

ICSID/ARB/07/30
ConocoPhillips Petrozuata B.V.
ConocoPhillips Hamaca B.V.
ConocoPhillips Gulf of Paria B.V.
and ConocoPhillips Company
v. Bolivarian Republic of Venezuela

Andreas Bucher
February 9, 2016

Dissenting Opinion in relation to the Application for Reconsideration of part of the Decision on the Merits

I. Introduction

1. My welcome as a member of the Tribunal freshly reconstituted on August 10, 2015 was marked by the filing, the very same day, of Respondent's Application for Reconsideration of the Tribunal's Decision on Respondent's [first] Request for Reconsideration of March 10, 2014 (the "Majority Reconsideration Decision"). This Second Application caused Claimants to respond in their letter of August 12, 2015, followed by comments contained in Respondent's letter of the same day, which was addressed in turn by Claimants' response by letter of August 13, 2015, again answered by Respondent through its email of August 14, 2015. It is common knowledge that Respondent's initial and renewed requests relate to the Tribunal's Decision on Jurisdiction and the Merits dated September 3, 2013 (the "Majority Merits Decision"). My learned Colleagues on the Tribunal's bench have decided to maintain their initial position taken in the "Majority Reconsideration Decision", well aware (in light of my notes submitted on August 18 and September 9, 2015) that it will again remain a majority ruling, associated to a new dissent as stated below, which adds support to Professor Abi-Saab's Dissenting Opinion of March 10, 2014. The refined thoughts contained in a recent article¹, on which the Parties have filed comments on January 22, 2016, did not have the effect of changing my Colleagues' categorical position, resulting in the Majority's Decision on Respondent's Request for Reconsideration of the Tribunal's Decision of 10 March 2014, dated February 9, 2016 (the "Second Majority Reconsideration Decision", or the "Renewed Version").

¹ CHARLES N. BROWER/PAULA F. HENIN, Res judicata, *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, in *Building International Investment Law, The First 50 Years of ICSID*, ed. by Meg Kinnear *et al.*, Alphen aan den Rijn 2016, p. 55-69.

II. *Scope of Opinion*

2. As I understand from the Respondent's Application for Reconsideration dated August 10, 2015, the Tribunal is seized, and has been seized through the earlier Respondent's Request for Reconsideration of September 8, 2013 with a factual pattern that allegedly points to "certain obvious factual, legal and logical errors" in the Majority Merits Decision of September 3, 2013, "the correction of any one of which would require a change in the majority's conclusion on the issue of good faith negotiation" (Respondent's Application, page 2).

3. When it was seized with the matter in September 2013, the Tribunal came to the conclusion that "it does not have the power to reconsider the Decision of 3 September 2013" The conclusion thus reached in the Majority Reconsideration Decision means that the Tribunal did not enter into any examination of the relief Respondent was seeking through its September 8, 2013 Request.

4. I understand that Respondent's objective expressed in its August 10 Application is limited to request the Tribunal to accept that its Decision of March 10, 2014 may be revisited. The Tribunal is only asked to declare being capable of revisiting the Majority Merits Decision of September 3, 2013 on the basis of Respondent's allegations contained in its two requests for reconsideration, these allegations being subject of further development once a ruling is made that such proceeding is opened.

5. When considering the here relevant part of the Majority Merits Decision of September 3, 2013 that the Majority places beyond its power of judgment any further, I would suggest to examine the matter from two different perspectives: (1) the content and effects of the decision (III, paras. 6-22) and (2) its purported binding effect (IV-VII, paras. 24-80).

III. *The Tribunal's Decision*

6. It is worth recalling the precise terms of the *dispositif* of the Tribunal's Decision on Jurisdiction and the Merits:

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

- a. It does not have jurisdiction under Article 22 of the Investment Law and accordingly the claims by ConocoPhillips Company are dismissed; and
- b. It has jurisdiction under Article 9 of the Bilateral Investment Treaty over:
 - i. the claims brought by ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV in respect of (1) the increase in the income tax rate which came into effect on 1 January 2007 and (2) the expropriation or migration; and
 - ii. the claims brought by ConocoPhillips Petrozuata BV and ConocoPhillips Gulf of Paria BV in respect of the increase in the extraction tax in effect from 24 May 2006.
- c. All claims based on a breach of Article 3 of the BIT are rejected.

- d. The Respondent breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value as required by Article 6(c) of the BIT.
- e. The date of valuation of the ConocoPhillips assets is the date of the Award.
- f. All other claims based on a breach of Article 6(c) of the BIT are rejected.
- g. All other questions, including those concerning the costs and expenses of the Tribunal and the costs of the parties' determination are reserved for future determination."

7. Under letter b), the decision is grounding its jurisdiction on claims made by Claimants on the basis of the BIT only.

8. For present purposes, the claims related to increases in taxes as referred to under letter a (i) and (ii) are not to be considered, as they are unrelated to Article 6 of the BIT and particularly to Article 6(c). The claim to be looked at is what the Tribunal identified as the "claims brought by ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV in respect of [(1) ... and] (2) the expropriation or migration".

9. Claimants' Request for relief raised in this latter respect reads, in relevant part, as follows:

- "(a) DECLARE that Venezuela has breached:
 - (i) Article 11 of the Foreign Investment Law and Article 6 of the Treaty by unlawfully expropriating and/or taking measures equivalent to expropriation with respect to ConocoPhillips' investments in Venezuela;
[...]
 - (b) ORDER Venezuela to pay damages to ConocoPhillips for its breaches of the Foreign Investment Law and the Treaty in an amount to be determined at a later stage in these proceedings, including by payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate;
 - (c) AWARD such other relief as the Tribunal considers appropriate;
[...]"

10. In light of these references, Claimants' claims that are to be retained for present purposes are the claim for a declaration on a breach of Article 6 of the BIT in matters of expropriation and migration, followed by a claim to pay damages for Respondent's violation of the Treaty, *i.e.* Article 6 of the BIT.

11. The Tribunal's Decision on the Merits has affirmed Respondent's breach of its obligation to negotiate in good faith for compensation based on the market value as required by Article 6(c) of the BIT. It can be easily verified that no such claim was contained in Claimants'

Request for Relief. It is my understanding that no such claim has ever been made by Claimants elsewhere in the course of this proceeding.²

12. Such claim is not contained either in the relief requesting the Tribunal to “Award such other relief as the Tribunal considers appropriate”. In any event, even if this would be the case, such relief is not included in the claims over which the Tribunal asserted its jurisdiction.

13. It may also be noted that in its Procedural Order No. 3 of June 12, 2010, the Tribunal did not consider the matter relevant for being dealt with as an issue to be added to the “claims” not dismissed for lack of jurisdiction. This addition was made in paragraph 334 of the Decision at the Tribunal’s own initiative, and it was identified as nothing more than one of “four issues” to be dealt with as part of “several issues” arising out of Article 6 of the BIT. Such “issue” did not represent or reflect a dispute dividing the Parties and calling for a legal determination.

14. If these observations are taken as the basis for the analysis of the conclusion under letter d) of the *dispositif*, it appears that the Tribunal had no jurisdiction and no mission to make any such ruling. Indeed, the Tribunal’s *dispositif* on the scope of its jurisdiction is based directly, in relevant part, on the claims raised by the three ConcocoPhillips Parties in respect of “expropriation or migration”. A decision in respect of Respondent’s purported obligation to negotiate in good faith has not been included in the Tribunal’s jurisdiction and has therefore been rendered *ultra vires*. If the topic is shifted from its jurisdictional character to the merits, the Tribunal acted *ultra petita* given the fact that none of the Parties asked the Tribunal to render such a decision. If this latter fact would be taken for what it means, it would appear that any discussion about *res judicata* – as argued by Claimants and acknowledged in the Majority Reconsideration Decision – is devoid of any substance because there was no *res judicatum* anyhow, the Tribunal having affirmed a decision on a question that it was not asked to rule upon.

