

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

IN THE ARBITRATION PROCEEDING BETWEEN

**FÁBRICA DE VIDRIOS LOS ANDES, C.A. AND OWENS-ILLINOIS DE VENEZUELA, C.A.**  
**CLAIMANTS**

and

**BOLIVARIAN REPUBLIC OF VENEZUELA**  
**RESPONDENT**

**ICSID Case No. ARB/12/21**

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

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Issued by

Prof. Hi-Taek Shin  
Prof. Zachary Douglas QC

*Secretary of the Tribunal*  
Ms. Marisa Planells-Valero

*Date: May 5, 2017*

## THE PARTIES' REPRESENTATIVES

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### REPRESENTING THE RESPONDENT:

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## A. THE PARTIES

1. The Claimants are Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A., two companies incorporated under the laws of Venezuela, which are owned and controlled by a Dutch corporation<sup>1</sup> (jointly, the “**Claimants**”).
2. The Respondent is the Bolivarian Republic of Venezuela (“**Venezuela**” or the “**Respondent**”).
3. The Claimants and the Respondent are hereinafter collectively referred to as the “**Parties**.”

## B. PROCEDURAL HISTORY

4. On July 23, 2012, the Claimants submitted a Request for Arbitration against Venezuela to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”). On August 10, 2012, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention.
5. The Tribunal was constituted on February 14, 2013, and comprised Professor Hi-Taek Shin, a national of Korea, appointed as president pursuant to Article 38 of the ICSID Convention and Rule 4(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”), Mr. L. Yves Fortier, a national of Canada, appointed by the Claimants, and Mr. Alexis Mourre, a national of France, appointed by the Respondent.
6. On April 11, 2013, the Tribunal and the Parties held a first session in Paris, France. During the session a number of procedural matters were decided, including a schedule for pleadings. In accordance with the schedule: (i) the Claimants filed a Memorial on the Merits on July 15, 2013; (ii) the Respondent filed a request to address objections to jurisdiction as a preliminary matter on August 16, 2013<sup>2</sup>; (iii) the Respondent filed a Counter-Memorial on the Merits on December 20, 2013; (iv) the Claimants filed a Reply on the Merits and a Counter-Memorial

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<sup>1</sup> According to the July 23, 2012, Request for Arbitration, the Claimants are controlled by OI European Group B.V. (“**OIEG**”), a company incorporated under the laws of The Netherlands.

<sup>2</sup> By Procedural Order No. 2 of September 23, 2013, the Tribunal declined the Respondent’s request for bifurcation.

on Jurisdiction on March 21, 2014; (v) the Respondent filed a Rejoinder on the Merits and a Reply on Jurisdiction on June 20, 2014; and (vi) the Claimants filed a Rejoinder on Jurisdiction on August 21, 2014. A hearing on jurisdiction and merits was scheduled to be held in Paris, from March 30 through April 3, 2015.

7. On March 13, 2015, the Respondent proposed the disqualification of Mr. Mourre and Mr. Fortier under Articles 14 and 57 of the ICSID Convention (“**First Proposal for Disqualification**”).
8. On March 16, 2015, the Centre transmitted the First Proposal for Disqualification to the Claimants and to the Tribunal and informed the Parties that the proceeding was suspended until the First Proposal for Disqualification was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural schedule for written submissions on the First Proposal for Disqualification.
9. In addition, on that same date, following receipt of a copy of the Proposal, Mr. Mourre submitted his resignation to the other members of the Tribunal and the Secretary-General of ICSID. The Centre immediately communicated Mr. Mourre’s resignation to the Parties.
10. On March 19, 2015, Prof. Shin informed the Parties that, in view of the pending challenge, the dates for the upcoming hearing were vacated, and that new hearing dates would be fixed as soon as possible after the resumption of the proceeding.
11. On June 16, 2015, the Chairman of the ICSID Administrative Council (i) rejected as untimely the Respondent’s First Proposal for the Disqualification of Mr. Yves Fortier, and (ii) dismissed, in view of Mr. Mourre’s resignation, the Respondent’s First Proposal for the Disqualification of Mr. Alexis Mourre (“**Decision on the First Proposal for Disqualification**”).
12. On June 17, 2015, and pursuant to ICSID Arbitration Rule 8(2), the Tribunal consented to the resignation of Mr. Alexis Mourre.
13. On July 31, 2015, the Respondent appointed Prof. Zachary Douglas QC, a national of Australia, as arbitrator, in accordance with ICSID Arbitration Rule 11(1).

