

**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

**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. Sara Marzal Yetano

Date: September 12, 2016

THE PARTIES' REPRESENTATIVES

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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 Claimants 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 jurisdiction as a preliminary matter on August 16, 2013²; (iii) the Respondent filed a

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.

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

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**”).
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 "**Second Proposal for Disqualification**").
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 Second Proposal for Disqualification.
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. On March 21, 2016, the Two Members informed the Parties that the Second Proposal for Disqualification 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. On March 28, 2016, the reasoned decision of the Two Members was transmitted to the Parties ("**Decision on the Second Proposal for Disqualification**").
20. A hearing on jurisdiction, merits and quantum took place in Paris, France, from April 4 to April 8, 2016.

21. On June 4, 2016, the Parties filed simultaneous post-hearing briefs.
22. On June 8, 2016, the Parties filed their submissions on costs.
23. By letter of July 8, 2016, the Respondent informed the Secretary of the Tribunal that Ms. Myriam Ntashamaje had accessed to the Box folder of the present case and that, according to her Ms. Ntashamaje LinkedIn account, she “has been working since August 2013 until the present day as an attorney in the international arbitration practice of the law firm Norton Rose Fulbright LLP.” The Respondent requested to be informed of the reasons why Ms. Ntashamaje had access to the case’s documents and on what basis she had such access.
24. On July 22, 2016, Mr. Fortier asked the Centre to transmit to the Parties and to the Two Members a letter providing explanations to the questions posed by Respondent in its July 8, 2016 letter (“**Mr. Fortier’s Explanations of July 22, 2016**”).
25. On July 25, 2016, the Respondent proposed the disqualification of Mr. Fortier (the “**Third Proposal for Disqualification**”).
26. On July 26, 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 Third Proposal for Disqualification.
27. On August 2, 2016, the Two Members set a timetable for the Parties’ submissions and Mr. Fortier’s explanations. In accordance with such timetable, the Claimants filed a submission on August 5, 2016 (the “**Claimants’ Reply of August 5, 2016**”) and Mr. Fortier furnished his explanations on August 8, 2016 (“**Mr. Fortier’s Explanations of August 8, 2016**”).
28. On August 12, 2016, both Parties submitted additional observations on the Third Proposal for Disqualification (“**Respondent’s Additional Comments**” and “**Claimants’ Additional Comments**”, respectively).

C. SUMMARY OF THE PARTIES’ POSITIONS

1. Venezuela’s Proposal for Disqualification

29. Venezuela argues that Mr. Fortier should be disqualified in light of the two following facts: (i) Mr. Fortier employs as an assistant Ms. Myriam Ntashamaje, who in her LinkedIn profile claims to have worked at the firm Norton Rose Fulbright LLP since August 2013; and (ii) Ms. Ntashamaje, as well as Mr. Fortier’s secretary Ms. Linda Tucci,³ receive their salary and other employment benefits from the company Services OR LP/SEC, an entity set up by Norton Rose OR LLP (now Norton Rose Fulbright LLP), for the purpose of providing staff and administrative support services to Norton Rose Fulbright LLP.
30. According to Venezuela, these two facts prove the existence of a professional and contractual link between Mr. Fortier and Norton Rose Fulbright LLP. Such link “provides major financial benefits to Mr. Fortier, as he obtains a significant comparative advantage by being able to manage the benefits of his employees at Cabinet Fortier through a company operating at a much larger scale with the employees of Norton Rose Fulbright LLP.”⁴ Venezuela further argues that “it cannot be assumed—and, in any event, Mr. Fortier has not provided any sort of evidence to prove it—that Mr. Fortier obtains [such] financial benefit [...] without giving anything in return, free of charge.”⁵
31. Venezuela contends that, contrary to what is stated in the *ConocoPhillips v. Venezuela* Challenge Decision VI,⁶ Services OR LP/SEC is not an independent company in which Norton Rose Fulbright LLP and Cabinet Fortier merely coincide as clients. Venezuela argues, instead, that it is impossible to separate the two entities for the purposes of the legal analysis of this challenge, since Services OR LP/SEC “was created by Norton Rose OR (now Norton Rose Fulbright LLP) to purvey certain labor services to its own employees, with the same legal address of Norton Rose Fulbright LLP and whose legal representative is Norton Rose Fulbright LLP.”⁷
32. Venezuela states that Norton Rose Fulbright LLP is the firm “with the largest number of claims against the Republic at the international level.”⁸ Furthermore, Respondent stresses