15. The Parties’ briefs on *quantum* were designed to draw the consequences in respect of damages based on the Tribunal’s Decision on Jurisdiction and the Merits. The Tribunal, when ordering the Parties to submit such briefs in its Decision on Respondent’s Request for Reconsideration of March 10, 2014, did not determine or qualify the violation of the legal obligation in relation to which the damages are to be quantified. There can hardly be an assessment of damages without reference to the underlying liability and the causal link required between both of them.

² The Tribunal’s Decision on the Merits states in paragraph 335 (including footnote 355) that Claimants contend in paragraph 19 of their Memorial on the Merits of September 15, 2008 that the takings were unlawful “for one or more of the reasons indicated in questions (2)-(4) in paragraph 334 above”, thus including a claim based on Respondent’s failure to negotiate in good faith. Nothing is correct in this statement. At the referenced paragraph, Claimants state that Venezuela must exercise the prerogative to nationalize in accordance with national and international law, and that this includes the duty to provide for compensation. None of the reasons outlined by the Tribunal’s Decision in paragraph 334 can be found there.

16. Given the fact that the Decision on Jurisdiction and the Merits identifies only one breach of a nature to allow consequential damage requests, the *quantum* to be determined must relate to the violation of an obligation to negotiate in good faith. This would mean as a matter of principle that the assessment of damages must have as its goal to wipe out the economic consequences of the breach of such an obligation.

17. This is not, however, what the Parties understand and take as the very basis of their statements on *quantum*:

18. Claimant's position is as follows:

“In its September 2013 Decision, the Tribunal's ultimate and unassailable conclusion was that Venezuela acted unlawfully in expropriating the three Projects. That breach of international law requires Venezuela to make full reparation to the Claimants for the investment taken, which is the matter now before the Tribunal.”³

19. When reading Respondent's explanations, it is easy to understand that it is opposing Claimants' presentation. It joins however Claimants' view in as much as it understands that the Tribunal's Majority Decision contains a “finding of unlawful nationalization”⁴.

20. When the view is, as it should be, that the assessment of damages must be connected to the breach as it was identified in the *dispositif* of the Decision on Jurisdiction and the Merits (letter d), these both positions are not correct. On the other hand, however, they are perfectly correct when the liability to be considered is based on Article 6 of the BIT as this had been claimed by Claimants.⁵ However, this is precisely the breach of the BIT that is not affirmed in the *dispositif* of the Decision.⁶ The Majority of the Tribunal decided to proceed (exclusively) with the examination of damages without ruling about the underlying liability.⁷

³ Claimants' Memorial on Quantum of 19 May 2014, para. 8. Similar statements are contained in Claimants' Reply on Quantum of 13 October 2014, paras. 2, 16, 87. Accordingly, Claimants' Experts Manuel A. Abdala and Pablo T. Spiller state in their Report dated May 19, 2014 as follows: “Our calculation of damages is based on the fair market value that the Claimants would have derived from the Projects but for their unlawful expropriation.”

⁴ Respondent's Counter-Memorial on Quantum of 18 August 2014, paras. 8 (page 6), 36.

⁵ Claimants also submit that international law requires the Respondent to restore the Claimants “to the position they would have enjoyed but for the confiscation”: Claimants' Reply on Quantum of 13 October 2014, Title II/A before para. 16. The situation in which Claimants should be restored is that just before the taking and not that when the breach of the obligation to negotiate in good faith occurred.

⁶ This has been stated already by Professor Abi-Saab in his Dissenting Opinion on Jurisdiction and the Merits of February 19, 2015, paras. 264-267. “We thus have a Decision the main finding of which – that of the illegality of the expropriation – cannot be found anywhere in its text.” (para. 264)

⁷ In its Note attached to the Renewed Version, the Majority provides an unsolicited interpretation of letter d of para. 404 of the *dispositif* of the Tribunal's Decision on Jurisdiction and the Merits, concluding that this provision was “precisely” stating that “Venezuela has breached Article 6 of the Treaty by unlawfully expropriating” Claimants' investments in Venezuela. However, letter d of the *dispositif* addresses exclusively Respondent's breach of its obligation to negotiate in good faith for compensation, which the Decision identified as being « commonly accepted », omitting to refer to any grounding in Article 6 of the BIT (para. 362, quoted in the Note). This obligation was not – and could not be – based on Article 6(c). This provision was referred to merely

21. The interim assessment is therefore that the issue relating to the nature and legality of the disputed nationalization has not yet been ruled upon. In this respect, the ruling made under letter d) of the Decision on Jurisdiction and the Merits has no impact. Indeed, no “obligation to negotiate in good faith” is contained in Article 6 of the BIT or more particularly in its letter c) and the Tribunal does not mention any. This letter states that “the measures are taken against just compensation” that shall represent the market value. The requirement for compensation is one of three conditions to be complied with in order to authorize a Contracting Party to take any measure to expropriate or nationalize, as stated in the introductory part of Article 6. Therefore, the third condition stated in letter c) has as its objective to permit expropriation or nationalization if the two other conditions under letters a) and b) are met. This means that the “just compensation” is one of the conditions for avoiding a breach under Article 6 of the BIT to occur. It is neither a condition stated in that provision, nor is it, more importantly, stated as a Contracting Party’s obligation under the BIT. Article 6 of the BIT is on breach for expropriation or nationalization. It is not on any other potential ancillary obligation as the conduct of negotiation based on good faith. Such obligation is just not there.⁸

22. Given that the Tribunal has not decided upon the alleged breach of Article 6, the presentation of submissions of the Parties as to the factual allegations to be made in that respect remains open. This is all the more so as the Tribunal has not declared the proceeding closed according to Arbitration Rule 38(1). This further means that the factual assessment underlying the ruling on the matter of good faith negotiation, while decisive in this latter respect, is not precluding Respondent from arguing and submitting evidence as a defence to presently outstanding claims on liability and damages, if any. Even when considering such ruling as binding in any way, such effect does not extend to the underlying reasons, which are subject to reexamination in respect of any other issue on the merits, for which such reasons or facts may be relevant.⁹ Claimants seem to share this view when stating that the Tribunal “may therefore wish to address this matter as part of its quantum determination”.¹⁰ In light of such an assessment, it would appear to me that consideration of Respondent’s Application for Reconsideration could be deferred at a later stage when the issue of an alleged breach of the BIT

as providing the standard on which good faith negotiations had to be based (see paras. 334(4), 404(d)). In Claimants’ briefs on the Merits, the assertions on the unlawfulness of the expropriation have been heavily supplied by the absence of any reasonable compensation on Respondent’s part, however without relying on a violation of an obligation to negotiate in good faith (cf. Claimants’ Memorial on the Merits of September 15, 2008, paras. 297-320; Claimants’ Reply on the Merits of November 2, 2009, paras. 375-391, 415-427, 432-437). Therefore, Claimants’ claim for a declaration that Venezuela had breached Article 6 has not been based on such violation.

⁸ The Tribunal may not ignore the clear assessment of Professor Abi-Saab in its Dissenting Opinion of February 19, 2015 (para. 115): “There is no mention in this text of an obligation to negotiate compensation.”

⁹ Another illustration may be given in respect of para. 402 of the Majority Merits Decision where it is emphasized that the Tribunal “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 Association Agreements to the determination of the quantum compensation payable in this case”, while it had decided that there was not “any evidence that in this period [April-June 2007], the Venezuelan representatives brought the compensation formulas in the Petrozuata and Hamaca Association Agreements into the negotiation” (para. 400).

