ICSID CASE NO. ARB/07/30

CONOCOPHILLIPS COMPANY ET AL.

Claimants

v.

THE BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

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

Issued by

Judge Kenneth J. Keith
Professor Georges Abi-Saab

Secretary of the Tribunal
Ms. Janet M. Whittaker

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Date: 27 February, 2012

I. PROCEDURAL BACKGROUND

A. DISCLOSURE BY L. YVES FORTIER, Q.C.

1. On 4 October, 2011, Mr. Fortier wrote by email to the Secretary-General of the International Centre for Settlement of Investment Disputes "making [a] disclosure, pursuant to Article 6 of the ICSID Convention, in relation to the announced merger of the firm of which he is a partner, Norton Rose OR LLP, with Macleod Dixon LLP, to become effective on 1 January 2012".

2. In his disclosure, Mr. Fortier stated that it had been brought to his attention, through the conflict checks conducted as part of the due diligence performed in relation to the merger, that the Caracas office of Macleod Dixon LLP, Despacho de Abogados miembros de Macleod Dixon, S.C.: (a) has provided, and continues to provide, legal services to one of the Parties, namely, ConocoPhillips Company; (b) is 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; and (c) is acting on behalf of ConocoPhillips Company in ICC cases involving the Venezuelan state owned petroleum company, Petróleos de Venezuela, S.A.

3. Mr. Fortier stated that he was making the disclosure at the first possible opportunity, the partners of the two partnerships involved in this merger having been presented with, and called upon to vote on, the potential merger between 1 October and 3 October, 2011, and the merger having been announced on the morning of that same day (4 October, 2011).

4. Mr. Fortier stated his conviction that the facts being disclosed had no bearing whatsoever on his ability to exercise independent judgment in this case. He said that he had no knowledge of the matters set forth in paragraph 2 above, and had had no communication regarding the matter, other than as strictly required for the purposes of his disclosure. However, he had been informed by the General Counsel of Norton Rose OR LLP that, out of an abundance of caution, formal measures were 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 were involved or might become involved in the future in this arbitration and members of Macleod Dixon LLP who were involved or might

be involved in the future in any of those matters, or any other matter involving, or which in the future may involve, ConocoPhillips Company or the Bolivarian Republic of Venezuela.

5. At Mr. Fortier's request, the disclosure was transmitted to his co-arbitrators and the Parties on the same day.

B. RESPONDENT'S PROPOSAL TO DISQUALIFY L. YVES FORTIER, Q.C.

6. By letter of 5 October, 2011, the Respondent proposed the disqualification of Mr. Fortier in accordance with Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules, in light of the forthcoming merger and the alleged "extent and depth of Macleod Dixon, S.C.'s involvement in multiple matters adverse to the Republic, PDVSA and its affiliates, including matters for ConocoPhillips" ("Proposal for Disqualification").

7. On 6 October, 2011, 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 for Disqualification.

8. On 12 October, 2011, the President of the Tribunal, having consulted with Professor Abi-Saab, set a timetable for the Parties to submit observations and Mr. Fortier to furnish explanations as provided for under Arbitration Rule 9, as follows:

- The Claimants were invited to submit a reply to the Proposal for Disqualification by 25 October, 2011;
- Mr. Fortier was invited to furnish any explanations that he wished to provide by 8 November, 2011; and
- Within two weeks of the date of any submission by Mr. Fortier, each Party was permitted to submit any further observations that it might wish to make.

9. By letter of 13 October, 2011, the Respondent raised six factual inquiries of Mr. Fortier and the Claimants and their counsel and provided a list of what it considered to be the relevant precedents ("the Respondent's 13 October Submission"). The inquiries were as follows:

> [W]e believe it is important to have a full explanation of (i) the extent of Macleod Dixon's advice and relationship with ConocoPhillips companies, whether in Venezuela or outside of Venezuela, (ii) the working relationship between Macleod Dixon and Freshfields generally and specifically in the arbitrations brought by ConocoPhillips subsidiaries against Petróleos de Venezuela, S.A. under both the Petrozuata and Hamaca Association Agreements, including whether any discussions have taken place concerning this ICSID Arbitration or concerning the relationship between those cases and this Arbitration, (iii) Macleod Dixon's representation of companies in connection with the 2007 migration process, including the identity of those companies and the nature of the assignments, (iv) the approximate percentage of annual revenues of Macleod Dixon's Caracas office over the last five years derived from matters in which they were adverse to Respondent or to Petróleos de Venezuela, S.A. or its subsidiaries, (v) a list of all litigation or arbitration matters of Macleod Dixon against the Respondent or Petróleos de Venezuela, S.A. or its subsidiaries, and all assignments preparatory to possible litigation or arbitration, and (vi) the contacts between Mr. Fortier and members of his arbitration team and Macleod Dixon, including any files on which they are or were working together, plans for the coordination of the international arbitration group and the business plan for promoting the combined firm's expertise in this area.[1]

10. On 14 October, 2011, the Secretary of the Tribunal, on behalf of Judge Keith and Professor Abi-Saab, requested that any observations about the factual inquiries in the Respondent's 13 October Submission, be submitted within the framework of the existing briefing schedule.

