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By E-mail (mkinnear@worldbank.org)

Ms. Meg Kinnear
Secretary-General
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30

Dear Ms. Kinnear:

We have received the observations of Judge Keith and Mr. Fortier and have the following comments:

1. With respect to Judge Keith, we note his belief that he has always done his best to maintain impartiality throughout his long and distinguished career, but we remain convinced that whatever may have been the case at the outset of this Arbitration, he should not continue to act as arbitrator here. Regardless of his sincerity and his record in other cases, the fact remains that on critical issues he has combined with Mr. Fortier to render decisions that would give rise to justifiable doubts in the mind of a third party as to his impartiality in this case. As pointed out in our April 2, 2015 submission, the challenge to Judge Keith – like the challenge to Mr. Fortier – cannot be disposed of based on his prior record or his belief that he has done his best to act in this proceeding with the requisite impartiality. If a record of accomplishments and a general statement of impartiality were sufficient to defeat a challenge, then no arbitrator could ever be disqualified on such grounds, regardless of the merits of the disqualification proposal. That cannot be the state of the law. No matter what credentials an arbitrator may have, and no matter how impartial that arbitrator considers himself to be, everyone is capable

of acting in a particular case in a manner that would appear, to a third party undertaking a reasonable evaluation of the evidence, as lacking the requisite impartiality. Unfortunately, that is the case here.

2. The most recent of the troublesome decisions of Judge Keith was the purported withdrawal of consent to Prof. Abi-Saab's resignation, with the result that Claimants, and apparently ICSID itself, believe that Respondent does not have the right to appoint a replacement arbitrator for Prof. Abi-Saab. As Judge Keith is aware, that decision: (i) was taken together with Mr. Fortier at a time when the entire proceeding was suspended and when Mr. Fortier could not have had any role to play since he was already under challenge;[1] (ii) was taken after Judge Keith and Mr. Fortier had, in Judge Keith's own words, "plainly" consented to Prof. Abi-Saab's resignation;[2] and (iii) was unprecedented, given Prof. Abi-Saab's health issues, which were well known to Judge Keith, Mr. Fortier and ICSID.[3] Judge Keith has not addressed any of these points.

3. Claimants, who urged both Judge Keith and Mr. Fortier not to provide any explanations,[4] also had nothing to say about the foregoing. They rested their argument on irresponsible personal attacks against Prof. Abi-Saab and attribution to him of illegitimate motives in resigning.[5] Claimants are obviously upset with Prof. Abi-Saab for his opinions dissenting from the majority's September 2013 finding of bad faith negotiation of compensation for the 2007 nationalization and from its decision on Respondent's application

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[1] Mr. Gonzalo Flores, the Secretary of the Tribunal appointed by ICSID, notified the parties on February 6, 2015, as follows: "In accordance with ICSID Arbitration Rule 9(6), the proceeding is suspended until a decision on the proposal for disqualification has been taken." Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated February 6, 2015, p. 2. No one has been able to explain how the Tribunal, and especially Mr. Fortier, could take any decisions when the entire proceeding was suspended by the proposal for Mr. Fortier's disqualification.

[2] Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 4, 2015, p. 2 (quoting Judge Keith).

[3] Never in the history of ICSID has consent to an arbitrator's resignation for serious health reasons been denied, and never has consent plainly given been withdrawn. Claimants actually make the argument that Judge Keith and Mr. Fortier were entitled to withhold consent, and presumably to withdraw a consent already given, without any reason. Claimants' Reply on Respondent's Third and Fourth Proposals to Disqualify Mr. Yves Fortier QC and Second Proposal to Disqualify Judge Kenneth Keith, dated April 9, 2015 ("Claimants' April 9, 2015 Submission"), ¶ 31. That is a novel interpretation of the ICSID Convention that no one could endorse. *See* Respondent's Submission on the Proposal to Disqualify Judge Keith and Mr. Fortier, dated April 2, 2015 ("Respondent's April 2, 2015 Submission"), ¶¶ 33-34.

[4] Claimants' April 9, 2015 Submission, ¶ 14 and nn. 7, 62. *See* E-mail from Respondent to Meg Kinnear, Secretary-General of ICSID, dated April 10, 2015 ("[W]e note that in several places (see ¶ 14, note 7 and note 62), Claimants strongly urge Judge Keith and Mr. Fortier not to provide any further explanation or observation. We understand Claimants' desire to cut off any further discussion or analysis of the issues presented, but as we have said before, this matter is far too serious to be swept under the rug.").

[5] This is the same Prof. Abi-Saab whom Claimants' counsel appointed as arbitrator when they were representing Romania in an ICSID case (*Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20), and the same Prof. Abi-Saab who was the co-recipient (with Sir Elihu Lauterpacht) in 2013 of the Hague Prize for International Law for his contributions to the development of international law. Respondent's April 2, 2015 Submission, ¶ 25 and n. 47.

for reconsideration, particularly since he pointed out that the evidence Respondent presented after the September 2013 decision, in the form of reports of the U.S. Embassy on the briefings provided by ConocoPhillips' own chief negotiators, demonstrated that if anyone had been acting in bad faith, it was Claimants, not Respondent.[6] In the words of Prof. Abi-Saab: "It [the narrative of the negotiations set out in the U.S. Embassy cables] reveals, once verified by the Tribunal to be true (but its veracity was not contested by the Claimants, only its relevance and admissibility), that if there was bad faith, it is not attributable to the Respondent, but to the Claimants who misled the Majority by their misrepresentations, in full awareness of their falsity."[7] The difference between what Prof. Abi-Saab said and what Claimants have said in attacking him is that Prof. Abi-Saab's observation was based on documented facts, not rank speculation as to motives by parties that made flagrant misrepresentations of fact to the Tribunal and then refused to fulfill their obligation to correct the record even in the face of unrefuted documentary evidence.[8] Regrettably, Judge Keith

[6] **Ex. R-313**, Letter from Respondent to the Tribunal dated September 8, 2013, Annex 4, Cable dated April 4, 2008, *ConocoPhillips Briefs Ambassador on Compensation Negotiations*, ¶¶ 2-5; *id*., Annex 5, Cable dated May 23, 2008, *Update on ConocoPhillips Negotiations*, ¶¶ 5, 9.

