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November 9, 2015

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:

Respondent submits this proposal to disqualify Mr. Yves Fortier as arbitrator in the above-referenced case in accordance with Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules, for the following reasons:

1. As you know, we have been concerned since 2011 about Mr. Fortier's relationship with Norton Rose, which, through its merger with Macleod Dixon in 2011, became the firm more adverse to Venezuela and Petróleos de Venezuela, S.A. ("PDVSA") and its affiliates than any other in the world.[1] You will also recall our concern regarding the materiality of the connections between Mr. Fortier and Norton Rose attorneys, including Mr. Martin Valasek, given that (i) Norton Rose represented ConocoPhillips companies in cases against PDVSA arising out of the very same association agreements that are involved in this case and (ii) Mr. Fortier's ongoing relationship with Mr. Valasek was in connection with cases that involved some of the same critical issues that are involved in this case, such as the proper

[1] *See* 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.").

valuation date in the case of expropriation, at the same time that those issues were being litigated here. [2]

2. In connection with the first proposal to disqualify Mr. Fortier, he stated that he would sever his ties with Norton Rose by the end of 2011, but that "[t]here are members of Norton Rose OR who have assisted me in certain files in which I serve as an arbitrator – e.g. by acting as Administrative Secretary to the Tribunal – whom I may continue to call upon for assistance after 1 January 2012."[3] In the second challenge, which was spurred by reports of Mr. Valasek's role in the *Yukos* cases, the Chairman of the ICSID Administrative Council noted Mr. Fortier's above-quoted 2011 disclosure and stated that there was "no evidence" that Mr. Valasek "acted beyond his stated role" as a tribunal assistant to Mr. Fortier in the *Yukos* cases.[4]

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[2] *See* Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated October 5, 2011; Letter from Respondent to Judge Keith and Prof. Abi-Saab, dated October 13, 2011 ("Respondent's October 13, 2011 Letter"); Letter from Respondent to Judge Keith and Prof. Abi-Saab, dated October 24, 2011; Letter from Respondent to Judge Keith and Prof. Abi-Saab, dated December 1, 2011; Letter from Respondent to the Tribunal, dated January 29, 2015; Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated February 6, 2015 ("Respondent's February 6, 2015 Letter"); Letter from Respondent to Judge Keith and Prof. Abi-Saab, dated February 10, 2015; Letter from Respondent to Judge Keith and Prof. Abi-Saab, dated February 16, 2015 ("Respondent's February 16, 2015 Letter"); Respondent's Submission on the Proposal to Disqualify Judge Keith and Mr. Fortier, dated April 2, 2015 ("Respondent's April 2, 2015 Submission"); Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated April 23, 2015 ("Respondent's April 23, 2015 Letter"); E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated June 18, 2015 ("Respondent's June 18, 2015 E-mail").

[3] Letter from Mr. Fortier to Judge Keith and Prof. Abi-Saab, dated October 18, 2011 ("Mr. Fortier's October 18, 2011 Letter"), p. 2 (emphasis added). Initially, Mr. Fortier saw no problem whatsoever with the merger, stating: "It has been brought to my attention as a result of the conflict checks conducted as part of the due diligence in relation to this transaction that the Caracas office of Macleod Dixon LLP, Despacho de Abogados miembros de Macleod Dixon, S.C., has provided in the past, and continues to provide today, legal services to one of the parties to this arbitration, namely ConocoPhillips Company. The Caracas office is also acting adverse to the interests of the Bolivarian Republic of Venezuela in certain matters, including one where the Bolivarian Republic of Venezuela is the respondent in an ICSID case filed by Universal Compression International Holdings S.L.U. against Venezuela. I understand that the Caracas office is also acting on behalf of ConocoPhillips Company in ICC cases involving the Venezuelan state-owned petroleum company, Petroleos de Venezuela, S.A. 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. I have no knowledge of the issues raised in any of the above matters and have had no communication regarding these matters other than as strictly required for the purposes of this disclosure. Nevertheless, I am informed by the General Counsel of Norton Rose OR LLP that, out of an abundance of caution, formal measures are immediately, well before the effective date of the merger, being put into place within Norton Rose OR LLP and Macleod Dixon LLP, in 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." E-mail from Mr. Fortier to Meg Kinnear, Secretary-General of ICSID, dated October 4, 2011. It was only after Respondent proposed his disqualification that Mr. Fortier decided to resign from Norton Rose.

