

**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  
A MAJORITY OF THE TRIBUNAL**

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*CHAIRMAN OF THE ADMINISTRATIVE COUNCIL*  
**DR. JIM YONG KIM**

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

*Date: June 16, 2015*

## THE PARTIES' REPRESENTATIVES

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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**”).

## B. PROCEDURAL HISTORY

3. 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.
4. The Tribunal was constituted on February 14, 2013, comprised of 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.
5. 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) Venezuela filed a request to address objections to jurisdiction as a preliminary matter on August 16, 2013;<sup>2</sup> (iii) Venezuela filed a Counter-Memorial on the Merits on December 20, 2013; (iv) the Claimants filed a Reply on the Merits and a Counter-Memorial on Jurisdiction on March 21, 2014; (v) Venezuela filed a Rejoinder on the Merits and a Reply on Jurisdiction on June 20,

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<sup>1</sup> According to the July 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 Respondent’s request for bifurcation.

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.

6. On March 4, 2015, the Secretary of the Tribunal conveyed the following message from Mr. Mourre to the parties:

*"As from May 2015, I will leave Castaldi Mourre & Partners to establish my own individual arbitrator practice. I will also as from then have a consultancy agreement with the law firm of Dechert LLP with the title of Special Counsel. At Dechert, I will only work on specific matters on which Dechert will ask me to participate, and I will have no access whatsoever to databases for matters other than those on which I will work directly. I will have a fixed compensation from Dechert and will not share in its profits or costs. My arbitrator's work will therefore be completely separate from Dechert. As a consequence, I do not consider me a Dechert lawyer for conflict purposes and I do not see Dechert's activities, except for the Dechert cases I work on, to be such as to cast any doubt on my independence and impartiality.*

*I am however informing the parties, for the sake of transparency, that Dechert has within the past year been adverse to the Bolivarian Republic of Venezuela and/or Petróleos de Venezuela in six litigation matters that are entirely unrelated to the present arbitration. I have no additional information on these cases and, for the avoidance of doubt, I of course confirm that I will not participate in any manner in any work of Dechert with respect to the Bolivarian Republic of Venezuela, Petroleos de Venezuela or any other entity related to the Republic of Venezuela."*

7. On March 9, 2015, Venezuela advised that Mr. Mourre's communication of March 4, 2015 cast serious doubts about his suitability as an arbitrator in any of the cases to which Venezuela was a party, and asked for additional information concerning Mr. Mourre's relationship with Dechert LLP. Specifically, Venezuela requested:

(a) *The date of commencement of the negotiations or talks between Mr. Mourre and Dechert LLP, which led to the decision to become part of that firm under the terms disclosed on 4 March 2015.*

(b) *The date when those negotiations or talks concluded and the agreement disclosed on 4 March 2015 was entered into.*

(c) *The particulars of the individuals who participated in those negotiations or talks between Mr. Mourre and Dechert LLP, and the place or places where they were conducted.*

(d) *A list of the cases in which Dechert LLP acts as counsel or advisor in —domestic or international— arbitration or court proceedings against Latin American States or their instrumentalities, including details on the stage of the proceedings, the industry concerned,*

*the subject-matter of the case, the claimant and—in the case of arbitration proceedings—the institution conducting the proceedings and the names of the members of the tribunal.*

*(e) A description of the functions that Mr. Mourre will carry out as from May of this year, in his role as ‘Special Counsel’ at Dechert LLP.*

*(f) A list of the team of in-house attorneys and external advisors in which Mr. Mourre will act as legal consultant within Dechert LLP, including the organizational chart on the basis of which he will receive work requests and/or instructions.*

*(g) In the event that this has been discussed during or after his negotiations with Dechert LLP, a list of the cases in which Mr. Mourre will participate, including the industries concerned and the subject-matter of the proceedings.*

8. On March 11, 2015, the Secretary of the Tribunal conveyed the following message from Mr. Mourre to the parties, inviting their comments by March 16, 2015:

