

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

WASHINGTON, D.C.

In the arbitration proceeding between

**PERENCO ECUADOR LIMITED**

Claimant

and

**THE REPUBLIC OF ECUADOR**

Respondent

**ICSID Case No. ARB/08/6**

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**DECISION ON ECUADOR'S RECONSIDERATION MOTION**

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*Members of the Tribunal*

Judge Peter Tomka, President  
Mr. Neil Kaplan, C.B.E., Q.C., S.B.S.  
Mr. J. Christopher Thomas, Q.C.

*Secretary of the Tribunal*

Mr. Marco Tulio Montañés-Rumayor

Date: 10 April 2015

**REPRESENTATION OF THE PARTIES**

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Procurador General del Estado  
  
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and

Mr. Eduardo Silva Romero  
Mr. Pierre Mayer  
Mr. José Manuel García Represa  
Mr. Philip Dunham  
Ms. Maria Claudia Procopiak  
Ms. Audrey Caminades  
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## I. Introduction

### A. Procedural History

1. On 12 September 2014, the Tribunal issued its Decision on Remaining Issues of Jurisdiction and on Liability (the “**Decision**”).

2. By letters dated 22 October and 7 November 2014, Ecuador indicated its intent to submit a Motion for Reconsideration (the “**Motion**”) of the Decision. By letters dated 29 October and 11 November 2014, Perenco opposed any such motion, arguing that the Decision had decided the issues in dispute addressed within it and that the Tribunal lacked any power under the ICSID Convention to reopen what it had previously decided.

3. In Procedural Order No. 11 dated 14 November 2014, the Tribunal allowed Ecuador’s request for leave to file a Motion for Reconsideration, subject to the following:

- a) Ecuador’s Motion was to be filed no later than 15 December 2014;
- b) The Tribunal would not, at that stage, fix a subsequent briefing schedule on the Motion;
- c) The Tribunal emphasised that it had already issued a reasoned Decision; that under the ICSID Convention and the Arbitration Rules no appeal is provided for, and that only in exceptional circumstances would it be open for the Tribunal to reconsider its prior reasoned decisions;
- d) Ecuador was directed to focus its Motion on the existence of those exceptional circumstances which would justify the reconsideration of the Tribunal’s Decision.

4. By agreement of the Parties, notified to the Tribunal on 11 December 2014, the deadline for the filing of Ecuador’s Motion for Reconsideration was extended to 19 December 2014. Ecuador duly submitted its Motion on 19 December 2014, accompanied by the fifth Expert Report of Juan Pablo Aguilar Andrade and its annexes, 1 factual exhibit (E-376) and 60 legal authorities (EL-204 to EL-264).

### B. Summary of the Motion

5. In its Motion, Ecuador submits that the Tribunal has the power to reopen and amend its Decision and that it must exercise this power in the present case because of the “repeated instances of the [Tribunal’s] omitting to determine issues put to it, violating fundamental rules of procedure, manifestly exceeding its powers and failing to state the reasons on which the [Decision] is based.”<sup>1</sup> In its view, this renders the Tribunal’s findings as to its jurisdiction over the treaty and contract claims, and its findings as to Ecuador’s breaches of the Participation Contracts and of the Treaty “fundamentally and fatally flawed.”<sup>2</sup> It seeks from the Tribunal a

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<sup>1</sup> Motion for Reconsideration (hereinafter “Motion”), para 3.

<sup>2</sup> Motion, para 3.

decision amending the Decision's findings on jurisdiction and the merits, and an order bifurcating the Motion and staying the Quantum phase of the arbitration during the pendency of the Tribunal's consideration of its application.<sup>3</sup>

6. At paragraph 3(c) and (d) of Procedural Order No. 11, the Tribunal noted that "only in exceptional circumstances would it be open for the Tribunal to reconsider its prior reasoned decisions" and it accordingly directed Ecuador to focus its Motion "on the existence of those exceptional circumstances which would justify reconsideration" of the Decision. Ecuador submits that those "exceptional circumstances" exist where it can establish any of the grounds for reversal found in the ICSID Convention and the ICSID Arbitration Rules or when it is otherwise in the interests of justice.<sup>4</sup> Ecuador submits that in each instance under the Convention and Rules, "the power to reopen and amend and/or reverse an extant decision is exercised exceptionally."<sup>5</sup>

7. Ecuador submits further that, contrary to the majority's holding in *ConocoPhillips v. Venezuela* in a similar request for reconsideration, decisions preceding what Ecuador calls a "Convention award" do not have *res judicata* effect and the legal consequences that ensue from such status.<sup>6</sup> It cites in support of this position a statement made by Professor Schreuer with respect to Article 51 of the Convention, which addresses a tribunal's power of revision, and where he states that while the procedure for revision was designed for situations in which the tribunal has terminated its activity and issued a final award, "[a] tribunal that is still in session can always revise its preliminary decisions informally."<sup>7</sup>

8. As shall be seen in further detail below, Ecuador also relies upon certain Convention and Arbitration Rules provisions that permit tribunals to take certain steps in relation to their awards as well as the provisions of Article 52 which allow a party to seek the annulment of an award.<sup>8</sup> Amongst the grounds of annulment contained in Article 52, the Motion relies principally on three grounds: manifest excess of powers, serious departure from a fundamental rule of procedure and failure by a tribunal to state the reasons upon which its award is based.<sup>9</sup> Ecuador submits in relation to the three grounds that the standard of review that the Tribunal ought to apply to its Motion "is not the post-award annulment standard" but a lesser standard that should be applicable to the grounds of review before proceedings are closed:

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<sup>3</sup> Motion, paras 2-3, 295-298.

<sup>4</sup> Motion, paras 14-15. At para 14, Ecuador states: "The Arbitral Tribunal therefore requested in Procedural Order No. 11 that Ecuador focus this Motion on the existence of those 'exceptional circumstances' which would justify the reconsideration of the [Decision]."

<sup>5</sup> Motion, para 15 [Italics in original, underlining emphasis added].

<sup>6</sup> Motion, paras 17-19.

<sup>7</sup> Motion, para 26, referring to C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention, A Commentary, Cambridge University Press, 2nd Edition, paras 4-5 (EL-199).

<sup>8</sup> Motion, paras 19-60. At para 60, Ecuador asserts: "[E]ach of the grounds of annulment is an exceptional circumstance justifying the reversal of a Convention award, a remedy reserved for the most serious errors undermining the validity and legitimacy of Convention awards. It must necessarily follow that, upon a showing of such an error prior to the making of a Convention award, a tribunal has the power to reopen, amend and/or reverse a decision preliminary to a Convention award."

<sup>9</sup> Motion, paras 29-60.

“Pre-award, the error identified need not be to the heightened ‘manifest’, ‘gross’, ‘egregious’ or ‘obvious’ standard. Rather, it is appropriate, and the purposes of the Convention require at this earlier stage, that a showing of any error is sufficient, in order that a tribunal ‘achieve its fundamental task of arriving at a correct decision.’”<sup>10</sup> [Underlining added, italics in original.]

