

**INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

**ICSID CASE NO. ARB/07/30 – ANNULMENT PROCEEDING**

**THE BOLIVARIAN REPUBLIC OF VENEZUELA**

*Applicant*

v.

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

*Respondents*

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**RECOMMENDATION IN RESPECT OF THE  
PROPOSAL FOR THE DISQUALIFICATION OF JUDGE DOMINIQUE  
HASCHER AND PROFESSOR DIEGO FERNÁNDEZ ARROYO**

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**THE HONOURABLE IAN BINNIE, C.C., K.C.**

Date: September 16, 2022

## **PART 1 - INTRODUCTION**

1. The Bolivarian Republic of Venezuela proposes the disqualification of Judge Dominique Hascher and Professor Diego Fernández Arroyo, from continuing to serve on the Annulment Committee hearing the Republic's application to set aside the Award rendered on 8 March 2019 (as rectified).
2. The Annulment Committee was constituted on 3 February 2020 (hereinafter, the “**Original Committee**”)<sup>1</sup> and was at the outset composed of Judge Hascher, Professor Fernández Arroyo (hereinafter, the “**Remaining Members**”) and Mr. Kap-You Kim (hereinafter, “**Mr. Kim**”).
3. On 14 March 2022, Mr. Kim advised that he had been retained to work alongside Three Crowns in an unrelated commercial matter which, he said, would not impact his ability to exercise independent and impartial judgment in the current proceeding. Three Crowns acts as co-counsel for the Claimants. In response to Venezuela's objection, Mr. Kim resigned. Venezuela now proposes the disqualification of the Remaining Members on the basis that they have been corrupted by Mr. Kim's “deplorable conduct”<sup>2</sup> and cannot perform their functions with competence, independence and impartiality.

## **PART 2 - BACKGROUND**

4. On 3 April 2020, the Original Committee issued an Order on Representation, allowing the continued participation of two parallel sets of counsel for Venezuela, *i.e.*, namely the

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<sup>1</sup> **Exhibit R-DISQ2-1**, Communication from ICSID Secretariat to the Parties confirming the constitution of the Original Committee, dated February 3, 2020.

<sup>2</sup> Venezuela Proposal for Disqualification, 12 June 2022, para. 39.

counsel appointed by Maduro (De Jesús) and counsel appointed by Guaidó (Curtis Mallet-Prevost, Colt & Mosle LLP).

5. On 9 April 2020, Venezuela requested reconsideration of the Original Committee's decision to permit continued participation by Guaidó counsel. The Original Committee rejected this request on 15 April 2020.
6. Venezuela then applied to disqualify all three members of the Committee on 16 April 2020 which was rejected on 23 July 2020.
7. On 3 August 2020, Venezuela again asked the Original Committee to reconsider its Order on Representation of 3 April 2020. The request was again rejected on 2 November 2020. On the same date, the Original Committee decided to lift the stay of enforcement of the 8 March 2019 Award provided the Claimants met certain conditions and provided certain assurances.
8. On 21 September 2021, Venezuela asked the Original Committee to reconsider the decision on reconsideration dated 2 November 2020<sup>3</sup> and by further application dated 4 October 2021 asked the Original Committee to reconsider its decision to lift the stay of enforcement.<sup>4</sup>
9. As of March 2022, the latter applications remained outstanding as a result of the suspension of the annulment proceeding following Venezuela's failure to pay the required advance on costs.

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<sup>3</sup> See **Exhibit R-DISQ2-3**, Venezuela's Request for Reconsideration, 21 September 2021.

<sup>4</sup> See **Exhibit R-DISQ2-4**, Venezuela's Request for Reconsideration, 4 October 2021.

10. On 14 March 2022, the day on which the proceedings resumed after Venezuela's payment of the advance on costs, the ICSID Secretariat conveyed the following message from Mr.

Kim:

“During the suspension of the proceedings, I was retained to act as co-counsel in a new matter (a commercial arbitration) alongside Three Crowns, which is acting as co-counsel with Freshfields Bruckhaus Deringer in this case. The background of this new matter has absolutely no bearing with the facts of the Conoco case, and I am convinced that my ability to exercise independent and impartial judgment would not be impaired. Nonetheless, I do not wish to disrupt the proceedings. If this engagement is to cause any issue, I am willing to recuse myself from the Conoco case.”<sup>5</sup>

11. Venezuela objected and Mr. Kim resigned on 18 March 2022.<sup>6</sup> On 29 April 2022, the Attorney General of Venezuela invited the Remaining Members to resign.

