

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

IN THE ARBITRATION PROCEEDING BETWEEN

FÁBRICA DE VIDRIOS LOS ANDES, C.A. AND OWENS-ILLINOIS DE VENEZUELA, C.A.
CLAIMANTS

and

BOLIVARIAN REPUBLIC OF VENEZUELA
RESPONDENT

ICSID Case No. ARB/12/21

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

Issued by

Prof. Hi-Taek Shin
Prof. Zachary Douglas QC

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Date: March 28, 2016

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A. THE PARTIES

1. The Claimants are Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A., two companies incorporated under the laws of Venezuela, which are owned and controlled by a Dutch corporation¹ (jointly, the “**Claimants**”).
2. The Respondent is the Bolivarian Republic of Venezuela (“**Venezuela**” or the “**Respondent**”).
3. The Claimant and the Respondent are hereinafter collectively referred to as the “**Parties.**”

B. PROCEDURAL HISTORY

4. On July 23, 2012, the Claimants submitted a Request for Arbitration against Venezuela to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”). On August 10, 2012, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention.
5. The Tribunal was constituted on February 14, 2013, and comprised Professor Hi-Taek Shin, a national of Korea, appointed as president pursuant to Article 38 of the ICSID Convention and Rule 4(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”), Mr. L. Yves Fortier, a national of Canada, appointed by the Claimants, and Mr. Alexis Mourre, a national of France, appointed by the Respondent.
6. On April 11, 2013, the Tribunal and the Parties held a first session in Paris, France. During the session a number of procedural matters were decided, including a schedule for pleadings. In accordance with the schedule: (i) the Claimants filed a Memorial on the Merits on July 15, 2013; (ii) the Respondent filed a request to address objections to

¹ According to the July 2012 Request for Arbitration, the Claimants are controlled by OI European Group B.V. (“**OIEG**”), a company incorporated under the laws of The Netherlands.

jurisdiction as a preliminary matter on August 16, 2013²; (iii) the Respondent filed a Counter-Memorial on the Merits on December 20, 2013; (iv) the Claimants filed a Reply on the Merits and a Counter-Memorial on Jurisdiction on March 21, 2014; (v) the Respondent filed a Rejoinder on the Merits and a Reply on Jurisdiction on June 20, 2014; and (vi) the Claimants filed a Rejoinder on Jurisdiction on August 21, 2014. A hearing on jurisdiction and merits was scheduled to be held in Paris, from March 30 through April 3, 2015.

7. On March 13, 2015, the Respondent proposed the disqualification of Mr. Mourre and Mr. Fortier on the basis that each of them lacked the requisite impartiality and independence under Articles 14 and 57 of the ICSID Convention (“**First Proposal for Disqualification**”).
8. On March 16, 2015, the Centre informed the Parties that the proceeding had been suspended until the First Proposal for Disqualification was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural schedule for written submissions on the First Proposal for Disqualification.
9. In addition, on March 16, 2015, following receipt of a copy of the Proposal, Mr. Mourre submitted his resignation to the other members of the Tribunal and the Secretary-General of ICSID. The Centre immediately communicated Mr. Mourre’s resignation to the Parties.
10. On March 19, 2015, Prof. Shin informed the Parties that, in view of the pending challenge, the dates for the upcoming hearing were vacated, and that new hearing dates would be fixed as soon as possible after the resumption of the proceeding.
11. On June 16, 2015, the Chairman of the ICSID Administrative Council (i) rejected as untimely the Respondent’s First Proposal for the Disqualification of Mr. Yves Fortier, and (ii) dismissed, in view of Mr. Mourre’s resignation, the Respondent’s First Proposal for the Disqualification of Mr. Alexis Mourre (“**Decision on the First Proposal for Disqualification**”).

² By Procedural Order No. 2 of September 23, 2013 the Tribunal declined Respondent’s request for bifurcation.

