

**CONOCOPHILLIPS PETROZUATA B.V.
CONOCOPHILLIPS HAMACA B.V.
CONOCOPHILLIPS GULF PARIA B.V.
AND
CONOCOPHILLIPS COMPANY
The Claimants
v.
BOLIVARIAN REPUBLIC OF VENEZUELA
The Respondent**

ICSID Case No. ARB/07/30

*DECISION ON JURISDICTION AND THE MERITS
3 September 2013*

**DISSENTING OPINION
of**

Georges Abi-Sab

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DISSENTING OPINION
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1 – I have concurred with the findings of the Tribunal’s “Decision on Jurisdiction and the Merits” of 3 September 2013, except for those appearing in the conclusive paragraph 404 of the Decision under (d) and (e), from which I dissented.

2 - The ICSID letter of transmittal of the Decision to the Parties, of the same date, bears the following sentence :

“Professor Abi-Saab’s ill health has prevented him from appending a written opinion for the time being, but it will follow in due course”.

Unfortunately, this obstacle has persisted until now. I am therefore delivering the Opinion as it stands (*en l’état*), with some of it in form of outline, given that the possibility of filling it in is becoming increasingly moot, and bearing in mind the progress of the proceedings.

3 – The opinion is in two parts. The first provides essential background that is skirted or only selectively covered in the Majority Decision. The second part consists of a critical analysis of the premises and reasoning of the Majority, spelling out the reasons of my dissent.

I - BACKGROUND

A – The Strategic Association Agreements

4 – A preliminary question that underlies the whole issue of the negotiations over compensation for nationalization here under consideration – but which the Majority totally eschews and evacuates from its field of vision – is that of the definition, *i.e.* the identification of the legal nature and limits, of the investment protected by the BIT.

5 – To answer this question, it is necessary to recall the historical origins of the relations between the Parties and the legal framework adopted by them to govern those relations, *i.e.* the Strategic Association Agreements (particularly their compensation clauses), and to clarify their relationship to the BIT.

1 – The elaboration and typology of the Strategic Association Agreements

6 – When, at the beginning of the 1990's, Venezuela adopted the policy of “*Opertura Petrolera*”, it followed, in negotiating agreements with foreign oil companies, a general trend prevailing at the time in the oil sector. This trend was aptly analyzed by Thomas Waelde and George Noli, who noted in 1996 that :

“...in the last ten or twenty years, stabilization clauses have undergone a substantial evolution. In the main, contemporary

stabilization commitments are negotiated with state enterprises rather than the state as such”¹.

They later on add :

“[T]he predominant ‘modern’ stabilization clause no longer looks to the government as such, but makes the state enterprise responsible for unilateral intervention by its own government...The state company promises to compensate the foreign contractor should his financial burden increase due to subsequent government legislation...When viewed from this perspective, the function of the stabilization clause has been effectively converted from an instrument aimed at the government’s legislative powers to a risk allocation mechanism in a purely – or mainly – commercial contract with the state company”².

7 – Negotiations along these lines took place between foreign oil companies, including the Claimants – Conoco at that stage, joined by Phillips to become ConocoPhillips (CP) later on – on one side, and the Venezuelan National Oil Company, PdVSA, through its subsidiaries Maraven and Corpoven that would constitute their national partners, on the other side, for the conclusion of Strategic Association Agreements for the exploitation of the extra-heavy oil of the Orinoco Belt.

8 – The Venezuelan State accompanied these negotiations at one remove, as the ensuing agreements had to be approved by Parliament. In other words, the PdVSA subsidiaries had to get Congressional Authorization to sign them. The conditions that the Congress attaches to its authorization thus constitute parameters of the agreement and are automatically incorporated in it by reference or *renvoi*, apart from actual insertion.

¹ Thomas Waelde and George Noli, Stabilizing International Investment Commitments : International Law Versus Contract Interpretation , 32 *Texas International Law Journal* (1996), 215 at 218.

² *Ibid.* 263-4.

9 – Conoco insisted, during negotiations over the terms of the Congressional Authorization, on obtaining certain guarantees, namely a stabilization clause, full compensation for any harmful change of regulation or other prejudicial governmental action and detailed specification of the items of this compensation, as well as the methods of their evaluation in case of nationalization³.

10 – These demands were flatly rejected by the Venezuelan party, and instead, the fiscal and regulatory government sovereignty was expressly safeguarded in the Congressional Authorizations, as well as transcribed in the Association Agreements themselves later on.

11 – However, the Congressional Authorizations made room for a measure of warranted security by allowing the PdVSA subsidiary to undertake in the Agreement to compensate itself the foreign partner for discriminatory harmful action by government, as well as (in the case of Hamaca) to exercise a buy-out option of the foreign partner’s share in the Association in case of dispute over the occurrence of such action or the extent of compensation for it; all of which within clearly defined limits (both thresholds and caps), as discussed at greater length below.

12 – Conoco accepted these conditions, including the compensation clauses, and was fully aware of their implications. In fact, these clauses largely followed formulae proposed by Conoco, which were quite favourable to it in the then prevailing economic circumstances.

³ See Letter from David Griffith, Conoco, Inc. to Alio Rojas (PdVSA subsidiary), Sept. 17, 1992, conveying Conoco’s “Comments on Conditions to Strategic Associations; Heavy Oil Project-Venezuela” (the initial list of conditions of Congressional Authorization). *Comment on Condition 16* (on compensation by Maraven to foreign partner for harmful discriminatory governmental action or legislation, without prejudice to governmental legislative and regulatory sovereignty) : “We would like full compensation based on market value, for any discriminatory law rule, or regulation... We would also like an economic stability clause...Finally, we will need to specifically address precisely how the assets and interest of Conoco will be valued and reimbursed in the event of nationalization” (Ex-R.97).

**2 – *The compensation clauses in the Strategic Association
Agreements with ConocoPhillips***

13 – What do the Association Agreements provide in case of government action, including new legislation, affecting the rights of foreign partners ? Cutting through the thickness of the texts, their provisions relating to changing laws or other acts of government affecting the rights of the foreign partner can be synthetically summarized as follows :

14 – a) Nowhere in the Agreements is there a provision that can be interpreted directly or indirectly as a stabilization clause. On the contrary, the Congressional Authorizations are crystal clear in asserting the freedom of the Venezuelan State to legislate and act in full sovereignty; and that the Association Agreements do not impose limitations on this freedom nor give rise to any liability of the Venezuelan State or any claim against it by a party or a third party for its exercise of this freedom.

15 – Thus, for example, the 19th Condition of the Hamaca Congressional Authorization provides :

“The Association Agreement, the creation and operation of the Entities and the other activities shall not impose any obligation on the Republic of Venezuela or restrict its exercise of sovereign rights, the exercise of which shall not give rise to any claim, regardless of the nature or characteristic of the same, by other States or foreign governments”⁴.

⁴ Ex.R-93, see also the 21st Condition. Similarly, the 16th and 18th Conditions of the Petrozuata Congressional Authorization (Ex.R-92) and the 19th Condition of the Corocoro Congressional Authorization (Ex.R-94)

16 – b) In case of discriminatory governmental action prejudicial to the interest of the foreign partners in the Association, these partners are entitled to claim compensation from the local partner (i.e. the PdVSA subsidiary in the Association) provided that :

i) the action is “discriminatory”, i.e. not applicable to all similarly situated companies, particularly those in the oil industry; and

ii) it produces an “unjust result” by causing a “significant material damage”, above a certain threshold (terms defined in the Agreements, as described below).

17 – The compensation is calculated on the basis of complicated formulae with a digressive “sliding scale”, inversely correlated to the price of Brent oil (i.e. the compensation diminishes as the Brent oil price increases), with a limit or a cap beyond which no compensation is due.

18 – i -Thus, the Petrozuata Association Agreement provides in Article 9/7 that if, as a result of Governmental “discriminatory action” (defined in Article 1⁵), a Class B shareholder (the foreign partner) suffers a “significant economic damage” (also defined in Article 1, as amounting to at least 6.5.million 1994 US dollars in any fiscal year, which thus sets the threshold for compensation), it shall be compensated by the Class A shareholder, i.e. the PdVSA subsidiary. The compensation is calculated on the basis of digressive sliding scale inversely correlated or pegged to the price of a barrel of crude oil : below and up to 18,1994 US dollars the compensation is 100%, progressively diminishing to naught at the price of 25,1994 US dollars.

19 – There is also another cap or limit if the total damage for the fiscal year is greater than 75 million,1994 US dollars; in which case the foreign partner

⁵ This definition corresponds to the generic meaning given in para. 16 above, but goes to great lengths enumerating what actions would fall under it as well as the exclusions, *i.e.* those actions that do not constitute discrimination.

shall get the greater of a) either 25% (one quarter) of the actual damage; or b) the amount resulting from the application of the above formula. In case of dispute between the parties, Article 13 provides for ICC arbitration.

20 – ii- Similarly, the Hamaca Association Agreement provides in its Article 14/2 that a governmental discriminatory action (defined at length in Article 14/1/b⁶) is “unjust” if it causes “material adverse effect” (i.e. beyond the threshold defined below) to a foreign partner; and that such an “Affected Party” shall be compensated by the local partner (the PdVSA subsidiary) within certain limits.

21 – These limits are first a threshold of the loss, which must be, in any fiscal year, superior to 5% of the “reference net cash flow” for that year, compared to what it would have been in the absence of the discriminatory action.

22 – But there is also a cap or upper limit, calculated on the basis of a complicated digressive formula which, as in the case of Petrozuata, is inversely correlated (or pegged) to the price of a barrel of crude Brent oil, that is triggered when that price averages 27,1996 US dollars over a period of three consecutive years. The maintenance of such high price for such a long period was thought practically unattainable at the time of the conclusion of the Agreement, as it had not been reached since records were kept, except once during the Iran-Iraq war. It was thus a formula highly favorable to Conoco at the time.

23 - iii – If there is disagreement between the Parties (the PdVSA subsidiary and the foreign partner) over “whether discriminatory actions resulting in material adverse effects occurred”, or on the amendments (of the Agreement

⁶ Same as in the precedent note, but with even greater detail particularly of the exclusions, i.e. of what does not constitute discrimination.

to re-equilibrate it by compensating for the effects of the discriminatory action), the foreign partner can go to ICC arbitration. If the arbitral tribunal finds that there was indeed compensable discriminatory action, then at a second stage the local partner (PdVSA subsidiary), can exercise the option (instead of paying compensation on a continuous basis, if the discriminatory action had a continuous effect) of *buying out* the foreign partner's shares at a *buying out* price, to be determined by the arbitral tribunal, "equal to the commercial value (without taking into account the effect of the Discriminatory Action, but *taking into account the provisions of Article XIV in respect to the Threshold Cash Flow*) of the Affected Party's Project Interest"⁷. In other words, the *buying out price* also is subject to the same upper cap, inversely correlated to the price of crude Brent oil.

24 – What is remarkable in these complicated formulae is that compensation is not automatically correlated for example to the percentage change in the rates of royalty or taxes – which would have amounted to stabilization – but pegged inversely to the increase of the price of Brent oil, with an upper cap beyond which no compensation is due. This clearly indicates that their object and purpose was not the freezing of the regulatory framework, but a measure of guarantee of a reasonable rate of return on investment (12 to 15% for Petrozuata, according to the negotiations documentation), or of recovery of the initial investment in case of a buy out.

⁷ Article 14/4/c(B), emphasis added.

3 – The relationship between the Strategic Association Agreements and the BIT

25 – The Strategic Association Agreements were negotiated and concluded well before ConocoPhillips transferred its interests in them into subsidiaries incorporated in the Netherlands in order to bring them under the protection of the BIT between Venezuela and the Netherlands.

26 – What can the treaty protect in law and does protect in fact ? In other words, what is the “protected investment” *in casu* ? Obviously, it is not the enterprise or project established by the Strategic Association Agreement as such – which is a joint venture between local and foreign partners – but the legal interests in the form of contractual rights that ConocoPhillips subsidiaries have in the enterprise, and which flow from and have as their legal title, the Strategic Association Agreement itself.

27 – These legal interests or contractual rights have been established and their configuration, including their contents, scope and limits, defined by the Strategic Association Agreements well before the entry of the BIT into the picture. What can the BIT contribute to these already existing legal interests and rights ?

28 – Clearly, any new rights or obligations attaching to an already existing investment in the form of contractual rights, which flow from sources extraneous to the contract that serves as legal title to the investment – such as a BIT or general international law (apart from *jus cogens* limitations) - come only as additional guarantees to buttress and reinforce the observance of the terms of the contract, but *in no circumstances* to revise or supplant them. In other words, the BIT can add to the protection of the contractual

rights, but cannot change their configuration, *i.e.* their content, scope and limitations.

29 – To assert, as does the Majority, that the treaty applies, without taking into consideration the terms of the contract, amounts to revising and rewriting the contract (the Association Agreement) by striking out or deleting some of the conditions or limitations that attach to ConocoPhillip’s contractual rights, thus changing the dimensions of the protected investment.

30 – To do so, whether in guise of legal reasoning or interpretation, is even more objectionable when, as *in casu*, the purported change in the dimension of the protected interests had been proposed by one party during the negotiation of the contract and flatly rejected by the other party; and where, instead, express terms – precisely those allegedly displaced by the treaty – were inserted in the contract, providing substantially different solutions to the contingencies constituting the subject-matter of the dispute.

31 – This fundamental error is the result of a great confusion in the understanding of the distinction between treaty claims and contract claims (itself a controversial distinction), assuming that these two categories are hermetically separated.

32 – At the risk of repetition, a treaty claim is necessarily based on a right that has been allegedly violated. If this right is created by contract, it is this contract that governs its legal existence and the modalities of this existence, including its contents and limits.

33 – The treaty claim cannot skirt or by-pass the configuration of this right or some of the conditions or limits of its existence; according to its legal title, the contract, as this right, in its fixed legal configuration, serves as the legal basis underlying the treaty claim. A treaty claim cannot allege a violation of a right, while ignoring the specific legal limits of this right. The

treaty may provide added remedies for its possible violations, but the underlying right subject to these violations is defined exclusively by its legal title that governs its existence.

34 – It clearly follows from the preceding analysis that the calculation of the “market value” of the nationalized investment *in casu* – consisting of contractual rights flowing from the Strategic Association Agreements, that constitute their legal title – has necessarily to take into account (i.e. to pass by or be filtered through) the compensation clauses of these Agreements which qualify and limit those rights protected by the BIT.

35 – This conclusion rests not only on legal, but also on economic grounds. The Claimants, in their Memorial, define “fair market value” as :

“...the price [at which] a willing buyer would buy given goods...and the price at which a willing seller would sell...on condition that none of the two parties [is] under any kind of duress and that both parties have good information about all relevant circumstances involved in the purchase”⁸.

36 – The Claimants also cite the American Society of Appraisers definition of “fair market value” as

“the price ...at which property would change hands between a hypothetical and able buyer and a hypothetical willing and able seller, acting at an arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts”⁹.

⁸ Claimants’ Memorial (15 September 2008), para. 397. This definition is an adaptation of that given by the Iran-US Claims Tribunal, *Starrett Co. v. Iran, Bank Markazi et al.*, 16 Iran-US C.T.R.112.

⁹ American Society of Appraisers, *The International Glossary of Business Valuation Terms*, (2005), p. 4, cited in Claimants Memorial, para. 397, fn.591.

37 - Proceeding from these definitions, how can any *homo economicus* exercising rational choice as a “willing buyer” of ConocoPhillips shares or contractual rights in the Strategic Association Agreements, calculate the price he would be willing to pay, without factoring in (or taking into account) the terms of the compensation clauses of the Agreements ? Would it be rational and economically sound to ignore, in his economic calculation, the limits of what he would be entitled to get, according to the Agreements, in case of a dispute with the local partner over what he would consider as State harmful discriminatory action; or disregard the buy-out price at which the local partner can in such a case acquire his interest in the project, according to the Agreement ?

38 – Obviously, given the legal and economic reasons expounded above, the calculation of the “fair market value” of ConocoPhillips interests in the Strategic Associations, has to “pass-by” or rather cannot “by-pass”, the compensation clauses in the Association Agreements.

39 – The cardinal error of the Majority Decision, in my submission, is precisely to have evacuated completely these compensation clauses from its reasoning, for no valid objective reason, in order to reach the conclusion it seeks, as shall be shown below (para.134ff)

B – Negotiations on Migration and Compensation

40 – The Majority describes and analyses the process of these negotiations in paragraphs 382-402 of the Decision. Two reasons impel me to revisit this process. The first is that the Majority’s narrative is rather selective, relying very heavily and uncritically on the pleadings and testimonies of the Claimants and their witnesses, while passing over certain elements of

significance for the proper understanding of the position of the Respondent and his main witness, Dr. Mommer.

41 – The second reason for revisiting here the process of negotiations is the adoption by the Majority of a confusing grid of analysis of this process as stretching over two overlapping periods¹⁰, leaving room for false impressions and implications.

