

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

IN THE ARBITRATION PROCEEDING BETWEEN

**CONOCOPHILLIPS PETROZUATA B.V.
CONOCOPHILLIPS HAMACA B.V.
CONOCOPHILLIPS GULF OF PARIA B.V.**
CLAIMANTS

and

BOLIVARIAN REPUBLIC OF VENEZUELA
RESPONDENT

ICSID Case No. ARB/07/30

INTERIM DECISION

Members of the Tribunal

Mr. Eduardo Zuleta, President
Professor Andreas Bucher, Arbitrator
The Hon. L. Yves Fortier, QC, Arbitrator

SECRETARY OF THE TRIBUNAL

Mr. Gonzalo Flores

Date: 17 January 2017

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I. Procedural Background

1. On 2 November 2007, the Claimants submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) a Request for Arbitration against the Bolivarian Republic of Venezuela (“Venezuela” or “the Respondent”) pursuant to Article 36 of the ICSID Convention. On 13 December 2007, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention.

2. The Tribunal was constituted on 23 July 2008. Its members were Judge Kenneth Keith, President, appointed by the Chairman of the ICSID Administrative Council pursuant to Article 38 of the ICSID Convention; The Hon. L. Yves Fortier, QC, appointed by the Claimants; and Sir Ian Brownlie, CBE, QC, appointed by the Respondent. On 1 February 2010, the Tribunal was reconstituted, with Professor Georges Abi-Saab being appointed by the Respondent, following Sir Ian Brownlie’s passing.

3. From 31 May to 12 June 2010 a hearing took place on jurisdiction and merits, followed by two days of pleadings on 21 and 23 July 2010. On 3 September 2013, the Tribunal issued a Decision on Jurisdiction and the Merits (“the 2013 Decision”), stating in its paragraph 404 the conclusions quoted below in part II.

4. On 8 September 2013, Counsel for the Respondent submitted a letter requesting a clarification and further explanations from the Tribunal regarding certain findings in the Decision on Jurisdiction and the Merits relating in particular to the 2013 Decision’s conclusion on the negotiation on compensation that took place between the Parties (the “First Application for Reconsideration”). In its letter, Counsel for the Respondent also requested “a limited and focused hearing” to address the specific issues raised.

5. Counsel for the Claimants replied to the Respondent’s letter on 10 September 2013. The Claimants opposed the Respondent’s requests and proposed instead a briefing schedule for submissions on *quantum*.

6. Between 11 and 23 September 2013, several further letters were submitted to the Tribunal by the Parties.

7. By letter of 1 October 2013, the Tribunal fixed a schedule for the Parties to file submissions on: (i) the Tribunal's power to reconsider the 2013 Decision; and (ii) a possible scheduling for *quantum* briefs. The Parties duly submitted two rounds of written pleadings.

8. In its Decision of 10 March 2014 the Tribunal stated that so far as the matter set out in the Respondent's Application for Reconsideration was concerned "this decision is limited to answering the question whether the Tribunal has the power which the Respondent would have it exercise. The decision does not address the grounds the Respondent invokes for reconsidering the part of the Decision which it challenges and the evidence which it sees as supporting those grounds. The power must be shown to exist before it can be exercised".¹

9. The Tribunal concluded that it did not have the power to reconsider the Decision on Jurisdiction and the Merits, with Professor Georges Abi-Saab dissenting. In the absence of such power it implicitly followed in the Tribunal's Decision that the Respondent's Request was dismissed.

10. Professor Georges Abi-Saab resigned on 20 February 2015 with immediate effect. On 10 August 2015 the Tribunal was reconstituted, with Professor Andreas Bucher being appointed by the Chairman of the Administrative Council.

11. On that same day, 10 August 2015, the Respondent submitted a Second Application for Reconsideration directed at the Tribunal's Decision of 10 March 2014. It requested a hearing on the application. The Respondent recalled that it had, immediately following the 2013 Decision, applied for reconsideration, pointing out

certain obvious factual, legal and logical errors the correction of any one of which would require a change in the majority's conclusions on the issue of good faith negotiations. Of particular relevance to this [Second] Application, Respondent pointed out that cables from the U.S. Embassy released after the hearing in this case in 2010, which reported on the briefings made by the chief ConocoPhillips negotiators to the U.S. Embassy in Caracas, left no doubt that the representations made by ConocoPhillips to the Tribunal regarding Respondent's supposed unwillingness

¹ Decision of 10 March 2014 on Respondent's First Request for Reconsideration, para. 9.

to negotiate fair market value had been completely false, and that it was in fact ConocoPhillips which was seeking compensation ‘on top of the fair market value of the assets.’ Since the majority had relied on Claimants’ misrepresentations in reaching its conclusion on bad faith negotiation, Respondent assumed that the Tribunal would want to reconsider the Majority Merits Decision to avoid an obvious gross miscarriage of justice. That assumption was based on the premise that every tribunal has the power to correct its own decision while the case is still pending before it and should exercise that power if its decision were indeed based on patently false representations. (footnote omitted)²

12. On 12 August 2015, the Claimants responded in these terms:

The application is frivolous and dilatory. Venezuela has not even attempted to articulate a legal basis for the admissibility of a request to reconsider a reconsideration decision – because there is none. The Tribunal’s 10 March Decision considered and rejected the same arguments that Venezuela now raises. It has *res judicata* effect and may not be revisited or reviewed in any way prior to the rendering of the final Award.³

The Claimants requested that the Tribunal dismiss the Respondent’s application forthwith and promptly reschedule the final hearing.

13. Later that same day, the Respondent commented upon the Claimants’ letter. On 13 August 2015 the Claimants stated that their letter of the previous day provided a complete answer to the Respondent’s points in its later letter.

14. On 15 August 2015, the Parties were advised that the Tribunal “is currently considering the Respondent’s application, including its request for a hearing, and will revert to the parties in due course. The Tribunal considers that no further submissions are needed at this point.”⁴

15. On 9 November 2015, the Respondent submitted a proposal to disqualify L. Yves Fortier QC as arbitrator. In terms of Rule 9(6) of the Arbitration Rules, the proceeding was suspended until 15 December 2015 when the proposal was dismissed. Two further proposals were made by the Respondent on 26 February 2016 and 22 July 2016 (Respondent’s

² Respondent’s Second Application for Reconsideration, pp. 2-3.

³ Claimants’ letter of 12 August 2015, p. 1.

⁴ ICSID’s letter of 15 August 2015, p. 2.

Fifth and Sixth Proposals to disqualify L. Yves Fortier), both dismissed on 15 March 2016 and 26 July 2016, respectively.

16. The Tribunal rendered its Decision on the Respondent's Second Application for Reconsideration on 9 February 2016. It explained that it had approached the matter, as have the Parties, in terms of seeking the existence and source of the power the Respondent would have it exercise. It is not a matter of finding a rule prohibiting the existence or exercise of such a power. That power has to be found to exist. The Respondent has failed to make such demonstration.

17. Accordingly, the Tribunal, by a majority, dismissed the Second Application for Reconsideration made by the Respondent for the reconsideration of its Decision on Respondent's First Request for Reconsideration of 10 March 2014, with Professor Andreas Bucher dissenting.

18. On 24 February 2016, the Tribunal held an Organizational Hearing in Washington, D.C., where several outstanding matters of procedure were discussed, including the scheduling and the agenda of the forthcoming hearings on *quantum*. A number of procedural issues were recorded in the Minutes and further refined in ICSID's letter of 8 June 2016.

19. On 21 March 2016, the President of the Tribunal, Judge Kenneth J. Keith resigned as arbitrator in this case with immediate effect. On 22 April 2016 the Tribunal was reconstituted, with Mr. Eduardo Zuleta being appointed as presiding arbitrator by the Chairman of the Administrative Council.

20. On 21 March 2016, the Respondent submitted the Updated Expert Report of Vladimir Brailovsky and Daniel Flores, dated 18 March 2016. On the same date, the Claimants submitted the March 2016 Update prepared by their Experts Manuel A. Abdala and Pablo T. Spiller (Compass Lexecon).

21. On 21 April 2016, the Claimants submitted the Rebuttal Expert Report prepared by Manuel A. Abdala and Pablo T. Spiller (Compass Lexecon) and the Second Expert Report of Richard Strickland, while, on the same date, the Respondent communicated the Valuation Update Reply prepared by Vladimir Brailovsky and Daniel Flores.

22. In accordance with the conclusions of the Organizational Hearing, the Claimants submitted on 15 April 2016 additional exhibits in the record (C-623 to C-671), as did the Respondent (R-603 to R-641).

23. By letter dated April 20, 2016, the Respondent filed with the Tribunal the Third Application for Reconsideration of the Majority's Decision of 9 February 2016, containing the equivalent request than in the preceding two earlier applications. In effect, this Third Application contained the same grounds as the Respondent's two earlier Applications. The Claimants responded by letter of 21 April 2016.

24. At the Organizational Hearing of 24 February 2016, the Claimants were ordered to produce a number of documents, which the Tribunal considered were not privileged. By letter of 11 May 2016, the Tribunal decided the last remaining issue in respect of the production of documents.

25. Another decision of the Tribunal at the Organizational Hearing was to invite the Parties to comment on the issues other than *quantum* that they considered were still outstanding, if any. The Tribunal received submissions from the Claimants on 2 March 2016 and from the Respondent on 11 March 2016. After due deliberation, the Tribunal considered it necessary to invite the Parties, by letter dated 17 March 2016, to file an additional round of submissions, which were received from the Claimants on 15 April 2016 and from the Respondent on 15 May 2016. The Parties were invited to specifically address the Claimants' request for a declaration of breach of Article 6 of the BIT.

26. The Tribunal held a first phase of the hearing on *quantum* on 15-19 August 2016 in respect of the following issues: (i) the scope of the Tribunal's finding on Article 6(c) of the BIT and the outcome of the Claimants' claim for a declaration that the Respondent breached Article 6 of the BIT; (ii) the Respondent's Third Application for Reconsideration;

(iii) the *misrepresentation* allegation; (iv) the relevance of the *compensation formulas* and (v) the impact of the ongoing ICC arbitration proceedings, if any.⁵

27. At the end of the hearing on 19 August 2016 and after consultation with the Parties, the Tribunal issued Procedural Order No. 4, providing in particular as follows:

1. The Tribunal remains seized of the Respondent's Request for Reconsideration dated April 20, 2016, and of Respondent's misrepresentation claim. The Tribunal considers that it has been fully briefed on these matters, which therefore need not be addressed further.

2. Pursuant to the Tribunal's order of August 17, 2016, the parties shall file with the Tribunal all documents exchanged or presentations made between them in the course of their negotiations between November 27, 2007 and September 2008, by August 31, 2016.

3. By September 19, 2016, the parties shall submit post-hearing briefs addressing the evidence adduced in the course of the hearing. The parties may include in their post-hearing briefs comments with respect to the documents produced pursuant to paragraph No. 2 above.

28. Procedural Order No. 4 further provided that the Parties shall proceed through joint and expeditious cooperation in establishing new and consolidated expert reports (1) on the production capacities of the Petrozuata, Hamaca and Corocoro Projects (para. 4) and (2) on the amount of damages resulting from the expropriation of the three Projects (para. 5), in each case on the basis of a jointly agreed structure of issues. In both cases, it was determined that the parties shall proceed through an initial exchange of their reports between them without copying the Tribunal and then revise the reports as necessary in order that each party may submit its final version to the Tribunal by 17 October 2016 for the reports on production capacities and by 17 November 2016 for the reports on damages.

29. Further instructions were given to the Parties by the Tribunal in Procedural Order No. 4 in respect of the substance of the expert reports on the amount of damages, which

⁵ The hearing was recorded and a transcript established, as this had been done for the 24 February 2016 Organizational Hearing and for the hearings held on 31 May to 12 June and 21 and 23 July 2010. The Tribunal uses the condensed version of the transcripts. Unless otherwise mentioned, the references in the present decision are made to the transcript of the August 2016 Hearing.

shall contain determinations on whether the valuation was made at the date of the expropriation, *i.e.* 26 June 2007, or on 31 December 2016, in each case taking into account, or not taking into account, the compensation formulas contained in the Association Agreements (para. 6). The final briefs on *quantum* were scheduled for 30 December 2016 (para. 7). The Order fixed the dates for the hearing on the second *quantum* phase at 21-25 February 2017 (para. 8), to which a further hearing was added by ICSID's letter 2 September 2016 for 27-31 March 2017.

30. On 31 August 2016, the Tribunal received from each party a set of presentations that had been used in the course of the negotiations between 27 November 2007 and 8 September 2008. Most of the documents submitted by each party were identical.⁶

31. The Claimants' and the Respondent's Post-Hearing Briefs were filed with the Tribunal on 19 September 2016.

32. In compliance with the procedure provided in paragraph 4 of the Order and the adjustments noted by the Tribunal's letters of 5 September and 3 October 2016, the Parties submitted consolidated expert reports on the production capacities of the three Projects on 17 October 2016 as follows: the Claimants' Expert Reports prepared respectively by Richard Strickland and by Neil K. Earnest of Muse Stancil; the Respondent's Expert Report of Jesús Rafael Patiño Murillo.

33. Following the procedure provided in paragraph 5 of the Order, the Parties submitted consolidated expert reports on the amount of damages resulting from the expropriation of the three Projects on 17 November 2016 as follows: The Claimants' Consolidated Update Report on the Damages Assessment for the Taking of ConocoPhillips' Investments in Venezuela prepared by their Experts Manuel A. Abdala and Pablo T. Spiller (Compass Lexecon), and the Respondent's Consolidated Expert Report on Valuation prepared by Vladimir Brailovsky and Daniel Flores.

⁶ The Claimants' Exhibits C-688 to C-694; Annexes 1 to 10 to the Respondent's letter dated 31 August 2016.

34. The Claimants submitted their Final Submission on Quantum, and the Respondent its Brief on Quantum, both on 30 December 2016.