³ And also Mr. Fortier’s former Secretary Ms. Chantal Robichaud until July 2013.

⁴ Respondent’s Additional Comments, ¶14. See also, Third Proposal for Disqualification, ¶7.

⁵ Respondent’s Additional Comments, ¶14.

⁶ CLA-297.

⁷ Respondent’s Additional Comments, ¶15.

⁸ Third Proposal for Disqualification, ¶16.

that in this proceeding in particular “there is a *direct, specific and current* participation of Norton Rose Fulbright LLP against the Republic in the local expropriation proceeding *with regard to the same measures* that are subject of the international arbitration.”⁹ For Venezuela, this means that “any decision that Mr. Fortier takes with respect to Claimants’ claim relative to the expropriation proceeding in this international arbitration shall have a direct impact on the same issue in the national proceeding, and vice versa.”¹⁰

33. In this regard, Venezuela adds that “the risk that an adverse decision in these proceedings to the interest of Norton Rose Fulbright LLP would pose to Mr. Fortier, and the impact that this could have on the conditions under which his assistants collaborate with him in his practice as arbitrator—even regarding these same proceedings—, would cause any impartial third party to have doubts about Mr. Fortier’s impartiality in this case.”¹¹
34. Finally, in response to Claimants’ argument that Venezuela’s Third Proposal for Disqualification is abusive, Venezuela notes that: (i) the responsibility for the successive challenges is exclusively Mr. Fortier’s, since he failed to reveal the information regarding his professional relationship with Norton Rose Fulbright LLP; (ii) Respondent proceeded cautiously and prudently in this case, first consulting the Secretariat; and (iii) the fact that other challenges by Venezuela in other proceedings have or have not been accepted is irrelevant to determine if there has been an abuse of process in this case.¹²

2. Claimants’ Observations

35. Claimants request that the Third Proposal for Disqualification be rejected and that Respondent be ordered to pay the costs, legal fees and any other expenses incurred by the Claimants in connection with it.¹³

⁹ Respondent’s Additional Comments, ¶19. See also, Third Proposal for Disqualification, ¶¶16-18, in which Venezuela explains that Norton Rose Fulbright LLP represents the company UNIMIN de Venezuela S.C.S. “in the local expropriation proceedings in which it is litigating against various measures challenged in this arbitration –in particular, a provisional measure and a legal notice ordered in Venezuela.”

¹⁰ Respondent’s Additional Comments, ¶21. See also Third Proposal for Disqualification, ¶21.

¹¹ Third Proposal for Disqualification, ¶21.

¹² Respondent’s Additional Comments, ¶¶25-30.

¹³ Claimants’ Reply of August 5, 2016, ¶¶23-24.