14. On August 5, 2015, the Centre (i) notified the Parties of Prof. Douglas' acceptance of his appointment as an arbitrator, and (ii) informed the Parties that, in accordance with ICSID Arbitration Rule 12, the Tribunal was reconstituted and the proceeding resumed as of that date from the point it had reached at the time the vacancy occurred.
15. On September 15, 2015, following an exchange of communications with the Parties, the Tribunal informed the Parties that the hearing on jurisdiction and merits would be held in Paris, France, from April 4 through April 8, 2016.
16. On March 4, 2016, the Respondent proposed the disqualification of Mr. Fortier under Articles 14 and 57 of the ICSID Convention (the "**Second Proposal for Disqualification**").
17. On March 7, 2016, the Centre transmitted the Second Proposal for Disqualification to the Claimants and to the Tribunal and confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Second Proposal for Disqualification.
18. On that same date, the President of the Tribunal, having consulted with Professor Douglas (the "**Two Members**"), set a timetable for the Parties' submissions and Mr. Fortier's explanations.
19. On March 21, 2016, the Two Members informed the Parties that the Second Proposal for Disqualification was rejected. The Two Members indicated that, in view of the proximity of the hearing scheduled from April 4 to 8, 2016, they had decided to communicate their decision to the Parties with the full reasoning for that decision to follow as soon as possible. On March 28, 2016, the reasoned decision of the Two Members was transmitted to the Parties ("**Decision on the Second Proposal for Disqualification**").
20. A hearing on jurisdiction, merits and quantum took place in Paris, France, from April 4 to April 8, 2016.
21. On June 4, 2016, the Parties filed simultaneous post-hearing briefs.
22. On June 8, 2016, the Parties filed their submissions on costs.

23. By letter of July 8, 2016, the Respondent noted (i) that Ms. Myriam Ntashamaje, Mr. Fortier’s assistant, had access to the Box folder of the present case, and (ii) that, according to her LinkedIn account, Ms. Ntashamaje “has been working since August 2013 until the present day as an attorney in the international arbitration practice of the law firm Norton Rose Fulbright LLP.” The Respondent requested to be informed of the reasons why Ms. Ntashamaje had access to the case’s documents and on what basis she had such access.
24. On July 22, 2016, Mr. Fortier asked the Centre to transmit to the Parties and to the Two Members a letter providing explanations to the questions posed by the Respondent in its July 8, 2016 letter (“**Mr. Fortier’s Explanations of July 22, 2016**”).
25. On July 25, 2016, the Respondent proposed the disqualification of Mr. Fortier under Articles 14 and 57 of the ICSID Convention (the “**Third Proposal for Disqualification**”).
26. On July 26, 2016, the Centre transmitted the Third Proposal for Disqualification to the Claimants and to the Tribunal and confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Third Proposal for Disqualification.
27. On August 2, 2016, the Two Members set a timetable for the Parties’ submissions and Mr. Fortier’s explanations.
28. On September 12, 2016, the Two Members rejected the Respondent’s Third Proposal for Disqualification (“**Decision on the Third Proposal for Disqualification**”).
29. On September 28, 2016, each Party filed a statement on the costs incurred in connection with the Third Proposal for Disqualification.
30. On November 2, 2016, each Party filed observations on the other Party’s statement of costs incurred in connection with the Third Proposal for Disqualification.
31. On December 23, 2016, the Respondent proposed the disqualification of Mr. Fortier (the “**Fourth Proposal for Disqualification**”).