*“...I acknowledge receipt of a communication dated March 9, 2015 from counsel for the Bolivarian Republic of Venezuela in this case. In this communication, the Bolivarian Republic of Venezuela requests additional information regarding my communication to the parties dated March 4, 2015, stating however that my future professional relationship with Dechert LLP ‘is such as to generate conflicts of interest that are not compatible with the requirements that an arbitrator must meet under the ICSID Convention’ (arbitrator’s translation). In this regard, I can only confirm that my professional relationship with this law firm – which will only start on May 1st – is not such as to generate any conflict since, (i) my arbitrator’s work (including in this case) will be totally separated from Dechert, (ii) I will not be a partner in Dechert and I will have no access whatsoever to their databases, (iii) my relationship with Dechert will be limited to specific matters on which Dechert will ask me to participate, and (iv) I will not have any involvement (and information on) in the cases on which Dechert may act against the Bolivarian Republic of Venezuela or related entities. Therefore, I am unable to provide any information relating to cases in which Dechert may be acting against the Republic or related governmental entities, since I don’t have that information and I don’t have access to it. I can only add that the conversations that led to the establishment of this professional relationship were informally conducted with Dr. Eduardo Silva Romero, with whom I have a longstanding friendship, and were concluded shortly before I made my declaration. Based on this, I can only confirm my total independence and impartiality. I however understand and respect the position of the Bolivarian Republic of Venezuela. In view of the importance attached to all arbitrators having the full confidence of the parties, if the Republic still believes that my statement is not compatible with my duties of independence and impartiality, I will have no choice but to resign as arbitrator in this case....”*

9. On March 13, 2015, Venezuela proposed the disqualification of Mr. Mourre and Mr. Fortier on the basis that each of them lacked the requisite impartiality and independence under Articles 14 and 57 of the ICSID Convention (the “**Proposal**”).

10. On March 16, 2015, the Centre informed the parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural schedule for written submissions on the Proposal.

11. In addition, on March 16, 2015, 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 ICSID Secretariat immediately communicated Mr. Mourre’s resignation to the parties.

12. Finally, also on March 16, 2015, the Claimants submitted comments to Mr. Mourre’s disclosure of March 11, 2015. These were submitted before the parties had been notified of Mr. Mourre’s resignation.

13. In accordance with the schedule, the Claimants submitted a Reply to the Proposal on March 24, 2015 (“**Claimants’ Reply**”). On March 30, 2015, Mr. Fortier furnished explanations pursuant to ICSID Arbitration Rule 9(3).

14. On April 6, 2015, Venezuela requested a translation into Spanish of the Claimants’ Reply. The Centre invited the Claimants to provide the translation by April 7, 2015, which the Claimants did.

15. Both parties submitted additional comments to the Proposal on April 14, 2015 (“**Additional Comments**”).

16. On April 22, 2015, Mr. Fortier, having reviewed the Additional Comments, provided further explanations.

17. On April 23, 2015, Venezuela requested an opportunity to comment on Mr. Fortier’s communication of April 22, 2015. Both parties were invited to submit any final comments concerning the Proposal by April 27, 2015, which comments were received by April 27, 2015. On June 11, 2015, Venezuela submitted a further letter to the Centre in connection with the Proposal.

The Centre invited the Claimants to provide comments on the letter by June 15, 2015, which the Claimants did.

## **C. PARTIES’ ARGUMENTS REGARDING THE PROPOSAL TO DISQUALIFY MR. MOURRE AND MR. FORTIER**

### **1. Venezuela’s Proposal for Disqualification**

18. Venezuela’s arguments on the proposal to disqualify Messrs. Mourre and Fortier were set forth in its submissions of March 13, April 14 and 27, and June 11, 2015. These arguments are summarized below.

