INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CONOCOPHILLIPS PETROZUATA B.V., CONOCOPHILLIPS HAMACA B.V. AND CONOCOPHILLIPS GULF OF PARIA B.V.

Respondents on Annulment

and

BOLIVARIAN REPUBLIC OF VENEZUELA

Applicant on Annulment

ICSID Case No. ARB/07/30
Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Judge Dominique Hascher, President
Prof. Diego P. Fernández Arroyo, Member
Prof. Lawrence Boo, Member

Secretary of the *ad hoc* Committee
Ms. Celeste E. Salinas Quero

Date of dispatch to the Parties: 22 January 2025

REPRESENTATION OF THE PARTIES

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Mr. Henry Rodríguez Facchinetti
Gerente General de Litigio de la Procuraduría General de la República Bolivariana de Venezuela
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TABLE OF ABBREVIATIONS/DEFINED TERMS

November 27 Application	Application for Annulment filed on 27 November 2019
5 December Application	Application for Annulment filed on 5 December 2019
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	Award of 8 March 2019
BIT	Agreement on encouragement and reciprocal protection of investments between the Republic of Venezuela and the Kingdom of the Netherlands and the Republic of Venezuela which entered into force on 1 November 1993
A/C-[#]	Exhibit of the Respondents on Annulment
Memorial (Curtis).	Applicant's Memorial dated 26 November 2020
Memorial (De Jesús)	Applicant's Memorial dated 26 November 2020
Reply (Curtis)	Applicant's Reply dated 10 May 2021
Reply (De Jesús)	Applicant's Reply dated 10 May 2021
CL-[#]	Legal Authority of the Respondents on Annulment
Committee	Judge Hascher, Prof. Fernández Arroyo, Prof. Boo
Hearing	Hearing on Annulment held on 18 – 20 October 2023
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes

A/R-[#]	Applicant's Exhibit
Counter-Memorial (Conoco)	Counter-Memorial of the Respondents on Annulment dated 24 February 2021
Rejoinder (Conoco)	Rejoinder of the Respondents on Annulment dated 23 July 2021
RL-[#]	Applicant's Legal Authority
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing

I. INTRODUCTION AND PARTIES

1. This proceeding concerns an application for annulment (the "**Application**") of the award rendered on 8 March 2019, in the arbitration proceeding between ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. and the Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30) (the "**Award**") rendered by a Tribunal composed of Mr. Eduardo Zuleta, Mr. L. Yves Fortier and Mr. Andreas Bucher. This Decision will use the "**Claimants**" or "**Conoco**," or the "**Conoco Parties**" or the "**Respondents on Annulment**" to refer to ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. and the "**Applicant**" or "**Venezuela**" or the "**Republic**" or the "**Respondent**" for the Republic of Venezuela. The Conoco Parties and Venezuela are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i). This Decision will also refer to the separate law firms that hold themselves as the Respondent's representatives, namely the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP ("**Curtis**") on behalf of the Bolivarian Republic of Venezuela and the law firm De Jesús & De Jesús ("**De Jesús**"), to distinguish the respective filings submitted by each.

2. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement on encouragement and reciprocal protection of investments between the Republic of Venezuela and the Kingdom of the Netherlands which entered into force on 1 November 1993 (the "**BIT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

3. The dispute in the arbitration proceeding related to the interests of the Claimants in two extra-heavy oil projects located in Venezuela's Orinoco Oil Belt region (Faja Petrolífera del Orinoco) — the "Petrozuata Project" and the "Hamaca Project" (the "**Upgrading Projects**"), and in an offshore project for the extraction of light to medium

crude oil — the "Corocoro Project" and the subsequent various measures taken by the Respondent.

4. On 3 September 2013, the Tribunal issued by majority its Decision on Jurisdiction and the Merits. The Tribunal found that the Respondent "breached its obligation to negotiate in good faith for compensation … on the basis of market value as required by Article 6(c) of the [Netherlands-Venezuela] BIT". On 8 March 2019, the Tribunal issues its Award, ordering the Respondent to pay ca. US$ 8.7 billion for damages and US$ 20.4 million to defray Conoco's arbitration costs.

5. The Respondent applied for annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying four grounds for annulment: (i) the Tribunal was not properly constituted (Article 52(1)(a)); (ii) manifest excess of powers (Article 52(1)(b)); (iii) serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iv) failure to state reasons (Article 52(1)(e)).