[4] Decision on the Proposal to Disqualify a Majority of the Tribunal, dated July 1, 2015, ¶¶ 66, 94.

3. On October 20, 2015, an article was published in *Global Arbitration Review* ("GAR") reporting on a filing by Russia in the District Court in The Hague in proceedings to set aside the *Yukos* awards, in which Russia presented an expert report concluding, with a 95% to 98% degree of certainty, that Mr. Valasek had written most of the substantive portions of the *Yukos* awards, particularly the portions containing the tribunal's "reasoning and conclusions."[5] The article also referred to Russia's observations in its submission to the court in The Hague, which was made public in a filing in Washington, D.C. in connection with a *Yukos* enforcement proceeding. Russia stated:

> Dr Chaski's analysis confirms that the substantive role of Mr Valasek in preparing the Final Awards not only went much further both than the description of his responsibilities by the Tribunal to the parties and the information provided to the parties by the Tribunal regarding his tasks, but also much further than is legally permitted, certainly without unambiguous, prior transparency and agreement by the parties. It is sad to have to conclude that the Chairman of the Tribunal, Mr Fortier, in April 2015 made an untrue statement about this role of his former assistant and partner in a filing Mr Fortier made in the ICSID case '*Conoco/Venezuela*', in which a challenge was filed against him, having regard to, among other things, his cooperation with Mr Valasek in the [*Yukos*] Arbitrations: "As Assistant to the Tribunals during nearly 10 years, Mr Valasek undertook numerous tasks assigned to him by the Tribunals, including summarizing evidence, researching specific issues of law and organizing the massive case file. Notwithstanding any press reports to the contrary and the speculation of the Respondent [Venezuela], Mr Valasek was not involved and did not play any role in the Tribunal's decision-making process."[6]

4. Shortly thereafter, Respondent obtained a copy of the expert report in question from the federal court file in Washington, D.C., together with a copy of the declaration of Prof. Albert Jan van den Berg, which attached Russia's filing in the Dutch proceeding. Respondent then immediately wrote to the Tribunal, attaching the above-referenced GAR article and the documents obtained from the court file in Washington, D.C., including the expert report

[5] Letter from Respondent to the Tribunal, dated October 26, 2015 ("Respondent's October 26, 2015 Letter"), Annex 1, Alison Ross, *Valasek Wrote Yukos Awards, Says Linguistics Expert*, GLOBAL ARBITRATION REVIEW, October 20, 2015, *available at* www.globalarbitrationreview.com, p. 3.

[6] Respondent's October 26, 2015 Letter, Annex 3, Declaration of Professor Albert Jan van den Berg, dated October 21, 2015, *Hulley Enterprises Ltd. et al. v. Russian Federation*, Case No. 1:14-cv-01996-ABJ, U.S. District Court, District of Columbia, Exhibit E, Statement of Reply of The Russian Federation, dated September 16, 2015, *The Russian Federation v. Veteran Petroleum Limited, et al.*, District Court of The Hague, ¶ 547 (emphasis added).

on the authorship of the *Yukos* decisions.[7] Respondent pointed out that "if the expert report regarding the authorship of the *Yukos* decisions is correct, it would not comport with Mr. Fortier's disclosure in this case."[8] Therefore, Respondent requested clarification from Mr. Fortier on this point.[9]