[7] Dissenting Opinion of Prof. Georges Abi-Saab to the Decision on Respondent's Request for Reconsideration, dated March 10, 2014 (the "Abi-Saab Reconsideration Dissent"), ¶ 65. Claimants accuse Respondent of "procedural misconduct" throughout this case (*see* Letter from Claimants to Meg Kinnear, Secretary-General of ICSID, dated February 25, 2015, pp. 1, 5), but aside from the fact that they have nothing to back up that charge, they have never been able to explain the material misrepresentations they made to the Tribunal concerning the compensation negotiations or why they should benefit from the majority's substantive decision that was clearly based on those misrepresentations. Likewise, the majority has never been able to explain how a tribunal that had made what Claimants refer to as an "interlocutory decision" (*see* Claimants' April 9, 2015 Submission, ¶ 39) in a matter still pending before it would be powerless to reopen that decision no matter how egregious the circumstances.

[8] Prof. Abi-Saab did not wish to respond to the personal attacks, but he did point out an obvious factual distortion in Claimants' complaint about the time he took to prepare his dissent, stating: "I do not propose to comment or respond to the slanderous personal attacks and gratuitous attributions of malicious intentions. But there are limits even to misinterpretations and distortions of facts; like[,] for example, writing (in paragraph 38 of [Claimants' April 9, 2015 Submission]) that I have 'had since 2010 to work on the dissent', i.e. from the moment I joined the Tribunal after the untimely death of Sir Ian Brownlie at the beginning of that year. For how can anyone start working in 2010 on a dissent from a decision adopted almost three years later, in September 2013?" **Annex 1**, E-mail from Prof. Abi-Saab to Meg Kinnear, Secretary-General of ICSID, dated April 15, 2015. Claimants complain that Prof. Abi-Saab did not resign earlier, apparently not understanding what Prof. Abi-Saab meant when he said he felt he had an obligation to write his dissent. Prof. Abi-Saab explained his principled position in terms that respected international legal scholars would appreciate: "I consider (and I think all jurists agree) that legal 'motivation' or reasoning is an essential part of any judicial or arbitral decision; that it is a paramount duty of anyone who participates in taking such a decision to ascertain that it is adequately motivated; and that if he or she does not agree with either the outcome or the reasoning of the majority, he has diligently to explain his reasons. This paramount obligation is even more exacting in international law, where there is no general appellate jurisdiction; and still more so if one is part of an appellate chamber whose function is to control the proper interpretation of the law. I have abided by this professional and moral categorical imperative throughout my professional life, without any exception." **Annex 2**, E-mail from Prof. Abi-Saab to Meg Kinnear, Secretary-General of ICSID, dated March 25, 2015 ("Prof. Abi-Saab's March 25, 2015 E-mail"). Judge Keith and Mr. Fortier were well aware of what Prof. Abi-Saab's intentions were as he struggled to deal with his health issues while dealing with Respondent's application for reconsideration and drafting his detailed and cogent dissenting opinions.

and Mr. Fortier in effect endorsed Claimants' irresponsible speculation as to Prof. Abi-Saab's motives by purporting to deny consent to his resignation, or to withdraw the consent that Judge Keith said had "plainly" been given, thereby purporting to deny Venezuela the right to appoint a replacement arbitrator.

4. Claimants misstated the issue with respect to Judge Keith as being whether the decision to withdraw consent to Prof. Abi-Saab's resignation was "so irrational that nothing other than manifest bias could explain it."[9] The correct standard was set forth in our submission of April 2, 2015. It is whether a third party undertaking a reasonable evaluation of the evidence would consider that there is an appearance of the lack of the requisite impartiality.[10] The evidence in this case includes the undisputed facts referred to above concerning Judge Keith's consulting with Mr. Fortier and jointly with him purporting to decide the issue while Mr. Fortier was under challenge, his withdrawal of the consent already given, without notice to Prof. Abi-Saab, and the unprecedented nature of such action. Judge Keith did not answer Prof. Abi-Saab's statement that there were no conditions attached to the consent he said he had "plainly" given.[11] Nor did he explain why, when urging Prof. Abi-Saab to finish his dissenting opinion and resign by February 6, 2015,[12] he did not then inform Prof. Abi-Saab that he intended to withdraw his consent.[13]

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[9] Claimants' April 9, 2015 Submission, ¶ 9(i).

[10] *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, dated March 20, 2014, ¶¶ 54, 57 ("The Parties agree that the applicable legal standard is 'an objective standard based on a reasonable evaluation of the evidence by a third party' or, in other words, on the 'point of view of a reasonable and informed third person'. . . . In these cases [*Blue Bank, Burlington* and *Repsol*], Dr. Kim Yong Kim, the Chairman of the ICSID Administrative Council found that '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'."). *See* Respondent's April 2, 2015 Submission, ¶ 2 and n. 3 (citing, *inter alia*, the decisions in *Caratube*, *Blue Bank*, *Burlington* and *Repsol*).

[11] **Annex 2**, Prof. Abi-Saab's March 25, 2015 E-mail ("I must emphasize that at no time, during my exchanges with my colleagues, particularly President Keith, was either the principle of my resignation or its acceptance by my co-arbitrators put into question. . . . [N]one of [the exchanges with my co-arbitrators] indicated that beyond a certain date the acceptance of the resignation would be withdrawn, or even contemplated (not to say asked me) to stay on, whether in general or if I did not resign by a certain date. . . . It is true that President Keith, in his answer, wrote 'I must insist that you complete and submit your dissent by Friday 6 February. The next step is for you to resign at that point'. But he did not write that otherwise, the acceptance of the resignation would be withdrawn.").