II. PROCEDURAL HISTORY

6. On 27 November 2019, ICSID received an Application for Annulment of the Award (the "**November 27 Application**"). Mr. George Kahale, from the law firm Curtis submitted the November 27 Application on behalf of the Bolivarian Republic of Venezuela. On 5 December 2019, ICSID received an "Application for Annulment" of the same Award (the "**December 5 Application**"). Dr. Alfredo De Jesús O., from the law firm De Jesús & De Jesús submitted the 6 December Application, also on behalf of the Bolivarian Republic of Venezuela. Both applications also contained a request under Convention Article 52(5) and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") for the stay of enforcement of the Awards until the Application was decided (the "**Request for Stay**").

7. On 16 December 2019, pursuant to Arbitration Rule 50(2), the Secretary-General of ICSID registered the Application. On the same date, in accordance with Arbitration Rule 54(2), the Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed.

8. In the Applications, the Respondent requested "that the Chairman of the Administrative Council of ICSID seek the recommendation of the President of the International Court of Justice with respect to the appointment of the three members of the *ad hoc* Committee." On 17 January 2020, ICSID wrote to the Parties notifying them that (i) "[t]he authority to appoint the members of an *ad hoc* Committee under the ICSID Convention falls on the Chairman of the Administrative Council. Accordingly, the Chairman will not seek a recommendation from the President of the International Court of Justice" and (ii) the Chairman intended to appoint Judge Dominique Hascher, Prof. Diego Fernández Arroyo, and Mr. Kap-You Kim to the *ad hoc* Committee.

9. On 3 February 2020, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Judge Dominique Hascher, a national of the Republic of France, and designated as President of the Committee, Professor Diego Fernández Arroyo, a national of Argentine Republic and the Kingdom of Spain and Mr. Kap-You Kim, a national of the Republic of Korea, had been constituted (the "**Committee**"). On the same date, the Parties were notified that Francisco Grob Duhalde, Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

10. On 20 February 2020, the Secretary of the Committee circulated a draft procedural order to the Parties in preparation for the first session and the preliminary procedural consultation referred to in Arbitration Rules 13 and 20, respectively.

11. On 25 February 2020, the Committee advised the Parties that the first session and the preliminary procedural consultation would be held with the Parties by telephone conference on 25 March 2020.

12. On 2 March 2020, De Jesús, Curtis and the Claimants confirmed their availability on the proposed dates.

13. On 13 March 2020, De Jesús and Claimants submitted their comments and proposals on the draft procedural order circulated on 20 February 2020 and provided their

availability. Curtis submitted its comments on 14 March 2020 along with its availability.

14. Following receipt of the Parties' observations on the Committee's communication of 25 February 2020, and in view of the Parties' availability, the Secretary of the Committee informed the Parties on 19 March 2020, that the Committee had decided to separate the first session from the preliminary procedural consultation and that it would hold the first session on 25 March 2020, only among its Members. The consultation on procedural matters would proceed in writing; however, the Parties would have the opportunity to present their views in an oral hearing scheduled for 17 April 2020, to be held by videoconference. In this regard, the Committee asked the Parties for their views on holding the hearing only in English.

15. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session on 25 March 2020, without the presence of the Parties.

16. On the same date, in response to the Committee's communication of 19 March 2020, counsel for the Respondent as represented by Curtis responded that they had no objection to holding the 17 April hearing only in English. Counsel for the Respondent as represented by De Jesús asked the Committee to consider whether a hearing was necessary "given the nature of the issues pending for decision before the Committee and in light of the public health crisis."

17. On 30 March 2020, the Claimants wrote to the Committee in response to the Respondent's (as represented by De Jesús) request that the hearing be cancelled, asking that the hearing go forward via teleconference rather than videoconference, if necessary.

18. On 3 April 2020, the Committee wrote to the Parties informing them that the 17 April hearing would go on as scheduled and requested an agreed protocol for the hearing and the Parties' views on the Draft Order circulated on 20 February 2020, by 10 April 2020.

19. On 10 April 2020, Curtis, De Jesús and the Claimants each submitted their respective views on the Draft Order.

20. On 15 April 2020, the Committee considered the Parties' respective views on the Draft Order and decided on the hearing schedule.