#### **(i) Proposal to Disqualify Mr. Alexis Mourre**

19. According to Venezuela, Mr. Mourre’s communication of March 11, 2015 contained an incomplete answer to Venezuela’s inquiries,<sup>3</sup> and simply reiterated general statements made in his letter of March 4, 2015.<sup>4</sup> Venezuela asserts that an arbitrator must “investigate by all reasonable means available to him the existence of situations of conflict of interest in any firm he or she wishes to join and must disclose all available information as soon as he or she becomes aware of it.”<sup>5</sup> In Venezuela’s view, Mr. Mourre’s explanations failed to provide sufficient details as to his relationship with Dechert LLP,<sup>6</sup> a firm that represents interests adverse to Venezuela.<sup>7</sup>

20. Venezuela raises potential similarities between cases against Venezuela where Dechert LLP acts as counsel and those in which Mr. Mourre sits as an arbitrator.<sup>8</sup> Venezuela claims that “an independent third party would necessarily understand that it is impossible for Mr. Mourre to decide issues with independent judgment in those cases … [without] regard to the positive or adverse consequences that his decisions may have on the interests of the firm for which he now works.”<sup>9</sup>

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<sup>3</sup> Venezuela’s Proposal for Disqualification of Arbitrators Alexis Mourre and Yves Fortier dated March 13, 2015 (“Proposal”) ¶6.

<sup>4</sup> Proposal ¶12-13.

<sup>5</sup> Proposal ¶14.

<sup>6</sup> Proposal ¶¶8-9.

<sup>7</sup> Proposal ¶7, 13.

<sup>8</sup> Proposal ¶16.

<sup>9</sup> Proposal ¶16; Venezuela’s Additional Comments ¶49.

21. Finally, Venezuela claims that Mr. Mourre's financial interest in the outcome of the cases against Venezuela handled by Dechert LLP would not be reduced by the fact that he would receive a fixed monetary compensation from that firm.<sup>10</sup>

22. In Venezuela's view, the relationship between Mr. Mourre and Dechert LLP is sufficient to lead an impartial third party to reasonably doubt his impartiality and independence.<sup>11</sup>

#### **(ii) Proposal to Disqualify Mr. Yves Fortier**

23. Venezuela notes that the law firms of Norton Rose<sup>12</sup> and Macleod Dixon LLP agreed to a merger in 2011, which became effective on January 1, 2012. This merger led Venezuela to propose the disqualification of Mr. Fortier on October 5, 2011 in ICSID Case No. ARB/07/30 (the "*First Conoco Challenge*")<sup>13</sup> on the basis of: (a) Mr. Fortier's long-standing relationship with Norton Rose; and (b) Macleod Dixon's repeat representation of interests adverse to Venezuela.<sup>14</sup> Mr. Fortier resigned from Norton Rose effective December 31, 2011, but Venezuela claims that it remains unclear whether his "unofficial professional ties with [Norton Rose] were broken either on or after that date" (emphasis added).

24. Venezuela states that it became aware that Mr. Fortier continued to "have strong professional links with Norton Rose" on January 27, 2015, through press reports that highlighted the participation of Mr. Martin J. Valasek, a Norton Rose partner, as assistant to the tribunal presided over by Mr. Fortier in the *Yukos v. Russian Federation* arbitration. In Venezuela's view, this demonstrates an ongoing professional relationship between Mr. Fortier and Norton Rose.<sup>15</sup>

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<sup>10</sup> Proposal ¶18.

<sup>11</sup> Proposal ¶19.

<sup>12</sup> Today Norton Rose Fulbright, following the merger of Norton Rose with Canada's Ogilvy Renault LLP and McLeod Dixon LLP and US Fulbright & Jaworski LLP (hereinafter, "**Norton Rose**").

<sup>13</sup> *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) ("**Conoco**"). Venezuela proposed the disqualification of Mr. Fortier in *Conoco* on October 5, 2011 ("the **First Conoco Challenge**") and on March 11, 2014 ("the **Second Conoco Challenge**"). Both disqualification proposals were rejected. On February 6, 2015, Venezuela filed a third proposal for the disqualification of Mr. Fortier in *Conoco* ("the **Third Conoco Challenge**"). This latest proposal is currently pending before the Chairman of ICSID Administrative Council.