5. On October 30, 2015, Mr. Fortier responded as follows:

> I have seen the Respondent's letters of 26 and 28 October to the Tribunal and attachments. I have also seen the Claimants' letter of 28 October.
>
> As you know, the Yukos tribunals are *functus* officio and not parties to the set aside proceeding in the Yukos cases presently pending in the District Court of The Hague or the proceeding relating to the Yukos awards in the United States District Court for the District of Columbia. Therefore, I cannot comment on any evidence which may have been submitted to these two courts.
>
> As for the "clarification" which the Respondent seeks, I reiterate what I wrote in paragraph 6 of my Explanations of 16 April 2015:
>
> > "[…] Mr. Valasek undertook numerous tasks assigned to him by the Tribunals, including summarizing evidence, researching specific issues of law and organizing the massive case file. Notwithstanding any press reports to the contrary and the speculation of the Respondent, Mr. Valasek was not involved and did not play any role in the Tribunal's decision-making process." This is a true and correct description of Mr. Valasek's role in the Yukos cases.
>
> I note that, in its letter of 28 October 2015, the Respondent refers again to "[my] ongoing relationship with Norton Rose." In this connection, I reiterate again what I wrote in paragraph 2 of my Explanations of 16 April 2015:

[7] Respondent's October 26, 2015 Letter, Annex 2, Expert Report Regarding Authorship of the Final Awards prepared by Carole E. Chaski, Ph.D., dated September 11, 2015, *Hulley Enterprises Ltd. et al. v. Russian Federation*, Case No. 1:14-cv-01996-ABJ, U.S. District Court, District of Columbia.

[8] Letter from Respondent to the Tribunal, dated October 30, 2015 ("Respondent's October 30, 2015 Letter"), p. 2.

[9] Respondent's October 26, 2015 Letter; Letter from Respondent to the Tribunal, dated October 28, 2015.

> "I affirm on my conscience and honour that I severed all of my professional links with Norton Rose as of 31 December 2011."[10]

6. The same day, Respondent wrote again to the Tribunal, pointing out that the fact that the *Yukos* tribunals were *functus officio* and not parties to the *Yukos* court proceedings was irrelevant to the question raised in Respondent's October 30, 2015 letter regarding Mr. Valasek's role in the *Yukos* cases.[11] Respondent reiterated that if the expert report regarding the authorship of the *Yukos* awards is correct, it would not comport with Mr. Fortier's disclosure in this case. As further stated in that letter: "Equally important is the right of Respondent to have full and accurate disclosure of all facts that it considers relevant to an arbitrator's impartiality."[12] Respondent therefore again requested Mr. Fortier to provide "a clear answer to the question whether Mr. Valasek did in fact write major portions of the *Yukos* awards."[13]

7. On November 6, 2015, in its letter to the Tribunal regarding the upcoming schedule, Respondent reminded the Tribunal that it was still awaiting a clear response from Mr. Fortier to the question raised in its October 26 and October 30, 2015 letters. Later that same day, Respondent received Mr. Fortier's response, which stated as follows:

> I acknowledge receipt of the Respondent's letter of 30 October 2015.

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[10] E-mail from ICSID to the Parties, dated October 30, 2015, forwarding communication from Mr. Fortier of the same date.

[11] Respondent's October 30, 2015 Letter, pp. 1-2.

[12] *Id.*, p. 2. Respondent referred to the Explanation to General Standard 3(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), which states: "The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view." *Id.*, pp. 2-3 (emphasis added); Respondent's October 26, 2015 Letter, Annex 4, IBA Guidelines, Explanation to General Standard 3(a), p. 7. Rule 6 of the ICSID Arbitration Rules provides for a continuing obligation on the part of ICSID arbitrators to disclose any "circumstance that might cause my reliability for independent judgment to be questioned by a party," which likewise emphasizes the importance of viewing the issue of disclosure from the point of view of the individual parties to the arbitration. *See* Respondent's February 16, 2015 Letter, Annex 3, Karel Daele, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION (Kluwer Law International 2012), p. 9, ¶¶ 1.023-1.024 ("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.") (emphasis in original).