21. On 16 April 2020, De Jesús submitted a Proposal for the Disqualification of the entire *ad hoc* Committee. The Proceeding was suspended until the proposal was decided on 23 July 2020. The Parties' submissions and the arbitrators' explanations are summarized in the Chairman of the Administrative Council's Decision, whereby the Proposal was declined, and the proceedings resumed on the same day.

22. On 5 August 2020, the Committee invited the Parties to consider the dates of 7, 8, 11, 16, 23, and 24 September for a reconvened hearing. The Parties subsequently provided their availability for the hearing on Stay of Enforcement of the Award.

23. On 10 August 2020, the Secretary of the Committee circulated the Committee's Annotated Draft Procedural Order No. 1 and requested the Parties indicate by 14 August 2020, whether they wish to add or change anything to it.

24. On 14 August 2020, the Parties submitted their respective responses to the Committee's directions of 10 August 2020.

25. On 28 August 2020, the Committee issued Procedural Order No. 1 ("**PO1**") recording the agreements of the Parties on procedural matters and the Committee's decisions on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of the proceeding would be decided before each session by the Committee after consultation with the Parties. Procedural Order No. 1 also sets out a procedural calendar for the proceeding including the date for the Hearing for the Stay of Enforcement of the Award.

26. On 2 November 2020, the Committee invited the Parties to consider the weeks of 18 and 25 October, 22 November and 6 December 2021, to hold the Hearing on Annulment. The Parties subsequently provided their availability.

27. On 16 November 2020, the Committee confirmed that the Hearing on Annulment would take place on the week of 25 October 2021.

28. On 26 November 2020, in accordance with the Procedural Calendar set out in PO1, De Jesús and Curtis both submitted their respective Memorial on Annulment. De Jesús' submission was accompanied by Exhibits A/R-1 to A/R-167 and Legal Authorities A/RLA-1 to A/RLA-76. Curtis' submission was accompanied by Exhibits A/R-1 to A/R-282 and Legal Authorities A/RLA-1 to A/RLA-176.

29. In accordance with the Procedural Calendar set out in PO1, the Conoco Parties filed their Counter-Memorial on Annulment together with Annex A, Exhibits A/C-1 to A/C-140 and Legal Authorities A/CLA-1 to A/CLA-102 on 24 February 2021.

30. As per the Procedural Calendar set out in PO1, De Jesús and Curtis both submitted their respective Reply on Annulment on 10 May 2021. De Jesús' submission was accompanied by Exhibits A/R-168 to A/R-184 and Legal Authorities A/RLA-77 to A/RLA-94. Curtis' submission was accompanied by Exhibits A/R-283 to A/R-293 and Legal Authorities A/RLA-177 to A/RLA-212.

31. On 23 July 2021, in accordance with the Procedural Calendar set out in PO1, the Conoco Parties filed their Rejoinder on Annulment together with Exhibit A/C-141 and Legal Authorities A/CLA-103 to A/CLA-115.

32. On 3 August 2021, the Secretary of the Committee wrote to the Parties on behalf of the Committee proposing to hold the hearing via Zoom due to the travel restrictions imposed by the COVID pandemic and invited the Parties to confer and agree on a schedule for the hearing.

33. On 11 August 2021, the Conoco Parties and Curtis submitted their proposals on the hearing schedule, and on 12 August 2021, De Jesús submitted its proposal.

34. Given the Parties' differing views on distinct matters, on 17 August 2021, the Committee transmitted its decision on the Parties on the mode of the hearing as well as the time allowance.

35. On 27 August 2021, the Committee circulated a draft of Procedural Order No. 2 concerning the organization of the Hearing on Annulment.

36. On 13 September 2021, De Jesús filed its proposed revisions and comments to the Committee's draft Procedural Order No. 2; Conoco and Curtis jointly filed their proposed revisions and comments.

37. On 17 September 2021, the Committee informed the Parties that Procedural Order No. 2 would be issued shortly, and a Pre-Hearing Organizational Meeting was not necessary in view of the narrow scope of disagreements.

38. On 29 September 2021, the Committee issued Procedural Order No. 2 ("**PO2**") concerning the arrangements for the Hearing on Annulment scheduled for 25-29 October 2021, and incorporating the agreements reached by the parties, as well as decisions made by the Committee in case of disagreements.