12. On 11 May 2022, the Remaining Members made the following declaration:

“Judge Hascher and Prof. Fernández Arroyo have taken note on 30 April 2022 of the letter dated 29 April 2022 from Mr. Reinaldo Muñoz Pedroza, Attorney General of the Bolivarian Republic of Venezuela (with its translation into English provided on 9 May 2022). The two Members of the Committee intend to continue serving in these annulment proceedings in fulfillment of their duties under the ICSID Convention with all independence and impartiality.”<sup>7</sup>

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<sup>5</sup> Email from the Secretary of the Committee to the Parties, 14 March 2022, **Exhibit R-DISQ2-6**.

<sup>6</sup> Email from the Secretary of the Committee to the Parties, 18 March 2022 (attaching **Exhibit R-DISQ2-8**, Letter from Mr. Kim).

<sup>7</sup> **Exhibit R-DISQ2-11**, Communications from the Remaining Members of the Original Committee in response to the Letter from Attorney General Mr. Reinaldo Muñoz Pedroza of 29 April 2022, dated 11 May 2022.

**1. The Grounds Stated in Venezuela’s Proposal to Disqualify Dated 12 June 2022**

**A. Allegations Against Mr. Kim**

13. Generally speaking, the allegation is that the proceedings before the Original Committee as a “collegial body” were “corrupted” by Mr. Kim’s “deplorable conduct”:<sup>8</sup>
- (a) Mr. Kim’s disclosure of 14 March 2022, revealed an “absolute lack of a high moral character”<sup>9</sup> in terms of Article 14 (1) of the ICSID Convention;
  - (b) the work of the Original Committee on the merits “had to be well advanced by mid-October 2021”<sup>10</sup> and therefore
  - (c) Mr. Kim took with him in March 2022 “all the confidential and privileged information of over two years of proceedings”;<sup>11</sup>
  - (d) including “information on the sensitivities of the Remaining Members on each and every issue”;<sup>12</sup>
  - (e) although Mr. Kim is now “formally excluded from the case [he] remains present in the context of the case”;<sup>13</sup>
  - (f) because “no reasonable third person knowing that the deliberations and considerations of the Original Committee are in the possession of the Conoco Parties’ Counsel [i.e. Three Crowns] could ever consider that the Original

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<sup>8</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 39.

<sup>9</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 6.

<sup>10</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 4.

<sup>11</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, paras. 9, 40.

<sup>12</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 9.

<sup>13</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 10.

Committee, or any panel in which one of the members of the Original Committee participates, offer any appearance of independence and impartiality”;<sup>14</sup>

- (g) alternatively, even “**the prospect** of the Conoco Parties having access to the works and sensitivities of the Remaining Members of the Original Committee [will result in] constant and unnecessary prejudice and suspicion.”<sup>15</sup> (Emphasis added)

**B. Allegations Against the Remaining Committee Members**

14. Judge Hascher and Professor Fernández Arroyo must be disqualified because:

- (a) they have been corrupted by Mr. Kim’s deplorable conduct<sup>16</sup> which breached “[the trust of a reasonable third person in the appearance of independence and impartiality] forever and this permeates the Remaining Members of the Original Committee”;<sup>17</sup>
- (b) who are “unable to perform their duties”;<sup>18</sup>
- (c) because they “will [...] question each and every of their future considerations in light of their past considerations and **the prospect** that the latter are known by the Conoco Parties”;<sup>19</sup> (Emphasis added)

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<sup>14</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 41.

<sup>15</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, fn para. 50.

<sup>16</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 39.

<sup>17</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, fn para. 43.

<sup>18</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, fn para. 45.

<sup>19</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, fn para. 50.

- (d) disqualification is necessary because “in spite of their best and sincere intentions and beliefs there is simply nothing that the Remaining Members of the Original Committee can do to reverse or remedy this situation”;<sup>20</sup> because
- (e) Mr. Kim’s conduct “irremediably placed the Parties on an unequal footing”;<sup>21</sup>
- (f) in addition, the “three-line response” of the Remaining Members to the serious concerns raised by Venezuela’s Attorney General was “laconic and frivolous” and “did not address the Republic’s concerns or the overall situation from which they arose”<sup>22</sup> and “reveals an appearance of bias against the Republic.”<sup>23</sup>

## **2. The Claimants’ Response Dated 24 June 2022**

15. The Claimants contend that the present proposal to disqualify is simply a continuation of “Venezuela’s procedural gamesmanship”<sup>24</sup> that include numerous arbitrator challenges and multiple requests for reconsideration designed “to prolong the matter for as long as possible.”<sup>25</sup> In particular:

- (a) the attacks on Mr, Kim are “pointless” as he has already resigned at Venezuela’s request”;<sup>26</sup>

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<sup>20</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, paras. 12, 16 and 17.