[13] Respondent's October 30, 2015 Letter, p. 2.

> I have answered the Respondent's question in my letter of 30 October. Mr Valasek's role in the Yukos cases was as I described it in my previous explanations of 16 April 2015 and 30 October 2015.
>
> The Respondent says it is irrelevant that the *functus officio* Yukos tribunals are not parties to the Yukos court proceedings. I beg to differ. If I were to assert that "the expert report regarding the authorship of the Yukos decision" was incorrect, I would be commenting on evidence which has been submitted to these two courts and I would be breaching the confidentiality of the tribunals' deliberations. This, I cannot do.
>
> With the greatest of respect for Respondent's Counsel, I will now put an end to our correspondence.[14]

8. Mr. Fortier makes two points in this latest response. First, he states that he cannot comment on evidence that has been submitted to the courts in The Hague and Washington, D.C. We do not understand why. We are not aware of any legal prohibition in that regard, and in any event, an arbitrator cannot invoke such grounds to refuse to divulge information that a party considers relevant to the arbitrator's impartiality and remain in the case. If the arbitrator is not in a position to make full and accurate disclosure, then the appropriate course would be resignation from the tribunal, not withholding of information.[15] Moreover, Respondent is not interested in Mr. Fortier's particular comments on the expert report filed in the *Yukos* court proceedings. It asked Mr. Fortier a straightforward question of fact that is definitely within his knowledge: Did Mr. Valasek write major portions of the *Yukos* awards, including the tribunals' reasoning and conclusions? That question can be answered without reference to the expert report. It may have been spurred by news of the expert report, but Respondent is only concerned with the ultimate issue of whether Mr. Fortier's disclosure in this case was full and accurate.

9. Mr. Fortier's second point is that if he commented on the expert report, he would be breaching the confidentiality of the *Yukos* tribunals' deliberations. However, Respondent does not see how informing it that the expert report is "incorrect" in concluding that Mr. Valasek wrote the reasoning and conclusions of the *Yukos* awards would breach the confidentiality of the *Yukos* tribunals' deliberations. The purpose of confidentiality is to protect the views exchanged among the arbitrators during deliberations, not to allow withholding of information unrelated to

[14] E-mail from ICSID to the Parties, dated November 6, 2015, forwarding communication from Mr. Fortier of the same date.

[15] As stated in the Explanation to Standard 3(d) of the IBA Guidelines: "In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign." Respondent's October 26, 2015 Letter, Annex 4, IBA Guidelines, Explanation to General Standard 3(d), p. 9.

the deliberations. In fact, Mr. Fortier has already provided information concerning Mr. Valasek's role in the *Yukos* cases ("summarizing evidence, researching specific issues of law and organizing the massive case file"), without any confidentiality concerns. The problem here is not confidentiality of the deliberative process; it is the lack of full and accurate disclosure. And, as noted above, even if confidentiality applied, which is not the case, the solution would not be to withhold the information requested; it would be to resign from this Tribunal.

10. At the end of Mr. Fortier's message of November 6, 2015, he states that he "will now put an end to our correspondence," presumably meaning that he will not be answering Respondent's direct question or providing any further clarification. Under the circumstances, Respondent is constrained to propose the disqualification of Mr. Fortier on the ground that he has made incomplete, inaccurate and/or misleading statements concerning his ongoing relationship with Norton Rose attorneys. As pointed out in our letter of October 30, 2015, there is an obvious and material distinction between: (i) everything Mr. Fortier has disclosed about the role of Norton Rose attorneys in his cases (including both the role he described in his original disclosure in October of 2011, when he stated that he may "continue to call upon" Norton Rose attorneys who have assisted him in certain files, "e.g. by acting as Administrative Secretary to the Tribunal," and the tasks of Mr. Valasek that Mr. Fortier described in his explanations submitted on April 16, 2015 and reiterated on October 30, 2015); and (ii) writing the reasoning and conclusions of the awards in the *Yukos* cases.