¹⁰ Claimants’ letter of January 22, 2016.

is dealt with in terms encompassing all of the elements pertinent under Article 6 of the BIT.¹¹ In this respect, I am respectfully dissenting from my Colleagues' majority position that the matter shall now be decided.

23. I will then turn to the question that represents the focus of Respondent's Request for Reconsideration and of the Majority's Denial of Power for Review.

IV. Applicable Rules on the Binding Effect of ICSID Decisions

24. It would seem superfluous to recall the applicable rules to this proceeding. They are, of course, the provision of the ICSID Convention (Art. 36-52) and those contained in the Arbitration Rules.

25. It appears useful, however, to add the set of rules adopted by the ICSID Secretariat based on its administrative power and observed by ICSID Tribunals and Annulment Committees as if they were rules having a normative basis while in reality they have normative effects only. These effects are a reality prevailing over Article 44 of the ICSID Convention, stating that any question of procedure not answered by the ICSID Convention or the Arbitration Rules shall be decided by the Tribunal.

26. This can be illustrated by the most famous of such rules, which is the Secretariat's position, adopted by Mr. Shihata (Secretary General at the time) that Decisions affirming a Tribunal's jurisdiction do not qualify as an award and therefore cannot be addressed through an application for annulment filed after they had been rendered.¹² This was a policy decision of the Centre, the pros and cons are not to be discussed here. It can hardly be disputed that there does not exist any provision in the Convention or in the Arbitration Rules providing for such a solution. The Rules merely address the case of a negative decision on jurisdiction, which has to take the form of an award (Rule 41(6)). The hypothesis of an affirmative incidental ruling on jurisdiction is not addressed by the Convention and the Rules.¹³ The Centre's position, while not based on any norm in the Convention and the Arbitration Rules, is nevertheless a norm in its effects, because it is put in efficient operation through the refusal of the Centre to provide for the constitution of an Annulment Committee in case an applicant would like to request that the Decision adopting a Tribunal's jurisdiction shall be reviewed by such a Committee. There is nothing else to be mentioned as the foundation of the refusal by the Cen-

¹¹ In the same vein, consideration may be given to the "several issues" the Tribunal referred to but did not propose to decide (para. 334), nor identify in its Decision on Jurisdiction and the Merits and which are part of the "all other questions" reserved for further examination under letter g) of the *dispositif* and not related to *quantum* or costs.

¹² Christoph Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., Cambridge 2009, Art. 41 No. 26, Art. 52 No. 66.

¹³ This seems also implicit in Arbitration Rule 41(2), authorizing the Tribunal to raise a jurisdictional issue "on its own initiative", and this "at any stage of the proceedings". While the wording would permit to rise a jurisdictional matter whatever decisions have already been made, this is not the prevailing understanding of the purpose of the rule.

tre to submit such application to an annulment proceeding than “the standard practice” actually followed.

27. One of the side rules that the Centre had to add later was the instruction given to tribunals prepared to deliver their Award (*i.e.* the final decision on the merits) to incorporate the Decision on Jurisdiction in their final ruling. In most cases this is made by a statement included in the procedural history representing the opening part of the Award¹⁴. In some cases, the incorporation takes a physical form, when the Decision on Jurisdiction is annexed to the Award. The objective of this practice is to ensure that the Tribunal’s Decision on Jurisdiction is subject to the scope of review of the Annulment Committee, which requires the Decision to be included in an Award. It seems to go without saying that there is not to be found any legal rule requiring such incorporation of a decision that should have an autonomous standing. However, it is the result of a norm in effect, as adopted and enforced by the Centre.

28. One other of the rules of such kind is the instruction given to ICSID Tribunals not to declare the proceeding closed pursuant to Rule 38(1) of the Arbitration Rule before the proceeding leading to the Award (*i.e.* the final decision on the merits) is to be handed down. This instruction is diversely handled by ICSID Tribunals, several of which declaring the proceedings closed when the decision contains a ruling affirming the Tribunal’s jurisdiction. The instruction, respectively what is more candidly called “the practice” or “the standard practice” has been observed in the instant case. Indeed, the Tribunal’s Decision on Jurisdiction and the Merits of September 3, 2013 does not contain a declaration that the proceeding was closed.¹⁵

29. The reason for adopting this “practice” appears to be a formal one. Arbitration Rule 38(1) requires that the proceeding shall be declared closed “when the presentation of the case by the parties is completed”. So, in a situation where a ruling has been made on liability, the parties’ presentation is not completed until they have argued about the ensuing damages, which means that it cannot be affirmed in the decision on liability that the proceeding is closed. However, one understands from the outset that Arbitration Rule 38(1) does not envisage the case of partial or interim decisions on jurisdiction or on the merits. While the Centre’s position has its merits, it leaves in a field of uncertainty the consequences of the omission of such declaration in such non-final decisions, albeit in a form adapted to the limited scope of the content of such decisions.

30. As will be seen below, these rules of “practice” are put into question in the instant case, when it comes to analyze their effects in front of the applicable rules of law, as con-

¹⁴ The place of such statement in the part on procedural history is the most unsuitable solution. Indeed, the statement has for its purpose to introduce the Tribunal’s Decision on Jurisdiction as a *ratio decidendi* for its Award that closes the proceeding. Its purpose is precisely not to merely recall a piece of historical importance, but to state a decision in the Award itself.

¹⁵ While this is explained by the reason that this decision represents a partial step only in the proceeding on the merits, it seems to be nevertheless confusing when the decision is labeled as covering “the Merits” when in fact it covers (in part) liability only.

tained in the ICSID Convention and the Arbitration Rules. While such rules of a character of “norms in effect” are based on the Centre’s power to administrate ICSID proceedings and therefore to be observed, it has to be born in mind that they cannot prevail over the Law as contained in the ICSID Convention and the Arbitration Rules, all the more so they are questionable in respect of Article 44 of the ICSID Convention.

V. *The Conclusion of the Majority’s Reconsideration Decision and of its Renewed Version*

31. The first focus must be to take notice of the decisional part of the Decision (the *dispositif*). It states that the Tribunal “does not have the power to reconsider the Decision of 3 September 2013”. The Renewed Version confirms this Decision, adding that Respondent’s Application is dismissed.

32. The Majority Reconsideration Decision declines making any statement on the substance of the matter submitted before it through Respondent’s Application. It has rendered a decision purely procedural in nature.

33. The key issue is whether, as contended by Respondent, the Decision on Liability, called “Decision on the Merits” is still open for reconsideration. This implies a re-examination of the reasons underlying the Majority Decision on Reconsideration and its Renewed Version, and consideration for proper application of the provisions of the ICSID Convention and the Arbitration Rules.

34. It is not clear to me whether Professor Georges Abi-Saab’s Dissenting Opinion was filed with the Tribunal early enough to be considered by the Majority in its First Decision; it was submitted largely on time to be addressed in its Renewed Version. However, the Majority disregarded the content of Professor Abi-Saab’s Opinion entirely. While I have greatest respect for my Colleague’s position, and regret that he had to leave the Tribunal for reasons of health, I have chosen to find my own way of reasoning that is in many parts parallel to the reasons he has given.¹⁶ In doing so, I certainly share Professor Abi-Saab’s views and feel strongly that his call for Justice deserves the utmost attention. Instead of repeating what he has so remarkably said, I declare to incorporate his Dissent into the present Opinion, to the extent it covers the same subject matter.

35. A further reminder is about the scope of my present examination. What the Tribunal is actually asked to do is to reconsider its position as to the admissibility of a request for reconsideration of the Decision on Liability. Respondent declares that it is not necessary for this Tribunal now to revisit the merits of its Application and of the Majority Merits Decision.