42 – There are indeed two phases, or rather two sets of virtually different negotiations, that should be analytically clearly disentangled. For they are hardly overlapping either in time or in their subject-matter. The first covers negotiations over the possibilities and conditions of “migration”. It started in 2006 and extended formally until the issue of Decree-Law 5.200 on 26 February 2007. The second phase covers negotiations on compensation for the relinquishment by ConocoPhillips of its interests in the projects, i.e. for “nationalization” proper. It started with the issue of Decree-Law 5.200 and extended well into 2008¹¹.

1 – Negotiations on Migration

a) Origins of “migration”

43 – Article 97 of Venezuela’s Constitution of 1961 provides :

“The State may reserve certain industries, exploitations or services of public interest for reasons of national interest, and shall foster the

¹⁰ Decision of 3 September 2013 (hereinafter cited as “Decision”), para. 363 : « The evidence relates to two overlapping periods, the first, from 2006 to early 2007, concerning the proposed migration of the projects to *empresas mixtas* and the second concerning the negotiations both before the taking of the investments, in June 2007, and beyond”. See below, para. 87ff.

¹¹ In reality, the watershed point beyond the date of the issue of Decree-Law 5.200. It was the first meeting after the issue of the Decree-Law on 29 March 2007 in which the Parties discussed concretely for the first time compensation for nationalization, and a figured offer was made.

creation and development of a basic heavy industry under its control”.¹²

This provision contemplated mainly the hydrocarbon industry.

44 – Parallel to the nationalization of the hydrocarbon sector in the 1970’s (with all claims arising therefrom settled by agreement), Venezuela adopted in 1975 the so-called “Nationalization Law” regulating this sector and reserving, in its Article 1, to the State the industry and trade of oil.

45 – Article 5 of the Law – referring to the possible role of the private sector, including foreign oil companies – provided :

“1) The State shall carry out the activities indicated in Article 1 of this Law directly through the National Executive or through state-owned entities, being able to enter into operating agreements necessary for the better performance of its functions, but in no case shall such transactions affect the essence of the reserved activities.

2) In special cases and if convenient for the public interest, the National Executive or such entities may, in the exercise of any of the indicated activities, enter into association agreements with private entities, with a participation that guarantees control on the part of the State and with a specified duration. The execution of such agreements shall require the prior authorization of the [Congressional] Chambers in joint session, within the conditions that they establish, once they have been duly informed by the National Executive of all the pertinent circumstances”¹³.

46 – In other words, paragraph 1 alludes to the possibility for the concerned public entities to conclude “service” or “operating agreements” with private

¹² Ex-R.95.

¹³ Ex-R.19.

entities, within the strictly fixed parameters of the law; while paragraph 2 permits in “special cases” the responsible public entities “to enter into association agreements” with private entities, including foreign companies, whose terms can vary, with “Congressional Authorization”.

47 – When Venezuela adopted the policy of “Apertura Petrolera” at the beginning of the 1990’s, it negotiated with foreign or international oil companies several types of agreements.

a) For the extra-heavy oil of the Orinoco Belt, it negotiated four “Strategic Association Agreements” with Congressional Authorization, thus falling under the exception of the “special cases” of paragraph 2 of Article 5 of the “Nationalization Law” of 1975, including the Petrozuata and later on the Hamaca Association Agreements, as described above.

b) Venezuela also concluded eight “Exploration at Risk and Profit sharing Agreements”, also with Assembly authorization; thus legally falling under the category of “special cases” of paragraph 2 of Article 5 of the 1975 “Nationalization Law”; including the Corocoro Agreement with ConocoPhillips and other companies.

c) Finally, Venezuela concluded a large number (32) of “Operating Services Agreements” without Congressional Authorization, under paragraph 1 of Article 5 of the 1975 “Nationalization Law”, which does not require such authorization, as these agreements involve only the provision of services, for a fee, and not any participation in equity or profits.

48 – After the election of President Chavez, the “Nationalization Law” of 1975 was replaced by the “Organic Hydrocarbons Law” No. 1.503 of 2001¹⁴. One of the main differences between the two laws is that the latter did not reproduce some of the exceptions provided for in the 1975 law,

¹⁴ Ex-R.18.

particularly under Article 5, paragraph 2 of that law (the “special cases”) concerning the participation of foreign entities in the oil sector through joint ventures with national public companies. These exceptions permitted the waiver, with Congressional Authorization, of the general requirement that the public sector local partner control the operations (“operatorship”) and the majority equity interest in these joint ventures.

49 – The 2001 Law was not applied retrospectively to those joint ventures based on these exceptions, but which were established legally under the old 1975 Law, with Congressional Authorization.

50 – This was not, however, the case of the large number of the “Operating Services Agreements” (OSA). They did not need special authorization, because the foreign entities were supposed simply to provide service for a fee (Article 5/1 of the 1975 Law). However, according to Dr. Mommer, after the “Apertura Petrolera”, this form of agreement was used to cover arrangements of participation in profits or delegation of “operatorship” to foreign entities.¹⁵

51 – Thus, when the Government re-examined them in 2005, they were considered illegal. The Government negotiated with the foreign partners in these 32 foreign projects for *conversion* of these “Operating Services Agreements” into *impreses mixtas* or *joint ventures* compatible with the prescriptions of the “Organic Hydrocarbons Law” of 2001. This process of *conversion* or *novation* is what has been termed “migration” (from one type of association to another).

52 – Agreement was reached on the migration with 30 out of the 32 foreign companies involved. Of the remaining two, one preferred to withdraw with

¹⁵ Direct Testimony of Dr. Bernard Mommer (24 July 2009), para. 6.

agreed compensation, while the remaining company ENI resorted to arbitration, but the case was settled before the constitution of the tribunal¹⁶ .

b) Negotiations on Voluntary Migration, 2006

53 – According to Dr. Mommer, in light of the successful conclusion of the migration of the “Operating Services Agreements” into *impresas mixtas* that started in 2005 :

“[i]n the second half of 2006, the idea of negotiated migration of the associations emerged. I held several meetings with project participants individually to discuss *possible structures and incentives* for restructuring the projects into mixed companies with expansion of opportunities which would improve the economics of the projects while bringing them into conformity with the 2001 ‘Organic Hydrocarbons Law’, [Dr. Mommer immediately adds the following comment] but ConocoPhillips was not interested in these concepts”.¹⁷

54 – It is to be noted that as Venezuela recognized that the Association Agreements (unlike the OSA) were legally established on the basis of Congressional Authorization, these meetings were an invitation to treat; to renegotiate freely a contract. According to Dr. Mommer again, there was no question of nationalization at that stage, but merely the exploration of the possibility of reconfiguring the contracts, i.e the Association Agreements.¹⁸

55 – The narrative of these negotiations by the Claimants is totally different. Thus, Mr. Lyons describes them as follows :

¹⁶ *Ibid.* para 7. ENI was also the partner of ConocoPhillips in the Corocoro project. But unlike its partner, ENI agreed to the migration of that project.

¹⁷ *Ibid.* para. 13. Emphasis added.

¹⁸ Transcript of Oral Hearings 31 May-12 June, 21-23 July 2010 (hereinafter cited as “Transcript”), p. 1905.

“...in August 2006, PdVSA sent term sheets to ConocoPhillips for the ‘migration’ of its two extra-heavy crude Projects, Petrozuata and Hamaca, to *empresas mixtas* (Exhibit C-231; Exhibit C-232). Although the terms of the proposed transition were not fully spelled out in the two-page term sheets, they clearly showed that Venezuela intended to take the existing interests of ConocoPhillips in those Projects, and offer in return a diminished stake and rights in the new *empresas mixtas*. The term sheets also demanded that we waive any claims in relation to nationalization. Those terms were unacceptable to us, as we made clear in discussions with Dr. Del Pino and Bernard Mommer, the Vice-Minister of Hydrocarbons, during the Fall of 2006”¹⁹.

56 – However, a cursory look at the non-binding term sheets sent by PdVSA reveals a totally different picture from that portrayed by Mr. Lyons. Thus, for example, for Petrozuata, the Term sheet (Ex.C-232) provided (in Article 1) that “The current project is divided in two parts” (1) a primary activity Mixed Company incorporated according to Article 33 of the Hydrocarbon Organic Law, i.e. PdVSA owning a minimum of 51% and ConocoPhillips no more than 49% (Article 2); which “will be the operator of the production of heavy and extra-heavy crude oil” (Article 3); and (2) an upgrading mixed company, in which PdVSA can be a minority shareholder (Article 2); the up grader can be operated by this mixed company or by ConocoPhillips (Article 3).

57 – PdVSA (which already held 49.9% of the Strategic Association of Petrozuata) was thus offering to buy less than 1% of ConocoPhillips 50% shares in the Association. This of course meant a change in the majority

¹⁹ Lyons, Witness Statement (10 September 2008), para.6 ; see also Claimants Memorial, para. 227-228.

(only for the production, not the upgrading). But the counter-part was a significant expansion of the project : lifting the limits on the size of production and authorizing the expansion of the upgrading to almost the double, etc. ConocoPhillips would thus become a slightly junior partner in a much larger project.

58 – In the words of Dr. Mommer,

“...until the end of 2006, we worked on the idea that we would have a negotiated transition in each case, doubling the project or finding ways to increase the total so that there was indeed, a *win-win situation*... There was no idea of forced migration, which was called nationalization. Up to then, it was negotiating, it was offering additional value, but also requiring to give up certain points...”²⁰

59 – Neither the Claimants narrative nor that of the Majority gives any attention to these incentives offered as counter-part for this proposed “negotiated migration”; making it sound like a unilateral diktat of divestment.

60 – Anyway, legally speaking, as the object of these exchanges was a proposed conversion or a novation, i.e. a proposed revision of the Strategic Agreements on a voluntary basis, it would be a patent mischaracterization to present them, as does the Majority, as negotiations over nationalization (following in that uncritically Mr. Lyons’s description and assessment that it largely reproduces in paragraph 382 of the Decision, and builds upon later).

²⁰ Transcript, p. 1905, emphasis added.

c) Negotiations on Compulsory Migration, January 2007

- 61** – Shortly after his reelection in December 2006, President Chavez announced on 8 January 2007 his new program of “nationalization”. But, as explained by Dr. Mommer, “nationalization in this context meant assuming control over the operations through majority ownership in mixed companies”²¹. However, the details of this program were specified later on, in Decree-Law No. 5.200, promulgated on 26 February 2007.
- 62** – Whilst this announcement marked a substantial shift in the legal object of the negotiations, from voluntary to compulsory migration to *empresas mixtas* with government majority ownership, it left room for negotiating the other details and modalities of this transition, as explained below.
- 63** – Negotiations started well before the promulgation of Decree-Law 5.200, on the basis of a model agreement sent by the Venezuelan Government to the foreign partners in the Associations. The Venezuelan Government sent to ConocoPhillips two draft migration contracts for the Petrozuata and the Hamaca Associations on 17 and 19 January 2007 (C-31 and C-32), on which turned the meeting of 31st January, which is reported in Mr. Lyons’s witness statement between himself and another ConocoPhillips executive on one side, and Dr. Mommer and several PdVSA officials on the other.
- 64** – According to Mr. Lyons, “At that meeting, we made clear that the terms being offered to compensate ConocoPhillips for relinquishing its rights in the existing Projects and migrating to the *empresas mixtas* regime were inadequate. *Vice-Minister Mommer made clear, however, that the*

²¹ Mommer’s Direct Testimony, para.14.

*government did not intend to modify these terms. In the circumstances, as a protective measure, we provided to the government trigger letters”.*²²

65 – There was in fact only one letter covering the three projects which, after presenting ConocoPhillips’ contentions and claims, concludes as follows:

“ConocoPhillips consequently formally notifies Venezuela in writing of the existence of a dispute in accordance with the provisions of the Treaty and the Foreign Investment Law.

In light of *Venezuela stated intention not to negotiate the terms of expropriation with ConocoPhillips*, ConocoPhillips reserves the right to submit the dispute to international arbitration in accordance with the provisions of the Treaty and the Foreign Investment Law...”.

Signed Albert Roy Lyons, dated 31 January 2007.²³

66 – The Majority adds at this juncture, after citing Mr. Lyons’s testimony and the trigger letter :

“Dr. Mommer in cross-examination said he did not think that was the breakpoint in the negotiations. The blanks in the model contracts remained negotiable as the success of the negotiations with the other Parties to the Association Agreements showed (1850-51)”.²⁴

67 – Indeed, it is difficult to see on what basis could Mr. Lyons write “Vice-Minister Mommer made clear....that the government did not intend to modify these terms”, when a cursory look at the draft conversion (migration) contracts (Ex.C-31 and C-32) reveal that the only fixed number figuring in them is that of the ownership by the Government or

²² Lyons’ Witness Statement, para.9 ; emphasis added.

²³ Ex-C.36; emphasis added.

²⁴ Decision, para. 385. What Dr. Mommer said exactly was that the “model [more than 50% Venezuelan ownership] was not negotiable. But there were blanks in the model, and they were...negotiable”. Transcript, p.1851.

by companies or entities owned by it, being more than 50% of the capital stock of the mixed company (Article 1.3) (the drafts, as well as the meeting of 31 January pre-dated Decree-Law No.5.200 which fixed the Government's share at 60%). There is no other mention of sums, the size of designated areas and other important items, which were left open for negotiations. Nor was there obviously, any mention of nationalization or *a fortiori* of compensation, the purpose of the draft contracts being the "migration" or conversion of the Strategic Associations into *empresas mixtas*, **not** the total withdrawal of the foreign partners from them.

68 – Nor can the reference in the trigger letters to "Venezuela's stated intention not to negotiate the terms of its expropriation with ConocoPhillips" be based on what was said during the meeting of 31st January 2007, as these letters were obviously prepared before hand, to be delivered on that occasion.²⁵

69 – It is clear, in my submission, on the basis of the record at our disposal, that at this juncture, i.e. on 31st January 2007, Venezuela was still trying to reach a "negotiated migration", *i.e.* the conversion of the Strategic Associations into *empresas mixtas*, with national majority holding, by providing incentives to the foreign partners (expansion of the volume of production, of the designated area, of the types of activities, etc.) through the negotiations of the blanks or dotted lines in the draft conversion contracts. But ConocoPhillips was "not interested" in the concept of "migration" itself, hence was not very interested in negotiating the details of the "blanks" in the model contracts.²⁶ It was speaking instead of nationalization meaning its total withdrawal from the projects or the

²⁵ Lyons' Witness Statement, para. 9.

²⁶ Mommer's Direct Testimony, para. 13; Transcript, p. 1855.

relinquishment of the totality of its interests in them to the Government. A subject that was not broached in the draft conversion contracts as for Venezuela at that point of time, the subject-matter of negotiations was still the “migration”.

70 – On 26 February 2006, Decree-Law No.5.200 was promulgated, specifying the details of President Chavez’s “nationalization program”, to bring all joint ventures with foreign companies in the hydrocarbon sector in line with the Organic Hydrocarbon Law of 2001. In short, it mandates the conversion (or migration) of all such existing joint ventures into *empresas mixtas*, in which the national partner (PdVSA affiliate) controls the “operatorship” as well as at least 60% of the equity ownership; and gives the partners four months to negotiate the details of the migration within these parameters. Beyond this time limit, if no agreement is reached, the Government would enforce the “migration”.

71 – This time limit was set only for reaching agreement on the conversion of the Strategic Associations into *empresas mixtas*. It obviously did not apply to negotiations on compensation for “nationalization” in the classical sense of the term, in case the parties failed to reach agreement on migration within the prescribed 4 months time limit, and the foreign partner chose to withdraw totally from the project.

2 – Negotiations on Compensation for Nationalization

72 – After the promulgation of Decree-Law 5.200 in February 2007, negotiations turned essentially on compensation for nationalization. The record shows, confirmed by declarations of representatives of both

parties, that these negotiations continued well into 2008. This phase can be divided in turn into three sub-periods :

- a) before the lapse of the time limit for migration
- b) after the lapse of the time limit, until the initiation of the present arbitration on 2 November 2007
- c) after the start of the present arbitration

a) Negotiations before the lapse of the time limit for migration

73 – The first sub-period is mainly characterized by an offer made by Venezuela, in a meeting of 29 March, which is reported in Mr. Lyons’ Witness Statement (paragraphs 12-14) and in three letters (identical ones for each project) dated 12 April 2007 (Ex.C241) sent by Mr. Lyons to Dr. Mommer and PdVSA representatives. Both Mr. Lyons’ Statement and the letters are abundantly quoted by the Majority (para. 388-391).

74 - The offer, according to Mr. Lyons and the letters, consists of two alternatives :

i - In case ConocoPhillips accepts to participate in the migration, it would have to transfer to the PdVSA subsidiaries 10.1% of its 50.1% shares in Petrozuata, and roughly 17% of its 40% shares in Hamaca, in exchange of which it would receive US\$ 100 millions for Petrozuata, and US\$ 370 millions for Hamaca.

ii – For the total relinquishment by ConocoPhillips of its interests in the two projects, ConocoPhillips is offered US\$ 1.1 billions for Petrozuata and US\$ 1.2 billions for Hamaca.²⁷

²⁷ Lyons Witness Statement, para. 12.

