

**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

**DECISION ON RESPONDENT'S REQUEST FOR
RECONSIDERATION OF THE TRIBUNAL'S DECISION OF 10 MARCH 2014**

Members of the Tribunal

Judge Kenneth J. Keith
Professor Andreas Bucher
Mr. L. Yves Fortier, CC, QC

SECRETARY OF THE TRIBUNAL
Mr. Gonzalo Flores

Date: 9 February 2016

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A. PROCEDURAL HISTORY

1. On 2 November 2007, 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; Mr L. Yves Fortier, CC, 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 Respondent, following Sir Ian Brownlie’s passing.

3. On 3 September 2013, the Tribunal issued a Decision on Jurisdiction and the Merits, concluding as follows:

(...) 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.¹

4. On 8 September 2013, counsel for Respondent submitted a letter requesting a clarification and further explanations from the Tribunal regarding certain findings in the Decision on Jurisdiction and the Merits (“**the September 8 letter**”). In its letter, counsel for Respondent also requested “a limited and focused hearing” to address the specific issues raised.

5. Counsel for the Claimants replied to the September 8 letter on 10 September 2013. Claimants opposed Respondent's requests and proposed instead a briefing schedule for submissions on *quantum*.

6. On 11 September 2013, Respondent submitted further comments, to which Claimants replied on 12 September 2013. Additional comments were received from Respondent on 12, 16 and 23 September 2013 and from Claimants on 23 September 2013.

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 Decision on Jurisdiction and the Merits of 3 September 2013; and (ii) a possible scheduling for *quantum* briefs. The parties duly submitted two rounds of written pleadings.

B. THE DECISION OF 10 MARCH 2014

8. The Tribunal stated in its Decision of 10 March 2014 that so far as the matter set out in paragraph 7 is concerned “this decision is limited to answering the question whether

¹ Decision on Jurisdiction and the Merits, 3 September 2013, para. 404.

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”.²

9. It then set out the arguments of the parties based on the provisions of the ICSID Convention and the ICSID Arbitration rules as well as commentaries, matters of principle and decisions of various international courts and tribunals.

10. Having considered those arguments, 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. It was implicit in the Tribunal’s Decision that the Respondent’s Request was dismissed.

C. THE NEW APPLICATION FOR RECONSIDERATION

11. 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.

12. On that same day, 10 August 2015, the Respondent submitted an “Application for Reconsideration of the Tribunal’s Decision of March 10, 2014 (the Majority Reconsideration Decision), which denied Respondent’s Request for Reconsideration of the Tribunal’s [September 3, 2013 Jurisdiction and Merits Decision]”.³ The Respondent recalled that it had, immediately following that Majority Merits 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 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

² Decision of 10 March 2014 on Respondent’s First Request for Reconsideration (“**Decision of 10 March 2014**”), para. 9.

³ Respondents’ Application for Reconsideration of the Tribunal’s Decision of March 10, 2014 (“**Respondent’s Second Application for Reconsideration**”), pp 1-2.

the U.S. Embassy in Caracas, left no doubt that the representations made by ConocoPhillips to the Tribunal regarding Respondent's supposed unwillingness 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)⁴

13. The Respondent sets out the conclusion of the Tribunal and quotes four paragraphs from Professor Abi-Saab's dissent.⁵ It concludes the substance of its submission as follows:

In making this Application, Respondent stresses that the issue for decision at this stage is a narrow one. It is not necessary for this Tribunal now to revisit the merits of the Majority Merits Decision. What is necessary is for this Tribunal to determine whether, assuming that Claimants did make material misrepresentations to the Tribunal as to Respondent's willingness to negotiate fair market value, the Tribunal did, and still does, have the power to reconsider the Majority Merits Decision. A negative answer to this question would mean that there are no circumstances under which a tribunal can reconsider its own decision in a case still pending before it, irrespective of material misrepresentations made to it and, indeed, presumably irrespective of any other egregious conduct. That is a principle that cannot be sustained under any legal system.⁶

It requested a hearing on the application.

14. 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.

⁴ Respondent's Second Application for Reconsideration, pp. 2-3.

