



International Arbitration Case Law

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CONOCOPHILLIPS COMPANY ET AL.

V.

THE BOLIVARIAN REPUBLIC OF VENEZUELA

(ICSID CASE NO. ARB/07/30)

DECISION ON THE PROPOSAL TO DISQUALIFY L. YVES

FORTIER, Q.C., ARBITRATOR

Case Report by Alexandre Meyniel**

Edited By Natasha Dupont***

A decision rendered on February 27, 2012, under the ICSID Convention and Arbitration Rules.

Tribunal: Judge Kenneth J. Keith, Professor Georges Abi-Saab.

Claimants' counsel: Mr. Jan Paulsson, Ms. Lucy Reed, Mr. Nigel Blackaby, Mr. Brian King, and Mr. Alexander Yanos, FRESHFIELDS BRUCKHAUS DERINGER LLP; and

Professor James Crawford SC, MATRIX CHAMBERS (UK).

Respondent's counsel: Dra. Cilia Flores, PROCURADORA GENERAL DE LA REPUBLICA; and

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1. *Facts of the Case*

On October 4, 2011, Mr. Fortier, one of the three arbitrators sitting in the dispute between ConocoPhillips [*hereinafter* "Claimant"] and the Bolivarian Republic of Venezuela [*hereinafter* "Respondent"], wrote to the Secretary-General of the International Centre for Settlement of Investment Disputes [*hereinafter* "ICSID"] to disclose information regarding the announced merger between the firm in which he was a partner, Norton Rose OR LLP, and Macleod Dixon LLP.

Indeed, following the due diligence performed in furtherance of the merger, Mr. Fortier had become aware that Macleod Dixon LLP's Caracas office was involved with both Claimant and Respondent to the extent it (a) had provided, and continued to provide, legal services to the Claimant; (b) had acted adversely to the interests of the Respondent in an ICSID case filed against Respondent; and (c) was currently acting on behalf of the Claimant in ICC proceedings involving the Respondent's state owned petroleum company. Mr. Fortier emphasized that the present disclosure was made at the "first possible opportunity."¹

On October 5, 2011, arguing the "extent and depth of Macleod Dixon, S.C.'s involvement in multiple matters adverse to the Respondent ... including matters for ConocoPhillips"² Respondent proposed the disqualification of Mr. Fortier in accordance with Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

On October 6, 2011, the Secretary of the Tribunal confirmed that pursuant to Rule 9(6) of the ICSID Arbitration Rules, the proceedings were to be suspended until a decision was rendered concerning the Proposal of Disqualification.

On October 18, 2011, Mr. Fortier informed Judge Keith, Professor Abi-Saab, and the Parties that, on October 17, 2011, he had taken the decision to resign from his firm, effective on December 31, 2011. Meanwhile, the ethical screen put in place since October 5, 2011 would be maintained. On October 24, 2011, the Respondent

¹ Decision on the Proposal to Disqualify, ¶3.

² *Id.* ¶ 6 (citing the Respondent's *Proposal for Disqualification*).

submitted that the question of Mr. Fortier's disqualification had not been resolved by the latter's resignation of Norton Rose OR LLP, and maintained its position with respect to the Proposal to Disqualify.

2. Legal Issues Discussed in the Decision

a) Applicable Legal Standards

The Tribunal held that the ICSID Convention and the ICSID Arbitration Rules alone were applicable to the determination of Respondent's Proposal to Disqualify. It found that the "IBA General Standards are not law for ICSID tribunals"³ and thus found inapplicable the General Standard 7(c) of the IBA Guidelines on Conflict of Interest in International Arbitration (2004).

The Tribunal relied on Articles 14 and 57 of the ICSID Convention as well as Rule 6 of the ICSID Arbitration Rules to establish the applicable standard. It noted that the purpose of the requirements of independence and impartiality, as embodied in the French, English and Spanish versions of Article 14 of the ICSID Convention, was to "protect parties against arbitrators being influenced by factors other than those related to the merits of the case."⁴ The Tribunal then went on to interpret the meaning of Article 57 of the ICSID Convention, which allows for a Party to 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." The Tribunal found the inclusion of the term "manifest" to impose "a relatively heavy burden on the party proposing disqualification."⁵ Lastly, the Tribunal stressed that the manifest lack of the disregarded impartiality and independence of judgment must originate from objective evidence.

b) Is there a duty to disclose information?

The Tribunal found that an arbitrator was under the duty to disclose information that fell under the ambit of Rule 6 of the ICSID Arbitration Rules. Here however, the issue turned on the extent of the arbitrator's duty to continue inquiring of potential and unknown conflicts of interests following the commencement of the proceedings.

³ *Id.* ¶59.

⁴ *Id.* ¶54.

⁵ *Id.* ¶56.

c) What is the extent of the arbitrator's duty to continue inquiring potential and unknown conflict of interests during the arbitral process?

The Tribunal found that the circumstances of this case did not warrant a finding of a breach of Rule 6(b) of the ICSID Arbitration Rules pursuant to which an arbitrator has the duty “to make reasonable enquiries into a possible conflict of interest arising from the merger discussions.”⁶ In other words, the Tribunal ultimately held that there is no objective evidence to show that Mr. Fortier “knew or should have known the information in question,”⁷ and was accordingly under the obligation to disclose information for which he had no duty to inquire.

d) What is the consequence of a breach of the obligation to disclose?

The Tribunal found that a non-disclosure does not in itself result in disqualification. Rather, the Tribunal stressed that a disclosure will result in the arbitrator’s disqualification only if the non-disclosed circumstances require so. Ultimately, the Tribunal found that disqualification should occur only if the particular factual circumstances “give rise to a reasonable suspicion of bias, whether conscious or unconscious.”⁸

3. Decision

The Tribunal dismissed the Respondent’s Proposal for Disqualification of Mr. Fortier as an arbitrator, and terminated the suspension of the proceedings that had been initiated pursuant to Rule 9(6) of the ICSID Arbitration Rules.

⁶ *Id.* ¶66.

⁷ *Id.* ¶67.

⁸ *Id.* ¶60.