9. In sum, Ecuador submits that the Tribunal can and ought to reopen and amend and/or reverse the Decision if it establishes that the Motion meets any of the grounds for reopening an Award or reviewing a decision prior to the making of an Award as set out in the Convention and/or the Arbitration Rules or where it is otherwise in the interests of justice to do so.<sup>11</sup>

10. Turning to the findings of the Decision that Ecuador submits should be reconsidered, Ecuador contends in turn:

11. First, that the Tribunal should reconsider its finding of jurisdiction over Perenco’s claim that Ecuador breached the Block 21 Participation Contract when it declared *caducidad* because its holding allegedly contradicts its Decision on Jurisdiction and in so doing amounts to a manifest excess of power, a serious departure from a fundamental rule of procedure, and a failure to satisfy the requirement to state the reasons on which the Decision is based.<sup>12</sup>

12. Second, the Tribunal should reconsider its finding that Perenco was controlled by French nationals at the material time and that the Tribunal accordingly has jurisdiction over Perenco’s treaty claims, because it was allegedly arrived at in violation of Ecuador’s right to fair and equal treatment, due to the Tribunal’s committing a serious departure from a fundamental rule of procedure.<sup>13</sup>

13. Third, the Tribunal should reconsider its finding that Ecuador’s non-compliance with its prior Decision on Provisional Measures amounted to a breach of contract because the Tribunal allegedly omitted to decide the question of whether its recommendations in that Decision were decisions for the purposes of Clause 22.2.2 of the Participation Contract, failed to state the reasons upon which its finding was based, and its finding contradicts its Decision on Provisional Measures.<sup>14</sup>

14. Fourth, that the Tribunal should reconsider its interpretation of the *exceptio non adimpleti contractus* defence as a result of which it found that defence was open to Perenco in order to suspend operations in the Blocks. In this regard, this decision was said to have been arrived at as a result of the Tribunal’s having committed a manifest excess of powers, a serious departure from a fundamental rule of procedure, and a failure to state the reasons on which the Decision was based.<sup>15</sup>

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<sup>10</sup> Motion, paras 109-113 [italics in original], citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v Argentine Republic* (ICSID Case No. ARB/03/19), Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, para 11 (EL-257).

<sup>11</sup> Motion, paras 14-113, in particular, paras 98 and 113.

<sup>12</sup> Motion, paras 114-147.

<sup>13</sup> Motion, paras 148-159.

<sup>14</sup> Motion, paras 160-182.

<sup>15</sup> Motion, paras 183-204.

15. Fifth, the Tribunal should reconsider its finding that Decree 662 breached the Participation Contracts because the finding allegedly discloses a manifest excess of powers in the interpretation and application of the *jus variandi* power, is contradictory to the Tribunal's previous finding in the Decision that Law 42 at 50% did not amount to a breach of the Participation Contracts, and that Law 42 at 99% did not amount to an expropriation in breach of the Treaty, and it was arrived at arbitrarily.<sup>16</sup>

16. Sixth, that the Tribunal should reconsider its finding that the application of Decree 662 to Perenco as well as the ensuing measures breached Article 4 of the Treaty because, in Ecuador's view, Decree 662 did not breach the Participation Contracts, the finding is contradicted by the Tribunal's earlier finding in the Decision that Law 42 at 50% did not amount to a breach of the Treaty, and it was arrived at arbitrarily.<sup>17</sup>

17. Seventh, the Tribunal's finding that Ecuador's declaration of *caducidad* breached the Block 21 Participation Contract and affected an expropriation of Perenco's contractual rights should be reconsidered because it allegedly contains a serious departure from a fundamental rule of procedure and was arrived at by the Tribunal having manifestly exceeded its powers.<sup>18</sup>

## **II. The provisions of the ICSID Convention, the ICSID Arbitration Rules and other authorities invoked by Ecuador**

18. Ecuador refers to the following provisions of the ICSID Convention and the ICSID Arbitration Rules in support of its Motion. They are listed in the order of their citation by Ecuador:

- (i) Article 49(2), which permits a tribunal to, at the request of a party, decide any question which it had omitted to decide in its award or rectify any clerical, arithmetical or similar error in the award;<sup>19</sup>
- (ii) Article 51, which permits a tribunal to revise its award on the ground of the discovery of some fact of such a nature as decisively to affect the award;<sup>20</sup>
- (iii) Article 52, which permits a party to request the establishment of an *ad hoc* Annulment Committee to seek annulment of an award under one or more of five grounds;<sup>21</sup>
- (iv) Arbitration Rule 38(2), which permits a tribunal, after closure of the proceedings but before the rendering of the award, to reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points;<sup>22</sup>

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<sup>16</sup> Motion, paras 205-240.

<sup>17</sup> Motion, paras 241-264.

<sup>18</sup> Motion, paras 265-283.

<sup>19</sup> Motion, paras 20-24.

<sup>20</sup> Motion, paras 25-28.

<sup>21</sup> Motion, paras 29-60.

<sup>22</sup> Motion, paras 61-71.

- (v) Arbitration Rule 25, which provides that any accidental error in any instrument or supporting document may with the consent of the other party or by leave of the tribunal, be corrected at any time before the award is rendered;<sup>23</sup> and
- (vi) Article 44, which provides that if any question of procedure arises which is not covered by Section 3 of the Convention and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect, the tribunal shall decide the question.<sup>24</sup>

19. Ecuador submits that “[i]n each case, the power to reopen and amend and/or reverse an extant decision is exercised *exceptionally*, in order to ensure the validity and legitimacy of the ICSID arbitration process and, ultimately, the finality of Convention awards.”<sup>25</sup> Ecuador asserts further that whilst Article 44 provides a “textual foothold” for the tribunal’s power “to take measures to preserve the integrity of its proceedings”, as noted by the *Hrvatska* tribunal in its ruling regarding the participation of David Mildon QC in further stages of the proceedings, “that power is in fact inherent.”<sup>26</sup> Ecuador submits that this “inherent power most obviously and profoundly manifests itself in an overarching exceptional circumstance in which it is not only appropriate but necessary for a tribunal to reverse its decision: where such action is in the ‘*interest of justice*’.”<sup>27</sup> Jurisprudence of the European Court of Human Rights is cited in support of the proposition that even if the applicable convention or court rules do not provide for the reopening of a court’s decision, this may be done in the interests of justice.<sup>28</sup>

20. Other cases, in particular *Abaclat v. Argentine Republic* and *Churchill Mining v. Indonesia*, are cited as examples of where tribunals have exercised their powers under Article 44 to tailor the proceeding to special circumstances; in the former case the tribunal was said to have “used its Article 44 powers in a profoundly important way so as to affect the rights of 60,000 investors and Argentina”<sup>29</sup>, and in the latter case the tribunal found that “Article 44 permitted it to reopen and reverse an earlier procedural order denying bifurcation of a preliminary issue.”<sup>30</sup>

21. Finally, Ecuador attaches particular significance to the “powerful dissenting opinion” of Professor Georges Abi-Saab in the case of *ConocoPhillips v. Venezuela*.<sup>31</sup> In that case, the Tribunal was also presented with a request for reconsideration of its earlier decision. The majority denied the request on two bases, the first being that there was no power under the

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<sup>23</sup> Motion, paras 72-75.

<sup>24</sup> Motion, paras 76-94.

<sup>25</sup> Motion, para 15 [Emphasis in original].

<sup>26</sup> Motion, paras 95-98, discussing *Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia*, ICSID Case No. ARB/05/24, Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008, para 33 (EL-262).

<sup>27</sup> Motion, para 97 [Emphasis in original].

<sup>28</sup> *Storck v. Germany*, ECHR, No. 61603/00, Decision on Admissibility, 26 October 2004, p 14 (EL-203) and *Des Fours Walderode v. The Czech Republic (dec.)*, ECHR, NO. 40057/98, ECHR 2004-V, p 6 (EL-264).

<sup>29</sup> Motion, paras 82-85, 89, 92, 94 [Emphasis in original].

<sup>30</sup> Motion, paras 86-89, 92, 94.

<sup>31</sup> Motion, paras 91-92, 99-100.



ICSID Convention to entertain such a request and the second being that the findings made by the tribunal in its prior decision were *res judicata*.<sup>32</sup> Professor Abi-Saab disagreed.<sup>33</sup>

22. The Tribunal will examine each of the provisions cited by Ecuador as well as pay particular attention to the *ConocoPhillips* decision and dissenting opinion in view of the relevance of that case to the present Motion.