11. By letter of 18 October, 2011, Mr. Fortier informed Judge Keith, Professor Abi-Saab and the Parties that, on 17 October, 2011, he had informed the members of the Executive Committee of Norton Rose OR LLP that he had decided to resign from the Firm, effective 31 December, 2011 ("Fortier Letter of 18 October"). In his letter, he stated that his relationship with the firm would cease entirely as of that date and provided further details about this. He confirmed that, during the intervening period, the ethical screen in fact put in place on 5 October, 2011, would be maintained.

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[1] The Respondent's Letter of 13 Oct,, 2011 ("Resp. 13 Oct. Subm.") at pp. 1-2.

12. On 19 October, 2011, the Claimants wrote to the Tribunal stating that, "[i]n light of the disclosures provided by [Mr.] Fortier in his letter dated October 18, 2011, it is clear that there is no basis for a challenge to the independence and impartiality of [Mr.] Fortier in this arbitration". The Claimants invited the Respondent to confirm the same.

13. On 19 October, 2011, the Respondent stated that it was considering the issue and requested that it receive answers from all concerned to the questions raised in the Respondent's Submission of 13 October.

14. Under cover of a letter dated 21 October, 2011, Mr. Fortier provided to Judge Keith, Professor Abi-Saab and the Parties, a Norton Rose OR LLP Press release stating that he would be leaving the firm on 31 December, 2011, to pursue his career independently.

15. By letter of 24 October, 2011, the Respondent stated its belief that the issue underlying the Proposal for Disqualification had not been resolved by Mr. Fortier's resignation from Norton Rose OR LLP, and stated that it continued to propose his disqualification and requested his withdrawal from the case ("the Respondent's 24 October Submission"). The Respondent made a further factual inquiry about whether there would be "any office sharing arrangements, arrangements for the provision of secretarial or other support services, or consulting or billing arrangements between Mr. Fortier and the combined firm".[2]

16. The Claimants submitted their Reply to the Respondent's Disqualification Proposal on 25 October, 2011 ("the Claimants' Reply").

17. On 26 October, 2011, the Respondent indicated by email that it would respond to the Claimants' Reply early the following week. Later on 26 October, 2011, the Claimants requested that the Parties be given specific directions as to the schedule for the remaining submissions on this matter.

18. On 27 October, 2011, the Parties were requested to make any further submissions regarding the Proposal for Disqualification within the framework of the briefing schedule established in the letter sent on behalf of Judge Keith and Professor Abi-Saab on 12 October, 2011.

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[2] The Respondent's Letter of 24 Oct., 2011 ("Resp. 24 Oct. Subm.") at p. 5.

19. On 28 October, 2011, Mr. Fortier requested an extension of the date for submission of his explanations to Friday, 18 November, 2011. On 31 October, 2011, Judge Keith and Professor Abi-Saab granted the extension requested.

20. By letter of 17 November, 2011, Mr. Fortier submitted his further explanations in connection with the Proposal for Disqualification ("Mr. Fortier's Further Explanations").

21. On 1 December, 2011, Respondent submitted its final observations in response to the Claimants' Reply and Mr. Fortier's Further Explanations ("Respondent's Final Observations").

22. On 2 December, 2011, the Claimants submitted their Additional Observations Concerning the Respondent's Disqualification Proposal ("Claimants' Additional Observations").

II. THE PARTIES' SUBMISSIONS AND MR. FORTIER'S EXPLANATIONS

A. RESPONDENT'S SUBMISSIONS

23. The Respondent asserts that facts exist, including the alleged failure to make disclosure of certain facts, that "constitute a 'circumstance that might cause [an arbitrator's] reliability for independent judgment to be questioned by a party'",[3] and warrant the disqualification of Mr. Fortier.

24. In the Respondent's view, these facts include the "targeting by Norton Rose of Macleod Dixon as a merger partner and the importance of Macleod Dixon's Caracas office in that regard", and "the fact that Macleod Dixon saw the arbitration expertise of the Norton Rose arbitration group in Montreal, the most prominent member of which is Mr. Fortier, as a significant advantage of the merger from its viewpoint".[4]

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[3] The Respondent's Final Observations dated 1 Dec., 2011 ("Resp. Final Obs.") at p. 14 (citing ICSID Arbitration Rule 6(2)).

[4] Resp. Final Obs. at p. 14. *See also* Respondent's letter proposing the disqualification of Mr. Fortier dated 5 Oct., 2011 ("Proposal for Disqualification") at p. 2; Resp. 24 Oct. Subm. at pp. 1-2.