36. Claimants state that Articles 14(1) and 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules set a high threshold for the disqualification of an arbitrator. Citing previous challenge decisions, the Claimants assert that such standard consist of the objective and stringent requirement that there be a “manifest” lack of the qualities set forth in Article 14(1) of the ICSID Convention, which means an “evident” or “obvious” lack of such qualities, excluding “reliance on speculative assumptions or arguments.”¹⁴
37. Claimants quote the paragraphs of the Decision on the Second Proposal for Disqualification and of the *ConocoPhillips v. Venezuela* Challenge Decision VI in which the legal standard for arbitration disqualification is described and argue that “on any view of the facts, the application of these standards cannot possibility lead to the disqualification of Mr. Fortier.”¹⁵
38. Claimants contend that the benefits provided by Services OR LP/SEC are administrative in nature and do not give rise to any partnership or professional links between Mr. Fortier and Norton Rose Fulbright LLP.¹⁶ Claimants further note that Respondent’s Third Proposal for Disqualification is virtually identical to its July 22, 2016 proposal to disqualify Mr. Fortier in *ConocoPhillips v. Venezuela*, as well as to previous disqualifications proposals filed by the Respondent against Mr. Fortier.¹⁷
39. In that regard, Claimants sustain that the conclusion reached by President Zuleta and Professor Bucher in the *ConocoPhillips v. Venezuela* Challenge Decision VI to reject Mr. Fortier’s disqualification proposal is unassailable and should equally apply to this case.¹⁸ Claimants highlight in particular that, “[a]s observed by President Zuleta and Professor Bucher, the administrative nature of the relationship between Arbitrator Fortier and Services OR LP/SEC (a legal entity distinct from Norton Rose OR LLP and/or Norton

¹⁴ Claimants’ Reply of August 5, 2016, ¶¶6-7.

¹⁵ Claimants’ Reply of August 5, 2016, ¶¶8-10.

¹⁶ Claimants’ Reply of August 5, 2016, ¶12.

¹⁷ Claimants’ Reply of August 5, 2016, ¶14.

¹⁸ Claimants’ Reply of August 5, 2016, ¶15.

Rose Fulbright LLP) ‘does not reveal any ties or influence between the two firms in respect of their legal work and responsibilities.’”¹⁹

40. Claimants also argue that, even if Ms. Ntashamaje were “an employee of Norton Rose Fulbright LLP (which does not appear to be the case), that still would not lead a reasonable third person with knowledge of that fact to the conclusion that Arbitrator Fortier manifestly lacks independence and impartiality,” since Ms. Ntashamaje role as a secretary “is purely administrative and plays no part in Arbitrator Fortier’s decision-making; she simply has no influence on Arbitrator Fortier’s independence or impartiality in this case.”²⁰
41. In response to Respondent’s arguments regarding Norton Rose Fulbright LLP’s involvement in the local expropriation proceedings in Venezuela, Claimants contend that the Two Members already considered and rejected such arguments.²¹ Referring to their reply to Respondent’s Second Disqualification Proposal,²² Claimants merely note that Norton Rose Fulbright LLP’s client is not a party to those local proceedings and was only included due to Respondent’s procedural mistake.²³
42. Claimants further argue that Respondent’s Third Proposal for Disqualification “is only the most recent instance of the Respondent’s procedural misconduct and abuse of its rights,” noting that, “in the context of either ICSID or ICSID Additional Facility proceedings in the last six years alone, the Respondent has requested the disqualification of an arbitrator in no less than 24 occasions” and only one resulted in the disqualification of an arbitrator.²⁴

D. EXPLANATIONS FURNISHED BY MR. FORTIER

43. Mr. Fortier’s Explanations of July 22, 2016 are transcribed below:

Dear Marisa,

¹⁹ Claimants’ Reply of August 5, 2016, ¶16.

²⁰ Claimants’ Reply of August 5, 2016, ¶17.

²¹ Claimants’ Reply of August 5, 2016, ¶18.

²² Claimants’ Reply to the Respondent’s Proposal for Disqualification of Arbitrator Yves Fortier, of March 9, 2016, ¶¶22-24.

²³ Claimants’ Reply of August 5, 2016, ¶19.

²⁴ Claimants’ Reply of August 5, 2016, ¶¶21-22.

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

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

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

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

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

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

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

Myriam Ntashamaje

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

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

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

Yours sincerely,

Yves Fortier QC

Montreal, 22 July 2016

44. Mr. Fortier's Explanations of August 8, 2016 read as follows:

Gentlemen,

In accordance with the schedule which you have fixed, I now provide you with brief additional explanations.