12. On June 17, 2015, and pursuant to ICSID Arbitration Rule 8(2), the Tribunal consented to the resignation of Mr. Alexis Mourre.
13. On July 31, 2015, the Respondent appointed Prof. Zachary Douglas QC, a national of Australia, as arbitrator, in accordance with ICSID Arbitration Rule 11(1).
14. On August 5, 2015, the Centre (i) notified the Parties of Prof. Douglas' acceptance of his appointment as an arbitrator, and (ii) informed the Parties that, in accordance with ICSID Arbitration Rule 12, the Tribunal was reconstituted and the proceeding resumed as of that date from the point it had reached at the time the vacancy occurred.
15. On September 15, 2015, following an exchange of communication with the Parties, the Tribunal informed the Parties that the hearing on jurisdiction and merits had been re-scheduled and that this hearing would now be held in Paris, France, from April 4 through April 8, 2016.
16. On March 4, 2016, the Respondent proposed the disqualification of Mr. Fortier (the "**Proposal**").
17. On March 7, 2016, 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.
18. On that same date, the President of the Tribunal, having consulted with Professor Douglas (the "**Two Members**"), set a timetable for the Parties' submissions and Mr. Fortier's explanations.
19. The Claimants filed a submission on March 9, 2016 (the "**Claimants' Reply of March 9, 2016**") and Mr. Fortier furnished his explanations on March 11, 2016 ("**Mr. Fortier's Explanations of March 11, 2016**").
20. On March 15, 2016, both Parties submitted additional observations on the Proposal ("**Respondent's Additional Comments**" and "**Claimants' Additional Comments**", respectively).

21. On March 21, 2016, the Two Members informed the Parties that the Proposal was rejected. The Two Members indicated that they had decided to communicate their Decision to the Parties, with the full reasons for that Decision to follow as soon as possible, in view of the proximity of the hearing scheduled from April 4 to 8, 2016.
22. The present document includes the reasons of the Decision on the Proposal to Disqualify Mr. L. Yves Fortier as Arbitrator issued by the Two Members on March 21, 2016, and the Two Members' decision on costs.

C. THE TWO MEMBERS' REASONS FOR REJECTING THE PROPOSAL TO DISQUALIFY MR. FORTIER

23. The Two Members first set out their analysis of the legal standard that must be applied to an application for the disqualification of an arbitrator and then consider each of the Respondent's two grounds for requesting the disqualification of Mr. Fortier.
24. The Two Members have resolved to deal with the substantive grounds that are advanced by the Respondent in its Proposal to disqualify Mr. Fortier in this case notwithstanding the admissibility objection raised by the Claimants in relation to the timeliness of the Respondent's Proposal. As the decision of the Two Members is to reject the Respondent's Proposal on the merits, the Two Members need not rule upon the Claimants' admissibility objection.³

1. The Legal Standard for the Disqualification of an Arbitrator

25. The Respondent's Proposal is based upon Articles 14 and 57 of the ICSID Convention and ICSID Arbitration Rule 9.
26. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads in pertinent part as follows:

³ Recalling that the Chairman of the ICSID Administrative Council rejected the Respondent's First Proposal for Disqualification as untimely, the Two Members limit their review to the two grounds which are based upon the "new" information the Respondent claims that it recently learned from a specialized publication on February 16, 2016.

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.

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

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

28. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*” (guaranteed independence in exercising their functions), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.⁴

29. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both

⁴ ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify a Majority of the Tribunal Arbitrator (July 1, 2015), ¶80 (“**Conoco**”); Abaclat and others v. Argentine Republic (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 4, 2014), ¶74 (“**Abaclat**”); Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego (December 13, 2013) ¶65 (“**Burlington**”); Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/20), Decision on the Parties’ Proposal to Disqualify a Majority of the Tribunal (November 12, 2013), ¶58 (“**Blue Bank**”); Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic (ICSID Case No. ARB/12/38), Decision on the Proposal to Disqualify a Majority of the Tribunal (December 13, 2013) ¶70 (“**Repsol**”), ¶70; Suez Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17) and Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007) (together “**Suez**”), ¶28; OPIC Karimum Corporation v. Bolivarian Republic Venezuela (ICSID Case No. ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011), ¶44; Getma International and others v. Republic of Guinea (ICSID Case No. ARB/11/29), Decision on the Proposal for Disqualification of Mr. Bernardo M. Cremades, Arbitrator (June 28, 2012), ¶59; ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012), ¶54; Alpha Projektholding GmbH v. Ukraine (ICSID Case No. ARB/07/16), Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (March 19, 2010), ¶36; Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5), Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010), ¶37; Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/13), Decision on Claimants’ Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013), ¶55.

“protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”⁵

30. Both the Respondent and the Claimants seem to agree that the applicable legal standard to evaluate the independence and impartiality of arbitrators is an objective standard based on the evaluation of the evidence by a third party.⁶

31. Specifically, the Respondent states that the applicable legal standard to evaluate the independence and impartiality of arbitrators required under the ICSID Convention is an objective standard based on the evaluation of an impartial and sufficiently informed third party.⁷ In support of its statement, the Respondent cites the statement of the Chairman of the ICSID Administrative Council in *Blue Bank*, who stated that:

*The legal standard is an objective standard based on a reasonable evaluation of the evidence by a third party. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.*⁸

32. The Claimants also state that the applicable legal standard is an “objective standard based on a reasonable evaluation of the evidence by a third party”.⁹

33. Finally, regarding the meaning of the word “manifest” in Article 57 of the Convention, a number of decisions have concluded that it means “evident” or “obvious”¹⁰ and it relates to the ease with which the alleged lack of qualities can be perceived.¹¹

34. The Two Members note that the Respondent referred to other sets of rules or guidelines in its arguments, such as the IBA Guidelines.¹² While these rules or guidelines may serve as useful references, the Two Members are bound by the standard set forth in the ICSID

⁵ Conoco supra note 4, ¶81; Abaclat supra note 4, ¶75; Burlington supra note 4, ¶66; Blue Bank supra note 4, ¶59; Repsol supra note 4, ¶71.

⁶ Proposal, ¶49; Claimants’ Reply of March 9, 2016, ¶14.

⁷ Proposal, ¶49.

⁸ Blue Bank supra note 4, ¶60.

⁹ Claimants’ Reply of March 9, 2016, ¶14.

¹⁰ Conoco supra note 4, ¶71; Abaclat supra note 4, ¶71, footnote 25; Burlington supra note 4 ¶68, footnote 83; Blue Bank supra note 4, ¶61, footnote 43; Repsol supra note 4 ¶73, footnote 58.

¹¹ C. Schreuer, *The ICSID Convention*, Second Edition (2009), page 938 ¶134-135.

¹² Proposal, ¶¶53 and 54.

Convention. Accordingly, this decision is made in accordance with Article 57 of the ICSID Convention.

2. The Respondent's First Ground for Disqualification: Mr. Fortier's Alleged Relationship with Norton Rose Fulbright LLP

35. The Respondent asserts that Mr. Fortier has maintained a relationship with the law firm Norton Rose Fulbright LLP since his resignation from Norton Rose OR and that the existence of such a relationship would cause a reasonable third party to conclude that Mr. Fortier is incapable of exercising impartial and independent judgment in this arbitration.

36. The Respondent draws this conclusion on the basis that Norton Rose Fulbright LLP acts for a number of clients in litigation against the Respondent and parties related to the Respondent. The Respondent further maintains that Norton Rose Fulbright LLP is involved in litigation before the courts in Venezuela relating to the present proceedings (but this is flatly denied by the Claimants).¹³

37. Norton Rose Fulbright LLP came into existence on January 1, 2012 as a result of a merger between Norton Rose OR and Macleod Dixon LLP on January 1, 2012. It was Macleod Dixon LLP that, according to the Respondent, was “*due to the nature of its litigation practice and its client portfolio, one of the most active firms in the representation of interests contrary to the Bolivarian Republic of Venezuela and the state-owned company PDVSA, both within and without Venezuela*”.¹⁴ According to the

