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By Email

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ConocoPhillips Petrozuata B.V., et al. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30)

Dear Mr. Chairman:

As authorized by the instructions conveyed on 26 March, the Claimants offer their observations arising from the challenged arbitrators' explanations circulated on 16 April 2015 (the *Explanations*). Each Explanation speaks for itself and negates the grounds invoked for the disqualification proposals.

Besides the Explanations, there has been one other development since the Claimants submitted their Reply on the challenges: the 15 April 2015 email from Professor Abi-Saab, resulting from the Respondent's transmission to him of confidential materials from the arbitration to which he should no longer be privy. Professor Abi-Saab's comments are in the first place inadmissible – the Convention and the Rules do not contemplate submissions by a former arbitrator on disqualification proposals, or any other matter.¹

In any event, Professor Abi-Saab's two observations are inapposite. *First*, the Claimants have never suggested that Professor Abi-Saab could have started work on his dissent as of the moment of his appointment – but rather as of the conclusion of the merits hearing in July 2010, at which point each arbitrator was under a duty to begin assessment of the issues, and the existence of disagreements with his fellow arbitrators would have been apparent.² *Second*, while Professor Abi-Saab's opposition to the mandatory provisions of Article 58 of the Convention might have

¹ Arbitration Rule 9(3) authorizes the submission of explanations by the challenged arbitrator(s) only.

² See Claimants' Reply Submission dated 9 April 2015, ¶ 39.



led him to refuse appointment at the outset,³ once he had agreed to serve, he was under a duty to follow them. He was not free to “[ake] it for granted” that he would be “spared the duty” with which he preferred not to comply.⁴

The issue before the Chairman in the challenges against Judge Keith and Mr. Fortier is whether the lack of consent to Professor Abi-Saab’s resignation is proof of manifest bias on their part. Nothing in the record supports that conclusion. One can of course have sympathy for Professor Abi-Saab’s health issues, but the decision to withhold consent stemmed instead from the timing of Professor Abi-Saab’s actions and their disruptive effect upon a proceeding that is already into its eighth year.⁵

The Claimants therefore respectfully repeat their call for the Chairman to resolve (and reject) all three challenges forthwith.⁶ We further request that the Chairman proceed to appoint the third Member of the Tribunal as expeditiously as possible, bearing in mind the need for the new arbitrator to have availability in the near term to participate in the final quantum hearing.

Respectfully submitted,

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³ Article 58 of the Convention provides: “The decision on any proposal to disqualify a conciliator or arbitrator *shall be taken* by the other members of the Commission or Tribunal” (emphasis added).

⁴ Email from Professor Abi-Saab to the Secretary-General, 15 April 2015.

⁵ See Letter from ICSID to the Parties, 4 March 2015.

⁶ Arbitration Rule 9(5) states: “Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.”