

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
ICSID Case No. ARB/07/30**

CONOCOPHILLIPS PETROZUATA B.V.

CONOCOPHILLIPS HAMACA B.V.

CONOCOPHILLIPS GULF OF PARIA B.V.

CLAIMANTS

-v-

THE BOLIVARIAN REPUBLIC OF VENEZUELA

RESPONDENT

**CLAIMANTS' REPLY TO RESPONDENT'S THIRD AND FOURTH PROPOSALS
TO DISQUALIFY MR. YVES FORTIER QC AND
SECOND PROPOSAL TO DISQUALIFY JUDGE KENNETH KEITH**

9 APRIL 2015



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I. INTRODUCTION

1. Pursuant to the instructions communicated to the parties by the Secretary to the Tribunal on 26 March 2015, the Claimants present their observations on Venezuela's latest proposals to disqualify Judge Kenneth Keith and Mr. Yves Fortier QC, which follow three earlier failed challenges to the same arbitrators (the former once and the latter twice). The new challenges are:
 - the proposal to disqualify Mr. Fortier submitted on 6 February 2015 (the *Fourth Challenge*); and
 - the proposals to disqualify Judge Keith and Mr. Fortier dated 25 March 2015 (the *Fifth* and *Sixth Challenges*; together, the *Resignation Challenges*).
2. The Fourth Challenge had already been fully briefed and was ripe for decision when the arbitrator appointed by Venezuela, Professor Georges Abi-Saab, resigned without deciding the challenge, thereby knowingly creating the very procedural complications about which Venezuela, for tactical reasons, now complains. This Reply will therefore focus primarily on the Resignation Challenges, which claim that the Tribunal's decision not to consent to Professor Abi-Saab's resignation somehow constitutes proof of obvious bias.
3. As explained below, all three of the new challenges are meritless, dilatory, and abusive. The Chairman of the Administrative Council should dismiss them forthwith.¹

* * *

4. Venezuela took the Claimants' investments through a process that culminated nearly eight years ago, in June 2007, marking one of the largest and most notorious expropriations in history. There was nothing subtle about the taking; the decree that accomplished it was labeled "nationalization." It is undisputed that Venezuela must compensate the Claimants for the value of the investments it has taken from them.

¹ For the avoidance of doubt, the Claimants dispute all of the allegations made in the Respondent's Submission on the Proposal to Disqualify Judge Keith and Mr. Fortier, 2 April 2015 (the *Respondent's Submissions*), unless the contrary is expressly stated herein.

5. In a Decision on Jurisdiction and the Merits issued in September 2013 (the *Decision on Liability*), the Tribunal dismissed several of the Claimants' claims (notwithstanding the supposed bias Venezuela now attributes to the Tribunal majority), thereby limiting the scope of compensation. The Tribunal found for the Claimants on the expropriation claim, however, and, by majority, ruled the taking to have been unlawful. It scheduled a final hearing on the quantum of compensation for this month, April 2015. The parties' written submissions were completed in January 2015; even Venezuela's absurdly depressed valuations confirmed that billions are at stake.
6. The final hearing has now been vacated because of three related tactical initiatives: Venezuela's Fourth Challenge on 6 February 2015; Professor Abi-Saab's resignation two weeks later, on 20 February 2015; and the Fifth and Sixth Challenges, which in effect constitute an impermissible appeal of the Tribunal's decision not to consent to the resignation. The proper progress of this arbitration has been derailed – once again – by the calculated actions of Venezuela and the arbitrator it appointed.
7. Venezuela's Resignation Challenges are clearly fuelled by its frustration at the prospect that Professor Abi-Saab's replacement will be a genuinely impartial arbitrator appointed by the Chairman of the Administrative Council. Yet the plain text of Convention Article 56 provides that if a party-appointed arbitrator resigns without the "consent of the Tribunal of which he was a member," the Chairman shall name his replacement.² The rule in the Convention is clear and has been followed in practice: four times in past cases, party-appointed arbitrators have resigned without their tribunals' consent; and four times, the Chairman has appointed their replacements.³
8. On 4 March 2015, Judge Keith and Mr. Fortier informed the parties that they did not consent to the resignation of Professor Abi-Saab – a decision the ICSID Convention assigns to their sole discretion.⁴ Venezuela's fury is occasioned not by the infringement of any right it has, but rather by the prospect of losing the benefit of a partisan arbitrator who will do

² ICSID Convention, Article 56(3).

³ See paragraph 43 below.

⁴ See Letter from ICSID to the Parties, 4 March 2015; Letter from ICSID to the Parties, 23 March 2015.

what Professor Abi-Saab did: delay the proceeding and issue polemics against the integrity of his co-arbitrators, to serve as fodder for still more dilatory challenges and, ultimately, the inevitable annulment proceeding.

9. As far as the three new challenges are concerned, there are only two substantive questions that are even plausibly before the Chairman:

(i) As to the Fifth and Sixth Challenges: Is the Tribunal's decision to decline to consent to Professor Abi-Saab's resignation so irrational that nothing other than manifest bias could conceivably explain it?

(ii) As to the Fourth Challenge: Is the fact that Russia has sought to vacate an award in another case in which Mr. Fortier served, alleging that an assistant to the tribunal exceeded the proper scope of his role, reason enough to conclude that Mr. Fortier manifestly lacks independence from the parties to *this* proceeding?

10. Both questions answer themselves. The Tribunal has given reasons for not consenting to Professor Abi-Saab's resignation, and those are plainly legitimate. In sum, the resignation was timed and executed in a manner that Professor Abi-Saab knew would disrupt and delay this arbitration, as it has. With respect to the second question, the facts underlying Russia's attack on the *Yukos* awards have been public knowledge for half a year or more. Yet Venezuela launched no challenge against Mr. Fortier then, and not for lack of knowledge: the *Yukos* arbitrations were the largest in history and have been followed closely by every practitioner in the field. The only new fact – that Russia has commenced a set-aside proceeding before the Dutch courts – cannot possibly provide any grounds for disqualification. The challenge is thus both untimely and unfounded.

11. Nor is there any merit to Venezuela's suggestion that the three new challenges should be referred to a third party for a recommendation on their disposition. Such recommendations have rarely been sought in ICSID practice, and the extraordinary circumstances that prompted them are plainly not present here.