23. The Tribunal begins by noting the *purposes* for which the foregoing articles and rules have been cited by Ecuador:

- (i) Article 49(2): This is cited for the proposition that the need to decide any question which the tribunal omitted to decide in the award and the need to make clerical, arithmetical or similar errors “are exceptional circumstances which permit the reopening of a *res judicata* Convention award.”<sup>34</sup>
- (ii) Article 51: The “relevant point for present purposes is that the right of revision pursuant to Article 51 is an exceptional remedy, permitting a tribunal to reopen and amend a Convention award where a new fact arises of such a nature as ‘*decisively to affect the award*’.”<sup>35</sup>
- (iii) Article 52: This is said to be relevant because annulment “proceedings serve ... to validate and ratify the legitimacy of the ICSID dispute settlement system”<sup>36</sup> Indeed, in Ecuador’s view, “such is the systemic importance of preventing such errors, reversal is justified even where the error was not “*determinative of the claim*.”<sup>37</sup> It continues: “reconsideration of a decision preliminary to a Convention award will be appropriate, in order to safeguard the validity and legitimacy of the ICSID Convention and indeed such Convention awards themselves, where the grounds for annulment of such preliminary decision are made out.”<sup>38</sup>
- (iv) Arbitration Rule 38: “As with the ability to revise, rectify and annul Convention awards, Rule 38 is a mechanism in the Arbitration Rules that is designed to assure the validity, legitimacy and finality of a Convention award by permitting a tribunal to correct problems that would undermine its correctness.”<sup>39</sup> Ecuador adds that “as is evident from the terms of the Rule, the threshold for a tribunal’s intervention and reopening of a proceeding pursuant to Rule 38 (new evidence of

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<sup>32</sup> *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent’s Request for Reconsideration, 10 March 2014 (“*ConocoPhillips* Majority Decision”) (EL-201); Motion, paras 18 and 90.

<sup>33</sup> *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Dissenting Opinion of Georges Abi-Saab (“*ConocoPhillips* Dissenting Opinion”) (EL-200); Motion, paras 91 and 92.

<sup>34</sup> Motion, paras 20-24.

<sup>35</sup> Motion, paras 25-28 [Emphasis in original].

<sup>36</sup> Motion, para 34 [Emphasis in original], more generally, see paras 29-60.

<sup>37</sup> Motion, para 34 [Emphasis in original].

<sup>38</sup> Motion, para 35 [Emphasis in original].

<sup>39</sup> Motion, para 70.

such a nature as to constitute a ‘*decisive factor*’ or a ‘*vital need for clarification*’) is clearly lower than the threshold of annulment of an award under Article 52.”<sup>40</sup>

- (v) Arbitration Rule 25: This deals with accidental errors in any instrument or supporting document which may be corrected with consent of the other party or by leave of the Tribunal at any time up to the rendering of the award. Thus, according to Ecuador, “prior to the rendering of a Convention award, provisions such as Rule 25 bestow[s] upon the Arbitral Tribunal the power to permit significant amendments and corrections to the record.”<sup>41</sup> For example, “[i]ncorrect numbers in documents and discrepancies between two versions of the same document in a dual-language arbitration are situations which may give grounds for correction under Rule 25.”<sup>42</sup>
- (vi) Article 44: Article 44 is said to confer “a wide residual discretion to decide procedural issues not covered by Chapter IV (Arbitration), Section 3 (Powers and Functions of the Tribunal) of the Convention, the Arbitration Rules or any other rules agreed by the parties.”<sup>43</sup> At another point in the Motion it is said that the article confers upon the tribunal “prior to the closure of proceedings and rendering of a Convention award ... the widest possible powers to conduct the arbitration proceedings.”<sup>44</sup>

Article 44’s precise relevance to the current Motion lies in Ecuador’s submission that: “...the matter of procedure this Arbitral Tribunal is called on to determine is whether it 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 and, if so, in what circumstances. Once it has determined that matter of procedure, the Arbitral Tribunal is free to act in accordance with the procedure so determined.”<sup>45</sup>

The Tribunal agrees with Ecuador that the threshold question is “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.” The second question posed by Ecuador in the passage quoted above (“and, if so, in what circumstances?”) arises only if the first question is answered in the affirmative.

24. The Tribunal further notes that while terms such as “correction”<sup>46</sup>, “rectification”<sup>47</sup>, “revision”<sup>48</sup> and “reopen”<sup>49</sup> are employed in the various provisions invoked by Ecuador, what one does not find are terms such as “reconsider” or “reverse”, the terminology used by Ecuador

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<sup>40</sup> Motion, para 70 [Emphasis in original].

<sup>41</sup> Motion, para 75.

<sup>42</sup> Motion, para 73.

<sup>43</sup> Motion, para 78.

<sup>44</sup> Motion, para 93.

<sup>45</sup> Motion, para 89 [emphasis added].

<sup>46</sup> Arbitration Rule 25.

<sup>47</sup> ICSID Convention, Article 49.

<sup>48</sup> ICSID Convention, Article 51.

<sup>49</sup> Arbitration Rule 38.

in its Motion.<sup>50</sup> In this regard, the Tribunal recalls that Article 53 of the Convention states an award “shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”

25. Having set out the various provisions of the Convention and Arbitration Rules and the rationales provided by Ecuador for citing such provisions, the Tribunal will now examine each in turn.

### **III. The legal framework governing the Motion**

26. In performing its own review of the provisions cited by Ecuador, the Tribunal will not follow Ecuador’s ordering of the provisions, but it will address each in the course of its analysis.

#### **A. Article 52 of the Convention**

27. The Tribunal begins with annulment because this figures prominently in the Motion. It is appropriate to begin by differentiating between the powers conferred upon a tribunal as it proceeds through the course of an ICSID arbitration, and the powers conferred on an *ad hoc* Annulment Committee established to review the tribunal’s award after it has completed its work.

28. Ecuador has reviewed the findings of various annulment committees to remind the Tribunal of the ways in which annulment committees have treated various transgressions of the grounds of Article 52(1) alleged to have been committed in the Decision.

29. The Motion observes that “the most exceptional circumstances permitting the reopening and amendment and/or reversal of a Convention award” are the grounds for annulment.<sup>51</sup> It draws from an extensive review of annulment committee consideration of the grounds listed in Article 52 that:

“... each of the grounds of annulment is an exceptional circumstance justifying the reversal of a Convention award, the remedy reserved for the most serious errors undermining the validity and legitimacy of Convention awards. It must necessarily follow that, upon a showing of such an error prior to the making on a Convention award (sic), a tribunal has the power to reopen, amend and/or reverse the decision preliminary to a Convention award.”<sup>52</sup>

30. The Tribunal does not agree that it *necessarily* follows that upon the showing of an error prior to the making of an award, a tribunal has the power to reopen, amend and/or reverse the decision preliminary to the award. To the contrary, a tribunal’s power to “reopen, amend and/or

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<sup>50</sup> For “reconsider”, see paras 2, 3, 11, 12, 13, 14, 15, 16, 35, 47, 51, 94, 97 *et seq.* For “reverse”, see paras 11, 15, 60, 71, 93, 97, 101, 102, 104, 105, 109, 165, 206 *et seq.* The term “reconsider” is only used in the Arbitration Rules in a specific context in Rule 55: “If a Committee annuls parts or all of an award, either party may request the resubmission of the dispute to a new Tribunal... If the original award had only been annulled in part, the new Tribunal shall not *reconsider* any portion of the award not so annulled.” [Emphasis added.] The term “reverse” is not used in Chapter IV (Arbitration) of the Convention or in the Arbitration Rules.