¹³ The Respondent asserts that Norton Rose Fulbright LLP is acting for a company called UNIMIN in this domestic litigation “aiming to challenge certain aspects of the measures taken by the Republic” in connection with the expropriation of the Claimants’ assets in the country (Proposal, ¶35). The Claimants replied by attesting that neither UNIMIN nor Norton Rose Fulbright LLP “have any connection whatsoever with either the Claimants or the Claimants’ counsel” and that that Norton Rose Fulbright LLP’s participation in the local expropriation proceedings “has been limited to pointing out the Respondent’s error and requesting that the expropriation request in relation to UNIMIN be dismissed.” (Claimants’ Reply of March 9, 2016 ¶¶22 and 23). The Two Members obviously cannot resolve this question in the present context save to note that the Respondent’s assertion, even if its veracity is assumed, cannot possibly have an impact on the ability of Mr. Fortier to exercise impartial and independent judgment for the reasons contained in this section of our Decision.

¹⁴ Proposal, ¶4.

Respondent, Norton Rose Fulbright LLP has since absorbed this portfolio of clients with interests adverse to the Respondent following the merger with Macleod Dixon LLP.

38. Mr. Fortier was a lawyer at the firm Ogilvy Renault for more than 50 years. On June 1, 2011, Ogilvy Renault was renamed Norton Rose OR following a merger. Mr. Fortier resigned from Norton Rose OR on December 31, 2011. The merger with Macleod Dixon LLP was then consummated on January 1, 2012. The new firm later became known as Norton Rose Fulbright LLP.¹⁵ These facts are a matter of public record and are confirmed by a press release issued by Norton Rose OR on October 21, 2011.¹⁶
39. The Respondent nonetheless maintains that “*Mr. Fortier has continued to have professional relations with the law [firm] Norton Rose Fulbright LLP even after his supposed disengagement from it*”.¹⁷ The Respondent’s evidence for these continued “*professional relations*” is the fact that Mr. Fortier has relied upon the services of lawyers employed at Norton Rose Fulbright LLP as assistants to tribunals in cases in which he has served as the presiding arbitrator. The new fact relied upon by the Respondent to justify the filing of the present challenge to Mr. Fortier is a press article¹⁸ that reveals that in one such case, *von Pezold v. Zimbabwe* (ICSID Case No. ARB/10/15), a lawyer for Norton Rose Fulbright LLP, Ms. Alison FitzGerald, was formally engaged as an assistant to an ICSID Tribunal over which Mr. Fortier was presiding after Mr. Fortier had resigned from Norton Rose OR. According to the Respondent, this fact demonstrates that Mr. Fortier continued to have a professional relationship with the firm Norton Rose Fulbright LLP (the entity that absorbed the firm Macleod Dixon LLP) even after his resignation from Norton Rose OR on December 31, 2011. Furthermore, the Respondent maintains that this appointment after the resignation of Mr. Fortier from Norton Rose OR cannot be

¹⁵ Mr. Fortier’s Explanations of March 11, 2016. The merger between Norton Rose OR and Fulbright Jaworski LLP became effective on June 3, 2013. Proposal, ¶6 footnote 13.

¹⁶ Mr. Fortier’s Explanations of March 11, 2016, ¶A.2.

¹⁷ Proposal, ¶1 (a).

¹⁸ Proposal, ¶1; Lacey Yong and Alison Ross, “Zimbabwe must return farms, tribunal rules”, Global Arbitration Review, February 16, 2016.

explained on the basis that it was expedient to ensure the continuity of an assistant to the tribunal that had been appointed prior to Mr. Fortier's resignation.¹⁹

40. The Award in *von Pezold v. Zimbabwe* records the following:

*Following a proposal by the Tribunal during the Joint First Session that Ms. Renée Thériault serve as assistant to the Tribunals in these two proceedings, and the Parties' subsequent agreement thereto, Ms. Thériault was appointed to serve as Assistant to the two Tribunals. In February 2012, with the agreement of the Parties, Ms. Alison FitzGerald replaced Ms. Thériault to serve as Assistant to the two Tribunals.*²⁰