12. The Fourth through Sixth Challenges are not in fact designed to repair any (non-existing) infringement of Venezuela's rights. The principal objective is delay, just as it was with

Venezuela's numerous previous requests for reconsideration, applications for hearings to air complaints about routine procedural directives, and indeed the first three challenges to Judge Keith and Mr. Fortier. This is regrettably of a piece with Venezuela's approach in many other cases, where it has mounted failed arbitrator challenges⁵ or sought to annul awards against it.⁶ Here, having lost on the expropriation claim and facing a substantial award of damages, Venezuela seeks to subvert and delegitimize the proceeding in its entirety.

13. The challenges thus call into question whether ICSID as an administering institution can provide a party with a prompt and fair procedure, when the opposing party does everything possible to prevent that from happening. It is the Claimants' rights, not Venezuela's, that are threatened. There is no doubt that the investments that were confiscated were worth billions of dollars; nor is there any doubt that the Claimants, under one of the best-established rules of international law, were entitled to *prompt* compensation for them. Venezuela has already managed to drag out this proceeding for seven and a half years, earning *millions of dollars every single day* from the confiscated assets. It, and Professor Abi-Saab, have now scuttled the long-scheduled quantum hearing, further prejudicing the Claimants and engendering yet more delay. There is only one proper response that the Chairman can give in these circumstances. The Fourth through Sixth Challenges should be promptly rejected and Professor Abi-Saab's replacement appointed forthwith, so that the proceeding may resume and new hearing dates may be fixed as soon as possible. That is the only way to limit the vast damage that Venezuela's misconduct has already caused, and to send a clear message that such conduct will be neither rewarded nor – and this is critical –

⁵ See *Koch Minerals Sàrl*, ICSID Case No. ARB/11/19; *Transban Investments Corp.*, ICSID Case No. ARB/12/24; *Rusoro Mining Ltd.*, ICSID Case No. ARB(AF)/12/5; *Universal Compression Int'l Holdings, S.L.U.*, ICSID Case No. ARB/10/9; *CEMEX Caracas Investments B.V.*, ICSID Case No. ARB/08/15; *Longreef Investments A.V.V.*, ICSID Case No. ARB/11/5; *Serafín García Armas*, UNCITRAL, PCA Case No. 2013-3. Additionally, on 13 March 2015, Venezuela filed another challenge to Mr. Fortier in *Fábrica de Vidrios Los Andes & Owens-Illinois de Venezuela v. Venezuela*, ICSID Case No. ARB/12/21.

⁶ See *Venezuela Holdings*, ICSID Case No. ARB/07/27 (application for revision of 9 October 2014 award filed 24 October 2014; application for annulment registered 9 February 2015; enforcement opposed in U.S. courts (S.D.N.Y. 14-cv-8163)); *Flughafen Zürich*, ICSID Case No. ARB/10/19 (application for annulment of 18 November 2014 award registered 27 March 2015); *Tidewater*, ICSID Case No. ARB/10/5 (application for revision of 13 March 2015 award registered 24 March 2015; enforcement opposed in U.S. courts (S.D.N.Y. 15-cv-1960)); **Annex 1**, A. Ulmer, *Venezuela Likely to Seek Annulment of \$455 million Owens-Illinois Award: Lawyer*, REUTERS, 12 March 2015 (discussing likely annulment or revision application in *OI European Group*, ICSID Case No. ARB/11/25).

allowed to intimidate ICSID into abdicating its responsibility to restore order and progress to this proceeding.

14. We note that Mr. Fortier has already provided his observations on the Fourth Challenge. As regards the Fifth and Sixth Challenges, the Tribunal has said everything that needs to be said regarding the lack of consent to Professor Abi-Saab's resignation – the 4 March 2015 decision (and the 23 March reaffirmation of that decision) speak for themselves.⁷ The Claimants consider that the record of these abusive challenges is complete, and that they are ripe for immediate decision without the need for further explanations from arbitrators who have exercised their mission properly – and with extraordinary (the Claimants respectfully suggest excessive) patience for the behavior of Venezuela and its appointed arbitrator.

* * *

15. The remainder of this Reply is structured as follows. Section II sets out the standard for disqualification. Section III addresses the Fifth and Sixth Challenges, demonstrating that they are baseless. Section IV summarizes the Claimants' position on the Fourth Challenge and also addresses miscellaneous other arguments raised by Venezuela. Section V explains why the new challenges should be decided by the Chairman, and Section VI is a brief conclusion.

II. THE APPLICABLE STANDARD

16. Article 57 of the ICSID Convention provides that disqualification of an arbitrator may be sought “on account of any fact indicating a *manifest* lack of the qualities required by

⁷ Letter from ICSID to the Parties, 4 March 2015; Letter from ICSID to the Parties, 23 March 2015. When a disqualification proposal is, as here, founded on a party's disagreement with a decision, it may be preferable as a matter of policy for the challenged arbitrator(s) to let the decision speak for itself. *See RSM Production Corp. v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavin Griffith QC, 23 October 2014, ¶ 33 (explaining that Dr. Griffith elected not to submit any observations regarding the proposal for disqualification).

paragraph (1) of Article 14.”⁸ Though Article 14 does not say so explicitly, it is generally accepted that those qualities include impartiality and independence.⁹

17. The Convention’s use of the word “manifest” is significant: the complaining party must prove that bias is “evident” or “obvious,” in the sense that it can be “discerned with little effort and without deeper analysis.”¹⁰ Article 57, moreover, imposes an “objective standard based on a reasonable evaluation of the evidence by a third party,” as opposed to the subjective perceptions or suppositions of the party requesting disqualification.¹¹ In sum, the burden on the challenging party is a heavy one.
18. For clear and necessary reasons, no ground for disqualification can be derived from the fact that a ruling is adverse to the challenging party. As the Chairman has observed:

The mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the Convention. If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.¹²

The Fifth and Sixth Challenges (i.e., the Resignation Challenges) are based on supposed defects in a decision adverse to Venezuela – in particular, the decision of Judge Keith and Mr. Fortier not to consent to Professor Abi-Saab’s resignation – and therefore must fail under that settled principle.

⁸ ICSID Convention, Article 57 (emphasis added). Article 14(1), in turn, requires that arbitrators “shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”

⁹ *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, ¶ 74.

¹⁰ *Caratube v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, ¶ 55 (citations omitted); see also *Blue Bank v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 61.

¹¹ *Blue Bank v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 60 (citing *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentina*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, ¶¶ 9–40).

¹² *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, ¶ 80; see also *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Proposal for Disqualification of Dr. Griffith, 23 October 2014, ¶ 80.