11. The distinction between performing the tasks of an administrative secretary or assistant, on the one hand, and writing the substantive portions of an award, on the other, has been widely recognized in the international arbitration community. For example, Prof. Klaus Peter Berger has written:

> For many, if not the majority of users of arbitration, it is difficult to distinguish 'writing' the decision from 'making' the decision, since it is only through writing, and in doing so, choosing between different ways of expressing one's views, that one can really make sure that one has not committed logical and other errors when reaching a decision. This means that writing the award is an inextricable part of the tribunal's highly personal decision-making duty owed to the parties.[16]

12. Another well-known commentator, Mr. Gary Born, states:

> In practice secretaries frequently perform (relatively administrative) legal research and organisation of evidence, and occasionally

[16] Respondent's October 30, 2015 Letter, Annex 1, Klaus Peter Berger, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION (3rd ed., Kluwer Law International 2015), ¶ 27.17 (emphasis added).

> provide assistance in drafting orders or parts of awards, which cannot help but have at least an indirect influence on the tribunal's decision-making. Nonetheless, and although there is some controversy as to the precise scope of a secretary's legitimate functions, it is widely agreed that the secretary must not assume the tribunal's functions of hearing the evidence, evaluating the legal arguments, deciding the case, or preparing a reasoned award.[17]

13. Messrs. Polkinghorne and Rosenberg have also written the following:

> Unlike procedural orders and non-substantive portions of awards, the secretary may not draft substantive portions of awards. The substantive portion of an award goes to the heart of the arbitration and hence its drafting is an essential duty of the arbitrators. The *intuiti personae* principle thus dictates that this task must remain with the arbitrators. There exists too great a risk that the reasoning or dispositive section of the award might bear the secretary's perspective and hence improperly influence the arbitrators' evaluation.[18]

14. Thus, there can be no doubt that writing the reasoning and conclusions of an award is not equivalent to or of the same nature as the performance of administrative tasks or even "summarizing evidence, researching specific issues of law and organizing the massive case file."[19] The only remaining question, therefore, is whether as a matter of fact Mr. Valasek's activity in the *Yukos* cases did indeed include writing the reasoning and conclusions of the *Yukos* awards. That is the question that we have posed to Mr. Fortier. The answer is obviously within his personal knowledge and it does not take long to say either "yes" or "no." Since he has refused to answer, we assume, and we believe a reasonable third party observer would assume, that the answer is "yes," which means that the description provided by Mr. Fortier on April 16, 2015 and reiterated on October 30, 2015 did not fulfill his duty to provide full and accurate disclosure in this case.

15. The foregoing should be viewed against the background of incomplete, inaccurate and/or misleading disclosures made by Mr. Fortier from the beginning concerning his relationship with Norton Rose attorneys. For example:

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[17] **Annex 1**, Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION (2nd ed., Kluwer Law International 2014), pp. 2044-2045 (emphasis added).

[18] **Annex 2**, Michael Polkinghorne and Charles B. Rosenberg, *The Role of Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, 8(2) DISPUTE RESOLUTION INTERNATIONAL 107 (October 2014), p. 126 (emphasis added).

[19] Mr. Fortier's Explanations, dated April 16, 2015.

- Mr. Fortier's disclosure on October 18, 2011 that "[t]here are members of Norton Rose OR who have assisted me in certain files in which I serve as an arbitrator – e.g. by acting as Administrative Secretary to the Tribunal – whom I may continue to call upon for assistance after 1 January 2012"[20] would be understood by a reasonable third party observer to mean that in existing cases in which Mr. Fortier acted as arbitrator, he may wish to continue to call upon Norton Rose attorneys already involved in those cases to perform the normal tasks of an "administrative secretary." It would not normally be understood to mean that either (i) Mr. Fortier definitely intended to call upon Norton Rose attorneys for assistance in both existing and new cases, or (ii) that the assistance in either existing or new cases would be far more than administrative in nature. However, the record shows both that Mr. Fortier did call upon Norton Rose attorneys for new cases that were just starting at the time he made his disclosure in 2011 and that the assistance provided, as is evident from Mr. Valasek's pervasive role in the *Yukos* cases, was highly substantive and not merely administrative in nature.[21]