75 – It is interesting to note (as does the Majority in para. 390) the comment of the Claimants’ Memorial that this offer “represented no more than 5% of the real value of the Claimants’ investments”.²⁸ But if 2.3 billion US dollars are only 5% of the value, this means that the Claimants value their interests at 46 billion dollars.

76 – Mr. Lyons writes in his Statement :

“We told Mr. Del Pino and Vice-Minister Mommer that these offers were far below the fair market value of our interests in the Projects. Vice-Minister Mommer responded that compensation would not be based on fair market value”.²⁹

77 – The three identical letters of 12 April 2007, after describing Venezuela’s compensation proposals, add :

“We were informed during this meeting [of 29 March] that the Bolivarian Government of Venezuela would not compensate ConocoPhillips for the fair market value of its interests ...Please confirm that our understanding of the ... Government... proposals as stated above is accurate and complete and further that the Bolivarian Government of Venezuela is willing to consider alternative compensation proposals as discussed in the March 31, 2007 meeting. As noted by Mr. Muleva on March 31, 2007, any valuation based upon book value would neither adequately compensate ConocoPhillips for the ... Government unilateral changes in commercial terms (royalty and taxes) over the past several years, nor

²⁸ Claimants Memorial, para. 309.

²⁹ Lyons Witness Statement, para. 13.

for the additional changes resulting from the Nationalization Decree”.³⁰

78 – After citing extensively the common argumentative parts of these letters, the Majority concludes “neither the Venezuelan Government nor PdVSA replied to these letters”.³¹

79 – It is true that one cannot find a direct written reply to these letters (and their queries) in the documents submitted to the Tribunal by the date it issued its Decision (3 September 2012);³² that is if one does not take into account the testimony of Dr. Mommer, the principal Venezuelan negotiator. For, as the Majority remarks, in the following paragraph :

“Dr. Mommer in cross-examination twice testified in response to Mr. Lyons’ testimony, that he did not think he had said to the Conoco Philipps representatives that compensation would not be based on market value”.³³

80 – The Majority, however, hastens to dismiss Dr. Mommer’s response by adding immediately: “Against that general denial, made only at the hearings and not in the two rounds of written testimony, the Tribunal notes the contrary written testimony of Mr. Lyons”.³⁴

81 – This perfunctory account by the Majority of Dr. Mommer’s response is both incomplete and incorrect. It is so fragmentary as to verge on misrepresentation when it encapsulates Dr. Mommer’s response in the

³⁰ Ex-C241.

³¹ Decision, para. 391

³² In fact, there was a written response to the three ConocoPhilipps letters of 12 April 2007, in the form of a letter sent the following day, the 13th of April 2007, by Dr. Mommer to Mr. Lyons. But this letter was not before the Tribunal when it took its Decision. See “Letter from Bernard Mommer to Albert Lyons dated April 13, 2007”, figuring as Annex 2 to “Respondent’s letter to the Tribunal dated September 8, 2013”.

³³ Decision, para. 392

³⁴ *Ibid.*, para. 393

sheepish and defensive phrase that “he did not think that he had said” what Mr. Lyons attributed to him.

82 – What Dr. Mommer did actually say, when the question was first put to him, was an emphatic “I don’t think I ever said something like that”.³⁵ And the Majority omits reporting his more forceful and forthright answer when asked the same question a little while later : “I think that witness statement [Lyons] is incorrect”.³⁶

83 – More serious still about the Majority’s rendering of Dr. Mommer’s testimonies is its factual incorrectness. It faults both by omission and by commission when it affirms that Dr. Mommer’s refutation of Mr. Lyons’ witness statement was “made only at the hearings and not in the two rounds of written testimony”.³⁷

84 – It thus passes over Dr. Mommer’s (first written) Direct Testimony, of 24 July 2009 (almost a year before the oral hearings), in which he roundly addresses these allegations, in paragraph 20 ; a paragraph that the Majority had paradoxically cited a little earlier in paragraph 385 of its Decision, and which reads :

“ConocoPhillips’ argument that the Republic never offered to discuss reasonable compensation in connection with the migration is also untrue. At first, we hoped that the ConocoPhillips companies would join the migration. When they refused, we tried in good faith to reach an amicable settlement, as we had done successfully before with other companies. I was present in the settlement discussions with the ConocoPhillips representatives. We were always open to paying

³⁵ Transcript, p. 1858.

³⁶ *Ibid*, p. 1862.

³⁷ Decision, para. 393

reasonable compensation, but ConocoPhillips from the beginning insisted on exorbitant sums that made settlement impossible”.³⁸

85 – Largely on the basis of its truncated and factually erroneous account of Dr. Mommer’s testimonies, the Majority, premising that Venezuela “had not responded in any meaningful way to the points made about the negotiations, in particular in those letters [of 12 April 2007]”, reaches the conclusion “that Venezuela at that time was not negotiating in good faith by reference to the standard of “market value” set out in the BIT...”.³⁹

86 – This conclusion is vitiated by a number of serious errors of fact and law, not to mention the series of unverified assumptions the Majority had to make in order to reach or rather jump to this conclusion, in particular the assumption that the Respondent had the obligation, beyond making a reasonable offer of fair compensation, to negotiate compensation in good faith with the Claimants, by reference to the standard of “market value” set out in Article 6(c) of the BIT, as interpreted by the Claimants, as well as the implied finding of the Majority that the offer of compensation of 29 March 2007 is so inadequate as to amount to a refusal to pay compensation. These assumptions and findings are discussed in some detail in Part II of this Opinion; with one exception relating specifically to the analysis of the process of negotiations; and thus better suited to be discussed at this juncture.

87 – This exception concerns a serious error flowing from the artificial and confusing grid of analysis used by the Majority,⁴⁰ that represents the process of negotiations between the Parties as stretching over “two overlapping periods, the first from 2006 to early 2007, concerning the

³⁸ Mommer’s Direct Testimony, para. 20.

³⁹ Decision, para. 394.

⁴⁰ See above para. 41-42.

proposed migration ... and the second from early 2007 concerning the negotiations both before the taking of the investments in June 2007, and beyond”⁴¹, turning obviously on compensation for nationalization.

88 – The Majority portrays these negotiations as a series of rounds of exchanges between the Parties. It is clear from the Majority’s narrative that it considers the offers made by the Respondent in the meeting of 29 March 2007 and their rejection by ConocoPhillips, particularly in the three identical letters dated 12 April 2007, as constituting the last round of exchanges that closes the first period (leading immediately to its conclusion in paragraph 394 based exclusively on the absence of response by Venezuela to these letters, that Venezuela at that time was not negotiating in good faith).⁴²

89 – In fact, however, this round of exchanges, in which for the first time compensation was specifically addressed and a quantified offer made by the Respondent, was very marginally related to the first period of negotiations dealing exclusively with migration.

90 – The only link this round had with the first period of negotiations was the minor of the two alternatives in the offer made by the Respondent at the meeting of 29 March 2007, consisting of the price it proposed for the limited amount of shares that ConocoPhillips would have had to transfer to their local partners in the two Associations of Petrozuata and Hamaca, within the framework of an agreed migration, to conform to the requirements of Law No.1.503 of 2001. But given the lack of enthusiasm of ConocoPhillips for (not to say interest in) migration from the

⁴¹ Decision, para. 363.

⁴² Decision, para. 394. That this conclusion relates to what the Majority considers “the first period of negotiations” is clearly demonstrated by the opening sentence of the immediately following paragraph 395 of the Decision : “The Tribunal now turns to the evidence concerning the negotiations from April 2007 before and after the taking of assets”

beginning, all the attention and efforts were focused on the second alternative, namely compensation for the withdrawal of ConocoPhillips, or its relinquishment of the totality of its interests in the projects, *i.e.* compensation for nationalization.

91 – In other words, this round did not represent the closure of the first period of negotiations as portrayed by the Majority, but the beginning of the second period of negotiations which turned on compensation for nationalization.

92 – This is not a moot question or an innocent and inconsequential confusion, given the far-reaching conclusions the Majority draws from it. This is because reaching the conclusion that a party was negotiating in bad faith requires the observation and scrutiny of the process of negotiations over a certain lapse of time sufficient for the Tribunal to detect a pattern of conduct that clearly reveals - leaving no room for doubt – that the concerned party was not negotiating in good faith.

93 – Representing the meetings of 29 and 31 March and the three letters of 12 April 2007 as the last of a series of rounds belonging to the first period of negotiations that started in mid 2006 (rather than the first round of a new period of negotiations over compensation for nationalization) makes it logically possible for the Majority to insinuate (or make us assume) that it had detected such a pattern from conduct of Venezuela, throughout the first period of negotiations; a necessary logical premise for its finding that “Venezuela at that time [*i.e.* “12 April 2007, the date of those letters”] was not negotiating in good faith by reference to the standard of ‘market value’ set out in the BIT”.⁴³

⁴³ Decision, para. 394.

94 – Apart from the serious legal problem raised by the cavalier manner in which the Majority jumps to this conclusions,⁴⁴ the conclusion in itself is patently absurd. This is because all the negotiations during the first period in 2006 and 2007 until the meeting of 29 March, turned on seeking mutually acceptable conditions for migration. Even after the reelection of President Chavez and the announcement of his nationalization program in January 2007, which rendered migration compulsory, efforts continued in search for mutually acceptable conditions within the parameters of that program (of national equity majority and operatorship). Thus during all this period of negotiations there was no room for, nor mention of compensation for nationalization, which was not the subject of negotiation; nor were there any sums proposed to be gauged by, or against any standard of compensation. How can then anyone extract from such negotiations any pattern of conduct that is evaluated according to its correspondence to a certain standard of compensation.

95 – Even if one accepts *arguendo* the misplacement into the first period of negotiations of the round opened with the Venezuelan offers of 29 March 2007 and its formal rejection in the three letters of 12 April 2007, this round would still be the only relevant episode during the whole first period of negotiations, for assessing the conduct of Venezuela in relation to compensation, as it is the only round where an offer, in fact the initial offer, was made and turned down.

⁴⁴ The insinuation and the assumption it carries – of a pattern of conduct revealing bad faith on the part of Venezuela – is made by the Majority without proving at any length its substance as expected and required by international law for the grave accusation of bad faith, according to the exacting standard of proof restated by the Tribunal itself earlier in the same Decision when the allegation of bad faith was addressed to the Claimants (Decision, para. 275 : “ It [The Tribunal] will do that bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one”. More on this further below.

96 – How can anyone (not to mention seasoned arbitrators) jump from the mere making of the very first offer of compensation by Venezuela to the conclusion that, from the starting blocks, Venezuela was not negotiating in good faith? A conclusion that requires the scrutiny of the whole process of negotiations over compensation, not merely the first act or shot in such a process. Apparently, in its haste to reach the conclusion it seeks, the Majority put the cart before the horse.

b) Negotiations around and after the lapse of the time limit set for compulsory migration.

97 – As mentioned above, the Majority considers that the second period of negotiations, turning on compensation for nationalization, started after the three letters of ConocoPhillips of 12 April 2007. Thus, in paragraph 395 of the Decision, after stating that “The Tribunal now turns to...the negotiations from April 2007 before and after the taking of the assets”, it proceeds, in the same paragraph, to quote Dr. Mommer on ConocoPhillips’ counter offer of June 2007. However, for the reasons already given, I consider that this classification is wrong and that the negotiations on compensation started with the Venezuelan offer of 29 March 2007 and its rejection by ConocoPhillips in the three letters of 12 April 2007. The following thus constitutes the second round of these negotiations over compensation.

98 – A few days before the deadline set by Decree-Law 5.200 for enforcing compulsory migration (12 June 2007), ConocoPhillips put forward a counter offer, reported by Dr. Mommer, in the form of a “Draft Memorandum of understanding” dated 15 June 2007 for an “Exchange of Assets”. According to this proposal, ConocoPhillips subsidiaries would

relinquish all their interests in the Petrozuata, Hamaca and Corocoro projects, in exchange of the interests of PdVSA subsidiaries in two refineries in the US, whose appraised value at the time was approximately 8.2 billion US dollars.⁴⁵

99 – Dr. Mommer does not relate Venezuela’s response, if any, to this offer; but reports that two months later (i.e. after the taking over of the projects), by a letter dated 17 August 2007, ConocoPhillips made a new proposal. That letter starts with the following sentence: “ConocoPhillips appreciates the verbal compensation proposal made to Roy Lyons on Monday, August 13, 2007”;⁴⁶ signifying that Venezuela had made a new offer beyond that of 29 March 2007.

100 – ConocoPhillips’ letter put forward a counter-offer, maintaining the formerly proposed exchange of assets, but adding to it the sum of one and a half billion dollars that it would pay to Venezuela, atop its interests in the three projects, in exchange for the interests of PdPVSA’s subsidiaries in the two US refineries. In other words, it valued its interests in the three projects at 6.7 billion USdollars. But this was still considered exorbitant by Venezuela.

101 – According to Dr. Mommer, this offer was “completely unrealistic because it gave no consideration to the compensation formulae that had been negotiated and agreed at the outset of the Petrozuata and Hamaca Projects, and did not even reflect the true value of the interests at issue without considering those formulae”.⁴⁷

102 -Significantly, no mention of this counter-offer, whether in its initial or revised form, appears in any of ConocoPhillips’ written or oral

⁴⁵ Dr. Mommer’s Direct Testimony, para. 21 and Appendix 4 (the Draft Memorandum of Understanding).

⁴⁶ *Ibid.* Appendix 5.

⁴⁷ Mommer’s Direct Testimony, para. 22.

pleadings. Nor was it mentioned by Mr. Lyons or any other ConocoPhillips' witness.

c) Negotiations after the initiation of the present arbitration

103 – The Tribunal did not dispose of any direct information on offers or counter-offers in the negotiations between the parties after the initiation of the present arbitration on the 2nd of November 2007. To be noted in this regard, that witnesses of both sides invoked a “confidentiality agreement” concerning negotiations after the start of arbitration (to be discussed at some length below).

104 – The Tribunal knew for certain, however, that negotiations continued well into 2008, via concordant public statements in February 2008 of both Mr. James Muleva, the CEO of ConocoPhillips⁴⁸ and the Venezuelan Minister of Energy and Petroleum, Rafael Ramirez,⁴⁹ who were then both optimistic about the chances of reaching an agreement.

105 – As shall be seen below, the Majority relies heavily on a reference in Minister Ramirez's statement to “book value” (“we should indemnify the book value of those assets”),⁵⁰ as one of the grounds enumerated in paragraph 400, on which it bases its final findings and draws their legal consequences in paragraph 401.

106 – Paragraph 401 reads (numbers between square brackets are added) :

“401 [1] The Tribunal accordingly concludes that the Respondent breached its obligations to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the

⁴⁸ Ex-R117, cited in Decision, para. 374.

⁴⁹ Ex- C190, cited in Decision, para. 399.

⁵⁰ *Ibid.*

basis of market value as required by Article 6(c) of the BIT [2] and that the date of the valuation is the date of the Award”.⁵¹

107 - These findings provide the answer to the question which appears as title to Part VIIB(4) of the Decision which reads :

“Did the Respondent in the Negotiations about Compensation Negotiate in Good Faith by Reference to the Standard in Article 6(c) of the BIT ?”⁵²

⁵¹ These two findings are taken up again in items (d) and (c) of paragraph 404, the *dispositif* of the Decision, which are the object of my dissent.

⁵² Decision, Title atop, para. 361.

II – CRITICAL ANALYSIS OF THE REASONING AND FINDINGS OF THE MAJORITY

A – False Presumptions and Erroneous Findings

108 - In paragraph 400 of the Decision (the one following immediately that in which it cites Minister Ramirez), the Majority sums up its conclusions, in terms of determinations and assumptions of law and fact, that serve as premises or grounds for its findings on the process of negotiations during the second or “final period” (and by implication on that process as a whole).

109 - Paragraph 400 reads : (the square brackets are superimposed for clarity)

“400. [1] The Tribunal does not have before it any evidence at all of the proposals made by Venezuela in this final period. [2] It observes that whatever confidentiality agreement there was has not prevented the submission to it by the Respondent of the ConocoPhillips proposals of June and August 2007. [3] There is no evidence that Venezuela moved from its insistence on book value, a standard confirmed by its Minister’s statement in early 2008 at a point when the arbitration had begun. [4] Nor is there any evidence that in this period, the Venezuelan representatives brought the compensation formulas in the Petrozuata and Hamaca Association Agreements into the negotiations. [5] Finally, at this stage too there was no proposal for compensation in respect of ConocoPhillips’ assets in the Corocoro Project as Dr.Mommer appeared to confirm in cross-examination; he was not re-examined on the course of the negotiations”.

110 – Most of these findings and assumptions of law and fact either cover serious errors or are unwarranted, unproven or even proven wrong by other elements in the file, as amply shown in what follows.

111 – For the clarity of exposition, it is useful to recapitulate these findings and assumptions of law and fact, together with those relating to the first period of negotiations⁵³ - which constitute the chain of reasoning of the Majority – in their logical sequence; before scrutinizing them in the same order.

