

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

IN THE ARBITRATION PROCEEDING BETWEEN

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

and

BOLIVARIAN REPUBLIC OF VENEZUELA
RESPONDENT

ICSID Case No. ARB/07/30

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

Issued by

Mr. Eduardo Zuleta
Professor Andreas Bucher

SECRETARY OF THE TRIBUNAL
Mr. Gonzalo Flores

Date: July 26, 2016

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A. PROCEDURAL BACKGROUND

1. The Decision issued on March 15, 2016, on the Respondent's fifth proposal for disqualification of Mr. Yves L. Fortier of February 26, 2016, summarizes, by reference to previous decisions, the earlier phases of the proceeding up to March 2016 (the "[Decision on the Fifth Proposal for Disqualification](#)").¹ This proposal was rejected for the reasons set out in that decision.
2. On April 22, 2016, the Tribunal was reconstituted, with Mr. Eduardo Zuleta being appointed by the Chairman of the Administrative Council, following Judge Kenneth Keith's resignation on March 21, 2016.
3. On May 6, 2016, the reconstituted Tribunal decided, *inter alia*, to divide the hearing on *quantum* into two phases, the first of which was scheduled to be held in Washington, D.C. on August 15 through 19, 2016. The second phase was scheduled for February 21 through February 25, 2017, also in Washington, D.C.
4. On July 22, 2016, Mr. Fortier asked the Centre to convey the following message to the parties and to Mr. Zuleta and Prof. Bucher (the "**Two Members**"):

Mesdames, Gentlemen,

A few days ago, I received from the ICSID Secretariat a letter from counsel for the Bolivarian Republic of Venezuela in ICSID Case No. ARB/12/21, *Fabrica De Vidrios Los Andes, C.A. and Owens-Illinois De Venezuela, C.A. v. The Bolivarian Republic of Venezuela*, accompanied by two attachments. I enclose copy of that letter and the attachments. I also enclose a reply to counsel for the Respondent in that case dated 15 July 2016 from Ms Marisa Planells-Valero, ICSID Secretary of that tribunal.

I also enclose my letter of explanations to Ms Planells-Valero dated 22 July which Ms Planells-Valero has now forwarded to the parties in ICSID Case No. ARB/12/21 and to the other members of that tribunal.

As the Bolivarian Republic of Venezuela is also the Respondent in ICSID Case No. ARB/07/30 and as I am also a member of that Tribunal, I have asked the ICSID Secretary of that Tribunal to send to the parties and the other members of that

¹ See Decision on the Fifth Proposal for Disqualification, ¶¶ 1-12.

Tribunal my letter of today's date to Ms Planells-Valero and all documents therein referred to.

These circumstances do not in any way cause my reliability for independent judgment to be questioned by any party to the instant proceeding but, in view of the history of this arbitration, I thought I should make the present disclosure. [attachments omitted]

5. The explanations to which Mr. Fortier referred are transcribed below:

Dear Marisa,

I have seen the Respondent's letter of 8 July 2016 with two annexes addressed to you. I have also seen your email of 14 July addressed to the parties, the Respondent's communication of 14 July and your reply of 15 July. I am happy to provide the following explanations.

I recall that I resigned as a partner of Norton Rose OR LLP on 31 December 2011 and that I then severed definitively my professional relationship with that firm. As of 1 January 2012, I commenced my practice as a sole and independent international arbitrator with Cabinet Yves Fortier. When I left Norton Rose OR LLP, I was sitting as an arbitrator (Chairman or party-appointed) on many arbitral tribunals. I then had two secretaries, Ms. Linda Tucci ("Linda") and Ms. Chantal Robichaud ("Chantal"), working exclusively for me. They had both been working with me for many years.

In order to ensure that I could continue my busy practice as an international arbitrator after 31 December 2011 with the least possible disruption, I asked Linda and Chantal if they would be prepared to continue to work with me at Cabinet Yves Fortier. They accepted as long as they could continue to participate in all insurance and other benefits to which they were entitled with Services OR LP/SEC (see below).

Services OR LP/SEC is a distinct legal entity set up by Norton Rose OR LLP for the purpose of providing staff and administrative support services to Norton Rose OR LLP. When I resigned as a partner of Norton Rose OR LLP, I entered into a service arrangement with Services OR LP/SEC with respect to the services of Linda and Chantal at the Cabinet Yves Fortier as of 1 January 2012.