25. The Respondent claims that this is of concern because "Macleod Dixon is and has been for many years more adverse to Respondent than any other law firm in the world". That point, it says, has not been contested.[5] The Respondent asserts that "[a] large portion of the business of Macleod Dixon's Caracas office is representing clients, including international oil companies, in both litigation and pre-litigation dispute matters against the Government, Petróleos de Venezuela, S.A. ('PDVSA') or its affiliates".[6] In this regard, the Respondent notes that Macleod Dixon is representing ConocoPhillips companies in matters against PDVSA, and asserts that members of the Claimants' counsel team are also handling certain of these matters.[7]

26. The Respondent refers to the statement of a Macleod Dixon partner that Norton Rose OR and Macleod Dixon have started to work together on some files,[8] and states that "[n]o one has informed us as to the nature of the 'files' on which lawyers from Norton Rose and Macleod Dixon have already been working together, including whether any of those files involve matters adverse to Respondent or PDVSA or its affiliates, which lawyers are involved, and how long they have been so working".[9] The Respondent states a concern that the ethical screen established on 5 October, 2011, was not set up earlier "when there had to be considerable contacts between the two firms about their respective practices".[10] The Respondent further asserts that an ethical wall does not "resolve the fundamental issue of bias, whether conscious or unconscious, which a reasonable person would fear may exist from the moment that Norton Rose targeted Macleod Dixon as a merger partner and entered into serious negotiations with a view to accomplishing that strategic objective".[11]

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5 Resp. 24 Oct. Subm. at pp. 1-2. *See also* Proposal for Disqualification at pp. 2-3; Resp. Final Obs. at pp. 1-2.

6 Resp. 24 Oct. Subm. at pp. 1-2. *See also* Resp. Final Obs. at pp. 1-2.

7 Resp. Final Obs. at pp. 2-3.

8 Resp. 24 Oct. Subm. at p. 2.

9 *Id*.

10 Resp. 24 Oct. Subm. at p. 4.

11 *Id*. at p. 5. *See also* Resp. Final Obs. at p. 12.

27. According to the Respondent, an obligation of disclosure existed "long before the formal vote on the merger".[12] In the Respondent's view "disclosure of the merger negotiations should have been made long before October 4, when Mr. Fortier knew or upon reasonable inquiry would have known, and when his firm obviously knew, of Macleod Dixon's practice, not after Respondent learned of the merger through the internet".[13] If such a disclosure had been made promptly, as required by the ICSID Rules, the Respondent would have moved immediately to disqualify Mr. Fortier. The Respondent claims that this alleged "[f]ailure to disclose at a much earlier stage, when serious merger discussions were commenced, constituted a failure to disclose a 'circumstance that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party'".[14]

28. In the Respondent's view, Mr. Fortier's resignation from his firm does not resolve the issue at hand.[15] The Respondent asserts that the matters adverse to Venezuela and PDVSA would have been uncovered at a relatively early stage of the merger negotiations, and that disclosure should have been made at that time.[16] Specifically, the Respondent claims that because "Macleod Dixon's Venezuela office ... was a material factor motivating the law firm merger for Norton Rose, and Norton Rose's international arbitration expertise based in Montreal was a key motivation for Macleod Dixon,"[17] "[f]rom these facts and common sense, we concluded that Mr. Fortier must have known of Macleod Dixon's involvement with ConocoPhillips and/or its adverse relationship to Respondent, PDVSA or its affiliates long before October 4, 2011 ... ".[18]

29. In response to Mr. Fortier's statements that he, in fact, had no knowledge of the breadth and significance of the matters adverse to the Respondent and PDVSA and its affiliates being handled by Macleod Dixon, that he had no involvement in the merger discussions, and that he was only apprised of the professional relationship between Macleod Dixon and ConocoPhillips Company late in the week of 26 September, 2011, the

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12 Resp. Final Obs. at p. 10 (citing *In re Eastern Sugar Antitrust Litigation*, F.2d 524 (3d Cir. 1982)).

13 Resp. Final Obs. at pp. 1, 6-9.

14 *Id*. at p. 6 (citing ICSID Arbitration Rule 6(2)).

15 *Id*. at p. 3.

16 Resp. 24 Oct. Subm. at pp. 3-4. *See also* Resp. Final Obs. at p. 3.

17 Resp. 24 Oct. Subm. at p. 2. *See also* Resp. Final Obs. at p. 3.

18 Resp. Final Obs. at p. 3.

Respondent asserts that "Mr. Fortier's lack of involvement in the merger discussions is not relevant to the disqualification proposal".[19] The Respondent asserts that "[t]he problem is not created by his involvement in those negotiations, but by the failure to disclose promptly – as required by ICSID Arbitration Rule 6(2) – his firm's actions".[20] Arbitrators, the Respondent says, are required to conduct conflict checks when a significant event occurs which could change the conclusion reached at the outset of the arbitration that there was no conflict, such as a law firm merger. An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest.[21] "Mr. Fortier does not say that he was not aware of the merger discussions, and does not say what inquiry, if any, he made as to potential conflicts once he knew that such discussions ... were taking place".[22] The Respondent considers that in the circumstances "disclosure of the merger negotiations should have been made long before October 4, when Mr. Fortier knew or upon reasonable inquiry would have known, and when his firm obviously knew".[23] That failure cannot be cured by the arbitrator's resignation from the firm as opposed to resignation from the Tribunal.