1. The initial presumption, in the Majority’s title-question, of an obligation on charge of the Respondent, beyond providing for fair compensation, to negotiate with the Claimants in good faith by reference to the standard of market value set out in the BIT, as interpreted by the Claimants.

2. The implied finding that the Respondent’s initial offer of compensation is illusory, amounting to a refusal to pay compensation.

3. The finding that by the end of the first period of negotiations, Venezuela was not negotiating in good faith by reference of the standard of the Treaty, as

a) it did not answer in writing the queries of the Claimants in their letters of 12 April 2007 about the standard of compensation

b) it did not refute (hence admitted, according to the Majority) statements the letters attributed to its representatives during the negotiations

i - that compensation will not be on the basis of market value

ii – but of book value

⁵³ See Decision, para. 394; and this Opinion, para. 86 above.

4 . The finding that during the second period of negotiations, the Respondent did not budge from its initial position, on the basis of

- a) continued insistence on book-value
- b) no evidence of new proposals
- c) the assumption that had there been any new proposals, the Respondent would not have hesitated to submit them, in spite of “whatever Confidentiality Agreement”
- d) no evidence that the compensation clauses of the Association Agreements were invoked by the Respondent during the negotiations
- e) no offer of compensation for the Conocoro project.

1) *The Initial Presumption in the Title-Question of an obligation on charge of the Respondent, beyond providing for fair compensation, to negotiate with the Claimants in Good Faith by reference to the Standard set out in the BIT, as interpreted by the Claimants*

a) - The title-question of the Majority is wrongly put

112 - The title-question (para. 107 above) to which the preceding chain of reasoning purports to provide an answer, posits a four-pronged legal presumption of

- a) a legal obligation on charge of the nationalizing State, here the Respondent, to negotiate in good faith with the Claimants the compensation,
- b) by reference to the standard set by the BIT,
- c) as interpreted by the Claimants;
- d) it being a condition of the legality or lawfulness of the nationalization.

113 – This question is wrongly put, because the above presumption is false in all its components, having no basis either in the BIT or in general international law.

114 – To start with the first prong of the presumption a), neither general international law nor the BIT requires negotiations, not to mention negotiations with such qualifications. The conditions of the legality or lawfulness of the act of nationalization itself, in general international law, reiterated in Article 6/a and 6/b, are

- i – that it be for a public purpose
- ii – that it be non-discriminatory.⁵⁴

The non-respect of either of these conditions renders the act of nationalization illegal *ab initio*.

115 – The obligation prescribed in Article 6(c) of the BIT that the measures of nationalization be “taken against just compensation” reflects the rule of general international law for the generality of cases⁵⁵ and has to be interpreted in the light of this rule. There is no mention in this text of an obligation to negotiate compensation. Nor can such an obligation be

⁵⁴ Article 6(b) of the BIT adds a second prohibition, which goes without saying as a species of *lex specialis*:

“b) the measures are not discriminatory or *contrary to any undertaking which the Contracting Party taking such measures may have given*” (emphasis added). This provision is modeled after the circumstances of the *Chorzow Factory* case, which is discussed at some length below, para. 255ff of this Opinion.

⁵⁵ This general rule is subject to qualification, the elaboration of which is not necessary here. See for example, the recent Resolution of the Institute of International Law, adopted on 13 September 2013 during its 76th Tokyo session, entitled “*Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties*”, Art- 14, para 2 : “... As to the interpretation and application of the notion of ‘adequate’ compensation, an appropriate balance must be assured between the interests of the investor and the public purpose of the State”; without forgetting the famous statement of Sir Hersch Lauterpacht in the 8th edition of Oppenheim’s *International Law* (1st volume, Peace, edited by H. Lauterpacht, London Longmans, 1955) p. 352 : “The second modification [of “the rule ... clearly established that a State is bound to respect the property of aliens”] must be recognized in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation”.

subsumed under, or derived by necessary implication from the rule of general international law underlying it.

116 - All the obligation to pay just compensation requires is that, at or around the time of nationalization, the State provides for such a payment, for example by establishing a procedure for its determination or by offering a given sum.

117 – If this is done, the State would have discharged its obligation, even when the offer of the State is contested, thus triggering a dispute over the applicable law (i.e. the legal standard applicable *in casu*), or the quantum of the compensation. Obviously, in such a case, negotiations are one of, and even the first to come to mind among the available means of settlement of such disputes. But it is one of several possible means (that comprise *inter alia* judicial and arbitral procedures), and there is no specific obligation on the State, or for that matter on the other Party, to use it rather than another, in the absence of a *lex specialis* to that effect.

That much for the first prong (a) of the Majority presumption.

118 – In any case (and here I am addressing the fourth prong (d) of the Majority’s presumption), neither the process of such negotiations, if they take place, nor their failure or success has anything to do with the legality or lawfulness of the nationalization. This is because, according to international jurisprudence and doctrine, the obligation to pay compensation is not a condition of the legality of the act of nationalization, but a secondary obligation flowing from that act⁵⁶. In

⁵⁶ See M.Mohebi, *The International Law Character of the Iran-United States Claims Tribunal*, Kluwer Law International, Boston, 1999, p. 289 : “The non-payment of compensation does not, as such, make a taking *ipso facto* wrongful, rather it is a violation by the expropriating state of an independent duty which applies evenly to both unlawful and lawful taking”. Also, A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S Claims Tribunal*, Martinus Nijhoff, 1994, pp. 333-334, “In actuality, no award of the Tribunal considered any expropriation or other measures affecting

other words, it is situated downstream rather than upstream the act of nationalization.

119 - There is, however, one particular case in which the failure to discharge the obligation to compensate can affect the legality or lawfulness of the nationalization. It is when the State refuses from the outset to pay any compensation, or, in the words of Oppenheim's classic *International Law*, "if compensation offered is clearly illusory",⁵⁷ *i.e.* when it is so negligible as to amount to a refusal to pay compensation. In such a case, nationalization or expropriation become mere confiscation of foreign property, which is illegal under international law.⁵⁸

120 – Can it be surmised *prima facie* that the 2.3 billion US dollars offered by the Respondent as compensation for the Petrozuata and Hamaca projects are so negligible a sum as to amount to a refusal to pay compensation, rendering the nationalization of these two projects illegal ? This is the contention of the Claimants that shall be discussed at some length below (para. 142ff).

121 – It would have been legally more judicious and much easier for all concerned had the Tribunal followed the objective road by putting the question in terms similar to the ones above (*i.e.* was the offer illusory ?). But the Majority chose another subjective road in the way it drafted the question (*i.e.* did Venezuela negotiate in good faith ?); making the answer turn on the proof of bad faith, a well nigh impossible task in the

property rights to be unlawful for want of prompt payment, notwithstanding the Tribunal's knowledge of the fact that no compensation was affected until the time of the awards and that in most instances no provision was even made in that respect".

⁵⁷ Oppenheim's *International Law*, vol.I Peace, 9th edition by Sir Robert Jennings and Sir Arthur Watts, London, Longsman, 1992, p. 921, footnote 35.

⁵⁸ There are admitted exceptions to this rule, for example when confiscation is applied as a penal sanction to a generally recognized crime, and in certain circumstances under the law of war; not to mention the controversy over the legality of confiscation of foreign property as an act of reprisal.

absence of direct evidence. This led the Majority to overload the question artificially with conditions and qualifications, leading - but only by presumption, conjecture and indirect inference - to the negative answer it seeks to reach, as shown below.

122 – However, in the final analysis, the proper legal solution of the issue lies in the answer to the former (objective) question, regardless of the answer to the latter (subjective one). And in both cases, the answer provided by the Majority (implicitly to the first; explicitly for the second, in para. 401 of the Decision) is wrong in my opinion.

b) The question is also a leading one

123 - Apart from being wrongly put, by positing on charge of the Respondent an obligation that does not exist either in the BIT or in international law, the title-question of the Majority is a “leading one”, because it subsumes or at least insinuates the negative answer it seeks to reach; and this through the last clause of the question “reference to the standard in Article 6/c of the BIT”, when the main contention between the parties is precisely on the determination of the proper standard of compensation as applicable law *in casu* and/or on the interpretation of this standard.

124 – Even if one accepts *arguendo* (that which I obviously do not) the legal existence of such an obligation to negotiate in good faith the compensation, the Majority, by adding the last qualifier clause, assumes (on top of the existence of the obligation) that the only legally possible “applicable law” to compensation is the BIT standard, and that merely contesting it or invoking, on credible legal grounds, another applicable law is a sufficient proof of bad faith.

125 – This latter presumption, which is not expressly articulated, but posited in the question by necessary implication, is a stark aberration. For, if the BIT is *lex specialis* in relation to general international law, there is nothing in law or legal logic that excludes the possible existence of an even narrower *lex specialis* that prevails over the BIT.

126 – Moreover, the drastic legal consequences that the Majority draws on the basis of this false presumption are even a worse legal aberration. To illustrate this, one can give a hypothetical example based on the factual matrix of the present case; supposing that during the negotiations, and contrary to the Claimants, the Respondent maintains, on the basis of reasonable grounds, that the BIT is not the proper “applicable law” that governs the standard of compensation,⁵⁹ *e.g.* that as the protected investment is a contractual right, established by a contract that provides for the compensation of the alleged violation, this contract is the proper applicable law.

127 – A tribunal is of course free, after due consideration, to endorse or reject such a legal thesis or position. But even if the tribunal rejects it, finding that the standard of the BIT is applicable *in casu*, does this allow that Tribunal, by whatever legal logic, also to find that the mere fact of the Respondent maintaining this position is proof, not to say sufficient proof, of its bad faith during the negotiations?

128 – In other words, can a tribunal consider that the mere adoption by a party, during prior negotiations, of a position that appears *prima facie* to be legally tenable, with reasonable support in legal opinion, in opposition

⁵⁹ For the avoidance of doubt I should clarify that this is not exactly my understanding of the position of the Respondent *in casu*, as shall be explained later.

to the legal position of the other party which it finally endorses, a sufficient proof of bad faith in negotiations ?

129 – It suffices to articulate such a finding with its logical underpinnings, or rather the total absence thereof, to show its utter legal absurdity; the more so, returning to our case, that the conclusion the Majority reaches on the basis of this presumption, *i.e.* that the Respondent has acted in bad faith, is a most serious international delict, to which the Tribunal attributes drastic legal consequences.

130 – To find that a party that rejects the other party's legal position, or propose an alternative one on the basis of credible legal grounds, that are not spurious, *i.e. prima facie* legally untenable; to find that the mere holding of such a position in negotiation or litigation, if it is ultimately rejected by the tribunal, is an act of bad faith of that party and a breach by itself of an independent obligation (whose source is not identified in either the BIT or general international law), apart from being a total legal aberration, would have general catastrophic implications.

131 – It would mean that no party would dare or at least be at ease defending its legal position for fear of being found in bad faith if it turns out that the tribunal does not endorse it, and being sanctioned independently for merely holding this position, apart from loosing on the merits in the original case.

132 – Moreover, this would open the door to legal extortion. For, unless one concedes to the other party's legal position, even if he considers it wrong, he runs the risk of double jeopardy in case a tribunal upholds the position of his opponent. He would not only lose on the merits, but would be found also at fault simply for upholding, in negotiations or adjudication,

what he considered the proper legal position; a fault which could have as a consequence to aggravate even his loss on the merits, as *in casu*.

133 – The absurdity of this position needs no further demonstration; and this takes care of the second prong of the false legal presumption of the Majority Decision described in para. 112 above.

134 – The question is also leading because it posits not only that there is only one possible legal standard of compensation, the BIT standard, but also that there is only one possible interpretation of this standard, the Claimants interpretation. This is the third prong (c) of the Majority’s false legal presumption (above, paragraph 112). It is not explicitly stated in the question, but underlies the reasoning of the Majority in answering it.

135 – The unveiling of this presumption needs explanation. : The Respondent’s position, as I understand it, and contrary to the hypothetical example I gave above, is not that the compensation clauses in the Association Agreements constitute the proper compensation standard (*i.e.* that the Association Agreements themselves are the proper applicable law) *in casu*. Venezuela’s position is rather that these clauses have to be taken into account in assessing the market value, as one of the factors that partake in the determination of that value. In other words, according to the interpretation of the Respondent, the BIT standard of market value, necessarily integrates (presumably for the evident legal and economic reasons given above, para. 25ff.) the compensation clauses of the Association Agreements, as constitutive components or parameters of this market value.

136 – Both the Claimants and the Tribunal do not make the distinction between considering the compensation clauses as an alternative legal

standard to “market value”, and their consideration as part or parameter of the same legal standard of “market value”.

137 – The Claimants chose at the beginning totally to ignore the issue of the compensation clauses in their first written pleadings. But in view of the heavy emphasis by the Respondent from the outset on these clauses, the Claimants summarily dismissed them in their last written pleading, the Reply⁶⁰, on the basis of the controversial distinction between contract claims and treaty claims. They contend that these compensation clauses have nothing to do with their treaty claim against Venezuela before this Tribunal, as they are part of contracts (the Association Agreements) to which Venezuela is not a party.

138 – The Majority chose another facile exit route to eliminate these conditions from its field of vision. It found that it had no evidence that this issue was raised during the negotiations; an erroneous finding, in my submission, as shown below (para. 201ff).

139 – However, the point to be noted here is different, namely that, regardless of the correct or erroneous character of the above finding, it reveals the position of the Majority on another important aspect of the issue. It is that the Majority adopts axiomatically, *i.e.* as a given, hence as a presumption, without any further proof than the assertion of the Claimants, their interpretation (or characterization) of the compensation clauses as not being intrinsic determinants of the market value of the protected investment.

140 – This presumption (being the third prong of the legal presumption carried by the title-question (see above, para.112), is patently false, for the reasons expounded above (para. 134ff). But it is an essential stepping

⁶⁰ Reply, 9 Nov. 2009, para 380, 493.

stone in the logical scheme of the Majority to attain the result it seeks to reach. For without presuming, implicitly, that the compensation clauses are not an intrinsic determinant of the market value of the protected investment, it would have been impossible for the Majority to skip or bypass a logically essential first step. This prior missed step is examining whether the initial offer of Venezuela was *prima facie* “illusory”, *i.e.* grossly inadequate, or not; hence whether it could serve as a reasonable basis of discussion or negotiations (*i.e.* taking the objective route), rather than jumping directly into the subjective quagmire of fathoming intentions, by inquiring into whether Venezuela was negotiating in good faith or not.

141 – Indeed this presumption that the compensation clauses are not part of the equation determining the market value of the protected investment, allowed the Majority to exclude them at the outset from being taken into consideration.⁶¹ By so doing, the Majority was also able to make another implied determination, again on the basis of the mere assertion of the Claimants, hence by way of presumption, (to be dealt with in the next section), namely, that the initial compensation offer of Venezuela (barring the effect of the compensation clauses) was illusory. Together, these two implied presumptions served as a jumping rod for the Majority’s leap of faith (faith in the Claimants assertions, without any further verification), into the long and wrong subjective detour leading to its (submittedly erroneous) finding that Venezuela from the outset, *i.e.* at least from its initial offer, was not negotiating in good faith.

⁶¹ The Majority said that it will examine later on, in the quantum phase of the proceedings, whether these clauses have any relevance in the calculation of this quantum. Decision, para. 402. But this position is logically incongruous, for the issue of the relevance of the compensation clauses is prior in logic to, and determinative of whether the Respondent’s initial offer was credible or not and consequently whether it was negotiating in good faith or not.

2) The implicit finding that the initial offer of Compensation by the Respondent was “illusory” or “grossly inadequate”, amounting to a refusal to pay compensation

142 -According to the Majority, the first period of the negotiations was closed by the round of exchange consisting of the very first offer of compensation by Venezuela for the total cession (or nationalization) of ConocoPhillips shares in the Petrozuata and Hamaca projects, made in a meeting on the 29th of March 2007, and its rejection by the Claimants’ three identical letters of 12 April 2007.

143 - The Majority found that :

“Venezuela at that time, [i.e. at the close of that first period of negotiations] was not negotiating in good faith by reference to the standard of ‘market value’ set out in the BIT”.⁶²

144 - This finding or determination subsumes by necessary implication another one, namely that Venezuela’s initial offer was so negligible or trivial, measured against the Treaty standard as to be “illusory” or “confiscatory”,⁶³ amounting to a refusal to pay compensation. In any case, that is the understanding of the Claimants, which comes out clearly from the speech of Claimants Counsel in the closing session of the oral hearings :

“Now, if Venezuela had actually made a good faith offer of compensation and then provided a reasonable opportunity for the Parties to resolve their dispute, we accept that that would have been a

⁶² Decision, para 394.

⁶³ Claimant’s Counsel, Transcript, p. 3854.