<sup>14</sup> Proposal ¶¶26-27.

<sup>15</sup> Proposal ¶28-29. Venezuela's Additional Comments ¶20-25.

25. On February 6, 2015, Venezuela filed a third disqualification proposal respecting Mr. Fortier in *Conoco* (the “***Third Conoco Challenge***”). Venezuela argues that Mr. Fortier’s alleged conflict of interest in Conoco [concerning Norton Rose] is similar to Mr. Mourre’s alleged conflict of interest in this case [concerning Dechert LLP]. Venezuela submits that, given these similarities, it became necessary to propose the disqualification of Mr. Fortier in the present case, since Mr. Mourre’s eventual resignation would have been considered by Prof. Shin and Mr. Fortier [who, in Venezuela’s view, is conflicted] under Article 56 of the ICSID Convention and ICSID Arbitration Rule 8(2).<sup>16</sup>

26. In addition, Venezuela: (a) notes that Mr. Fortier’s offices “are located in the reception area of Norton Rose, at the same building, on the same floor [...] physical proximity [that] would make an impartial observer assume that Mr. Fortier is in regular contact [with] Norton Rose;”<sup>17</sup> (b) alleges that Mr. Fortier still serves as *Chairman Emeritus* of Norton Rose, based on a hyperlink that allegedly leads to Norton Rose’s website;<sup>18</sup> (c) referring to the same hyperlink, notes the existence of the email address *yves.fortier@nortonrosefulbright.com*, which must have been created after December 2011, since the merger of Norton Rose and Fulbright & Jaworski only became effective in June 2013;<sup>19</sup> and (d) refers to Mr. Fortier’s public endorsement of the political candidacy of Ms. Rachel Bendayan, a current Norton Rose lawyer.<sup>20</sup>

27. Given these links, Venezuela alleges that, “any impartial third-party [would] have reasonable and justifiable doubts on whether Mr. Fortier would decide the cases to which [...] Venezuela is a party with independence and impartiality, as he will have to decide on issues [...] which have a direct impact on the economic interests of [Norton Rose] and its clients.”<sup>21</sup>

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<sup>16</sup> Proposal ¶23-24.

<sup>17</sup> Proposal ¶30. Venezuela’s Additional Observations ¶26.

<sup>18</sup> Venezuela’s Additional Observations ¶19.

<sup>19</sup> *Ibid.* Venezuela attaches as Annex II a reference to the e-mail address of Mr. Yves Fortier, identified as *yves.fortier@nortonrosefulbright.com*.

<sup>20</sup> Respondent’s letter dated April 27, 2015, page 5. Venezuela attaches as Annex VI a public statement made by Mr. Fortier, as stated in Ms. Bendayan’s website.

<sup>21</sup> Proposal ¶32.

## **2. Claimants' Observations**

28. The Claimants' arguments on the proposal to disqualify Mr. Mourre and Mr. Fortier were set forth in their submissions of March 24, April 14 and April 27, 2015. These arguments are summarized below.

### **(i) Proposal to Disqualify Mr. Alexis Mourre**

29. The Claimants submit that: (a) there has been no inappropriate non-disclosure by Mr. Mourre;<sup>22</sup> (b) M. Mourre made arrangements to ensure that his future relationship with Dechert LLP would not subvert his integrity in these and other proceedings;<sup>23</sup> and (c) nothing in the facts disclosed by Mr. Mourre indicates an evident or obvious inability to exercise independence or an appearance of lack of impartiality.<sup>24</sup>

30. The Claimants conclude that, even if genuinely held, the subjective belief of the Respondent cannot constitute a basis for disqualification.<sup>25</sup>