- 1) As to the facts, they are set out in my email of 22 July 2016 to Ms. Marisa Planells-Valero which is part of the record with all documents therein referred to.
- 2) Also in the record is the Decision of 26 July 2016 of my co-arbitrators in ICSID Case No. Arb/07/30 ("the Decision") where the proposal of Venezuela for my disqualification based on the same grounds as those invoked by the Respondent in the present proposal was dismissed.
- 3) Also in the record is your Reasoned Decision of 28 March 2016 rejecting the earlier proposal made by the Respondent to disqualify me as arbitrator in this case. Many of the reasons in that Decision are very pertinent to the present proposal (see in particular paragraph 46).

- 4) As the Respondent maintains again that I continue to have professional links with Norton Rose Fulbright LLP “up to date” (paragraph 6, see also paragraph 15), I will affirm again that I resigned as a partner of Norton Rose OR on 31 December 2011 and severed all of my professional links with that firm on that date.
- 5) I reiterate that the service arrangement between Cabinet Yves Fortier and Services OR LP/SEC with respect to the services of my secretaries since 1 January 2012 does not in any way cause my reliability for independent judgment and impartiality in the present case to be put into question.

Respectfully,

Yves Fortier QC

E. ANALYSIS

45. The Two Members refer to their analysis of the legal standard for the disqualification of an arbitrator in their Decision on the Second Proposal for Disqualification²⁵ and adopt that analysis for their consideration of the Third Proposal for Disqualification herein.
46. The Respondent has alleged two grounds for the disqualification of Mr. Fortier: (i) Mr. Fortier employs as an assistant Ms. Myriam Ntashamaje, who in her LinkedIn profile claims to have worked at the firm Norton Rose Fulbright LLP since August 2013; and (ii) Ms. Ntashamaje, as well as Mr. Fortier’s other secretary, receive their salary and other employment benefits from the company Services OR LP/SEC, an entity set up by Norton Rose OR LLP (now Norton Rose Fulbright LLP), for the purpose of providing staff and administrative support services to Norton Rose Fulbright LLP.
47. The Two Members will address each ground in turn.

1. The First Ground

48. The factual predicate of the first ground asserted by the Respondent is that: (1) Ms. Myriam Ntashamaje has been an employee of Norton Rose Fulbright LLP since August 2013; (2) Norton Rose Fulbright LLP is acting in a large number of cases against the Respondent

²⁵ Decision on the Second Proposal for Disqualification, ¶¶25-34.

and parties related to the Respondent; (3) Ms. Myriam Ntashamaje has been assisting Mr. Fortier in the present arbitration and had access to the Box folder containing the electronic record of this arbitration.

49. The Two Members acknowledge at the outset that if these facts were to be true then a serious question would arise concerning the integrity of the information exchanged in these proceedings as it would have to be assumed that a law firm, which is not a counsel of record in this case, was able to access the record of the arbitration through the employment of Ms. Myriam Ntashamaje and her access to the Box folder.
50. The second and third factual premises set out above are not in dispute. In relation to the first premise, the Respondent has referred to a LinkedIn page that appears to be maintained by Ms. Myriam Ntashamaje herself which states under the rubric “Experience” that she has occupied the following position from August 2013 to the present: “Legal support (International Arbitration), Norton Rose Fulbright”.
51. Given the contents of this webpage in the public domain, the Two Arbitrators consider that it was legitimate and proper for the Respondent to have sought Mr. Fortier’s clarification as to the position of Ms. Myriam Ntashamaje on July 8, 2016. Mr. Fortier then provided the requested clarification on July 22, 2016, which, insofar as relevant to this First Ground, was as follows: “Myriam has never worked for Norton Rose Fulbright and is not an attorney. She is a secretary who assists me clerically in my arbitration files including the present one. The entry in her LinkedIn profile is inaccurate.”
52. Having received this clarification from Mr. Fortier, the Two Members do not consider that the Respondent was justified in taking its next steps. The Respondent proceeded to file a challenge to Mr. Fortier on the basis that Ms. Myriam Ntashamaje was indeed an employee of Norton Rose Fulbright LLP from August 2013 onwards and/or that it made no difference whether or not this was a “mistake” because the relevant perspective for adjudging the impartiality of an arbitrator is that of a third party, who would conclude on the basis of the “evidence” that Ms. Myriam Ntashamaje was not mistaken at all.²⁶