32. On that same date, the Centre transmitted the Fourth Proposal for Disqualification to the Claimants and to the Tribunal and confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Fourth Proposal for Disqualification.
33. On December 30, 2016, the Two Members set a timetable for the Parties' submissions and Mr. Fortier's explanations on the Fourth Proposal for Disqualification.
34. On January 5, 2017, Mr. Fortier requested an extension until January 20, 2017 for the submission of his explanations. On January 9, 2017, the Two Members granted the requested extension.
35. On January 10, 2017, the Claimant requested an extension until January 16, 2017 for the submission of their Reply to the Fourth Proposal for Disqualification. On January 11, 2017, the Two Members granted the requested extension.
36. In accordance with the timetable set by the Two Members on December 30, 2016, as modified on January 9 and 11, 2017, the Claimants filed their Reply to the Fourth Disqualification Proposal on January 16, 2017 (the "**Claimants' Reply of January 16, 2017**"), and Mr. Fortier furnished his explanations on January 20, 2017 ("**Mr. Fortier's Explanations of January 20, 2017**").
37. On January 26, 2017 the Respondent requested an extension for the filing of the Parties' Additional Observations on the Fourth Proposal for Disqualification until February 10, 2017. On that same date, the Claimants opposed this request.
38. On January 27, 2017, the Claimants submitted to the Secretariat their Additional Observations on the Fourth Proposal for Disqualification (the "**Claimants' Additional Observations**"). By this communication, the Claimants shared their understanding that, pursuant to the Two Members' communication of January 20, 2017, the Centre would forward the Claimants' Additional Observations to the Respondent, to the Two Members and to Mr. Fortier, following receipt of the Respondent's Additional Observations.
39. On that same date, the Two Members granted the Respondent's request for an extension.

40. On February 3, 2017, the Respondent requested that the Two Members schedule (i) a document production phase and (ii) a hearing to examine certain witnesses in connection with the Fourth Proposal for Disqualification (the “**Document Production and Hearing Request**”). By communications of February 3, 4 and 6, the Claimants opposed the Document Production and Hearing Request. On February 6, 2017, the Respondent submitted a further communication on this matter.
41. On February 7, 2017, the Two Members informed the Parties that they would be taking a decision on the Document Production and Hearing Request following their review of the Parties’ Additional Comments on the Fourth Proposal for Disqualification.
42. On February 10, 2017, the Respondent submitted its Additional Observations on the Fourth Proposal for Disqualification (the “**Respondent’s Additional Comments**”). On February 13, 2017, the Secretary of the Tribunal circulated to the other Party, to the Two Members and to Mr. Fortier, each Party’s Additional Comments.

## C. SUMMARY OF THE PARTIES’ POSITIONS

43. The Parties’ respective positions in connection with the present Proposal for Disqualification are briefly outlined below. The Two Members note, however, that in deciding this matter they have considered the full extent of the Parties’ arguments in their written submissions. To the extent that arguments are not referred to expressly in the brief summary below, they should be deemed to be subsumed into the Two Members’ analysis.

### 1. Venezuela’s Proposal for Disqualification

44. Venezuela states that it has gathered certain evidence that would prove that Ms. Myriam Ntashamaje, Mr. Fortier’s assistant, has been employed by Norton Rose Fulbright LLP (“NRF”) since August 2013, and requests, on this basis, the disqualification of Mr. Fortier as an arbitrator in this case.<sup>3</sup>

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<sup>3</sup> Fourth Proposal for Disqualification ¶¶ 13 and 17-18. Respondent’s Additional Comments ¶ 7.

45. Venezuela explains that, following the issuance of the Decision on the Third Proposal for Disqualification, it decided to hire the services of the firm Quest Research & Investigations LLC (“QRI”) to conduct an investigation regarding the employment status of Ms. Ntashamaje.<sup>4</sup>

46. Venezuela states that, through the services of this firm, it has been able to obtain confirmation of the following:

- I. Confirmation that Ms. Ntashamaje “is currently and has been at all times since 26 August 2013 a permanent employee at the law firm Norton Rose Fulbright LLP.” Venezuela explains that this confirmation was provided by Ms. Claudia Gagnon, Compensation and Mobility Technician at NRF, by email of December 7, 2016 in response to QRI’s employment verification request regarding Ms. Ntashamaje.<sup>5</sup>
- II. Confirmation that Ms. Ntashamaje “possesses a telephone extension within Norton Rose Fulbright LLP’s automatic answering system, through which she can be directly reached at the office”<sup>6</sup> and an email address with NRF.<sup>7</sup>

47. According to Venezuela, these evidence would prove that when Mr. Fortier declared, in his explanations of July 22, 2016, that Ms. Ntashamaje has never worked for NRF, he “deliberately or with inexcusable negligence, [...] misrepresent[ed] the true state of affairs regarding Ms. Ntashamaje’s employment at the law firm Norton Rose Fulbright LLP.”<sup>8</sup>

48. Venezuela further submits that these evidence would also demonstrate that Mr. Fortier “breached the confidentiality of this arbitration by granting unauthorized and undisclosed

<sup>4</sup> Fourth Proposal for Disqualification ¶ 24.