### **(ii) Proposal to Disqualify Mr. Yves Fortier**

31. The Claimants observe that "the Respondent has unambiguously recognized that the true reason behind the challenge to Mr. Fortier was to prevent him from considering a potential resignation from Mr. Mourre."<sup>26</sup> According to the Claimants, this is not a valid ground for disqualification under Article 57 of the ICSID Convention, nor are the Respondent's previous unsuccessful attempts to disqualify Mr. Fortier.<sup>27</sup>

32. The Claimants also note that Mr. Fortier informed the *Conoco* tribunal and parties in 2011 that he would continue working with members of Norton Rose on certain files in which he was sitting as an arbitrator, and that the *Conoco* tribunal had rejected the *First Conoco Challenge*, knowing that Mr. Fortier would continue to have a relationship with some members of Norton

<sup>22</sup> Claimants' Reply ¶43. Claimants' Additional Observations ¶20.

<sup>23</sup> Claimants' Additional Observations ¶20.

<sup>24</sup> Claimants' Reply ¶38.

<sup>25</sup> Claimants' Reply ¶44.

<sup>26</sup> Claimants' Additional Comments ¶11. Claimants' Reply ¶47-48.

<sup>27</sup> Claimants' Reply ¶50.

Rose.<sup>28</sup> In addition, the Claimants submit that the relationship between Messrs. Valasek and Fortier cannot evidence a manifest lack of the requisite independence or impartiality of the latter under Article 57 of the ICSID Convention.<sup>29</sup>

33. The Claimants further state that Venezuela has offered no explanation as to “why Mr. Fortier’s choice of an office in proximity to the office of a law firm entirely uninvolved in this case would undermine his ability to fulfill his role as arbitrator in these proceedings.”<sup>30</sup>

34. Finally, the Claimants assert that “ICSID jurisprudence has confirmed consistently that professional contacts between an arbitrator and legal counsel cannot, without more, be considered grounds for automatic disqualification.” They conclude that Mr. Fortier’s relationship with Norton Rose “cannot cast any plausible doubt on Mr. Fortier’s independence or impartiality, let alone establish the ‘manifest’ lack of these qualities that is required for a challenge to succeed in ICSID proceedings.”<sup>31</sup>

#### **D. EXPLANATIONS FURNISHED BY THE ARBITRATORS**

35. Following Mr. Mourre’s resignation on March 16, 2015, he ceased to be a member of the Tribunal and thus furnished no explanation.

36. By communication of March 30, 2015, Mr. Fortier declared the following:

*“The Respondent in this arbitration has requested my disqualification in its letter of 13 March 2015 to the Secretary of the Tribunal.*

*I note that the Respondent has attached to its request as Annex 1 what it describes in footnote 9 as the “Conoco Disqualification”, being a proposal for my disqualification also on behalf of the Bolivarian Republic of Venezuela in the ICSID Case of ConocoPhillips Company and Others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30 which is still pending. I am surprised to see this explicit reference to a proceeding which I believe to be confidential. For your information, I have submitted explanations to my co-arbitrators and the parties in that proceeding which I would be happy to provide to you if you wish (subject to the parties’ consent).*

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<sup>28</sup> Claimants’ Reply ¶52. Claimants’ Additional Comments ¶12 (ii).

<sup>29</sup> Claimants’ Reply ¶54.

<sup>30</sup> Claimants’ Reply ¶56. Claimants’ Additional Observations ¶12 (iii).

<sup>31</sup> Claimants’ Reply ¶57. Claimants’ Additional Observations ¶13.

*To assist you in considering the Respondent's request, I offer the following explanations in respect of the Respondent's allegations which concern me (pages 11 to 15):*

1. *The Respondent alleges that after 31 December 2011, I have "continued to have strong professional links with Norton Rose" (para. 28. See also paras. 29 and 32) and that I "now serve as "Chairman Emeritus" of Norton Rose OR" (para. 26) (my emphasis).*