<sup>51</sup> Motion, para 29.

<sup>52</sup> Motion, para 60.

reverse” must first be shown to exist under the Convention before such power can be exercised and its existence cannot be inferred from the fact that the Convention contains an annulment procedure.

31. The Tribunal also observes that although Ecuador has argued that the errors that the Tribunal is said to have committed are so serious as to constitute grounds for annulment, later on in the Motion, Ecuador shifts gears and argues that the “the standard of review that the Arbitral Tribunal ought to apply when determining whether to re-open and amend and/or reverse one or more of its earlier decisions must necessarily be lower in pre-closing circumstances than the standard of review at the post-award annulment stage (or even in post-closing circumstances).”<sup>53</sup> It argues further that the “the Convention provides that the earlier in the proceedings a request for reopening is made, the lower the standard of review.”<sup>54</sup>

32. The Tribunal does not accept this argument. It has been told that each of the alleged defects in its Decision is a ground for annulment, yet it is then told that it ought to apply a less rigorous standard for reviewing its own work than an annulment committee would apply. In the Tribunal’s view, this is not persuasive. Either a tribunal commits an error which may constitute a ground for annulment, or it does not. On well-established practice and principle, if a tribunal commits some sort of error which falls short of providing a ground for annulment, the award stands (leaving to one side, as discussed below, the tribunal’s exercising any power to correct, interpret or revise the award – if the conditions for taking any of those actions are met).

33. The Tribunal also considers that the allocation of roles and responsibilities in the ICSID system means that when deciding a claim, a tribunal should avoid taking on the role of simultaneously acting as if it were an annulment committee sitting in judgement of its own work. As intended by the Convention, the roles are different and must remain separate. Each body must discharge the mandate that it is given pursuant to the Convention and it is in principle wrong to mix the two. Just as many annulment committees have emphasised Article 53’s injunction that the award “shall not be subject to any appeal” and therefore have refused to enter into a consideration of the correctness of a tribunal’s legal reasoning<sup>55</sup>, a tribunal equally cannot, in a

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<sup>53</sup> Motion, para 109.

<sup>54</sup> Motion, para 112 [Emphasis added].

<sup>55</sup> This is well established. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, (Yves Fortier, President, Professor James Crawford, Professor José Carlos Fernández Rozas, Members), para 62: “Although the issue of the proper role of an annulment committee in the ICSID system must necessarily inform the analysis and the conclusions of this Committee, relatively little needs to be said about the issue for the reason that there seems to be little disagreement between the parties. Claimants and Respondent agree that an *ad hoc* Committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention. It also appears to be established that there is no presumption either in favour of or against annulment, a point acknowledged by Claimants as well as Respondent.” *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, (Antonias Dimolitsa, President, Robert S.M. Dissoupara and Professor Andrea Giardina, Members), para 19: “The *ad hoc* Committee considers it appropriate to discuss briefly its role within the annulment system established by Article 52 of the Washington Convention. No one has the slightest doubt – all the *ad hoc* Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it

phased arbitration, hold the sword of Damocles above its head and second-guess itself as to whether it has manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, and so on.

34. The Tribunal therefore finds that the alleged basis for a tribunal power to “reopen, amend and/or reverse” is not to be inferred from the existence of an annulment procedure.

B. The other provisions of the Convention and Arbitration Rules

35. The Tribunal will now turn to the other provisions to which Ecuador has referred.

36. The Tribunal begins by expressing its view that these provisions, to the extent that they deal with reopening an award (which for present purposes will be assumed to include a decision), do not take Ecuador’s Motion very far. The real issue is not whether an award can be rectified to correct a clerical error, for example, but rather whether an award can be *revised* (going so far as to be *reversed*, which is what Ecuador seeks in the present circumstances).<sup>56</sup>

37. There is a vast difference between *reopening* an award to correct a clerical error or to decide a question which the tribunal omitted to decide and *revising* an award. The grounds are entirely different and in particular, the single ground for revising an award in Article 51 of the Convention is specific and narrowly worded.

(i) Post-award procedures open to a tribunal upon the application of a party

38. The Convention contains three procedures that permit a party to revert to the tribunal after its award is issued:

- (i) the tribunal has the power under Article 49 to, at the request of a party, decide any question which it had omitted to decide in the award or to rectify any clerical, arithmetical or similar error;
- (ii) the tribunal has the power to interpret the award under Article 50; and

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does not entail the carrying out of a substantive review of an award.” *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, (H.E. Judge Gilbert Guillaume, President, Professor James Crawford and Dr. Sara Ordóñez Noriega, Members), para 31: “Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.” *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki, (Judge Florentino P. Feliciano, President, Mr. Omar Nabulsi and Professor Brigitte Stern, Members), para 20: “It is not contested by the parties that the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, it is not contested that “... an *ad hoc* committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings.” *Wena Hotels LTD. V. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding, (Konstantinos D. Kerameus, President, Professor Andreas Bucher and Professor Francisco Orrego Vicuña, Members), para 18: “As has been stated in earlier published decisions made on requests for annulment of ICSID awards, the remedy of Article 52 is in no sense an appeal.”

<sup>56</sup> The Motion requests reversal of the Decision at paras 15, 60, 71, 86, 93, 97, 101, 102, 104, 105, 109, 165, 206, 211, 236, 243, 248, 249, 260, 285-289, and 291.

(iii) the tribunal has the power to revise the award under Article 51 on the ground of discovery of some fact of such a nature as decisively to affect the award.

39. Two of these three methods can be put to one side. Ecuador's Motion does not seek an interpretation under Article 50. Ecuador has also acknowledged that Article 51 cannot apply to the present Motion:

“The Article 51 procedure, as Ecuador has previously pointed out, is not available with respect to decisions preliminary to a Convention award such as the Decision on Jurisdiction and Liability. Indeed, as Prof. Schreuer expressly points out, the Article 51 procedure is not available with respect to ‘*decisions on jurisdiction*’ and like decisions preliminary to Convention awards—which the Decision on Jurisdiction and Liability undoubtedly is.”<sup>57</sup>

40. This is undoubtedly correct. But in conceding that Article 51 is not available and putting it to one side, Ecuador's Motion tends to obscure a crucial point.

(ii) Article 51 of the Convention

41. In the Tribunal's view, it is important to note that of the three post-award procedures available, the only one that permits a tribunal to *revise* the award is Article 51 and the only ground for engaging in such revision is the “discovery of some fact of such a nature as decisively to affect the award, provided 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.”<sup>58</sup>

42. This strongly suggests that once the tribunal has decided the issues before it, its decision becomes *res judicata* and cannot be revised unless a very specific situation which calls out for the tribunal to revisit its prior findings is presented. As shall be seen, the tribunal can take other post-award steps, but when it comes to revision, it can only do so in a single, specific instance.

43. There is ample prior authority in support of the view once the tribunal decides with finality any of the factual or legal questions put to it by the parties, as was the case in the Decision on Remaining Issues of Jurisdiction and Liability, such a decision becomes *res judicata*.

44. In the *CMS Gas Transmission v. Argentine Republic* Award, the tribunal commented:

“It must also be noted that in connection with the merits the Respondent has again raised certain jurisdictional issues that were addressed in the jurisdictional phase of the case such as the *jus standi* of the Claimant. These issues were decided upon at that stage and will not be reopened in this Award.”<sup>59</sup>

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<sup>57</sup> Motion, para 27, quoting from Schreuer *et al*, paragraphs 4-5 (EL-199).

<sup>58</sup> Convention, Article 51(1); see also, Arbitration Rule 50(1)(c)(ii).