<sup>5</sup> Fourth Proposal for Disqualification ¶¶ 26-31. Respondent’s Additional Comments ¶ 4. See also, Affidavit of Tyler Maroney of December 23, 2016 (“Affidavit of T. Maroney”).

<sup>6</sup> Fourth Proposal for Disqualification ¶ 33. Respondent’s Additional Comments ¶¶ 2 and 6. See Affidavit of T. Maroney p. 1, where Mr. Maroney explains that this confirmation was obtained by calling the main number of the NRF Montreal’s office and “[entering] the first three letters of Ntashamaje’s last name using the phone’s alphanumeric keypad. The NRF answering system identified, in English, the owner of the extension as Myriam Ntashamaje and transferred the call to that extension. After approximately five rings, the call was answered by a voicemail in which a female voice identified herself in French as Ntashamaje.”

<sup>7</sup> Fourth Proposal for Disqualification ¶ 34. Respondent’s Additional Comments ¶¶ 2 and 5. See Affidavit of T. Maroney p. 1, where Mr. Maroney explains that one of QRI employees sent an email to myriam.ntashamaje@nortonrosefulbright.com, and did not receive a bounce back.

<sup>8</sup> Fourth Proposal for Disqualification ¶ 13.

access to the record of the case to an employee of a law firm that is counsel of record to neither party in this arbitration.”<sup>9</sup>

49. Venezuela concludes that this “misconduct makes arbitrator Yves Fortier unsuited to serve any longer as an arbitrator in these proceedings for lack of the traits required by an arbitrator under Article 14(1) of the ICSID Convention.”<sup>10</sup>
50. Venezuela also submits, together with its Additional Observations, the affidavit of Mr. Danny Kastner, an expert in Canadian employment law.<sup>11</sup> Based on this affidavit, Venezuela argues that the scheme under which Ms. Ntashamaje would be receiving NRF health benefits through the coverage offered by Services OR LP/SEC, without being a NRF employee, could only mean that “Norton Rose Fulbright LLP, Cabinet Fortier and Mr. Fortier himself have engaged in fraudulent conduct under Canadian law.”<sup>12</sup>
51. According to Venezuela, this would also make Mr. Fortier “ostensibly unfit to act as an arbitrator in this international arbitration, in as far as his conduct is contrary to the moral standard required by Article 14(1) of the ICSID Convention.”<sup>13</sup>
52. Finally, Venezuela argues that the cost of this proposal should be discharged from the fees received by Mr. Fortier as an arbitrator in this proceeding, and request that the Two Members “reconsider their prior decisions condemning [Venezuela] in costs regarding the proposals to disqualify Yves Fortier.”<sup>14</sup>

## **2. Claimants’ Observations**

53. The Claimants request that the Fourth Proposal for Disqualification be rejected and that Respondent be ordered to pay the costs, legal fees and any other expenses incurred by the Claimants in connection with it.<sup>15</sup>

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<sup>9</sup> Fourth Proposal for Disqualification ¶ 35.

<sup>10</sup> Fourth Proposal for Disqualification ¶ 18. Respondent’s Additional Comments ¶ 32.

<sup>11</sup> Affidavit of Mr. Danny Kastner, J.D., of February 8, 2017 (“Affidavit of Mr. Kastner”).

<sup>12</sup> Respondent’s Additional Comments ¶ 21. See also Affidavit of Mr. Kastner pp. 2-3.

<sup>13</sup> Respondent’s Additional Comments ¶ 22.

<sup>14</sup> Fourth Proposal for Disqualification ¶ 45. Respondent’s Additional Comments ¶ 39.