39. On 7 October 2021, ICSID wrote to the Parties informing them that the Secretary-General, moved the Committee to stay the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e).

40. On 14 October 2021, the Committee stayed the proceeding for lack of payment of the required advances, pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e).

41. Following the Respondent's payment of the outstanding advance, on 14 March 2022, the suspension of the proceeding was lifted, and the proceeding resumed.

42. On the same date, a disclosure from Mr. Kim was transmitted to the Parties.

43. On 18 March 2022, Mr. Kim notified his co-members and the Secretary-General that he was resigning as a Committee Member. On the same date, the Secretary-General notified the Parties of Committee's vacancy and suspended the proceeding pursuant to ICSID Arbitration Rules 10(2) and 53.

44. On 20 March 2022, De Jesús requested that the Chairman of the Administrative Council seek a recommendation from the Secretary-General of the Permanent Court of Arbitration to fill the vacancy left by Mr. Kim.

45. On 28 March 2022, the Secretariat acknowledged receipt of the letter and informed the Parties that the Chairman would not seek an external recommendation to fill the vacancy in the *ad hoc* Committee.

46. On 29 March 2022, De Jesús renewed its request and on 30 March 2022, the Secretariat acknowledged receipt of the request.

47. On 7 April 2022, the Secretariat informed the Parties of the Secretary-General's intention to propose to the Chairman the appointment to the *ad hoc* Committee of Mr. Lawrence Boo, a national of Singapore.

48. On 29 April 2022, Conoco informed that it had no objections. De Jesús requested that the remaining Committee Members, Judge Hascher and Prof. Fernández Arroyo, resign.

49. On 4 May 2022, Conoco submitted comments to De Jesús's request.

50. On 11 May 2022, the Secretariat transmitted to the Parties Judge Hascher's and Prof. Fernández Arroyo's message that they would continue to serve on the Committee.

51. On 24 May 2022, the Secretariat reiterated the Secretary-General's intention to propose Mr. Boo as per the communication of 7 April 2022.

52. On 26 May 2022, the Secretariat informed the Parties that the Chairman had appointed Mr. Boo and would seek his acceptance.

53. On 1 June 2022, the Committee was reconstituted. The new Committee was composed of Judge Dominique Hascher (French), Professor Diego Fernández Arroyo (Argentine/Spanish) and Professor Lawrence Boo (Singaporean). Following the reconstitution of the Committee, the proceeding resumed pursuant to ICSID Arbitration Rules 12 and 53.

54. On 12 June 2022, De Jesús submitted a Proposal for the Disqualification of Judge Dominique Hascher and Professor Diego Fernández Arroyo. The Proposal requested that the Secretary-General of ICSID seek a recommendation from a third-party neutral in connection with the Disqualification Proposal.

55. On 17 June 2022, ICSID acknowledged receipt of the Proposal and notified the Parties that in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision has been taken on the Disqualification Proposal. ICSID also informed the Parties that Ms. C. E. Salinas Quero, ICSID Legal Counsel, would now serve as Secretary of the Committee and established a procedural calendar for the subsequent filings on the Proposal.

56. On 22 July 2022, ICSID informed the Parties that the Chairman, after due consideration, and in the exercise of his discretion, decided to request a recommendation on the Disqualification Proposal from Mr. Ian Binnie C.C., Q.C., former Justice of the Supreme Court of Canada.

57. On 7 September 2022, following the Parties' comments on ICSID's communication of 22 July 2022, ICSID confirmed Judge Binnie's designation.

58. On 27 September 2022, ICSID transmitted to the Parties the Chairman of the Administrative Council's Decision, including a copy of Judge Binnie's recommendation to the Chair in respect of the Disqualification Proposal, dated 16 September 2022. The Proposal was declined, and the proceedings resumed on the same day.

59. On 5 October 2022, the Parties were invited to confer and propose dates to reschedule the Hearing on Annulment and their views on a paper hearing.

60. Following receipt of the Parties' views on the Committee's message of 5 October 2022, the Committee decided to hold an oral, in-person hearing considering the fact that the sanitary restrictions which prompted videoconferencing in 2021 were lifted.