- lawful expropriation, *sub modo*, subject to the actual payment of compensation and interest. But that's not what happened".⁶⁴
- 145** - What would be then, according to the Claimants, a "good faith" or "reasonable offer"? Here we do not have one, but a large variety, of answers.
- 146** - i - Thus, in their Memorial, the Claimants contend that Venezuela's offer "represented no more than five percent of the real value of the Claimants' investments".⁶⁵ This means that, according to the Claimants, the fair market value of their investment amounts to 46 billion US dollars. And indeed, if the offer proved to represent no more than 5% of the value of the nationalized assets, it would be "wholly inadequate", "illusory", hence "confiscatory".
- 147** - ii - Surprisingly, in the same Memorial, the Claimants demand an open-ended "award of damages" of "US\$ 30.305,400,400".⁶⁶ However, this claim of 30 billion US dollars includes other items such as the US credit tax deduction and compensation for changes in tax and royalty rates. The "fair market value of the interests of the Claimants in the Projects, as of August 31, 2008" is estimated at "17.576.8" billion US dollars (including Corocoro).
- 148** - iii - Yet, in the Closing session of the oral pleadings, Counsel to the Claimants declared that "an offer of Fair Market Value would have been of the order of seven to ten times the amount of the offer actually made".⁶⁷ This means that it should fall within the range of 16.1 to 23 billion US dollars.

⁶⁴ Transcript, p. 3852. cited also by the Majority in paragraph 397 of the Decision.

⁶⁵ Claimants Memorial, para. 309, cited in the Decision, para 390; and in this Opinion, para 75 above.

⁶⁶ Claimants' Memorial, para. 473.

⁶⁷ Transcript. p. 3514.

149 – iv -Then we have the counter-offer made by the Claimants themselves, in their letter of 17 August 2007 discussed above (para.98ff), in which the Claimants modified their earlier offer of exchange of assets, amounting , if translated into monetary terms, to accepting the equivalent of 6.7 billion US dollars in exchange of their interests in the three projects and the settlement of all their other claims.

150 - Whilst keeping in mind the usual “without prejudice” reservation of the letter and its pointing up the transactional character of its modified offer (by adding one and a half billion dollars in cash to the mere barter of assets proposed in the earlier letter of 15 June 2007), this offer by the Claimants remains nonetheless indicative of what they were willing still to accept as “fair compensation”. For, it is normal in such negotiations to start round the top of the range of one’s estimates of the value of his assets. But more indicative of his real evaluation, is where he sets the lower confines of that range.

151 - Still, one has to compare comparables, which requires deducting from the 6.7 billions the value of Corocoro, as well the first and sizeable separate claim of compensation for what Counsel for the Claimants calls the “expropriation by stages”⁶⁸(*i.e.* creeping expropriation) through changes in royalty rates and tax legislation.⁶⁹

152 -This leaves us at best with roughly the double of the 2.3 billions offered by Venezuela, which is a reasonable range of difference between negotiating parties in such situations, very far from the ratio of 1 to 7 or 1 to 10 proposed by Counsel to the Claimants, and already discussed above (para. 148ff).

⁶⁸ Transcript, p. 3519.

⁶⁹ This claim is rejected unanimously by the Tribunal in para. 404(b) of the Decision.

153 – Such extremely dispersed estimates – ranging from 46 to significantly less than 6.7 billion US dollars – should have incited the Majority to exercise a modicum of judicial due diligence, by conducting its own *prima facie* verification of the veracity of such estimates, before taking position on the reasonableness of the Respondent’s initial offer. This could have been easily done by looking in the file for indices or estimates prepared for internal use or purposes other than being used as part of the pleadings *in casu*, and thus more credit worthy.

154 – Had the Majority cared to exercise this modicum of judicial due diligence, it would have found, with some effort it is true, two such documents which would have settled the matter, at least on a *prima facie* basis, which is all that is needed at this stage.

155 – Both these documents are part of the exhibits submitted by the Claimants and their accountants (LECG). And both take the form of calculation tables with widespread time series, apparently constructed following the discounted cash flow (DCF) methodology favoured by the Claimants.

156 – The first table concerns the Petrozuata Project. It is part of a document entitled “ConocoPhillips RCAT Group, *Building Production Capacity Reserves/Loss of Reserve Area COP*”, dated 14 October 2006.⁷⁰ The relevant table is on a page entitled “Project Summary”. It computes the actual value of ConocoPhillips’ part in the Petrozuata project (apparently by DCF for the period 2007-2036) under four hypotheses :

a – With the reserve area

i - on the basis of 120 b/d (barrel/day) 1.121.706 million US\$

ii – on the basis of 146 b/d 1.251.219 million US\$

⁷⁰ Claimants’ Rebuttal Exhibits, C-474.

b – Without the reserve area

i - on the basis of 120 b/d 925.455 million US\$

ii – on the basis of 146 b/d 945.568 million US\$

157 – In other words, this internal document emanating from the Claimants, and dating from October 2006, just before the reelection of President Chavez, *i.e.* before the issue of compulsory migration appears, evaluates the interests of ConocoPhillips in the Petrozuata project to range from 1.25.219 (under best conditions) to 925.445 million US dollars. A range within which the offer of the Respondent of 1.1 billion US dollars falls neatly, on its upper reaches.

158 – The second table concerns the Hamaca Project. It is part of a document entitled “Petrolara Amareven Model”⁷¹. The relevant table appears on page 551. It bears the following legend : “2006 Business Plan NP (2007-2037) at Jan.1-07”, and at bottom of the page “Petrolara Amareven (Hamaca) Model-Calculation Sheet – p. 551 of 566”. Apart from the time series, apparently for DCF purposes, the two relevant entries are

“2006 BP NPV before debt \$3.011.64

2006 BP NPV \$2.364.00”

159 – This being the total value of the Project, the 40% share of ConocoPhillips amounts to :

“2006 Business Plan before debt \$1.204.656

2006 Business Plan deducting debt 945.6”

160 - Obviously, it is the net value (after deducting debt) that counts. And here again, 945.6 Million dollars is much less than the 1.2 billion US

⁷¹ LECG, *Preliminary valuation Report of Claimants’ Investments in Venezuela*, LECG Exhibit No. 129, p. 551 of 566.

dollars that the Respondent offered, equivalent in fact to the value of ConocoPhillips' share in the project before deducting debt.

161 – These two documents of the Claimants should have put the controversy over the “good faith” or “reasonable” character of the Respondent’s initial offer to rest, had the Majority exercised a modicum of judicial due diligence by looking for them or their likes and looking into them. For, it is not enough that a party rejecting an offer of compensation contends that it is “manifestly and grossly inadequate”⁷², for it to be so considered by the Tribunal.

162 – All that was needed *in casu* was a preliminary search by the Tribunal to verify the assertions of the Claimants against other possible pieces of evidence in the file, in order to reach an independent *prima facie* decision, on the reasonableness of the offer; which is all that is required at this stage, leaving the detailed valuation to the quantum stage.

163 – But the Majority chose otherwise. It opted for the facile escape route of looking not at the thing itself (the actual amounts estimated and offered), but at its shadow (the label put on it and other nominal quibbles on what was said or not said about it). By so doing, the Majority took the wrong turn substituting for the logically prior, objective and straight forward question “was the initial offer of compensation reasonable” – whose answer could have settled the issue from the outset – the subjective question “was the Respondent negotiating compensation in good faith?”

164 – Still, whilst choosing to evade the former question, by shifting to the latter one, the Majority did answer the former question implicitly and in the negative. For absent a negative answer to the former objective

⁷² Claimants’ Counsel, Transcript p. 3515.

question, the latter subjective one would be without object. This negative answer, being inferred by necessary implication, rather than expressly articulated in the Decision, is not supported therein by any justification or explanation, whilst serious legal consequences are drawn on its basis. But, above all, as an implied finding that the initial offer of compensation by the Respondent was “illusory” or “grossly inadequate” it is a wrong and erroneous determination of fact, for the reasons expounded above.

3 – The Finding that by the end of the first period of negotiations, Venezuela was not negotiating in Good Faith by reference to the Standard of the Treaty

165 - Concerning the first negotiations period, that it considers closed with the three identical letters of the Claimants dated 12 April 2007, the Majority “concludes” in paragraph 394 of the Decision “that Venezuela at that time was not negotiating in good faith by reference to the ‘market value’ set out in the BIT”.

166 - The Majority bases this finding on two grounds :

a – that the Venezuelan authorities did not respond in writing “to the points made about those negotiations in those letters”,⁷³

b – that they “did not challenge the account the letters gave of the course of the meetings”⁷⁴ (hence admitted it, as the language of the Majority seems to infer); in particular

i - they did not reject the position attributed to them that any compensation would not be based on fair market value,⁷⁵

⁷³ Decision para. 394.

⁷⁴ *Ibid.* para. 393.

ii – proposing instead “book value”.

167 – Even if one assumes *arguendo* that the Majority’s subjective approach is right and consequently that the title-question (with its four pronged legal presumption) is properly put – that which I strongly reject for the reasons given in the preceding two sections – the answer given to that question by the Majority in the form of the above finding of fact, the same as the grounds on which it is built, are, as determinations of fact, wrong, for the following reasons :

168 – a) Concerning the first ground of the Majority’s finding, *i.e.* the absence of a Venezuelan response to the three letters of 12 April 2007 and their queries about the legal standard of compensation and the statements attributed to the Venezuelan authorities in the course of negotiations, it is true as already mentioned, in paragraph 79 above, that no direct written reply to these letters can be found among the documents submitted to the Tribunal by 3 September 2013, the date the Decision was issued⁷⁶. The Majority, however, gives excessive weight to written documents, excluding oral answers and explanations that must have been given or exchanged during the various meetings of negotiations.

169 – Anyway, a negotiating party would normally be reluctant to answer such questions in writing, during the sensitive stages of the negotiations, for fear of losing all flexibility and foreclosing beforehand the outcome

⁷⁵ *Ibid.*

⁷⁶ As was indicated in footnote 32 above, there was in fact a written response in a letter by Dr. Mommer to Mr. Lyons, dated 13 April 2007 (the day following that of the Claimants’ letters of 12 April 2007). But that letter was submitted to the Tribunal after the Decision of 3 September 2013 was issued, and could not have been taken into consideration. In that letter, Dr. Mommer, commenting on the Claimants’ letters of the day before writes : “As in previous communications from ConocoPhillips, these letters are disappointing for both their tone and their content, leading to the unfortunate conclusion that ConocoPhillips is more interested in trying to build a procedural case than in concluding in a satisfactory way the process of migration ... We do not deem it necessary or useful to discuss herein the legal issues and the facts alleged in your letters ...” (reference in footnote 32 above).

of the negotiations, or in case of their failure, of his answers being used somehow against him; i.e. in both cases, for fear of falling into a trap.

170 – Thus, the absence of a written answer during an on-going negotiation, cannot be interpreted or taken for an absence of all or any answer. But even in the absence of answer, this cannot be considered in itself, under any system of evidence, as proof of bad faith.

171 - b) The second ground on which the Majority bases its finding is that the Venezuelan authorities did not challenge the account the letters gave of the course of negotiations, and particularly that they did not reject the statements attributed to them in this account, the Majority inferring there from an admission by the Venezuelan authorities of the veracity of this account.

172 – In the first place, not answering a letter or rejecting the allegations it proffers concerning the recipient, is not an internationally wrongful act, except where a specific obligation (*i.e. lex specialis*) requires it. Nor can it be considered by itself, in any procedural system I know of, and in any case not in international procedural law, as an admission of the veracity of the contentions included in such letters. For “silence is silent”, it does not speak either way; unless context imparts it with significance (“*le silence circonstancié*”). But here, on the contrary, the context, as described in paragraph 169 above, justifies silence even further.

173 – Be that as it may, neither of the statements or positions attributed by the letters to the Venezuelan authorities bears out the finding of bad faith in negotiations by reference to market value.

i - Invoking “book value” is not in itself a rejection of “market value”. Book value is simply an accounting or actuarial method of computing sums, here compensation, according to whatever legal

standard, including the “market value” standard. It is discussed at greater length in the next section;

ii – The statement allegedly made by Dr. Mommer that “any compensation would not be based on fair market value” as well as the misrepresentation by the Majority of Dr. Mommer’s strong refutation of it are discussed in paragraphs 79 to 84 above. They are discussed further later on, together with other misinterpretations by the Majority of Dr. Mommer’s testimonies and conduct (below, paras. 277-279).

4) The Finding that during the second and final period of negotiations, the Respondent did not budge from its initial position, and was thus not negotiating in Good Faith

174 – This finding is based on five grounds, enumerated in paragraph 400 of the Decision. They are :

- a) continued insistence of the Respondent on book value
- b) no evidence of new proposals on his part
- c) the assumption that had there been any new proposals, the Respondent would not have hesitated to submit them, in spite of “whatever Confidentiality Agreement”
- d) no evidence that the compensation clauses of the Association Agreements were invoked by the Respondent during the negotiations
- e) no offer of compensation for the Conocoro project was made throughout the negotiations.

175 – The last two grounds pertain to both periods of negotiation. And all of them, with the exception of the last one, are either false presumptions or erroneous determinations of fact, as shown in what follows.

a) Continued insistence of the Respondent on “Book Value”

176 -- Relying on the Claimants narrative of the negotiations as presented in Mr. Lyons’ letters of 12 April 2007;⁷⁷ and particularly on the mention of “book value” by Minister Rafael Ramirez in his statement in the National Assembly on 14 February 2008⁷⁸, the Majority finds that :

“There is no evidence that Venezuela moved from its insistence on book value, *a standard* confirmed by its Minister’s statement in early 2008 at a point when the arbitration had begun” .⁷⁹

177 - This finding is used in order to reach the conclusion that Venezuela was not negotiating in good faith on the basis of the standard of market value prescribed in Article 6c of the BIT. The Majority thus considers book value as an equivalent, but antagonistic, legal standard to that of “market value”; wherein lies its fundamental conceptual error.

178 - Indeed, far from being a standard, not to mention a legal standard such as “market value”, “book value” is a mere technical accounting method of valuation, which can be used to compute or assess “current” or “fair market value”, as well as any other value determined according to whatever legal standard.

179 - This is non-controversial common knowledge. And it is as such, *i.e.* as an accounting technique or method, not as a legal standard, that “net book value” is treated for example in the ILC commentary on Article 36 (entitled “Compensation”) of its “Draft Articles on Responsibility of States for International Wrongful Acts”.⁸⁰

⁷⁷ EX-C-241 : “any valuation based upon book value would : neither adequately compensate ConocoPhillips for...Venezuela’s unilateral changes in commercial terms (royalty and taxes) over the past several years, nor for the additional changes resulting from the Nationalization Decree”.

⁷⁸ Ex-C-190, cited in Decision, para. 399.

⁷⁹ Decision, para.400 (emphasis added).

⁸⁰ *Yearbook of the International Law Commission, 2001*, vol.II, part 2, Commentary on Article 36, para. 24.

180 - Significantly, the very accounting experts of the Claimants, LECG, treat “book value” as one of the “valuation methodologies”, stating that they “considered” but “rejected the use of the Book Value and Adjusted Book Value approaches to valuation”,⁸¹ in favour of “the Discounted Cash Flow (DCF) methodology”. This clearly means that they considered it as a mere technical accounting method, among others, of computing the compensation, once determined, and not a legal standard following which this compensation is to be determined.

181 - Thus, proposing to use “book value” as an accounting method cannot be considered in itself as a rejection of the legal standard of “current market value”. The difference, if there is one as *in casu*, is not over the legal standard of “current market value”, but over the accounting methodology of its computation.

182 - Nor is the proposal to use the “book value” method of valuation an absurdity, as shown by the declaration of the expert accountants of the Claimants, LECG, cited above, that they have considered the use of this methodology but preferred that of DCF over it; which means that they deemed it sufficiently credible to be worthy of consideration, even if they ended up opting for DCF.

183 - Indeed the comparison of the two methodologies – the one asset-based; the other with a future income capitalization approach - reveal that each of them has its merits and shortcomings that contrast with those of the other, and which are magnified or shrunk according to the circumstances of the case, or rather the assumptions that accountants

⁸¹ LECG “Preliminary Valuation Report of Claimants Investments in Venezuela”, September 12 2008, para. 76.

make about the state of the asset and the present and future conditions of the specific market.⁸²

184 - Thus, the ILC Commentary on Article 36 notes, concerning “book value method” that :

“Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. ... The limitations of this method lie in its reliance on historical figures...which tend to undervalue assets, especially in periods of inflation...⁸³.

185 - In other words, the advantage of this method is its certainty and objectivity, while its shortcomings lie in its ‘backward looking’ character (as LECG describes it⁸⁴), whence its conservative slant, particularly in inflationary environments.

186 - On the other hand, concerning the DCF method, the ILC Commentary remarks that :

“Since 1945, valuation techniques have been developed to factor in different elements of risk and probability. ... Although developed as a tool of assessing commercial value, it [the DCF method] can also be useful in the context of calculating value for compensation purposes. But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses *a wide range of inherently speculative elements*, some of which have a significant impact upon the outcome (*e.g.* discount rates,

⁸² It also follows from the above observation in the text that depending on those conditions or the assumptions made about them, the book value method may yield, in a given case, less or more than that of the DCF.

⁸³ *Supra* note 80, para 24.