<sup>15</sup> Claimants’ Reply ¶¶ 63-65.

54. Firstly, the Claimants argue that the Fourth Proposal for Disqualification fails as a matter of fact because (i) Ms. Ntashamaje has never been employed by NRF, and (ii) there is no evidence “even suggesting that Ms Ntashamaje has shared confidential information with Norton Rose or otherwise undermined the integrity of these proceedings.”<sup>16</sup>

55. The Claimants submit, together with their Reply, a letter from Mr. Jean-Charles René, NRF’s General Counsel and Head of Risk in Canada.<sup>17</sup> According to the Claimants, the information provided in this letter confirms that:

- (i) Ms. Ntashamaje receives her salary and other employment benefits from the company Services OR LP, a distinct legal entity from NRF.<sup>18</sup>
- (ii) The information on Ms. Ntashamaje’s employment status that Ms. Gagnon provided to the Respondent’s investigator is inaccurate as, for the purpose of confirming the hiring date, title and status of Ms. Ntashamaje, Ms. Gagnon consulted a list of employees that “comprises all of Services OR LP’s employees and does not distinguish between those who work at [NRF] and those who do not.”<sup>19</sup>
- (iii) Ms. Ntashamaje does not have a telephone extension at NRF and when calling Ms. Ntashamaje’s number, “[her] voicemail message expressly states that she works for Arbitrator Fortier and does not mention Norton Rose.”<sup>20</sup>
- (iv) Ms. Ntashamaje’s email address at NRF “[has been] made available to Ms. Ntashamaje in order for her to receive general administrative information relating to such subjects as social benefits, remuneration, etc.”<sup>21</sup>

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<sup>16</sup> Claimants’ Reply ¶ 4. Claimants’ Additional Comments p. 1.

<sup>17</sup> See Mr. Jean-Charles René’s letter of January 13, 2017 (C-257) (“Mr. René’s letter”). Mr. René’s letter was submitted in response to the Claimants’ letter to NRF of January 7, 2017 (C-256).

<sup>18</sup> Claimants’ Reply ¶ 12. *See also* Mr. René’s letter p. 1.

<sup>19</sup> Claimants’ Reply ¶ 13.

<sup>20</sup> Claimants’ Reply ¶ 15. *See also* Mr. René’s letter p.3.

<sup>21</sup> Claimants’ Reply ¶ 16.

56. The Claimants further submit that no evidence to support the allegation that Mr. Fortier breached the confidentiality of this proceeding by granting access to the documents in this case to Ms. Ntashamaje has been put forward by the Respondent. According to the Claimants, Mr. René's letter confirms this when he certifies that "no individual working at [NRF] has access to the documents and records of Cabinet Yves Fortier."<sup>22</sup>
57. Secondly, the Claimants argue that the Fourth Proposal for Disqualification also fails as a matter of law because "even if Ms. Ntashamaje was employed by Norton Rose (*quod non*), the Respondent has failed to demonstrate how that fact could affect the independence or impartiality of Arbitrator Fortier."<sup>23</sup>
58. The Claimants state that Articles 14(1) and 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules set a high threshold for the disqualification of an arbitrator. Citing previous challenge decisions, the Claimants assert that such standard consist of the objective and stringent requirement that there be a "manifest" lack of the qualities set forth in Article 14(1) of the ICSID Convention, which means an "evident" or "obvious" lack of such qualities, excluding "reliance on speculative assumptions or arguments."<sup>24</sup>
59. According to the Claimants, even assuming that Ms. Ntashamaje was employed by NRF, the Respondent has failed "to explain the basis on which a reasonable third person could conclude that the assistance of a Norton Rose secretary at Cabinet Yves Fortier [...] means that Arbitrator Fortier's interests are sufficiently aligned with the interests of Norton Rose such that he cannot be relied upon to exercise independent and impartial judgment in this case."<sup>25</sup> Ms. Ntashamaje's role at Cabinet Fortier is purely administrative and there is no objective basis for believing that she plays any part in Mr. Fortier's decision-making.<sup>26</sup> As a result, the subject-

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<sup>22</sup> Claimants' Reply ¶¶ 18-21.