19. Venezuela recognizes the principle but attempts to circumvent it by contending that a ruling may be so irrational that it could have been produced only by bias.¹³ Venezuela cites no authority in support of its thesis. On the contrary, it is well-established that a proposal to disqualify is not and cannot be an appeal on the merits¹⁴ – although that is precisely what Venezuela, a serial abuser of the challenge process, attempts to obtain. If parties were able to do what Venezuela seeks to do here, then, as the Chairman has previously stated, “proceedings could continuously be interrupted by the unsuccessful party,”¹⁵ which would simply allege that a decision was irrational in an effort to obtain interlocutory review.
20. Even assuming for argument’s sake that a circumstance like the one Venezuela advances could conceivably be grounds for disqualification, the burden on the proponent would of necessity be extremely high. Venezuela would have to show that *no* unbiased arbitrator could *possibly* have decided not to consent to Professor Abi-Saab’s resignation in the same circumstances. This Venezuela has not done and cannot do.

III. THE DECISION TO WITHHOLD CONSENT TO PROFESSOR ABI-SAAB’S RESIGNATION IS NOT GROUNDS FOR DISQUALIFICATION

A. The Decision Does Not Suggest, Let Alone Prove, Bias

21. This arbitration, initiated in November 2007, is well into its eighth year. A full hearing on jurisdiction and the merits was completed in July 2010. After the passage of three years, in September 2013, the Tribunal was left in the awkward position of having to publish its Decision on Liability without Professor Abi-Saab’s dissent – which he had failed to prepare and would not complete for another 18 months, bringing the total delay to nearly *five years*.
22. Meanwhile, Professor Abi-Saab agreed to hold the quantum hearing in April 2015, at a location that would require him to cross the Atlantic.¹⁶ The parties completed their

¹³ See, e.g., Respondent’s Submissions, ¶¶ 30–31, 39.

¹⁴ See *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, ¶ 80; see also *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Proposal for Disqualification of Dr. Griffith, 23 October 2014, ¶ 80.

¹⁵ *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, ¶ 80.

¹⁶ See Letter from ICSID to the Parties, 1 August 2014.

memorials and accompanying reports in January 2015, and the quantum issues were ripe for adjudication. Then, on 20 February 2015 – less than two months before the already belated final hearing on quantum – Professor Abi-Saab resigned. Although the Fourth Challenge had been fully briefed the week before, Professor Abi-Saab declined to take a view on the challenge before absenting himself from the proceeding. The entirely foreseeable result was the further disruption and delay to this arbitration that has in fact followed.

23. In these circumstances, Judge Keith and Mr. Fortier gave a straightforward explanation for declining to consent to Professor Abi-Saab’s resignation:

The two arbitrators did not however consent to a resignation in late February when the quantum hearing was only seven weeks away and a challenge to one of the arbitrators was pending.¹⁷

24. Those two bases for declining to consent are reasonable, indeed eminently so, and there is no reason not to accept them as genuine. That ends the matter, whether Venezuela agrees with the Tribunal’s reasons or not.
25. No one could dispute – and even Venezuela has not disputed – that it is legitimate for a tribunal to take the procedural schedule into consideration in its decision-making. The Tribunal here considered that the timing of the resignation threatened to disrupt the long-scheduled final hearing and withheld consent on that basis. The remaining Members made clear that they would have consented to Professor Abi-Saab’s resignation had he done so when it would not have disrupted the proceeding.
26. As the Tribunal noted, it was not simply the date of Professor Abi-Saab’s resignation that was disruptive – it was also the fact that he resigned before voting on Venezuela’s pending challenge to Mr. Fortier. That challenge was fully submitted: both sides had made their submissions, Mr. Fortier had submitted brief observations on the proposal, and the parties had responded to his observations, all within the space of seven business days. Then another week passed, during which Professor Abi-Saab was working “furtively” (as he now

¹⁷ Letter from ICSID to the Parties, 4 March 2015.

says) on his dissent to the Tribunal's 18-month-old Decision on Liability.¹⁸ He certainly was capable of casting his vote on the Fourth Challenge during that period. But he resigned without doing so, thereby knowingly disrupting the proceeding.

27. In short, Professor Abi-Saab resigned at a time that would cause maximal disruption. The Tribunal had the discretion to withhold consent because the resignation objectively disrupted the proceeding, irrespective of whether that was Professor Abi-Saab's intention or not. The taking of that decision does not even suggest that the Tribunal was secretly motivated by bias, rather than by the reasons that it gave. It certainly does not *prove* manifest bias, because it cannot plausibly be said that no unbiased Tribunal would have made the same decision.
28. Venezuela quarrels with the Tribunal's judgment, claiming, for example, that the final hearing would have had to be rescheduled even if Professor Abi-Saab had resigned some weeks or months earlier. It was, however, for the Tribunal to estimate when it was too late to save the hearing, and differences of opinion about its estimation cannot conceivably require the removal of the two arbitrators. In fact, Venezuela is demonstrably wrong. Diligent arbitrators are capable of preparing for hearings, even in complex matters, in short order. To cite but one example, in the complex and highly contentious *Loewen* case, no lesser figure than Lord Mustill was appointed to replace a resigning arbitrator only four weeks before the hearing.¹⁹
29. Venezuela further argues – based on representations as to confidential Tribunal communications improperly conveyed by Professor Abi-Saab at Venezuela's request²⁰ – that the Tribunal was willing to consent to a resignation on 6 February 2015, and therefore had no grounds for withholding consent two weeks later (on 20 February), when Professor Abi-Saab in fact resigned. Again, the argument is premised on second-guessing the Tribunal's judgment as to how late was too late. At some point, the Tribunal had to draw a

¹⁸ Email from Professor Abi-Saab to ICSID, 25 March 2015.

¹⁹ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶¶ 23–25 (Lord Mustill was appointed as arbitrator on 14 September 2001 and the hearing on the merits commenced on 15 October 2001).

²⁰ See Email from the Respondent to Judge Keith, Mr. Fortier, and Professor Abi-Saab, 17 March 2015; Email from Professor Abi-Saab to ICSID, 25 March 2015.

line, and so it did.²¹ Furthermore, besides the passage of yet more time, something else had changed by 20 February: Venezuela had made the Fourth Challenge, the parties had fully briefed it, and Professor Abi-Saab had failed to take the simple step of expressing a view before departing. The procedural posture left in the wake of his resignation was different and more damaging than it would have been had he resigned earlier.