¹⁶ See also Brower/Henin, *op.cit.*, p. 67, noting that “Professor Abi-Saab’s Dissenting Opinion rightly points out that the majority’s Decision on Reconsideration underplays the specific characteristics of the ICSID system and its *lex specialis*.”

While this may be correct, it is nevertheless beyond doubt that a decision to allow such revisit requires a demonstration of a certain degree of flaws contained in the decision to be reconsidered, of a gravity that requires under elementary standards of natural justice or other standards of a similar nature that the decision be put under review.

36. Respondent invokes in this respect the occurrence of “gross miscarriage of justice” and effects given to “patently false representations” on part of Claimants. I assume that the Tribunal is faced with a *prima facie* showing of such deficiencies. The Majority Reconsideration Decision does not state otherwise, and while Claimants’ reject Respondent’s Request strongly, they do not offer evidence showing that such a *prima facie* view is clearly beyond any reasonable understanding.

37. Respondent’s submission of August 10, 2015 argues that the Tribunal decided certain aspects of the merits of the instant case in committing “obvious factual, legal and logical errors”, that representations made by Claimants before the Tribunal “had been completely false”, and that Claimants “had not even challenged” evidence presented by Respondent. It is added that Respondent’s Application for Reconsideration considers as “of particular relevance” in this respect “cables from the U.S. Embassy released after the hearing in this case in 2010”.

38. No more precision is provided in respect of the date when these cables were released and made available to Respondent. In its First Brief dated October 28, 2013, it was stated that those reports were “published long after the hearing in June 2010” (No. 4, 38). No indication is given what the word “long” means. Claimants have set the date of the coming out to the public of the cables on August 30, 2011.¹⁷ I was not able to identify in the documents whether the relevant facts were known to Respondent and to the Tribunal before rendering the Decision on Jurisdiction and the Merits on September 3, 2013.¹⁸ I note however that the Majority Reconsideration Decision envisages the hypothesis of a revision of its forthcoming Award on the point actually under dispute (para. 23), and that Claimants approve in their letter of August 12, 2015 that revision would be one available way for post-award remedy, which would mean that the facts to be invoked for such revision would have been unknown to the Respondent and the Tribunal when the decision was rendered (cf. Art. 51(1) ICSID Convention, Arbitration Rule 50(1)(c)(ii)). This point requires clarification, as Claimants have also strongly submitted that Respondent’s application does not offer any window for a revision.¹⁹

¹⁷ Claimants’ First Submission on Respondent’s Application for Reconsideration of October 28, 2013, No. 23.

¹⁸ It seems premature for me to draw today a negative inference from the Tribunal’s sentence in its Decision on Jurisdiction and the Merits that it “does not have before it any evidence at all of the proposals made by Venezuela in this final period” (para. 400), statement which is then explained in further detail.

¹⁹ Claimants’ First Submission on Respondent’s Application for Reconsideration of October 28, 2013, No. 21-25; Claimants’ Second Submission on Respondent’s Application for Reconsideration of November 25, 2013, No. 26-31; Claimants’ letter of January 22, 2016.

VI. *The Majority's First Reason*

39. The Tribunal states correctly that “in accordance with practice”, the decisions contained in the Decision on Jurisdiction and Liability “are to be incorporated in the Award”.²⁰ It then adds that it is established “as a matter of principle and practice” that such decisions resolve points in dispute between the Parties and have therefore *res judicata* effect. No reference to any provision of law is given in support of such position. The Tribunal merely quotes a decision rendered in the case *Electrabel S.A. v. Hungary*²¹, stating that such decisions “are intended to be final” and therefore not to be revisited in any later phase of the arbitration proceedings.²²

40. The use of the terms *res judicata* is subject to questions. This concept applies to situations where the same claim decided between the same parties and based on the same cause of action is raised in a distinct or successive proceeding. This notion does not apply to decisions to be made before the same court or tribunal in the same proceeding.

41. I note that the decision rendered in the case *Electrabel S.A. v. Hungary* does not rely on any precedent or norm of law, but merely indicates that the view expressed is “the Tribunal’s view”. The decision was not intended to produce precedential effect for itself. The Tribunal wanted its holding to be limited to the particular case it was ruling upon.²³ It has also to be noted that the term of art *res judicata* has not been used.²⁴

42. An interesting comparison can be made with the more recent Award rendered in the *Quiborax* Case. Two members of this Tribunal had been part of the *Electrabel* Tribunal²⁵. In this case, the Respondent raised in the merits phase a jurisdictional objection that it had not invoked during the preceding phase that was terminated by the Tribunal’s Decision on Jurisdiction. The Tribunal’s Award dismissed Respondent’s attempt to raise again the question whether Claimants’ investments were made in accordance with Bolivian Law. However, it accepted an exception, stating that: “Only the allegation of an illegality that was unknown to Bolivia during the jurisdictional phase may justify reopening the matter at the merit stage.”²⁶

²⁰ Majority Reconsideration Decision, para. 21.

²¹ *Electrabel S.A. v. Republic of Hungary*, ICSID/ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of November 30, 2012, para. 10.1.

²² Majority Reconsideration Decision, para. 21; Renewed Version, para. 31.

²³ Cf. Andrew McDougal/Samy Markbaoui, *ConocoPhillips Petrozuata, ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, *Journal of World Investment and Trade* 15 (2014) p. 1062-1069 (1068).

²⁴ The Majority Reconsideration Decision (para. 21) and the Renewed Version (para. 31) both rely on the *Electrabel* Decision in support of the principle of *res judicata*, omitting to note that this term does not appear in the Decision.

²⁵ Professors Gabrielle Kaufmann-Kohler and Brigitte Stern.

²⁶ *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID/ARB/06/2, Award of September 16, 2015, para. 130. The Majority is therefore wrong in stating in its Renewed Version that the *Quiborax* Tribunal did not question the binding character of the earlier ruling or its “*res judicata* effect” (para.

Thus, no *res judicata* was retained or even mentioned. Bolivia raised a number of other objections to jurisdiction at the merits stage, in respect of which the Tribunal assessed that “there is no reason that can justify reopening the jurisdictional issues at this stage, assuming this were at all possible”.²⁷ In this last note, *res judicata* is implicitly mentioned as an issue, however without using the term, which is not elevated to a *ratio decidendi*.

43. Having affirmed to be bound by the so-called *res judicata* effect of its decision of 2013 on Respondent’s violation of an obligation to negotiate in good faith, the Tribunal then asks in its Reconsideration Decision whether the provisions of the Convention and the Rules make a difference to this position.²⁸ It may have been more convincing to ask the questions the other way round. The question was whether the Convention or the Rules take any position on the effects given to such a decision before it is incorporated in the Award and if, in light of these elements of law, the principle of *res judicata* applies.

44. In a first reason, the Tribunal does not find in Article 44 of the ICSID Convention and in Arbitration Rule 38(2) any element that would allow deviating from the above mentioned principle of *res judicata*, which is also said to be based on *practice* as if such practice would be binding upon the Tribunal. The first provision acknowledges the Tribunal’s power to address procedural issues not dealt with in the Convention or the Rules. The Tribunal acknowledges that this provision is designed to enable gaps in the procedure to be filled. It concludes from this that this provision “cannot be seen as conferring a broad unexpressed power of substantive decision” (para. 22, *in fine*). In so stating, the Tribunal does not address Respondent’s request nor examine the requirements underlying Article 44 in its own admission. Why should the question be addressed whether Article 44 confers a “power of substantive decision” when the Tribunal states a few line before that this Article is about “procedural issues”. And why should the non-existence of a “substantive power of decision” in Article 44 be sufficient to deny the examination of an Application that, as filed by Respondent, is on the procedural issue whether a decision rendered before may be re-examined or not?