41. Ms. Renée Thériault was also a lawyer at Norton Rose OR.

42. The Respondent's case is that the formal appointment of Ms. Alison FitzGerald as assistant to the ICSID Tribunal in *von Pezold v Zimbabwe* after Mr. Fortier's resignation from Norton Rose OR evidences that Mr. Fortier has continued to have a professional relationship with Norton Rose Fulbright LLP despite his affirmation that he "severed all of [his] professional links with Norton Rose OR as of December 31, 2011".²¹ This is coupled with the continued assistance provided by two other lawyers at Norton Rose Fulbright LLP to tribunals over which Mr. Fortier is the presiding arbitrator since his resignation from Norton Rose OR.²²

43. The Respondent is asking the Two Members to infer, based upon the fact that Mr. Fortier was able to procure the formal appointment of Ms. Alison FitzGerald as an assistant to the aforementioned ICSID Tribunal after his resignation from Norton Rose OR, and the fact that two other lawyers from Norton Rose Fulbright LLP continued to act in that capacity, that Mr. Fortier must continue to have a relationship with Norton Rose Fulbright LLP of some nature.

44. The Two Members consider that it is reasonable to infer that there was an understanding between Mr. Fortier and Norton Rose OR (that evidently was not repudiated when

¹⁹ Respondent's Additional Comments, ¶25.

²⁰ Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15), Award (July 28, 2015), ¶21.

²¹ Mr. Fortier's Explanations of March 11, 2016, ¶A.2.

²² Proposal, ¶¶10-11;

Norton Rose OR became Norton Rose Fulbright LLP) that lawyers of Norton Rose Fulbright LLP serving as assistants to tribunals over which he was presiding could continue to serve in that capacity after the departure of Mr. Fortier from Norton Rose OR. This understanding evidently extended to replacing Ms. Renée Thériault, who had indicated to Mr. Fortier before he had resigned from Norton Rose OR that she would not be able to continue to assist the Tribunal in the *von Pezold v Zimbabwe* case (see Part 3 of the Decision below).

45. But the critical question then must be confronted: why would the existence of such an understanding between Mr. Fortier and Norton Rose Fulbright LLP cause a reasonable third person to conclude that Mr. Fortier is incapable of exercising independent and impartial judgment in this case?
46. It does not assist the Respondent's case to characterize the aforementioned understanding as a "*relationship*". What is important is whether that understanding, whether or not it is characterized as a relationship, could be interpreted by a reasonable third person as capable of influencing Mr. Fortier's judgment in the present case. A "*relationship*" can encompass a spectrum of possible connections between Mr. Fortier and Norton Rose Fulbright LLP, some of which would cause no reasonable third person to doubt for an instant that Mr. Fortier were capable of exercising independent and impartial judgment, and others which would inexorably result in Mr. Fortier's disqualification. At one end of the spectrum, if Mr. Fortier retained personal friendships with some of the lawyers at the firm at which he practiced for over 50 years, which would hardly be surprising, this could not result in his disqualification. Likewise, if Mr. Fortier is a tenant of the same office building as Norton Rose Fulbright LLP, together with other law firms and companies as would appear to be the case, then this might also be described as a relationship but not a material one for the purposes of adjudging Mr. Fortier's ability to act independently and impartially. In contradistinction, if Mr. Fortier were to continue to receive a share of the profits generated by Norton Rose OR (now Norton Rose Fulbright LLP) following his resignation, would cause a reasonable third person to entertain doubts about Mr. Fortier's impartiality. That is because Mr. Fortier in that situation would have a direct financial interest in the activities of Norton Rose Fulbright LLP, which include acting against the

Respondent in international and domestic proceedings. But no financial interest on the part of Mr. Fortier has even been alleged and Mr. Fortier's affirmation that he severed all professional ties with Norton Rose OR on December 31, 2011 rules out any such financial interest.

47. At its highest the Respondent's case is that a relationship persists between Norton Rose Fulbright LLP and Mr. Fortier as evidenced by the continued services rendered by three lawyers at Norton Rose Fulbright LLP to tribunals over which Mr. Fortier presided following his resignation from Norton Rose OR. But how would such a relationship possibly incentivize Mr. Fortier to act partially against the interests of the Respondent in this case?