35. Pursuant to the Tribunal's invitation in its 6 May 2016 letter, the Parties communicated their submissions and valuation reports they had filed until 20 May 2016 with the ICC Tribunal (Case No. 20549/ASM), where ConocoPhillips are the claimants and PdVSA and two of its subsidiaries are the respondents. These briefs were complementary to the two Requests for Arbitration dated 10 October 2014, copies of which were communicated at an earlier date to this Tribunal (R-494, R-495). Each party provided explanatory comments related to these proceedings by letters both dated 20 May 2016. On 16 September 2016, the Respondent filed with the Tribunal its Rejoinder submitted in the ICC proceedings on 9 September 2016. Finally, with the Claimants' agreement and as agreed by the Tribunal, the Respondent submitted on 16 December 2016 the transcript of the hearing that took place from 28 November to 10 December 2016 in the ICC Arbitration (R-654). By letter to the Parties dated 19 December 2016, the Tribunal recalled that pursuant to paragraph 3 of the Minutes of the Organizational Hearing of 24 February 2016, as reiterated in its directions of 6 May, 1 July and 12 September 2016, this material has been received for information purposes only and will not, accordingly, be accorded any evidentiary value in this case. The Tribunal also informed the Parties in its letter dated 23 December 2016 that it does not grant leave for the Parties to submit documents referred to during the ICC hearing or other documents not on the record in the ICC Arbitration, or to file additional legal authorities.

II. The 2013 Decision on Jurisdiction and the Merits

36. The conclusions reached by the Tribunal's 2013 Decision read as follows:

404. For the foregoing reasons, the Tribunal decides as follows:

- a. It does not have jurisdiction under Article 22 of the Investment Law and accordingly the claims by ConocoPhillips Company are dismissed; and
- b. It has jurisdiction under Article 9 of the Bilateral Investment Treaty over:
 - i. the claims brought by ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV in respect of (1) the increase in the income tax rate which came into effect on 1 January 2007 and (2) the expropriation or migration; and

ii. the claims brought by ConocoPhillips Petrozuata BV and ConocoPhillips Gulf of Paria BV in respect of the increase in the extraction tax in effect from 24 May 2006.

c. All claims based on a breach of Article 3 of the BIT are rejected.

d. The Respondent breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value as required by Article 6(c) of the BIT.

e. The date of valuation of the ConocoPhillips assets is the date of the Award.

f. All other claims based on a breach of Article 6(c) of the BIT are rejected.

g. All other questions, including those concerning the costs and expenses of the Tribunal and the costs of the parties' determination are reserved for future determination.

Items (a), (b)(i), (b)(ii), (c), (f) and (g) above have been decided unanimously by the Tribunal. Items (d) and (e) have been decided by majority, with Arbitrator Georges Abi-Saab dissenting.

37. The Tribunal's Majority has decided twice that it had no power to examine the Respondent's Application for Reconsideration, each time with the third arbitrator dissenting.

38. Nonetheless, the true meaning and effects of the 2013 Decision's statement in respect of the Respondent's conduct of the negotiation on compensation in paragraph 404(d) remained a matter of debate. The Tribunal felt that further clarity was useful in relation to the obligation prohibiting expropriation by the host State as contained in Article 6 of the BIT, and in relation to the assessment of the Claimants' claim for damages. Further procedural developments, and particularly the August 2016 Hearing, had the effect of providing a broader view on the negotiations that actually took place between the Parties, including in the period between November 2007 and September 2008, which the Tribunal was not able to evaluate in the prior proceeding that was concluded by the 2013 Decision. Further, the Respondent submitted a claim based on alleged misrepresentations made by the Claimants to the Tribunal. Therefore, the Tribunal decided that the Respondent's Third Application for Reconsideration and the misrepresentation allegation were both to be addressed at the August 2016 Hearing. Both matters will be examined below, considering in the first place the content of the 2013 Decision's statement in respect of the negotiations on compensation, before analyzing the negotiations in 2007 and 2008.

III. The True Meaning of the 2013 Decision's Findings in Respect of the Negotiations on Compensation

A. Introduction

39. In order to assist the understanding of the Tribunal's finding under letter d) of paragraph 404 of its 2013 Decision, it is helpful to repeat the exact wording of this provision, which reads as follows:

d. The Respondent breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value as required by Article 6(c) of the BIT.

40. The very essence of this provision is contained in the terms "obligation to negotiate in good faith for compensation". On a narrower look, the key terms expressing the content of the obligation referred to are: "to negotiate in good faith". The first question to be addressed is about the meaning of this expression. Contrary to what may appear at one's mind as a first impression, there is not only one meaning. Indeed, more than one meaning can be attributed to these terms and to the whole sentence: (1) One of them would mean that the Respondent did not negotiate with good faith; (2) another one would say that the Respondent did not negotiate, either "at all" or at least "seriously" or otherwise with the required involvement. Indeed, the obligation to negotiate in good faith may also be breached by a party that refuses or omits to negotiate, while still acting in good faith (*e.g.* because the host State has no funds left to pay and accepts its obligation). Thus, undoubtedly, a problem of interpretation is raised.

41. The problem results from the polysemic content of the expression "negotiate in good faith". If considered as a legal requirement, its conditions are not fulfilled (1) by a party not acting in good faith, but also (2) by a party not negotiating, even being in good faith. In other words, the expression contains two cumulative requirements: (1) negotiate, and (2) in good faith; if either one is not fulfilled, the requirement is not met. Thus, the question is: what was the meaning under consideration by the Tribunal when rendering the 2013 Decision? Was the Decision finding a breach of an obligation to negotiate in good

faith (1) because the Respondent was not acting in good faith, or was the breach caused by the Respondent (2) because of its omission to negotiate (somehow “sufficiently”)?

B. The Respondent’s Position

42. The Respondent understood the statement as having the first meaning, *i.e.* the Tribunal finding that the Respondent did not endeavor in good faith to negotiate the Claimants’ compensation.

43. In its First Application for Reconsideration dated 8 September 2013, the Respondent complained that the Tribunal in its Decision had found lack of good faith on the part of the Respondent in the negotiation on compensation. In its first brief on the matter of Reconsideration, dated 28 October 2013, the Respondent noted:

... two members of the Tribunal, with Prof. Abi-Saab dissenting, went on to find lack of good faith on the part of the Republic in the compensation negotiations and, as a consequence, that the nationalization was unlawful.” (para. 2). Respondent further mentioned the “majority’s finding of lack of good faith (para. 3)

In its second brief dated 25 November 2013, the Respondent referred to the “majority’s startling finding of lack of good faith negotiation” (para. 71).

44. In its Second Application for Reconsideration, dated 10 August 2015, the Respondent explained that the 2013 Decision found that the nationalization was rendered unlawful due to a purported failure of the Respondent to negotiate compensation based on the principle of fair market value, “which, according to the majority, meant that the Respondent did not negotiate compensation in good faith” (page 2), further referring to the Majority’s “conclusion on bad faith negotiation” (page 3).

45. In its Counter-Memorial on Quantum of 18 August 2014, the Respondent refers to the Majority’s “finding of bad faith negotiation” (paras. 3, 36, 173). The Respondent’s Rejoinder on Quantum of 7 January 2015 mentions the “majority’s finding of bad faith negotiation” (paras. 7, 11, 300, 315), but without discussing the issue of “good faith”. The Rejoinder submits strongly that the Respondent did effectively negotiate fair market value (paras. 12, 27, 28).

46. At the August 2016 Hearing, the Respondent included in its opening statement numerous references to the Tribunal's conclusion on Venezuela having behaved in bad faith when negotiating compensation.⁷ For Witness Mommer, "it never crossed my mind we would be accused of bad-faith negotiations".⁸ The Respondent's Post-Hearing Brief again referred to the "majority finding on bad faith negotiation" (paras. 8, 21), further noting that Venezuela had been "found to have negotiated in bad faith" (para. 35). Similar statements are contained in the Respondent's Brief on Quantum (paras. 3, 5, 14).

47. The Respondent thus understands that the 2013 Decision's statement in paragraph 404(d) blamed the Bolivarian Republic of Venezuela for not having acted in good faith in its relations with the Claimants on the matter of compensation.

C. The Claimants' Position

48. In their submission of 28 October 2013 on the Respondent's First Application for Reconsideration, the Claimants noted that the Tribunal had decided that Venezuela's expropriation of the ConocoPhillips Parties' investments was unlawful "because Venezuela refused to offer more than book value for the expropriated assets (or anything for Corocoro) in connection with the expropriations and, therefore, failed to negotiate prompt, adequate and effective compensation in good faith." (para. 1) This presentation does not identify any act contrary to good faith. The focus is exclusively on the Respondent's purported failure to offer more than book value. While the Respondent is blamed for not having offered compensation with its three inherent requirements through negotiations conducted in good faith, the Claimants do not indicate in any way which of these attributes – applicable cumulatively – was not complied with.

49. In their second submission, dated 25 November 2013, the Claimants stated that the issue to be examined "was the issue of whether Venezuela engaged in good faith negotiations to provide the Claimants with fair market value for all three expropriations" (para.

⁷ TR-E, Day 1, p. 114/20, 115/4-5, 116/9, 117/6, 137/7, 11, 138/10-11, 142/12-13, 148/11.

⁸ TR-E, Day 4, p. 1103/14-15.

31). Again, no distinction was made depending whether Venezuela was not negotiating or was not acting in good faith.

50. In their first Memorial on Quantum of 19 May 2014, the Claimants noted that “the Tribunal held that Venezuela’s expropriation of the Claimants’ investments in June 2007 was contrary to the terms of Article 6 of the Treaty, and thus unlawful” (para. 68), further quoting paragraph 401 of the 2013 Decision. The Claimants’ Reply on Quantum of 13 October 2014 merely recalls that “Venezuela failed to negotiate compensation in good faith” (para. 26). It was further explained that: “At no point during that eleven-month expropriation process did Venezuela pay fair market value compensation, propose a process for doing so, or even negotiate in accordance with that mandatory standard.” (para. 88). Again, nowhere in these two briefs is any lack of good faith on the part of Venezuela taken as a distinct factual element with specific legal effects, including an obligation to provide for compensation.

51. At the August 2016 Hearing, it was stated on behalf of the Claimants that Venezuela did not sincerely negotiate as required by the principle of good faith, further noting that “whether the State has engaged in good faith negotiations ultimately boils down to the question of whether it has made an offer of fair-market-value compensation”.⁹ In their Post-Hearing Brief, the Claimants explain that the 2013 Decision held that Venezuela “did not satisfy even its antecedent obligation to negotiate in good faith against the FMV [fair market value] standard.” (para. 10). The Claimants’ Final Submission on Quantum contains similar statements (paras. 5, 65).

D. The Tribunal’s Analysis

1. *The 2013 Decision’s findings*

52. The question to be examined is whether the breach of the obligation referred to in paragraph 404(d) of the 2013 Decision was caused by the lack of negotiating by the Respondent and/or the lack of its acting in good faith. In both hypotheses, the Decision’s identification of the relevant obligation that was breached is reached, because in both cases

⁹ TR-E, Day 1, p. 41/2-5.

there would have been no “negotiation in good faith”. The statement made under letter d) of the *dispositif* does not identify explicitly which part of this legal obligation was not complied with, or whether all parts of it have been breached.

53. A review in detail and in context of the explanations provided by the Tribunal leads to the conclusion that the 2013 Decision does not mention the notion of bad faith in relation to the negotiations on the part of the Respondent. No bad faith was retained as a ground for the Decision’s conclusion in paragraph 404(d). Indeed, the term “bad faith” is to be found in the 2013 Decision only once (para. 274), on a point relating to jurisdiction. It is never used in connection with the negotiations. This would seem sufficient to conclude that a purported breach of an obligation of acting in good faith is not contained in the *dispositif* in paragraph 404(d).

54. Further, the 2013 Decision never uses the term “good faith” alone. There is no statement indicating that the Respondent was not acting in good faith. When the words “good faith” are used, they are always connected to the term “negotiate”. Therefore, when explaining that the Respondent did not “negotiate in good faith”, the Decision does not specify whether this must be explained by the Respondent’s attitude of not negotiating, or by its lack of good faith, or maybe both.

55. The term “good faith” is used 26 times in the Tribunal’s explanations. Seven of these occurrences relate to matters of jurisdiction, not relevant for the present analysis (paras. 228, 232, 254, 273[3x], 275). In relation to the negotiations, the same term appears in several parts where the Parties’ positions and the views of certain witnesses are presented, describing their respective role as negotiating partner acting in good faith: Respondent (paras. 358[2x], 374, 381[2x]), Claimants (paras. 365, 371, 372, 379 [“good faith offer”], 397[2x][“good faith efforts”]), Dr. Mommer (para. 385), Mr. Lyons (para. 388). None of these statements implies a negative judgment, *i.e.* criticizing the other party for not acting in good faith. Never is the term defined in any way.

56. The Tribunal used the term “good faith”, firstly, for the purpose of identifying the question to be examined. In paragraph 334(d), the question was raised: “did the Respondent ... negotiate in good faith in accordance with the standard in Article 6(c) ...” The same

words were used in the title before paragraph 361. In the following paragraph 362, the Tribunal noted that "... it is also commonly accepted that the Parties must engage in good faith negotiations to fix the compensation in terms of the standard set (...)". Secondly, the Tribunal did use the combined expression of "negotiate" and "good faith" in the explanation of its decision on the subject in paragraph 394, as follows: "Considering the situation after 12 April 2007, the date of those three letters, the Tribunal, on the basis of the evidence before it, concludes that Venezuela at that time was not negotiating in good faith by reference to the standard of "market value" set out in the BIT." This was followed by this statement in paragraph 401: "The Tribunal accordingly concludes that the Respondent breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value as required by Article 6(c) of the BIT,...", which are the terms reproduced in paragraph 404(d) of the Decision.

57. These quotations demonstrate that the Tribunal never made any distinction between "negotiating" and "good faith", using in all instances both terms conjunctively. The Decision does not identify whether the Respondent's breach of its obligation was due to the lack of either "[sufficient] negotiation" or "good faith" or both. The Tribunal notes also that the Decision contains only one single statement (para. 394) where a conclusion based on the evidence is made by reference to good faith.

58. The Decision never identifies the content of the term "good faith" nor does it attribute the failure to comply with this requirement to the Respondent. This means that the Decision in paragraph 404(d) is based on the Respondent's failure to negotiate on the basis of market value and not on a purported attitude of bad faith on part of the Respondent during the exchange of views that actually took place.

59. Furthermore, if the lack of good faith, that is bad faith, was a legal requisite leading to the finding of a breach of the Respondent's obligation, one would expect that these concepts would be defined in the Decision and its components examined in their legal elements and in relation to the evidence. Nothing like this can be found in the Decision. In fact, when the Decision states that the Respondent was not negotiating in good faith, it referred to facts demonstrating that the Respondent failed to engage in negotiations leading to just

compensation based on market value as required by Article 6(c). Nowhere does the Decision say, in relation to such failures on the part of the Respondent, that the Respondent was acting in bad faith.