<sup>21</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 41.

<sup>22</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, fn para. 58.

<sup>23</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, fn para. 60.

<sup>24</sup> Claimants’ Comments on Proposal, 24 June 2022, fn para. 5.

<sup>25</sup> Claimants’ Comments on Proposal, para. 7.

<sup>26</sup> Claimants’ Comments on Proposal, para. 16.

- (b) in any event his association with Three Crowns would fall under the IBA’s “Orange List” not the “Red List” thus requiring disclosure but without any implication of the existence of a conflict of interest;<sup>27</sup>
- (c) Mr. Kim made appropriate disclosure then resigned and there is no evidentiary basis for the “conjecture that Mr. Kim has revealed, or will reveal, the Committee’s deliberations thus far;”<sup>28</sup> and
- (d) Three Crowns’ counsel “represents that Mr. Kim has not done so;”<sup>29</sup>
- (e) thus affirming that Mr. Kim has been true to his Declaration of Confidentiality dated 31 January 2020.<sup>30</sup>

### **PART 3 - LEGAL PRINCIPLES APPLICABLE TO DISQUALIFICATION**

16. Venezuela accepts the onus of establishing with respect to each of Judge Hascher and Professor Fernández Arroyo “any **fact** indicating a **manifest** lack of the qualities required by Article 14(1) of the ICSID Convention” including “recognized competence”, “independent judgment” and “impartiality”<sup>31</sup> as set out more particularly in *Blue Bank*

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<sup>27</sup> Claimants’ Comments on Proposal, para. 18.

<sup>28</sup> Claimants’ Comments on Proposal, fn para. 19.

<sup>29</sup> Claimants’ Comments on Proposal, para. 21.

<sup>30</sup> **Exhibit R-DISQ2-1**, ICSID Convention, Regulations and Rules fn.

<sup>31</sup> Venezuela Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, paras. 25, 26, 28. Article 57 of the ICSID Convention establishes the standard applicable for a proposal for disqualification, 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**. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV. (Emphasis added)

Article 14(1) of the ICSID Convention provides as follows:

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. (Emphasis added)



*International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*.<sup>32</sup> Venezuela does not differentiate between the Remaining Members.

17. Venezuela contends, and the Claimants agree, that there is no requirement for proof of actual lack of independence or impartiality. It is sufficient to establish *an appearance* based on the perspective of a reasonable third person *i.e.* “an objective standard based on a reasonable evaluation of the evidence by a third party.”<sup>33</sup> As stated in *Blue Bank v. Venezuela* at paras. 59 to 61, it is sufficient to establish “the appearance of dependence or bias” as long as the appearance is based on objective evidence and is “evident” or “obvious.”
18. The Claimants’ view, similarly, is that “the proposal must be rejected unless Venezuela can prove that an objective, reasonable third party would conclude that Judge Hascher and Professor Fernández Arroyo lack the qualities of impartiality and independence required of them under the ICSID Convention”<sup>34</sup> while emphasizing that “the Convention’s use of

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<sup>32</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, fn. 16, **Exhibit RL-DISQ2-5**, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, 12 November 2013. Venezuela also relies on **Exhibit RL-DISQ2-2**, *Caratube International Oil Company LLP & Mr. Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, para. 53; **Exhibit RL-DISQ2-3**, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, para. 75; **Exhibit RL-DISQ2-4**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, 13 December 2013, para. 66; **Exhibit RL-DISQ2-6**, *Saint-Gobain Performance Plastics Europe v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013, para. 56.

<sup>33</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 30; Claimants’ Comments on Proposal, para.13. **Exhibit RL-DISQ2-7**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.*, 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, 22 October 2007, para. 39. See also, **Exhibit RL-DISQ2-5**, *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, 12 November 2013, para. 60; **Exhibit RL-DISQ2-2**, *Caratube International Oil Company LLP & Mr. Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, para. 57.

