

**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
A MAJORITY OF THE TRIBUNAL**

CHAIRMAN OF THE ADMINISTRATIVE COUNCIL
DR. JIM YONG KIM

Secretary of the Tribunal
Mr. Gonzalo Flores

Date: May 5, 2014

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A. THE PARTIES

1. The Claimants are ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V., three companies incorporated under the laws of The Netherlands (jointly, “**ConocoPhillips**” or “**the Claimants**”).
2. The Respondent is the Bolivarian Republic of Venezuela (“**Venezuela**” or the “**Respondent**”).

B. PROCEDURAL HISTORY

3. On November 2, 2007, 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 ICSID Convention. On December 13, 2007, 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 July 23, 2008. Its members were Judge Kenneth Keith, a national of New Zealand, appointed as president pursuant to Article 38 of the ICSID Convention; Mr L. Yves Fortier, CC, QC, a national of Canada appointed by the Claimants; and Sir Ian Brownlie, CBE, QC, a national of the United Kingdom, appointed by the Respondent. On February 1, 2010, the Tribunal was reconstituted, with Professor Georges Abi-Saab, an Egyptian national, being appointed by the Respondent, following Sir Ian Brownlie’s passing.
5. On September 3, 2013, the Tribunal issued a Decision on Jurisdiction and Merits (“**Decision on Jurisdiction and Merits**”). It found the Respondent in breach of its international obligation to negotiate compensation in good faith for its taking of ConocoPhillips’ assets in three oil projects in Venezuela, and rejected all other claims submitted by the Claimants. Professor Abi-Saab dissented from this Decision, but he has not yet provided the text of his dissent.
6. On September 8, 2013, the Respondent requested a clarification and further explanations from the Tribunal regarding certain findings in the Decision on Jurisdiction and Merits (“**the**

September 8 letter”). In its letter, the Respondent also requested “a limited and focused hearing” to address the issues raised.

7. By letter of September 10, 2013, the Claimants opposed the Respondent’s requests and instead proposed a briefing schedule for submissions on *quantum*. The parties exchanged further correspondence on the matter on September 11, 12, 16 and 23, 2013.

8. On October 1, 2013, the Tribunal fixed a schedule for the parties to file written submissions on: (i) the Tribunal’s power to reconsider the Decision on Jurisdiction and Merits; and (ii) a possible schedule for quantum briefs. In accordance with the schedule, the parties simultaneously filed briefs on October 28 and November 25, 2013.

9. On March 10, 2014, the Tribunal issued a majority decision rejecting Respondent’s Request for Reconsideration (the “**Decision on Reconsideration**”). Professor Abi-Saab appended a Dissenting Opinion.

10. On March 11, 2014, Venezuela proposed the disqualification (the “**Proposal**”) of Judge Keith and Mr. Fortier (the “**Challenged Arbitrators**”) “on grounds of lack of the requisite impartiality under Article 14 of the ICSID Convention.”

11. On March 13, 2014, the Centre informed the parties that the proceeding was suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural calendar for the parties’ submissions on the Proposal.

12. In accordance with the procedural calendar, the Respondent submitted a brief with its arguments on the disqualification proposal on March 21, 2014. The Claimants submitted a Reply to the Respondent’s disqualification proposal on March 28, 2014.

13. On March 30, 2014, the Respondent submitted a letter commenting on the Claimants’ Reply to the Respondent’s disqualification proposal and asking several questions to the challenged arbitrators. On March 31, 2014, the Claimants replied to Respondent’s March 30 letter.

14. On April 4, 2014, Mr. Fortier furnished explanations pursuant to ICSID Arbitration Rule 9(3). On that same date, Judge Keith declined to furnish explanations, also in accordance with ICSID Arbitration Rule 9(3).

15. As scheduled, both parties submitted additional comments on the Proposal on April 14, 2014.

C. PARTIES' ARGUMENTS REGARDING THE PROPOSAL TO DISQUALIFY JUDGE KEITH AND MR. FORTIER AND THE ARBITRATORS' EXPLANATIONS

1. Venezuela's Proposal for Disqualification

16. Venezuela's arguments on the proposal to disqualify Judge Keith and Mr. Fortier were set forth in its submissions of March 21 and April 14, 2014 and supplemented by its communication of March 30, 2014. These arguments are summarized below.