- On February 13, 2015, during the second challenge related to Mr. Fortier's ongoing professional relationship with Norton Rose attorneys, he stated: "On 18 October 2011, I informed you (and the parties to the present arbitration) that 'after 1 January 2012', I would continue to call upon certain members of Norton Rose OR for assistance 'in certain files in which I serve as an arbitrator'. I then gave as an example of such assistance the role of Administrative Secretary. Another obvious example for any lawyer practicing in the field of international arbitration is, of course, the role of Assistant to the Tribunal which is precisely the role Mr. Valasek fulfilled for the Yukos Tribunals for nearly 10 years until the Final Awards were issued on 18 July 2014. . . . This is precisely what I disclosed in my letter of 18 October 2011."[22] However, Mr. Fortier's letter of October 18, 2011 did not mention Mr. Valasek and did not describe, precisely or otherwise, the role of "assistant," which he apparently believes is different from that of administrative secretary, even though he knew that Mr. Valasek was performing that role.

- On February 16, 2015, Respondent replied to Mr. Fortier's expansive reading of his October 18, 2011 disclosure, stating: "[W]e do not believe that Mr. Valasek's role, which obviously was very extensive in the *Yukos* cases and very different from the administrative assistance of a secretary (the *Yukos* tribunal did have two other persons fulfilling that role), fits within Maître Fortier's 2011 disclosure.

[20] Mr. Fortier's October 18, 2011 Letter, p. 2 (emphasis added).

[21] *See* Respondent's April 23, 2015 Letter, ¶ 15.

[22] E-mail from ICSID to the Parties, dated February 14, 2015, forwarding communication from Mr. Fortier, dated February 13, 2015.

Moreover, we do not accept the notion that the 2011 disclosure covers any continuing or new relationship that Maître Fortier may have with Norton Rose, no matter its nature or extent. Nor did we ever accept that any continuing relationship with Norton Rose was appropriate."[23] Respondent also noted that "neither Maître Fortier nor Claimants have come to grips with the fact that the professional relationship with Mr. Valasek, a partner (not a junior associate) of Norton Rose who has written on substantive matters of direct relevance here (*Chorzów Factory* and valuation, including moving the valuation date), presents special circumstances exacerbating the conflict in this case. How can anyone feel comfortable with the fact that Mr. Valasek, a partner of a firm that represents Conoco, whose articles on those substantive issues support Claimants' position in this case, spent 3,000 hours assisting Maître Fortier in the *Yukos* cases, which involved many of those same issues, at the same time that Maître Fortier was deciding them in this case?"[24]

- On April 16, 2015, Mr. Fortier for the first time provided his description of Mr. Valasek's role in the *Yukos* cases – "summarizing evidence, researching specific issues of law and organizing the massive case file" – and argued that "[a]fter I 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."[25] As discussed above, the nature of such tasks is not in any sense comparable to writing the tribunals' reasoning and conclusions.

- In that same communication on April 16, 2015, Mr. Fortier also made the following statement: "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 is Ms. Alison Fitzgerald who works in the Ottawa office of Norton Rose. These are the two Zimbabwe's cases referred to in footnote 27 of the Respondent's submission."[26] Besides the fact that Mr. Fortier

[23] Respondent's February 16, 2015 Letter, ¶ 2.

[24] *Id.*, ¶ 3. One of Mr. Valasek's articles has already been cited by Claimants in their submission in this case. *See* Respondent's February 6, 2015 Letter, 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); Respondent's April 2, 2015 Submission, ¶ 16 and n. 30; Respondent's April 23, 2015 Letter, ¶ 11.