61. On 6 December 2022, the Parties were informed that a 3-day hearing would be held on the dates proposed, subject to the Parties' availability. The Committee also set out the Hearing sequence and time allocation for the Hearing.

62. On 21 December 2022, the Committee confirmed that the dates reserved for the 3-day Hearing were 18, 19, 20 and (21 in reserve) October 2023.

63. On 27 January 2023, ICSID informed the Parties of the 3 available venues to hold the 3-day Hearing in October 2023. On 14 February 2023, following the Parties' views on the venues, the Committee deemed Paris as an appropriate venue for the Hearing on Annulment.

64. On 24 August 2023, a draft Procedural Order No. 3 was circulated to the Parties requesting their joint comments or their respective positions in case of disagreement. The Parties were also requested to provide their availability to hold a Pre-Hearing Organizational Meeting.

65. On 18 September 2023, De Jesús filed a request for the *ad hoc* Committee to decide on the admissibility of new evidence.

66. On 22 September 2023, the Committee issued Procedural Order No. 3 ("**PO3**") concerning the arrangements for the Hearing on Annulment.

67. On 29 September 2023, the Claimants filed a request for the *ad hoc* Committee to decide on the admissibility of new evidence and observations on De Jesús' request of 18 September 2023.

68. On 10 October 2023, the Committee admitted the Parties' document requests of 18 and 29 September 2023.

69. A Hearing on Annulment was held in Paris from 18 October to 20 October 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Committee:

Judge Dominique Hascher	President
Prof. Diego Fernández Arroyo	Member of the Committee

Mr. Lawrence Boo	Member of the Committee

ICSID Secretariat:

Ms. Celeste E. Salinas Quero	Secretary of the Committee

For the ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V.:

Mr. Elliot Friedman	Freshfields Bruckhaus Deringer US LLP
Mr. Lee Rovinescu	Freshfields Bruckhaus Deringer US LLP
Mr. Sam Prevatt	Freshfields Bruckhaus Deringer US LLP
Mr. Cameron Russell	Freshfields Bruckhaus Deringer US LLP
Mr. Pedro Ramirez	Freshfields Bruckhaus Deringer US LLP
Mr. D. Brian King	New York University School of Law
Mr. Constantine Partasides	Three Crowns LLP
Mr. Mihir Chattopadhyay	Three Crowns LLP
Ms. Sindi Gavarrete (support)	Freshfields Bruckhaus Deringer US LLP
Ms. Cassia Cheung (support)	Freshfields Bruckhaus Deringer US LLP
Mr. James Haase (support)	Immersion Legal Graphics LLC
Mr. Diego Rueda	Freshfields Bruckhaus Deringer US LLP
Ms. Yesica Crespo	Freshfields Bruckhaus Deringer US LLP
Parties:	
Ms. Kelly Rose*	ConocoPhillips Company
Ms. Tonya Jordan*	ConocoPhillips Company
Ms. Laura Robertson*	ConocoPhillips Company
Mr. Alberto Ravell*	ConocoPhillips Company
Mr. Fernando Avila*	ConocoPhillips Company
Ms. Lindsey Raspino*	ConocoPhillips Company

For De Jesús & De Jesús:

Mr. Reinaldo E. Muñoz Pedroza	Attorney General of the Bolivarian Republic of Venezuela
Mr. Henry Rodríguez Facchinetti*	Head of Litigation of the Attorney General's Office of the Bolivarian Republic of Venezuela
Mr. Alfredo De Jesús S.	De Jesús & De Jesús
Dr. Alfredo De Jesús O.	Alfredo De Jesús O. | Transnational Arbitration & Litigation
Ms. Eloisa Falcón López	Alfredo De Jesús O. | Transnational Arbitration & Litigation
Ms. Marie-Thérèse Hervella	Alfredo De Jesús O. | Transnational Arbitration & Litigation
Ms. Déborah Alessandrini	Alfredo De Jesús O. | Transnational Arbitration & Litigation

For Curtis, Mallet-Prevost, Colt & Mosle:

Mr. George Kahale III	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Eloy Barbará de Parres	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Irene Petrelli	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Simon Batifort	Curtis, Mallet-Prevost, Colt & Mosle LLP
Dori Yoldi	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Fernando Tupa	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Fuad Zarbiyev	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Noemie Solle	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Vincent Bouvard	Curtis, Mallet-Prevost, Colt & Mosle LLP