17. Venezuela bases the challenge to Judge Keith and Mr. Fortier on "their steadfast refusal to entertain an application for reconsideration of the [Decision on Jurisdiction and Merits] on an important issue that they decided based on what has been proven beyond doubt to be false premises and their negative 'general attitude vis-à-vis the Respondent,' their propensity to decide by 'sheer fiat,' their adoption of 'a presumption . . . of a constant pattern of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes,' and their 'relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings [which] have evinced a lack of the requisite impartiality under Article 14(1) of the ICSID Convention.'"¹

18. Venezuela claims that the finding in the Decision on Jurisdiction and Merits that the Respondent failed to negotiate compensation for the 2007 oil nationalization in good faith was based on improper inferences drawn from false factual premises, and it was manufactured by the Challenged Arbitrators as the Claimants never accused Respondent of bad faith negotiation.²

¹ Memorial in Support of Proposal to Disqualify Arbitrators of March 21, 2014 ¶3.

² Memorial in Support of Proposal to Disqualify Arbitrators ¶5. Respondent's Second Submission of April 14, 2014 ("Respondent's Second Submission") page 5.

19. Venezuela argues that the Challenged Arbitrators inferred that the Claimants' allegations concerning the compensation negotiations were true because the Respondent did not present evidence of what had occurred during the critical negotiating period. Venezuela further claims that the Challenged Arbitrators ignored the Confidentiality Agreement between the parties to the compensation negotiations, because Respondent had commented on earlier negotiations. Therefore, the Challenged Arbitrators assumed that Venezuela did not feel bound by the Confidentiality Agreement and should have provided additional evidence. Venezuela states that "while as a matter of law it is never appropriate to infer bad faith negotiation on the part of the State, as a matter of logic the Challenged Arbitrators were obviously wrong in drawing an inference from the purported lack of evidence in this case."³

20. Venezuela also refers to U.S. Embassy cables - part of the WikiLeaks released after the hearing on the merits held in 2010 - submitted by the Respondent with the September 8 letter, to demonstrate that the Claimants made misrepresentations of fact at the hearing that proved decisive to the Challenged Arbitrators.⁴ Venezuela claims that these cables prove that the Claimants made false representations to the Tribunal, upon which the decision of the Challenged Arbitrators on the lack of good faith negotiation was based.⁵

21. Venezuela asserts that a decision based on misrepresentations would not comport with basic principles concerning the administration of justice and could not be made by arbitrators having the requisite impartiality under the ICSID Convention.⁶ Venezuela adds that "no legal system can endorse the position that an arbitrator has no power in a case still pending before him to rectify an obvious mistake, irrespective of whether its original opinion was based on misrepresentation, fraud, forged documents, false testimony or any other egregious misconduct" and that "this is the effect of the Challenged Arbitrator's blanket refusal to even consider the facts on Respondent's Application for Reconsideration."⁷

22. Venezuela maintains that the Challenged Arbitrators did not seriously entertain Respondent's application for reconsideration, refused to engage in any analysis of the facts,

³ Memorial in Support of Proposal to Disqualify Arbitrators ¶9.

⁴ Memorial in Support of Proposal to Disqualify Arbitrators ¶10.

⁵ Memorial in Support of Proposal to Disqualify Arbitrators ¶11.

⁶ Memorial in Support of Proposal to Disqualify Arbitrators ¶16.