45. In its Renewed Version, the Majority develops the confusion in slightly different terms. It reaffirms that Article 44 of the ICSID Convention relates to “a question of procedure” or to the “conduct of the proceedings”, and then affirms that the power to reconsider rulings as invoked by Respondent appears to be a “very different power”, without further definition, except the conclusion that the “ordinary meaning of Article 44” does not appear “to include the power which the Respondent seeks”, which is “a power of a substantive kind” (para. 23). It also notes that Article 44 applies to “practical instances” that “are of a quite dif-

33). The *Quiborax* Tribunal accepted to examine the objection and rejected it. In the instant case, Respondent requests nothing more than that its Application may be heard and examined.

²⁷ Cf. Award, para. 541. Similarly, the Tribunal in *CMS Gas Transmission Company v. Republic of Argentina* ICSID/ARB/01/8, Award of May 12, 2005, stated simply that certain issues dealt with at the jurisdictional stage raised by Respondent in relation to the merits “were decided upon at that stage and will not be reopened in this Award” (para. 126). The principle of *res judicata* has not been mentioned.

²⁸ Majority Reconsideration Decision, para. 22.

ferent order from the broad power of substantive reconsideration which the Respondent invokes in this case” (para. 28). The Majority then recalls that Article 44 does “not deal with matters of substance”, referring to the history of the Convention, which is entirely irrelevant in relation to the matter raised in the instant case, which has not been examined at that time. The Majority does again not give attention to the content of terms like “procedure” and “substance”. It further invokes the “role and character of rules of procedure” to which Article 44 is confined and concludes that “it would be remarkable” if this provision would be understood “to include the power which the Respondent invokes here” (para. 24). The statement is surprising: the mere fact that a certain understanding of Article 44 would lead to a result being “remarkable” serves as justification for the dismissal of the proposal. It may be sufficient here to mention the procedural decisions made by the *Abaclat* Tribunal²⁹ to understand that Article 44 allows going far above matters of residual and little procedural impact as the Majority affirms (para. 24). It appears also remarkable that the Majority does not consider Arbitration Rule 19, instructing the Tribunal to “make the orders required for the conduct of the proceeding”, without any restriction.³⁰ Both provisions, Article 44 of the Convention and Rule 19, are to be understood as the procedural addition to the principle stated in Article 42(2) of the Convention, prohibiting the Tribunal to adopt a finding of *non liquet* on the ground of silence or obscurity of the law. There is thus no power given to an ICSID Tribunal to decline exercising its mission on a purported lack of power that no rule supports.

46. In relation to Arbitration Rule 38(2), the Tribunal states that it has a “much more limited function”, without explaining what that function should be and why it should be limited. It is merely added that this Rule, together with Article 44 of the ICSID Convention, are of an essentially procedural character, which appears from the cases on which Respondent relies. This position does not respond in any way to the Application before the Tribunal, which is, precisely, procedural in nature.

47. It is worth considering in more detail Arbitration Rule 38, paragraph 2, which is considered not applicable in the instant case, given is “much more limited function”. Arbitration Rule 38 states as follows on the matter of “Closure of the Proceeding”:

- “(1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
- (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to con-

²⁹ *Abaclat et al. c. Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, paras. 515-521, concluding that the “ICSID Framework” does not contain a “qualified silence” excluding the adoption of appropriate procedural rules to deal with “mass claims”.

³⁰ The primary addressee of this provision is clearly the Tribunal. In its Renewed Version, the Majority disposes from considering Rule 19 because Respondent did not seek therein support for its power of reconsideration (para. 36, *in fine*). *Iura novit curia* does not exist. Respondent was not most explicit, indeed. A reference to Rule 19 can be found in a quote in footnote 125 of Respondent’s Second Brief pursuant to the Tribunal’s Request of October 1, 2013, dated November 25, 2013.

stitute a decisive factor, or that there is a vital need for clarification on certain specific points.”

48. If the second provision is not applicable, this is not because it has a limited function (not defined by the Tribunal anyhow), but because the proceeding in the instant case has never been declared closed. No such declaration is contained in the Decision on Jurisdiction and the Merits.³¹ Therefore, the Tribunal should have been lead to conclude that *a fortiori* a party addressing the Tribunal in the instant case with a request to proceed in a certain manner is not constraint to demonstrate that new evidence presents a “decisive factor”, or is showing “a vital need for clarification on certain specific points”. Indeed, the proceedings are still ongoing and have not been closed in any of its aspects.³²

49. It may also be noted that Article 43 of the ICSID Convention states that the Tribunal may call upon the Parties to produce documents or other evidence “at any stage of the proceedings”, without making any reservation for the case where a matter had already been assessed in an interim or partial decision. If such a decision would have to constitute a complete barrier for any reconsideration, the drafter of the provision would have undoubtedly amended the provision accordingly.

50. In this respect as well, the Centre’s position on certain regulatory aspects causes problem. This can be illustrated with a decision on jurisdiction that is not an award but becomes an award once it is incorporated in the Award subject to annulment. Up to that moment, the decision is not final and is sometimes not treated as such “in practice”. Indeed, it happens frequently that an initial decision on jurisdiction is, during the merits phase, subject to further refinements or adaptations in relation to its scope *ratione materiae*. Sometimes, decisions on jurisdiction contain an express reservation in this respect. This does not cause any problem in practice, and rightly so. Nevertheless, the Tribunal proceeding in such a way is necessarily starting from a position where it does not feel its decision on jurisdiction representing *res judicata*.

51. Let us take another hypothesis. A Tribunal is faced with two claims. It decides in a first move that it has jurisdiction about claim 1, but not on claim 2. In such a case, Arbitration Rule 41(6) does not apply and no award is rendered. Later, in the merits phase, the Tribunal understands that its position in relation to claim 2 is wrong and it affirms jurisdiction equally in this respect and renders the final Award. This Award deals with jurisdiction in respect of claim 2 and it incorporates the earlier decision in respect of claim 1. What happened to the initial decision denying jurisdiction over claim 2? It simply disappeared from the proceeding,

³¹ Claimants’ First Submission on Respondent’s Application for Reconsideration of October 28, 2013, No. 15, *in fine*, omits observing this point when arguing that the stage to which Rule 38(2) refers has passed. In fact, it has never been reached.

³² Even if Rule 38(2) would be pertinent, allowing reopening of the proceeding in light of new evidence, the effects on the substance of the clarification requested from the Tribunal are crystal clear and cannot be reduced to an “essentially procedural character” as the Majority affirms in its Renewed Version (para. 36).

showing that it was not *res judicata*. The Committee sitting over an annulment request will not be seized with the matter, because that decision is not brought before it. The Committee may conclude that the Tribunal was wrong in affirming its jurisdiction over claim 2 and therefore pronounce the Award's annulment. In so doing, it does not restore the first jurisdictional decision in respect of claim 2.

52. At this stage, the conclusion is simple: There is no rule precluding the Tribunal from reviewing its Decision affirming Jurisdiction.³³ The *Helnan* Tribunal decided accordingly, referring to Schreuer, noting that while Respondent's objection to the Arbitral Tribunal's jurisdiction "could have been raised sooner", it was understandable that it was raised within the merits phase of the proceedings only.³⁴ The *Tokios Tokelès* Tribunal disposed of the principle as a purely facultative indication, not compelling the Tribunal to reconsider an issue on jurisdiction.³⁵

53. A similar reasoning applies when an initial (partial) decision on liability has been rendered. The aforementioned "standard practice" makes it easier than it would be if Arbitration Rule 38(2) would apply. The proceeding has not been declared closed and, therefore, is still open. This does not mean that the Tribunal could be requested at any time to revisit its decision. Such a decision stands by its authority and the Tribunal's position that it has fully examined the matter. It is "intended to be final", but it is not final yet. This leaves open, by necessity, a margin for a party's submission based on certain grounds of major importance that the Tribunal shall not dismiss based on arguments denying its power to do so.