30. The Respondent also notes that Mr. Fortier's resignation is not effective until 31 December, 2011, and argues that "[i]f there was a problem before the announcement of Mr. Fortier's resignation from his firm, as there surely was, that problem has not gone away, and we do not believe that it evaporates on New Year's eve, by which time key decisions in the case may have been made ... over the course of the last fifteen months since the oral argument in The Hague".[24]

31. The Respondent argues that "[n]o matter how hard one tries to maintain impartiality when one's firm has decided on a strategic objective of a merger with another firm so pervasively adverse to a party in a case in which one is sitting as an arbitrator, the serious risk of conscious or unconscious bias exists, which in this case would call into question any decision on any issue on which the Tribunal favors Claimants' position over

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19 *Id*. at p. 4.

20 Resp. Final Obs. at p. 10.

21 *Id*. at p. 4.

22 *Id*.

23 *Id*. at p. 6.

24 Resp. 24 Oct. Subm. at p. 4.

that of Respondent".[25] The Respondent asserts that "[t]he objection in this case is not predicated on any actual lack of independence or impartiality, but on apprehensions of the appearance of impropriety".[26] "[I]t is clear that the rules regarding conflicts and disclosure obligations are not dependent upon proof of actual impact on the position taken by an arbitrator ... The standard is an objective one and many cases speak of the possibility of 'conscious or unconscious' bias".[27]

32. The Respondent also asserts that "no litigant should be in the position of having as a member of a tribunal an arbitrator who has been forced to take an 'emotional decision' as Mr. Fortier has taken in resigning from his firm after the party was compelled to submit a proposal for disqualification".[28] The Respondent argues that "the perception of conscious or unconscious bias is exacerbated in such a situation".[29]

33. The Respondent concludes its final observations in these terms:

> In this case, there is no question that Respondent's disqualification proposal is based on 'actual, objective facts' which are essentially undisputed. Those facts include: (i) the targeting by Norton Rose of Macleod Dixon as a merger partner and the importance of Macleod Dixon's Caracas office in that regard; (ii) the fact that Macleod Dixon saw the arbitration expertise of the Norton Rose arbitration group in Montreal, the most prominent member of which is Mr. Fortier, as a significant advantage of the merger from its standpoint; (iii) the breadth and significance of Macleod Dixon's Caracas practice adverse to Respondent and PDVSA and its affiliates, including a major case together with Claimants' counsel in this case against PDVSA on behalf of ConocoPhillips's companies arising out of the same association agreements at issue in this case; (iv) the non-disclosure of such circumstances during the course of serious merger negotiations, which obviously took place over a period of months and while the Tribunal has been deliberating; (v) the initial announcement by Mr. Fortier that he thought the merger posed no problem to his remaining a member of the Tribunal; and (vi) the fact that we still have not received answers to the specific questions raised in our prior letters. Collectively, these undisputed facts constitute a 'circumstance that might cause [an arbitrator's] reliability for independent judgment to be questioned by a

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25 Resp. Final Obs. at p. 12.

26 *Id*. at p. 13.

27 Resp. Final Obs. at p. 12 (citing various decisions of the Canadian courts).

28 Resp. 24 Oct. Subm. at p. 6.

29 *Id*.

party.' The failure to make disclosure warrants disqualification in this extremely important case.[30]

B. THE CLAIMANTS' SUBMISSIONS

34. The Claimants contend that there is no ground to disqualify Mr. Fortier under Article 57 of the ICSID Convention and request that the Proposal for Disqualification be dismissed.

35. The Claimants assert that "[t]he notion of arbitral independence as applied by ICSID tribunals is an objective test for the existence of circumstances that result in a manifest lack of independence on the part of the arbitrator".[31] Accordingly, for disqualification to occur, facts must be adduced that demonstrate such a manifest lack of the required qualities.

36. The Claimants state that there is "no objective fact to suggest that [Mr.] Fortier manifestly lacks the qualities required by Article 14(1) of the ICSID Convention or that he is unable to be relied upon to exercise independent judgment in this arbitration".[32]

37. In particular, the Claimants assert that the facts demonstrate that: "(*a*) there is not now and never will be a conflict of interest; (*b*) [Mr.] Fortier has no information in his possession concerning any work done by Macleod Dixon LLP … in relation to the Claimants, the Respondent or any corporations owned by the Respondent; and (*c*) [Mr.] Fortier has had no involvement in the merger between Macleod Dixon and Norton Rose OR LLP … or related negotiations".[33] In their view "because the disclosures from [Mr.] Fortier conclusively establish that he has never received any information concerning Macleod Dixon's work for ConocoPhillips or against Venezuela, and also that [Mr.] Fortier will never be associated with Macleod Dixon, the information sought in the Respondent's letter dated October 13, 2011 is irrelevant".[34]

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30 Resp. Final Obs. at at pp. 13-14 (citing ICSID Arbitration Rule 6(2)).