2. *Conclusion*

60. Based on the above analysis of the 2013 Decision, the conclusion is that the Tribunal did not find a lack of good faith on the part of the Respondent for its breach of an obligation to negotiate on the basis of market value as required by Article 6(c) of the BIT. The Tribunal stated simply that the Respondent failed to be involved in negotiations leading to an offer complying with the requirements of “just compensation” and “market value”.

61. The Respondent is mistaken when it understood, since the filing of its First Application for Reconsideration, that the Tribunal had made a finding of bad faith in respect of the Bolivarian Republic of Venezuela’s involvement in the negotiations. The 2013 Decision does not contain any such statement. The decision in paragraph 404(d) must be understood as stating that the Respondent breached its obligation to negotiate the compensation for its taking of the ConocoPhillips’ assets in the three projects on the basis of market value as required by Article 6(c) of the BIT.

62. Therefore, the Respondent’s Third Application for Reconsideration must be considered as moot to the extent it required the Tribunal to review an assessment of lack of good faith in negotiating for compensation on the part of the Bolivarian Republic of Venezuela, which is not contained in the Tribunal’s 2013 Decision. The Tribunal must dismiss the Application in this regard, irrespective of whether the Tribunal would have, or does not have the power to reconsider the Application (as decided twice by the Tribunal’s Majority).

63. In its true meaning, the Tribunal’s conclusion contained in paragraph 404(d) of the 2013 Decision is about the Respondent’s breach of its obligation to negotiate compensation on the basis of market value. When the issue of good faith is set aside, the Respondent’s Application for Reconsideration would have to be understood, as this is still argued by the

Respondent before this Tribunal, that the Majority erred when it concluded that “Claimants’ allegations that the Republic never agreed to negotiate anything other than book value”¹⁰.

64. When the Tribunal’s Majority rejected the Respondent’s first and second Applications for Reconsideration, it equally dismissed this reduced part of the Applications, considering that the matter was beyond its power for decision.

65. In this respect as well, the 2013 Decision’s conclusion is to be taken for what it says and nothing more. The Tribunal’s statement was based on the factual evidence available at the relevant time. The Decision simply repeats what is explained in paragraph 401 that draws the conclusion of the Tribunal’s analysis of the evidence, which all relates (with one exception¹¹) to the period before this arbitral proceeding had been introduced, leaving out of the Tribunal’s observation and gathering of evidence, negotiations that were covered by the Confidentiality Agreement effective as from 27 November 2007. Moreover, while deciding that the Respondent breached its obligation to negotiate compensation on the basis of market value, it does not contain a ruling on the consequences of such violation. The Tribunal’s conclusion in paragraph 404(d) of its 2013 Decision does not explain the nature of the obligation to negotiate compensation based on fair market value, nor does it state its effects in case of a breach, and therefore has generated debate between the Parties as to whether or not such conclusion leads to a breach of Article 6 of the BIT.

66. The 2013 Decision did not preclude further consideration of further evidence relating to the negotiations actually ongoing after the date when the Request for Arbitration was submitted. The Tribunal placed emphasis on the lack of evidence concerning the negotiations conducted after the date of the expropriation – the “final period” –, making clear that such evidence would have been relevant had it been forthcoming (para. 400). After the

¹⁰ Respondent’s First Brief dated 28 October 2013, para. 3.

¹¹ Minister Ramírez’ speech to the Parliament on 14 February 2008 (C-190). It is true that the Tribunal drew a negative inference from the statement of the Minister that Venezuela was negotiating on the basis of book value only (2013 Decision, para. 400). However, the Tribunal also noted that it had no access to information on facts covered by the Confidentiality Agreement, thus showing that its reliance on the Minister’s February 2008 statement was subject to caution.

2013 Decision was rendered, the Tribunal declared open the *quantum* phase¹². In so doing, the Tribunal did not specify further the issues to be included in the examination of such *quantum*, nor did it elaborate on the legal basis of the damages thus to be determined. One of the items to be considered in this respect has to be the question of the effects of the breach identified in paragraph 404(d) of the 2013 Decision on the Claimants' claims for damages. This includes the question whether the Respondent's conduct after the time taken as relevant by the Tribunal in 2013, *e.g.* when the Confidentiality Agreement took effect, and until the final failure of the negotiations on compensation in September 2008, could also be qualified as constituting such a breach. Consideration of the Respondent's allegation that the Claimants misrepresented pertinent facts to the Tribunal is equally relevant in this respect. In the August 2016 Hearing these issues were extensively debated by the Parties.

IV. The Negotiations

A. Preliminary Observations

1. The Respondent's claim based on the Claimants' alleged misrepresentations to the Tribunal

67. While assuming that the Tribunal had decided that Venezuela had been acting in bad faith when negotiating compensation for the taking of ConocoPhillips' assets, the Respondent objects to this conclusion and submits that it was based on materially false representations made by the Claimants to the Tribunal. The Respondent contends that the Claimants should not be allowed to take any advantage from their own wrongful conduct. The legal principle supporting this position would mean that the Claimants have to assume one of the consequences of the Tribunal's finding of bad faith on the part of the Respondent, which is to remove the valuation date from the date of the nationalization to the date of the Award.

68. The Respondent's claim introduces a new perspective relating to the negotiations on compensation that were ongoing in 2007 and 2008. Indeed, when considering whether

¹² Decision on Respondent's Request for Reconsideration dated 10 March 2014.

the Respondent took part in the negotiations with the aim of reaching agreement on the basis of fair market value, the Tribunal has to examine whether the assertions and the evidence brought forward by the Claimants and submitted to the Tribunal were materially false representations, which, in the Respondent's view, may produce adverse legal effects for the Claimants.

69. While the issue of misrepresentation will be dealt with in this Interim Decision, the Tribunal will not address today the Respondent's further contention that the Tribunal should reconsider the 2013 Decision which set the valuation date as the date of the Award. Even if the Tribunal had been seized with such a request,¹³ the Tribunal recalls that, for the forthcoming examination of the issues on damages, the Parties have been directed by paragraph 6 of Procedural Order No. 4 to focus on both 26 June 2007 and 31 December 2016 as possible valuation dates. Therefore, any question in relation to the matter of the valuation date will be dealt with at the appropriate stage of this proceeding.

2. The fate of the Confidentiality Agreement

70. The lack of information before the Tribunal on the negotiations ongoing since November 2007 was due to the Confidentiality Agreement concluded on 18 January 2008¹⁴ that all Parties considered at the time binding, including during the proceeding leading to the 2013 Decision (paras. 395-400). No information was therefore submitted to the Tribunal. A failure to provide evidence is usually attributed to the Party bearing the burden of proof of the pertinent fact. In this case, both Parties failed to provide any evidence. Therefore, no adverse inference can be attributed to any of them for such reason. This also explains why the Tribunal's decision in paragraph 404(d) cannot extend to the period when no pertinent facts were available in respect of the ongoing negotiations since November 2007; the Tribunal had no facts on its record (other than the speech of Minister Ramírez) in this regard.

¹³ During the August 2016 Hearing Counsel for the Respondent made a remark that if the Tribunal would like a formal application to reconsider the issue, "then consider it done" (TR-E, Day 1, p. 203/10-11).

¹⁴ C-579.

71. Before and during the August 2016 Hearing, the Parties expressed opposing views as to the relevance of the Confidentiality Agreement in respect of the examination of witnesses and a forthcoming production of new documents relating to the negotiations that took place during the period when the Confidentiality Agreement was in effect.

72. There is no dispute that both Parties respected their confidentiality obligations, except for the alleged breach by Mr. Goff's and Mr. Lyon's in their disclosures to the U.S. Embassy, which were revealed by the WikiLeaks cables' summaries of a number of meetings where ConocoPhillips' main negotiators reported to the Embassy about the ongoing negotiations with Venezuela's representatives. According to the Respondent, this was a breach of the Confidentiality Agreement.¹⁵

73. The Claimants referred to Article 2 of the Agreement and submitted that there was no undertaking agreed upon that would preclude either side from revealing its own statements and positions. The Claimants further confirmed that the witnesses on both sides were free to answer questions put to them at the hearing without being constrained by the Confidentiality Agreement. Accordingly, the Claimants declared that they would not object to Venezuela putting questions to the Claimants' witnesses with respect to settlement discussions that occurred after the Confidentiality Agreement came into force. In addition, to the extent the Respondent would consider that its witnesses' ability to provide evidence on those matters was limited under the Confidentiality Agreement, the Claimants expressly released the Respondent from any such obligation.¹⁶ This position was confirmed at the hearing¹⁷, with special emphasis by the Claimants on their right to defend themselves against the Respondent's claim based on their alleged misrepresentations to the Tribunal, which should not be hindered by the Respondent's intention to hide behind the Confidentiality Agreement¹⁸.

¹⁵ TR-E, Day 2, p. 643/16-19; Day 3, p. 663/22-664/4.

¹⁶ The Claimants' letter dated 8 July 2016.

¹⁷ TR-E, Day 1, p. 30/10-12; Day 2, p. 642/6-643/14, 665/21-666/4, 943/3-5.

¹⁸ TR-E, Day 3, p. 660/12-662/6.

74. Before the hearing, the Respondent did not agree that its witnesses could testify without constraint in view of the Confidentiality Agreement.¹⁹ At the hearing, it accepted that the Claimants' Witness Goff could testify about the negotiations²⁰ and released its own Witnesses from their confidentiality obligation²¹, retaining however Venezuela's obligation not to reveal documents²² relating to the negotiation as long as its Counsel were not authorized to produce any such document²³. Contrary to the position of the Respondent's Counsel, Witness Mommer refused to testify about events occurring during the period covered by the Confidentiality Agreement²⁴, with the exception of matters dealt with in the WikiLeaks cables²⁵. While still invoking the Confidentiality Agreement²⁶, Counsel's argument shifted to invoking a settlement privilege, which was, in the Respondent's view, the very purpose of this Agreement²⁷. The Tribunal asked Counsel of the Respondent to confer with his client in this respect.²⁸ The authorization was not provided during the Hearing.²⁹

75. The Respondent ultimately agreed to submit some of the presentations that were used during the meetings of the negotiators between December 2007 and September 2008, and it did not object to the Claimants' acting in the same way. In its letter of 31 August 2016, the Respondent declared, however, that it maintained its objection based on Article 2 of the Confidentiality Agreement. The objection has been reiterated in the Respondent's Post-Hearing Brief "as a matter of principle" (para. 24). The purpose of this objection is

¹⁹ The Respondent's letter dated 8 July 2016.

²⁰ TR-E, Day 2, p. 643/19-644/1.

²¹ TR-E, Day 2, p. 645/4-12. This was also the Tribunal's instruction (TR-E, Day 3, p. 946/19947/3, 947/14-22; Day 4, p. 1031/17-18).

²² TR-E, Day 2, p. 639/8-12, 644/1-645/3, 646/20-647/1. It was explained that Venezuela didn't want evidence of the specific parameters of the fair-market-value discussion to be used (p. 644/10-12).

²³ TR-E, Day 2, p. 647/11-13.

²⁴ TR-E, Day 3, p. 942/9-943/16, 947/4-948/7; Day 4, p. 1061/13-16, 1142/12-13, 1143/1-9.

²⁵ TR-E, Day 3, p. 942/19-943/1, 945/16-18, 946/2-3, 962/21-963/1. For Respondent's Counsel, what Witness Mommer could not do was to deliver documents, which he didn't have anyway (TR-E, Day 3, p. 946/3-4, 948/21-949/31). It was explained to the Witness that the subject matter of the coverage through the Confidentiality Agreement was dealt with in the WikiLeaks cables.

²⁶ The point was raised – and not resolved – whether in light of the Claimants' alleged breach of the Confidentiality Agreement the Respondent was still bound by the commitments contained therein (TR-E, Day 2, p. 646/5-647/5; Day 3, p. 693/4-694/4). See also Article 1.168 of the Civil Code of Venezuela: "En los contratos bilaterales, cada contratante puede negarse a ejecutar su obligación si el otro no ejecuta la suya, a menos que se hayan fijado fechas diferentes para la ejecución de las dos obligaciones."

²⁷ TR-E, Day 3, p. 656/14-657/12, 658/8-659/4, 663/19-22, 664/11-15.

²⁸ TR-E, Day 3, p. 655/15-656/2, 666/6-22, 790/14-21. The Tribunal had decided not to issue a decision on this matter before the hearing (ICSID letter of 12 July 2016).

²⁹ Cf. statement of Counsel of the Respondent, TR-E, Day 3, p. 789/15-790/9; Day 5, p. 1451/11-12.

unclear, not explained and unconvincing. What should be the meaning of the objection in relation to the ten documents the Respondent accepted to submit, without being forced to do so? The Respondent does not answer the question whether Article 2 may still remain legally binding on its part when it admitted that the Claimants' were in breach of the obligations contained in the Agreement. The Respondent's presentations all relate to matters dealt with in the WikiLeaks cables in respect of which the Respondent expressly declared at the hearing that they were no longer covered by confidentiality. The Respondent invoked a settlement privilege (without further definition of its scope) when it claimed to be entitled to retain documents that were used during the negotiations, further explaining that specific parameters of fair-market-values should remain secret. However, it appears that the documents which the Respondent filed with the Tribunal do not contain such sensitive information on Venezuela's part, and if they did, they would have been revealed anyhow through the Claimants' filing of most of the same documents. Finally, the Respondent does not explain why and to what extent its objection based on the Confidentiality Agreement should be of any relevance to the Tribunal, or why the Tribunal should be concerned by the legal obligations contained therein and only agreed upon between the Parties.

B. The Respondent's Position

76. The Respondent's first line of argument in respect of the negotiations on compensation consists of reverting to the Tribunal's evaluation of the relevant facts and the conclusion it reached in paragraph 404(d) of the 2013 Decision. The Respondent contends that valuations were made in 2006 and 2007 by both sides until the date when the taking became effective; these valuations were not fundamentally different from each other. ConocoPhillips' evaluation models in late 2006 were US\$ 2.07 billion for the two Projects, an amount lower than what they report on the Respondent's offer made in early 2007 (cumulating at US\$ 2.3 billion, not including the Corocoro Project). Therefore, it should be inferred from the positions of both parties at that time that there existed no serious dispute on the substance of the negotiation. The same remained true when considering the increase Venezuela offered in early August 2007 from US\$ 2.3 to US\$ 3.1 billion (according to Mr. Limbacher's letter dated 10 August 2007). Irrespective of whether the Respondent did submit proposals in line with fair market value, or not, it was never too far away from the

Claimants' valuations. Therefore, the Tribunal should not have concluded that the Respondent was in breach of an obligation to negotiate in good faith on the basis of market value. The Respondent further observes that the Claimants never submitted in 2007 a valuation that could have been compared to the Respondent's offers. The Claimants had no meaningful response to a 2007 valuation presented by the Respondent's experts, which showed that the Parties' experts were remarkably close to each other.