⁸⁴ *Supra* note 81, para. 77.

currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods. A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits”.⁸⁵

187 - Put it differently, the DCF method while factoring potential future-generated income, in the calculation of value, is based on highly speculative elements⁸⁶ and has a strong over-estimation bias. That which led a highly authoritative and objective source such as the ILC to underline the cautious approach of tribunals to the use of this method and their “decided preference for asset-based methods”, and to highlight the risk in using it of “double-counting”.

188 - Indeed, it is worth noting that in most cases, tribunals, after examining the problem, end up using a mix of these methods⁸⁷ ; and even when they profess using the DCF method, award only a fraction of what the full application of the method would have yielded.⁸⁸

⁸⁵ *Supra* note 80, para. 26 (footnotes omitted).

⁸⁶ Cf. *Amoco International Finance Corp. v. The Government of the Islamic Republic of Iran et al.*, Partial Award No. 310-56-3, July 14, 1987, 15 Iran-US CTR 189 (1987), para. 239 : “The element of speculation in a short-term projection is rather limited, although unexpected events can make it turn out to be wrong. The speculative element rapidly increases with the number of years to which a projection relates. It is well known, and certainly taken into account by investors, that if it applies to a rather distant future a projection is a most purely speculative, even if its done by the most serious and experienced forecasting firms, especially if it relates to such a volatile factor as oil prices”.

⁸⁷ E.g. *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhtan*, Award, ICSID case No. ARB /05/16, 29 July 2008, paras.8.09 – 8010 and 8013; *National Grid Public Limited Company v. Argentina*, Award, Case 1.09-cv-00248-RBW, 3 November 2008. Ad Hoc Tribunal (UNCITRAL), paras. 276 and 285.

⁸⁸ E.g. *CMS Gas Transmission Company v. Argentina*, Award, ICSID case No. ARB/01/8, 12 May 2005, paras. 421, 423, 439 – 68; *Enron Corporation and Ponderosa Assets LP.v.Argentina*, Award, ICSID Case No. ARB/01/3, 22 May 2007, paras. 405-406, 435.

189 - Turning to the statement of *Minister Rafael Ramirez* in the National Assembly in February 2008, in which he mentioned “book value”, it is clear from the above examination of the two accounting methodologies in general, that proposing “book value” as a method of valuation of the nationalized interests *in casu* is neither a theoretical heresy nor a practical aberration; nor does it imply by itself the rejection of the use of any legal standard, including the fair market value standard, for the determination of the scope of these interests.

190 - In any case, one should read the statement of Minister Ramirez in its context in order to understand it correctly, rather than cite it out of context and conjecture from it. And the context clearly indicates that Minister Ramirez was referring to “book value” by highlighting its virtues not as a legal standard but as a technical accounting method of assessing value, being “transparent”, “auditable”, etc.; and this in contrast to the DCF method, which he did not specifically name, but is easily identifiable through his description of it as yielding “numbers [that] sometimes appear to be fantasies...abusive-or hope to obtain the value of that business in 25 more years of operation under certain scenarios that are beyond anything normally seen in the hydrocarbons market”.⁸⁹

191 – In other words, the Declaration of the Minister reveals a choice or preference for an accounting method of calculation of value, which may be right or wrong, but this does not transform it into a different legal standard, nor its preference into a refusal to pay “just compensation”.

192 - Moreover, one should ponder on what Minister Ramirez said exactly : “we should indemnify the book value of those assets”. The use of “should” clearly signifies a preference, not a definitive decision (which

⁸⁹ Ex-C. 190, para 23.

would have been the case had he said for example “we will only use” or indemnify book value”); which left the matter open to further negotiations.

193 - And indeed , Minister Ramirez started that part of his speech by noting that :

“Unlike ExxonMobil, it [ConocoPhillips] has requested and has maintained communications to an extent that makes it possible to reach an amicable solution to our dispute. We are working on that, and, as the Global CEO of ConocoPhillips expressed in past statements, we are on our way to reaching an agreement”.⁹⁰ And he closed that part of his speech by declaring that :“we are working with Conoco to resolve our controversy in these matters, and are closing the gap between our numbers”.⁹¹

That which was confirmed by the concordant statement of Mr. James Muleva, the CEO of ConocoPhillips around the same time, to which Minister Ramirez referred in his speech.⁹²

194 - These two contemporaneous statements clearly show that as late as February 2008, well after the initiation of the arbitration, the situation was not frozen and the positions of the parties were hopefully still moving towards a settlement, whence the mention by Mr. Ramirez that they were “closing the gap between [their] numbers”. But if Venezuela (the same as ConocoPhillips) was moving from its position towards that of the other parties, “to close the gap between [their] numbers”, how can

⁹⁰ *Ibid.*

⁹¹ Ex-C.196.

⁹² Public statement of Mr. James Muleva, reported by Reuters on 12 February 2008, in which he said : “We are continuing our discussions with PdVSA and the Venezuelan authorities...I believe we are making progress. It will take time. I would like to see and hope that we can come to some sort of solution to this in 2008...the objective is to reach an amicable solution so as not to follow the [arbitration] process through for a number of years” (Ex-R.117).

it be affirmed, as does the Majority, that “there is no evidence that Venezuela moved from its insistence on book value”?⁹³

195 - *To conclude on “book value”*, the findings of the Majority incorporate or are based on three presumptions, the first two of law, the last of fact, namely :

i - that “book value” is a *legal standard* of compensation, the same as “market value”;

ii - that it is necessarily, i.e. in all cases, a lower standard, yielding a lower outcome, than “market value”; and

iii - that during the second or “final period” of negotiations, Venezuela had not budged from its initial position and offer (of 29 March 2007), as witnessed by its continued “insistence on book value”, expressed by Minister Ramirez in Parliament in February 2008.

196 - Both the first two presumptions (of law) are plainly wrong. The above analysis has amply shown, concerning the first assumption

a) that “book value” is not a standard, and more particularly not a legal standard like market value, but merely an accounting method of computing value, once this value is legally determined in principle according to whatever legal standard; in other words,

b) that this method can be used for the computation of compensation determined according to any legal standard, including that of “market value”.

197 - Moreover (concerning the second assumption), even if we compare book value not with market value (which would be mixing apples with oranges) but, as should be, with the other accounting methodology

⁹³ Decision, para. 400.

chosen by the Claimants, the DCF, the “book value” method, in spite of its conservative slant, can yield less or more than the DCF method applied to the same asset or project valued, depending on the specific conditions of the valued asset or project and the assumptions accountants make about the present and future conditions of the particular market involved.

198 – None of the above was taken into consideration by the Majority, which based its finding on the mere use of the term, comforted in its interpretation by the confusion between the legal standard of compensation and the actuarial methods of its calculation.

199 - In the final analysis, the controversy over the invocation of “book value” may prove barren. For what ultimately counts, beyond nominalism or the label put on the sum of compensation offered (that on which the Majority based its argument), is the actual magnitude of this sum, and whether it reasonably corresponds to a standard of compensation that is *prima facie* objectively and legally credible *in casu*, regardless of the accounting method used to calculate this magnitude.

200 -- Finally, the third assumption (or is it rather a determination ?) made by the Majority, by inference from Minister Ramirez’ declaration of “*preference for*” (“*we should, indemnify book value*”), transformed by the Majority into “*insistence on book value*”, in February 2008, that Venezuela did not budge during the second period of negotiations from its initial position nor made any new proposals; this assumption goes well beyond the issue of “book value”. It is addressed in the next section.

b) - The absence of any evidence of proposals made by Venezuela during the second period of negotiations that bear specifically on compensation

201 - The Majority affirms, in the first sentence of paragraph 400 of the Decision, that [1] “The Tribunal does not have before it any evidence at all of the proposals made by Venezuela in this final period”. From this affirmation, together with what the Majority sees as Venezuela’s continued “insistence on book value”,⁹⁴ the Majority infers the presumption that during the second and final period of negotiations starting in April 2007, Venezuela did not move, nor did it make any further effort or offer beyond its initial position and proposition of 29 March 2007.

202 - This presumption is factually simply wrong; even if one goes only by what figures in the Majority’s narrative of the negotiations. Two examples suffice.

203 - (1) The covering letter of ConocoPhillips of 17 August 2007, transmitting its modified offer of exchange of assets, starts as follows :

“ConocoPhillips appreciates the verbal compensation proposal made to Roy Lyons on Monday 13 August, 2007. After consideration of this proposal, ConocoPhillips respectfully submits the counter-proposal reflected in the attached term sheet...”.⁹⁵

204 - The Majority cites only the first sentence in paragraph 397 of the Decision, thus recognizing that a new offer was made by Venezuela. But it hurries immediately to add : “... that offer does not appear anywhere

⁹⁴ Decision, para. 400, see discussion above, para. 176ff.

⁹⁵ Direct Testimony of Dr. Bernard Mommer, July 24, 2009, Annex No.5. See para.99 above.

else in the evidence”, as a prelude to its total disregard in reaching the conclusion that Venezuela did not budge or move from its initial position, which is the same as saying that it did not make any new offers; that which flies in the face of what it had just chronicled.

205 - (2) Addressing the National Assembly on 14 February 2008, Minister Ramirez though advocating (“we should”) the use of the book value accounting method, underscored, both at the beginning and the close of that part of his speech devoted to the dispute with ConocoPhillips, his optimism as to the success of the (then) ongoing negotiations; an optimism corroborated by the statement of Mr. Muleva, the CEO of ConocoPhillips, a few days earlier.⁹⁶ Particularly, Minister Ramirez, concludes that part of his speech, which is cited at length by the Majority in paragraph 399 of the Decision, with the following hopeful note : “We are working with Conoco to resolve our controversy in these matters, and are closing the gap between our members”.

206 - But if the parties are working together to resolve their controversy and “are closing the gap between [their] members”, this necessarily means that they are both moving from their initial positions, whatever these positions may have been (or may have been declared to be, in addressing certain audiences).

207- These two examples, chronicled by the Majority, clearly show that the position of Venezuela during the second period of negotiations over compensation for nationalization was not frozen at its initial station, but a moving one, making new offers, taking steps, etc., in an on-going negotiation.

⁹⁶ See *supra*, para,193 and footnote 92 above.

208 - It is true that the Tribunal did not have before it information about the contents of these offers and moves.⁹⁷ But that does not allow the Majority in logic or in law to feign ignoring that they took place and presume they never existed, in order to reach the result it seeks, namely a determination of fact that Venezuela not only did not move, but also implicitly that it never intended to move, from its initial position, and was thus negotiating all along in bad faith.

209 - Besides, if the immobility of Venezuela in its initial position is to be used, as the Majority clearly strives to do, as evidence of Venezuela's bad faith in negotiations, then what counts most, in proving or disproving it, is not so much the contents of any possible new moves or offers by Venezuela as the fact that they did or did not take place.

210 - In sum, deducing presumptively the absence of new offers by Venezuela during the second period of negotiations from the mere lack of information about their contents, in spite of their proven existence (as chronicled by the Majority itself) is a blatant logical aberration and a gross legal error. The more so as witnesses on both sides have invoked a Confidentiality Agreement concluded between the parties during that period, to decline providing the Tribunal with information about the

⁹⁷ The Tribunal did not have before it when the Decision was issued (3 Sept. 2013), the Wikileaks cables that the Respondent submitted to it soon after, as annexes to his letter of 8 September 2013. One of these cables describes in great detail the substantial moves of the Respondent towards the position of the Claimants. In this cable, dated 4 April 2008 and entitled "ConocoPhillips Briefs Ambassador on Compensation Negotiations", the US Embassy in Caracas reports to Headquarters on a meeting held on that day (4 April 2008) in which "Greg Goff [the Chief ConocoPhillips negotiator then] and ... Roy Lyons ... briefed the Ambassador on the state of compensation negotiations with BRV [Bolivarian Republic of Venezuela]". It reports *inter alia* that : "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 as agreed on fair market methodology with discount rates for computing the compensation for the expropriated assets. However, given the recent increase in oil prices, the fair market value of the assets have increased ... CP has proposed a settlement number and the BRV appears to be open to it". (EX-R.313, Annex 4). I analyze this cable in greater detail in my Dissenting Opinion appended to the Tribunal's "Decision on Respondent's Request for Reconsideration" of 10 March 2014, paras. 25ff.

contents of the negotiations; whence the contrived efforts of the Majority to do away with this Confidentiality Agreement.

c) - The discarding of the Confidentiality Agreement⁹⁸

211 - During the oral hearings, both Mr. Goff (ConocoPhillips negotiator)⁹⁹ and Dr. Mommer (Venezuela's negotiator)¹⁰⁰ invoked a Confidentiality Agreement between the parties which prevented them from saying anything about the negotiations during the latter period, apart from Goff saying that they went on for a long time.¹⁰¹

212 - The Majority Decision brushes aside any legal significance and effect of this Confidentiality Agreement when invoked in particular by Dr. Mommer to abstain from providing the Tribunal with any information about the course of the negotiations, necessarily including whatever offers made by Venezuela during that period; and this by adding immediately after the first sentence of paragraph 400 of the Decision :

[[1] "The Tribunal does not have before it any evidence at all of the proposals made by Venezuela in this period"), the following :

[2] " It [the Tribunal] observes that whatever confidentiality agreement there was has not prevented the submission to it by the Respondent of the ConocoPhillips proposals of June and August 2007".

213 - In other words, the Majority is saying that, notwithstanding the Confidentiality Agreement, had Venezuela made any reasonable offers

⁹⁸ This section is largely taken from my Dissenting Opinion appended to the Tribunal's "Decision on Respondent's Request for Reconsideration of 10 March 2014. The repetition proves necessary for the completeness and the continuous sequencing of the reasoning.

⁹⁹ Transcript, p. 684.

¹⁰⁰ *Ibid.* pp. 185 -7-8

¹⁰¹ *Ibid.* p. 684

during that period which could strengthen its position *in casu*, it would not have hesitated to put them before the Tribunal, as it did by submitting to the Tribunal the Claimants' proposals of June and August 2007, in violation of that Agreement.

214 - This reasoning of the Majority is revealing in more ways than one. Apart from a general attitude vis-à-vis the Respondent and particularly its principal witness, Dr. Mommer, it reveals an important *error in the establishment of facts* on the part of the Majority, by assuming that the Confidentiality Agreement was in effect in June 2007 (the date of the first counter-offer by ConocoPhillips, revised in August 2007),¹⁰² whilst it had on record before it evidence to the contrary. Indeed the question of the date of entry into force of the Confidentiality Agreement was put to Counsel for the Respondent during the oral hearings. His answer was that it did not come into force until November 2007.¹⁰³ This answer was neither challenged nor contradicted by the Claimants during the Hearings and was even confirmed by them later on.

215 - Thus, the Majority committed a *material error in establishing the facts*. But worse still, it drew from it by inference, a grave legal consequence: not only that the Respondent has breached its confidentiality obligation by submitting to the Tribunal the Claimants offers of June and August 2007, when that obligation had not yet come into being; but also, and *ex hypothesi*, that the Respondent would not have hesitated to do the same, *i.e.* submit to the Tribunal any proposition it would have made during the final period of negotiations, had they existed, in violation of its confidentiality obligation, which indeed

¹⁰² See *supra* para. 211ff.

¹⁰³ Transcript, p. 3705-6.

covered that final period. In other words, the Majority predicated, not on the basis of positive proof, but by divination or sheer fiat, a presumption – drawn from a single misconceived instance involving an error of fact – of a constant course of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes.

216 - And through this extraordinary speculative reasoning by hypothesis, extrapolated from an erroneously established fact, the Majority makes another affirmative finding of fact over something it admitted knowing nothing about, namely the possible offers Venezuela made or did not make during the final period of negotiations, which was indeed covered by the Confidentiality Agreement; an Agreement that was invoked by witnesses for both parties to justify their refusal to divulge the exchanges and offers made during that period.

217 - This affirmative finding of fact that the Respondent did not make any new offer, or rather that it stayed put in its initial position during that final period of negotiations, reached through the extraordinary speculative reasoning described above, is at the basis of the even more serious legal finding that Venezuela had not negotiated in good faith during that final period over compensation.

218 - Obviously, if the factual premise on which are based these legal findings - reached by speculative chain-reaction reasoning – turns out to be erroneous, as *in casu* , the whole legal edifice built on it crumbles down like a house of cards.

d) The presumption that the Compensation Clauses of the Association Agreements were not invoked by the Respondent during the negotiations

219 – Paragraph 400 of the Decision [4] reads :

“Nor is there any evidence that in this period [the second period of negotiations], the Venezuelan representatives brought the Compensation formulas in the Petrozuata and Hamaca Association Agreements into the negotiations”.

220 – This is a finding of fact,¹⁰⁴ on the basis of which the Majority posits a presumption

i - that the Compensation Clauses did not play any role, or rather were not at all invoked during the negotiations; and in consequence,

ii – that the Tribunal does not have to take them into consideration in answering the title-question of whether Venezuela acted in good faith or not in the negotiations over compensation.

221 – This finding, as well as the presumption built on it, are both wrong, for factual, rational (or logical) and legal reasons.