<sup>34</sup> Claimants’ Comments on Proposal, para. 3.

the word “manifest” is significant: the complaining party must prove that bias is “evident” or “obvious” in the sense that it can be “discerned with little effort and without deeper analysis.”<sup>35</sup> Moreover, the bias must be “highly probable, not just possible.”<sup>36</sup>

19. In a supplementary argument, Venezuela’s relies on Rule 8(1) of the ICSID Arbitration Rules which provides that a member of the Annulment Committee under the ICSID Convention could be disqualified if he or she “becomes incapacitated or unable to perform the duties of his office.”<sup>37</sup> According to Venezuela, Rule 8(1) covers “any situation or circumstance that would amount to an obstacle in the performance by an adjudicator [...] [including] the duty to treat parties “on an equal procedural footing.”<sup>38</sup>
20. In this connection, Venezuela pleads Rule 6(2) of the ICSID Arbitration Rules which requires all members of arbitral tribunals and annulment committees to sign a declaration attesting their willingness to be bound by a non-limitative set of basic and essential duties in the performance of their mission under the ICSID Convention. In particular, Rule 6(2) of the ICSID Arbitration Rules establishes a basic duty “to judge fairly as between the parties.”

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<sup>35</sup> Claimants’ Comments on Proposal, para. 12. **Exhibit RL-DISQ2-2**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, para. 55 (citation omitted); see also **Exhibit RL-DISQ2-5**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, para. 61; **Annex D**, *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008, para. 68 (citation omitted).

<sup>36</sup> Claimants’ Comments on Proposal, para. 12. **Exhibit A/R-119 [Curtis] / Exhibit A/R-146 [De Jesús]**, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 27 February 2012, para. 56.

<sup>37</sup> **Exhibit RL-DISQ2-1**, ICSID Convention, Regulations and Rules, ICSID Arbitration Rule No. 8(1).

<sup>38</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 32. **Exhibit RL-DISQ2-8**, Broches, Aron., *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Volume 136), Collected Courses of the Hague Academy of International Law, Ed. Brill (1972), p. 344.

21. According to the Claimants, Rule 8 deals exclusively with mental or physical inability.<sup>39</sup> In any event, they say, the Remaining Committee members are perfectly able to “treat the parties on an equal procedural footing” unless “Mr. Kim will breach his professional and ethical obligations” and “there is no possible basis for reaching that conclusion.”<sup>40</sup>

#### **PART 4 - ANALYSIS**

22. The starting point is Article 57 of the ICSID Convention which provides, of course, that disqualification of committee members may be sought “on account of **any fact** indicating a **manifest** lack of the qualities required by paragraph (1) of Article 14”<sup>41</sup> (emphasis added) including competence, independence and impartiality.
23. Leaving aside for the moment the meaning of “manifest”, the prior question is what are the facts? The assessment is to be made from the perspective of a reasonable third person, *i.e.* it is an objective test rather than as viewed subjectively by Venezuela or the Claimants.
24. Venezuela argues that although Mr. Kim is “formally excluded from the case [he] remains present<sup>42</sup> in the context of the case.” This is only true if by “present” Venezuela means his

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<sup>39</sup> Claimants’ Comments on Proposal, para. 28: “[...] As Professor Schreuer explains:

‘Incapacity relates to a mental or physical inability to participate in the commission’s or tribunal’s work for reasons of health. It does not relate to a supervening conflict of interest or to the conciliator’s or arbitrator’s inability to find the time to participate in the commission’s or tribunal’s work. These contingencies would call for a resignation.

Arbitration Rule 8 extends the procedure for the disqualification of an arbitrator to cases of incapacity...’

<sup>40</sup> Claimants’ Comments on Proposal, para. 29.

<sup>41</sup> ICSID Convention, Article 57 (emphasis added). Article 14(1), in turn, requires that members of the Panel of Arbitrators “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.” Although the text of Article 57 refers to disqualification applications made against members of tribunals, it also governs applications to disqualify members of ad hoc committees. Under Arbitration Rule 53, the Rules apply *mutatis mutandis* to annulment proceedings; in turn, Rule 9(1) incorporates Article 57 in reference to disqualification applications against ad hoc committee members. See ICSID Arbitration Rule 9(1) (“A party proposing the disqualification of an arbitrator [or ad hoc committee member] 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.”).