77. Relying on Witness Mommer, the Respondent asserts that Venezuela's proposals were realistic because they took account of the compensation formulas applicable to the Petrozuata and Hamaca Projects, whereas ConocoPhillips totally disregarded the express limitations of liability provided for under the compensation provisions that had been negotiated at great length.

78. The second line of the Respondent's submissions begins with its assertion that the 2013 Decision was based on materially false representations of the Claimants and on an inference drawn by the Tribunal from a lack of evidence concerning the negotiations during a period that was covered by the Confidentiality Agreement. The Claimants cannot continue to escape the consequences of the misrepresentations that they made to this Tribunal and that led to the Majority's finding of bad faith negotiation, which in turn led to the Majority's ruling that the valuation date should be moved beyond the date of the nationalization to the date of the Award.

79. For the Respondent, the Claimants' misrepresentations were: (1) The Claimants said in their memorials that the amount that the Respondent offered them in 2007 represented 5% of fair market value, thus indicating that their assets had a value of US\$ 46 billion in 2007. (2) The Claimants stated at the 2010 Hearing that a fair market value would have been between 7 to 10 times the amount that was actually offered. That would have been around US\$ 20 billion. (3) The Claimants said at the hearing and in the post-hearing skeleton that Venezuela never offered fair market value, even though ConocoPhillips' own executives, lead negotiator Goff and Mr. Lyons, reported exactly the opposite to the U.S. Embassy in Caracas, expressly acknowledging that the Republic was negotiating fair market value. (4) Dr. Mommer did not respond to the 12 April 2007 letter while in fact he did

the next day. (5) The Claimants never denied these facts, which are irreconcilable with the representations they made at the 2010 Hearing.

80. The Claimants' main misrepresentation is the one affirming that "Venezuela made it clear that it would not offer compensation based on Fair Market Value". There was never any basis for that representation. The revelation of the U.S. Embassy cables removes any doubt in this respect. The two cables of 4 April and 23 May 2008 reflect the acknowledgment of the Claimants' lead negotiators that the Respondent was in fact negotiating fair market value. Neither Mr. Goff nor Mr. Lyons has ever denied that they said to the U.S. Embassy what was reported in the cables quoted by the Respondent in its prior submissions. Mr. Goff has not submitted any additional witness statement to refute the cables. The cables are obviously accurate in respect of the key issue before this Tribunal and demonstrate beyond doubt, argued the Respondent, that the Claimants did make material misrepresentations to the Tribunal on the question that the Majority of the Tribunal found to be of central importance, namely, whether the Respondent negotiated on the basis of fair market value.

81. If the Majority had understood that both sides were in fact bound by confidentiality commencing in November 2007 and if the Majority had understood that it was explained to the U.S. Embassy by the Claimants that the Respondent was negotiating on the basis of fair market value, would it still have found bad faith negotiation on the part of the Respondent? Of course not, says the Respondent.

82. The Respondent notes that the Claimants' response is contained in a single paragraph of their Reply on Quantum where they say that the substance of the cable is not accurate and that Venezuela never made a fair market value offer. That is why Mr. Lyons states that he sees no reason to revise his prior testimony. The Claimants rely on a new witness statement of Mr. Lyons. But nowhere does he state that the cables were inaccurate or that the meetings did not take place.

83. Next, says the Respondent, the Claimants argue that if it had made a formal, fair market value offer, it would have been submitted to the Tribunal. This says nothing about the accuracy of the cables. Despite the Claimants' assertion, there is no doubt that offers

were made. The Tribunal has referred to the offer the Claimants say was made to them in early 2007.

84. The reality is that the Claimants do not contest the accuracy of the U.S. Embassy cables at all, argues the Respondent. If the Claimants had told the Tribunal what is now on the record, the Tribunal would not have found bad faith negotiations. Further, the entire evidence now before the Tribunal shows that book value was not the subject of the negotiations.

85. The Respondent concludes that there is ample precedent for the principle that a party should not be allowed to benefit from its own misconduct or wrongdoing. Other expressions are used, including the notion of good faith. It would be a clear violation of those principles to allow the Claimants in this *quantum* phase to take advantage of their own wrongful acts to increase compensation. Regardless of what was decided in the first phase of this proceeding, including the Majority's refusal to reconsider its 2013 Decision, this Tribunal unquestionably has the power to apply the universally legal principles referred to above in the *quantum* phase.

86. The Respondent contends that the Claimants' misconduct and fraud must have the effect of denying the Claimants the relief they seek. More specifically, the Respondent asserts that the Tribunal should at this time exclude from the calculation of *quantum* of damages that portion that arises from moving the valuation date to the date of the Award due to the finding of bad faith and unlawful expropriation.

87. What is important for the Respondent is that but for the Claimants' misrepresentations and their failure to correct the record, the Majority of this Tribunal would never have made its finding of bad faith negotiation, and without that finding, the Majority would have found the nationalization to be lawful, just as the *Mobil* ICSID tribunal did³⁰. There would

³⁰ *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd. et al. v. The Bolivarian Republic of Venezuela*, ICSID/ARB/07/27, Award dated 9 October 2014 (CL-348).

never have been a dispute about the valuation date being other than 26 June 2007. Therefore, the appropriate remedy for the Claimants' misrepresentations is to remove any benefit the Claimants would otherwise have obtained from a higher, post-nationalization valuation.

88. The Respondent refers to a number of precedents where misconduct and fraud led to the dismissal of all claims, such as in *Azinian v. Mexico*³¹, *Libananco v. Turkey*³² and other cases involving Turkey. It also mentions the unprecedented incident of Qatar's submission of forged documents in the case in *Qatar v. Bahrain*³³. It is thus well recognized that wrongful conduct may be taken into account in determining the appropriate amount of damages that should be awarded. The Claimants must be prevented from receiving the benefit that would directly result from the wrong they have perpetrated.

C. The Claimants' Position

89. The Claimants recall that the Tribunal found that the expropriation was unlawful. It observed that Venezuela failed to make any good-faith offer of prompt, market value compensation at any of the relevant milestones, including the August 2006 term sheets promulgated by Venezuela for the forced migration, Venezuela's draft contracts of January 2007 for converting the three Projects into *empresas mixtas*, and Venezuela's verbal offers made at meetings on 29 and 31 March 2007, based on book value and referred to in the Claimants' letter responses of 12 April 2007. At no point during the eleven-month expropriation process did Venezuela pay fair market value compensation. It has not referred to any document evidencing any fair market value offer in the period leading up to the expropriation. The Tribunal further considered post-expropriation events, *i.e.* the Claimants' offer of 17 August 2007 (a variation of the 15 June offer), and public statements on on-going negotiations in February 2008, particularly Minister Ramírez' speech of 14 February 2008.

³¹ *Robert Azinian et al. v. The United Mexican States*, ICSID/ARB(AF)/97/2, Award dated 1 November 1999 (R-450).

³² *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID/ARB/06/8, Award dated 2 September 2011 (R-451).

³³ International Court of Justice, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment dated 16 March 2001, ICJ Reports 40 (2001) (R-452).

In sum, the Tribunal conducted a detailed review of the evidentiary and testimonial record in reaching its conclusion that Venezuela violated Article 6(c) of the BIT.

90. Venezuela made only one offer of compensation in the pre-expropriation period. Even after the expropriation, Venezuela's posture remained the same. The Claimants were compelled to commence this arbitration in November 2007; shortly thereafter (with effect from 27 November), the Confidentiality Agreement came into effect and the Parties commenced discussions – not about compensation for the expropriation – but rather about the settlement of the arbitration claims. Those discussions are entirely irrelevant to the issue of good faith negotiations for compensation for the expropriation. And three months into the settlement talks, Minister Ramírez was still saying that Venezuela would never pay market value.

91. The Claimants note that since the Respondent requested reconsideration of the 2013 Decision, it argues that two WikiLeaks cables from April and May 2008 show that the Tribunal was wrong in finding that Venezuela did not negotiate in good faith and that this erroneous conclusion was the result of the Claimants' misrepresentations, when they never released information about the reports Messrs. Goff and Lyons had made to the U.S. Embassy.

92. The Claimants explain that these cables were never seen by them. They are based on double-hearsay and not admissible as evidence. The substance of the cables is not accurate. Venezuela never made a fair market value offer for the expropriated Projects. If a formal, fair market value offer for the three Projects had in fact been made, the Tribunal surely would have been presented with it by now. Venezuela has provided no document of the sort. The cables do not refer to any such document. Further, the cables refer to a method based on fair market value in relation to the first arbitration claim only. There is no basis for Venezuela's claims of error by the Tribunal or misrepresentations by the Claimants.

93. As to the allegations of misrepresentation, Venezuela relies on two documents that have nothing to do with whether the government ever offered fair market value. The Wik-

iLeaks cables purport to describe discussions with respect to the settlement of the Claimants' arbitration claims. The truth is that Venezuela never made any offer of fair market value compensation, either at the legally relevant time, or indeed at any time.

D. The Tribunal's Findings

1. *The negotiations before the filing of the Request for Arbitration*

94. The Respondent once again seeks to re-argue the evidence and the conclusions drawn by the Tribunal in its 2013 Decision. The Tribunal decided that the few proposals that were made by the Respondent and submitted to the Tribunal did not represent fair market valuations.

95. The Respondent objects that its own valuations, made in a different scenario as explained below, were close or comparable to those of the Claimants. The Tribunal notes, however, that the simple fact that the figures or valuations from each side were not very different at the relevant time, in a first period in 2007, and for the relevant scenario, does not demonstrate, on its own, that the amounts arrived at represented market prices.

96. The Tribunal also notes that when the Respondent mentions the Claimants' own valuation in 2007, it refers to internal valuations prepared in 2006, at a time when no nationalization had yet been decreed. At that time, the Government had presented its offers to engage into a process of migration of foreign investments into state companies, *empresas mixtas*, where foreign investors were not admitted to hold more than a minority stake. As the 2013 Decision explains with many details (paras. 365-370)³⁴, none of the proposals submitted by the Respondent for the purpose of such migration – in August 2006 and January 2007 – was based on compensation in any form other than through the acquisition of minority stakes in the state entities to be formed.

97. The Tribunal does not need to explain that a valuation for the purpose of migration in the form of a minority holding into a state entity represents amounts considerably different from those resulting from a valuation of the interests an investor was holding in

³⁴ See also Witness Mommer, TR-E, Day 3, p. 973/18-991/19.

companies controlled by a majority of foreign investors and protected through an investment treaty and a mechanism of international arbitration. In the Respondent's own and correct admission, migration was different from expropriation. It did not trigger a valuation on the basis of market values as this applies in the case of an expropriation or nationalization. The financial components of a migration into *empresas mixtas* subject to state holding were not reflecting the same market values, as were the elements put on a market open to any buyer willing to acquire the rights contained in the Association Agreements. In particular, loss of profit arising from these Agreements over their remaining life-time was not an issue in case of migration; such profit was simply substituted by the profit resulting from the operation of the *empresas mixtas* (including the improvements such as the New Areas).

98. The situation changed significantly when Decree-Law No. 5.200 on nationalization was enacted on 26 February 2007. From that day on, ConocoPhillips was threatened by a complete taking of all of its assets if it were still opposing its migration as a minority stakeholder into a company controlled by a state holding of 60%. This had of course consequences on the approach the investors took in respect of the compensation of their interests. There was no longer any point in comparing compensation for the forthcoming nationalization of the totality of ConocoPhillips' assets to the valuations made for the very different purpose of migration of ConocoPhillips' interests as minority stake in state companies.

99. The Respondent contends that when it was faced with this perspective of having to provide compensation of ConocoPhillips' interests as a consequence of the nationalization, it did in fact negotiate on the basis of fair market valuations, contrary to what the Tribunal's Majority concluded in the 2013 Decision.

100. The Respondent was aware that ConocoPhillips wanted to be provided with appropriate compensation. This was the reason it submitted two verbal compensation proposals at a meeting held on 29 March 2007. The total amount put forward in case of ConocoPhillips' withdrawal from Venezuela was US\$ 2.3 billion, which, in the Respondent's submission, was not far removed from ConocoPhillips' own internal valuations. The proposal consisted of two variants, for each of the two main projects (no offer being made yet for Corocoro). The first variant offered a certain percentage of participation through migration

into the state company holding the assets in the future (covering a larger surface, thus providing additional profits), which was 22.85% for Hamaca and 40% for Petrozuata, these shareholdings being accompanied by a payment of US\$ 350 million in the case of Hamaca and of US\$ 100 million for Petrozuata. The second variant offered no migration, providing for the complete exit of ConocoPhillips for the amount of US\$ 1.2 billion for Hamaca, and US\$ 1.1 billion for Petrozuata; both amounts totaling US\$ 2.3 billion, which is often referred to by the Respondent as evidence of Venezuela's intention to evaluate ConocoPhillips' interests at fair market levels. For Witness Mommer, the two cash payments of 350 and 100 million were supposed to represent book values³⁵, whereas the amount of US\$ 2.3 billion was a reasonable first estimate of the fair market value of ConocoPhillips' assets, as Venezuela understood it³⁶. When looking at the presentations submitted during the negotiations in 2008, it appears highly unlikely to this Tribunal that this second assertion is correct. As the Claimants rightly observe, the amount of 2.3 billion comes very close to the amount of 2.283 billion recorded in a presentation bearing the date of December 2007 and identified as representing the book value of the three Projects, including Corocoro.³⁷

101. The Respondent did not provide evidence as to the components of such market valuations. The Respondent did not disclose either the proposal itself, which has been merely referred to in the Claimants' letters of 12 April 2007, signed by Mr. Lyons. These letters conveyed ConocoPhillips' understanding that Venezuela would not compensate them for fair market values. They set out ConocoPhillips' refusal to accept Venezuela's proposals, further noting that they were premised on the waiver by ConocoPhillips of its rights to seek compensation through other legal means, including international arbitration. The amounts submitted by Venezuela seemed to reflect a cash payment in exchange for ConocoPhillips' exit from the migration process rather than a compensation for an expropriation that at that time was not yet enforced. These three letters were not well received by Venezuela, causing Vice-Minister Mommer the following day to complain strongly

³⁵ TR-E, Day 3, p. 1002/13-14, 1003/9-11.