48. The relevant circumstances are as follows:

- In the previous cases, Mr. Fortier had no financial interest in the services rendered by the lawyers at Norton Rose Fulbright LLP to the tribunals in question: they sent invoices directly to ICSID for their work.
- Those lawyers did not act as assistants to tribunals in which the Respondent was a party.
- In each of the cases in which those lawyers did serve as assistants to the tribunals, the parties would have had an opportunity to object to the appointments by virtue of their relationship to the firm Norton Rose Fulbright LLP but evidently did not do so.
- In the present case, Mr. Fortier is not the presiding arbitrator and no assistant, in addition to the ICSID Secretary, has been appointed to serve the tribunal.

49. The Respondent asserts that "*Norton Rose has economic interests relating to the success or failure of the arguments put forward by the Bolivarian Republic of Venezuela in its international proceedings (including those where the claimants are represented by different law firms)*".²³ That may or may not be so depending on the terms on which Norton Rose Fulbright LLP is acting for clients against the Respondent or parties related to the Respondent. But on what basis could a reasonable third person conclude that the assistance of three lawyers of Norton Rose Fulbright LLP to tribunals over which Mr.

²³ Proposal, ¶4.

Fortier presided following his resignation from Norton Rose OR means that Mr. Fortier's interests are sufficiently aligned with the interests of Norton Rose Fulbright LLP such that Mr. Fortier cannot be relied upon to exercise independent and impartial judgment in this case? At no point in the Respondent's lengthy submissions does the Respondent attempt to answer this question and that is fatal to its first ground for requesting the disqualification of Mr. Fortier.

3. The Respondent's Second Ground for Disqualification: Mr. Fortier's Alleged False Declaration Concerning the Appointment of Ms. Alison FitzGerald as an Assistant to the Tribunal in *von Pezold v Zimbabwe*

50. The Respondent refers to Mr. Fortier's declarations in response to the Respondent's applications to disqualify him in *Conoco v. Venezuela* (ICSID Case No. ARB/07/30) and submits that those declarations were false in light of what is now known about the timing of Ms. Alison FitzGerald's appointment in the *von Pezold v Zimbabwe* case.

51. Mr. Fortier's declaration of April 16, 2015 reads, in relevant part:

*Ms. FitzGerald was appointed as Assistant to the Tribunals prior to December 31, 2011 when she was the very junior lawyer with Ogilvy Renault. After I resigned from Norton Rose, it also made good practical and financial sense to have her continue as Assistant to these ICSID tribunals. Since January 1, 2012, Ms. FitzGerald has billed ICSID directly for her work as Assistant to these Tribunals.*²⁴

52. Mr. Fortier refers to "Tribunals" in the plural because there were two related cases involving Zimbabwe that proceeded in parallel and Ms. FitzGerald was appointed to serve as an assistant to both those Tribunals.

53. As the extract from the award in *von Pezold v Zimbabwe* reveals (quoted at paragraph 40, above), Ms. FitzGerald was formally appointed as assistant to that Tribunal in February 2012. The Respondent maintains that this is highly relevant because it contradicts Mr. Fortier's earlier declaration of April 16, 2015 in *Conoco v. Venezuela*.

54. In the context of a further challenge to Mr. Fortier in *Conoco v Venezuela*, Mr. Fortier provided the following explanation of this discrepancy in the dates on February 26, 2016:

1. Upon my recommendation to my co-arbitrators, Ms. Renée Thériault of the Ottawa office of Ogilvy Renault was appointed, with the consent of the parties, as assistant to the two tribunals when they were constituted.

2. Ms. Renée Thériault fulfilled her duties as assistant to these tribunals until mid-December 2011 when she informed me that she had decided to leave active practice at the end of the month and join the Supreme Court of Canada as a research assistant.

²⁴ Proposal, ¶22; Explanations from Mr. Yves Fortier, dated April 16, 2015, ¶18.