<sup>42</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 10.

earlier participation cannot be expunged from the minds of his former colleagues. However, Venezuela does not allege any “deplorable act” or other impropriety against Mr. Kim prior to his connection with Three Crowns. That connection did not occur until “the suspension of proceedings.”<sup>43</sup> There is thus no basis for the reasonable third party to infer prejudice to Venezuela from whatever earlier discussion Mr. Kim held with the Remaining Members.

25. Moreover, the significance of accepting Venezuela’s argument on this point would be to set the stage for disqualification of the Remaining Members of any Tribunal or Annulment Committee whenever one member resigns or is disqualified. This would be because the Remaining Members would be deemed to lack “independence” from the “corrupting” views of the departing member, or cannot be expected to go forward impartially because their “future considerations” would forever be tainted by “past” exposure to the views (whatever they might be) of the departing member. The reasonable third person would consider such an outcome to be devoid of any foundational “fact” within the meaning of Article 14(1) of the ICSID Convention.
26. On the “unequal footing” point, Venezuela alleges as a fact that Mr. Kim has disclosed<sup>44</sup> to Three Crowns the “opinions and sensitivities of the [Remaining Members] [...] on each and every [...] argument.”<sup>45</sup> This is a bare allegation. Venezuela offers no justification even for suspicion except its notion that Mr. Kim’s conduct in agreeing to work on an unrelated matter with Three Crowns is “deplorable” and (it seems) one deplorable act can

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<sup>43</sup> Exhibit R-DISQ2-6, 14 March 2022.

<sup>44</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 41.

<sup>45</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, paras. 9, 40, 48.

be expected to lead to another, especially where, Venezuela says, the mere “prospect” of such an unauthorized disclosure is a sufficient basis to disqualify the Remaining Members. However, there are no facts (nor does Venezuela even offer a plausible version of relevant circumstances) which might lead the reasonable third person to infer the existence or even the appearance of a risk of improper disclosure of confidential information to Three Crowns. Mr. Kim made a business decision to work with Three Crowns on an unrelated commercial matter, a decision with which Venezuela strongly disagrees, but Venezuela provides no reason to suspect on that basis that Mr. Kim has acted or may act unprofessionally in breach of his duty of confidentiality and in violation of the Undertaking he gave when accepting his appointment as Member of the Annulment Committee.

27. This lack of substance to the allegation of wrongful disclosure also disposes of the “unequal footing” argument because if there is no violation of confidentiality, Conoco counsel have no special advantage or insight into the thinking of the Remaining Members and are thus on equal footing with counsel for the Claimants.
28. Leaving aside the allegations against Mr. Kim, Venezuela’s case against the Remaining Members must be read in light of Venezuela’s affirmation that “the Republic is mindful that Judge Hascher and Professor Fernandez Arroyo may still nurture the intention and the candid belief to serve with full independence and impartiality despite the deplorable conduct of Mr. Kim and the Conoco Parties’ Counsel”<sup>46</sup> although “unfortunately, in spite of their best and sincere intentions and beliefs, there is simply nothing that the Remaining Members of the Original Committee can do to reverse or remedy this situation.”<sup>47</sup> This is

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<sup>46</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 16.

<sup>47</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 12.

“not because they do not intend to remain independent and impartial as individuals *in abstracto*, but because, *in concreto*, they do not have the power to restore the integrity of the Original Committee.”<sup>48</sup>

29. It is important to note, therefore, that Venezuela does not impugn the integrity of Judge Hascher and Professor Fernández Arroyo. Nor does Venezuela question the good faith of their declaration of 11 May 2022 that they “intend to continue serving in these annulment proceedings in fulfillment of their duties under the ICSID Convention with all independence and impartiality.”<sup>49</sup> However, Venezuela says they must be disqualified because they will conduct future deliberations “in light of their past considerations”<sup>50</sup> and are members of a panel deemed to be corrupted (retrospectively) by Mr. Kim’s “deplorable”<sup>51</sup> conduct in March 2022.
30. Venezuela’s notion that the Remaining Members “do not have the power to restore the integrity of the Original Committee” presupposes that the integrity of the Original Committee has been compromised but Venezuela has offered no “facts” within the meaning of Article 14(1) of the ICSID Convention or other objective justification for such a conclusion.
31. Undoubtedly, the Remaining Members will not expunge from their brains “past considerations” but there is no reason to do so because, as earlier mentioned, no imputation of impropriety or conduct prejudicial to Venezuela is made against Mr. Kim prior to his

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<sup>48</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 17.