³⁶ TR-E, Day 3, p. 1004/4-13.

³⁷ Cf. the Claimants' Post-Hearing Brief, paras. 41, 50, referring to C-695-697. The most relevant slide is contained in the presentation under C-695 (page 2) and copied in most parts in the Claimants' Brief on page 13 (however wrongly attributed to C-697).

about ConocoPhillips' attitude and to reject anything that they suggested. For Witness Mommer, the 12 April letters in no way reflected the results of the meeting they had on 29 March 2007.³⁸ In his letter of 13 April 2007³⁹, no offer whatsoever was retained for the purpose of negotiation.

102. The following months, meetings were held, but no further offer was made by the Respondent, with the effect that at the date of the taking on 26 June 2007, the expropriation was enforced with no compensation either paid or offered by Venezuela. Minister Ramírez stated in his speech on the same day that they “have talked about continuing negotiations in order to establish pertinent agreements”.⁴⁰

103. ConocoPhillips then tried to reach agreement upon an asset trade involving refineries owned by Venezuela in the United States. Two offers were made, dated 15 June and 17 August 2007⁴¹, the second one arriving at a net value of US\$ 6.7 billion⁴². In between these two offers, Venezuela made an offer of US\$ 4 billion.⁴³ Neither offer was accepted. As from that time, the parties were reported to be billions of dollars apart.⁴⁴ Minister Ramírez expressed another view.⁴⁵

³⁸ TR-E, Day 4, p. 1044/3-19, 1045/14-1048/17, 1175/3-1176/12.

³⁹ R-313, Annex 2.

⁴⁰ C-249. Cf. Witness Mommer, Third Supplemental Direct Testimony of 7 January 2015, para. 5, and TR-E, Day 4, p. 1187/3-15, confirming that contacts and discussions on negotiations continued.

⁴¹ Cf. Appendix 4 and 5 to Witness Mommer's Direct Testimony of 24 July 2009.

⁴² Cf. Witness Mommer, Direct Testimony of 24 July 2009, para. 22. For Witness Goff, the valuation for the Citgo Company was probably closer to US\$ 10 billion (TR-E, Day 2, p. 616/8-19), a number that had been communicated to Venezuela's team during the negotiations in 2008 (TR-E, Day 2, p. 617/16-618/6, 624/8-625/7).

⁴³ At the August 2016 Hearing, Witness Mommer referred in this respect to the Request for Arbitration, § 98 (TR-E, Day 4, p. 1052/7-9, 1060/9-10). The proposal also contained an asset swap (TR-E, Day 4, p. 1060/9-1061/12). Without providing any detail, Witness Lyons refers to the same proposal in the U.S. cable dated 26 July 2007 (C-679) and at the August 2016 Hearing (TR-E, Day 3, p. 675/17-21, 689/9-690/6), noting that he was not knowledgeable about it. Witness Goff noted that he may have seen this 4 billion figure but he was unable to specifically remember (TR-E, Day 2, p. 565/17-567/7). The Claimants note that the offer of US\$ 4 billion should be compared to the annual additional revenue of US\$ 5.8 billion per year that President Chávez announced as the revenue that was in large part produced from projects taken from ConocoPhillips (cf. Request for Arbitration, § 98; Claimants' Memorial of 15 September 2008, para. 237).

⁴⁴ Cf. Mr. Lyons' report to the U.S. Embassy, cable dated 22 August 2007 (C-680).

⁴⁵ When he met the President of the Commission on Energy and Mines of the National Assembly on 29 August 2007, he told him that negotiations continued with ConocoPhillips and Exxon Mobil and asserted “that he will soon finalize negotiations with Exxon Mobil and ConocoPhillips oil companies” (C-362).

104. The Claimants stated that Venezuela's proposal of a pay-out of US\$ 2.3 billion represented not more than 5% of the total real value of its interests, which would translate into a value of US\$ 46 billion. The Respondent refers to this amount as one of the grossly overstated misrepresentations made by the Claimants to the Tribunal. Witness Goff thought that such amount was not realistic.⁴⁶ In fact, such amount had not been invoked during the negotiations in 2007 or later. It was mentioned for the first time in the Claimants' Memorial of 15 September 2008 (para. 309, p. 159). When considering the events in preparing its 2013 Decision, the Tribunal, taking note of the Claimants' statement (para. 390), was certainly aware that this amount was overstated, given the fact that in the same Memorial, the Claimants evaluated their total loss at US\$ 20,468 billion, together with a gross-up related to U.S. taxes of US\$ 9,836 billion.

105. The Claimants themselves did not retain such amount for their own estimates during the negotiations; they considered their assets to be worth around US\$ 20 billion, as stated in Mr. Limbacher's letter of August 10, 2007⁴⁷ and confirmed by Mr. Mulva, CEO of ConocoPhillips, when meeting the U.S. Embassy on 31 October 2007.⁴⁸ Mr. Lyons added at the August 2016 Hearing that Mr. Limbacher mentioned the US\$ 20 billion claim already before 26 June 2007⁴⁹, but that he stated also that ConocoPhillips was prepared to accept a much lower value in order to reach an agreement⁵⁰. For ConocoPhillips, as explained by Mr. Limbacher, Executive Vice-President, Venezuela's own valuation was below "by a factor of six or seven"⁵¹, which comes close to the amended offer of US\$ 3.1

⁴⁶ TR-E, Day 2, p. 494/22-495/10, 550/12-18.

⁴⁷ R-653.

⁴⁸ Cable of 31 October 2007 (C-682). At the August 2016 Hearing, the Claimants used yet another comparison to show the discrepancy between their figures and Venezuela's offer of 2.3 billion. In their submission, the Projects Petrozuata and Hamaca were generating US\$ 7.3 billion per year; half of that income stream minus costs and taxes belonged to ConocoPhillips, resulting in an earning of US\$ 14 billion inclusive of interest for the past nine years, not counting the further amount representing the two decades of the remaining duration of the expropriated rights in each of the three Projects (cf. TR-E, Day 1, p. 11/12-22, 12/3-6, 49/1-6).

⁴⁹ TR-E, Day 3, p. 713/1-4, 18-19, 717/14-15.

⁵⁰ TR-E, Day 3, p. 700/16-19.

⁵¹ Cable dated 12 September 2007 (C-681).

billion made by Venezuela at a meeting of 2 August 2007 and mentioned in Mr. Limbacher's letter of 10 August 2007⁵².

106. In the minds of those involved in estimating what would become a just compensation for Venezuela's taking of ConocoPhillips' assets, any view on what would represent a fair market value must have been approximate. The figures put forward by ConocoPhillips' representatives may have been considered high or excessive. Nevertheless, ConocoPhillips was entitled to react to the nationalization of its assets in defense of its own interests and to present its claim for compensation. Venezuela had no meaningful reply to ConocoPhillips' proposals and valuations. Its position remained focused on the amounts proposed in connection with the migration into *empresas mixtas*, without considering the different context in which the matter of compensation was to be approached as a consequence of the nationalization of the totality of ConocoPhillips' assets.⁵³ The focus was thus on a rigid asset valuation, no consideration being given to market prices covering ConocoPhillips' assets and profits as a whole.⁵⁴

107. It was thus no surprise when the Venezuelan official Mr. Del Pino declared to the press on 28 September 2007 that PdVSA will only pay book value for the confiscated assets.⁵⁵ It is true that the concept of book value as used by the Parties in this case is impre-

⁵² See also Witness Lyons (TR-E, Day 3, p. 676/18-19, 678/7-680/15), explaining that what is called an offer in Mr. Limbacher's letter was in fact rather a cursory statement made by Mr. Del Pino at a meeting on 2 August 2007. Witness Mommer said that the offer referred to in the letter was correct (TR-E, Day 4, p. 1173/2-5) but that he did not recall that his team had been consulted (TR-E, Day 4, p. 1095/3-1096/15).

⁵³ Thus, Witness Mommer said that he reacted with disbelief in respect of the US\$ 20 billion estimate of fair market value mentioned in Mr. Limbacher's letter of 10 August 2017, explaining that the proposal was absurd in comparison to the sums that were paid to all the companies with which Venezuela reached agreement (TR-E, Day 4, p. 1177/4-1178/7). His testimony relates to the agreements on migration to *empresas mixtas* exclusively.

⁵⁴ Relying on the Congressional Authorizations, the Respondent's view was that "the restructuring into mixed companies were not compensable actions" (Counter-Memorial of the Bolivarian Republic of Venezuela dated 27 July 2009, para. 278).

⁵⁵ C-685. The Respondent recalled at the August 2016 Hearing that for Venezuela, book value was about US\$ 1.8 billion (TR-E, Day 1, p. 109/3-4, 135/1-3; Day 3, p. 685/18-19). When referring to internal ConocoPhillips valuations retained in October 2006 for the Business Plan for Petrozuata and Hamaca, it identified a net present value of 3.011.64 billion, less a debt of 774 million, which brings the overall amount down to approximately 2.237 billion (cf. TR-E, Day 2, p. 539/6-548/11; Day 3, p. 720/7-722/7, referring to C-474 and LECG Exhibit 129). While he accepted these figures, Mr. Lyons noted that the underlying calculations served to verify whether the operating companies would be able to meet their cash obligations. He strongly

cise, as such may be even more than the notion of fair market value. However, in the circumstances of the instant case, fair market value included, contrary to book value or any similar concept, estimations about the evolution of oil prices in the coming years. These estimates had undoubtedly the potential of leading to higher amounts, which became evident later on. Venezuela's proposals were set at a clearly lower level than amounts based on fair market values (including profits emerging during the future life-time of the projects)

108. The Respondent argues – based on a press release – that Mr. Lowe, Executive Vice-President of ConocoPhillips, told an investment conference on 5 September 2007 that Venezuela had agreed to pay fair market value compensation for a crude-oil project ConocoPhillips abandoned earlier the same year.⁵⁶ However, as the Claimants rightly observed⁵⁷, the same press report notes Minister Ramírez' recent position that Venezuela will recognize book value, not the net present value, as also stated by Mr. Del Pino at the end of the same month. A week after the Conference, Mr. Limbacher reported to the U.S. Embassy that Venezuela has not been flexible in its negotiating position.⁵⁸

109. Witness Mommer objected to the use of the term book value, testifying that he and his team had never referred to such concept, but that they were considering market values.⁵⁹ Book value, he said, was ConocoPhillips' language; whatever was not their market value, they called it book value.⁶⁰ However, he had little more than simple denials to express when confronted with the use of the term book value in the press report on Mr. Del Pino's statement or in Minister Ramírez' speech of 14 February 2008.⁶¹ The evidence before the Tribunal shows that the term book value had been used as conveying a meaning similar to Venezuela's frequently expressed position that it will object to any compensation based on

opposed the idea that they were to be used for net present value calculations or any other business purpose, all the more so as the document did not include oil price increases (TR-E, Day 3, p. 722/18-725/2). Witness Sheet explained that these were reserve calculations that had to be based on fixed prices and have nothing to do with a fair-market-type valuation (TR-E, Day 3, p. 827/10-830/22). He added that discount rates are irrelevant to a reserve calculation (TR-E, Day 3, p. 843/14-844/8).

⁵⁶ Dow Jones Newsletters, 5 September 2007 (R-602; cf. TR-E, Day 1, p. 155/8-156/19).

⁵⁷ TR-E, Day 1, p. 60/8-61/17.

⁵⁸ Cable dated 12 September 2007 (C-681).

⁵⁹ Cf., in relation to his 13 April letter in response to the three letters of 12 April 2007, TR-E, Day 4, p. 1048/3-13.

⁶⁰ TR-E, Day 4, p. 1111/2-1112/4, 1134/21-1135/19, 1144/14-1146/1, 1197/9-17, 1200/1-22.

⁶¹ C-190. Cf. TR-E, Day 4, p. 1112/9-1114/20, 1115/11-1116/4, 1122/18-1128/19, 1136/5-1137/11, 1146/2-8.

fair market values as they were determined by the Claimants. This understanding must also be retained when reading the Tribunal's 2013 Decision (para. 400).

110. The shift from an asset analysis – used for the purposes of migration – to market value in the context of nationalization seems not to have retained the attention of Venezuela's representatives. The Government of Venezuela was not subject to particular constraints when fixing the conditions for migrations into *empresas mixtas*; under the circumstances, the foreign investors' bargaining power was limited. The situation was different however once the consequences of the nationalization had to be evaluated. In this respect, compensation had to be "prompt, fair and adequate" as required by Article 11(1) of the Investment Law. The legal situation is similar on the basis of Article 6(c) of the BIT, where "market value" is mentioned explicitly.

111. One would have expected that this difference in the level of valuating compensation for nationalization, compared to a migration into state companies, would be reflected in the negotiations and discussions ongoing in 2007. On ConocoPhillips' side, the effect must have been that higher amounts based on market values including forthcoming oil price increases could be requested. This was the consequence of the fact that unlike migration, the expropriation of ConocoPhillips' assets brought into effect the protection provisions of Article 6 of the BIT. Migration, as it was proposed to ConocoPhillips in 2007, included the termination of the Association Agreements with no compensation and a waiver of international arbitration. Expropriation necessarily triggered compensation for the value of the assets and the profit resulting from the Agreement's operation over the whole of their remaining life-time, combined with arbitration as a procedural safeguard. Both approaches – migration and termination through expropriation – yielded economic values of very distinct dimensions, even if both were relying on market references.