[12] *Id*.

[13] Respondent specifically requested from Judge Keith and Mr. Fortier the documents relating to the consent that Judge Keith said had been "plainly" given, including any conditions attached thereto, but Judge Keith and Mr. Fortier, following Claimants' suggestion in their March 13, 2015 letter to the Secretary of the Tribunal, invoked the confidentiality associated with tribunal deliberations. The requested documents had nothing to do with tribunal deliberations and had actually been requested earlier by Claimants themselves. Respondent's April 2, 2015 Submission, ¶¶ 35-36.

5. On March 4, 2015, ICSID communicated the supposed reasons for the withdrawal of the consent that had already been given, quoting Judge Keith as saying that the "two arbitrators did not however consent to a resignation in late February when the quantum hearing was only seven weeks away and a challenge to one of the arbitrators was pending."[14] We have never received an explanation of that statement, and there is none. We asked for evidence of the terms of the consent, but none has been forthcoming, and Prof. Abi-Saab unequivocally confirmed that no conditions were attached to the consent. Of course, no one could possibly believe, and we are certain Judge Keith would not contend, that there was a negotiated consent that included as a condition that there be no pending challenge to Mr. Fortier at the precise moment of Prof. Abi-Saab's resignation. Moreover, even if it were possible under the ICSID Arbitration Rules to withdraw a consent already given – the rules contain no such provision – withdrawal of the consent in retaliation for the challenge to Mr. Fortier would be unacceptable by any standard.

6. Judge Keith also did not contest the fact that the quantum hearing could not have gone forward on April 13 even if Prof. Abi-Saab had resigned earlier than February 20, for example on February 6, the date Judge Keith was urging him to resign on, or even December 31, 2014, as pointed out in our letter of March 4, 2015.[15] Given the time necessary to appoint a replacement, the massive file in this case, including thousands of pages of memorials and hundreds of thousands of additional pages of exhibits, witness statements, expert reports and their appendices, and the fact that no serious arbitrator would agree to proceed to an immediate hearing in such an important case without a reasonable time to prepare, postponement of the hearing was inevitable. Claimants dispute this point, saying that the Tribunal could have reasonably estimated otherwise.[16] But Judge Keith said nothing of the kind. In any event, as

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[14] Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 4, 2015, p. 2. Referring to the two "reasons" set forth in ICSID's March 4, 2015 letter, Claimants wrote that "[t]he Tribunal has given reasons for not consenting to Professor Abi-Saab's resignation, and those are plainly legitimate." Claimants' April 9, 2015 Submission, ¶ 10. But the reasons stated did not exist when the consent was given and were never stated as conditions to that consent. They were circumstances existing at the moment of resignation and could not be a basis for withdrawing the consent already given, particularly not without notice to Prof. Abi-Saab. Those so-called reasons were actually first provided by Claimants in their letter of February 25, 2015, where Claimants argued that consent to Prof. Abi-Saab's resignation should be denied because the hearing was only seven weeks away and the resignation came at a time when Mr. Fortier was under challenge. Letter from Claimants to Meg Kinnear, Secretary-General of ICSID, dated February 25, 2015.

[15] Letter from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated March 4, 2015, ¶ 4. *See* Respondent's April 2, 2015 Submission, n. 126 and ¶ 40.

[16] Claimants' April 9, 2015 Submission, ¶ 28. Claimants point to *Loewen v. U.S.A.*, a case in which Mr. Fortier was an arbitrator and resigned following a proposal for his disqualification arising out of a proposed law firm merger, to support their contention that "[d]iligent arbitrators are capable of preparing for hearings, even in complex matters, in short order." *Id.* While the *Loewen* case was nothing like this case, it is worth noting that the claimant there, which had appointed Lord Mustill as replacement arbitrator one month before the hearing on the merits, subsequently moved to vacate and set aside the tribunal's award partly on grounds that the tribunal had failed to consider significant evidence in the record. In its petition to vacate, Loewen wrote: "The Tribunal missed all of this evidence, a deeply embarrassing omission for so distinguished a panel. . . . Recall, again, the language of the 2003 Decision: the Tribunal claimed that TLGI and Mr. Loewen 'failed to present evidence' and that the Tribunal was 'simply left to speculate on the reasons why the decision was made.' Those words

noted above, no condition regarding the hearing or otherwise was attached to the consent. In his communication to Judge Keith of January 11, 2015, Prof. Abi-Saab even stated that he was prepared to "stick[] it out through the hearings on quantum" if necessary, at the price of his own health, although he added "I cannot guarantee how long I can hold on, as it does not depend on me."[17] As Prof. Abi-Saab reports, Judge Keith wanted him to complete his dissent by February 6 and then resign, but "did not write that otherwise, the acceptance of the resignation would be withdrawn. Nor did he envisage the possibility I alluded to of my staying on. On the contrary, he emphasized that 'I am sure that from your own and Rosemary's point of view and in terms of your health that it is necessary for this burden to be lifted'."[18] In view of that record, it is impossible to understand how the prospect of vacating the hearing date could be an excuse for withdrawing the consent that had been "plainly" given.[19]

7. In addition, while Claimants want to narrow the issue to this latest unfortunate episode, the fact is that this case has spiraled out of control ever since Judge Keith and Mr. Fortier made their equally unprecedented decision on an issue that even Claimants had never argued in this case, namely, that the State had somehow negotiated compensation for the 2007 nationalization in bad faith even though it had, in a good faith effort to reach agreement, offered compensation in excess of the value of Claimants' interests as shown on their own records shortly before the nationalization and in excess of the amount calculated pursuant to the compensation mechanism they had agreed to at the outset of the upgrading projects at issue in this case.[20] That decision of Judge Keith and Mr. Fortier, as the whole world now knows, was based on flagrant misrepresentations made to the Tribunal by Claimants, but Judge Keith and Mr. Fortier refused even to consider the possibility of reopening their finding when they were presented with irrefutable documentary evidence of those misrepresentations. Their refusal led

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could only have been uttered by arbitrators who had, literally, viewed no relevant evidence at the time they made their decision." **Annex 3**, *Raymond L. Loewen v. The United States of America*, U.S. District Court for the District of Columbia, Case No. 1:04-CV-02151 (RWR), Petition to Vacate and Remand Arbitration Award, dated February 25, 2004, pp. 28, 36. The only relevant point the *Loewen* case demonstrates is that the proposal of the United States to disqualify Mr. Fortier due to the proposed merger of his firm with the firm that had previously acted for the claimants was taken seriously enough by Mr. Fortier to resign. The same should have occurred on Venezuela's proposal.