Court Reporters:

Mr. Trevor McGowan	English court reporter
Mr. Dante Rinaldi	Spanish court reporter
Ms. María Eliana Da Silva	Spanish court reporter

Interpreters:

Ms. Anna Sophia Chapman	English – Spanish interpreter
Ms. Amalia Thaler-de Klemm	English – Spanish interpreter
Ms. Amalia Thaler-de Klemm	English – Spanish interpreter

*****Denotes remote participant

70. The Parties sent their agreed transcript corrections on 17 November 2023, and the final transcript corrections, with the corrections incorporated by the court reporters were circulated on 29 November 2023.

71. The Parties filed their submissions on costs on 15 December 2023.

72. The proceeding was closed on 2 December 2024.

III. STAY OF ENFORCEMENT

73. The Parties' submissions on the Stay of Enforcement are summarized in the Committee's Decision of 2 November 2020.

74. In its Decision, the Committee decided:

> 67. […] to discontinue the stay once it has been satisfied that all assurances have been given by the Conoco Parties that, should enforcement of the Award be possible under the OFAC sanctions regime, it can return any

money collected under the Award to Venezuela in case of annulment. In fulfilment of this objective, the Committee requests that the Conoco Parties provide:

1) the authorization from OFAC to pay any amounts recovered into a segregated account and to repay any funds paid on the Award if annulled, and
2) the conditions for opening one or more segregated accounts for the funds collected outside of the US, and
3) a guarantee from ConocoPhillips that it will return to Venezuela any funds paid under the Award.

68. The Committee accepts that the authorizations from OFAC be submitted in redacted form.

69. All questions concerning the costs and expenses of the Committee and of the Parties in connection with this application are reserved for subsequent determination, together with the Application for Annulment.

75. By letter dated 22 January 2021, the Claimants informed the Committee that the three conditions set forth in the Committee's Stay Decision, had been satisfied, and therefore the stay should be lifted. The letter was accompanied by Annex 1, a copy of the OFAC Authorization and Annex 2, a guarantee from ConocoPhillips.

76. On 5 February 2021, De Jesús submitted its observations and requested the Committee allow it to verify the evidence produced by the Claimants. The letter was accompanied by Annex 1, OFAC License No. VENEZUELA-EO13884-2020-370509-1 dated 15 January 2021, and Annex 2, ConocoPhillips Company's Letter, Guarantee of Repayment in Satisfaction of the Committee's Conditions on Lifting the Stay of Enforcement dated 21 January 2021.

77. On 8 February 2021, the Committee acknowledged receipt of the submissions and confirmed that it did not receive anything from Venezuela, as represented by Curtis.

78. On 10 February 2021, the Committee wrote to the Parties informing them, among other things, that it "expect[ed] an OFAC authorization delivered to the Conoco Parties, identified in paragraph 3 of the Decision as ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V., the Respondents

on Annulment that had opposed on 4 February 2020 Venezuela's request to continue the stay of enforcement."

79. On 12 February 2021, Conoco submitted a response to the Committee's communication of 10 February 2021, together with Annexes 1-5.

80. The Committee invited Venezuela to file any comments by 26 February 2021.

81. On 26 February 2021, De Jesús filed its comments asking the Committee to dismiss Conoco's request to lift the stay as in their view, they failed to comply with the three conditions set forth in the Committee's Stay Decision.

82. On 3 March 2021, the Committee wrote to the Parties in response to the recent correspondence. The Committee requested among other things, "an official statement from OFAC that the Conoco Parties do not need the authorization requested under n° 67, 1) of the Stay Order"; and for the Conoco Parties to "produce a certificate referring to the commitments signed by Ms Schwarz on 21 January and 12 February 2021 (Annexes 2 and 4) and affirming her power and authority to act on behalf of the ConocoPhillips Company for the matter".

83. On 11 May 2021, Conoco sent a letter to the Committee along with Annexes 1, 6, 7 and 8.

84. On 13 May 2021, the Committee invited Venezuela to comment by 21 May 2021.

85. As instructed by the Committee, De Jesús submitted its comments to the Claimants' letter and Annexes on 21 May 2021.

86. Following receipt of Conoco's and De Jesús' correspondence, the Committee wrote to the Parties on 26 May 2021, and invited Conoco to provide concrete details of the segregated account(s).