112. On Venezuela's side, the insistence on book value or similar value-levels had a short-term future in light of a possible claim submitted to international arbitration, either based on the Investment Law, or the BIT, or both. The filing of such a claim was announced to Venezuela for the first time as early as in the trigger letters of 31 January 2007, causing

no reaction on Venezuela's part.⁶² The evidence before this Tribunal does not show that Venezuela was considering a need to shift towards fair market valuations in light of the pertinent legal requirements.⁶³ When Witness Mommer was asked whether he had been taking account of the Investment Law and in particular of its requirement for "prompt, fair and adequate compensation", he answered that this Law never played a role for him.⁶⁴ In the same vein, he also must have disregarded the requirement for "just compensation" representing "market value" in Article 6(c) of the BIT⁶⁵; as he explained, he became seriously aware of a forthcoming ICSID proceeding when he heard it from Mr. Mulva at the meeting with Minister Ramírez on 29 October 2007.⁶⁶

113. In sum, as explained in the Tribunal's 2013 Decision (paras. 388-398), up to the time of the filing of the Claimants' Request for Arbitration, the Respondent did not envisage, conduct or propose to ConocoPhillips a market valuation as required by Article 6(c) of the BIT. It did not make any offer based upon such valuation. Witness Mommer's confirmed that there was no written offer made by Venezuela before the day when the Confidentiality Agreement became effective.⁶⁷

114. However, the Respondent submits that its approach to the issue of compensation changed in the period following the initiation of the present arbitral proceeding, when a new round of negotiations was undertaken, which the Tribunal allegedly omitted to consider in its 2013 Decision and refused to reconsider as requested by the Respondent's Application for Reconsideration.

⁶² Cf. 2013 Decision, paras. 384, 393.

⁶³ In the terms of Witness Boué: "... we thought, well, nationalization happened on date X, so why does it matter what happens afterward?" (TR-E, Day 3, p. 883/7-9).

⁶⁴ TR-E, Day 4, p. 1195/4-5, 1196/7-1197/9.

⁶⁵ "I never thought about ICSID at first because, according to the Association Agreement, who had to pay compensation was PdV and not the Government." (TR-E, Day 4, p. 1098/19-22). He thought that the dispute was about a contract claim to be submitted to ICC Arbitration, with the effect that any indemnity ultimately would have to be paid by Maraven/PdV and not the Government (TR-E, Day 4, p. 1099/4-1101/2).

⁶⁶ TR-E, Day 4, p. 1118/18-22, 1120/10-18, 1193/12-1194/2. See also Witness Boué, Supplemental Direct Testimony of 7 January 2015 (paras. 4-5).

⁶⁷ TR-E, Day 3, p. 941/20-942/10.

2. *The negotiations after the filing of the Request for Arbitration*

115. The Respondent draws the Tribunal's attention to the fact that the Claimants' own witnesses in this case, lead negotiator Mr. Goff and Mr. Lyons, reported to the U.S. Embassy in Caracas that Venezuela's representatives were negotiating fair market value, as stated in a cable from the Embassy dated 4 April 2008⁶⁸. According to another cable of 23 May 2008, Mr. Goff explained that it was ConocoPhillips who was insisting on receiving compensation more than, or on top of fair market value, while expressly acknowledging that the Republic was negotiating fair market value⁶⁹.

116. If this information was correct, it would be part of a negotiation phase that was covered by the Confidentiality Agreement that was in effect since 27 November 2007. The report before the U.S. Embassy was thus relating to a series of facts that the Tribunal did not have as evidence in the record when preparing its 2013 Decision, and this with the agreement of all Parties, including the Party that is now accusing the Claimants of not releasing information it itself did not want to be revealed to the Tribunal.

117. The Tribunal notes that the Respondent's understanding of the cable of 4 April 2008, where its representatives are allegedly reported as having agreed upon fair market valuations, is not fully accurate when compared to the text of the report, which reads, in relevant parts, as follows:

SUMMARY

§1 ... CP [ConocoPhillips] and BRV [Bolivarian Republic of Venezuela] have reached agreement on the methodology for determining fair market value of CP's assets. High oil prices will increase the amount of CP's compensation claims. ...

NEGOTIATIONS ARE PROGRESSING

§2 ... Goff began the meeting by stating he was a "little optimistic". He said May was the "crunch time" for the negotiations. CP would like to do a trade for Citgo assets if possible and negotiations have been moving in that direction. PDVSA claims it has enough cash on hand to pay off CP's claims but CP has its doubts.

⁶⁸ R-313, Annex 4.

⁶⁹ R-313, Annex 5.

§3 Goff explained that May is the key date for CP due to the fact that it has to submit is [*recte*: its] official claims to the arbitration panel in June. CP's claims run in the tens of billions of dollars. Lyons noted that the claims have increased recently due to recent increases in oil prices.

§4 According to Goff, CP has two basic claims: a claim for compensation for its expropriated assets and a claim based on the progressive expropriation of the underlying assets. Goff stated the BRV has accepted that fair market value is the standard for the first claim. He said the BRV has moved away from using book value as the standard for compensation and has agreed on a fair market methodology with discount rates for computing the compensation for the expropriated assets. However, given the recent increases in oil prices, the fair market value of the assets has increased.

§5 As for the claim based on the progressive expropriation of the assets, Goff said the claim was on top of the fair market value of the assets. CP has proposed a settlement number and the BRV appears to be open to it. Goff added that CP also plans on increasing the settlement number for the second claim due to recent increases in oil prices.

The report made to the U.S. Embassy notes in paragraphs 1 and 4 that Venezuela had accepted fair market value as the standard for ConocoPhillips' first claim, which relates to the expropriated assets.⁷⁰ However, ConocoPhillips had a second claim, based on the "progressive expropriation of the underlying assets", as stated in paragraph 4. The report does not explain this expression.⁷¹ It notes in paragraph 5, nonetheless, that this claim was "on top of the fair market value of the assets", which seems to indicate that this second claim was on an amount comparable to the market value of the assets, *i.e.* the first claim. In this respect, however, the report does not provide any information about the methodology applied, nor does it indicate that Venezuela did agree to fair market methodology as it did in respect of the first claim. Witness Goff told the Tribunal that he did not make such a "second" claim.⁷² The report does not go further than stating that ConocoPhillips had proposed

⁷⁰ For Witness Goff, there was an understanding around fair market value to begin discussions (TR-E, Day 2, p. 502/14-16, 522/5-17, 616/1-7, 632/11-20). When asked again on the topic, he did not remember whether the framework on which the discussions were based did include the term fair market value (TR-E, Day 2, p. 632/21-633/15). In fact, the copy supplied to the Tribunal does not contain this expression (C-688). Witness Lyons confirmed that the sentence on the standard of compensation for the first claim was correct (TR-E, Day 3, p. 702/13-21). Some of the presentations used during the negotiations recorded expressly that the discussions centered upon a fair-market-value approach to valuation (C-693, C- 694).

⁷¹ Witness Lyons observed that the second claim was relevant for the filing of arbitration and related to the fiscal changes that occurred in June or October 2004 through June 2007 (TR-E, Day 3, p. 696/6-13, 700/8-9).

⁷² TR-E, Day 2, p. 512/10-19.

a “settlement number” and that Venezuela appeared “to be open to it”. Thus, the report does not provide evidence for an agreement by Venezuela to fair market valuation in respect of the second claim.

118. The Respondent relies heavily on this 4 April 2008 cable when asserting that Venezuela was negotiating on the basis of fair market value. The Respondent notes that the Claimants do not object to the accuracy of the cables, which is demonstrated by Witness Lyons’ silence in this respect.⁷³

119. The Tribunal also notes that none of the witnesses had stated or explained at the hearing that the content of the U.S. Embassy cables was not accurate or unreliable, as argued by the Claimants. It is equally clear that the Claimants are wrong in considering that the cables reported about settlement discussions that had nothing to do with negotiations; there is no doubt that the Parties tried to negotiate compensation with the effect that a successful negotiation would have settled the arbitration. The Claimants’ arguments on the lack of any relevance of the cables have no merit.

120. However, Mr. Goff – the Claimants’ Witness – provided an explanation that has to be considered. He recalled that the briefings consisted generally in just responding to the questions the Embassy had, by way of a very general conversation.⁷⁴ He was never told that what they talked about would be written down or recorded.⁷⁵ As the excerpt quoted above shows, the cable is not always easy to understand.⁷⁶ It is certainly not as clear as the Respondent argues it is. While Venezuela is said to accept fair market methodology, the 4 April 2008 cable also says that this observation does not apply to the totality of ConocoPhillips’ claims. Finally, while the report states that Venezuela was prepared to “be

⁷³ “Nothing that I have read causes me to reconsider or amend my prior testimony regarding the negotiations or Venezuela’s position in them.” (Fifth Witness Statement of 13 October 2014, para. 14).

⁷⁴ TR-E, Day 2, p. 496/19-497/2, 498/11-13, 501/4-8, 512/4-8. See also Witness Lyons, TR-E, Day 3, p. 750/8-15.

⁷⁵ TR-E, Day 2, p. 555/1-3.

⁷⁶ Witness Goff noted that for part of paragraph 5 (quoted above), he could not tell what it means (TR-E, Day 2, p. 511/16-512/9, 515/1-6).

open” to consider a settlement number, it does not refer to any proposal or offer actually made on Venezuela’s behalf.

121. The Respondent relies not only on the cable of 4 April 2008, but also on a further cable dated 23 May 2008. The Respondent notes correctly that this second cable shows optimism on the part of Mr. Lyons.⁷⁷ It does not sound like bad faith negotiation.⁷⁸ Nonetheless, the cable does not report on any offer submitted by Venezuela, nor does it inform the U.S. Embassy that Venezuela was negotiating on the basis of fair market values.

122. The Tribunal observes that neither one of these two cables, nor any other, include evidence that Venezuela had submitted any concrete offer based on fair market value. The Respondent affirms that there is no doubt that offers were made, and it refers in support of this contention to the offers the Claimants received in early 2007.⁷⁹ The Respondent misses the point. The offers made in early 2007 were made prior to the nationalization; they were irrelevant in terms of the fair market valuation of all of ConocoPhillips’ assets subject to Decree No. 5.200. The Respondent does not supply any document or any other evidence in support of an allegation that an offer based on fair market values was submitted after November 2007. This has nothing to do with the accuracy of the U.S. Embassy cables. It is the simple fact that no offer on the part of Venezuela is reported or even mentioned in these cables. Respondent’s Witness Mommer explained to the Tribunal that for Venezuela, the differences between the Parties were so fundamental that the negotiations did not reach the point to make a written offer; thus, Venezuela had not made any written offer at any

⁷⁷ The Claimants further explain that this optimism reflected an interest Venezuela’s negotiators showed in respect of the results of an analysis performed by Mr. Goff and his team of the Citgo assets in the United States, and presented shortly before, at a meeting of 20 May 2008 (C-692); such positive reaction was thus exclusively related to the valuation of Venezuela’s own assets (cf. TR-E, Day 1, p. 64/15-65/5). Witness Lyons considered the meeting to be very positive (TR-E, Day 3, p. 736/17).

⁷⁸ Witness Goff noted that the negotiation teams had « friendly discussions » (TR-E, Day 2, p. 531/1-2). The presentation of the Citgo valuation noted expressly that the team from Citgo was very responsive and willing to work with ConocoPhillips during the process.

⁷⁹ The Respondent’s Rejoinder on Quantum of 7 January 2015, para. 314; 2010 Hearing, TR-E, Day 14, 3977/14-22.

time.⁸⁰ The Claimants' Witness Goff recalled that during the entire period of his involvement in the negotiations, he never received a written or oral offer from Venezuela.⁸¹ Venezuela, as will be analyzed below, could not make a binding offer if not in writing.

123. Similar conclusions must be drawn from the latest available cable dated 5 September 2008, where Mr. Lyons reported to the U.S. Embassy that following a meeting held the day before with the Venezuelan Government's negotiating team, negotiations on compensation for ConocoPhillips' expropriated assets had broken down and no future meeting dates had been set.⁸² The Venezuelan negotiating team returned to its original position that Venezuela will only pay book value for the assets. Mr. Lyons explained that throughout the negotiations, Venezuela had agreed to the use of a net present value calculation for the market value of the assets as stipulated in Venezuela's investment law and the Dutch Bilateral Investment Treaty.⁸³ But now, Venezuela rejected such a calculation and it also refused to consider the possibility of a swap for Citgo's assets in the United States which were potentially of greater value to ConocoPhillips than for Venezuela. Again, this cable

⁸⁰ Cf. TR-E, Day 3, p. 949/8-950/7, 951/8-13, 955/10, 971/13-21; Day 4, p. 1053/2-6. At one moment during the August 2016 Hearing Witness Mommer asserted that Venezuela did make offers during the confidentiality period (TR-E, Day 4, p. 1061/22-1063/3, 19-20). As no document was provided or referred to, he may have confused offers and presentations. When he was taken thereafter through all of his statements he came to admit that none of them described or evidenced any offer made by Venezuela during that period of the negotiations (cf. TR-E, Day 4, p. 1070/19-1077/12). And after having stated that Venezuela made an offer at the last meeting on 4 September 2008 (TR-E, Day 4, p. 1140/13-1144/2), he finally told the Tribunal that a presentation had been made, not confirming that it included an offer (TR-E, Day 4, p. 1202/20-1204/14). The Respondent's filing of presentations on 31 August 2016 did not contain information in this respect.

⁸¹ TR-E, Day 2, p. 602/18-603/1. The Respondent is correct in stating that there is no requirement that compensation offers must be memorialized in writing and that they must not be declared as binding (Respondent's Post-Hearing Brief, para. 17). Nonetheless, a proposal submitted in writing is usually more precise and easier to understand if provided with elements about the underlying calculations, whereas a purely oral communication has a more uncertain character in respect of its content and by the simple fact that its author declines to have it recorded. In any event, the Respondent's argument is mistaken: the Government of Venezuela was not authorized to make any monetary commitment without formalizing it in writing (cf. Witness Mommer, TR-E, Day 3, p. 971/22-972/5).

⁸² Venezuela's position must have been affected by a sudden event. Few days ago, in a press report of 1st September 2008, Minister Ramírez was told to be hoping to reach an agreement with ConocoPhillips before a call for participation in three areas in the Carabobo Block of the Orinico Belt will be made in October (El Universal, C-364).

⁸³ See also Witness Lyons, TR-E, Day 3, p. 771/3-772/12.

does not go any further than noting that, throughout the negotiations, Venezuela was prepared to envisage market values.⁸⁴ But, there is no evidence of any concrete proposal or offer on that basis on the Respondent's part.

124. In an earlier cable, dated 7 August 2008, Mr. Goff was reported as having stated that Venezuela's assessment of the value of ConocoPhillips' (CP) expropriated assets "continues to be substantially different than that of CP". This difference was exacerbated by the fact that oil prices had more than doubled since the nationalization. Mr. Goff opined that Venezuela would likely be willing to pay cash if ConocoPhillips accepted Venezuela's valuation, but this would significantly undervalue the assets. Once again, the Tribunal notes that the cable does not allow recognizing whether an offer has been submitted to ConocoPhillips or the basis for any such offer.