31 Cl. Reply at ¶¶ 10-11. *See also* the Claimants' Additional Observations Concerning the Respondent's Disqualification Proposal ("Cl. Add. Obs.") at ¶ 7.

32 Cl. Reply at ¶ 12.

33 Cl. Add. Obs. at ¶ 2. *See also* Cl. Reply at ¶¶ 2-3, 6-8.

34 Cl. Reply at ¶ 4, fn. 2.

38. The Claimants also state that "[Mr.] Fortier's disclosures and announcement of his resignation from Norton Rose prior to the merger's effective date make it abundantly clear that there never has been, and will not be any association between [Mr.] Fortier and Macleod Dixon".[35] In particular, "[a]s of December 31, 2011, [Mr.] Fortier will … have no financial or professional ties to Norton Rose," and thus will have severed those ties prior to the merger between Norton Rose and Macleod Dixon set to take place on 1 January, 2012.[36]

39. The Claimants assert that the Respondent's contention that Mr. Fortier's purported failure to make disclosure warrants his disqualification "does not withstand analysis".[37] Specifically, the Claimants refer to Mr. Fortier's affirmation that he was not involved in the discussions between Norton Rose OR and Macleod Dixon.[38] The Claimants contend that "[a]lthough at some point he became aware that discussions between Macleod Dixon and Norton Rose were taking place, he had no knowledge of (*a*) the likelihood that such discussions would result in a successful outcome, (*b*) any relationship between Macleod Dixon and the Claimants or (*c*) any adverse relationship between Macleod Dixon and the Respondent and/or entities related to the Respondent".[39] The Claimants state that "[t]here is no case suggesting that an arbitrator has an obligation to research all of the potential conflicts that could potentially arise from a potential law firm merger and then disclose all those potentials to the arbitrating parties, before a merger is clear or an actual conflict is clear".[40] Specifically, the Claimants argue that "[t]he cases cited by the Respondent do not say anything remotely supporting the position it takes in this challenge".[41]

40. In conclusion, the Claimants state that "[i]t is clear from [Mr.] Fortier's disclosures and imminent resignation from Norton Rose that no reasonable observer could find that [Mr.] Fortier's conduct created an appearance of a lack of impartiality or independence – let alone establish the 'manifest' lack of these qualities that is required for a challenge to

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35 *Id.* at ¶ 12.

36 Cl. Reply at ¶¶ 3, 7.

37 Cl. Add. Obs. at ¶¶ 3-4.

38 Cl. Reply at ¶ 8.

39 Cl. Add. Obs. at ¶ 4.

40 *Id*. at ¶ 5.

41 *Id*. at ¶¶ 6-7 (distinguishing the authorities cited by the Respondent).

succeed".[42] Instead, the "Respondent's application is based on conjecture and hypothesis and, therefore, must be dismissed".[43] The Claimants also request that the Respondent be ordered to pay the Claimants the costs of this challenge proceeding in accordance with ICSID Arbitration Rule 28.[44]

C. L. YVES FORTIER Q.C.'S EXPLANATIONS

41. In his disclosure, Mr. Fortier stated that it had been brought to his attention, as a result of the due diligence performed in relation to the proposed merger of Norton Rose OR and Macleod Dixon, that Macleod Dixon: (a) provides legal services to one of the Parties, namely, ConocoPhillips Company; (b) is acting adverse to the interests of the Respondent in certain matters, including in another ICSID case against Venezuela; and (c) is acting on behalf of ConocoPhillips Company in ICC cases involving the Venezuelan state owned petroleum company, Petróleos de Venezuela, S.A. He stated that he had no knowledge of these matters, and had had no communication about them, other than as strictly required for the purposes of his disclosure. Mr. Fortier said he was convinced that the facts being disclosed did not affect his ability to exercise independent judgment in this case. He reported that he had been informed that, out of an abundance of caution, an ethical screen was immediately, well in advance of the effective date of the merger, being put into place within Norton Rose OR and Macleod Dixon.

42. Upon informing Judge Keith, Professor Abi-Saab and the Parties of his decision to resign from Norton Rose OR, effective 31 December, 2011, Mr. Fortier stated that his decision was motivated by his desire to continue his practice as arbitrator and mediator without having to contend with the risks of conflicts inherent to being a partner in a firm associated with a global law practice.[45] He also noted that he had been considering this decision carefully since November 2010 when Ogilvy Renault announced that it would join the Norton Rose Group, and since Norton Rose OR LLP's announcement that it would merge with Macleod Dixon LLP as of 1 January, 2012.

43. Mr. Fortier confirmed that he had no entitlement to any retirement benefit from Norton Rose OR. He also stated that, as of 1 January, 2012, he would cease to have any

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42 *Id*. at ¶ 13.