*This is wrong. I deny categorically that allegation of Respondent. It is a matter of public record that I resigned as a partner of Norton Rose OR on 31 December 2011 and severed all of my professional links with that firm on that date. My profile referenced in footnote 10 of the Respondent's request is a CV which was published some time in 2011 when I was still Chairman Emeritus of Norton Rose OR. For your information, Norton Rose OR ceased to exist on 31 December 2011. If one visits the website of Norton Rose Fulbright, <http://www.nortonrosefulbright.com> (as I have just done), one sees no reference to L. Yves Fortier and this has been so since 1 January 2012. You may also wish to consult the website of Cabinet Yves Fortier at <http://www.yfortier.ca>.*

2. *Referring to the Yukos v. Russia awards and the role that Mr. Martin Valasek fulfilled as assistant to these tribunals, the Respondent alleges "that it shows the existence of a current professional link between Mr. Fortier and [Norton Rose]" (para. 29).*

*With respect, the role that Mr. Valasek, a former colleague at Norton Rose OR, continued to play as assistant to the Yukos tribunals after 31 December 2011 shows no such thing.*

*It is a matter of public record that Mr. Valasek was appointed as assistant to the Yukos Tribunals in 2005, with the consent of my co-arbitrators and the parties, and that he served in that capacity for nearly 10 years until the Final Awards were issued on 18 July 2014.*

*After I resigned as a partner of Norton Rose OR LLP on 31 December 2011 in order to pursue my career as an independent arbitrator and mediator, Mr. Valasek continued to perform his duties as assistant to the Yukos tribunals until the Final Awards were issued.*

*Whatever may have been written in recent press reports does not change the fact that, after 1 January 2012 and until 18 July 2014, Mr. Valasek, in the Yukos arbitrations, continued to assist the tribunals as he had done since 2005.*

3. *The Respondent alleges that my "current offices are located in the reception area of Norton Rose, at the same building, on the same floor [...] and that this is in conflict with the statements made by Mr. Fortier to the Republic when informing it about his resignation from Norton Rose with a view to avoiding a previous disqualification" (para. 30).*

*Place Ville Marie is the largest office building in Montreal. It has 41 floors and each floor has four separate, distinct wings. There are more than ten law firms in this building.*

*My Montreal office, since 1 January 2012, is situated in the North wing of the 28th floor. The Montreal offices of Navigant Consulting are also in this wing. Norton Rose Fulbright has a mail room (not a reception area which is on the 25th floor) in the South wing and a cafeteria for its employees in the East wing. The West wing was leased very recently to Tory's LLP, a major Canadian law firm.*

*These facts are not in conflict with any other statement I may have made previously to other counsel for the Republic in other disqualification proceedings.*

*I hope that these explanations will be of assistance to you as you consider the pending proposal for my disqualification. I reiterate my profound conviction that I am, always have been, and will remain able to exercise independent judgment in this arbitration.”*

37. By communication of April 22, 2015, Mr. Fortier declared the following:

*“I have now seen the English translation of the Respondent’s “comments on [my] comments of 30 March 2015” for which I thank the Respondent’s counsel.*

*With your leave, I wish to clarify a few important facts in the Respondent’s comments:*

*In paragraph 19, the Respondent refers to and files as Annex II my alleged current profile found through a web search engine such as Google (not through the current Norton Rose Fulbright website, <http://www.nortonrosefulbright.com>). In order to be fair, I need to complete and clarify this Annex II by submitting (i) the full Google search results page for “Yves Fortier Norton Rose Fulbright” (as Annex 1) and (ii) the second search result on that page, being the announcement issued by Norton Rose OR on 21 October 2011 entitled “Revered international arbitrator, Yves Fortier, leaving Norton Rose OR to establish independent practice” (as Annex 2).*

*To be clear, I reconfirm in its entirety the statement I made at paragraph number 1 of my comments of 30 March 2015.*

*The email address, [yves.fortier@nortonrosefulbright.com](mailto:yves.fortier@nortonrosefulbright.com) referred to in paragraph 19, is not today, and has never been, active.*

*In paragraph 26, the Respondent refers to me as “a former Managing Partner”. In fact, I have never been a “Managing Partner” of Norton Rose OR or any one of its predecessor firms. I served as the non-executive Chairman of the firm from 1992 to 2009.”*

## E. DECISION BY THE CHAIRMAN

### 1. The proposed disqualification of Mr. Alexis Mourre

38. Mr. Mourre resigned from the Tribunal. As a result, it is no longer necessary to address the proposal for his disqualification, which is accordingly dismissed.