<sup>59</sup> *CMS Gas Transmission v. Argentine Republic* Award, para 126 (Professor Francisco Orrego Vicuña, President, the Honourable Marc Lalonde PC, OC, QC and H.E. Judge Francisco Rezek, Arbitrators).

45. In the *Waste Management Inc. v. United Mexican States (Waste Management II)* Decision on Mexico's Preliminary Objection concerning the Previous Proceedings (a case conducted under the ICSID Additional Facility Rules rather than the Convention) the tribunal stated:

“In cases where the same issue arises at the level of jurisdiction and of merits, it may be appropriate to join the jurisdictional issue to the merits. But at whatever stage of the case it is decided, a decision on a particular point constitutes a *res judicata* as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal.”<sup>60</sup>

46. In the *Electrabel S.A. v. Republic of Hungary* Decision on Jurisdiction, Applicable Law and Liability, the tribunal noted:

“This Decision is made in regard only to the first phase of these arbitration proceedings, relating to extant issues of jurisdiction and liability; and it is not made in regard to any issue of quantum (including interest). Although necessarily described as a ‘Decision’ and not an ‘Award’ under the ICSID Convention and ICSID Arbitration Rules, the several decisions and reasons contained in this Decision are intended by the Tribunal to be final and not to be revisited by the Parties or the Tribunal in any later phase of these arbitration proceedings.”<sup>61</sup>

47. Finally, in the *ConocoPhillips v. Venezuela* Decision on Respondent’s Request for Reconsideration, the tribunal stated:

“As noted, the Respondent characterises the Decision as “interim” or “preliminary” and, accordingly, capable of being reconsidered, perhaps on an informal basis. The only reason suggested in its submissions is the temporal one: a further stage in the proceedings, relating to *quantum*, remains. The Decision does not however take an interim or preliminary form in respect of the matters on which it rules.”<sup>62</sup>

And:

“Those decisions in accordance with practice are to be incorporated in the Award. It is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect. ‘They are intended to be final and not to be revisited by the Parties or the Tribunal in any later phase of their arbitration proceedings.’”<sup>63</sup>

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<sup>60</sup> *Waste Management Inc. v. United Mexican States (Waste Management II)*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceeding, para 45. (Professor James Crawford, President, Benjamin R. Civiletti and Eduardo Magallón Gómez, Arbitrators.)

<sup>61</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, (V.V. Veeder, President, Professor Gabrielle Kaufmann-Kohler and Professor Brigitte Stern, Arbitrators.), para 10.1

<sup>62</sup> *ConocoPhillips* Decision, para 20.

<sup>63</sup> *Id.*, para 21.

48. The Tribunal recognises that Ecuador takes issue with the *ConocoPhillips* decision.<sup>64</sup> Nevertheless, with respect to the proposition for which it has just been cited, it fits within a well-established view as to the effect to be given to decisions made during the course of a phased arbitration such as the present one.

49. Reverting to Article 51, the Tribunal further notes that the “decisively affect the award” test sets a very high standard with respect to the kind of *fact* that could justify reopening the tribunal’s prior evaluation of the evidence and the legal conclusions that it reached.

50. In the Tribunal’s view, even if Article 51 were applicable in the present circumstances in temporal terms – which Ecuador concedes is not the case – it could be triggered only by the discovery of a new potentially decisive fact. There is no such fact put before the Tribunal in the present Motion. Indeed, in the Tribunal’s view, the seminal facts in this case are not disputed; it is instead their legal consequences on which the parties have disagreed. Even if the Decision were to be equated to an Award, the 5<sup>th</sup> expert report on Ecuadorian law of Professor Juan Pablo Aguilar submitted with the Motion would not fall within the ambit of Article 51.

51. Although Ecuador has acknowledged Article 51’s inapplicability to its Motion,<sup>65</sup> the Tribunal has dwelt upon the article because it is the only one available to a tribunal which allows it to revise its award. As shall be seen, procedures other than that provided in Article 51 involve a lesser “modification”, as it were, of a tribunal’s award.

52. The fact that Ecuador cannot fit its Motion within the narrow confines of the only article of the Convention that authorises a tribunal to revise its award essentially puts an end to the Motion. However, for purposes of good order, the Tribunal will deal with the balance of the provisions cited by Ecuador.

(iii) Article 49 of the Convention

53. Ecuador accepts that Article 49, which deals with the possibility of a tribunal’s deciding a question which it omitted to decide in the award or rectifying any clerical, arithmetical or similar error in the award, is also by its own terms related to the award.

54. Ecuador refers to this article for the proposition that: “In each case, these are exceptional circumstances which permit the *reopening* of a *res judicata* Convention award” and argues that if the power can be said to exist in relation to an award, it ought perforce to exist in relation to a decision made prior to an award.<sup>66</sup>

55. Reference to a number of the cases in which Article 49(2) has been invoked shows that tribunals (and in one case an annulment committee) have carefully examined Article 49(2) requests to see whether or not they truly involve a question which was omitted to be decided or deal with a minor clerical error requiring rectification, on the one hand, or, are an attempt by a party to re-argue a point with a view to persuading the tribunal to change its mind, on the other.<sup>67</sup>

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<sup>64</sup> Motion, paras 18, 90-92, 99-100.

<sup>65</sup> Motion, para 27.

<sup>66</sup> Motion, paras 24 and 60.

<sup>67</sup> The inclusion of the word “similar” in the phrase “clerical, arithmetical or similar error” would, on the *ejusdem generis* rule, not permit the Tribunal to consider a “similar error” to be of a different genus



56. Although it was an *ad hoc* Annulment Committee decision, perhaps the best elaboration of the point was made in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, the relevant parts of which the Tribunal quotes as follows:

23. The Argentine Republic also requests the rectification of what it considers to be seven material errors in the Decision. It submits that the scope of the remedy of rectification provided for in Article 49(2) of the ICSID Convention is well established, as illustrated by recent precedents, and argues that the particular errors affecting the Decision in the present case are so serious that, unless rectified, they could “nullify the Decision on Annulment” and prejudice Argentina’s position in future ICSID arbitrations. The implication is that, in its deliberations and preparation of the Decision, the Committee disregarded many of the arguments put forward by the Respondent, to its significant detriment.
24. The Claimant, for its part, argues that the seven requests for rectification should be rejected, on the grounds that they exceed the scope of Article 49(2) and, in effect, represent further attempts by the Respondent to reopen debate on issues already decided by the Committee.
25. A review of pertinent arbitral awards illustrates that the availability of the rectification remedy afforded by Article 49(2) depends upon the existence of two factual conditions. First, a clerical, arithmetical or similar error in an award or decision must be found to exist. Second, the requested rectification must concern an aspect of the impugned award or decision that is purely accessory to its merits. Simply stated (and contrary to Respondent’s assertion at paragraph 26 of its Request), Article 49(2) does not permit the “rectification” of substantive findings made by a tribunal or committee or of the weight or credence accorded by the tribunal or committee to the claims, arguments and evidence presented by the parties. The sole purpose of a rectification is to correct clerical, arithmetical or similar errors, not to reconsider the merits of issues already decided. As will be seen, below, many of the Respondent’s requests derive from a misunderstanding of this fundamental principle.”<sup>68</sup>

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than clerical or arithmetical errors. The Motion, at para 23, seems to suggest that the Tribunal has a wider discretion than the Tribunal thinks it has. “Whilst clerical and arithmetical errors are generally easily identifiable, the reference to a “*similar error*” “*was intended to permit other corrections that are required to make the Award correspond to the intent of the Tribunal.*” If it is intended to suggest that in the guise of rectifying an error which is not clerical or arithmetical, the Tribunal should revise its legal reasoning, the Tribunal does not agree.