[17] *See* **Annex 2**, Prof. Abi-Saab's March 25, 2015 E-mail.

[18] *Id*.

[19] Claimants complain that Prof. Abi-Saab did not cast his vote on the pending challenge to Mr. Fortier before submitting his resignation, contending that this caused "maximal disruption." Claimants' April 9, 2015 Submission, ¶ 27. But the vacating of the April hearing date would certainly not have been avoided if Prof. Abi-Saab had voted on the proposal to disqualify Mr. Fortier before resigning, irrespective of how he would have voted on the proposal. Even if Prof. Abi-Saab and Judge Keith had voted together to reject the proposal – the quickest of the possible outcomes – Prof. Abi-Saab would still have resigned, and it still would have been necessary to vacate the hearing date.

[20] Respondent's First Brief on the Application for Reconsideration, dated October 28, 2013, ¶¶ 35-36; Respondent's Second Brief on the Application for Reconsideration, dated November 25, 2013, ¶¶ 62-67. As previously documented, these are not merely arguments; they are facts that have never been contested. Respondent's April 2, 2015 Submission, ¶ 26.

Prof. Abi-Saab to say: "In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence. It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication."[21] That entire episode was determined to be insufficient for disqualification last year – in a decision of the Chairman of the ICSID Administrative Council that has been considered by other observers as an example of an unreasoned decision[22] – but that does not mean that it should not be considered as part of the background for this challenge. As stated in our submission of April 2, 2015, if the line was not crossed in 2014, it certainly has been crossed now with the new unprecedented decision of Judge Keith and Mr. Fortier purporting to withdraw their consent to Prof. Abi-Saab's resignation.

8. With respect to Mr. Fortier, we do not understand how he would even consider participating in the decision to withdraw consent to Prof. Abi-Saab's resignation, given the pending proposal for his disqualification filed on February 6, 2015. But he did participate and, as best as can be determined from Judge Keith's communication of March 4, 2015 and Claimants' April 9, 2015 submission, purported to withdraw his consent to the resignation because the consent did not envision that Respondent would be challenging him. That would

[21] Abi-Saab Reconsideration Dissent, ¶¶ 66-67. Prof. Abi-Saab's observations on the majority's decision on Respondent's application for reconsideration were ignored by the Chairman of the ICSID Administrative Council in 2014. Decision on the Proposal to Disqualify a Majority of the Tribunal, dated May 5, 2014. After Prof. Abi-Saab's February 19, 2015 dissent, particularly the passages highlighted in Respondent's April 2, 2015 Submission, his observations cannot simply be brushed aside. Respondent's April 2, 2015 Submission, ¶¶ 28-31. He was in the best position to know what happened, and his observations make clear that Respondent had no chance of obtaining a fair hearing in this case.

[22] *See* Respondent's April 2, 2015 Submission, Appendix 4, Baiju S. Vasani and Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, 30(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 194 (Winter 2015), p. 208 ("Furthermore, the generality of the standard adopted by Dr Kim and his failure to fully explain his application of that standard (in any of his decisions in *Blue Bank*, *Burlington*, *Repsol*, *Abaclat* and *ConocoPhillips II*) is equally disappointing. In each written decision, while Dr Kim provides a consistent formulation of parameters he seeks to apply, he devotes little more than approximately a page in each case (or sometimes less) to applying this test to the facts and grounds for disqualification at issue."). Mr. Fortier defended the Chairman's decision as follows: "It bears pointing out that the Chairman of the ICSID Administrative Council in his Decision of 5 May 2014 found that '[. . .] there is nothing in the reasoning or conclusions of the Decision on Reconsideration that suggests an absence of impartiality' (at para. 55)." Mr. Fortier's Explanations dated April 16, 2015 (as attached in the E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated April 16, 2015) ("Mr. Fortier's April 16, 2015 Explanations"), pp. 1-2. That is indeed what the conclusory decision on the challenge states, but it does not change the fact that the Chairman did not address any of Respondent's substantive arguments. Whoever is to decide this proposal for disqualification should address the substance, including the new developments concerning the scandalous events relating to the purported withdrawal of consent to Prof. Abi-Saab's resignation and denial of Respondent's right to appoint a replacement arbitrator.

mean that the consent was withdrawn in retaliation for the challenge, which would be manifestly inappropriate.[23] In response to Respondent's point that the withdrawal of consent "smacks of retaliation against Respondent for challenging Mr. Fortier and against Prof. Abi-Saab for documenting in meticulous detail the negative 'general attitude vis-à-vis the Respondent' of Judge Keith and Mr. Fortier and their penchant for 'relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings,'"[24] Claimants argued that the notion that withdrawal of consent may have been in retaliation for Prof. Abi-Saab's dissent (which was rendered one day before Prof. Abi-Saab's resignation) was "the rankest speculation."[25] However, the facts are that prior to Prof. Abi-Saab's dissent, consent to his resignation had been "plainly" given, and with respect to the notion that the withdrawal of consent was in retaliation for the challenge (a point Claimants do not address), there is no need to engage in any speculation, as Judge Keith himself stated that he and Mr. Fortier had not consented to a resignation when "a challenge to one of the arbitrators was pending."[26]

