a formal sense by the end of December 2011.²⁷ The formal appointment was in February 2012 after the parties had agreed. The Two Members do not see that difference as significant. The substantive decision was made by the three arbitrators in December 2011.

35. More significantly, the Two Members cannot see that the facts relating to that appointment provide any support at all for the proposition that that limited tie with Norton Rose would lead a reasonable third person with knowledge of those facts to the conclusion that Mr. Fortier is manifestly lacking in the ability to act impartially between the parties in the present arbitration.

36. Insofar as the Respondent invokes in support of its new Proposal the “entire background of this matter”²⁸ and the “pattern of circumstances”,²⁹ it does not cite new facts requiring the Two Members to reconsider facts considered in the earlier requests for disqualification. They recall paras 37 to 38 of their Decision issued on December 15, 2015.

D. COSTS

37. The Two Members see no reason to depart from the standard practice of determining costs issues at the end of the proceeding.

²⁷ See ¶¶ 7 and 23 above.

²⁸ Respondent’s Submission of February 26, 2016, p. 2.

²⁹ An expression used by the authors quoted in the Respondent’s Additional Observations, ¶ 2.

E. DECISION

38. For the foregoing reasons, the Two Members:

- (1) decide to dismiss the Proposal made by the Respondent to disqualify Mr. Yves Fortier as Arbitrator, and
- (2) decide to defer the application made by the Claimants for an order for costs to a later stage in the proceedings.

[signed]

[signed]

Judge Kenneth J. Keith

Professor Andreas Bucher