⁵ See Prof. Abi-Saab's Dissenting Opinion to the Decision on the Respondent's Request for Reconsideration, paras 64-67.

⁶ Respondent's Second Application for Reconsideration, p. 6.

It has *res judicata* effect and may not be revisited or reviewed in any way prior to the rendering of the final Award.⁷

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

15. Later that same day, the Respondent commented by recalling its earlier letter:

...no system of justice can tolerate a rule that a tribunal cannot correct its own decision, no matter how egregious the circumstances, in a case still pending before it. Surely one cannot argue that an interim decision proven to be based upon corruption, intimidation or coercion cannot be reconsidered. The same is true for a decision shown to be based upon material misrepresentations.⁸

In support of its contention that *res judicata* did not apply here – there is no final award and the same proceeding continues – it quoted from the *Sabotage Cases*:

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.⁹

16. 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. They "consider that further debate is neither necessary nor appropriate".¹⁰

17. On 15 August 2015, the parties were advised that the Tribunal "is currently considering Respondent's application, including its request for a hearing, and will revert

⁷ Claimants' letter of 12 August 2015, p. 1.

⁸ Respondent's letter of 12 August 2015, para. 1.

⁹ *VIII United Nations Reports of International Arbitral Awards* 160 (2006), pp. 189-190.

¹⁰ Claimants' letter of 13 August 2015, p. 1.

to the parties in due course. The Tribunal considers that no further submissions are needed at this point.”¹¹

18. 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. The Tribunal then gave the Respondent the opportunity to comment on a letter of 8 December 2015 submitted by the Senior Vice President Legal, General Counsel and Corporate Secretary of ConocoPhillips which the Respondent did on 8 January 2015. The Tribunal also gave the parties the opportunity to comment by 22 January 2016 on an article discussing the March 2014 Decision brought to its attention by Counsel for the Respondent.¹² Each party provided that comment.

19. In the light of that additional material, subsequent decisions and the earlier arguments submitted to it, the Tribunal has given further consideration to the powers it may possess in respect of the application now before it.

D. ANALYSIS

20. The Tribunal begins by noting that the parties in their exchanges in August did not elaborate to any great extent on the arguments they had made in relation to the earlier application for reconsideration. It accordingly returns to those arguments as well as to the material and arguments made and becoming available subsequently.

21. The Tribunal undertakes this inquiry without prejudice to the contention, raised by the Claimants, that the Decision of 10 March 2014 is itself *res judicata* and cannot be re-examined.

22. The Respondent in 2013 in support of its submission that the Tribunal had power to reconsider the 2013 Decision on Jurisdiction and the Merits invoked Articles 43 and 44

¹¹ ICSID’s letter of 15 August 2015, p. 2.

¹² Charles N. Brower and Paula F. Henin, “Chapter 5: *Res judicata*” in Meg N. Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, (Kluwer Law International; Kluwer Law International 2015) (the “**Article on Res Judicata**”) pp. 55 - 69.

of the Convention, together with the inherent power of the Tribunal to make decisions regarding the conduct of proceedings going beyond the specific rules under which it is constituted, and Rule 38(2) of the Arbitration Rules. It also referred to commentaries, matters of principle and decisions of various international courts and tribunals. It placed major emphasis on Article 44 and particularly on its second sentence:

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

23. The power to which the second sentence refers is a power to decide on a question of procedure not covered by the Convention, the Arbitration Rules or any rules agreed by the parties. According to a leading commentator on the ICSID Convention, the power is declaratory of the inherent power of any tribunal to resolve procedural questions in the event of *lacunae*.¹³ The commentary continues in these terms: “In exercising this power, the Tribunal may not go beyond the framework of the Convention, the Arbitration Rules and the parties’ procedural agreements but must primarily attempt to close any apparent gaps through the established methods of interpretation ...”.¹⁴ The procedural character of the power appears not only in the very terms of Article 44 but also in the use that has been made of that power; that commentary instances decisions about time limits, production of documents, suspension when other arbitral processes are pending, publicity to be given to proceedings and the grant of *amicus curiae* status.¹⁵ These are matters related to “the conduct of the proceedings”, to use the wording of Rule 19 of the Arbitration Rules. Does the power stated in Article 44 contain within it a power to reconsider rulings, in effect by a rehearing, which it has made on jurisdiction and on aspects of the merits? Does such a power concern “a question of procedure” or “the conduct of the proceedings”? It appears