9. As for the relationship between Mr. Fortier and Norton Rose, we understand, but must respectfully and strongly disagree with, Mr. Fortier's position for several reasons. In the first instance, Mr. Fortier states that he did not resign from his firm because of the 2011 proposal to disqualify him, but rather because he wanted to continue his practice as an independent arbitrator without having to contend with repeated conflicts of interest inevitable in a large law firm. We fully appreciate the difficulties Mr. Fortier must have faced as part of Norton Rose, and we do not doubt that he, like others in his situation, had long wrestled with the conflicts issue. But the undeniable fact remains that despite his wrestling with the issue, he had chosen to remain with Norton Rose until after Respondent proposed his disqualification. It will be recalled that in his October 4, 2011 communication regarding the merger of Norton Rose and Macleod Dixon, Mr. Fortier stated: "I am convinced that the facts which are the object of this disclosure have no bearing whatsoever on my ability to exercise independent judgment in the present arbitration."[27] That was despite the fact that it was uncontested that Macleod Dixon was more adverse to Venezuela and its State companies than any other firm in the world.[28] Mr. Fortier went on to explain the measures that would be taken at Norton Rose "in

[23] *See* Respondent's April 2, 2015 Submission, ¶¶ 33-34.

[24] *Id*., ¶ 40.

[25] Claimants' April 9, 2015 Submission, n. 32.

[26] Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated March 4, 2015, p. 2 (quoting Judge Keith).

[27] E-mail from Mr. Fortier to Meg Kinnear, Secretary-General of ICSID, dated October 4, 2011, p. 1.

[28] Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated October 5, 2011, pp. 1-2; Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, dated February 27, 2012, ¶ 62 ("As the Respondent says, there has been no contest in this proceeding to its proposition that there is no firm in the world more adverse to the Respondent and PDVSA and its affiliates than Macleod Dixon."). After the merger of Macleod Dixon with Norton Rose, Norton Rose continued to represent ConocoPhillips companies in an arbitration against Petróleos de Venezuela, S.A. arising out of the same association agreements that are involved in this case. Respondent's April 2, 2015 Submission, ¶ 11.

order to avoid any communication of information between members of Norton Rose OR LLP who are involved or who may become involved in the future in this arbitration and members of Macleod Dixon LLP who are involved or who may become involved in the future in any of the above-mentioned matters, or any other matter now involving, or which may in the future involve, ConocoPhillips Company or the Bolivarian Republic of Venezuela."[29] Obviously, Mr. Fortier's intention when he gave notice of the merger was to stay on with Norton Rose, not to resign, and the measures proposed to be taken were intended precisely to accommodate his remaining as a partner of the firm. It was only after Respondent filed its challenge that Mr. Fortier took the decision to resign from Norton Rose.[30]

10. Mr. Fortier affirms that he has severed all professional links with Norton Rose as of December 31, 2011, referring to his website.[31] This is a matter of semantics. As we have previously stated, we do not dispute the fact that Mr. Fortier established his own firm and is no longer a partner of Norton Rose, but we do dispute Mr. Fortier's apparent definition of professional relationships, which, at least for purposes of conflicts, extends beyond a partnership or employment relationship. The precedents make clear, for example, that a co-counsel relationship is a professional relationship, and we do not believe there can be any doubt that the substantial relationships maintained by Mr. Fortier with Norton Rose attorneys assisting him in his arbitrations after his resignation from the firm constitute professional relationships within the meaning of those precedents.[32] Mr. Fortier's website does not, and such a website normally would not, disclose those relationships, but that does not mean that they do not exist or are immaterial to this proposal for disqualification.

11. Like Mr. Fortier, we have no intention of litigating here the challenge by the Russian Federation to the *Yukos* awards. What is important here is that Mr. Martin Valasek, who is and has been for many years a partner of Norton Rose, and who was selected by Mr. Fortier to assist him in the *Yukos* cases, continued to act in that capacity until the *Yukos* awards were rendered in July 2014.[33] That constitutes an ongoing professional relationship between Mr. Fortier and a partner of Norton Rose. Moreover, as we have pointed out, that relationship is particularly disturbing because the *Yukos* cases involved important issues concerning the interpretation of the *Chorzów Factory* decision and the determination of the appropriate valuation date in the case of expropriation, issues that are highly relevant here, and

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[29] E-mail from Mr. Fortier to Meg Kinnear, Secretary-General of ICSID, dated October 4, 2011, p. 1.

[30] Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated October 5, 2011.

[31] Mr. Fortier's April 16, 2015 Explanations, p. 2.

[32] *See* Respondent's April 2, 2015 Submission, n. 34.

[33] Mr. Fortier points out that Mr. Valasek was an assistant to the *Yukos* tribunal, not to him personally, but he was the chairman of that tribunal, and he appointed Mr. Valasek. It is now a matter of public record that when Mr. Valasek was being appointed in the *Yukos* cases, Mr. Fortier informed the parties there as follows: "I would like to bring to the attention of the parties that I have asked one of my colleagues in my office in Montreal to assist me in the conduct of this case." Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 16, 2015, Annex 2, Writ of Summons dated November 10, 2014, filed by the Russian Federation with the District Court in The Hague on January 28, 2015, *available at* old.minfin.ru/en, ¶ 488 (emphasis added).