<sup>23</sup> Claimants' Reply ¶ 6.

<sup>24</sup> Claimants' Reply ¶¶ 22-27.

<sup>25</sup> Claimants' Reply ¶¶ 28-29. Claimants' Additional Comments p. 1.

<sup>26</sup> Claimants' Reply ¶ 30.

matter of Mr. Fortier's explanations regarding Ms. Ntashamaje would be immaterial for purposes of ascertaining Mr. Fortier's ability to exercise independent or impartial judgment.<sup>27</sup>

60. Moreover, the Claimants continue, “even assuming there was a breach of confidentiality [...], this alone [would] not be one of the grounds established in the ICSID Convention for the disqualification of an arbitrator.” According to the Claimants, “[m]erely allowing someone to have access to the Box folder created for this case, even if it turns out they should not have had such access, could not, without more, lead a reasonable third person to conclude that the arbitrator manifestly lacks impartiality or independence.”<sup>28</sup>
61. Finally, the Claimants object to the Respondent’s request for the reconsideration of the Two Members previous decisions on costs stating that “[m]erely filing a new disqualification proposal does not allow a party to request ‘reconsideration’ of prior, fully adjudicated costs decisions” and that, as the Respondent’s Second and Third Proposals for Disqualification were abusive and manifestly unfounded, the prior decisions on costs “should stand regardless of the outcome of the present Proposal.”<sup>29</sup>

#### **D. EXPLANATIONS FURNISHED BY MR. FORTIER**

62. Mr. Fortier’s Explanations of January 19, 2017, submitted together with an affidavit signed by Ms. Myriam Ntashamaje, are attached as Annex A to this Decision.

#### **E. ANALYSIS**

63. The Two Members refer to their analysis of the legal standard for the disqualification of an arbitrator in their Decision on the Second Proposal for Disqualification<sup>30</sup> and adopt that analysis for their consideration of the Fourth Proposal for Disqualification herein.

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<sup>27</sup> Claimants’ Reply ¶ 33, footnote 32 citing, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. Arbitrator (July 26, 2016) ¶ 12(d) (CLA-297).

<sup>28</sup> Claimants’ Reply ¶ 34.

<sup>29</sup> Claimants’ Reply ¶ 65.

<sup>30</sup> Decision on the Second Proposal for Disqualification, ¶¶ 25-34. See also Decision on the Third Proposal for Disqualification ¶ 45.

64. The Respondent has deployed considerable resources since it last challenged Mr. Fortier on the basis that Ms. Ntashamaje has been employed by NRF since August 2013 to substantiate its allegation with evidence. Thus, for instance, it retained a private investigator to make inquiries about the employment history of Ms. Ntashamaje. Despite the Respondent's deployment of resources, however, there has been no material change to the situation that the Two Members described in their Decision on the Third Proposal for Disqualification. In that Decision, the Two Members concluded that they had no reason to doubt Mr. Fortier's explanation that Ms. Ntashamaje has never been employed by NRF. As matters stand today, the Two Members still have no reason to doubt that explanation.
65. To the contrary, all that the Respondent's deployment of resources has achieved is to compel Ms. Ntashamaje, and a Senior Partner and General Counsel and Head of Risk at NRF Canada, Jean-Charles René, to confirm what Mr. Fortier had already confirmed during the course of the Third Proposal for Disqualification. Ms. Ntashamaje confirmed, in a sworn affidavit, that she has never been employed by NRF. She also confirmed that her original LinkedIn profile was inaccurate. Mr. René, in a letter that he recognised would be transmitted to the Tribunal and to the Respondent, confirmed that Ms. Ntashamaje has never been employed by NRF. He also confirmed Mr. Fortier's previous explanation that, for administrative reasons, she received her salary and employment benefits from Services OR LP, a separate legal entity established by Norton Rose OR LLP (now NRF) to provide administrative and support services to NRF. Mr. René stated that the “reason why the assistants who followed [Mr. Fortier] to work exclusively at Cabinet Yves Fortier were paid by Services OR LP was to allow them to continue to participate in the insurance and other benefits to which they were entitled while working at Norton Rose OR LLP. When Ms. Ntashamaje was hired in August 2013 as a replacement for one of those assistants, the same arrangement was replicated, in order that all assistants working at Cabinet Yves Fortier would receive the same treatment”.<sup>31</sup> Finally, Mr. René stated that: “I can certify that no individual working at NRFC has access to the documents and records of Cabinet Yves Fortier.”<sup>32</sup>

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<sup>31</sup> Mr. René’s letter pp. 1-2.