30. That resolves the core issue before the Chairman regarding the Resignation Challenges. Once it is accepted, as it must be, that Judge Keith and Mr. Fortier acted within the broad scope of their discretion in declining to consent to the resignation, the challenge necessarily falls away. The analysis can and should end there. Nonetheless, for the sake of completeness, the remainder of this section responds to Venezuela's other, and equally unmeritorious, assertions.

B. Professor Abi-Saab's Conduct Has Been Precisely of the Kind that Article 56 Was Intended to Deter

31. Article 56 of the ICSID Convention does not define or limit the grounds that a tribunal may consider in deciding whether to consent to a Member's resignation. What is germane to any particular case is left to the discretion of each tribunal. In fact, Article 56 does not require the tribunal to give reasons for consenting or not: it simply takes the existence or absence of consent as a fact and states what the consequences are.²² It is not necessary, therefore, that

²¹ Beyond that, Venezuela has put words into the Tribunal's mouth: even on Professor Abi-Saab's account, the Tribunal did not consent to his resigning on 6 February 2015 (which he did not do anyway, so the entire issue is beside the point). The 4 March decision relates that during 2014, Professor Abi-Saab had been promising to finish his dissent, and said he would resign when it was finished. Finally, late in 2014, he said he would resign at the end of the year even if he had not finished the dissent. *See* Letter from ICSID to the Parties, 4 March 2015. But he did not. Of course, the other Members of the Tribunal could not force Professor Abi-Saab to resign; nor could they force him to remain on the Tribunal once he did tender his resignation. All they could do under the Convention was decide whether to consent to a resignation if and when it was tendered. In that context – according to Professor Abi-Saab's account – Judge Keith simply “insisted” that Professor Abi-Saab finally do, by 6 February, what he had long been saying he would do: submit the dissent and resign. *See* Email from Professor Abi-Saab to ICSID, 25 March 2015. Even according to Professor Abi-Saab, Judge Keith did not say whether or not he (or Mr. Fortier) would consent to the resignation – which they could not prevent – if it were tendered by 6 February. Moreover, as Professor Abi-Saab admits, he disregarded that deadline as well.

²² ICSID Convention, Article 56(3) (“If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.”).

the resigning arbitrator has colluded with the party that appointed him, as Venezuela incorrectly suggests.²³

32. Nonetheless, the sequence of events that gave rise to the Resignation Challenges is telling. Venezuela brought the challenges as a direct consequence of Professor Abi-Saab's 25 March 2015 email, which Venezuela itself had repeatedly solicited. Disappointed with the other arbitrators' decision not to consent to Professor Abi-Saab's resignation, Venezuela asked the Tribunal for clarification of points that it (implausibly) claimed had been left ambiguous.²⁴ Before they responded, Venezuela improperly, and (in accordance with its constant practice) without seeking leave to do so, disclosed to Professor Abi-Saab communications among the parties, the Tribunal, and ICSID during a time when he no longer had any role in the proceeding.²⁵ It did so for the explicit purpose of soliciting former arbitrator Abi-Saab's assistance in trying to overturn a decision the Tribunal had already made. The Tribunal responded to Venezuela's request for clarification on 23 March 2015, reaffirming that it had not consented to Professor Abi-Saab's resignation. The Tribunal also said that it would be wrong to disclose pre-resignation communications among its Members.²⁶
33. Professor Abi-Saab knew that the Tribunal had expressly upheld the principle of confidentiality of intra-Tribunal communications, because Venezuela forwarded the Tribunal's 23 March letter to him.²⁷ Yet in his email of 25 March, former arbitrator Abi-Saab quoted extensively from communications that he said the arbitrators had exchanged when he had been a Member of the Tribunal. Unsurprisingly, Professor Abi-Saab's account of events now serves as the basis for Venezuela's Resignation Challenges.
34. Thus, Venezuela requested Professor Abi-Saab to provide confidential information that it hoped would undermine a procedural decision it did not like; lo and behold, he not only

²³ See, e.g., Respondent's Submissions, ¶¶ 33–34.

²⁴ Letter from the Respondent to ICSID, 4 March 2015.

²⁵ Email from the Respondent to Mr. Fortier, Judge Keith, and Professor Abi-Saab, 17 March 2015.

²⁶ Letter from ICSID to the Parties, 23 March 2015 (“any such correspondence is protected by the confidentiality of the internal deliberations of the Tribunal and as such, will not be released to the parties.”).

²⁷ Email from the Respondent to ICSID, 23 March 2015 (attaching ICSID's Letter of the same date and copying Professor Abi-Saab on the communication).

revealed confidential information but also attacked the integrity of his former co-arbitrators for making the decision; and Venezuela has used that information, and copious quotations from his attack, to challenge the remaining arbitrators.

35. Venezuela protests that it had no wish to disrupt the final hearing. But actions often speak louder than words, and Venezuela's conduct throughout this arbitration disproves its assertion. It has from the outset sought to delay the inevitable substantial Award against it, including by making repeated proposals to disqualify arbitrators – with each proposal suspending the proceeding. It has also routinely requested hearings to argue against duly issued procedural and substantive decisions, each request wasting further time.²⁸ Venezuela's objective and consistent conduct shows that delaying the Award for as long as possible is one of its principal strategic objectives. That is certainly what any observer of its pattern of behavior (including Professor Abi-Saab) would have concluded; and he acted in a manner consistent with that objective.

C. The Absence of Consent to Professor Abi-Saab's Resignation Does Not Impinge on Either the Ability to Render a Dissenting Opinion, the Permissibility of Resigning for Reasons of Health, or any Right to Appoint an Arbitrator

36. Venezuela puts up several straw men, alleging that various "rights" belonging to it or Professor Abi-Saab have been disregarded, when those "rights" (if they had existed) have not been impinged upon at all.²⁹
37. The first straw man is Venezuela's insistence that health problems can be a legitimate reason for resigning. No one disagrees with that. It is simply beside the point. Indeed, the Tribunal would have consented to Professor Abi-Saab's resignation on health grounds, had he not unacceptably delayed the resignation and then forced the cancellation of the final hearing.

²⁸ The very first example set the tone for what would happen every time Venezuela was displeased with even a routine procedural decision: it demanded a hearing to reargue Procedural Order No. 1, in which the Tribunal decided to proceed normally rather than to bifurcate the proceeding. Letter from the Respondent to the Tribunal, 26 January 2009. *See also, e.g.*, Letter from the Respondent to the Tribunal, 8 September 2013 (requesting a new hearing to argue for reconsideration of certain decisions taken in the Tribunal's Decision on Liability of 3 September 2013).