Accordingly, Linda and Chantal followed me physically to the Cabinet Yves Fortier where they worked exclusively for me as of 1 January 2012. They continued to be paid by Services OR LP/SEC who, every month, presented me with an invoice representing the amount of their salaries and the cost of their incidental benefits. I have settled these monthly invoices with Services OR LP/SEC since 1 January 2012.

Chantal left my Cabinet in July 2013. I then hired Myriam Ntashamaje (“Myriam”) in August 2013 under the same arrangement as Chantal as I wanted her to have the same treatment as Linda. Since that time, Myriam has worked and continues to work exclusively for the Cabinet Yves Fortier. As I did in Chantal’s case, I reimburse Services OR LP/SEC every month for her salary and the cost of all her incidental benefits.

Myriam has never worked for Norton Rose Fulbright and is not an attorney. She is a secretary who assists me clerically in my arbitration files including the present one. The entry in her LinkedIn profile is inaccurate. Her own electronic signature on her email communications on my behalf or on behalf of my colleague, Ms Annie Lespérance, is very clear. It reads as follows:

Myriam Ntashamaje Legal assistant to *The Hon. L. Yves Fortier, P.C., CC, OQ, QC and Ms. Annie Lespérance*

To be clear, Me Annie Lespérance, whom the parties met in April at the Paris hearing, is the only lawyer who works with me at the Cabinet Yves Fortier. She is remunerated directly by me.

I hope these explanations answer to their satisfaction the questions which counsel for the Respondent put to the ICSID Secretary, Ms Marisa Planells-Valero, on 8 July 2016.

Yours sincerely,

Yves Fortier QC

Montreal, 22 July 2016

6. On the same day, Respondent proposed the disqualification of Mr. Fortier (the “**Proposal**”), as follows:

We have just received the attached communication from Mr. Fortier disclosing his arrangement with Services OR LP/SEC, which Mr. Fortier says is an entity organized by Norton Rose OR LLP “for the purpose of providing staff and administrative support services to Norton Rose OR LLP.” As we understand it, in this manner, Mr. Fortier’s staff remain paid by Services OR LP/SEC and receive the insurance and other benefits offered to other Norton Rose personnel. We further understand from Mr. Fortier’s disclosure that he is billed monthly by Services OR LP/SEC for the cost of his staff’s salaries and benefits. We do not understand how this arrangement could even be possible without an affiliation between the firms, but in any event it seems obvious that the arrangement provides Mr. Fortier with the substantial benefits of allowing him to retain and hire new staff while relieving him of the burden and substantial additional cost involved in setting up an equivalent benefits plan for Cabinet Yves Fortier.

Frankly, with all that has transpired in this case, we find this disclosure now to be shocking. We are disturbed both by the substance of the disclosure, which one would have thought would have been more appropriately made long ago, and by the extremely uncomfortable position we are now in, less than one month before the hearing Respondent has been asking for since September 2013. Much as Respondent is looking forward to that long awaited hearing, it is not prepared to waive any part of its objections to Mr. Fortier's serving as arbitrator in this case.

We are therefore again constrained to propose the disqualification of Mr. Fortier pursuant to Articles 14(1) and 57 of the ICSID Convention, unless of course he voluntarily resigns. We see no reason to repeat any of the factual background or legal arguments of the prior challenges, which we incorporate herein by reference. We urge Mr. Zuleta and Prof. Bucher to decide this challenge as soon as possible. If the decision is to reject the challenge, the August hearing dates should be preserved. If the decision is made to uphold the challenge, we understand that an unfortunate consequence would be to postpone the August hearing, but in that event we would be in favor of rescheduling to the earliest possible dates.

We deeply regret that we have been placed in this situation, but have no choice but to pursue this course because we sincerely believe that Mr. Fortier should not continue to serve on this Tribunal and Respondent must be assured that it will not face any argument of waiver in the event of any subsequent proceedings if it does not now make this proposal. [footnote omitted]

7. Upon receipt of this Proposal, the Secretary of the Tribunal confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Proposal.