Mr. Valasek, both alone and together with Mr. Pierre Bienvenu of Norton Rose, has published articles that are adverse to the positions of Respondent in this case, including one article that has already been cited by Claimants in this case against Respondent.[34]

12. Mr. Fortier points out that Mr. Valasek was an associate when he first joined the *Yukos* cases, but he has been a partner for at least the last eight years, having become a partner less than a year after his appointment in those cases.[35] In November of 2008, Mr. Fortier was quoted in his then firm's press release as saying: "'This appointment is recognition that Martin is very active on the international arbitration scene and a rising star in the field. . . . We are proud of Martin's achievements and expect that he will continue to make his mark in this area in which our firm is already a leader.'"[36] The press release identified Mr. Valasek as "a partner in the Litigation Group."[37]

13. Mr. Fortier points out that after he resigned from Norton Rose, "it made eminent practical (and financial) sense that Mr. Valasek who had then served the Yukos tribunals as Assistant for more than 6 years continue to serve in that capacity until the end of the proceedings."[38] We do not doubt the size or complexity of the *Yukos* cases or that it was efficient to keep Mr. Valasek on after Mr. Fortier's resignation, although we cannot imagine that replacing Mr. Valasek in that case would have created insurmountable difficulties. In any event, that entire issue is irrelevant here. We are not talking about what may or may not have made practical sense in the *Yukos* cases; we are talking about the appearance of the lack of the requisite impartiality in this case created by the decision to be practical in the *Yukos* cases. Simply put, Venezuela has every reason to be concerned that Mr. Fortier continued to be

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[34] *See* Respondent's April 2, 2015 Submission, ¶¶ 16, 21 and nn. 29, 30, 43; Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated February 6, 2015, Annex 15, Martin J. Valasek, *A "Simple Scheme": Exploring the Meaning of Chorzów Factory for the Valuation of Opportunistic Expropriation in the BIT Generation*, 4(6) TRANSNATIONAL DISPUTE MANAGEMENT (November 2007); *id*., Annex 16, Pierre Bienvenu and Martin J. Valasek, *Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES, VOL. 14, 231 (A. Jan van den Berg ed., Kluwer Law International 2009). *See also* ¶ 16, *infra*.

[35] *See* **Annex 4**, Martin J. Valasek and Patrick Dumberry, *Conferences: Reports from Selected Past Conferences*, 24(3) ASA BULLETIN 600 (September 2006), p. 601 (identifying Martin J. Valasek as "a partner . . . in the Montreal office of Ogilvy Renault LLP"). On February 9, 2015, Claimants also referred to the use of "younger" lawyers to assist in cases. Letter from Claimants to the Tribunal dated February 9, 2015, p. 5. Again, there is no reason to engage in a semantic debate about the use of the adjective "younger." The undisputed fact remains that Mr. Valasek has been a partner for many years.

[36] **Annex 5**, Norton Rose Fulbright (formerly Ogilvy Renault), Press Release, *Martin J. Valasek Appointed to the Regional Coordination Committee of the Young Arbitrators' Forum*, November 6, 2008, *available at* www.nortonrosefulbright.com.

[37] *Id*.

[38] Mr. Fortier's April 16, 2015 Explanations, p. 2. In their February 9, 2015 letter, Claimants defended the practice on similar grounds, stating that ceasing "the use of younger lawyers assisting the tribunals in *Yukos* or other cases would have been prejudicial to the parties there, both in terms of cost and disruption." Letter from Claimants to the Tribunal dated February 9, 2015, p. 5.

assisted in matters such as legal research and analysis of substantive issues by a partner of Norton Rose in a case involving key issues of direct relevance to our case, a partner who has also written articles on those key issues, including one that has already been cited by Claimants against Respondent. While Mr. Fortier states that Mr. Valasek did not play any role in the *Yukos* tribunals' decision-making process, the point of the standard is to avoid such issues and thereby avoid the appearance of a lack of impartiality.[39]

14. Both Claimants and Mr. Fortier have made the point that the *Yukos* awards have been public for some time. Claimants actually say that this proposal is untimely because the *Yukos* cases "have been followed closely by every practitioner in the field."[40] That may be the best illustration of their propensity to leave no frivolous argument behind in their opposition to the proposal to disqualify Mr. Fortier. While the *Yukos* cases are of course famous, neither Respondent nor its counsel are in the habit of keeping track of the individuals who act as secretaries or assistants to tribunals. We read and follow cases for substance. In any event, it is not Respondent's obligation to conduct an ongoing investigation into Mr. Fortier's relationships; it is for the arbitrator to disclose <u>on a continuous basis</u> any "relationship or circumstance" that may be problematic.[41]

15. Mr. Fortier states that he does not make routine use of Norton Rose attorneys to assist him in his arbitrations.[42] Again, we do not wish to engage in a semantic argument. The relationship with Mr. Valasek is itself serious enough for the reasons discussed above.

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[39] It will be recalled that the Secretariat of the Permanent Court of Arbitration ("PCA") refused a request from counsel for the Russian Federation for details regarding the approximately 3,000 hours worked by Mr. Valasek, on the basis that disclosing any further details would invade the confidentiality of the tribunal's deliberations. Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 16, 2015, Annex 2, Writ of Summons filed by the Russian Federation, ¶ 500. We cannot know exactly what role Mr. Valasek played, but the circumstances of this case give rise to the appearance of a conflict, even if all he did was to organize files and answer telephone calls. As a partner in a major law firm who billed 3,000 hours and charged over a million dollars, he obviously did much more than that. The PCA had appointed two other persons to provide administrative services in the *Yukos* cases. *See* Respondent's April 2, 2015 Submission, n. 28.

[40] Claimants' April 9, 2015 Submission, ¶ 10.

[41] *See* Respondent's April 2, 2015 Submission, n. 26; Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 10, 2015, n. 14; ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 6(2) (Form of declaration: "I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."); **Annex 6**, Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 131 (C. Binder *et al.* eds., Oxford University Press 2009), p. 132 ("This disclosure requirement [ICSID Arbitration Rule 6(2)] is a continuing obligation throughout the arbitration."); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Annulment Proceeding), Decision on the Argentine Republic's Request for Annulment of the Award, dated August 10, 2010, ¶¶ 221-222 (referring to an arbitrator's "continuous duty of investigation"); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, dated December 13, 2013, ¶¶ 57, 61 (The challenged arbitrator acknowledged that he had a "duty to continuously disclose any circumstance that might raise doubts as to his independent judgment.").