⁷ Respondent's Second Submission page 5.

reached their conclusions in the Reconsideration Decision without addressing the arguments made or authorities cited by the Respondent, and refused to hold the hearing requested by the Respondent. It submits that this conduct evidences “an unwavering determination by the Challenged Arbitrators to maintain their finding no matter what the circumstances and no matter how erroneous the finding may be.”⁸

23. Venezuela maintains that this challenge involves more than the “mere existence of an adverse ruling,” and that “although mere mistakes of procedure or law normally do not constitute sufficient proof of an arbitrator’s bias, there is a widely-recognized exception for ‘particularly serious or recurring errors, which would constitute a blatant breach of his obligations.’” In Venezuela’s submission “this case involves a decision of the Challenged Arbitrators on a fundamental issue that directly and dispositively affects liability, coupled with a steadfast refusal by the Challenged Arbitrators to even consider the facts establishing that their decision was based upon false factual premises and misrepresentations of a party, an untenable position for any arbitrator to take. To the best of Respondent’s knowledge, no proposal of this kind has ever been presented to ICSID.”⁹

24. Venezuela also maintains that an impartial arbitrator cannot ignore the facts and circumstances of a case and that a tribunal cannot refuse to review its own decision where it is demonstrated to be based on patently false factual premises and misrepresentations. It submits this is particularly evident where the case is still pending before the tribunal with an entire phase left to unfold, “a phase that will be based on and infected by the very decision that was founded upon those patently false premises and misrepresentations.”¹⁰ Venezuela adds that the issue here is whether the manner in which the Challenged Arbitrators approached Venezuela’s Application for Reconsideration creates the appearance of a lack of the requisite impartiality.¹¹

⁸ Memorial in Support of Proposal to Disqualify Arbitrators ¶¶35-36. Respondent’s Second Submission page 5.

⁹ Memorial in Support of Proposal to Disqualify Arbitrators ¶47 and footnote 73.

¹⁰ Memorial in Support of Proposal to Disqualify Arbitrators ¶50. Respondent’s Second Submission page 4.

¹¹ Respondent’s Second Submission page 3.

25. Venezuela maintains that it is not asking the Chairman to determine the merits of the case, but only the merits of the challenge and it requests an oral hearing on this matter before the Chairman of the ICSID Administrative Council.¹²

26. Finally, Venezuela submits that Judge Keith's and Mr. Fortier's communications of April 4, 2014 do not address the issues raised in its submissions or in its March 30 letter.¹³

2. Claimants' Observations

27. The Claimants' arguments on the proposal to disqualify Judge Keith and Mr. Fortier were set forth in their submissions of March 28 and April 14, 2014, supplemented by their communication of March 31, 2014. These arguments are summarized below.

28. The Claimants allege that the Proposal is patently frivolous and that it is part of a series of meritless and desperate delaying tactics by Venezuela.¹⁴ The Claimants maintain that Venezuela, while disagreeing with some of the factual and legal conclusions reached by the Challenged Arbitrators, has failed to show bias or misconduct on their part.¹⁵ The Claimants add that the Proposal is "founded on nothing more than the Respondent's unhappiness with the Procedural Decision."¹⁶

29. The Claimants note that Venezuela is not challenging the independence of the Challenged Arbitrators but their impartiality, claiming that Venezuela's allegations fall far short of satisfying that ground for disqualification.¹⁷

30. The Claimants argue that this challenge is precluded by well-established principles and the fact that the Majority ruled against Venezuela in a reasoned decision, after deliberation, cannot give rise to a successful challenge.¹⁸ The Claimants allege that "it is unquestionable that [in the Reconsideration Decision] the Majority considered the parties' arguments and reached a

¹² Memorial in Support of Proposal to Disqualify Arbitrators ¶52; Respondent's Second Submission pages 2 and 7.

¹³ Respondent's Second Submission page 1.

¹⁴ Claimants Reply to Respondent's Proposal to disqualify Judge Kenneth Keith and Maître L. Yves Fortier of March 28, 2014 ("Claimant's Reply") ¶1.

¹⁵ Claimant's Reply ¶2.

¹⁶ Claimant's Reply ¶10.

¹⁷ Claimant's Reply ¶16.