¹³ C. Schreuer, *The ICSID Convention: A Commentary*, Second Edition (2009), p. 688.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, pp. 689-707.

to the Tribunal to be a very different power. It is a power of a substantive kind. The ordinary meaning of Article 44 read by itself does not appear to the Tribunal to include the power which the Respondent seeks.

24. The Tribunal also recalls that throughout the preparation of the text of the Convention those responsible for the drafting emphasized that the Arbitration Rules to be made by the Administrative Council under Article 6(1)(c) of the Convention and referred to in Article 44 would not deal with matters of substance.¹⁶ They would not in general be concerned with matters of great importance.¹⁷ That conforms with the role and character of rules of procedure adopted by bodies other than the court or tribunal and to be applied by them. That being so, it would be remarkable were the residual power of the tribunal in respect of matters of procedure or the conduct of the proceeding – a power at the fourth level, below the Convention, the Arbitration Rules and rules agreed by the parties – to include the power which the Respondent invokes here.

25. The provision is of course to be read in context and by reference to purpose as many court and tribunal decisions, often referring to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, have long made clear. That process of interpretation may be related in this case to “the framework” provided by the Convention to recall the words of a leading commentator¹⁸ or in the words of another ICSID tribunal rejecting a motion for reconsideration, “the clear structure of the Convention and the Arbitration Rules”¹⁹ The Tribunal recalls that the International Court of Justice in an early ruling interpreting a treaty, in that case the Charter of the United Nations, considered that “the structure of the Charter” fully confirmed the conclusions to which the Court was led by the text of the provision before it.²⁰

¹⁶ *History of the ICSID Convention*, vol II, pp. 111, 214, 249, 331, 357 and 571-2.

¹⁷ *Ibid*, p. 79.

¹⁸ See para 23 above.

¹⁹ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Ecuador’s Reconsideration Motion, 10 April 2015 (the “**Perenco Ecuador Decision**”), para 80.

²⁰ *Competence of the General Assembly regarding admission to the United Nations*, 1950 ICJ Reps 4, 8-9.

26. The Convention contains a carefully constructed set of provisions for the interpretation, revision and annulment of the Award – Articles 50-52, constituting Section 5 of Chapter IV – Arbitration. Those provisions are followed by Article 53, the first provision of Section 6, headed Recognition and Enforcement of the Award:

Article 53

- (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
- (2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Article 50, 51 or 52.

It is convenient to mention at this stage Article 48(3) of the Convention:

Article 48

- (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

In the 2014 Decision, the Tribunal said that the decisions included in the 2013 Decision in accordance with practice are to be incorporated in the Award.²¹ This is required, as Article 48(3) recognizes, since the Award given at the end of the process must deal with every question submitted to the Tribunal. The required reasons are also to be incorporated, at least by reference.²² The Tribunal notes that in the process of the drafting of what became Article 48(3) the text was amended to emphasise that the tribunal in its award was to deal with every issue presented.²³

27. In addition to the provisions regulating interpretation, revision and annulment is article 49(2) which enables a party within 45 days to request the Tribunal to decide any question which it omitted to decide and to rectify any clerical, arithmetical or similar error

²¹ Decision of 10 March 2014, para. 21.

²² See also Schreuer, *op. cit.*, pp. 538 and 829-30 – to the extent that preliminary decisions are decisive for the outcome they must be reflected in the award.

²³ *History of the ICSID Convention*, vol II, pp 610, 632-633 and 849.

in the award. The Tribunal notes the limits of all those powers – to correct error, to interpret, to revise by reference to new facts, to annul on limited grounds. This last power, in contrast to the other three, is not to be exercised by the tribunal itself but by a separately constituted *ad hoc* committee of three persons. Those specifically prescribed powers are reflected in the final phrase of the first sentence of Article 53(1): the award, which, as the Tribunal has just said, is to incorporate the earlier decisions, is binding and not subject to appeal or any other remedy except those provided for in this Convention. Nowhere is there any suggestion that the Tribunal might be able, before completing the award which may then be subject to that range of processes explicitly provided for in careful detail, to re-examine parts of its decision in effect by way of a rehearing or an appeal.