²⁹ *See, e.g.*, Respondent's Submissions, ¶¶ 33–37.

38. Professor Abi-Saab's health problems, whatever their nature, did not require him to act as he did. So far as the Claimants are aware, Professor Abi-Saab resigned from other cases in which he was sitting long ago.³⁰ If it was apparent to him that he would not be able to remain on this Tribunal long enough to participate in the rendering of the Award, he had a duty to minimize the effect his inevitable resignation would have on the proceeding. It was his determination to couple his resignation with his dissent. Yet, having had since 2010 to work on the dissent, throughout 2014 he continued to delay, knowing that the longer he waited, the more likely it was that the final hearing would be affected. That was his choice; it violated his basic duties as an arbitrator; and it served the interests of his appointing party.
39. Venezuela's second straw man is to recite Professor Abi-Saab's "obligation" to publish a dissent from the Decision on Liability.³¹ There is no such obligation: Arbitration Rule 47(3) *allows* arbitrators to "attach" a dissenting opinion to the award, when their colleagues can see it and respond to it. The Rules do not require a dissent at all, much less give license to an arbitrator to second-guess an interlocutory decision at his or her leisure. Dissents, moreover, have no legal force in the ICSID system. There are eminent arbitrators who as a matter of policy do not indicate that they disagree with an award, let alone write a separate opinion. In other instances, a decision or award may simply note that one of the arbitrators dissents from it, or from part of it, with no separate opinion. In any case, there is certainly no right, let alone an "obligation," to publish a dissent at any moment of one's choosing. The merits hearing in this case concluded in July 2010. Professor Abi-Saab's dissent came nearly *five years* later, and a year and a half after the issuance of the Decision on Liability to which the dissent pertained. His extreme delay disrupted the proceeding, even by his own account.³²

³⁰ Claimants' Letter to ICSID, 25 February 2015, n.15 (citing Professor Abi-Saab's resignation from the *Abaclat* tribunal on 1 November 2011 and from the tribunal in *Murphy v. Ecuador* in or about November 2013).

³¹ See Respondent's Submissions, ¶ 37.

³² Venezuela suggests that Judge Keith and Mr. Fortier withheld consent to the resignation in "retaliation" for the content of Professor Abi-Saab's belated dissent. This is the rankest speculation, supported by nothing; as explained above, there were perfectly good reasons for withholding consent. Indeed, Venezuela's argument makes no logical sense. Professor Abi-Saab wrote two dissents, the first being from the denial of Venezuela's application to reconsider the Decision on Liability. It was no less shrill and no less hostile towards the Tribunal majority, describing them as creating a "travesty of justice." Yet thereafter, Judge Keith and Mr. Fortier continued to show remarkable forbearance towards Professor Abi-Saab's continued delays in publishing his other dissent and resigning. This demonstrates that their later withholding of consent was not caused by

40. Meanwhile, it is worth recalling that Professor Abi-Saab issued two dissents in this case, and their timing is noteworthy. For while he was supposedly unable to write his dissent from the Decision on Liability for five years, Professor Abi-Saab managed to produce his dissent to the denial of Venezuela’s later application for reconsideration in approximately three and a half months; it was published simultaneously with the decision from which he dissented in March 2014. Venezuela used inflammatory statements in that dissent as the basis to challenge Judge Keith and Mr. Fortier, bringing the proceedings once again to a halt. Then, once the proceeding resumed and the final quantum hearing loomed, Professor Abi-Saab finally got around to releasing his dissent from a much *earlier* decision, and used that as the justification for resigning at a moment that was – again – opportune for the party that appointed him.
41. His actions, moreover, illustrate the abuse of dissenting opinions to assist one’s appointing party. Both of Professor Abi-Saab’s dissents were intemperate in the extreme, going beyond the bounds of propriety and civil discourse. They appear intended less to identify points of disagreement with his fellow arbitrators than to place in doubt the very legitimacy of the proceeding, by creating a script that his appointing party could use as a complaint against them. And, sure enough, the core of the Respondent’s Submissions on the current challenges consists of lengthy quotations from Professor Abi-Saab’s diatribes against his colleagues. Regrettably, this seems to be part of Professor Abi-Saab’s *modus operandi* when his preferred outcome is not accepted³³ – although it has reached extreme proportions in this case.
42. Finally, Venezuela objects to the supposed violation of its “right” to appoint Professor Abi-Saab’s replacement. The flaw in that argument is obvious. The ICSID Convention sets out how a tribunal is to be constituted. Any rights the parties have in constituting the tribunal exist only in that framework, including Article 56(3), which provides that if a party-

personal pique at the tone and content of Professor Abi-Saab’s dissenting opinions, but rather by the disruptive timing of his resignation – just as they said.

³³ In the *Abaclat* proceeding, Professor Abi-Saab accused an eminent Tribunal majority of partiality and of employing defective “legal method and reasoning, as well as the understanding of some basic principles, rules and concepts of international law,” resulting in their overlooking “glaringly insuperable obstacles” to jurisdiction. He published the dissent eleven weeks after the decision to which it related, then resigned from the tribunal. *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility – Dissenting Opinion of Georges Abi-Saab, 28 October 2011, ¶¶ 2, 4.

appointed arbitrator resigns without consent, the Chairman will select his replacement. Whatever “rights” Venezuela may have, they do not include a right to appoint a replacement for an arbitrator who has resigned without the required consent.

43. Given the clarity of Article 56(3), it is not surprising that the Chairman’s consistent practice confirms that a party has no “right” to make an appointment in these circumstances. This case marks the fifth time that the Chairman has been called upon to replace a party-appointed arbitrator who has resigned without consent. The first occasion was in fact in the very first ICSID arbitration, when Sir John Foster QC, an eminent barrister and Member of Parliament in the UK, resigned without the other tribunal members’ consent.³⁴ The Chairman appointed his replacement (over the protests of the American investors who were the claimants in that case). Since then, the Chairman has replaced party-appointed arbitrators who resigned without their tribunals’ consent in three other cases³⁵ – notably including the *Pey Casado* case, in which consent was withheld where the respondent’s arbitrator resigned “on the eve of deliberation by the Tribunal scheduled with his consent.”³⁶

D. Venezuela’s Complaints About Procedural Aspects of the Replacement of Professor Abi-Saab Are Neither Correct Nor Relevant to the Disqualification Proposals

44. Lastly, Venezuela contends that the decision not to consent to Professor Abi-Saab’s resignation was procedurally flawed, because the Fourth Challenge disabled Mr. Fortier from participating in the decision. This suggestion is, in the first place, irrelevant to the Resignation Challenges, because it has nothing to do with alleged bias. But it is also wrong in substance.