54. Let us assume that the Tribunal has acted accordingly and modified its decision on liability, later incorporated in that revised format into the final Award. In such a case, the initial decision on liability will not be submitted for examination by the annulment Committee that has no power whatsoever to restore what may be wrongly argued as that decision's *res judicata* effect. The Committee might annul the new decision, but it cannot do more. Therefore, the *res judicata* value of intermediate decisions on jurisdiction or the merits is inexistent. A note of caution in respect of a principled and abstract call for *res judicata* had been voiced

³³ "... there appears to be nothing to stop a tribunal from supplementing, rectifying, interpreting or revising a preliminary decision on jurisdiction informally while the case is still pending before it." Christoph Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., Cambridge 2009, Art. 41 No. 24. The Renewed Version comports the extraordinary omission of this statement, while Schreuer's Commentary is invoked for the proposition that Article 44 deals only with the power to rule on matters of procedural character, not including the power invoked by Respondent (para. 23).

³⁴ *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID/ARB/05/19, Award of July 3, 2008, para. 112.

³⁵ *Tokios Tokelès v. Ukraine*, ICSID/ARB/02/18, Award of July 26, 2007, para. 98: "The Tribunal notes that it could have dealt with the contention simply recording that by virtue of the treatment of the same point in the Decision on Jurisdiction the principles of *res judicata* and issue estoppel excluded any right to raise it again, but in the circumstances it has been thought right to reconsider the question, with the same result as before."

already by the *Amco II* Tribunal in 1988.³⁶ The approach is different and more suitable if *res judicata* would be invoked not as a categorical bar to any reconsideration, but for the purpose of affirming the Tribunal's authority to confirm its position upon reflection in such a way that parties shall be advised not to disturb the proceedings by applications for reconsideration not based on strong grounds.

55. A further observation may be added. Indeed, even when considering an interim decision on liability having effects of *res judicata*, this applies only to the decisional part of such a ruling, not to the underlying reasons. In the instant case, it would seem that when assuming, on the one hand, that Respondent's liability in certain aspects has been finally decided, it may also appear, on the other hand, that the facts, as they were retained as evidence in the decision can be revisited during any further part of the proceeding in relation to other items relevant for the merits. In the instant case, it may be that in one way or the other, a factual pattern that led the Tribunal to conclude that Respondent's liability is affirmed, will also be argued as an element for decision in respect of the determination of alleged damages that are derived from a line of facts interrelated by reasons of causality, and which have as their starting point the facts that have been retained in the framework of the decision on liability.³⁷ If these facts are proven to be wrong, as contended by Respondent, the Tribunal may no longer be able to take them as a basis for an award on damages. The "new" facts, as alleged and evidenced, will have to be retained, with the effect that the conclusion on the matter of damages risks to become inconsistent with the reasons and the conclusion underlying the prior decision on liability, which, in the instant case, was based on circumstances relating to part of the negotiations on compensation only. This would become a critical issue when it comes to rule upon the question whether this latter decision shall be incorporated into the Final Award.

VII. *The Majority's Second Reason*

56. In a further step, the Tribunal turns to its second reason for its conclusion that it cannot find in the pertinent provisions the "source of a power to reconsider".³⁸

57. It is based on the assertion that:

"The overall structure and the detailed provisions of the ICSID Convention were plainly designed to provide for review or actions in respect of decisions of a tribunal once the Award was rendered. There is no gap to be filled by the power proposed here."

³⁶ "It is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determination as part of what constitutes *res judicata*." *AMCO v. Republic of Indonesia*, ICSID/ARB/81/1, Decision on Jurisdiction of May 10, 1988, para. 32.

³⁷ The matter is debated in the briefs on damages: Respondent's Counter-Memorial on Quantum, August 18, 2014 (paras. 3, footnote 1, 36, 136, 142-149, 171-185; Claimant's Reply on Quantum, October 13, 2014, paras. 10, 78-105; Respondent's Rejoinder on Quantum, January 7, 2015, paras. 13-15, 280-327. Respondent's letter of September 16, 2013, seems to touch upon the issue.

³⁸ Majority Reconsideration Decision, para. 23.

58. This statement is of an extraordinary simplicity, stating that there should not be put any blame on a Tribunal not performing with satisfaction because the matter can always be cured once the Award has been rendered. Indeed, the Tribunal does not find any provision in Section 3 of Part IV of the ICSID Convention “even hinting at such power”, and nothing more results from Section 4 dealing succinctly with the Award itself. The final points state the essence of this reasoning:

“And it is only in Section 5 that powers are conferred on the Tribunal to interpret and revise the Award and on an *ad hoc* Committee to annul an Award on prescribed grounds. It is in those ways and those alone that decisions such as that in September 2013 can be questioned, changed or set aside.”

In closer relation to the instant case it is then stated:

“Those various post-award remedies are, of course, available to both Parties. Those provisions and that structure exclude the possibility of the proposed powers of reconsideration being read into the Convention. The reading of the Convention is also supported by the drafting history mentioned above (paragraph 18).”³⁹

59. These statements are not correct. Firstly, the assertion that the provisions on post-award remedies exclude the possibility of the Tribunal’s proposed powers is wrong because these provisions contain not any hint of a rule in such a direction.⁴⁰ In addition, the mere existence of post-award remedies does not have any effect *a contrario*, excluding any remedy during an on-going proceeding that would allow the examination of a request of a kind as filed by Respondent. It may suffice to look at Arbitration Rule 38(2) where such a remedy is provided; it has been stated above that such access to the Tribunal’s scrutiny is given *a fortiori* when a proceeding has not been declared closed as in the instant case.

60. Secondly, the reader observes that it is affirmed that the various post-award remedies are available to both Parties. The statement is not elaborated any further⁴¹, to the exception of the indication given above that this involves interpretation, revision and annulment of an

³⁹ The Tribunal relies on quotes from Claimants’ Second Submission that are taken in most part from their statement and not from the *travaux préparatoires*. Claimants merely mentioned the Convention’s drafters stressing the “binding character of any decision by [an arbitral tribunal] on preliminary questions or merits” (referring to *History of the ICSID Convention*, Volume II-1 (1968), page 408, CL-269). Claimants’ quote is misleading. It does not originate from the “drafters of the Convention”, but from the Chairman of a meeting of legal experts. And it refers to a comment having the purpose to “emphasize the distinction between the ruling of a tribunal and a recommendation by the conciliation commission concerning competence” (*ib.*). In any event, any statement that would have been made at the time of the Convention’s drafting is of little relevance since the Centre has taken the position that an affirmative Decision on Jurisdiction cannot have the quality of an award.

⁴⁰ No reason is given further on whether and why such exclusion could be derived from the « overall structure » of the ICSID Convention. Such a concept is void of substance and pure verbalism used in an attempt to fill in gaps in a reasoning that has no basis in the provisions contained in such structure, which are the only ones which count. The Renewed Version further invokes the “framework” provided by the Convention and its “clear structure” (paras. 25, 30), not providing even an allusion to what these terms should mean as a matter of law.

⁴¹ Nor is it supported by any reason given in Claimants’ letter dated August 12, 2015, where the Tribunal’s words are copied in a footnote and not supplied by any comment.

Award. It is or must be understood that such a statement can make, and is intended to make sense, in relation to Respondent's Application for reconsideration only. The Tribunal offers not any element of examination allowing to know whether this position is correct. It is not.