²⁶ Third Proposal for Disqualification, ¶¶11-12.

53. The Two Members have no reason to doubt the veracity of Mr. Fortier's clarification and the Respondent has not furnished any evidence to undermine it. As to the perspective of a third party, the question can be stated rather simply: would a third party in possession of Ms. Myriam Ntashamaje's LinkedIn page and Mr. Fortier's subsequent clarification in relation to the information displayed on that LinkedIn page conclude that Ms. Myriam Ntashamaje had committed an error, or would that person conclude that Mr. Fortier has deliberately misrepresented the true state of affairs concerning Ms. Myriam Ntashamaje's employment to the Two Members, the Parties and ICSID in full knowledge that his clarification will be recorded in a decision that will be made public and that the contents of his representation are easily susceptible to verification by the public?
54. Once the hypothetical question to the reasonable third person is stripped of innuendo and posed in a direct and transparent fashion, there can be no doubt about what the third person's response would be: a reasonable third person would conclude that Ms. Myriam Ntashamaje had committed an error on her LinkedIn page and that the true state of affairs is that she has been employed by Cabinet Yves Fortier throughout the relevant period.
55. The Two Members dismiss the First Ground of the Respondent's Third Proposal for Disqualification.

2. The Second Ground

56. The Respondent's second ground relates to the existence of a relationship between Mr. Fortier and Norton Rose Fulbright LLP that arises as a result of Mr. Fortier's service arrangement with Services OR LP/SEC following his resignation as a partner of Norton Rose OR LLP on December 31, 2011. Services OR LP/SEC is a distinct legal entity that was established by Norton Rose OR LLP (the predecessor firm to Norton Rose Fulbright LLP) for the purpose of providing staff and administrative support services to Norton Rose OR LLP. (The Two Members assume for the purposes of this application that Services OR LP/SEC continue to provide services to Norton Rose Fulbright LLP.) When Mr. Fortier resigned from Norton Rose OR LLP, his two secretaries at the law firm departed with him

to Cabinet Yves Fortier. In order to ensure continuity in respect of their existing insurance entitlements and other benefits, however, they continued to be paid by Services OR LP/SEC. Services OR LP/SEC in turn presented Mr. Fortier with monthly invoices for their salaries and the cost of their incidental benefits which Mr. Fortier has settled since January 1, 2012. Upon the resignation of one of the two secretaries in July 2013, Mr. Fortier then retained Ms. Myriam Ntashamaje in August 2013 on the basis of the same arrangement with Services OR LP/SEC so that both secretaries would be treated equally.

57. In assessing the significance of the relationship between Norton Rose Fulbright LLP and Mr. Fortier for the purposes of adjudging the Respondent's Third Proposal for Disqualification, the Two Members recall their observations in their Decision on the Respondent's Second Proposal for Disqualification in respect of an understanding between Norton Rose OR LLP and Mr. Fortier that lawyers of Norton Rose OR LLP serving as assistants to tribunals over which Mr. Fortier was presiding could continue to serve in that capacity after the departure of Mr. Fortier from the law firm:

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.²⁷

58. In its Third Proposal for Disqualification, the Respondent refers to this reasoning in the Two Members' Decision on the Second Proposal for Disqualification and submits that:

[T]he new information disclosed on 22 July 2016 leaves no room for doubt as to the fact that the relationship between Mr. Fortier and Norton Rose Fulbright LLP is located near the financial end of the spectrum of possible connections, which –according to co-arbitrators Shin and Douglas– would cause a reasonable third party to have doubts about Mr. Fortier's impartiality in these proceedings. This is so because Mr. Fortier has a contractual and economic relationship with Norton Rose Fulbright LLP, which he failed to disclose to the parties, and from which he obtains an economic benefit presumably in exchange for some sort of consideration.²⁸

59. The Two Members do not agree with the Respondent's analysis. There is no element of the relationship between Mr. Fortier and Services OR LP/SEC that would cause a reasonable third party to conclude that Mr. Fortier is manifestly lacking in the ability to act impartially in this arbitration. It cannot possibly be said that the services arrangement between Mr. Fortier and Services OR LP/SEC gives Mr. Fortier a direct financial interest in the activities of Norton Rose Fulbright LLP (activities which include acting against the Respondent in international and domestic proceedings). Services OR LP/SEC invoices Mr. Fortier for the salaries and incidental benefits paid by Services OR LP/SEC to his secretaries and Mr. Fortier has paid those invoices on a monthly basis since January 1, 2012. The relationship between Mr. Fortier and Services OR LP/SEC is thus financially neutral.
60. The Two Members accept that Mr. Fortier benefits from the convenience of maintaining this arrangement with Services OR LP/SEC and that presumably it is within the power of Norton Rose Fulbright LLP to terminate that arrangement even if Services OR LP/SEC is a separate legal entity. The Two Members also accept for the purposes of this application that Norton Rose Fulbright LLP has an indirect financial interest in the success of the

²⁷ Decision on the Respondent's Second Proposal for Disqualification, ¶46.

²⁸ Third Proposal for Disqualification, ¶24.

claimants it represents against the Respondent and its affiliated entities. But once again the Two Members ask whether a reasonable third person could conclude that the convenience of maintaining this arrangement between Mr. Fortier and Services OR LP/SEC 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? The Two Members conclude that a reasonable third person would not entertain serious doubts about Mr. Fortier's capacity to exercise independent and impartial judgment with knowledge of these facts.

61. Finally, the Respondent, as in the Second Proposal for Disqualification, asserts that Norton Rose Fulbright LLP is acting for a company called UNIMIN in domestic litigation in Venezuela "which questions the supposed lack of determination of the expropriated assets and the lack of due process in the expropriation proceeding debated in this arbitration".²⁹ The Claimants deny this: they maintain that Norton Rose Fulbright LLP's client is not a party to those local proceedings and was only included due to Respondent's procedural mistake.³⁰ The Two Members cannot resolve this contested issue in the present context as it would necessitate making findings of fact in relation to the nature and scope of the domestic proceedings. The Two Members instead have assumed that the Respondent's assertion is accurate for the purposes of determining this Third Proposal for Disqualification and have found that this additional circumstance 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.

F. COSTS

62. As the Two Members have already noted, it was legitimate and proper for the Respondent to seek Mr. Fortier's clarification in respect of the employment status of Ms. Myriam Ntashamaje in the circumstances. The same cannot be said for the Respondent's decision, once having received Mr. Fortier's clarification, to proceed to file its Third Proposal for Disqualification. For these reasons the Two Members have decided that the Respondent

²⁹ Respondent's Additional Comments, ¶20.

³⁰ Claimants' Reply of August 5, 2016, ¶19, ¶21-22.

shall be responsible for the costs associated with this Third Proposal for Disqualification and that an order to that effect will be made in the final award to be issued by the Tribunal in these proceedings.

G. DECISION

63. For the foregoing reasons, the Two Members:

- (1) Decide to dismiss the Respondent's Third Proposal for Disqualification, and
- (2) Decide that the Respondent shall be responsible for the costs associated with the Third Proposal for Disqualification 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