43 *Id*. at ¶ 7.

44 Cl. Add. Obs. at ¶ 8; Cl. Reply at ¶ 14(b).

45 Mr. Fortier's letter dated 18 Oct., 2011 ("Fortier 18 Oct. Ltr.") at p. 1.

access to the firm's files and information systems. During the intervening period, the ethical screen put in place on 5 October, 2011, would be maintained. Mr. Fortier confirmed that the only person at Norton Rose OR who had assisted him in the present case – a junior associate – had already signed the undertakings establishing the ethical wall, and that she had not done any work in this matter since August 2011. He also confirmed that he would not call upon that junior associate or any other person from Norton Rose OR to assist him in the case in the future.[46]

44. In response to the inquiries raised in the Respondent's 13 October Submission, Mr. Fortier confirmed that he had not been involved in any way in the negotiation leading to Norton Rose OR LLP's future merger with Macleod Dixon. He also stated, in response to the Respondent's sixth inquiry (*see* paragraph 9 above), that he had "not taken part in or been privy to the plans (if any) 'for the coordination of the international arbitration group and the business plan for promoting the combined firm's expertise in this area.'" Mr. Fortier stated that he had no knowledge of the information sought in the Respondent's other five inquiries in that submission.

45. In Mr. Fortier's Further Explanations, he responded to the points raised by the Respondent in the Respondent's 24 October Submission. Specifically, he stated that he has "no knowledge of any file (if indeed any exists) 'on which lawyers from Norton Rose and Macleod Dixon have already been working together.'" [47] Further, "[he] can categorically state that [he had] had no involvement in any such file, nor [has he] been made privy to any information about any such file".[48]

46. In reply to the Respondent's assertion that he "must have known almost a year ago 'the breadth and significance of the matters adverse to the Respondent and PDVSA and its affiliates being handled by Macleod Dixon' and that [he] should have made a disclosure at that time," [49] Mr. Fortier said that he "had no such knowledge and had no involvement in the merger discussions between Norton Rose and Macleod Dixon," and that he was "only

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46 Fortier 18 Oct. Ltr. at pp 1-2.

47 Mr. Fortier's Further Explanations dated 17 Nov., 2011 ("Fortier Further Expl.) at p. 1.

48 *Id*.

49 *Id*.

apprised of the professional relationship between Macleod Dixon and ConocoPhillips Company late in the week of September 26".[50]

47. With respect to the timing of the disclosure, Mr. Fortier stated that "[i]mmediately after the result of the vote was announced on 3 October, [he] notified the Secretary General of ICSID that [he] would be making a disclosure under Arbitration Rule 6 and [he] made his disclosure on 4 October".[51] He said that "[he] had no reason whatsoever to make any disclosure prior to that time".[52]

48. With respect to the Respondent's queries about whether there would be "any office sharing arrangements, arrangements for the provision of secretarial or other support services, or consulting or billing arrangements between Mr. Fortier and the combined firm,"[53] Mr. Fortier responded that he intends to have rental premises that will allow him, "as of 1 January 2012, to continue [his] practice as an arbitrator and mediator autonomous from Norton Rose OR / Norton Rose Canada".[54] Additionally, he has entered into discussions about joining a set of chambers in London and plans to work occasionally from home.

49. Finally, in relation to the Respondent's reference to his statement in the Norton Rose OR LLP Press Release that his decision to leave the firm was an "emotional decision" to take,[55] Mr. Fortier stated that "the source of this emotion was his long association with Ogilvy Renault, which was his home for more than 50 years," and that this home changed over a year ago when that firm merged with Norton Rose.[56] He asserted that "these very natural emotions (which are balanced by the exhilaration of embarking on my own venture) do not and will not prevent [him] from continuing to exercise impartial and independent judgement in the present arbitration, about which [he has] always been and remain[s] dispassionate".[57]

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50 *Id*.

51 Fortier Further Expl. at p. 1.

52 *Id*.

53 Resp. 24 Oct. Subm. at p. 5.

54 Fortier Further Expl. at p. 1.

55 Resp. 24 Oct. Subm. at p. 6.

56 Fortier Further Expl. at p 2.

57 *Id*.

50. Mr. Fortier "reiterate[d] [his] profound conviction that [he is], always [has] been and will remain, able to exercise independent judgment in the present arbitration".[58] He also confirmed that he sees no reason to reconsider his decision not to withdraw from the case.[59]

III. DECISION ON THE PROPOSAL FOR DISQUALIFICATION

A. APPLICABLE LEGAL STANDARDS

51. The Convention provides in Article 14(1) that members of panels are to be "persons of high moral character … who may be relied upon to exercise independent judgment". Under Article 57, a party may propose to a 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". In the terms of Article 58, the proposal in this particular case is to be decided by "the other members of the … Tribunal" unless they are equally divided.