61. It may be recalled again that Respondent's Application is about the reconsideration of the Decision on Jurisdiction and the Merits on specific items that are identified. This request has been characterized by the Tribunal's Decision as being beyond its powers. The question is then whether such ruling can be submitted to one of the aforementioned post-award remedies. It cannot.

62. There is certainly no point in considering interpretation as a remedy in this respect.

63. The ground based on the proper constitution of the Tribunal is contentious between the Parties but is not relevant for present purposes and not to be commented by me in any event.

64. As reasons have been given, there is no point in invoking the ground based on the absence of reasons provided. And the Tribunal has certainly not envisaged that this ground may be relevant in case an *ad hoc* Committee would consider that no reason have been given because those actually given are all wrong.

65. It is difficult to imagine how the Tribunal could consider a possible application of the ground that it had manifestly exceeded its powers in relation to its decision stating that it has no power to proceed with Respondent's Request. The argument would have to be that in stating that it has no power the Tribunal exceeded its power to make such an assessment. The Tribunal will certainly not want to offer any argument that it acted accordingly and suggest to Respondent the expectation that it will be able to invoke such a ground for annulment. Such a perspective is left for pure speculation.

66. The only ground that may be of some relevance is that the Tribunal may have committed a serious departure from a fundamental rule of procedure. However, the Tribunal affirms and explains that no such rule of procedure exists or needs to be adopted for the purpose of filling a gap in the ICSID Convention or the Arbitration Rules. How could the Tribunal affirm the existence of a remedy on a ground that it denies simultaneously?

67. In respect of these both latter grounds for annulment, it is more than surprising that they are offered to the Parties as a remedy while the Tribunal refuses to proceed with the appropriate remedy itself. If the Tribunal affirms today that a forthcoming Award can be subject to annulment on the ground that the Tribunal has manifestly exceeded its powers or has disregarded a fundamental rule of procedure, it does not do anything else than affirming that this is what it is actually doing. Therefore, either these grounds have no foundation in the instant case and no annulment can be reached, or they, or one of them, are actually reached, which necessarily means that at the actual stage, the Tribunal has the power to proceed and/or has to

apply the applicable fundamental rule of procedure. This is enough to demonstrate that the Tribunal's argument that what it might actually be doing wrong can be cured in a later proceeding on annulment is equally wrong. The Tribunal shall state the Law and not defer the Parties to a remedy-proceeding stating that the Tribunal got it wrong.

68. The Tribunal includes in the list of available remedies a request for revision. Such a request requires, pursuant to Article 51(1) ICSID Convention and Arbitration Rule 50(1)(c)(ii) that:

“the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence;”

69. In order to apply this provision, at least by analogy, it is required that the facts to be invoked for such revision were unknown to the Respondent and the Tribunal when the decision was rendered. As stated above, I am not certain whether such a requirement is met in the instant case.

70. The situation would become particularly untenable when a case for revision could seriously be envisaged. When the Tribunal affirms in its Majority Reconsideration Decision that this remedy is, “of course”, available to both Parties⁴², how could it be envisaged that the very same Tribunal, seized with the application for revision (Arbitration Rule 51), would then decide otherwise?

71. In any event, the wording of the provision tells that no revision is available. Indeed, the decisive point in time is the date when the Award was rendered. This date is clearly situated in the future, when the damage phase is closed, certainly not before the end of 2016. Therefore, there will be no point whatsoever that the Respondent will have an opportunity to proceed with an application for revision, invoking facts that were revealed in 2010 or 2011 and certainly before the final Award will be delivered. And if access to the remedy of revision is determined as it is under the Rules, this is why the parties must be given the opportunity to present the facts relevant for their case during the proceedings of the arbitral tribunal, either until the date when the proceeding is declared closed⁴², or even thereafter but then under the restrictions contained in Arbitration Rule 38(2). If anyone would like to rely on the “overall structure” of the system, that is the best place to do it.

72. In conclusion, not only does the alleged existence of post-award remedies not imply *a contrario* that a party is left with no means for reconsideration during an ongoing proceeding. More importantly, such conclusion, even if considered correct, has no basis in the instant case because no such remedy will be available to Respondent.

⁴² A position shared by Claimants in their letter dated August 12, 2015.

73. Going one step further in this analysis, it appears that the Tribunal refused to make any assessment about Respondent's Request for Reconsideration because it did not see any provision in the ICSID Convention and the Arbitration Rules that would allow the Tribunal to so proceed.⁴³ This statement affirms that the Tribunal is faced with a case of silence of the Law, which implies that it cannot take a power nowhere that is not provided by the Law. Such a conclusion is not compatible with Article 42(2) of the ICSID Convention, which states firmly that the Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. As explained above, this provision is supplemented in matters of procedure by Article 44 instructing the Tribunal in such a case that it "shall decide the question", a direction also given by Arbitration Rule 19. None of these provisions prohibits entering into an examination on reconsideration of a pre-award decision. There is no qualified silence to such an effect. The Tribunal, conducted by its Majority, fails to comply with its mission when declining to affirm its power to deal with Respondent's Application.

74. The matter here under consideration has been dealt with in some detail in the ICSID Tribunal's *Decision on Ecuador's Reconsideration Motion* of April 10, 2015, rendered in the case *Perenco Ecuador Limited v. The Republic of Ecuador*.⁴⁴ The Tribunal took into consideration Ecuador's Motion and, after careful examination, decided to dismiss it. The Tribunal had considered, among others, the Majority Decision on Reconsideration rendered in the instant case, together with Professor Abi-Saab's Dissenting Opinion. In rejecting Ecuador's Motion, the Tribunal examined all potentially applicable rules of the Convention and the Arbitration Rules for the purpose of providing an answer to the question "whether the Tribunal can, in the absence of an express procedural rule in the Convention or the Rules (or agreement of the Parties), reopen and amend the Decision on Jurisdiction and Liability".⁴⁵ Like the Majority in the instant case, it did not find such a rule, and consequently, dismissed the Motion for the reason that "there is no power vested in it which would allow it to engage in the exercise requested of it". This reasoning is categorical and regrettably simplistic.

75. Depending on how the relevant question is framed, the outcome is determined from the outset. If the question is asked whether there is a rule available providing expressly for a possibility for review of certain prior decisions, the answer is negative. When, on the other hand, the question asked is whether there exists a rule preventing the Tribunal from taking such a decision for opening of such a review, the answer cannot be negative because no rule does so provide. Another position can be adopted on the only basis of *a contrario* interpretation, which, however, is wholly unsupported by the applicable rules. This was the *Perenco* Tribunal's approach, asserting that because no express provision does exist, such power is

⁴³ Majority Reconsideration Decision, para. 22 ; Renewed Version, para. 27, *in fine*.

⁴⁴ *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion of April 10, 2015.

⁴⁵ Decision, para. 23, *in fine*.

nonexistent. Nonetheless, the Tribunal did not point to any provision that would not allow such power to be exercised.

76. The *Perenco* Tribunal argued specifically by reference to Article 51 of the ICSID Convention, which sets a very high standard for the possibility of a revision of an award. It draws from this provision the conclusion that it is “the only article of the Convention that authorizes a tribunal to revise its award”, which does not fit Ecuador’s motion and therefore “essentially puts an end to the Motion”⁴⁶. The inconsistency of this statement jumps at the eyes: Article 51 applies to the revision of awards and has nothing to say about a revision or reconsideration of a decision preliminary to an award. Similarly, the Tribunal states that reopening of such a decision “is not to be inferred from the existence of an annulment procedure”⁴⁷, which means that a tribunal cannot “second-guess itself as to whether it has manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, and so on”⁴⁸. Again, any annulment procedure applies to awards exclusively, whereas the issue under discussion is about interim or preliminary decisions.