### 2. The proposed disqualification of Mr. Yves Fortier

39. Proposals for the disqualification of an arbitrator under the ICSID Convention and Rules must be submitted promptly. Arbitration Rule 9(1) reads as follows:

*A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.*

40. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. Accordingly the timeliness of a proposal must be determined on a case-by-case basis.<sup>32</sup>

41. In this case, Venezuela filed the Proposal on March 13, 2015, following Mr. Mourre's disclosures of March 4 and March 11, 2015.

42. The Claimants argue that Venezuela did not file the Proposal *promptly*, and thereby waived its right to seek Mr. Fortier's disqualification under ICSID Arbitration Rule 27.<sup>33</sup> The Claimants state that Venezuela learned of the basis for the Proposal as early as October 2011<sup>34</sup> and that, in any event, should have been aware of the relationship between Messrs. Fortier and Valasek by July 2014, when the *Yukos* award was made public.<sup>35</sup>

43. Venezuela claims that the Proposal was filed *promptly*. It admits that it became aware of Mr. Fortier's alleged continued professional links with Norton Rose on January 27, 2015 through

<sup>32</sup> See *Conoco* *supra* note 13, Decision on the Proposal to Disqualify a Majority of the Tribunal of May 5, 2014 ¶39, footnote 26.

<sup>33</sup> Claimants' Reply ¶60. Claimants' Additional Observations ¶16.

<sup>34</sup> Claimants' Reply ¶¶61 and 68-69. Claimants' Additional Observations ¶15.

<sup>35</sup> Claimants' Reply ¶70.

public media reports on the *Yukos* case.<sup>36</sup> However, Venezuela claims that the promptness of this disqualification proposal ought to be considered by looking at the specific circumstances that motivated the proposal.<sup>37</sup> Venezuela concedes that it knew all facts relevant to its proposal to disqualify Mr. Fortier by January 2015, but argues that the relevant date to assess promptness of the proposal should be set as March 11, 2015, when it realized Mr. Fortier would have had to consider the resignation of Mr. Mourre.<sup>38</sup>

44. In this case, the latest fact on which the Proposal is based dates from January 27, 2015, *i.e.* forty-five days prior to Venezuela's filing of the Proposal.

45. Indeed, it is common ground that on February 6, 2015, Venezuela filed a proposal for the disqualification of Mr. Fortier in *Conoco* based on the same facts invoked in this Proposal.<sup>39</sup> Nonetheless, Venezuela waited further thirty-five days to submit the Proposal in the present case, and only filed the Proposal in this case when it became aware of the possibility of Mr. Mourre's resignation, a fact that has no bearing on Mr. Fortier's reliability to exercise independent judgment.

46. In these circumstances, the disqualification proposal cannot be considered timely filed. Therefore, the Proposal is rejected.

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<sup>36</sup> Proposal ¶28. Venezuela's Additional Observations ¶¶35-36.

<sup>37</sup> Venezuela's Additional Observations ¶39.

<sup>38</sup> *Supra* ¶25. See also Proposal ¶24.

<sup>39</sup> See Annex I of the Proposal.

## F. CONCLUSIONS

47. For the reasons set forth above, the Chairman decides as follows:

1. Respondent's proposal to disqualify Mr. Alexis Mourre pursuant to Article 57 of the ICSID Convention is dismissed;
2. Respondent's proposal to disqualify Mr. Yves Fortier pursuant to Article 57 of the ICSID Convention is rejected as untimely.

[Signed]

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*Chairman of the ICSID Administrative Council*

Dr. Jim Yong Kim