<sup>68</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision of the *Ad Hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award, 28 May 2003 (Yves Fortier, President, Professor James Crawford, Professor José Carlos Fernández Rozas, Members), paras 23-25 [Emphasis added]. To the same effect, see *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Claimants’ Request for Rectification and/or Supplementary Decision of the Award, 25 October 2007 (Professor Francisco Orrego-Vicuña, President; Professor Albert Jan van den Berg and Pierre-Yves Tschanz, Arbitrators), para 57, and *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No.

(iv) Article 49(2) of the Convention, first limb

57. Since Article 49 is expressly concerned with reverting to the tribunal after it has rendered its award, strictly speaking it is not applicable to the present Motion. However, the Tribunal will put that aspect of the article's wording to one side and proceed *arguendo* on the basis that the reference to the word "award" could encompass a "decision" and therefore Article 49 could be triggered at this point in the proceeding. The Tribunal does so because it wishes to explain its conception of its duty to decide the questions presented to it.

58. Section 5.1 of the Motion is entitled: "The Arbitral Tribunal's finding that Ecuador's non-compliance with the Provisional Measures amounted to a breach of contract omitted to decide an issue."<sup>69</sup> The Tribunal observes however that the Convention does not refer to a tribunal's omitting to decide an "issue", but rather to its omitting to decide a "question." It seems to the Tribunal that a "question" (which is not defined by the Convention) is capable of encompassing one or more issues and an alleged failure to decide an *issue* in the course of deciding a *question* is not what Article 49 is concerned with.

59. The point has been made in a recent annulment committee decision in the course of discussing the Convention's provisions in Article 48 on the contents of an award:

"Article 48(3) refers to the tribunal's obligation to '*deal with*' '*every question*' submitted to it when rendering an '*award*'. The expression '*every question*' has not been defined by the ICSID Convention. All versions of the ICSID Convention ought to be given the same meaning. When read in conjunction with the Spanish and French versions of the ICSID Convention, it seems without doubt that the words '*every question*' in the English version refer to the heads of claim of the parties ('*las pretensiones*' in the Spanish version, '*les chefs de conclusions*' in the French version). Article 48(3), therefore, refers to the tribunal's obligation to deal with, either directly or indirectly, all of the parties' *heads of claim* within its award."<sup>70</sup>

60. The Tribunal has carefully reviewed its Decision and finds it did not omit to decide the various questions identified by Ecuador in its Motion. For example, in relation to Ecuador's complaint concerning whether or not Ecuador's decision not to comply with the Decision on Provisional Measures could constitute a breach of the Participation Contracts, in addition to recounting the history of the *coactiva* proceedings (from paragraphs 150 to 179 of the Decision), the question is addressed in the Decision's Findings at paragraphs 412 to 417.<sup>71</sup>

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ARB/07/23, Decision on Claimant Request for Supplementation and Rectification of the Award, 18 January 2013 (Dr. Andrés Rigo Sureda, President, Honourable Stuart E. Eizenstat and Professor James Crawford, Arbitrators), para 47.

<sup>69</sup> Emphasis added.

<sup>70</sup> *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, (Eduardo Zuleta, Chairman, Florentino Feliciano and Makhdoom Ali Khan, Members), para 87 [emphasis in original].

<sup>71</sup> The operative paragraph is paragraph 417, which states as follows:

61. The Tribunal holds the same view with respect to the other alleged failures to deal with every question submitted to it. Therefore, the Tribunal does not see any basis for the exercise powers under Article 49(2), first limb.

(v) Article 49(2) of the Convention, second limb

62. Turning to a tribunal's power to rectify certain types of errors, since the Motion describes certain decisions taken by the Tribunal as being in error, the Tribunal wishes to record its view as to what can permissibly be rectified under Article 49 even if it were applicable.

63. If a tribunal rectifies a clerical, arithmetical or similar error, it is "reopening" the award and the award is accordingly amended. But there is no suggestion in Article 49 that in the process of acting on these specific grounds a tribunal can engage in a full scale revision of its factual and/or legal analysis, that is, change its mind on questions that it has identified as necessary for decision and which it has then decided. The *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* decision quoted in paragraph 56 above makes this crystal clear. The Convention itself likewise makes this clear by addressing revision of awards in another article.

64. This view as to the rectification procedure's limited purpose is shared by the discussion in the second edition of The ICSID Convention: A Commentary, where it is stated:

Art. 49(2) provides a remedy for inadvertent omissions and minor technical errors in the award. It is not designed to afford a substantive review or reconsideration of the decision but enables the tribunal to correct mistakes that may have occurred in the award's drafting in a non-bureaucratic and expeditious manner.<sup>72</sup>

65. Indeed, reference to the decided cases shows that the kind of "error" which is likely to be accepted as requiring rectification is one where both parties to the arbitration agree that an error requires correction, or where the party that has not moved to rectify the award nevertheless does not object to such a motion by the other party.<sup>73</sup> It need hardly be said that this is not the

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"In the Tribunal's view, a plain reading of clauses 22.2.2 indicates that the contracting parties agreed that they would comply not only with a final award (i.e., in Spanish, the '*laudo*' issued by a tribunal), but in addition, they would observe and comply with the decisions (i.e., in Spanish, the '*decisiones*') of the tribunal. The latter term constitutes a more capacious category of tribunal decisions of which the final award forms a part. Thus, under the Participation Contracts, Ecuador was bound to comply with the Decision on Provisional Measures and its failure to do so constitute a breach of contract."

<sup>72</sup> The ICSID Convention: A Commentary, 2nd edition, pp 849-850 [emphasis added].

<sup>73</sup> See, for example, *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Rectification of the Award, (Francisco Orrego Vicuña, President, Thomas Buergethal, and Maurice Wolf, Arbitrators), paras 18-20; *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Rectification of Award, (Professor Karl-Heinz Böckstiegel, President, Sir Jeremy Lever and Professor Pierre Marie-Dupuy, Arbitrators) para 7; *Industria Nacional de Alimentos, S.A. and Indalsa Peru (formerly Empradas Lucchetti, S.A. and Lucchetti Peru, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Rectification of the Decision on Annulment of the *Ad hoc* Committee, (Justice Hans Danelius, President, Sir Franklin Berman and Professor Andrea Giardina, Arbitrators), para 8.

situation in the present case.<sup>74</sup> Nor, from the face of Ecuador's Motion, can it be said that the errors which it alleges have been committed by the Tribunal are characterised as falling within the category of minor errors.<sup>75</sup> Article 49(2) is not concerned with re-opening an award to "correct" alleged errors of law.

66. The Tribunal finds therefore that Article 49 does not advance Ecuador's Motion for Reconsideration.

(vi) Arbitration Rule 38

67. Rule 38 deals with a different situation, namely, that which obtains after the parties have presented their cases and the proceeding is declared closed. Rule 38(2) provides:

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

68. Ecuador places considerable weight on this rule, but upon review it too is inapposite to the situation at hand.

69. The operative assumption of Rule 38 is that, after the proceeding has been closed but prior to the making of the award, either new evidence comes to light that could decisively affect the outcome of the case (in this first respect, Rule 38 echoes Article 51 of the Convention) *or* there is a vital need for clarification on certain specific points.

70. Since it is unlikely that the tribunal itself would come into possession of new evidence on its own, the former limb would almost certainly be one that would be activated by a disputing party's filing a motion to reopen the proceeding on the ground that it had discovered new evidence of a decisive nature. This is not the situation in the present case.

71. As for the second limb, while not ruling out the possibility that a disputing party would seek clarification of certain specific points between the time of the hearing and the issuance of the award, the prospect seems rather remote. The wording implies that the second ground is one that is activated by the tribunal itself. This could be expected to occur where the tribunal, having declared the proceeding closed and then having engaged in deliberations, realises that one or more specific points needs to be clarified and therefore calls upon the parties to file additional evidence and/or submissions.