[42] Mr. Fortier's April 16, 2015 Explanations, p. 3.

However, we note that Ms. Alison FitzGerald, who is counsel at Norton Rose, has continued to assist Mr. Fortier in two arbitrations, and Ms. Rachel Bendayan, who had assisted Mr. Fortier in this case before he resigned from Norton Rose, seems to have continued to assist him on cases after his resignation. While Ms. Bendayan is apparently now on temporary leave from Norton Rose to campaign for Parliament in Canada, her campaign website features a picture of Mr. Fortier, quoting him as saying in March 2014: "I have worked closely with Rachel over the last six years in a number of international arbitrations."[43] Mr. Fortier states that Ms. FitzGerald is the "only other Norton Rose lawyer who has continued to serve, after 31 December 2011, as Assistant to an ICSID arbitral tribunal which I chair and who continues to do so today."[44] That may be true, but our request for information was not limited to ICSID arbitral tribunals and was not limited to Norton Rose attorneys who continue to serve today. What we requested was information on "all of his other relationships with Norton Rose since January 1, 2012."[45] Mr. Fortier's statement on Ms. Bendayan's website would seem to indicate that at least she continued to assist him on cases after he resigned from Norton Rose, and his carefully worded statement quoted above does not address the possibility that other Norton Rose lawyers worked with Mr. Fortier after he resigned from Norton Rose, for example, on non-ICSID cases, or at any point prior to the submission of his response of April 16, 2015. Nor does it cover the possibility that Norton Rose lawyers have assisted him in cases, ICSID or otherwise, in which he is not the tribunal chair. In other words, we still do not know the full extent of Mr. Fortier's relationships with Norton Rose attorneys. Whether or not Mr. Fortier considers those relationships to be material to the disqualification proposal, Respondent is entitled to know what they are.[46]

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[43] **Annex 7**, *Endorsements: L. Yves Fortier*, RACHEL BENDAYAN: OFFICIAL CANDIDATE FOR THE LIBERAL PARTY OF CANADA IN OUTREMONT, dated March 31, 2014, *available at* rachelbendayan.com.

[44] Mr. Fortier's April 16, 2015 Explanations, p. 3.

[45] Respondent's April 2, 2015 Submission, ¶ 20. April 2 was not the first time that the information was requested from Mr. Fortier. *See* Letter from Respondent to the Tribunal dated January 29, 2015, p. 2 ("Respondent is constrained to ask for further explanation from Maître Fortier as to the extent of his relationship with Norton Rose since January 1, 2012."); Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated February 6, 2015, p. 2 ("On January 29, 2015, Respondent wrote to the members of the Tribunal expressing its concern arising out of these press reports and requesting an explanation from Maître Fortier as to the extent of his relationship with Norton Rose since January 1, 2012.").

[46] As one commentator has pointed out: "The question of whether or not a circumstance must be disclosed, must thus be answered from the perspective of the parties. The reference to 'a party' indicates that a subjective standard is adopted whereby the judgment of the parties is decisive in order to determine whether the arbitrator must make a disclosure or not. There are two good reasons for this subjective test. First of all, one of the functions of disclosure is to ensure that the parties are able to challenge the arbitrator if, in their view, he/she does not meet the requirements to serve on the Tribunal. If the purpose of disclosure is to give parties the opportunity to protect their interest as *they* see them, then it makes a lot of sense that the test for disclosure is also in the eyes of those parties. Secondly, a wide disclosure duty helps parties to trust the Tribunal to render a just decision and to accept the award ultimately rendered." Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 16, 2015, Annex 3, Karel Daele, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION (Kluwer Law International 2012), p. 9, ¶¶ 1.023-1.024 (emphasis in original).

16. Mr. Fortier also argues that the physical proximity of his new office to Norton Rose is not a "serious argument."[47] We disagree for the reasons set forth in our earlier submissions,[48] and we believe that any third party would find that proximity, combined with the other elements of this disqualification proposal, gives rise to justifiable doubts as to Mr. Fortier's impartiality in this case. To put this issue in perspective, we refer again to the 2014 article featuring Mr. Fortier in his office and discussing his emotional ties to Norton Rose:

> And it may be known as Norton Rose Fulbright today, but the name Ogilvy Renault is still stamped on his heart. His office, located in Place Ville Marie, in downtown Montreal, is still on the same floor as Norton Rose's reception area. "You're going to talk to Pierre Bienvenu [the co-head of Norton Rose's international arbitration group and the co-author with Mr. Valasek of the article cited twice by Claimants against Respondent in this case]? Well, his office is just over there!" says Fortier of his friend, a senior partner at his former firm. Fortier retains many good memories from his 50-year career with Ogilvy Renault, where he was once chairman. There's still a strong sense of camaraderie with his former colleagues – Pierre Bienvenu, Stephen Drymer, and so many others who first knew him as their mentor. They now know him as their friend.[49]

As we have previously pointed out, this kind of physical proximity, coupled with the evident emotional ties Mr. Fortier has to Norton Rose, exacerbates the problem created by his ongoing professional relationship with Norton Rose attorneys and reinforces the appearance of a lack of the requisite impartiality in this case. In our estimation, any third party undertaking a reasonable evaluation of the facts would consider that a "serious argument."

17. In sum, we respectfully disagree with Mr. Fortier and Claimants that he is in a position to continue to act as arbitrator in this case. Claimants state that the only substantive question to be decided on this aspect of the challenge to Mr. Fortier is whether "the fact that Russia has sought to vacate an award in another case in which Mr. Fortier served, alleging that an assistant to the tribunal exceeded the proper scope of his role" is "reason enough to conclude that Mr. Fortier manifestly lacks independence from the parties to *this* proceeding."[50] That is a frivolous statement of the issue. The proposal to disqualify Mr. Fortier is based on (i) his

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[47] Mr. Fortier's April 16, 2015 Explanations, p. 3.