<sup>32</sup> Mr. René’s letter p. 2.

66. These statements from Ms. Ntashamaje and Mr. René, together with a further statement from Mr. Fortier, were given in response to the email exchange between the Respondent's private investigator and Ms. Gagnon, who is the Compensation and Mobility Technician at NRF, which was appended to the Respondent's Fourth Proposal for Disqualification. In that exchange, Ms. Gagnon stated that Ms. Ntashamaje was an employee of NRF rather than Cabinet Yves Fortier. Mr. René gave extensive explanations for why Ms. Gagnon's response was incorrect and the circumstances in which it was given. In particular, according to Mr. René, Ms. Gagnon's list of Service OR LP's employees did not distinguish between those who work at NRF and those who do not.<sup>33</sup>
67. The Two Members have no doubt that a reasonable third person would conclude that the explanations given by Ms. Ntashamaje, Mr. René and Mr. Fortier in relation to Ms. Ntashamaje's employment history are more reliable than the information that had been extracted from Ms. Gagnon by a private investigator—information that has since been repudiated by the responsible senior partner at NRF.
68. Once again the Two Members consider that it is important to recall the alleged significance of Ms. Ntashamaje's employment history to Mr. Fortier's ability to exercise independent and impartial judgment in this case. It is not in dispute that Ms. Ntashamaje had access to the Box folder for this arbitration. The Respondent's argument is that, if Ms. Ntashamaje were in fact an employee of NRF, then that law firm, which frequently represents claimants in litigation against the Bolivarian Republic of Venezuela, would be able to exploit that information in some way detrimental to the Respondent.
69. In their Decision on the Third Proposal for Disqualification, the Two Members acknowledged that if it were true that Ms. Ntashamaje were employed by NRF, then "a serious question would arise concerning the integrity of the information exchanged in these proceedings as it would have to be assumed that a law firm, which is not a counsel of record in this case, was able to access the record of the arbitration through the employment of Ms. Myriam Ntashamaje and her access to the Box folder."<sup>34</sup> But a serious question relating to the integrity of information

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<sup>33</sup> Mr. René's letter p. 3.

<sup>34</sup> Decision on the Third Proposal for Disqualification ¶ 49.

exchanged in these proceedings does not necessarily translate into a serious ground for questioning the impartiality or independence of Mr. Fortier. The fervour in which the Respondent has pursued the gathering of evidence in relation to Ms. Ntashamaje's employment history is thus surprising given the disconnect between the alleged mischief—Ms. Ntashamaje's purported employment at NRF—and the impartiality or independence of Mr. Fortier.

70. The Respondent wants to go even further. It has requested that the Two Members order the production of documents relating to the employment history of Ms. Ntashamaje and convene a hearing to examine the various protagonists that have become implicated in the Respondent's challenge of Mr. Fortier. The Two Members deny this request. First, it is by no means clear that the Two Members have the power to conduct a separate evidential trial in respect of written explanations provided in the context of a challenge to an arbitrator. By way of example, the Two Members have not been conferred any powers under the ICSID Convention or Arbitration Rules to preside over the interrogation of individuals who are not witnesses of either party in the arbitration (this would be the case at least in respect of Ms. Ntashamaje and Mr. René in the context of this Fourth Proposal for Disqualification). As the parties have not made submissions on this issue, the Two Members say nothing more about it.
71. Second, assuming that the Two Members do have such a power, the circumstances of this challenge militate strongly against its use. Even if Ms. Ntashamaje were found to be an employee of NRF, over the express written statements of Ms. Ntashamaje, NRF's General Counsel (Mr. René) and Mr. Fortier to the contrary, then this would by no means be conclusive as to Mr. Fortier's lack of impartiality or independence. There is no evidence whatsoever to the effect that (1) Mr. Fortier granted access to the Box folder in this case to Ms. Ntashamaje so that she could share that information with employees of NRF or (2) Ms. Ntashamaje did in fact share that information with employees of NRF. If neither of those elements is established, the Two Members do not understand how Mr. Fortier's impartiality or independence could be impeached simply on the basis that Ms. Ntashamaje had access to the Box folder. The Respondent has never attempted to join the dots in this respect.