¹⁸ Claimant's Reply ¶¶16, 22.

reasoned decision on the basis of those arguments. There is no evidence to support the accusation that the resulting decision evinced any degree of partiality. A fortiori, an objective third party could not conclude in these circumstances that the Majority's finding demonstrated a 'manifest lack' of impartiality towards the Respondent."¹⁹

31. The Claimants also submit that the failure to hold the oral hearing requested by Venezuela does not establish manifest lack of impartiality by the Challenged Arbitrators.²⁰

32. The Claimants argue that the Respondent is postulating a "non-existent challenge standard of 'particularly serious or recurring errors' of procedure or law" as the basis to uphold this challenge.²¹

33. The Claimants state that the Chairman of the Administrative Council is "neither in a position to, nor mandated to, scour the factual record to determine, for example, what the WikiLeaks cables should be understood to mean, or whether the Majority relied more heavily on the witness testimony offered by one party. And that is precisely why evidence of arbitrator bias must be 'obvious' and 'discerned with little effort and without deeper analysis.' Were it otherwise, arbitrator challenges would turn into full blown legal and evidential appeals – a result antithetical to the ICSID system, but precisely what the Respondent is attempting to manufacture here."²²

34. The Claimants refute Venezuela's contention that the majority had reached its Decision on Jurisdiction and Merits as a result of certain misapprehensions. The Claimants state that they have consistently disputed the allegation that the Tribunal's finding of an illegal expropriation was based on a misapprehension and have refuted Venezuela's contention that the facts not contested by the Claimants were undisputed. The Claimants argue that the Respondent is now seeking to transform their explicit and principled stance "into a form of unspoken acquiescence, referring wishfully to the supposedly undisputed fact that the arbitrators erred."²³

¹⁹ Claimant's Reply ¶28.

²⁰ Claimant's Reply ¶29.

²¹ Claimant's Reply ¶19.

²² Claimant's Reply ¶21.

²³ Claimant's Reply ¶32.

35. The Claimants argue that they placed the issues of illegality of the expropriation and good-faith negotiations before the Tribunal and that these points were argued in multiple rounds.²⁴

36. Finally, the Claimants maintain that Venezuela's assertions concerning the Confidentiality Agreement and the WikiLeaks cables are legally irrelevant, as they pertain to the period after the Claimants filed their Request for Arbitration.²⁵

3. Arbitrators' Explanations

37. By communications of April 4, 2014, Judge Keith advised that he did not wish to furnish any explanations on the Proposal and Mr. Fortier declared the following:

Having read carefully the parties' submissions of 21 March and 28 March respectively, I believe that you have been well and sufficiently briefed. Accordingly, today, I only offer the following comments.

For more than 10 years now, I have been practicing law exclusively as an arbitrator. I consider arbitration a very noble profession and I am extremely proud to be a member of that profession.

When I ceased, after many years at the Bar, to act as counsel, I no longer represented clients. I became an adjudicator who, whether as party appointed or chairman of arbitral tribunals, had no case to win or lose. I pledged to myself that I would always be independent and impartial and decide all cases submitted to tribunals on which I sat strictly on the basis of the factual evidence and the applicable law. I am convinced that I have always honored my pledge. The present case is no exception.

D. DECISION BY THE CHAIRMAN

1. Timeliness

38. 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

²⁴ Claimant's Reply ¶34.

²⁵ Claimant's Reply ¶36.

is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

39. As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case-by-case basis.²⁶

40. In this case, Venezuela filed the Proposal on March 11, 2014. It arose from a March 10, 2014 Tribunal ruling on Venezuela's request for reconsideration of the September 2013 Decision on Jurisdiction and Merits. This disqualification proposal was filed promptly for the purposes of ICSID Arbitration Rule 9(1).

2. Request for Oral Hearing before the Chairman

41. Article 58 of the ICSID Convention states that the decision on any proposal to disqualify the majority of arbitrators shall be taken by the Chairman of the ICSID Administrative Council.

42. The Respondent requested that the Chairman of the Administrative Council hold a hearing on the Proposal.²⁷ The Claimants have not advanced a position in this regard.

43. Under the ICSID Convention and the ICSID Arbitration Rules, the Chairman has discretion to determine the procedure that will be followed in deciding a disqualification proposal before him. The sole procedural guidance in the Rules is that the Chairman shall use his best efforts to take the decision within thirty days after he has received the proposal.