72. The point was made by the *ad hoc* Annulment Committee in *Libananco Holdings Co. Limited v. Republic of Turkey*:

It is not unusual that, after written and oral proceedings are completed, during the course of deliberations tribunals discover issues that require further presentations

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<sup>74</sup> Letter dated 11 November 2014 from Debevoise & Plimpton LLP to the Tribunal objecting to Ecuador's seeking to have the Tribunal reconsider its Decision on Remaining Issues of Jurisdiction and Liability.

<sup>75</sup> At various points of the Motion, the Respondent alleges "serious and fundamental", "manifest" and "gross" errors. Motion, paras 11, 47, 135.

by the parties. In the Committee’s view, the Rule was not meant to require an immediate closure of the proceeding upon the last filing or hearing. Rather, each tribunal or committee must be assured, after proper deliberations, that it has all necessary arguments and evidence upon which it has reached or will reach a determination concerning all issues in the case. Closing the proceeding while deliberations are still underway may in fact interfere with the deliberations. This is particularly so when the deliberations concern the question whether or not the case should proceed to the merits, since the tribunal may not have made up its mind about its jurisdiction immediately upon the last presentation in the jurisdictional phase and it cannot close the proceeding if it decides to continue on the merits.<sup>76</sup>

73. Once again, this is not the situation in the present case. Thus, the Tribunal finds the second limb of Rule 38(2) is also inapposite in the circumstances at hand.

(vii) Arbitration Rule 25

74. The next provision called into aid by the Respondent is Rule 25, Correction of Errors, which states as follows:

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

75. Although the Motion contends that there is a “power to reopen and amend and/or reverse the record pursuant to Rule 25” and further that “provisions such as Rule 25 bestow upon the Arbitral Tribunal the power to permit significant amendments and corrections to the record”, in the Tribunal’s view, this rule has no relevance to the present Motion.<sup>77</sup> It plainly cannot be used to justify the Tribunal’s ‘reconsidering’ its Decision in order to reverse its prior findings.

(viii) Article 44 of the Convention

76. Finally, the Respondent has relied upon the Tribunal’s residual discretion to decide a question of procedure which is not covered by Section 3 or the Arbitration Rules or any rules agreed by the parties.

77. The Tribunal does not consider that the matters raised in the Motion and the revisions requested fall within the *genus* of unaddressed procedural matters. To the contrary, as the foregoing review has shown, the circumstances in which a tribunal can reopen an award are comprehensively addressed and in specific and sometimes very narrow terms (as in the case of Article 51). The Tribunal once again recalls the terms of Convention Article 53, which provides: “The award shall be binding on the parties and shall not be subject to any appeal or to any other

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<sup>76</sup> *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Excerpts of Decision on Annulment, (Andrés Rigo Sureda, President, Hans Danelius and Eduardo Silva Romero, Members), para 60 [Emphasis added].

<sup>77</sup> Motion, paras 11, 75.

remedy except those provided for in this Convention.” There is simply no general power to reopen and reverse awards, nor does the Tribunal view the absence of such a general power to be a *lacuna* that needs to be filled in the sense that the *Abaclat* majority sought to fill a perceived gap in the Arbitration Rules when it came to so-called “mass claims”.

78. It is not persuasive to seek to link together discrete provisions of the Convention and the Rules that were designed with specific purposes in mind and with varying degrees of the power to reopen an award in order to support the claimed existence of a power – whether general, procedural or otherwise – which is said to vest in a tribunal simply because it has issued a decision, as opposed to an award.

79. The examples provided by Ecuador, particularly *Abaclat* and *Churchill Mining*, are unavailing. The former case dealt with a very specific issue dealing with the question of whether a large number of claimants could bring a collective or mass claim under the applicable bilateral investment treaty and the ICSID Convention. At the jurisdictional stage, the majority of the tribunal concluded that there was a “gap” in the Convention and the Arbitration Rules which permitted it to formulate a means by which that group of claims could proceed collectively. Professor Abi-Saab dissented. Whether the tribunal was right or wrong in its analysis is not for this Tribunal to say; however, it appears to the Tribunal that this is an example of a tribunal in the early stages of a case seeking to design a procedure that would govern the special needs and demands of the case before it. As for *Churchill Mining*, the issue before that tribunal was purely procedural and simply involved the revisiting of a previously determined procedural schedule in light of new evidence that had been brought to the tribunal’s attention. It is entirely different from the present Motion.

80. The Tribunal also does not find Ecuador’s appeal to the inherent powers of the Tribunal to advance its case. The clear structure of the Convention and the Arbitration Rules cannot be overridden by a general appeal to inherent powers.

81. This takes the Tribunal to *ConocoPhillips v. Venezuela*. The Tribunal refrained from forming a view as to whether it preferred the approach taken by the majority or by the dissenting arbitrator until it had the opportunity to study each of the provisions of the Convention and Arbitration Rules cited by Ecuador and the reasons therefor. Having done so, and having regard to the differences in approach as between the majority and the minority in that case, the Tribunal has little difficulty in expressing its general agreement with the approach taken by the majority.

82. That said, the Tribunal can see how Professor Abi-Saab could form his view that it was necessary for that tribunal to revisit a prior factual finding. His dissenting opinion was predicated upon Venezuela’s submission of new evidence that was *not* available to the tribunal when it rendered its earlier merits decision and which he considered to be of great decisiveness on a particular issue going to the question of whether or not the respondent had breached its obligation to negotiate compensation for an expropriation in good faith.<sup>78</sup> In his view, the

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<sup>78</sup> *ConocoPhillips v. Venezuela* Decision on Jurisdiction and the Merits, para 401. Professor Abi-Saab agreed with much of the Decision but dissented on two issues, both of which came to the forefront

tribunal was in the situation contemplated by Rule 38(2) (i.e., “[e]xceptionally, 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 constitute a decisive factor...”) and it is understandable why he considered that Rule 38(2) ought to be applied in effect even if it is temporally limited. According to Professor Abi-Saab:

“...the Tribunal [was being] requested to exercise the power of limited reconsideration of its prior partial Decision of 3 September 2013, while the case is still pending before it, is that of correcting a claimed material error committed by the Tribunal itself in establishing the facts, as well as in the legal conclusions and consequences it drew from or built on these erroneously established facts.”<sup>79</sup>

83. The basis for the application was Venezuela’s contention that “the Tribunal was under certain misapprehensions with respect to the parties’ confidentiality commitments and the progress of the negotiations after the migration, as well as to consider some crucial related evidence recently revealed via Wikileaks.”<sup>80</sup>

84. Professor Abi-Saab found that in the prior Decision, from which he had also dissented, the majority had “committed *a material error in establishing the facts*” [his emphasis] in its treatment of settlement negotiations and from that it had divined “a presumption - drawn from a single misconceived instance involving an error of fact - of a constant pattern of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes.”<sup>81</sup>

85. He argued both for a general power of reconsideration and further, that if he was wrong on that point, for a specific power of reconsideration “based on a particular or certain particular legal grounds”:<sup>82</sup>

“In sum, in certain contingencies which put or risk putting the credibility and integrity of the tribunal into question – such as its becoming aware that it had committed an error in interpreting evidence or in establishing the facts that led it astray in its legal findings; that the decision did not follow from the facts as determined; that new credible evidence demonstrate that the facts as established by the tribunal were based on wrong premises; or that changed circumstances have rendered the decision otherwise untenable – inherent jurisdiction empowers and even mandate the tribunal to reconsider the prior decision.”<sup>83</sup>

86. The present Tribunal takes a different view as to the existence of a general power of reconsideration as well as on Arbitration Rule 38(2). But in any case, the type of situation which so concerned Professor Abi-Saab is simply not present in the present case.