³⁴ *Holiday Inns S.A. and Occidental Petroleum Corp. v. Morocco*, ICSID Case No. ARB/72/1, in ICSID, ELEVENTH ANN. REP. 1976/1977, p. 34.

³⁵ See *Enron Corp. and Ponderosa Assets v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 39 (co-arbitrator replaced under Arbitration Rule 11(2)(a)); *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶¶ 34–37; *Toto Construzioni v. Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, ¶ 22 (“The two other members of the Tribunal were unable to consent to his resignation.”).

³⁶ *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶¶ 34–37 (unofficial translation from Spanish original).

45. Article 56(3) of the Convention operates where a party-appointed arbitrator has resigned “without the consent of the Commission or Tribunal of which he was a member.”³⁷ As the commentary confirms, “[s]ince Art. 56(3) requires a positive decision to give consent, failure [by the two remaining members] to reach agreement would amount to a refusal to give consent.”³⁸ In the present case, Judge Keith did not consent to the resignation, and therefore there could have been no “consent of the ... Tribunal,” irrespective of Mr. Fortier’s views or status. Thus, even if Venezuela were correct that the pendency of the Fourth Challenge disabled Mr. Fortier from taking a view on the resignation (which it is not), the result would be the same because the President chose not to consent.
46. Consider, finally, the intolerable consequence of Venezuela’s alternative reality. According to Venezuela, the Fourth Challenge could not be resolved until Professor Abi-Saab had been replaced, after which his replacement and Judge Keith would resolve the challenge. But Professor Abi-Saab could not be replaced until it was known who was to appoint the replacement; and that could not be known, in Venezuela’s script, until the two remaining Members of the Tribunal had decided whether to consent to his resignation. At the same time, Venezuela says that Mr. Fortier could not participate in that decision so long as the Fourth Challenge was outstanding. So Professor Abi-Saab could not be replaced until the Fourth Challenge was resolved; but the Fourth Challenge could not be resolved until Professor Abi-Saab was replaced. This Catch-22 would lead Venezuela to the ultimate prize: a way to freeze a proceeding forever, leaving international law a dead letter.

IV. THE OTHER GROUNDS VENEZUELA CITES HAVE EITHER BEEN DECIDED PREVIOUSLY OR WAIVED, AND THEY ARE NOT WELL-FOUNDED IN ANY EVENT

47. The previous section addressed Venezuela’s core argument in support of the Fifth and Sixth Challenges – i.e., that the Tribunal’s decision not to consent to Professor Abi-Saab’s resignation could somehow be construed as proof of obvious bias. This section shows that the remaining grounds Venezuela cites for disqualification are, for the most part, inadmissible (including the entirety of two of the four substantive sections of its

³⁷ ICSID Convention, Article 56(3).

³⁸ Annex 2, C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, p. 1195 (2d ed. 2009).

Submissions),³⁹ either because they have already been rejected, or because they are untimely. The single admissible basis – that a disappointed litigant in an unrelated case has filed a setting-aside proceeding against an award – falls flat on the merits.

48. Besides the withholding of consent to Professor Abi-Saab’s resignation, the other basis for the Resignation Challenges is that Judge Keith and Mr. Fortier supposedly evinced bias by dismissing Venezuela’s application to reconsider the September 2013 Decision on Liability (the *Reconsideration Decision*).⁴⁰ Venezuela previously challenged both Judge Keith and Mr. Fortier on this same basis in March 2014 (the *Reconsideration Challenges*). The Chairman rejected those challenges,⁴¹ and that decision cannot be revisited now. Even on Venezuela’s theory that Professor Abi-Saab’s dissents “reveal” some bias that was latent in the Reconsideration Decision, there is nothing new: Professor Abi-Saab’s dissent from the Reconsideration Decision was dispatched to the parties together with that Decision and formed the basis of the rejected Reconsideration Challenges. Of course, as the Chairman noted at the time in dismissing the challenges, Venezuela’s grievance was based on its dissatisfaction with the Reconsideration Decision.⁴² Similarly, Venezuela’s attempt to resurrect the Reconsideration Challenges by claiming a “negative general attitude” on the part of the Tribunal majority would fail even if it were admissible:⁴³ this supposed “general attitude” is purportedly evidenced by nothing other than the content of the Tribunal’s decisions and orders, including the Decision on Liability and the Reconsideration Decision.
49. That leaves the Fourth Challenge, which is against Mr. Fortier alone. The parties have fully briefed the Fourth Challenge. The Claimants incorporate by reference their previous submissions, as they were invited to do,⁴⁴ and have attached them as an Appendix to this Reply. The following paragraphs touch briefly on the main points.

³⁹ See Respondent’s Submissions, sections II and IV.

⁴⁰ See Respondent’s Submissions, section V.

⁴¹ Decision on the Reconsideration Challenges, 5 May 2014.

⁴² Decision on the Reconsideration Challenges, 5 May 2014, ¶¶ 54–56.

⁴³ E.g., Respondent’s Submissions, ¶¶ 3, 24–27, 41; see also *id.*, ¶ 31 (“general attitude of hostility”).

⁴⁴ Letter from ICSID to the Parties, 26 March 2015.