<sup>49</sup> **Exhibit R-DISQ2-11**, Communication from the Remaining Members of the Original Committee in response to the Letter from Attorney General Mr. Reinaldo Muiioz Pedroza of 29 April 2022, 11 May 2022.

<sup>50</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 50.

<sup>51</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 16.

March 2022 association with Three Crowns. There is no allegation that the “past deliberations” were tainted by the participation of Mr. Kim and therefore there is no “taint” to carry forward into “future deliberations” to Venezuela’s disadvantage.

32. As to the allegation of bias arising out of the Remaining Members “laconic”<sup>52</sup> and “frivolous”<sup>53</sup> written response to the complaint of Venezuela’s Attorney General, there is nothing in the ICSID Convention or Arbitration Rules (or the particular facts of this case) to require a detailed response to the demand for resignation. Even in Venezuela’s letter of 7 July 2022, it is conceded that the joint communication of 29 June 2022 of the Remaining Committee furnishing explanations on the Proposal for Disqualification:

“falls within the practice of challenged adjudicators to refrain from providing any explanation although Rule 9(3) of the ICSID Arbitration Rules is an invitation that they do so. However established, such a practice does not in any manner foster justice or the integrity of the ICSID system, it aims only at hindering the adversarial nature of the disqualification process and at transforming Rule 9(3) into a shield in order for the challenged adjudicators to protect themselves.”<sup>54</sup>

33. Venezuela takes issue with the usual practice of challenged arbitrators. This may be a matter for debate in *abstracto* but in the circumstances of this case, no reasonable third party would construe conformity with the usual practice to be evidence of bias. Moreover, in my opinion, the allegations are so lacking in particularity or any factual foundation it is difficult to know what more the Remaining Members could have said except to affirm their independence and impartiality.

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<sup>52</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 15.

<sup>53</sup> Proposal for Disqualification of Judge Hascher and Professor Fernández Arroyo, para. 15.

<sup>54</sup> 7 July 2022 letter, p. 2.

34. Venezuela makes an alternative argument under Rule 8(1) which provides:

“(1) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Rule 9 shall apply.”

35. Venezuela does not allege physical incapacity but argues that each of the Remaining Members are “unable to perform the duties of his office” because they “will question each and every of their future considerations in light of their past considerations and the prospect that the latter are known by the Conoco Parties.”<sup>55</sup> The Remaining Members are thus trapped by the past participation with Mr. Kim and “in spite of their best and sincere intentions and beliefs there is simply nothing that the Remaining Members of the Original Committee can do to reverse or remedy this situation.”<sup>56</sup> However, as discussed, the allegations of impropriety on the part of the Remaining Members or the existence of some “taint” by prior association with Mr. Kim lack any foundation in fact and viewing the same allegations under Rule 8(1) does not add anything to Venezuela’s main argument under Article 57.

36. In the circumstances, it is not necessary to stress the limiting word “manifest” in Article 14(1) as discussed in *Blue Bank v. Venezuela* because Venezuela has failed to show that the Remaining Members lack independence and impartiality much less “manifestly” lack independence and impartiality. Accordingly, the extra requirement that this lack be “manifest” is not a significant consideration in the analysis.

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<sup>55</sup> Venezuela Proposal for Disqualification, para. 50.

<sup>56</sup> Venezuela Proposal for Disqualification, paras. 12, 16 and 17.



## PART 5 - RECOMMENDATION

37. Venezuela proposes disqualification on the grounds that:

“the situation created by Mr. Kim and the Conoco Parties’ Counsel has irremediably corrupted the integrity of these annulment proceedings as a whole, the works of the Annulment Committee as a collegial body and, by way of correspondence, the ability of the Remaining Members of the Original Committee to fulfill their duties in accordance with the ICSID Convention. Mr. Kim’s departure from the case does not cure the irreparable damage that has been caused to the case.”<sup>57</sup>

38. In my opinion, for the reasons stated above there is nothing in Venezuela’s allegations against the Remaining Members to suggest a lack of competence, independence or impartiality (let alone a “manifest” lack) or an appearance of such a lack in the eye of a reasonable third person.

39. My recommendation is therefore that Venezuela’s proposal to disqualify Judge Hascher and Professor Fernández Arroyo be dismissed.

[signed]

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Hon. Ian Binnie, C.C., K.C.

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<sup>57</sup> Venezuela Proposal for Disqualification, para. 8.