3. *I thus recommended to my co-arbitrators that Ms. Thériault be replaced by her colleague, Ms. Alison Fitzgerald, also a young lawyer at the Ottawa office of Ogilvy Renault with whom I had worked previously.*

4. *My co-arbitrators readily endorsed my recommendation before the end of December 2011.*

5. *As you will recall, I resigned as a partner at Ogilvy Renault effective 31 December 2011 and at that time was making arrangements to leave my office and pursue my career as an independent arbitrator. There were thus a number of matters, such as the formalization of Ms. Fitzgerald's appointment as a successor to Ms. Thériault, which I did not consider pressing. Accordingly, those matters went on a list of "things to do" in early 2012.*

6. *At the end of an extended Christmas vacation, on 2 February 2012, through the secretary of the tribunals, I informed the parties of Ms. Thériault's departure from active practice in December and proposed, on behalf of the tribunals, that her former colleague at Ogilvy Renault (at that time Norton Rose OR), Ms. Alison Fitzgerald, be appointed in her place and stead subject to the same terms and conditions. All parties agreed and I note that the formalization of Ms. Fitzgerald's appointment took place in February 2012.*

55. In its Proposal, the Respondent quotes this passage of Mr. Fortier's declaration in full and then makes the following statement:

This explanation is very unsatisfactory. In fact, it is hardly an explanation at all. Confronted with the incontestable character of the discovered facts denounced by the Republic, Mr. Fortier cannot but confirm that he lied to the Republic when, on April 16th 2015, he explained the circumstances of Ms. FitzGerald appointment and why he believed her continuity in the position did not impaired his impartiality regarding the Republic.²⁵

56. In contradistinction with the Respondent, the Two Members find Mr. Fortier's explanation concerning the discrepancy of dates to be entirely satisfactory.

57. If an arbitrator, when facing an application for disqualification, were found to have deliberately concealed or misrepresented a fact in a declaration to the parties, then such conduct would provide a conclusive justification for the disqualification of the arbitrator. In the present case, however, there is simply no basis whatsoever to infer from the circumstances of Mr. Fortier's declaration of April 16, 2015 in *Conoco v. Venezuela* that Mr. Fortier had sought to conceal the formal date of Ms. FitzGerald's appointment as

²⁵ Proposal, ¶21.

assistant to the Tribunal in *von Pezold v. Zimbabwe* or that he had sought to misrepresent the circumstances of that appointment. A reasonable third party would conclude that there was an interval between Mr. Fortier's proposal to his co-arbitrators to appoint Ms. FitzGerald to replace Ms. Thériault as assistant to the Tribunal and the formal appointment of Ms. FitzGerald to that role and that Mr. Fortier had mistakenly conflated those two dates in his declaration of April 16, 2015. A reasonable third party would take additional comfort from the fact that the information provided by Mr. Fortier in both his aforementioned declarations in *Conoco v. Venezuela* was actually immaterial to an assessment of Mr. Fortier's ability to exercise independent and impartial judgment. There was, in other words, no conceivable incentive for Mr. Fortier to conceal or misrepresent the facts of Ms. FitzGerald's appointment. For the reasons elucidated in respect of the Respondent's First Ground for Disqualification, whether Ms. FitzGerald was formally appointed in December 2011 before Mr. Fortier resigned from Norton Rose OR, or in February 2012 and therefore after Norton Rose Fulbright LLP had come to existence, these facts would not give pause to a reasonable third party about the ability of Mr. Fortier to exercise independent or impartial judgment. For these reasons, the Respondent's Second Ground for Disqualification must also be rejected.

D. COSTS

58. As this Respondent's Proposal for the disqualification of Mr. Fortier was wholly without merit, the Two Members have decided that the Respondent shall be responsible for the costs associated with the Proposal and that an order to that effect will be made in the award to be issued by the Tribunal in these proceedings.

E. DECISION

59. For the foregoing reasons, the Two Members:

- (1) Decide to reject the Proposal made by the Respondent to disqualify Mr. Yves Fortier as arbitrator, as indicated in the Secretariat's letter of March 21, 2016, and
- (2) Decide that the Respondent shall be responsible for the costs associated with the Proposal and that an order to that effect will be made in the award to be issued by the Tribunal in these proceedings.

[Signed]

Prof. Hi-Taek Shin

[Signed]

Prof. Zachary Douglas QC