50. The Fourth Challenge similarly restates a challenge that was made – and rejected – previously. Venezuela first proposed the disqualification of Mr. Fortier on 5 October 2011 (the *First Challenge*). Like the Fourth Challenge, the First Challenge arose from Mr. Fortier’s supposed relationship with what Venezuela describes as “the firm more adverse to Venezuela than any other in the world,” the former McLeod Dixon LLP – a firm with which Mr. Fortier has in fact never been affiliated. On 4 October 2011, Mr. Fortier had disclosed that the (much larger and more prominent) law firm of which he *was* a partner, Norton Rose OR LLP, would be merging with Macleod Dixon. The next day, Venezuela proposed his disqualification. Mr. Fortier announced his intention to resign from his firm before the merger, which he proceeded to do.⁴⁵ On 27 February 2012, Judge Keith and Professor Abi-Saab dismissed the First Challenge.⁴⁶
51. Venezuela now renews its contention that Mr. Fortier should be disqualified because of his “professional relationship” with the merged firm, which is presently called Norton Rose Fulbright. The renewed challenge arises from Mr. Fortier’s service as presiding arbitrator in the well-known *Yukos* cases. Martin Valasek, now a partner at Norton Rose Fulbright (but never an attorney with Macleod Dixon), acted as an assistant to the *Yukos* tribunal.
52. In addition to failing on the merits as fully explained in our previous submissions incorporated here by reference,⁴⁷ the Fourth Challenge is inadmissible at the threshold, because Venezuela did not raise it in timely fashion. ICSID Arbitration Rule 9(1) requires arbitrator challenges under Convention Article 57 to be made “promptly,” and the “sanction for the failure to object promptly is waiver of the right to make objection.”⁴⁸ Venezuela knew, or had access to, the facts underlying the Fourth Challenge long before it was filed on 6 February 2015. Specifically:

⁴⁵ Letter from Mr. Fortier to Judge Keith and Professor Abi-Saab, 18 October 2011, p. 1.

⁴⁶ Decision on the Proposal to Disqualify Mr. Fortier, 27 February 2012, ¶¶ 64–65, 68.

⁴⁷ See **Appendix**.

⁴⁸ *CEMEX v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Disqualification, 6 November 2009, ¶ 36 (citation omitted) (Guillaume, Abi-Saab).

- Immediately after the First Challenge was made in October 2011, Mr. Fortier disclosed that he would continue to work with lawyers from his former firm who had been assisting him in cases in which he was sitting as arbitrator.⁴⁹
- Mr. Valasek’s role as an assistant to the *Yukos* tribunal was already publicly known at that time.⁵⁰
- The level of Mr. Valasek’s fee for his decade-long service in that extraordinary case, which is the core of the Fourth Challenge, was publicly reported in August 2014.⁵¹

Thus, all of the above facts were known to Venezuela by August 2014, rendering the Fourth Challenge, filed on 6 February 2015, untimely.⁵²

53. Venezuela contends that it should not be charged with knowledge of Mr. Valasek’s role, because it is not obliged to keep tabs on the arbitrators’ other cases. *Yukos*, however, is not simply another case. The final awards that were published in July 2014 resolved the largest investment arbitration dispute to date and set out how that tribunal arrived at a valuation of approximately US\$ 50 billion. No law firm involved in investment arbitration cases, including the Respondent’s counsel, could have failed to read that award as soon as it became available or to follow news about the proceeding published in the international arbitration trade press.

⁴⁹ Letter from Mr. Fortier to Judge Keith and Professor Abi-Saab, 18 October 2011, p. 2.

⁵⁰ See **Appendix** at 9 February 2015 Letter from the Claimants to the Tribunal, attaching Annex B thereto (Alison Ross, *Yukos decisions published*, GLOBAL ARBITRATION REVIEW, 1 February 2010). Mr. Valasek’s role was made public when the tribunal’s jurisdictional awards were published in February 2010.

⁵¹ See **Appendix** at 9 February 2015 Letter from the Claimants to the Tribunal, attaching Annex A thereto (Sebastian Perry, *The cost of Yukos*, GLOBAL ARBITRATION REVIEW, 15 August 2014). The level of Mr. Valasek’s fee was reported in the same news source relied upon by Venezuela (as well as in the *Yukos* awards themselves).

⁵² Tribunals have routinely rejected challenges based upon shorter periods of delay. See *Suez v. Argentina*, ICSID Case No. ARB/03/17 and ARB/03/19, Decision on Disqualification, 22 October 2007, ¶ 26 (53 days); *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Disqualification, 13 December 2013, ¶¶ 41, 49, 61, 75 (four months); *CEMEX v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Disqualification, 6 November 2009, ¶ 44 (five months). Similarly, in *Azurix v. Argentina*, the tribunal held that a delay of eight months was clearly too long under any “reasonable standard.” See ICSID Case No. ARB/01/12, Decision on Annulment, 1 September 2009, ¶¶ 35, 269. Compare *Saba Fakes v. Turkey* (challenge timely where filed within 10 days of constitution of the tribunal) (discussed in *CEMEX v. Venezuela*, Decision on Disqualification, ¶ 37).

54. Thus, the *only* ground for the Venezuela’s Fourth Challenge that is not plainly untimely is the fact that Russia challenged the *Yukos* awards in the Dutch courts in January 2015; and that fact is simply irrelevant. Russia’s challenge has nothing to do with the present case and will be resolved in another forum. And whatever the merits or demerits of Russia’s allegations as to Mr. Valasek’s service *to the tribunal* in the *Yukos* cases, those allegations cannot show – at all, much less “manifestly” – any bias or lack of independence on the part of Mr. Fortier in *this* case.

V. THERE IS NO BASIS TO SEEK THE RECOMMENDATION OF A THIRD PARTY

55. Venezuela’s request that “ICSID seek the recommendation of a third party” in deciding the Fourth through Sixth Challenges is a standard reiteration of Venezuela’s favorite tactics.⁵³ First, it is designed to put off resolution of the outstanding challenges and thus to delay further the rendering of the Award. Second, it aims to delegitimize a decision-maker who has dared to render a previous decision with which Venezuela disagrees – in this case the Chairman’s dismissal of the earlier Reconsideration Challenges. It is essential to the credibility of ICSID as an administering institution to resist such bullying.

56. Venezuela advances two contentions in support of its request: (i) that ICSID has a conflict of interest because of the identity of the challenged arbitrators; and (ii) that a third party should be consulted because ICSID has been “involv[ed]” in the matters at hand.⁵⁴ Both contentions are meritless.

57. The first contention has no relevance to the challenge to Judge Keith in any event. Venezuela has not alleged that he has any connection to the World Bank that would preclude the Chairman from resolving the proposal to disqualify him.

58. Nor is there any valid reason for the Chairman to refrain from resolving the proposals to disqualify Mr. Fortier. He has never had a role at the World Bank that would create any conflict. Venezuela cites the *Generation Ukraine* and *Siemens* cases in support of its flawed argument. But those cases involved challenges to arbitrators who had been on the staff of

⁵³ Respondent’s Submissions, ¶¶ 4–6.

⁵⁴ See Respondent’s Submissions, ¶¶ 4–6.

the World Bank – indeed, in senior roles, including Deputy General Counsel.⁵⁵ Mr. Fortier has never been employed by the World Bank or been a member of its staff.