125. The Tribunal has not received any evidence about the precise impact of Minister Ramírez' statement in a speech before the National Assembly on 14 February 2008, when he declared, referring to the companies that had left the country, that the Republic "should indemnify the book value of those assets".⁸⁵ He also said that he agreed with Mr. Mulva, the Global CEO of ConocoPhillips, in a speech on 12 February 2008⁸⁶ that "we are on our way to reaching an agreement". For Witness Mommer, it was obviously a political speech, directed much more towards the dispute with Exxon than the negotiations with ConocoPhillips.⁸⁷ It would seem however that Venezuela's negotiators could not ignore such declaration.⁸⁸

⁸⁴ Witness Goff did not remember that the Venezuelan negotiating team declared that only book value will be paid and that they rejected fair market values (TR-E, Day 2, p. 628/14-629/14). Witness Mommer told the Tribunal that this was consistent with his own testimony (TR-E, Day 4, p. 1153/7-1155/22). Witness Boué confirmed that Dr. Mommer had explained at the 4 September meeting that they were considering fair market value, also taking account of the compensation formulas (TR-E, Day 3, p. 888/18-22).

⁸⁵ C-190. The relevant words in the Spanish original text are: "... pero, por supuesto, indemnizar el valor en libros de esos activos, ...".

⁸⁶ Reuters UK, 12 February 2008 (R-117).

⁸⁷ Cf. TR-E, Day 4, p. 1126/5-1128/4, 1146/2-8, 1185/13-1186/9; 2010 Hearing, TR-E, Day 7, p. 1804/7-8.

⁸⁸ Witness Mommer remained not impressed: "I just continued working." (TR-E, Day 4, p. 1128/18), further recalling that he had clear instructions to reach an agreement based on market value (TR-E, Day 4, p. 1127/2-3, 1128/4-7).

126. The Tribunal further notes that the presentations made by and to the teams conducting the negotiations after November 2007 do not offer more evidence in this respect. Most of the presentations that were submitted to the Tribunal on 31 August 2016 originated from the Claimants. They contain extensive information about valuations that were discussed during the meetings held prior to August 2008. However, they do not record any evidence of an amount of compensation that could be awarded, or at least provide directions that would allow the indication of such result with reasonable clarity. As Witness Goff explained to the Tribunal, “we never agreed on a specific value”.⁸⁹ He said that they had multiple valuations, but the discussion was not targeted to get a specific number.⁹⁰ This is due in large part to the fact that the focus was at that time again on an asset swap involving various assets of Venezuela in the United States (mostly belonging to Citgo⁹¹). This had indeed been a priority for ConocoPhillips’ negotiators, as stated expressly in the two reports made to the U.S. Embassy on 4 April and 23 May 2008 that have been mentioned above. Pursuant to another cable, dated 7 August 2008⁹², Venezuela finally declared that it preferred an “auction type approach” in order to establish the right asset value, before turning down the idea all together.⁹³

127. In these circumstances, any valuation covering all of ConocoPhillips’ assets as if they were put on the free market must have been considered as of secondary importance and thus not representing a primary incentive for a productive exchange of offers on amounts to be paid in the hypothesis of all of ConocoPhillips’ assets being put on an open

⁸⁹ He added: “There was never a specific value that we tried to get to. It was a range of values.” (TR-E, Day 2, p. 513/16-18) “It was somewhat of an abstract negotiation because it wasn’t exchanging values.” (TR-E, Day 2, p. 619/4-6) “We never exchanged views.” (TR-E, Day 2, p. 636/17)

⁹⁰ TR-E, Day 2, p. 514/4-9, 556/4-9. The Witness further noted that there was no discussion of any terms or anything like that (TR-E, Day 2, p. 530/16). When pressed to be more specific, he said that while he could not remember values ten years after the events, the values were in excess of US\$ 10 billion (TR-E, Day 2, p. 557/5-11, 20-22). Witness Lyons mentioned figures as 8 or 9 billion (TR-E, Day 3, p. 735/5-7). Witness Goff also confirmed that in the discussions they never had an exact number that they talked about. They never said what the assets were worth. He did not know the Venezuelan number. They never said it’s only book value. Cf. TR-E, Day 2, p. 574/18-577/1, 589/7-15, 594/15-16, 595/12-13. The communication of the approximate value of the Citco companies appears to be an exception (cf. TR-E, Day 2, p. 616/8-19, 617/16-618/6); however, Venezuela did not respond specifically (TR-E, Day 2, p. 624/8-625/7), as Witness Lyons also mentioned (TR-E, Day 3, p. 706/9-11).

⁹¹ The most valuable asset of Citgo was the refinery in Lake Charles, counting for 70 or 80 percent of the overall Citgo value (cf. Witness Sheet, TR-E, Day 3, p. 797/14-19, 799/2-8).

⁹² C-683.

⁹³ See also Witness Lyons, TR-E, Day 3, p. 769/3-22.

market. Thus, the evidence before the Tribunal is that, in respect of either one of these two methodologies, no concrete offer of any reasonable compensation was ever made by Venezuela.

128. The change in the Respondent's positions, moving back from a more market oriented approach to the original basis referring to book value or similar lower value levels, can also be explained by the fact that at the time when negotiations were breaking down, the first active steps taken in this arbitral proceeding were looming, with the first session of the Tribunal scheduled for 13 September 2008, and the Claimants' Memorial filed on 15 September 2008. The Claimants were certainly aware, weeks ahead, that they were going to claim about US\$ 30 billion for compensation. This must explain that they were not prepared to settle with the Respondent for a much lesser amount. On the Respondent's side the view prevailed that ICSID jurisdiction would be denied and the matter be litigated in ICC Arbitration.⁹⁴ Under these circumstances, both Parties had no reason to pursue negotiations in the near future. This must have been the situation as well when representatives of both sides had an unsuccessful meeting in April 2009 in Vienna.⁹⁵

129. In conclusion, it is undisputed that the Respondent at no time made any compensation payments to the Claimants or any other performance equivalent to such compensation, *i.e.* through an asset swap. The explanations provided above demonstrate that the Respondent has not made any reasonable offer for such a payment or other equivalent contribution to be made in the near future, either through the negotiations that had been conducted or on its own initiative. The Claimants are right when they state that the Respondent did not produce a single Venezuelan-sourced document in support of its position.⁹⁶

130. The Tribunal further observes that the Respondent's insistence on the relevance of the compensation formulas for Venezuela's approach towards an agreement with ConocoPhillips is not convincing in this respect. At no time did the Respondent or its Witness

⁹⁴ Cf. Witness Mommer, TR, Day 4, p. 1150/16-17, 1193/10-11, 1194/7-12; Mr. Lyons, U.S. Embassy cable of 5 September 2008 (C-684).

⁹⁵ Witness Goff simply mentioned that this meeting took place and the individuals involved (TR-E, Day 2, p. 504/16-18, 505/2-4, 587/13-14, 588/2-22). Witness Sheet told the Tribunal that they talked about the project but that the discussion didn't go anywhere (TR-E, Day 3, p. 805/20-806/1).

⁹⁶ The Claimants' Post-Hearing Brief, para. 28.

Mommer demonstrate through a concrete submission whether, and if so, to what extent these formulas would have had an impact in calculating the economic dimension of ConocoPhillips' migration into *empresas mixtas*, with the effect that the Association Agreements, including the formulas, would have been terminated. Additionally, no evidence was produced of a possible influence of these formulas on calculations based on book values or similar concepts as they were prevailing in Venezuela's methods used in relation to the compensation for the expropriation of ConocoPhillips' assets.⁹⁷ In any event, the relevance of the compensation formulas could only be demonstrated in relation to a concrete offer for compensation. There is no evidence before the Tribunal that such input was included in Venezuela's proposals made by the end of March 2007. After that date, no further offer for payment was made. The compensation formulas were a matter internal to Venezuela's negotiators.⁹⁸ The Respondent's Witnesses explained that these formulas were mentioned by Dr. Mommer and subsequently by Dr. Boué for the first time at the last meeting on 4 September 2008; they did not have any impact on the negotiations which had, by then, definitely broken down.⁹⁹ The corresponding conclusion of the Tribunal in paragraph 394

⁹⁷ Witness Mommer's explanations are based on principles, stating that "fair market value could not be assessed without considering the impact of the compensation mechanisms, which for us was an integral part of fair market value". When ConocoPhillips told the U.S. Embassy that Venezuela "had moved away from using book value", the meaning was that Venezuela was willing to discuss compensation without applying the formulas in a good faith effort to reach a settlement, but without ever abandoning its legal position regarding the formulas. (cf. Third Supplemental Direct Testimony of 7 January 2015, para. 3.) They were not successful in the negotiations with Exxon and ConocoPhillips "because of these limitation provisions" (TR-E, Day 4, p. 1128/7-9).

⁹⁸ Witness Mommer (TR-E, Day 3, p. 955/21-958/13). Witness Goff told the Tribunal that the issue of the compensation provisions had no impact during the settlement negotiations; they were not discussed at all (TR-E, Day 2, p. 583/20-586/5). Witness Lyons noted that they were simply mentioned twice by Dr. Mommer but not associated with any discussion or offer (TR-E, Day 3, p. 746/13-748/12, 755/2-756/20). The first time was in June 2007 when Dr. Mommer said that the formulas were irrelevant, and the second time was at the last meeting on 4 September 2008 where Dr. Mommer said that the formulas were relevant for the ICC Arbitration (TR-E, Day 3, p. 746/7-11, 748/8-12, 756/1-8).

⁹⁹ Witness Boué, Supplemental Direct Testimony of 7 January 2015, para. 2; TR-E, Day 3, p. 881/18-882/18, 886/9-13, 888/18-22, 893/1-896/4. See also Witness Mommer, TR, Day 4, p. 1031/5-1037/5, noting that he did not remember that the matter had been raised at prior meetings. He further explained that the limitations resulting from the compensation provisions were actually affecting the market price and were relevant when the Contract was relevant; this made a big issue at the end where there remained no way to agree (TR-E, Day 4, p. 1183/1-22).

of the 2013 Decision is still valid today. The matter was not raised as part of the calculations but in relation to the arbitration.¹⁰⁰ Therefore, the Respondent's submission in this respect is pure speculation.

131. The Respondent also recalls, together with Witness Mommer¹⁰¹, that ConocoPhillips' own vision of fair market value included, in addition to reviewed figures taking account of oil price increases, valuations based on the 2004 fiscal regime that no longer existed; ConocoPhillips did not consider indeed either the extraction tax or the 50% income tax that were both applicable to all companies in the petroleum industry¹⁰². This was explained by Witness Mommer as the "qualitative difference between Market Value, according to Conoco and according to us", further referring to: "This big gap, old and new fiscal regime, [l]imitations or not."¹⁰³ The Tribunal understands that these are factors of major importance in considering the difference in the negotiating parties' respective positions. Another important dividing factor was the applicable oil price for the remaining 28 years of the Projects.¹⁰⁴ The Respondent confirms: "The parties did not agree on what fair market value was, and could not agree given the difference in premises."¹⁰⁵ However, this does not in any way change the fact that there is no evidence that any compensation was provided or offered on the Respondent's behalf to the Claimants, including or not amounts or portions derived from such taxes.

3. The Respondent's allegations on the Claimants' misrepresentations

132. The Respondent's claim based on the Claimants' alleged misrepresentation is focused on the Claimants' omission to provide the Tribunal with relevant information that

¹⁰⁰ Witness Boué, TR-E, Day 3, 894/17-896/4.

¹⁰¹ TR-E, Day 3, p. 1008/14-16; Day 4, p. 1173/19-22, 1191/18-1192/9.

¹⁰² Witness Goff responded that the valuations were based upon the original fiscal policy (TR-E, Day 2, p. 513/2-9), but he was also less affirmative (TR-E, Day 2, p. 533/2-20). Witness Mommer noted that when they had discussions at the 29 March 2007 meeting, ConocoPhillips ignored the fiscal measures (TR-E, Day 3, p. 1008/6-7). He added that the offers made by ConocoPhillips in June and August (on an asset swap) parted from the position that the old fiscal regime applied (TR-E, Day 4, p. 1052/15-17). On 16 June 2008, an "Upstream Update" was presented by ConocoPhillips that included both 2004 and 2007 fiscal terms (C-693, slides 7, 8 and 10, the latter noting that the risk-adjusted arbitration value is higher than the proposed settlement range under fiscal terms in effect on 26 June 2007).

¹⁰³ TR-E, Day 4, p. 1074/5-8.

¹⁰⁴ Cf. the presentation of January 2008 under Exhibit C-696.

¹⁰⁵ The Respondent's Post-Hearing Brief (para. 11), adding to the quoted part of the sentence that there is no question that the Respondent negotiated on that basis.

would have lead the Tribunal to decide otherwise than it did in its 2013 Decision. The Respondent's claim is explained in large part by its misunderstanding of the true meaning of the Tribunal's ruling in paragraph 404(d) of its Decision. As explained above, the Tribunal's statement did not include a finding of a lack of good faith on the part of the Respondent in the course of the negotiation for compensation. Therefore, the Claimants cannot be blamed for any alleged misrepresentation that would have caused the Tribunal to reach such a conclusion. The Tribunal adds that the Respondent rightly observes that some of the presentations filed with the Tribunal on 31 August 2016 are explicit in respect of the constructive cooperation between the teams conducting the discussions after November 2007.

133. In light of these circumstances, any assertion of misrepresentation on the Claimants' part would be reduced to a claim that relevant information was unduly retained or that evidence was presented that was either forged or otherwise misleading.

134. The legal principle at stake in this respect is not specified by the Respondent with more detail than by reference to wrongful conduct, misconduct and fraud. The Respondent does not explain whether and why a case of misrepresentation is included in such principle, and if so, what kind of misrepresentation is relevant. Indeed, in the broad sense of its meaning, "misrepresentation" before a tribunal could include any conduct of a party convinced of its factual allegations some of which might be considered as wrong or irrelevant by the tribunal when adducing the pertinent evidence.¹⁰⁶ The Respondent does not elaborate on this crucial point. It accepts that the legal principle referred to includes the notion of good faith, together with other expressions, but it does not define in any way what kind of misrepresentations might reach such threshold.¹⁰⁷ It appears sufficient for present purposes to retain that a simple allegation of facts that during the proceeding prove to be wrong is not

¹⁰⁶ Such language is used by the Respondent when contending that "key statements of fact made to this Tribunal by Claimants, which were relied upon by the majority in its 2013 decision, were untrue in material respects" (Respondent's Post-Hearing Brief, para. 41).