8. By letter of the same day, the Claimants objected to the Proposal in the following terms:

We write in opposition to the Respondent's seventh proposal to disqualify Mr. Fortier as arbitrator in this proceeding, and ninth arbitrator challenge overall, submitted today.

The challenge can and should be disposed of immediately, without any further briefing. The Respondent has not even attempted to articulate a colorable basis for its latest disqualification proposal, instead invoking "all that has transpired in this case." What has in fact transpired is that Venezuela has raised six frivolous challenges to Mr. Fortier, each rejected either unanimously by the unchallenged Tribunal Members, or by the Chairman of the Administrative Council. In particular, the apparent basis of the new challenge – Mr. Fortier's alleged connection to Norton Rose Fulbright – has already been dismissed on multiple occasions.

The only “new fact” alleged is that Mr. Fortier has used Services OR LP/SEC as a service provider for purposes of paying compensation to two secretaries at his independent law office, Cabinet Yves Fortier. Mr. Fortier has explained, without contradiction, that this is an arms-length administrative arrangement. This “fact” is therefore entirely inconsequential: it does not call Mr. Fortier’s impartiality into question in any way, much less could it satisfy the high standard for disqualification that this Tribunal has rightly established. The Claimants therefore respectfully request that the unchallenged Members of the Tribunal reject the proposal summarily so that this latest distraction does not interfere with the Parties’ hearing preparations.

The Claimants also request an immediate award of all the costs they have incurred in responding to Venezuela’s baseless challenges, which the Claimants will quantify immediately upon receipt of the unchallenged Members’ decision. If ever a costs order were justified, it is here – where the Respondent, a serial abuser of the challenge mechanism, has continued to recycle allegations that have already been rejected on multiple occasions. [footnotes omitted]

9. On July 23, 2016, Respondent replied to Claimants’ letter as follows:

We agree with Claimants that no further briefing is required on the pending proposal to disqualify Mr. Fortier. We only wish to remind Claimants that they previously argued against disqualification of Mr. Fortier on the ground that he had severed all financial and professional ties to Norton Rose. They boldly asserted the following on October 25, 2011: "As of December 31, 2011, Maître Fortier will therefore have no financial or professional ties to Norton Rose. . . . Maître Fortier will have thus severed all financial ties to Norton Rose prior to the merger between Norton Rose and Macleod Dixon set to take place on January 1, 2012." It is hard to reconcile that with Mr. Fortier's latest disclosures. Claimants may not appreciate, or more likely simply wish to ignore, the obvious financial benefits the previously undisclosed "service" arrangement has provided to Mr. Fortier, but that does not change the facts. A small firm with few employees is not able to offer the same benefits package at the same cost as a large firm, and the additional savings resulting from not having to hire staff to design and administer employee benefits plans is significant, as anyone with experience in these matters knows.

We are offended at Claimants' continued accusations concerning these challenges. They act as if we are responsible for the non-disclosures of continuing relationships between Mr. Fortier and Norton Rose. While Claimants are not concerned about each new revelation, Respondent certainly is. As we explained in our letter of yesterday, we sincerely regret that this latest disclosure has put us in the position of again having to challenge Mr. Fortier, but Respondent cannot be placed in the position of having to sit back and accept what it considers to be unacceptable and risk waiver of its strong objection to Mr. Fortier's continued service on this Tribunal. We join Claimants in requesting an expedited decision on the challenge.

10. Having reviewed the parties' submissions, the President of the Tribunal consulted with Professor Bucher and informed the parties on July 23, 2016, that (i) the Proposal would be decided on the basis of the communications already received; (ii) Mr. Fortier would have until noon Monday, July 25, 2016, to furnish any additional explanation he may wish to make in accordance with ICSID Arbitration Rule 9(3); and (iii) the dates of the August hearing would be maintained, pending the outcome of the Proposal.

11. As scheduled, on July 25, 2016, Mr. Fortier provided his explanations pursuant to ICSID Arbitration Rule 9(3), as follows:

Gentlemen,

In accordance with the schedule which you established, I now provide you with very brief additional explanations.

1) As to the facts, they are set out in my e-mail of 22 July to Ms Marisa Planells-Valero in ICSID Case No. ARB /12/21 which is part of the record together with all documents therein referred to.