222 – But before going into them, it is important to grasp the full import of this finding in the reasoning of the Majority. For if evacuating the Compensation Clauses from the negotiations is a necessary step or condition – as it appears to be in paragraph 400 of the Decision – for reaching the conclusion that Venezuela was not negotiating in good faith, then had they been invoked, this conclusion could not have been reached.

¹⁰⁴ The Majority made the same finding in paragraph 394 concerning the first period of negotiations : “There is no evidence at all that the compensation formulas played any part in the negotiations between the Parties”. Thus, the finding and the presumption built on it cover the whole course of negotiations.

In other words, their invocation would have signified (or witnessed to) the existence of a *bona fide* dispute between the Parties over either

i – the legal standard of compensation, i.e. whether it is that of the Treaty or that of the Agreements; or over the interpretation of the standard of the Treaty, *i.e.* whether it integrates or not the Compensation Clauses of the Agreements; or

ii – over the adequacy of the compensation offered; which implies a *prima facie* estimation by the Tribunal of the reasonableness of the sums offered if the clauses were taken into consideration, hence the good faith of the party that invoked them. In other words, if the offer is *prima facie* reasonable or adequate, measured by the standard (or its interpretation) invoked by the State, even if this standard or its interpretation is contested by the other party, this State is deemed (according to the logic of the Majority) to have acted in good faith, regardless of the final decision of the Tribunal on this issue.

223 - The presumption this finding is thus making about the conduct of Venezuela throughout the negotiations over compensation, extending over more than a year from 29 March 2007 until well into 2008, is that beyond making an offer of a certain sum, calculated by whatever accounting methodology, Venezuela not only rejected the Treaty legal standard, but also kept silent, or refused to give any indication about the legal standard, or Venezuela's interpretation of it, that underlies and legally justifies its offer.

224 – This presumption is a tall story indeed. It sounds like a play on the theatre of the absurd or a Pinter scenario of incommunicability. For what were those high-ranking negotiators speaking about during the numerous long meetings they had over more than a year ? And why would the

representatives of ConocoPhillips continue, for such a long time, trying to negotiate with a dumb partner (while expressing optimism about the outcome) ?

225 – Besides, the Majority’s position is that it found “no evidence at all” in the record before it that Venezuela invoked the compensation clauses during the negotiations. This record is composed basically (if one goes by the references in the Decision, and apart from the pleadings of the Parties) of the written and oral testimonies of Dr. Mommer and Mr. Lyons, including the annexed ConocoPhillips’ trigger letters and the letters of 12 April 2007. But as the Majority went to enormous trouble to do away with Dr. Mommer’s testimony,¹⁰⁵ it relied exclusively on the Claimants’ narrative of the negotiations.

226 – However, both ConocoPhillips’ Counsel and witnesses, principally Mr. Lyons, totally avoided to mention in their narrative anything that might obstruct or deviate its thrust. For example, no one on the Claimants’ side even mentioned the counter-offer of ConocoPhillips in June and revised in August 2007,¹⁰⁶ although it was invoked by Dr. Mommer who produced the letters of ConocoPhillips. This is obviously because the counter-offer shed strong doubt on ConocoPhillips’ claim *in casu* of 30 billion US dollars.

227 – The same with the compensation clauses which the Claimants totally ignored in the Request of Arbitration and their Memorial; but referred to them very briefly in their Reply, given the strong emphasis on them in the Counter-Memorial of the Respondent. But the fact that the

¹⁰⁵ This was done by discrediting the Testimony, wrongly, as shown above in para. 79ff; or when that was not possible at all, by brushing it aside as being devoid of any evidentiary value, as shown below, para. 233ff

¹⁰⁶ Except for a very brief allusion to it in the Claimants Counsel’s closing in the oral hearings, dismissing it as transactional.

compensation clauses are not mentioned in ConocoPhillips' letters or by Mr. Lyons, because they are prejudicial to the Claimants' case, does not mean that they were not mentioned during the negotiations.

228 - The compensation clauses being one of the main arguments of the Respondent throughout the present proceedings, could not have been totally absent from the negotiations that preceded these proceedings. Indeed, although the Claimants' line during the proceedings was to belittle the relevance and importance of these clauses, no one on the Claimants' side contested that they were an outstanding issue or claimed that they were not raised during the negotiations. That last proposition comes directly from the Majority's wand.

229 - Be that as it may, the fourth sentence of paragraph 400, as a finding of fact that there is no evidence (paragraph 394, on the first period of negotiations adds "at all") that the compensation clauses were invoked during the negotiations, is *factually*, simply, incorrect. The Tribunal disposed of two indices in the record contradicting the Majority's findings; one direct, the other indirect.

230 – 1 –The indirect index is found in the oral testimony of Mr. Jeff W. Sheets, Claimants' witness, who was the treasurer of the Company during the crucial period 2005-2007. He was asked by Counsel to the Respondent "are you aware of any discussion at that time about these agreements [the Association Agreements] and the compensation provisions of these agreements and how they might relate to anything that was happening in Venezuela?". He answered "I was aware that the

discussions were happening within the Senior Management, but I was not involved in the detailed discussions about these”.¹⁰⁷

231 - That it be known to insiders that discussions were taking place within the Senior Management about the Agreements and their compensation provisions while the negotiations were going on, is highly significant in revealing that these compensation provisions were a live and worrying issue for the senior Management of ConocoPhillips in the negotiations taking place at that time.

232 – Of course, Mr. Sheets’ testimony does not give any indication about the contents of these internal discussions or on the way the issue was raised or approached in the negotiations. Still, it indicates that the issue was alive and living as one of the bones of contention in the then on-going negotiations.

233 - 2 – The second, direct, index or rather proof that the compensation clauses were invoked by the Respondent during the negotiations is found in Dr. Mommer’s “Direct Testimony” of July 24, 2009. Describing in paragraph 22 of this Testimony the revised counter-offer of ConocoPhillips of 15 August 2007,¹⁰⁸ he gives the reasons Venezuela rejected this counter-offer as follows :

“... it was ... completely unrealistic because it gave no consideration to the compensation formulas that had been negotiated and agreed at the outset of the Petrozuata and Hamaca Projects and did not even reflect the true value of the interests at issue without considering those formulas”.

¹⁰⁷ Transcript, p. 1547. The Majority refers to this testimony in the Decision, in footnote 394 in the descriptive part of “The submissions of the Parties”; but does not revert to it or take it into consideration in its “assessment of the evidence relating to the negotiations” (title atop para. 382 of the Decision).

¹⁰⁸ See above, para.99ff.

234 – Giving no consideration to compensation clauses being the first and foremost reason for Venezuela’s rejection of the modified counter-offer, it goes without saying that it was the justification given to ConocoPhillips for this rejection in the course of the negotiations that went on for several months beyond that date. But the Majority chose another interpretation of Dr. Mommer’s Testimony, that incites in reaction *the rational (or logical) reasons* confuting the finding and presumption of the Majority.

235 – Commenting on the last sentence of paragraph 22 in Dr. Mommer’s Direct Testimony (reproduced in paragraph 233 above) - in which he gives the failure to take into consideration of the compensation clauses as the first and foremost reason for the rejection of ConocoPhillips’ modified counter-offer – the Majority writes, in paragraph 396 of the Decision :

“Except for the final sentence, these paragraphs [21 and 22 of Dr. Mommer’s Direct Testimony] do no more than purport to summarise the substance of the two proposals which appear as Appendices to Dr. Mommer’s Testimony ... It will be observed that his comment in the final sentence is not presented as an account of a reason given by the Venezuelan authorities in June and August 2007 to ConocoPhillips for rejecting the proposals”.

236 – This statement is a rare (perhaps unique) example in the annals of judicial and arbitral decisions, of wishing away (by fiat ? or magic ?) cumbersome or embarrassing evidence. In fact, what the Majority is saying in this seemingly off-handed remark, is that Dr. Mommer’s first hand testimony (he being the chief negotiator for Venezuela), that the failure to take into consideration the compensation clauses was the main

reason for Venezuela's rejection of ConocoPhillips' counter-offer, should not be taken to mean that this reason was ever expressed or given in the negotiations with ConocoPhillips to explain or justify this rejection.

237 – The rationale of this highly imaginative interpretation, is simply that this crucial piece of information, that the Majority describes as a “comment” (another mischaracterisation, not to say misrepresentation) was “presented”, *i.e.* written as a direct statement, rather than taking the form of a scenario or a dialogue of the kind “we told them”, “they told us”, which is used in Mr. Lyons' three letters of 12 April 2007 and later on in his “witness statement”.

238 – Apart from the simple answer of difference in style, as witnessed by the terse two written testimonies of Dr. Mommer, and his short incisive answers in cross-examination, the essay of the Majority to explain away this crucial, from the horse's mouth, piece of evidence, is truly baffling. It strives to make us believe that Dr. Mommer, with this issue of the compensation clauses looming large in his mind as one of the strongest economic and legal arguments, if not the strongest one at his disposal as chief Venezuelan negotiator, kept it to himself, mulling over it in his internal forum (*dans son for intérieur*) as the French say, but refrained from using it as trump card in negotiating with ConocoPhillips. This attempt to interpret the compensation clauses out of the Testimony and out of the negotiations flies in the face of the obvious; like trying to play Hamlet without the Prince.

239 – The last sentence of paragraph 22 in Dr. Mommer's Direct Testimony is also significant in another way. For it reveals the understanding of Venezuela of the relationship between the compensation clauses and the

market value. It explains why Venezuela rejected the Claimants' modified offer in the following terms :

“.. because it gave no consideration to the compensation formulas ... and did not even reflect the true value of the interests at issue without considering those formulas”.

In other words, Dr. Mommer considers, as any seasoned economist like him should (for the elementary economic considerations expounded above, paras. 36-37), that the true value of the interests, *i.e.* their market value, includes the taking into consideration of the compensation clauses *i.e.* that these clauses are not an alternative standard to that of the market value, but are an integral part or component of it.

240 – Turning to the *legal considerations* that confute the Majority's presumption described in paragraph 220 above, and more particularly its second part, it may be useful to recall the gist of this part of the presumption; namely that since the Tribunal found that the compensation clauses were not invoked by Venezuela during the negotiations, the Tribunal does not have to take them into consideration in answering the title-question whether Venezuela negotiated compensation by reference to the Treaty Standard in good faith or not.

241 – However, in paragraph 402 of the Decision, the Majority makes the following “without prejudice” reservation :

“The Tribunal emphasizes that it does not at this stage make a finding in respect of the relevance, if any, of the compensation formulas included in the Petrozuata and Hamaca Associations Agreements to the determination of the quantum of the compensation payable in this case”.

242 – The logical and legal contradiction between the two propositions of the presumption and the “without prejudice” clause is glaring. For how can the Tribunal decide on the merits, by answering, as envisaged by the presumption, the subjective question of whether Venezuela negotiated the compensation in good faith or not by reference to the Treaty standard, without deciding first, at least on a *prima facie* basis, the legally and logically prior issue that is left open by the without prejudice clause,¹⁰⁹ and on the solution of which depends the answer of the subjective question ? But as this point has been already treated (see above para.134ff) there is no need to expatiate on it here any further.

**e) No offer of compensation was made during the negotiations
for the Corocoro Project**

243 – Paragraph 400[5] of the Decision reads :

“Finally, at this stage too [*i.e.* the second period of negotiations, like the first] there was no proposal for compensation in respect of ConocoPhillips’ assets in the Corocoro Project as Dr. Mommer appeared to confirm in cross-examination”.

244 – This is true. But as Dr. Mommer explained in cross-examination, they were concentrating on the two big projects, Corocoro being much smaller and had not started production when it was nationalized. He also said that they were preparing an offer for Corocoro, but never came to finalize

¹⁰⁹ This without prejudice clause, by expressly leaving the issue of the compensation clauses open, has also reversed the implied earlier finding or presumption by the Majority that the initial offer of the Respondent was “grossly inadequate” (following in that the Claimants’ contention, without any further verification), which was a necessary precondition for the Majority’s bifurcation into the subjective question. See above, para.142ff

it.¹¹⁰ That which was confirmed by Mr. Lyons in his letter of 12 April 2007, concerning Corocoro, where he relates that in the meeting of 31 March 2007 they (ConocoPhillips representatives) were told by their Venezuelan opposite members, “that such an offer would be forthcoming”;¹¹¹ though finally none came. In other words, the intention was there, but it did not translate into a concrete offer.

245 – Two further remarks on this rather non-controversial point. The first is that as the Project had not started production at the time of nationalization, the computation of the compensation, whatever the legal standard according to which it is determined, can only be by an asset-based methodology. Indeed, in spite the valiant efforts of LECG to prove the contrary, there is a very large consensus among the accountants and the cases that dealt with the subject that income-based methodologies and particularly DCF, are totally unsuitable in such a case, as there is no income yet to calculate on its basis, and any modelings or calculations on their basis would be speculative to an unacceptable degree.¹¹²

246 – The other more important remark is of a legal nature : The fact that no offer was made is confined to the Corocoro Project and does not, nor can

¹¹⁰ Transcript, 1862-3.

¹¹¹ EX.C.241.

¹¹² See *World Bank Guidelines on the Treatment of Foreign Direct Investment*, International Legal Materials, Vol. 31, No. 6 (November 1992), pp. 1363-1384 and 1376. Also *Asian Agricultural Products Limited v. Sri Lanka*, Final Award on Merits and Damages, ICSID Case No ARB/87/3, 27 June 1990, para. 96, 101-108; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case ARB/84/3, Award, 20 May 1992, paras 188-189; *Metalclad Corporation v. The United Mexican States*, ICSID case No.ARB(AF)/97/1, Award of 30 August 2000, paras. 120-122; *Tecnicas Medioambientales Tecmed SAS v. Mexico*, Award, ARB(AF)/00/2, 29 May 2003, para. 186; *Wena Hotels Limited v. Egypt*, Award, ICSID case ARB/98/4, 8 December 2005, paras. 123-125; *Siag and Vecchi v. Egypt*, Award, ICSID case No ARB/05/15, 1 June 2009, paras. 566-570; *Gemphus SA and others v. Mexico*, Award, ICSID Case No ARB(AF)/04/3, 16 June 2010, para. 13-70 to 13-72 and *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. Mobil Cerro Negro, LTD. AND Mobil Venezolana De Petroleos, Inc .v. The Bolivarian Republic of Venezuela*, ICSID Award Case No. ARB/07/27, 9 October 2014, para. 382.

it in law, affect or undermine the separate offers made for each of the two much bigger projects.

B - Other serious legal defaults of the Decision

1) *The Decision lacks “motivation” on a crucial point of its*

Findings

247 – In paragraph 401 of the Decision, the Majority provides its conclusions reached on the basis of the grounds it enumerates in the preceding paragraph 400 (critically examined in Part II A of this Opinion) :

“401. [1] The Tribunal accordingly concludes that the Respondent breached its obligations 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 [2] and that the date of the valuation is the date of the Award”.

248 - Remarkable at first glance in these findings is that the Majority attributes to what it considers (in [1]) a breach of an obligation of the BIT¹¹³, the legal effect, as it sees it (in [2]) of an unlawful nationalization.¹¹⁴

249 - Even if one assumes, *arguendo*, the correctness of both statements (which I strongly refute), there remains logically a missing link between them (in fact the major premise in the Majority’s legal syllogism, of which [1] and [2] are respectively the minor premise and the conclusion); a link that the Majority forgot or did not dare to articulate. It can be expressed as follows : - that the breach of the presumed obligation

¹¹³ A highly contestable finding as shown above, para...

¹¹⁴ Decision, para. 343 : “... if the taking was unlawful, the date of valuation is in general the date of the award”. Again a highly criticable finding.

(beyond providing for just compensation) to negotiate in good faith the compensation by reference to the standard of the Treaty as interpreted by the Claimants, renders the nationalization illegal. The omission is understandable because of the patent untenability of such a proposition.

250 – 1) In the first place, the presumed obligation to negotiate compensation in good faith, by reference to the Treaty standard, as interpreted by the Claimants, has no basis in the BIT or in general international law (above, para. 112ff), hence no legal consequences or sanctions on its own. All the Treaty, as general international law require is that expropriation be against just or fair compensation.

251 – If the State provides for such compensation, on or around the time of expropriation, by whatever means it chooses, for example by offering a sum or opening a procedure for its determination, it would have acquitted itself of its obligation; whether this has been done within or outside any negotiations, and regardless of how these negotiations were conducted and of their success or failure.

252 - In other words, the only question that this condition requires a tribunal to answer at the preliminary stage of deciding on the legality of the expropriation, is whether the expropriating State provided for compensation, and if it did, to ascertain that what was offered was not “illusory” amounting to a refusal to pay compensation.

253 – If the answer to these two questions is in the affirmative, the expropriation is lawful (provided it satisfies the other conditions). This remains the case regardless of any dispute that may arise between the parties over the standard or quantum of the compensation¹¹⁵. Such a

¹¹⁵ See *i.a. Compania del Desarrollo de Aanta Elen SA v. Costa Rica*, Final Award, iCSID Case No ARB/96/1, 17 February 2000, paras. 68-74.

dispute, or the negotiations that might take place to resolve it, have nothing to do with the legality of the expropriation.