28. It is convenient to consider at this point the arguments based on the inherent powers or jurisdiction of the Tribunal. As indicated, Article 44 may be seen as reflecting those powers, while making them express. The Tribunal has already noted practical instances of the exercise of such powers which fall within the scope of Article 44 in any event.²⁴ They are of a quite different order from the broad power of substantive reconsideration which the Respondent invokes in this case. It is true that in three cases the International Court of Justice has spoken in general terms about its duty to safeguard its judicial function and to maintain its judicial character.²⁵ Those cases, however, are not directly on point since they were decided on the basis that there was no live dispute in issue before the Court which accordingly had nothing before it to decide in terms of its function of deciding disputes; in one case circumstances had arisen which rendered any adjudication devoid of purpose²⁶ and in the other two the disputes between the parties no longer existed.²⁷ Further, the

²⁴ See para. 23 above.

²⁵ *Case concerning the Northern Cameroons (Cameroon v United Kingdom) Preliminary Objections, Judgment of 2 December 1963*; ICJ Reports 1963, pp. 15, 29, 31, 38; *Nuclear Tests (Australia v France), Judgment*, 1974 ICJ Reports, pp. 253, 259 and *Nuclear Tests (New Zealand v France) Judgment*, 1974 ICJ Reports, pp. 457, 463.

²⁶ 1963 ICJ Reports, pp. 33-34

²⁷ 1974 ICJ Reports, pp. 270-272 and 475-477.

judgments of the Court were final and binding and, in the circumstances of each case, the post judgment processes of interpretation and revision appear not to have been available.

29. The agreement and rules establishing and regulating the work of the Commission and its Umpire who decided the Sabotage cases (which, it will be recalled, the Respondent again cited in its present application)²⁸ contain nothing comparable to Articles 49-52 of the ICSID Convention.²⁹ Moreover, as the Umpire recorded, the Commission had in its practice repeatedly reopened and corrected decisions to accord with the facts and the applicable legal rules.³⁰

30. The Tribunal returns to the context of the Convention or its framework or structure. Even if in principle the inherent powers or jurisdiction of this tribunal were capable of extending to a power such as that invoked here, in the words of a decision of another ICSID tribunal cited earlier, “the clear structure of the Convention and the Arbitration Rules cannot be overridden by a general appeal to inherent powers”.³¹

31. In its 2014 Decision, the Tribunal in support of its proposition that the 2013 Decision had the character of *res judicata* quoted from an earlier decision. It now takes the opportunity to quote the relevant passage accurately and in full; in the *Electrabel S.A. v Republic of Hungary* Decision on Jurisdiction, Applicable Law and Liability, the tribunal noted:

This Decision is made in regard only to the first phase of these arbitration proceedings, relating to extant issues of jurisdiction and liability; and it is not made in regard to any issue of *quantum* (including interest). Although necessarily described as a ‘Decision’ and not an ‘Award’ under the ICSID Convention and ICSID Arbitration Rules, the several decisions and reasons contained in this

²⁸ See para 15 above.

²⁹ *VII United Nations Reports of International Arbitral Awards*, p. 13 and *VIII United Nations Reports of International Arbitral Awards*, pp. 469-477.

³⁰ *VII United Nations Reports of International Arbitral Awards*, p. 188.

³¹ *Perenco Ecuador Decision*, para 80.