[25] Mr. Fortier's Explanations, dated April 16, 2015. Respondent pointed out that "[w]e 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." Respondent's April 23, 2015 Letter, ¶ 13.

[26] Mr. Fortier's Explanations, dated April 16, 2015.

had never mentioned to the parties that, in addition to Mr. Valasek, he was also being assisted by Ms. Fitzgerald, a counsel at Norton Rose, until Respondent brought it to the attention of the Secretary General, Mr. Fortier did not disclose in his April 16, 2015 communication that he was also being assisted by at least one other Norton Rose lawyer after his resignation on December 31, 2011, Ms. Rachel Bendayan, who originally was assisting him in this case.[27]

- On June 1, 2015, after stating that he "reiterate[d] and reconfirm[ed] all of the explanations which [he] set out very clearly in [his] email of 16 April 2015," Mr. Fortier disclosed the following: "Ms. Bendayan was appointed in 2011 as Assistant to the Tribunal which I chaired in ICSID Case No. ARB/11/8, Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan. As there was a hearing on Jurisdiction scheduled for June 2012, and as Ms. Bendayan had assisted the Tribunal in respect of that phase of the arbitration, it also made good practical and financial sense to have Ms. Bendayan continue as Assistant to this ICSID Tribunal until the completion of the Jurisdictional phase of the Arbitration. After the decision on Jurisdiction was rendered in February 2013, Mrs. Bendayan resigned as Assistant to this Tribunal and was replaced by my colleague, Ms. Annie Lespérance."[28] However, we later learned that Ms. Bendayan was appointed as assistant to the tribunal in the *Agility* case the very same day that Mr. Fortier advised the parties in this case of his resignation from Norton Rose, October 18, 2011.[29] While Respondent does not accept that "good practical and financial sense" justifies a continuing substantive relationship with Norton Rose attorneys while continuing to serve as arbitrator in this case,

[27] Respondent's April 23, 2015 Letter, ¶ 15.

[28] E-mail from ICSID to the Parties, dated June 1, 2015, forwarding communication from Mr. Fortier of the same date (emphasis added). This disclosure came only after repeated requests from Respondent. *See* Respondent's April 23, 2015 Letter, ¶ 15 ("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."); E-mail from Respondent to Meg Kinnear, Secretary-General of ICSID, dated May 27, 2015 ("We have not received . . . . any answer to our request for full disclosure from Mr. Fortier of his relationships with Norton Rose or its attorneys as described in paragraph 15 of our letter of April 23, 2015. At least with respect to ICSID cases, we assume that ICSID itself has more information than does the Respondent in this regard. We reiterate the point made in paragraph 15 of our April 23 letter that the parties are entitled to have full disclosure of the requested information.").

[29] E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated June 1, 2015; First E-mail from ICSID to the Parties, dated June 18, 2015, forwarding Mr. Fortier's communication of the same date ("Mr. Fortier's June 18, 2015 Communication"); Respondent's June 18, 2015 E-mail.

there was obviously no reason whatsoever to appoint a Norton Rose attorney to assist Mr. Fortier in a new case just beginning.

- In addition, a reasonable third party reading Mr. Fortier's June 1, 2015 disclosure that Ms. Bendayan remained in the *Agility* case "until the completion of the Jurisdictional phase of the Arbitration" and that she resigned "[a]fter the decision on Jurisdiction was rendered in February 2013" would assume that she ceased acting in that role in February 2013, but we later learned that she actually continued for nearly two more years. This came to light only after Respondent asked Mr. Fortier for the exact date of Ms. Bendayan's resignation in the *Agility* case, which he then acknowledged was October 10, 2014.[30] As Respondent stated at the time: "Respondent does not understand why it has been so difficult to obtain such basic information, and why, when information is provided, it proves to be either incomplete or incorrect, or both."[31] An arbitrator should not slowly dribble out information that a party obviously considers relevant, and a party should not be forced to parse disclosures and conduct investigations to determine whether the disclosure is full and accurate.[32]