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of his dissent in the subsequent request for reconsideration. *ConocoPhillips* Dissenting Opinion, paras 38-51, 61-65.

<sup>79</sup> *ConocoPhillips* Dissenting Opinion, para 9 [emphasis added].

<sup>80</sup> *Id.*, para 1.

<sup>81</sup> *Id.*, para 17 [emphasis added].

<sup>82</sup> *Id.*, para 52.

<sup>83</sup> *Id.*, paras 52 and 61.

87. Nothing of the potential significance of the factual evidence that Venezuela adduced in support of its motion has been adduced by Ecuador. Professor Aguilar's 5<sup>th</sup> expert report could not be taken to constitute the kind of recently discovered evidence that came to light after the *ConocoPhillips* Decision had been issued.

88. Thus the facts in the *ConocoPhillips* case, in the view of this Tribunal, are so far removed as to deprive Professor Abi-Saab's views of any relevance to the instant case.

#### **IV. The “serious departure from a fundamental rule of procedure” complaints**

89. Ecuador has also raised various due process concerns. The Tribunal has already noted its view that it is not the appropriate body to review these types of complaints, since they are properly advanced before an *ad hoc* annulment committee. It will simply note that in complex cases such as the instant one, decisions must be taken at various points with respect to the way forward. It will illustrate the point by reference to one of Ecuador's complaints.

90. The Tribunal is criticised for allegedly having given Perenco an additional opportunity to establish French control (with respect to the question of Perenco's standing to bring a claim under the Treaty) and for having “specifically advised the Claimant of the argument it needed to develop and the issues it needed to prove (which it had thus far been unable to) in order for the Arbitral Tribunal to find jurisdiction.”<sup>84</sup> In Ecuador's view, “this same treatment, i.e., the opportunity to be advised of the Arbitral Tribunal's legal and factual concerns and respond to them in further rounds of written and oral pleadings, was not accorded to Ecuador.”<sup>85</sup> It alleges that the Tribunal departed from the parties' pleaded cases on certain issues and based its decisions on propositions not presented by any of the parties and in so doing did not grant Ecuador the same opportunity or indeed any opportunity to provide its views on these newly developed propositions.<sup>86</sup>

91. It is not unusual for tribunals to defer consideration of jurisdictional objections pending a further development of the evidentiary record and tribunals commonly join jurisdictional issues to the merits, as indeed the Tribunal did in the instant case.<sup>87</sup> Thus, the Decision on Jurisdiction did not signal the end of the jurisdictional phase. Having reflected on the parties' submissions and the evidence, the Tribunal decided it was appropriate to provide both parties with a further opportunity to address certain issues in respect of which the Tribunal was not yet prepared to rule.

92. Both parties were therefore given the opportunity over two rounds of written pleadings to adduce further factual and expert evidence and to make submissions. With respect to questions of Bahamian law, both sides adduced expert evidence on questions such as the status of shares

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<sup>84</sup> Motion, para 152.

<sup>85</sup> Motion, para 154.

<sup>86</sup> Motion, para 154.

<sup>87</sup> At paragraph 86 of the Decision on Jurisdiction, the Tribunal, in discussing whether the Claimant had a right of standing held that the issue would be joined to the merits because in the Tribunal's view certain other issues should be clarified prior to arriving at a definitive view as to the Claimant's standing to invoke the Treaty.



owned by an individual who died intestate and the steps required under Bahamian law to effect the transfer of title to the shares. Both parties also addressed the Treaty's negotiating history, with Ecuador urging the Tribunal to pay particularly close attention to the evolution of the relevant provisions (as recorded in paragraphs 492 to 499 of the Decision), while Perenco's main argument was that the plain meaning of the text prevailed, and further that the negotiating history was too fragmentary and incomplete to be reliable.

93. There was nothing in Ecuador's Counter Memorial on Liability and Counterclaims which suggested that Ecuador was not comfortable with the additional opportunity given to both parties to address Perenco's claimed standing to invoke the Treaty. Indeed, Ecuador's first pleading in the next phase requested the Tribunal to further bifurcate the proceeding so as to deal with all remaining jurisdictional issues before proceeding to the merits.<sup>88</sup> The Counter-Memorial also devoted 71 paragraphs to recounting the factual aspects of the Perrodo family's claim to control Perenco, and 38 paragraphs on the Treaty's structure when analysed in light of its negotiating history.<sup>89</sup>

94. Ecuador now expresses its surprise at the Tribunal's asking for the negotiating history in its Decision on Jurisdiction and then not discussing the produced texts in detail in its next Decision: "Ecuador fails to understand why the Arbitral Tribunal requested further evidence on the issue if it considered the history of the negotiations to be irrelevant."<sup>90</sup>

95. The Tribunal did not consider the *travaux* to be irrelevant. While it expressly refrained from expressing a view in its Decision on Jurisdiction as to whether or not the negotiating history would assist it in deciding the point, the Tribunal was interested in examining such records as might be available and for that reason requested the parties to jointly approach the French authorities with a view to obtaining the relevant documents and make submissions thereon to the Tribunal. Upon carefully reviewing the parties' submissions and the negotiating history, the Tribunal did not find the negotiating history to provide a determinate answer to the interpretative question that was different from the interpretation ultimately arrived at. (This explains the way in which the Tribunal expressed its findings at paragraphs 509 to 511 and 528.) A more elaborate set of reasons would not have led to a different result.

96. There are a myriad of different ways in which a Decision or an Award can be drafted. The objective is to organize and decide the questions presented for decision in a suitably comprehensive and comprehensible fashion, at all times having regard to the fundamental imperative of treating the disputing parties equally and in accordance with due process. This is what the Tribunal has sought to do.

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<sup>88</sup> Counter Memorial on Liability and Counterclaim, para 12.

<sup>89</sup> Counter Memorial on Liability and Counterclaim, paras 27-98 and 99-137, respectively.

<sup>90</sup> Motion, para 156.

## **V. Conclusion**

97. For the foregoing reasons, the Tribunal concludes that there is no power vested in it which would allow it to engage in the exercise requested of it, namely, to issue a decision amending its Decision on Remaining Issues of Jurisdiction and Liability dated 12 September 2014 in respect of any of the seven issues identified by Ecuador in its Motion. Article 52 of the Convention does not vest this Tribunal with the power to reopen, amend and/or reverse a decision preliminary to its award. Similarly, the grounds for rectification of an award in Article 49 or revision of an award under Article 51 do not assist the Motion. Rules 25 and 38 of the ICSID Arbitration Rules likewise do not provide any support for the Motion. Article 44 of the Convention does not establish a general power of reconsideration of a tribunal's decisions. Finally, there is no basis for the invocation of the Tribunal's inherent powers. Such powers cannot be used to circumvent the Convention's and the Arbitral Rules' plain language when it comes to amending or otherwise re-opening an award. To the extent that it has responded to particular arguments advanced by Ecuador in its Motion with respect to specific findings of the Decision, the Tribunal has done so purely for illustrative purposes and without prejudice to its decision that it does not have the power to reopen and reconsider its findings in the manner for which Ecuador has contended.

## **VI. Decision**

98. Accordingly, Ecuador's Motion is dismissed, as are its consequent requests to bifurcate the proceedings and stay the Quantum phase of this arbitration.

99. Costs are reserved for future determination.

[signed]

Judge Peter Tomka  
President of the Tribunal

[signed]

Mr. Neil Kaplan, C.B.E, Q.C., S.B.S.  
Arbitrator

[signed]

Mr. J. Christopher Thomas, Q.C.  
Arbitrator