Decision are intended by the Tribunal to be final and not to be revised by the Parties or the Tribunal in any later phase of these arbitration proceedings.³²

To the same or similar effect are two other ICSID cases cited by the *Perenco Ecuador* tribunal along with the relevant passage of the Tribunal's 2014 Decision in support of its proposition that

There is ample prior authority in support of the view [that] once the tribunal decides with finality any of the factual or legal questions put to it by the parties, as was the case in the Decision on Remaining Issues of Jurisdiction and Liability, such a decision becomes *res judicata* [citing *CMS Gas Transmission v Argentine Republic* ICSID ARB 01/8, May 12 2005, para 126 and *Waste Management Inc v United Mexican States (Waste Management II)* ICSID Case No. ARB (AF)/00/3, para 45.]³³

32. It is convenient to mention at this stage the recent award in *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia*.³⁴ The tribunal in that case had made a Decision on jurisdiction in 2012, a Decision which, it said, “forms an integral part of this Award”.³⁵ At the merits stage the Respondent raised a new objection to jurisdiction. The tribunal said that

Only the allegation of an illegality that was unknown to [the Respondent] during the jurisdictional phase may justify reopening the matter at the merit stage (emphasis added).³⁶

33. The tribunal then stated that the Respondent had all the necessary elements at the jurisdictional phase to advance the arguments in issue but had not done so. “As such, the objection could be rejected outright.”³⁷ But due to the gravity of the accusation the tribunal considered it and the related evidence and found that it was inconclusive. Accordingly it

³² *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 10.1. See also Award, 25 November 2015, para 2.

³³ *Perenco Ecuador* Decision, para. 43.

³⁴ *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.

³⁵ *Ibid*, para. 51.

³⁶ *Ibid*, para. 130.

³⁷ *Ibid*, para. 132.

dismissed that argument.³⁸ That ruling does not in any way question the binding character of the earlier rulings or their *res judicata* effect. Later in its award the tribunal turns to other objections to jurisdiction, objections which the Respondent had not made at the jurisdictional phase. The tribunal dealt with these objections in this way:

The jurisdictional phase concluded with the Decision on Jurisdiction, in which the Tribunal established that it had jurisdiction over the claims of Quiborax and NMM. The Tribunal finds that there is no reason that can justify reopening the jurisdictional issues at this stage, *assuming this were at all possible*. It therefore denies the Respondent's new jurisdictional objections (emphasis added).³⁹

Again, the tribunal gives no support at all to the proposition that there may be limits to the binding force of earlier jurisdictional decisions or their *res judicata* effect.

34. In its comment of 22 January 2016 and in support of its argument that *res judicata* does not override “the search for truth and substantive justice”, the Respondent quotes a “key passage” from the Article to which it had referred the Tribunal.⁴⁰ That passage begins as follows:

[W]hen tribunals have attributed *res judicata* effect to a decision they previously issued in the same proceedings, they have also considered themselves to possess what Professor Abi-Saab calls a “specific power” to revisit such decision under certain limited and exigent circumstances, such as where new material evidence emerges calling into question the correctness of their prior findings. As such, it may not be right to suggest, as the majority in *ConocoPhillips v Venezuela* did, that the question of a tribunal's power to revisit its own findings can be considered in isolation from the context of that very request (...)⁴¹

³⁸ Ibid, paras 132-134.

³⁹ Ibid, paras 538-541.

⁴⁰ See para. 18 above.

⁴¹ Article on Res Judicata, pp. 68-69.

The Tribunal notes however that the cases to which the authors refer⁴² do not support that proposition; in each case, even if the tribunals did consider the asserted grounds, they do not identify any power to reconsider the issues and all applications failed.

35. The *Perenco Ecuador* tribunal, this Tribunal notes, said that it had little difficulty in expressing its general agreement with the approach taken by the majority in the 2014 Decision.⁴³ It is true that it did consider the grounds that had been invoked in support of the application for reconsideration in its case but as it made clear at the end of its decision rejecting the application it concluded that it had no power to engage in the exercise requested of it, namely to issue a decision amending its decision on remaining issues of jurisdiction and liability. Its examination of the grounds was “purely for illustrative purposes and without prejudice to its decision that it does not have the power to reopen and reconsider its findings in the manner for which Ecuador has contended”.⁴⁴