52. In this case, the Respondent emphasises the requirements of ICSID Arbitration Rule 6(2) under which arbitrators have a continuing obligation promptly to notify the Secretary-General of the Centre of any relationship with the parties or circumstances that might cause an arbitrator's reliability for independent judgment to be questioned by a party. In this context, the Respondent also refers to General Standard 7(c) of the IBA Guidelines on Conflicts of Interest in International Arbitration (2004) which reads as follows:

> An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.

[58] Fortier 18 Oct. Ltr. at p. 2.

[59] Fortier Further Expl. at p. 2.

53. While we were referred to authorities from a number of international and national jurisdictions on judicial and arbitral independence and impartiality, we have gained most assistance from those which have ruled on challenges to members of ICSID tribunals under the provisions of the ICSID Convention and ICSID Arbitration Rules which we too are to apply. The authorities from other jurisdictions relate to different legal rules and standards, established by treaty, law or the rulings of judicial and arbitral bodies, and are to be understood in their particular contexts which also differ.

54. ICSID decisions call attention to a slight difference between the English and French texts and the Spanish text of Article 14(1). The former use the expression "may be relied upon to exercise independent judgment" / "offre toute garantie d'indépendence dans l'exercice de leurs fonctions" while the latter refers to a person who "inspirar plena confianza en su imparcialidad de juicio" (emphasis added). (The three language texts of Arbitration Rule 6 also include slight differences.) Since all three texts are declared to be equally authentic, and because of their close relationship in principle and in practice, we apply the two standards of independence and impartiality in making our decision. As those decisions also say, independence concerns the lack of relations with a party that might influence the arbitrator while impartiality involves not favouring one party or the other.[60]

55. The decisions emphasise the purpose of the requirements of independence and impartiality: they protect parties against arbitrators being influenced by factors other than those related to the merits of the case.

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[60] *See Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May, 2011 ("*Universal*") at ¶ 70; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 Oct., 2007 ("*Suez*") at ¶ 29; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Prof. Brigitte Stern, Arbitrator, 23 Dec., 2010 ("*Tidewater*") at ¶ 37.

56. The decisions also recognise that the term "manifest" in Article 57 means "obvious" or "evident" and highly probable, not just possible, and that it imposes a relatively heavy burden on the party proposing disqualification. Further, the manifest lack of the required qualities, here independence and impartiality of judgment, must appear from objective evidence.[61]

57. As indicated earlier, the Respondent emphasised what it saw as a conflict of interest in Mr. Fortier's failure to disclose to the Parties, at a much earlier stage, the negotiations between the two law firms. That contention presents a number of questions of law: what is the extent of that obligation of disclosure? In particular what, if any, obligation does it impose on an arbitrator in the course of a proceeding to inquire into possible conflicts? And what is the consequence of the breach of the obligation to disclose, if it is established?

58. Arbitrators are obliged to disclose information which they see as falling within the text stated in Arbitration Rule 6 if that knowledge actually comes to their notice. But to what extent are they to make inquiries about possible conflicts unknown to them, including the situation where, as here, the arbitration is under way? The Respondent emphasised the IBA General Standard 7(c), quoted in paragraph 52 above, and, in particular, its last sentence: failure to disclose is not excused by a lack of knowledge if the arbitrator makes no reasonable attempt to investigate. Whether there is in any given case an obligation to undertake such an investigation depends very much on the facts which we examine later.

59. The IBA General Standards are not law for ICSID tribunals. Moreover, in their own terms, they are "Guidelines"; "they are not legal rules and do not override any … arbitral rules chosen by the parties". The Working Group which prepared them trusted that "they would be applied with robust common sense and without pedantic and unduly formalistic interpretation". Further, the conflict of interest text incorporated in General Standard 2(b) is significantly different from that in Article 57 of the Convention and is easier to satisfy. The standard requires resignation or disqualification "if facts or circumstances have arisen since the appointment that from a reasonable third person's point of view, having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence" (emphasis added).

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[61] *Universal* at ¶ 71; *Suez* at ¶¶ 34, 40.

60. To come to the last question raised in paragraph 57, we do not consider that a non disclosure does in itself result in disqualification. The IBA Guidelines, endorsed by an ICSID decision on this point, say that non disclosure cannot make an arbitrator partial or lacking in independence; it is only the facts and circumstances that he did not disclose that can do so.[62] That proposition is, however, subject to this qualification – depending on the particular facts and circumstances, the non disclosure may itself give rise to a reasonable suspicion of bias, whether conscious or unconscious.

B. THE FACTS AND CIRCUMSTANCES

61. As we begin our consideration of the facts and circumstances, one feature of the Respondent's submissions is to be recalled. The Respondent stated that, had the merger proposal been disclosed promptly, as required by the ICSID rules, it would have immediately moved at that time to disqualify Mr. Fortier, given the significance and breadth of Macleod Dixon's adverse relationships to the Respondent, PDVSA and its affiliates, including Macleod Dixon's ongoing representation of ConocoPhillips itself.[63] That position requires us to consider the situation as it was on 4 October, 2011, when Mr. Fortier wrote to the Secretary-General of ICSID and at an earlier time, unspecified, when the Respondent says Mr. Fortier should have made the disclosure.