[48] Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated February 6, 2015, pp. 3-4; Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 10, 2015, p. 6; Letter from Respondent to Judge Keith and Prof. Abi-Saab dated February 16, 2015, ¶ 6; Respondent's April 2, 2015 Submission, ¶ 21.

[49] Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated February 6, 2015, Annex 14, Marc-André Séguin, *The Diplomat*, CANADIAN BAR ASSOCIATION NATIONAL MAGAZINE, January – February 2014, p. 1. *See* ¶ 11 and n. 34, *supra*.

[50] Claimants' April 9, 2015 Submission, ¶ 9(ii) (emphasis in original).

ongoing professional and emotional ties to Norton Rose, the firm more adverse to Venezuela than any other in the world and the firm that continued the representation of ConocoPhillips companies after the merger with Macleod Dixon in a case involving the same agreements as are at issue here, including receiving assistance in cases involving critical issues that are being litigated in this case; and (ii) the same grounds reviewed above with respect to Judge Keith, including his participation in the decision to withdraw consent to Prof. Abi-Saab's resignation at a time when Mr. Fortier himself was under challenge. When the issue is properly stated, it is difficult to understand how Mr. Fortier can remain as an arbitrator in this case, just as it was impossible for him to remain as a partner of Norton Rose in 2011.

18. Claimants argue that the challenges "should be promptly rejected and Professor Abi-Saab's replacement appointed forthwith" in order to "limit the vast damage that Venezuela's misconduct has already caused, and to send a clear message that such conduct will be neither rewarded nor – and this is critical – allowed to intimidate ICSID into abdicating its responsibility to restore order and progress to this proceeding."[51] The only parties that have done damage by their conduct in this case are Claimants, which sent this case spiraling out of control with their flagrant misrepresentations to the Tribunal concerning the compensation negotiations relating to the 2007 nationalization. None of Respondent's actions in this case has been improper in any respect, including its challenges to the arbitrators. It was not Respondent's fault that Mr. Fortier's firm merged with the firm more adverse to Venezuela than any other in the world; it was not Respondent's fault that Mr. Fortier found it convenient to continue working with Mr. Valasek and others at Norton Rose long after he resigned from the firm; it was not Respondent's fault that Claimants made flagrant misrepresentations to the Tribunal having a material impact on the decision of Judge Keith and Mr. Fortier to find that Venezuela had negotiated compensation in bad faith; it was not Respondent's fault that Judge Keith and Mr. Fortier decided that they would stick to that finding no matter what the evidence showed, including the cables of the U.S. Embassy in Caracas reporting on the briefings the Embassy had received from ConocoPhillips' own chief negotiators; and it was not Respondent's fault that Judge Keith and Mr. Fortier took the unprecedented step of purporting to withdraw their consent to Prof. Abi-Saab's resignation for serious and unquestioned health reasons, endorsing Claimants' maneuver to deny Respondent the right to appoint a replacement arbitrator. Claimants want to steamroll to the end of this case to get to what they anticipate will be the "inevitable annulment proceeding"[52] that they assume will take place because they assume they will prevail in this proceeding no matter what the evidence shows and no matter what the legal principles may be. They are right that if that happens, there will inevitably be an annulment proceeding, which would be one of the few annulment applications in history virtually certain to prevail on any number of grounds, but Respondent should not have to rely on an annulment proceeding to obtain a fair hearing.

19. Finally, Claimants object to the suggestion that ICSID seek the recommendation of a third party, arguing that it is "essential to the credibility of ICSID as an administering

[51] *Id.*, ¶ 13.

[52] *Id.*, ¶ 8.

institution to resist such bullying,"[53] but the fact is that such a procedure is appropriate in this case both because of Mr. Fortier's position as Chair of the World Bank Group's Sanctions Board and because of ICSID's involvement in the events surrounding Prof. Abi-Saab's resignation. With respect to the first issue, Claimants are incorrect in assuming that the practice of referring such matters outside of ICSID is limited to cases involving staff of the World Bank.[54] The principle of those cases, which involve former staff members, is surely applicable when the proposal to disqualify involves the current Chair of the World Bank Group's Sanctions Board.[55] With respect to the second issue, as detailed in prior submissions, ICSID allowed Judge Keith and Mr. Fortier to address the issue of consent to Prof. Abi-Saab's resignation at a time when all proceedings were already suspended due to the challenge to Mr. Fortier.[56] That decision of ICSID was inappropriate and played an important role in the events that followed. We therefore reiterate our request that this matter be referred for recommendation outside of ICSID. This is not a matter of bullying; it is a matter of attempting to obtain a modicum of fairness.

20. In light of the importance of these proposals for disqualification, Respondent reiterates its request for a hearing on the proposals.

Very truly yours,

George Kahale

George Kahale, III

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[53] *Id.*, ¶ 55.

[54] *Id.*, ¶ 58.

[55] *See Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award dated September 16, 2003, ¶ 4.16 (ICSID sought the recommendation of the PCA in the proposal to disqualify Dr. Jürgen Ross, in light of the prior services that Dr. Voss had rendered in the World Bank, "in order to ensure the impartiality of the process."); Respondent's April 2, 2015 Submission, Appendix 1, Antonio R. Parra, THE HISTORY OF ICSID (Oxford University Press 2012), p. 267 (The ICSID Secretariat has "sought the recommendation of the Secretary-General of the PCA for challenge decisions by the Chairman [of the ICSID Administrative Council] in cases where the Chairman or ICSID might be thought to have a conflict.").

[56] Respondent's April 2, 2015 Submission, ¶¶ 4-6, 35-38; Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated February 6, 2015 ("[T]he proceeding is suspended until a decision on the proposal for disqualification has been taken.").