36. The Respondent in support of its earlier application also claimed that the “interim” or “preliminary” character of the 2013 Decision enabled reconsideration. It has not elaborated on that contention and accordingly the Tribunal does no more than recall its earlier rejection of that argument.⁴⁵ The Tribunal also does not see the essentially procedural character of Article 43 of the Convention and Rule 38(2) of the Arbitration Rules as supporting the existence of the power of substantive decisions which the Respondent invokes. Moreover, those provisions would not have been applicable in their own terms; the Tribunal has no reason to exercise the power to call evidence provided in Article 43(a), and in terms of Rule 38(2), the proceedings had not been declared closed. On the role of Rule 38(2) the Tribunal also expresses its general agreement with what the

⁴² See Article on Res Judicata, pp. 68-69, ftns 73 and 76. The Article cites *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, paras 5 and 98; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 126; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 121-130; and *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, para. 94.

⁴³ *Perenco Ecuador* Decision, para. 81.

⁴⁴ *Perenco Ecuador* Decision, para. 97.

⁴⁵ See Decision of 10 March 2014, para. 20.

Perenco Ecuador tribunal says about that provision.⁴⁶ The Tribunal notes that the Respondent did not seek support for its power of reconsideration from Rule 19.

37. The Tribunal has approached this matter, as have the parties, in terms of seeking the existence and source of the power the Respondent would have it exercise.⁴⁷ 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.

E. DECISION

38. Accordingly, the Tribunal, by a majority, dismisses the application made by the Respondent for the reconsideration of its Decision on Respondent's Request for Reconsideration of 10 March 2014, with Professor Andreas Bucher dissenting.

[Signed]

Mr L. Yves Fortier, CC, QC
Arbitrator

Professor Andreas Bucher
Arbitrator

[Signed]

Judge Kenneth J. Keith
President

⁴⁶ *Perenco Ecuador* Decision, paras 67-73.

⁴⁷ See para. 7 above.

Note by Arbitrator Kenneth Keith and Arbitrator Yves Fortier

1. We add this note as a comment on Part III of the dissenting opinion of Arbitrator Andreas Bucher.
2. The Respondent's Application which is to be decided by the Tribunal is "for Reconsideration of the Tribunal's Decision of March 10, 2014 (the Majority Reconsideration Decision...)". The Respondent stressed that "the issue for decision at this stage is a narrow one. It is not necessary for this Tribunal now to revisit the merits of the Majority Merits Decision" (see para 13 above for the remainder of that passage). Given the limited scope of the Application before the Tribunal we cannot see that the passage of Arbitrator Bucher's dissent headed "The Tribunal's Decision" is relevant.
3. We also need to make it clear that we do not interpret the 2013 Decision in the way Arbitrator Bucher does. Nor indeed do the Parties, as he indeed recognises (paras 17-19 of his opinion). The Tribunal ruled that the Respondent had acted unlawfully by reference to Article 6(c) of the BIT. That requires that the measures be taken against just compensation. The Tribunal said this about that provision:

The requirements [in Article 6(c)] for prompt payment and for interest recognise, in accordance with the general understanding of such standard provisions, that payment is not required at the precise moment of expropriation. But it is also commonly accepted that the Parties must engage in good faith negotiations to fix the compensation in terms of the standard set, in this case, in the BIT, if a payment satisfactory to the investor is not proposed at the outset. (para 362)

Having reviewed the evidence and the Parties' submissions, the Tribunal concluded that the Respondent had breached its obligation to negotiate in good faith for compensation for its taking of the assets on the basis of market value as required by the BIT (para 401). It included that conclusion in its Decision (para 404(d)).

With respect, Arbitrator Bucher errs when he writes in paragraph 11 of his dissenting opinion that the Claimants made no claim in their Request for Relief for a declaration that

Respondent breached its obligation to negotiate in good faith for compensation based on market value. In their Request for Relief, the Claimants asked the Tribunal for a declaration “that Venezuela has breached ... Article 6 of the Treaty by unlawfully [emphasis added] expropriating ...” their investments in Venezuela. This is precisely what the majority found in paragraph 404(d) of the Decision.

[Signed]

Mr L. Yves Fortier, CC, QC
Arbitrator

[Signed]

Judge Kenneth J. Keith
President