72. The Respondent has said that if it could be established that Ms. Ntashamaje were in fact an employee of NRF, then this would simultaneously establish that Mr. Fortier has given a false statement in the context of challenge proceedings and that in turn would cast serious doubts over Mr. Fortier's independence and impartiality. This possibility, in the Respondent's submission, justifies the convening of an evidential hearing on these matters. But this would be tantamount to saying that no statement by a challenged arbitrator to an allegation made by the challenging party can be accepted unless tested under cross-examination or otherwise corroborated by other witness testimony tested under cross-examination.
73. In a challenge process, the individuals or institution adjudicating the challenge have to assume that any statement made by the challenged arbitrator is made in good faith and is accurate unless and until compelling evidence is submitted by the challenging party to undermine that assumption. Any other approach would bring international arbitration as a system for dispute resolution to its knees: a challenge to an arbitrator would signal the beginning of a trial within a trial and crush any expectation of an efficient and affordable procedure.
74. The Two Members must deal with one final point raised by the Respondent. In reliance upon the affidavit of Mr. Kastner, an expert in Canadian employment law, the Respondent argues that the scheme under which Ms. Ntashamaje would be receiving NRF health benefits through the coverage offered by Services OR LP/SEC, without being a NRF employee, could only mean that "Norton Rose Fulbright LLP, Cabinet Fortier and Mr. Fortier himself have engaged in fraudulent conduct under Canadian law,"<sup>35</sup> and that, on that basis, Mr. Fortier is "ostensibly unfit to act as an arbitrator in this international arbitration, in as far as his conduct is contrary to the moral standard required by Article 14(1) of the ICSID Convention."<sup>36</sup> As Mr. Kastner expressly put it in his Affidavit, he did not review the relevant insurance agreements in preparing the affidavit, and as such his analysis "is obviously limited"<sup>37</sup>. No other evidence was presented by the Respondent to substantiate its allegations of fraudulent conduct under Canadian law. The Two Members are not prepared to conclude on the basis of Mr. Kastner's "limited" analysis, conducted entirely in the abstract and without sight of the underlying

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<sup>35</sup> Respondent's Additional Comments ¶ 22. *See also* Affidavit of Mr. Kastner pp. 2-3.

<sup>36</sup> Respondent's Additional Comments ¶¶ 21-22.

<sup>37</sup> Affidavit of Mr. Kastner p. 2.

documents, that an international law firm, NRF, has entered into a fraudulent scheme for the conferral of employment benefits and that Mr. Fortier is a party to that scheme.

75. The Two Members dismiss the Respondent's Fourth Proposal for Disqualification. Its main factual predicate—that Ms. Ntashamaje was employed by NRF—has not been established. The Respondent concedes as much by requesting the production of documents relating to Ms. Ntashamaje's employment and the convening of a hearing to interrogate those persons who have given statements confirming Mr. Fortier's explanations.

## F. COSTS

76. In view of the lack of the merits of the Respondent's grounds for another challenge of Mr. Fortier as discussed above, the Two Members have decided that the Respondent shall be responsible for the costs associated with this Fourth Proposal for Disqualification and that an order to that effect will be made in the final award to be issued by the Tribunal in these proceedings.

## G. DECISION

77. For the foregoing reasons, the Two Members:

- (1) Decline the Respondent's request for the production of documents relating to Ms. Ntashamaje's employment and a hearing for the interrogation of persons who have given statements to confirm Mr. Fortier's explanations;
- (2) Dismiss the Respondent's Fourth Proposal for the Disqualification of Mr. Fortier;
- (3) Decide that the Respondent shall be responsible for the costs associated with the Fourth Proposal for Disqualification and that an order to that effect will be made in the award to be issued by the Tribunal in these proceedings.

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[Signed]

Prof. Hi-Taek Shin

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[Signed]

Prof. Zachary Douglas QC