77. Making a step further, the Tribunal asserts that the restrictive rule on revision of awards demonstrates that when a tribunal “has decided issues before it, its decision becomes *res judicata* and cannot be revised unless a very specific situation which calls for the tribunal to revisit its prior findings is presented”.⁴⁹ Again, the conclusion contains an unsupported *a contrario* argument. The Tribunal, instead of citing any provision that would confer such *res judicata* effect, refers to “ample prior authority”⁵⁰, quoting the *CMS Award* (that does not use the term), *Waste Management II* (which is not conclusive)⁵¹, and *Electrabel* (which is confined to the particular case and no longer supported by two of the Tribunal’s members), omitting any mention of decisions not compatible with such “authority”. Finally, the *Perenco* Tribunal points to the Majority Reconsideration Decision rendered in the instant case, which “fits within a well-established view”.⁵² However, it also observes that the relevant facts and allega-

⁴⁶ Decision, para. 52.

⁴⁷ Decision, para. 34.

⁴⁸ Decision, para. 33. See also para. 24, relying on Article 53 of the Convention – a provision that refers to awards and has nothing to say about the nature and effects of pre-award decisions.

⁴⁹ Decision, para. 42.

⁵⁰ Decision, paras. 43-48. The quote is repeated in the Majority’s Renewed Version (para. 31), without further elaboration, except the mention of two other ICSID cases “to the same or similar effect”, as “cited by the *Perenco Ecuador* tribunal”, although they do not support the argument.

⁵¹ The *Perenco* Tribunal notes (para. 45) that the Tribunal seized with the *Waste Management II* case affirmed that a decision on a particular point on jurisdiction or the merits constitutes *res judicata*; *Waste Management Inc. v. United Mexican States (Waste Management II)*, ICSID/ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceeding, para. 45. This presentation is not correct and no support can be driven for a situation as existing in the *Perenco* matter and in the instant case. As the *Waste Management II Award* of April 30, 2004 explains, the decision on jurisdiction that was addressed by Mexico’s objection was rendered in a *prior* and *different* proceeding, when jurisdiction was denied because of Claimant’s failure to commit with the requirement to pursue domestic remedies before resorting to international arbitration (para. 4). The *Waste Management II* Tribunal concluded that this negative decision did not prevent Claimant from bringing its claim again before an arbitral tribunal (para. 11).

⁵² Decision, para. 48.

tions are significantly different in both cases⁵³, thus adding a note of caution that shows that the categorical assertion of a *res judicata* effect attached to any pre-award decision is not sufficient to prohibit reconsideration in all cases.

78. The *Perenco* Tribunal omitted to examine whether the applicable procedural rules provide for any kind of finality that would preclude revisiting interim decisions on jurisdiction or on the merits. It stated, when considering Professor Abi-Saab's Dissent, that it had a different view on Arbitration Rule 38(2),⁵⁴ but it did not take into account that in the instant case, the proceedings have not been closed and that therefore Rule 38(2) does not apply⁵⁵. One other simplification appears in the *Perenco* Tribunal's reasoning holding that Article 44 of the Convention does not provide for such a power. This does by no means have the *a contrario* effect that such power therefore shall not exist: to the contrary, this provision empowers the Tribunal to decide any procedural matter it deems fit for such purpose, and this may very well include a certain ability to review prior decisions. The *Perenco* Tribunal restricted the scope of this provision in this respect by its assertion that no other provision was available to provide for such power (para. 77); in arguing so, it deprived Article 44 of the Convention of its *effet utile* in the matter under scrutiny. Article 44 of the Convention has precisely the purpose to vest the Tribunal with the power to decide matters that are otherwise not dealt with by the Convention and the applicable Rules.⁵⁶ And no provision of the Convention or the Arbitration Rules prohibits a Tribunal to review its prior (interim or partial) decisions as a matter of principle. The *Perenco* Tribunal addressed the question exclusively in terms of permission, not raising the matter in terms of prohibition. It adopted a categorical ruling about the effects of interim and partial decisions under the ICSID system, omitting to consider that this system does not provide for or contemplate such decisions, as this had been noted by the *TanESCO* Tribunal.⁵⁷ The question submitted through *Perenco's* Application was answered by a simple *a contrario* assertion without any reliance on a ground providing so in the ICSID Convention or the Arbitration Rules.

79. Finally, the question may also be raised whether the refusal to deal with Respondent's request and the lack of available remedies in this respect does not result in a violation of a fundamental right of a party to get access to justice. It is my submission that the ICSID Convention has to be interpreted so far as possible in harmony with other rules of international

⁵³ Decision, paras. 86-88.

⁵⁴ Decision, para. 86.

⁵⁵ This is a manifest mistake that must be highlighted. It can be explained by the fact that the absence of a declaration for closure of the proceedings is not mentioned in the Majority Decision on Reconsideration. It can be identified when reading the Decision on Jurisdiction and the Merits.

⁵⁶ Interestingly, the *Perenco* Tribunal recognizes that the *Abaclat* Tribunal was "seeking to design a procedure that would govern the special needs and demands of the case before it" (para. 79). The Tribunal understands that this seems admissible as "an example of a tribunal in the early stage of a case" (*ib.*). However, it does not identify why such filling of a gap was authorized by Article 44 "in the early stage of a case" and not at a later stage, at least as long as the proceeding had not been declared closed.

⁵⁷ *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID/ARB/98/8, Final Award of July 12, 2001, para. 32.

law of which it forms part. I also submit that a fundamental rule of Law provides for a possibility to submit to court an application for reconsideration or revision of a decision that has been induced by illegal behavior or based on facts nonexistent at the time of the decision and ignored by the aggrieved party and the Tribunal for reasons not due to the negligence of the party later invoking the true facts, further assuming that the submission for reconsideration or revision, if accepted, would cause to modify in significant part the prior decision.⁵⁸ This is certainly a principle that the Tribunal must have in mind when it takes a decision on Respondent's Application, be it on the basis of Article 44 of the ICSID Convention or on the basis of the "rules of international law as may be applicable", on which Article 42(1) relies. Faced with a *prima facie* serious allegation of a clear and fundamental violation of Justice, no Tribunal or Arbitrator can stand by and affirm that it is left with "no power" to deal with the matter.⁵⁹

80. In conclusion, the Tribunal's mission should be to reverse the Decision of March 10, 2014 (the "Majority Reconsideration Decision") and to proceed with the examination of the Respondent's Request for Reconsideration of September 8, 2013, together with the Respondent's Application for Reconsideration dated August 10, 2015, based on the allegation that Claimants did make material misrepresentations to the Tribunal as to Respondent's willingness to negotiate fair market value, if and to the extent that the underlying facts for such assumption are of such a nature as decisively to affect the Decision by a fundamental error of fact and law, and if evidence is supplied that when the Decision was made these facts were either unknown to or manifestly and erroneously disregarded by the Tribunal and that such ignorance or disregard was not due to negligence on Respondent's part.

[Signed]

Andreas Bucher
Arbitrator

⁵⁸ Another way to address the issue is to refer to well-recognized exceptions to the recognition and enforcement of a decision's effect of *res judicata*, including a situation where evidence has been submitted "that the previous decision is vitiated by a fundamental flaw, such as being tainted by corruption or fraud, resulting from a procedure inconsistent with fundamental due process principles, or having been rendered by a tribunal lacking jurisdiction": Brower/Henin, *op.cit.*, p. 69.

⁵⁹ See also Brower/Henin, *op.cit.*, concluding that "it might not be right to suggest, as the majority in *ConcocoPhillips v. Venezuela* did, that the question of a tribunal's power to revisit its own findings can be considered in isolation from the context of the very request" (p. 68/69).