44. The Chairman notes that the parties have been given a full opportunity to argue their positions with respect to the Proposal. The parties have comprehensively briefed the Chairman on the relevant facts and law and an oral hearing is not necessary in these circumstances.

45. Accordingly, the Chairman has decided the Proposal on the basis of the written submissions presented by the parties and the explanations provided by the Challenged

²⁶ See *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) ¶73 (“**Burlington**”); *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 4, 2014) ¶68 (“**Abaclat**”).

²⁷ Memorial in Support of Proposal to Disqualify Arbitrators ¶52; Respondent's Second Submission page 7.

Arbitrators, as required by Articles 57 and 58 of the ICSID Convention and the Arbitration Rules.

3. Merits

46. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads in relevant part as follows:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.

47. A number of decisions have concluded that the word “manifest” in Article 57 of the Convention means “evident” or “obvious,”²⁸ and that it relates to the ease with which the alleged lack of the required qualities can be perceived.²⁹

48. The disqualification proposed in this case alleges that Judge Keith and Mr. Fortier manifestly lack the impartiality required by Article 14(1).

49. Article 14(1) of the ICSID Convention provides:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

50. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*” (guaranteed independence in exercising their functions), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.³⁰

²⁸ *Burlington supra* note 26 ¶68, footnote 83; *Abaclat supra* note 26 ¶71, footnote 25; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties’ Proposal to Disqualify a Majority of the Tribunal (November 12, 2013) ¶61, footnote 43 (“**Blue Bank**”); *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 (December 13, 2013) ¶73, footnote 58 (“**Repsol**”).

²⁹ C. Schreuer, *The ICSID Convention*, Second Edition (2009), page 1202 ¶¶134-154.

³⁰ The parties agree on this point: Memorial in Support of Proposal to Disqualify Arbitrators ¶44. Claimants’ Reply ¶12. So does ICSID jurisprudence: *Burlington, supra* note 26 ¶65; *Abaclat supra* note 26 ¶74; *Blue Bank supra* note

51. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both “protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”³¹

52. 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.³²

53. The legal standard applied to a proposal to disqualify an arbitrator is an “objective standard based on a reasonable evaluation of the evidence by a third party.” As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.³³

54. The Respondent is dissatisfied with the majority’s Decision on Reconsideration and with the procedure that led to it, in particular, the Tribunal’s failure to convene an oral hearing on the request for reconsideration.

55. However, the Tribunal adopted a reasonable procedure that was within its discretion to regulate the conduct of the proceeding. Similarly, there is nothing in the reasoning or conclusions of the Decision on Reconsideration that suggests an absence of impartiality.

28 ¶58, *Repsol supra* note 28 ¶70; *Suez Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) and *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007) (together “*Suez*”), ¶ 28; *OPIC Karimum Corporation v. Bolivarian Republic Venezuela* (ICSID Case No. ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Decision on the Proposal for Disqualification of Mr. Bernardo M. Cremades, Arbitrator (June 28, 2012) ¶ 59; *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012) ¶54; *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (March 19, 2010) ¶36; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010) ¶37; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimants’ Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013) ¶55.

³¹ *Burlington supra* note 26 ¶66; *Abaclat supra* note 26 ¶75; *Blue Bank supra* note 28 ¶59; *Repsol supra* note 28 ¶71.

³² *Burlington supra* note 26 ¶66; *Abaclat supra* note 26 ¶76; *Blue Bank supra* note 28 ¶59; *Repsol supra* note 28 ¶71.

³³ *Burlington supra* note 26 ¶67; *Abaclat supra* note 26 ¶77; *Blue Bank supra* note 28 ¶60; *Repsol supra* note 28 ¶72.

56. In the Chairman's view, a third party undertaking a reasonable evaluation of the facts in this case, would not conclude that they indicate a manifest lack of the qualities required under Articles 57 and 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

E. DECISION

Having considered all of the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chairman rejects the Bolivarian Republic of Venezuela's Proposal to Disqualify Judge Kenneth Keith and Mr. L. Yves Fortier.

[Signed]

Chairman of the ICSID Administrative Council

Dr. Jim Yong Kim