87. On 17 June 2021, Conoco submitted an update together with Annexes 1, 3, and 9-11. The following day, the Committee invited Venezuela to comment by 23 June 2021. On 21 June 2021, De Jesús requested an extension, which the Committee granted.

88. On 30 June 2021, De Jesús filed its comments to Conoco's letter of 17 June 2021.

89. On 9 July 2021, the Committee wrote to the Parties whereby it asked Conoco to respond by 16 July 2021, to three questions posed by the Committee.

90. In accordance with the Committee's instructions, Conoco submitted its response on 16 July 2021, together with Annexes 9, 12 and 13.

91. On 20 July 2021, the Committee invited Venezuela to submit comments by 23 July 2021, which it did.

92. On 26 July 2021, the Committee wrote to the Parties, confirming that the first and third conditions set forth in their Stay Decision had been satisfied and asked Conoco to provide concrete details as to the second condition.

93. On 30 July 2021, Conoco provided an update as requested by the Committee. On 3 August 2021, De Jesús responded by stating that Conoco still had not satisfied the second condition.

94. On 5 August 2021, the Committee wrote to the Parties taking note of the recent correspondence and reserving its position until Conoco provided the final account information as stated in their letter.

95. On 8 September 2021, Conoco provided the final account information of the segregated accounts. On 9 September 2021, the Committee invited Venezuela to comment by 15 September 2021.

96. On 13 September 2011, De Jesús requested an extension until 17 September 2021, to file its comments and the Committee agreed. On 17 September 2021, De Jesús filed its response to Conoco's letter of 8 September 2021.

97. On 29 September 2021, the Committee wrote to the Parties informing them that the second condition of the Decision on Stay had been satisfied and, therefore, the stay of enforcement of the Award rendered on 8 March 2019, was discontinued.

IV. ORDERS ON REPRESENTATION

A. PROCEDURAL BACKGROUND

98. On 15 March 2020, De Jesús sent a letter asking the Committee to "exclude the participation" of Curtis from this proceeding on the basis that it is acting on a power of attorney issued by "a person who does not exercise any authority or power within the Venezuelan legal system."

99. On 19 March 2020, the Committee invited Curtis and the Claimants to comment on De Jesús' 15 March letter regarding Venezuela's representation in this proceeding.

100. On 30 March 2020, Curtis filed their observations and requested the Committee to reject the application to change the *status quo* of Venezuela's representation. On the same date, Claimants submitted their respective comments stating that the *status quo* should be maintained with the participation of both the Special Attorney General and the Acting Attorney General and their respective representatives, Curtis and De Jesús.

101. De Jesús submitted further observations on 31 March 2020.

102. On 3 April 2020, the Committee concluded "that maintaining Curtis and De Jesus as counsel of record accords, at this stage of the proceedings, [complies] with procedural fairness" (¶ 37)[1] and issued an Order rejecting De Jesús' application and decided "not to exclude Curtis, instructed by the Special Attorney General, from these proceedings."

103. On 9 April 2020, De Jesús submitted a Reconsideration Request asking that the Committee revisit its 3 April Order, arguing that "it lacks a legal basis as it disregards Venezuelan law, the only applicable law to resolve the issue of representation of the Republic" and "ignores the relevant facts in its assessment for the resolution of the issue of representation of the Republic."

[1] Order on the Applicant's Representation, 3 April 2020, ¶ 37.

104. On 13 April 2020, the Claimants and Curtis submitted their respective comments on the Reconsideration request, and on 14 April 2020, De Jesús submitted their reply.

105. By communication of 15 April 2020, the Committee rejected De Jesús' 9 April Request observing that the application was based on arguments which were already made by De Jesús in its previous letters and had been considered by the Committee when it decided to reject De Jesús's first application.

106. On April 16, 2020, De Jesús proposed to disqualify the entire *ad hoc* Committee. The proceeding remained suspended until July 23, 2020, when the Chairman of the Administrative Council issued a decision declining the disqualification proposal.

107. On 3 August 2020, De Jesús filed another request for the Committee to reconsider its Order on Representation of 3 April 2020.

108. Following invitation from the Committee, on 12 August 2020, Curtis and the Claimants filed their observations on De Jesús' request of 3 August 2020.