59. Mr. Fortier is an External Member and Chair of the World Bank Group’s Sanctions Board. He has served in this role since June 2012.⁵⁶ Yet when Venezuela made its Reconsideration Challenges against Judge Keith and Mr. Fortier in March 2014, it was content for the Chairman to decide them. If Venezuela truly believed that Mr. Fortier’s role with the Sanctions Board disqualified the Chairman from deciding a challenge to him without third-party assistance, it would have argued as much back then, but it did not do so.
60. In any event, the Sanctions Board is not a unit of the World Bank. It is an “independent body with a majority of external members.”⁵⁷ External members such as Mr. Fortier cannot hold or have previously held any appointment to the staff of the World Bank Group. His service on the Board creates no grounds for a referral to a third party. Indeed, for the Chairman to grant Venezuela’s request on the improper basis it propounds would suggest that the Sanctions Board is not independent.
61. Moving to contention (ii), Venezuela argues that a third-party recommendation should be procured “given ICSID’s involvement in some of the events that have given rise” to the Resignation Challenges.⁵⁸ That is tantamount to saying that the Chairman must always seek a third-party recommendation in any challenge, because ICSID’s “involvement” in this case is the same as in any other: it has administered the proceeding and conveyed communications between the parties and the Tribunal. There is no precedent for referral to a third party because of ICSID’s mere “involvement,” and rightly so.

⁵⁵ Compare *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 4.16 (discussing Jürgen Voss) with Annex 3, J. Voss, *The Multilateral Investment Guarantee Agency*, 21 J. WORLD TRADE 5, 5 (1987) (describing author as “Counsel, The World Bank”). Compare *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 36 (discussing Andrés Rigo Sureda) with Annex 4, Biography of Dr. Rigo Sureda (noting that he “served with the World Bank in several capacities (1973-2000), including Assistant General Counsel and Deputy General Counsel (1992-2000)”).

⁵⁶ See Annex 5, *Sanctions Board Members* page of the World Bank website.

⁵⁷ Annex 6, *Sanctions System at the World Bank* page of the World Bank website.

⁵⁸ Respondent’s Submissions, ¶ 6.

62. Venezuela blames ICSID for “permit[ing] a situation to develop” in which Venezuela’s interests may be prejudiced.⁵⁹ Two events generated the current situation, and neither involved ICSID: Venezuela made the Fourth Challenge; and Professor Abi-Saab resigned while that challenge was pending and without the Tribunal’s consent. Thereafter, ICSID’s “involvement” has been through the Secretary to the Tribunal, a role that ICSID Counsel play in every proceeding. The Secretary has conveyed messages between the Tribunal and the parties, again a normal function of tribunal secretaries. For example, when Venezuela questioned whether the Claimants should be permitted to comment on Professor Abi-Saab’s resignation, the Secretary responded, but only to convey the message that the President of the Tribunal considered that comments from the parties would be helpful.⁶⁰ Beyond that, ICSID has done no more than follow the Convention and the Rules, as its function requires.
63. Finally, Venezuela contends that, were a third party to be requested to make a recommendation, it could not be the august institution that has played that role in the few previous instances in which such recommendations have been sought, namely the Permanent Court of Arbitration. The flimsiness of this contention betrays Venezuela’s true motive, which is to disqualify one decision-maker after another in order to foster delay: first the two remaining Members of the Tribunal; then the Chairman; and next the PCA. Inevitably, Venezuela would object to any other third party, dragging out the process as long as possible; it has shown no compunction about objecting when it has no grounds for doing so. Its objection to the PCA is a case in point. Judge Keith and Mr. Fortier are members of the PCA Financial Assistance Fund Board of Trustees. That Fund makes grants to states that have difficulty meeting the financial costs of participating in PCA arbitrations, and the trustees’ task is to allocate the Fund’s limited resources among states who apply for grants. They are in no position of dependence on the PCA, and the PCA has no favors to ask or expect of them.⁶¹ To suggest that this role creates some conflict for the PCA is beyond frivolous.

⁵⁹ Respondent’s Submissions, ¶ 4.

⁶⁰ Email from ICSID to the Parties, 24 February 2015.

⁶¹ See generally Annex 7, *Financial Assistance Fund* page of the PCA website.

64. In sum, Venezuela's request that the Chairman refer the challenges to a third party is baseless. He should proceed to decide the challenges himself, and as expeditiously as practicable.

VI. CONCLUSION

65. For the foregoing reasons, the Claimants respectfully request that the Chairman:

- dismiss Venezuela's 6 February 2015 challenge to Mr. Fortier (the Fourth Challenge);
- dismiss Venezuela's 25 March 2015 dual challenge to Judge Keith and Mr. Fortier (the Fifth and Sixth Challenges);
- reject Venezuela's request to involve a third party in deciding upon the challenges; and
- appoint Professor Abi-Saab's replacement as quickly as possible.

66. In closing, it remains to address the very last paragraph of the Respondent's Submissions:

Respondent reserves the right to submit such additional evidence and arguments as it may deem appropriate to complement or supplement this submission or to respond to any argument or observation submitted by Claimants, Judge Keith or Mr. Fortier.

67. The Respondent has no "right" that it could reserve to "complement or supplement" its submission, let alone at any time or in any manner that "*it* may deem appropriate." This is part of a pattern that Venezuela has followed since the beginning of this proceeding – and, so far as can be determined from the public record, in its other ICSID cases. Venezuela deems itself to be in charge of the proceeding and endowed with a special procedural right to do whatever it wishes, whenever it wishes. The cardinal rule is that Venezuela must always have the last word – even after a matter has been finally decided. There is apparently little that can be done about this regrettable practice, save to note its arrogance and contemptuousness of an institution that Venezuela denounced with great fanfare in 2010 – and to request that the Chairman dispose of any unauthorized future submissions by Venezuela as speedily as possible.⁶² Only in that way can those who are properly in charge

⁶² The authorization that either party has been given for further submissions is both conditional – only if Judge Keith or Mr. Fortier submits an "explanation" on the disqualification proposals; and limited in scope – to

of this proceeding regain control of it, leading – at long last – to the rendering of an Award that the Claimants, like all arbitrating parties, were entitled to expect with reasonable promptness when they commenced this proceeding in 2007.

Respectfully submitted,
9 April 2015



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and
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THREE CROWNS

observations “arising from Judge Keith and Mr. Fortier’s explanations (if any).” Letter from ICSID to the Parties, 26 March 2015.