¹⁰⁷ The Respondent admits that the relevant threshold is unclear: "There must be some point beyond which flagrant misrepresentations of fact, whose falsity is exposed by the testimony of one's own witness, must be corrected." (Respondent's Post-Hearing Brief, para. 43).

sufficient to represent “wrong conduct” or “misconduct” under the legal principle the Respondent refers to. There should be a predominant element of fraud, bad faith or of an intention to mislead the tribunal to the detriment of the opposing party before such principle could be considered as relevant.¹⁰⁸

135. In respect of the relevant facts alleged by the Respondent in support of its claim on misrepresentation, the Tribunal finds that the Respondent has failed to provide any convincing evidence in support of its assertion, which appears reduced to the simple question whether or not Venezuela had submitted an offer based on fair market value during its negotiations with ConocoPhillips’ representatives. The Respondent’s allegation that the WikiLeaks cables provide such evidence has been shown to be wrong. Even if one came to a different conclusion on this point, there would still be no ground for accusing the Claimants of misrepresentation when the true fact to be represented is under the control of the Respondent who is at liberty to demonstrate that it had submitted an offer for compensation based on fair market value. The Respondent has not done so. The Respondent’s Witness Boué confirmed to the Tribunal that he had not provided any explanation or produced any documentary evidence in support of the Respondent’s allegation.¹⁰⁹ Therefore, it has not provided evidence either of the fact that it had made such offer, or of the allegation that the Claimants were misrepresenting relevant facts before the Tribunal. The Tribunal adds that if misrepresentations had been made, such as those alleged by the Respondent, the rules of procedure applicable in this proceeding, providing in particular for cross-examination of witnesses, have proven to establish the pertinent facts and to render any misrepresentation ineffective.

136. For the reasons given above, the Respondent’s claim in respect of the Claimants’ alleged misrepresentations must fail.

¹⁰⁸ In relation to the Claimants’ alleged misrepresentation of the negotiations through the reports made to the U.S. Embassy, the Respondent invokes a breach of the Confidentiality Agreement but it admits that there was no damage resulting from that breach (Respondent’s Post-Hearing Brief, para.24).

¹⁰⁹ TR-E, Day 3, p. 871/14-873/16.

V. Article 6 of the BIT

137. The Tribunal has concluded in its 2013 Decision that the Respondent committed a breach of Article 6(c) of the BIT by not respecting its obligation to negotiate in good faith on the basis of market value for the compensation to be provided to the Claimants for the taking of its assets.

138. The Tribunal begins by recalling that Article 6(c) is part of Article 6 which prohibits the host State from taking measures to expropriate or nationalize investments of nationals of the other Contracting Party unless certain conditions are complied with. Its letter (c) constitutes one of the “conditions” which must be complied with in order that the measure constituting or equivalent to an expropriation or nationalization does not constitute a breach of the obligation to abstain from taking such measure. The question whether the provision of letter (c) has been complied with is crucial in the instant case, because it is settled that the Bolivarian Republic of Venezuela had complied with the two other requirements, prescribing that the measures taken must have been taken in the public interest and in compliance with due process of law (a) and that they were not discriminatory or contrary to any undertaking binding upon the Contracting Parties (b).¹¹⁰

139. When comparing the terms used in Article 6 and those used in paragraph 404(d) of the 2013 Decision, there is an apparent difference due to the fact that the term “condition” is used in one place, whereas the term “obligation” appears in the other. As will be seen, the use of these different words does not make any difference.

140. The provision of just compensation to the investor is of course to be understood as an obligation on the part of a host State intending to proceed with an expropriation or nationalization. It is thus implicit in Article 6(c) even if the term is not used expressly. This was clearly the understanding of the Tribunal when drafting its 2013 Decision.

¹¹⁰ There is no dispute on the Tribunal’s record in this respect. In relation to one issue raised by the Claimants, the Tribunal concluded in its 2013 Decision that no undertaking as contemplated in Article 6(b) can be found in the Tribunal’s record (cf. paras. 344-352).

141. However, the nature of such obligation has to be understood in the specific framework of Article 6. The obligation implicitly referred to in Article 6(c) is one of the three pertinent requirements which must be complied with by the host State if it proceeds to expropriate or nationalize the investor's investment. Beyond this function, it has no legal autonomy.¹¹¹

142. Indeed, a breach of an obligation contained in Article 6(c), as stated in the 2013 Decision, does not have the effect of providing the aggrieved party with a claim for damages based on such breach. The legal effect of such breach appears exclusively in the overall context of Article 6, because the non-compliance with the requirements of letter (c) means that the measures taken by the host State do not comply with the conditions set out in this provision.

143. The 2013 Decision did not state, nor did the Tribunal ever say so elsewhere, that the breach of the obligation to negotiate in good faith the compensation to be provided to the Claimants was the cause of the Claimants' claim for damages and the foundation of the opening of the *quantum* phase. This was all the more so as the Claimants had never made such a claim.

144. Indeed, both Parties understood the 2013 Decision precisely in that way.¹¹² For the Claimants, "the Tribunal's ultimate and unassailable conclusion was that Venezuela acted unlawfully in expropriating the three Projects."¹¹³ The Respondent shared the Claimants' view on this point as it noted that the Tribunal's Majority Decision contains a "finding of unlawful nationalization"¹¹⁴, noting however in its final Brief on Quantum of 30 December 2016 that "no finding of unlawful expropriation has ever been made in this case" (paras.

¹¹¹ The 2013 Decision identified the issue whether such obligation was breached or not as one of "four issues" to be dealt with as part of "several issues" arising out of Article 6 of the BIT (para. 334), further noting that the Parties' contentions in respect of Article 6(c) related to the lawfulness of the taking of the investments (para. 343).

¹¹² As the Claimants noted at the August 2016 Hearing: "The Parties went on to draft their pleadings on the quantum issues on the common basis that the expropriation had been unlawful." (TR-E, Day 1, p. 23/17-19).

¹¹³ Claimants' Memorial on Quantum of 19 May 2014, para. 8. Similar statements are contained in Claimants' Reply on Quantum of 13 October 2014, paras. 2, 16, 87. See also the Claimants' letters of 2 March and 15 April 2016, their Post-Hearing Brief, paras. 2, 10, 14-20 and Final Submission on Quantum of 30 December 2016, paras. 12, 22, 65, 71, 78.

¹¹⁴ Respondent's Counter-Memorial on Quantum of 18 August 2014, paras. 8 (page 6), 36.

15, and 3, 16). In addition, the Parties are both of the view that the setting of the date of valuation at the date of the Award cannot be understood otherwise than if there was an unlawful expropriation.¹¹⁵

145. The conclusion of this analysis is that the term “obligation”, as it is used in paragraph 404(d) of the 2013 Decision, must be understood as having the same meaning as the term “condition” found in Article 6 of the BIT. If and to the extent that the requirements of Article 6(c) have not been complied with, one of the three cumulative conditions set out in Article 6 has not been fulfilled, and the effect is that Article 6 has been breached.

146. When reading the 2013 Decision, no other conclusion can be derived from the finding of the Tribunal in paragraph 404(d). This is so even when one recognizes that the *dispositif*, as this has been observed, does not contain an expressly labeled conclusion on the effects of the Respondent’s breach of Article 6(c).

147. The Tribunal stated that the requirement of compensation was one of the necessary conditions for an expropriation to be “lawful” (paras. 334, 343, 401). Using the same logic, the finding that one of these conditions has not been met must be understood as having the effect of rendering the expropriation in June 2007 unlawful.

148. The 2013 Decision did not state this conclusion explicitly in its *dispositif*.¹¹⁶ This could have been done in the Award. However, in light of the controversies that have been raised, depending whether one makes a narrow or a broader reading of the finding in paragraph 404(d), and after having granted the Parties ample opportunity to submit their positions on the matter, both through written submissions and in the August 2016 Hearing, the Tribunal has decided to rule now explicitly on this matter.

¹¹⁵ Cf. the Respondent’s First Brief on the Application for Reconsideration dated 28 October 2013, para. 2, and its statements at the August 2016 Hearing (TR-E, Day 1, p. 195/5-19, 203/2-17); the Claimants’ opening statement at the same Hearing (TR-E, Day 1, p. 18/16-19/13, 21/10-14). See also the 2013 Decision, paras. 343 and 401.

¹¹⁶ The Respondent had raised an objection in this respect and submitted its reasoning in its letters dated 11 March and 15 May 2016, further relying on the dissenting opinions submitted by Professor Abi-Saab on 10 March 2014 and by Professor Bucher on 9 February 2016.

149. The Claimants requested the Tribunal to declare that Venezuela has breached Article 6 of the Treaty by unlawfully expropriating and/or taking measures equivalent to expropriation with respect to ConocoPhillips' investments in Venezuela and to order Venezuela to pay damages to ConocoPhillips for its breaches of the Treaty.¹¹⁷

150. As noted above, the Tribunal's record reveals that the first two requirements of Article 6 have been met. An expropriation or nationalization requires a "taking" to be operated by the authorities of the host State. Such taking may cover rights other than rights *in rem*, as confirmed by Article 6 which refers to the broad concept of "investments". In the instant case, such taking became effective on 26 June 2007, when ConocoPhillips' assets were definitively taken over by Venezuela and by PdVSA's or its subsidiaries' employees.¹¹⁸ This taking did not extend to the assets exclusively. It meant that Venezuela assumed directly the activities performed by the Associations and it extinguished ConocoPhillips' ownership interests.¹¹⁹ It necessarily included the rights contained and held by ConocoPhillips through the Association Agreements and all other contractual undertakings relating to the three Projects. As Witness Mommer recalled, at that date, the Association Agreements were terminated.¹²⁰

151. There is no dispute about the fact that the measures enforced on 26 June 2007 have not been taken against "just compensation" as required by Article 6(c). In fact, no compensation has been paid at all. Therefore, the question whether compensation was provided that meets the threshold of market value is irrelevant.

152. The Tribunal, in its 2013 Decision, recognized a margin of flexibility and accepted, by reference to experience in investment practice, that the requirement of compensation provided on time is still complied with if the Parties "engage in good faith negotiations to

¹¹⁷ Cf. the Claimants' Request for Relief in its full version as quoted in the 2013 Decision, para. 212.

¹¹⁸ When the Respondent argues that ConocoPhillips was subject to a transfer of control and restructuring of the Projects only, not including an expropriation, it refers exclusively to the forced migration provided for in Decree-Law 5.200 (Counter-Memorial of the Bolivarian Republic of Venezuela dated 27 July 2009, para. 277). The expropriation took place by virtue of Article 5 of Decree 5.200 when such migration failed after a four-month negotiation period elapsed, with the effect that ConocoPhillips was forced to hand over its investment to the host State.

¹¹⁹ Witness Mommer, TR-E, Day 3, p. 993/8-994/17.

¹²⁰ The Witness used the term "disappear" (2010 Hearing, TR-E, Day 7, p. 1838/16-17), further explaining that the assets were taken over (TR-E, 2010 Hearing, Day 7, p. 1716/14-15, 1854/12-13).

fix the compensation in terms of the standard set, in this case, in the BIT” (para. 362). When referring to the language used in Article 6(c), such negotiation should be engaged either immediately before the measures were taken or when the impending measures became public knowledge, which, in the instant case, refers to a date shortly before 26 June 2007. However, such negotiation that might serve as a transitory substitute for actual payment must be of a nature resulting in providing satisfaction to the investors with equal or with similar effects than actual payment. Article 6(c) further requires that payment shall be made “without undue delay”; compared to a situation where compensation is addressed through negotiation, such substitute of actual payment is acceptable in the context of Article 6(c) exclusively if it leads to positive results without undue delay. In the normal course of proceeding with such negotiations efficiently and without delay, the host State must necessarily take a pro-active approach, which implies that it should put forward concrete proposals likely to meet the required level of compensation (*e.g.* market value) and having a chance to be approved by the investor.¹²¹

153. The Respondent has not complied with any of these requirements. The negotiations that took place before the taking over of ConocoPhillips’s assets and interests were conducted by Venezuela on a model representing a migration into *empresas mixtas*, based on a substance and an amount of compensation that had nothing to do with a compensation representing market values covering the loss of profits that were to be earned by ConocoPhillips’ companies until the end of the lifetime of the Projects. When the negotiations were engaged in parallel to the arbitration proceeding, Venezuela never made a concrete proposal. The evidence before the Tribunal demonstrates with stringent clarity that no offer was ever made by Venezuela in order to put a positive end to the negotiation. In addition, Witness Mommer never referred to any written offer submitted by Venezuela’s representatives, while admitting that the Government of Venezuela was not authorized to make any monetary commitment without formalizing it in writing.¹²² Finally, when Venezuela decided to abandon the negotiations on 8 September 2008, this was a clear sign of its prefer-

¹²¹ The Claimants submit that a binding offer of compensation must be made (Post-Hearing Brief, para. 34).

¹²² TR-E, Day 3, p. 971/22-972/5.

ence to have the matter settled through arbitration, which had no other meaning than admitting that the requirement for just and timely compensation based on market value, as contained in Article 6(c) of the BIT, had not been complied with.

154. These reasons support the Tribunal's conclusion that it accepts the Claimants' request and declares that the Respondent had breached Article 6 of the BIT.

155. The 2013 Decision's finding that the Respondent breached Article 6(c) of the BIT is incidental to this conclusion. Indeed, as noted above, Article 6(c) represents only one of the three cumulative requirements composing the BIT's provision on expropriation and nationalization. Therefore, having concluded that Article 6 of the BIT has been breached, the Tribunal will not need to address in its Award any breach of Article 6(c) that relates only to one of the three conditions that must be met by the host State in order to make the taking lawful.

VI. Decision

156. Based on the reasons given above, the Tribunal reaches the conclusions as follows:

1. The Respondent's Third Application for Reconsideration is dismissed.
2. The Respondent's claim based on the Claimants' alleged misrepresentations to the Tribunal is dismissed.
3. The Tribunal declares that Venezuela has breached Article 6 of the BIT by unlawfully expropriating the Claimants' investments in the three Projects in the Orinoco Belt in Venezuela.

[signed]

The Hon. L. Yves Fortier, QC
Arbitrator

[signed]

Professor Andreas Bucher
Arbitrator

[signed]

Mr. Eduardo Zuleta
President