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. It has continued to provide us with further information, publicly available, about those matters. In that context, the Respondent states that it has not had answers to the questions raised in its letter of 13 October, 2011 (*see* paragraph 9 above), with the exception of an answer by Mr. Fortier concerning his lack of involvement in the coordination of the international arbitration group of the combined firm and the business plan for promoting its expertise.[64] That answer is set out in paragraph 44 above and his answer to a further question about arrangements with the combined firm in paragraph 48. We consider those particular answers later.

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62 *Tidewater* at ¶ 43.

63 Resp. Final Obs. at p. 1.

64 Resp. Oct. 24 Subm. at pp. 5-6; Resp. Final Obs. at pp. 1-2, 5 and 14.

63. We recall that the Claimants did not answer the questions put to them by the Respondent. They considered the information sought from them not to be relevant because Mr. Fortier's disclosures "conclusively establish that he has never received information concerning Macleod Dixon's work for ConocoPhillips or against Venezuela, and also that [Mr.] Fortier will never be associated with Macleod Dixon" (*see* paragraph 37 above). We come to the contentions relating specifically to Mr. Fortier later. For the moment it is enough for us to recognise the very extensive role of Macleod Dixon in Venezuela and its adverse position to the Respondent and PDVSA and its affiliates. We do not need answers to the questions addressed to that matter to be satisfied of that. Our concern is with any involvement which Mr. Fortier may have had within his firm on those matters and any knowledge which he had about them or ought to have had.

64. Mr. Fortier has stated in clear terms in his disclosure letter of 4 October, 2011 that:

> I have no knowledge of the issues raised in any of the above matters [about the legal services provided by the Caracas office or Macleod Dixon] and have had no communication regarding these matters other than as strictly required for the purposes of this disclosure.[65]

He also stated that he had not been involved in any way in the negotiation, that he had not taken part in or been privy to the plans for the international arbitration group in the combined firm, that he had no knowledge of any file, if any exists, on which lawyers from the two firms had been working together and he "categorically" stated that he had no involvement in any such file, nor had he been made privy to any information about any such file. Finally on this matter, he said that he had no knowledge of "the breadth and significance of the matters adverse to the Respondent and PDVSA and its affiliates" (the Respondent's phrase) almost a year earlier and that he was "only apprised of the professional relationship between Macleod Dixon and ConocoPhillips later in the week of September 26" (*see* paragraphs 41 and 44-46 above). We note that Mr. Fortier was not asked when he became aware of the "breadth and significance" of Macleod Dixon's practice adverse to the Respondent and PDVSA and its affiliates, or of any such adverse relationship.

65. We have no reason to doubt the accuracy of those statements made by Mr. Fortier.

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[65] *See also* paragraphs 2, 4 and 41 above.

66. Two issues remain. The first is whether Mr. Fortier is in breach of his duty under Rule 6(b) of the Arbitration Rules to make reasonable enquiries into a possible conflict of interest arising from the merger discussions. The Respondent referred us to a decision which placed on the arbitrator a continuous duty of investigation, but the arbitrator was a director of a major international bank: any such arbitrator was required specifically to investigate whether the bank had any connection with or interest in any of the parties in pending arbitrations and also to notify the parties in each arbitration of such a connection or interest.[66] In a second case, the duty was one arising from new employment and included the duty to inform the parties of that fact.[67] The facts in this case are plainly different and the rulings in those cases inapplicable. The Respondent also referred us to "a leading case" from a US Federal Court of Appeals about the merger of a law firm, but that was a case of actual knowledge of a conflict of interest which the Court ruled should have been disclosed to the parties, again a very different case from this one.[68]

67. The Respondent says that big law firm mergers do not happen overnight and that due diligence, including conflict checks, takes place long before the decision to merge. It is also the case that proposals for mergers sometimes fail. We cannot see that, in the circumstances of this case, there is a sufficient basis for saying that at some point well before 4 October, Mr. Fortier knew or should have known the information in question and hence was under an obligation to disclose. There is no evidence before us on which such a finding could be based.

68. It follows that the Proposal for Disqualification is dismissed.

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66 *See Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 Aug. 2007, dated 10 Aug., 2010 at ¶¶ 217-228.

67 *See New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007).

68 *In re Eastern Sugar Antitrust Litigation*, 697 F.2d 524 (3d Cir. 1982).

IV. CONCLUSION

69. For the reasons given, we decide that:

1. The Respondent's Proposal for Disqualification of Mr. L. Yves Fortier as a member of this Tribunal is dismissed;

2. Issues of costs relating to this Decision will be resolved at a later stage in this proceeding; and

3. As from the date of this Decision, the suspension of the proceeding under ICSID Arbitration Rule 9(6) is terminated.

[SIGNED] [SIGNED]

Judge Kenneth J. Keith Professor Georges Abi-Saab