16. In sum, given Mr. Fortier's refusal to answer the direct question regarding the authorship of the substantive portions of the *Yukos* awards, his disclosures in this case have been incomplete, inaccurate and/or misleading, which constitutes a clear ground for his disqualification to serve as arbitrator in this case. A reasonable third party observer would simply not equate the tasks described in any of Mr. Fortier's disclosures with the writing of a tribunal's reasoning and conclusions. Moreover, even if Mr. Valasek did not write the *Yukos* tribunals' reasoning and conclusions, Mr. Fortier's failure to answer the direct question posed would itself constitute grounds for disqualification inasmuch as none of his reasons for not answering the question is tenable. In particular: (i) the fact that the *Yukos* tribunals are *functus officio* and are not parties to the *Yukos* court proceedings is irrelevant; (ii) there is no bar to Mr. Fortier's commenting on the expert report submitted in the *Yukos* court proceedings; (iii) Respondent's straightforward question can be answered with a simple "yes" or "no," without

[30] Mr. Fortier's June 18, 2015 Communication.

[31] Respondent's June 18, 2015 E-mail.

[32] Apart from his ongoing connections with Norton Rose attorneys, Mr. Fortier appears to retain strong emotional ties to Norton Rose. A 2014 article pictured him in his new office, in the same building as Norton Rose in Montreal, stating: "And it may be known as Norton Rose Fulbright today, but the name Ogilvy Renault is still stamped on his heart. . . . '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." Respondent's February 6, 2015 Letter, Annex 14, Marc-André Séguin, *The Diplomat*, CANADIAN BAR ASSOCIATION NATIONAL MAGAZINE, January – February 2014, p. 1. That does not excuse non-disclosure or failure to respond to direct questions.

referring to the expert report in the *Yukos* court proceedings; and (iv) the confidentiality of tribunal deliberations relates to the exchange of views among the arbitrators, not to information unrelated to the deliberations. In any event, even if Mr. Fortier did have a good reason for not answering the question presented, that would not in any way justify his continuation as an arbitrator in this case. As made clear in the Explanation to General Standard 3(d) of the IBA Guidelines, the proper course of action for an arbitrator that is not in a position to make full and accurate disclosure is to resign, not to withhold the information requested and continue serving as arbitrator.[33]

In light of the foregoing, Respondent calls upon Mr. Fortier to resign voluntarily, as he did in the *Loewen* case when he was challenged by the United States based upon a conflict created by another law firm merger.[34] The fact that this case is advanced is no excuse for not resigning.[35] Indeed, Mr. Fortier's resignation in *Loewen* came only one month before the hearing on the merits.[36] While Respondent sincerely hopes that Mr. Fortier will follow the same course here, if he does not, it is respectfully requested that the co-arbitrators decide that he should be disqualified from further participation as arbitrator in this case.

Very truly yours,

George Kahale III

George Kahale, III

Enclosure

[33] Respondent's October 26, 2015 Letter, Annex 4, IBA Guidelines, Explanation to General Standard 3(d), p. 9.

[34] *See* Respondent's October 13, 2011 Letter, Appendix D, *Loewen Group, Inc. and Lowen v. United States of America*, ICSID Case No. ARB(AF)98/3 (NAFTA), Award, dated June 26, 2003 ("*Loewen*"), ¶¶ 21-22 (noting that the United States had filed a motion for the disqualification of Mr. Fortier on the ground of "the proposed merger of Mr. Fortier's firm with a firm which had previously acted for Claimants" and that Mr. Fortier thereafter resigned from the tribunal).

[35] As stated in the IBA Guidelines: "Disclosure or disqualification . . . should not depend on the particular stage of the arbitration. . . . While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards." Respondent's October 26, 2015 Letter, Annex 4, IBA Guidelines, Explanation to General Standard 3(e), p. 9.

[36] *See* Respondent's October 13, 2011 Letter, Appendix D, *Loewen*, ¶¶ 22, 25.