2) I note that the Respondent in its letter of 22 July 2016 proposing my disqualification suggests that I should "voluntarily resign[s]".

3) I see no reason to resign from this Tribunal. The service arrangement between Cabinet Yves Fortier and Services OR LP/SEC with respect to the services of my secretaries since 1 January 2012 does not in any way cause my reliability for independent judgment and impartiality in the present case to be put into question.

Respectfully,

Yves Fortier

B. THE TRIBUNAL'S REASONS

12. The Two Members recall that:

- (a) 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;
- (b) The standard to be applied to Respondent's Proposal is whether a reasonable third person, with knowledge of all the facts, would conclude, on an objective basis, that the challenged arbitrator is manifestly lacking in the ability to act impartially (Article 14 read with Article 57 of the ICSID Convention);
- (c) The allegation that serves as the basis for the challenge, assuming it can be established, must be capable of being related to the present case, that is, that the particular facts must give rise to a manifest lack of independence and impartiality in this case; and
- (d) A non-disclosure does not in itself result in disqualification. The IBA Guidelines, endorsed by an ICSID decision on this point, provide that non-disclosure cannot make an arbitrator partial or lacking in independence; it is only the facts and circumstances that he did not disclose that can do so.

13. The facts on which the Proposal relies concern an arrangement under which the company "Services OR LP/SEC" pays the salaries and the cost of incidental benefits of two staff members working for the Cabinet Yves Fortier (Ms. Linda Tucci and Ms. Chantal Robichaud, the latter being replaced in August 2013 by Ms. Myriam Ntashamaje). Services OR LP/SEC invoices Cabinet Yves Fortier for the corresponding amounts on a monthly basis. Cabinet Yves Fortier has paid the invoices to Services OR LP/SEC since 1 January 2012. Services OR LP/SEC is also providing such service to Norton Rose OR LLP.

14. Respondent does not dispute the fact that Services OR LP/SEC is a distinct legal entity. Respondent submits, however, that the provision of services both to Norton Rose

OR LLP and to the Cabinet Yves Fortier could not “be possible without an affiliation between the firms”. Respondent does not, however, provide evidence or support of any nature for the alleged affiliation. The Proposal is therefore based only on the fact that the Cabinet Yves Fortier receives services relating to the employment of two of its staff members that are of the same nature as the services provided by the same company to Norton Rose OR LLP.

15. Respondent alleges that the arrangement provides Mr. Fortier with the “substantial benefits of allowing him to retain and hire new staff while relieving him of the burden and substantial additional cost involved in setting up an equivalent benefits plan for the Cabinet Yves Fortier”. Even assuming this to be correct, Respondent does not show in any way why and in what respect such advantages and benefits may have any effect on Mr. Fortier’s activity as arbitrator in this case. The mere fact that Mr. Fortier’s Cabinet and Norton Rose OR LLP have recourse to the same provider of services in respect of the administration of employment matters relating to their respective staff does not reveal any ties or influence between the two firms in respect of their legal work and responsibilities. Respondent does not conclude otherwise.

16. More significantly, the Two Members cannot see how the facts relating to those services provide support for the proposition that such an indirect and purely administrative tie with Norton Rose would lead a reasonable third person with knowledge of those facts to the conclusion that Mr. Fortier is manifestly lacking in the ability to act impartially between the parties in the present arbitration.

17. Respondent invokes in support of its new Proposal the “factual background” and “legal arguments” of its prior challenges, which it declares to “incorporate herein by reference”. However, Respondent does not cite new facts requiring the Two Members to reconsider facts already considered in the earlier requests for disqualification, much less indicates how this alleged new facts relate to the facts in prior challenges to Mr. Fortier. In this regard, the Two Members cannot accept that they can be seized with a ‘cumulative record’ of this and all prior proposals for Mr. Fortier’s disqualification. The Two Members are seized only with the Proposal made on July 22, 2016. The Proposal does not allege new

facts requiring them to reconsider the facts alleged in relation to prior requests for disqualification.

C. COSTS

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

D. DECISION

19. For the foregoing reasons, the Two Members:

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

[signed]

Mr. Eduardo Zuleta

[signed]

Professor Andreas Bucher