254 – 2) Secondly, if the Majority did not make an express finding of illegality of the expropriation, because it could not base it on its first finding (that the Respondent did not negotiate in good faith), while unable to derive its second finding (that the date of valuation is that of the award) directly from, and as a consequence of its first finding; in other words, if there is no way for the Majority to evade making an express finding of illegality in order legally to justify its second finding, on what other legal basis could it have founded such a declaration of illegality ?

255 – i- Invoking the *Chorzow Factory* case,¹¹⁶ as does the Majority does not help in that regard. The Majority invokes it to argue that “the compensation payable in respect of an unlawful taking of an investment” in breach of a treaty obligation, cannot be determined according to the standard of that treaty set for compensation of lawful expropriations. It refers to the *Chorzow Factory* judgment – according to which the decision in such a case must be according to customary, *i.e.* general international law - in order to reach the result it seeks, namely that the valuation date should be that of the award.¹¹⁷

256 – But this is a pure exercise of circular thinking, for it starts by postulating what it is supposed to establish, namely the illegality of the expropriation. Even if one accepts that in case of an illegal expropriation (which is different from a violation of the treaty), the standard of the treaty for the compensation of expropriation does not apply (a much

¹¹⁶ *PCIJ, Rec.*, Series A No 17, Judgment No. 13 (Merits), (Sept. 13, 1928), pp. 46-47.

¹¹⁷ Decision, para. 342.

controverted proposition over which doctrine and cases are divided¹¹⁸), what is the solution provided by general international law ? It can be found in the *Chorzow Factory* judgment itself. It has to start by characterizing the breach itself under general international law, because one cannot characterize an act under one law and attach to it legal effects derived from another law.

257 – Cutting through the maze and mystification that surrounds this old case, the solutions it lays down as being those of customary international law are relatively simple. It distinguishes between two types of breach of treaty obligations in the context of expropriation. The first is where the treaty prohibits the very act of expropriation, as in the *Chorzow Factory* case itself, where the purpose of the treaty was not so much the protection of their economic interests as the guarantee of the continued existence of the German settlers in the newly established States of East Europe after WWI. In this case, expropriation in violation of such prohibitive provisions renders the expropriation illegal *ab initio*, begetting the legal consequences of illegal expropriation. The other case is where the right of the State to expropriate is not limited as such. The

¹¹⁸ The *Middle East Cement* Tribunal, after concluding that the measures taken by the Respondent were measures the effects of which amounted to expropriation in terms of Art. 4(a) of the BIT because not taken following due process of law, concluded that the Claimants was entitled to compensation in accordance with the standard of Art. 4(c) of the BIT was due by the Respondent (*Middle East Cement Shipping and Handling Company SA v. Egypt*, Award, ICSID Case No ARB/99/6, 12 April 2002, paras. 139-144). The *Funnekotter* Tribunal also followed this line of reasoning and clearly stated that the standard of compensation in the controlling BIT (“just compensation” and “genuine value” in Art. 6(c) of the Netherlands-Zimbabwe BIT) and the standard in customary international law, were identical. See *Bernardus Henricus Funnedotter and oterhs v. Zimbabwe*, Award, ICSID Case No ARB/05/6, 22 April 2009m para, 115. Similarly in *Franz Sedelmayer v. the Russian Federation*, after finding that the Respondent had failed to prove the public purpose of the taking and hence concluding that it had breached Art. 4(1) of the BIT, the Tribunal decided that the Claimant was entitled to compensation in accordance with Art. 4(2) OF THE bit. (*Franz Sedelmayer v. the Russian Federation* , SCC Award, 7 July 1998, pp. 17-18). See also the *Tecmed* case where the Tribunal found that the non-renewal of a permit allegedly due to political pressure, did not fulfill the condition of public interest and hence constituted a breach of Art. 5(1) of the BIT, it applied for the purposes of calculating the awarded compensation, the standard of compensation agreed by the BIT parties in Art. 5(2) of the BIT (*tecnicas Medioambientales Tecmed SA v. Mexico*, Award, ARB/AF/002m 29 May 2003, paras. 128,187,188.

Court which seems to confine the term – expropriation- to this case, describes it as one “to render which lawful only the payment of fair compensation would have been wanting”¹¹⁹, and defines the fair compensation due in this case as “limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment”.¹²⁰ Thus, the non-payment of compensation, according to the Court, in cases where the right of the State to expropriate is not restricted, does not entail a change in the standard of compensation, which remains that of fair or just compensation; the expropriated interests to be valued at the time of the taking. In other words, the non-payment of compensation does not render the expropriation illegal, as the Court does not attach to it the legal effects of an illegal expropriation, but the obligation to pay fair compensation remains outstanding.

258 – Applied *in casu*, the first case corresponds to the cases provided for in Article 6(b) of the BIT. It is to be recalled that the Tribunal has unanimously rejected the part of the Claimants’ claim based on that provision.¹²¹ This also means that the expropriation of the interests of the Claimants *in casu* falls under the second case, according to the *Chorzow Factory* analysis.

259 – ii - Moving beyond *Chorzow* up to the present, a survey of the cases where a tribunal declared an expropriation illegal for non-payment of compensation shows that all of them, without any exception, fall in either one of two categories :

¹¹⁹ *Supra*, note 116, p. 46.

¹²⁰ *Ibid.* p. 47.

¹²¹ Decision, paras. 334-352, particularly 352.

i- cases where expropriation was contested by the State party but was found, by the tribunal, to be “creeping”,¹²² or “indirect”¹²³ expropriation; or

ii – cases where the expropriating State clearly refuses from the outset to pay compensation and consequently makes no offer.¹²⁴

260 – Obviously, the expropriation *in casu* does not fall in either of the two above categories. It was not “creeping” or “indirect” as it was effected through open legal processes and instruments; and was preceded by a concrete offer.

261 - iii - Remains, as potential ground of illegality, the Claimants’ contention that the offer was “grossly inadequate”, meaning “illusory” or negligible amounting to a refusal to pay compensation and thus falling in the second above category. Apart from the fact that an offer of 2.3 billion US dollars is hardly negligible, and in spite of the wide ranging estimations of the Claimants, it is worth recalling that this offer corresponded almost exactly to the internal estimates of the two Projects

¹²² *Siemens AG v. Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8, 6th February 2007, paras. 263 and 273; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, Award, ICSID Case No ARB/05/16, 29 July 2008, para. 708.

¹²³ *Middle East Cement Shipping and Handling Company SA v. Egypt*, Award, ICSID Case No ARB/99/6 (2003) 12 April 2002, paras. 103, 110; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, Final Award on jurisdiction, merits and damages, ICSID Case No ARB/03/16, 2 October 2006, para. 383; *Compania de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, Award, ICSID Case No ARB/97/3, 20 August 2007, paras. 7.5.11 et seq. and 7.5.24; *Saipem SpA v. Bangladesh*, Award, ICSID Case No ARB/05/7, IIC 378 (2009), 30 June 2009, para. 129; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, Award, ICSID Case No ARB/06/11, IIC 561 (2012) 24 September 2012 at para. 455.

¹²⁴ *Wena Hotels Limited v. Egypt*, Award, ICSID Case No ARB/98/4, 8 December 2000, para. 76; *Bernardus Henricus Funnekotter and others v. Zimbabwe*, Award, ICSID Case No ARB/05/6, 22 April 2009, paras. 99-102 and *Burlington Resources Incorporated v. Ecuador*, Decision on liability, ICSID Case No ARB/08/5, 14 December 2012, paras. 543-545.

by the Claimants themselves, dated October 2006 and January 2007, just a few months before the expropriation (above, para. 154ff).

262 – This is not, however, the main point here. What is crucial is the fact that this contention has not been examined, verified or pronounced upon in the Decision, though the unfolding reasoning of the Majority left one with the impression that the Majority has admitted it implicitly. But at the penultimate page of the text, the “without prejudice” reservation of the Majority in paragraph 402 - that the Tribunal had made no determination on the possible relevance of the compensation clauses to the determination of the quantum of the compensation - negated this impression of an implicit finding or presumption of illegality of the expropriation (on the basis of the gross inadequacy of the initial offer).

263 – However, without a decision of the Tribunal on the question of the relevance of the compensation clauses, it cannot pronounce itself on the adequacy or gross inadequacy of the Respondent’s offer, which in turn is needed as prerequisite for any decision it might take on the legality of the expropriation.

264 – We thus have a Decision the main finding of which – that of the illegality of the expropriation – cannot be found anywhere in its text. It has to be deduced by implication from another finding, an express one this time – that the date of valuation is that of the award – which is an alleged legal effect of an illegal expropriation.

265 – Being implicit means that this major finding is not given any clear and precise legal justification and grounding in the Decision, *i.e.* any legal “motivation”. It is true that certain potential grounds, such as the *Chorzow Factory* judgment are mentioned in discussing the legal issues in general. But as the above survey shows, none of the potential grounds

is applicable (or even possible) *in casu*. And in any case none is specifically designated by the Decision as legal ground for its finding that it did not pronounce explicitly and did not include in its *dispositif* of paragraph 404.

266 – The Decision thus leaves us with an amusing legal riddle, to guess and find for ourselves what can be the legal ground of the non-pronounced determination of illegality of expropriation. Hardly a “judicial motivation”.

267 – If one interprets charitably the Decision, considering that it did not make a finding of illegality of the expropriation, as it does not appear in the *dispositif* of paragraph 404, the dilemma remains whole. For, under this interpretation the finding of paragraph 404(e) – that the date of valuation is the date of the award – will be left hanging in the air, without any legal ground to stand on.

2) *Serious departures from Due Process*

268 - The Decision takes great liberty with the principles and rules of procedure, particularly in relation to evidence and the burden of proof, some of which constitute serious departures from due process. A few examples suffice.

269 - a) A glaring example of the temperamental way of the Majority in handling proof, is the variable geometry it showed in dealing with the issue of good faith in two different parts of the Decision. In examining, under jurisdiction, a preliminary objection based on the concept of “corporations of convenience”, the Tribunal starts its analysis with the following sentence :

“It [the Tribunal] will do that bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one”.¹²⁵

270 – This follows closely the classical dictum on the subject in the *Tacna-Arica* Arbitration (1925) :

“A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion”¹²⁶

And indeed, the present Tribunal, unanimously, rejected the objection.

271 – However, when it came to the proof of bad faith of the Respondent in the negotiations over compensation, the Majority relies exclusively on inference from hypothetical premises extrapolated from partly erroneous findings of fact, as abundantly shown above (*e.g.* para.211ff)

272 - b) Another example is provided in paragraph 393 of the Decision, in which the Majority enumerates the indices it uses to conclude, in the following paragraph, that the Respondent did not negotiate in good faith during the first period of negotiations. The indices it cites are basically that the Respondents’ representatives did not answer the Claimants’ letters of 12 April 2007, and did not reject a statement attributed to them that compensation will not be based on market value. In other words, the Majority posits that not answering letters immediately and not rejecting what they attribute to the recipient, are sufficient proof of the veracity of the contents of those letters; even when these contents are vigorously contested later on in litigation. A truly innovative rule that has no

¹²⁵ Decision, para. 275.

¹²⁶ R.I.A.A. vol. 2, p. 930.

equivalent in any system of procedure and particularly not in international procedural law.

273 – Even more interesting are the last two sentences of the same paragraph 393 of the Decision, which read :

“ The Tribunal does of course recognize, in terms of the ruling made earlier in this decision that the royalty and tax changes are not in its view in breach of the BIT. But that was not known to the Parties at that stage of their negotiations.”

274 - This unsolicited defense of the attitude of the Claimants claiming much beyond the market value of the assets in the negotiations, by invoking that they didn't know they had no right to that addition, strongly contrasts with the highly suspicious attitude towards the Respondent. For had the Majority had the same solicitude towards the Respondent, it could have found a parallel excuse on their behalf : that even if Dr.Mommer, had really said that Venezuela would not pay market value (which he forcefully rejected), such a statement could be explained by the fact that he was thinking of the compensation clauses in the Agreements (which he probably was) as qualifying the market value (and which are not ruled upon yet anyway, in contrast to the claim of compensation for royalty and tax charges which was dismissed by the Tribunal) .

275 - c) A third example is the treatment by the Majority of the testimonies of Dr. Mommer, which has been described at different junctures of this Opinion.

276 – To recapitulate briefly, the Majority in reconstituting in its analysis the process of negotiations, limited itself to the documentary evidence put before it specifically for that purpose. And as the Claimants, since their trigger letter of January 2007 were clearly preparing a litigating file,

while Venezuela was, probably for the same reason, suspicious of epistolary negotiations, the Majority relied heavily on ConocoPhillips' sources. All it had before it from the Venezuelan side were the testimonies of Dr. Mommer; and even the letters appended thereto were letters from ConocoPhillips, not from Venezuelan sources. And it is these testimonies of Dr. Mommer that the Majority systematically discredited, and where it could not, it discarded as irrelevant.

277 – Thus, in discrediting Dr. Mommer's refutation of the statement attributed to him that Venezuela will not pay market value, the Majority restates his response as "he did not think he had said [so]"¹²⁷. Then the Majority immediately discredits this testimony by describing it as a "general denial, made only at the hearings and not in the two rounds of written testimony".¹²⁸ This expeditious dismissal is based on two basic errors. In the first place, the Majority suddenly forgets a paragraph in Dr. Mommer's first "Direct Testimony", filed almost a year before the oral hearings, that the Majority reproduces in the Decision,¹²⁹ three pages before, in which he generally but firmly rejects such allegations. The second error is in reporting Dr. Mommer's answers in cross-examination, which verges on misrepresentation of his twice forceful answers, first politely "I don't think I ever said something like that", then more directly "I think that witness statement [Lyons'] is incorrect" (see above, para. 79ff).

278 – Then again, in trying to prove that the Confidentiality Agreement would not have restrained Venezuela from submitting to the Tribunal any new proposals it would have made during the second period of

¹²⁷ Decision, para. 392.

¹²⁸ Decision, para. 393.

¹²⁹ Decision, para. 385.

negotiations, had it made any; the Majority gives as proof the fact that Dr. Mommer submitted as annexes to his first testimony the two letters of ConocoPhillips containing their counter-offers of June and August 2007. The Majority was thus assuming that these counter-offers were covered by the Confidentiality Agreement, and were submitted all the same. It extrapolates from this a presumption of a constant course of conduct on the part of Venezuela that it would not hesitate to act in violation of its obligations, in order to advance its interests. But all that hypothetical construction is built on an error of fact, as the Confidentiality Agreement had not been concluded yet when the two letters of ConocoPhillips were sent in June and August 2007 (see above, para. 211ff above).

279 – Finally, the explanation in Dr. Mommer’s first “Direct Testimony” that the first and foremost reason for Venezuela’s rejection of ConocoPhillips’ counter-offers was that they did not take into consideration the compensation clauses in the Associations Agreements, could not logically be discredited. But the Majority discarded it all the same as irrelevant, on the artificial argument that his explanation that this was an overriding consideration for Venezuela’s rejection of the counter-offer, does not mean that it was invoked or mentioned in the negotiations (above para. 219ff).

280 – All these inferential acrobatics and liberties taken with the rules of evidence and procedure were necessary for the Majority to eliminate the main obstacle to attain the result it sought to reach, namely that the initial offer of Venezuela was wanting and that no other effort was made later on.

d) a fourth example is also given in paragraph 284 below.

3) *The Decision is Ultra Petita hence Ultra Vires*

281 – In paragraph 404, constituting the *dispositif* of the Decision, the Majority finds that :

“...(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”.

282 – This is the very first time in the huge record of this case, comprising hundreds of thousands pages of written and oral proceedings, that the issue of good faith of the Respondent in the negotiations over compensation appears; in the Decision on the Merits. No such claim of bad faith appears in any of the Claimants’ submissions, from the Request of Arbitration to the post-hearings briefs. Nor was it raised or contended by any of their Counsel and witnesses in the oral hearings. Nor was it raised by way of question to the Parties from the bench. An utter decision by surprise.

283 - As it does not respond to any submission of the Parties, this finding is *ultra petita*, *i.e.* it lies beyond the requests of the Parties which define *inter alia* the ambit and limits of the jurisdiction *ratione materiae* of a tribunal in a given case; and as such the decision bearing this finding is *ultra vires*.

284 – Besides, considered from a procedural point of view, the manner in which this matter was handled leaves much to be desired. The Majority centered its decision on an issue that had not been raised or addressed by the Parties, and to which their attention was not drawn by the Tribunal to

illicit their opinion. In particular, the Respondent, who was found responsible for a most serious internationally wrongful conduct on that basis, was not given the opportunity to present its position on the matter.

285 – By proceeding in this manner, the Majority committed a serious violation of the procedural rights of the Parties, particularly the Respondent, and of the fundamental principle of even handedness and equality of arms between the Parties; that which constitutes a serious departure from due process.

* * * * *

For all these reasons, I dissent from the findings of the Tribunal
under (d) and (e) of paragraph 404 of the Decision

[signed]

Georges Abi-Saab

19 February 2015