109. During the Stay of Enforcement Hearing held on 30 September 2020, the Parties were given the opportunity to address De Jesús' 3 August 2020, request. De Jesús presented oral observations during the hearing.

110. By Order dated 2 November 2020, "[f]ailing any demonstration that Venezuela's representation should be in the hands of De Jesús, to the exclusion of Curtis, for the preservation of Venezuela's rights to accede to justice" (¶ 39),[2] the Committee decided to reject De Jesús' request of 2 August 2020, for reconsideration of the Order on Representation of 3 April 2020.

111. On 21 September 2021, De Jesús filed a Request asking the Committee to reconsider its Order of 2 November 2020.

[2] Order on the Applicant's Request for Reconsideration, 2 November 2020, ¶ 39.

112. Upon an invitation from the Committee, on 23 September 2021, Curtis submitted their comments on De Jesús' Request of 21 September 2021, and the Claimants submitted their comments on 27 September 2021.

113. The proceeding was suspended from 14 October 2021 to 14 March 2022, due to lack of payment and again from 18 March to 1 June 2022, following the resignation of Mr. Kim. It was suspended again from 12 June to September 27, 2022, following the proposal to disqualify Committee Members Judge Hascher and Professor Fernández Arroyo.

114. On 6 December 2022, the Committee invited the Parties to update their respective submissions on the issue of the representation. On 15 December 2022, Curtis replied on behalf of Venezuela that "we see no changes in the situation and have no further comment[.]"

115. On 16 December 2022, the Claimants replied that they "have no further observations, as there has been no relevant change of circumstances. If the relevant circumstances do change, however, the Claimants will respond to any renewed application made;" and on 21 December 2022, De Jesús replied that "the Republic fully reiterates the content of its previous submissions […] and confirms it has no further comment. The Republic's communication is made without prejudice to its objection on the continued participation of Curtis in these proceedings […]".

116. By Order dated 15 February 2023, the Committee decided the following:

> 30. […] we conclude that the 21 September 2021 Request to reconsider the Reconsideration Order on Representation of 2 November 2020 has not demonstrated that the preservation of Venezuela's effective exercise of the right to present its case has been prejudiced by Curtis' involvement (see Order of 2 November 2020, para. 39).
>
> 31. We, therefore, maintain today our Decision of 3 April 2020.
>
> 32. All questions concerning the costs and expenses of the Committee and of the Parties in connection with this application are reserved for subsequent determination, together with the Application for Annulment.

117. On 12 September 2023, De Jesús submitted a letter dated 11 September 2023, from the Attorney General of the Republic of Venezuela requesting that the Committee reconsider its decision issued by way of Order dated 15 February 2023, on the issue of representation by Curtis. De Jesús submitted that in the current political and geopolitical context there is no doubt that the only Government of Venezuela is led by President Maduro and that the Attorney General is Mr Pedroza.[3]

118. Upon invitation from the Committee, Curtis and the Claimants each filed their observations on De Jesús' request of 12 September 2023.

119. On 8 October 2023, De Jesús submitted a letter dated 7 October 2023, from the Attorney General of the Republic of Venezuela containing further observations on the issue of the representation by Curtis.

120. Upon invitation from the Committee, on 11 October 2023, Curtis submitted a letter from Gustavo Marcano of the *Consejo de Administración y Protección de Activos de la República Bolivariana de Venezuela* and the Claimants filed their observations on the letter of the Attorney General dated 7 October 2023.

121. On the same date, the Committee acknowledged receipt of the Parties' correspondence and informed them the Request for Reconsideration would be considered and answered with the Request for Annulment of the Award as filed by Curtis on 27 November 2019, and De Jesús as filed on 5 December 2019, the hearing for which was from 18 to 20 October 2023.

B. THE COMMITTEE'S ANALYSIS AND DECISION ON THE ISSUE OF VENEZUELA'S REPRESENTATION

122. The Committee takes note that the Venezuelan political situation has evolved and is thankful to De Jesús for the information in furtherance of the Committee's communication of 16 April 2020. However, as this proceeding is concerned, the situation has not changed in the essence. The Republic, as represented by Curtis, replied

[3] Letters of 11 September and 7 October 2023 of Attorney General Muñoz Pedroza.

that there was no basis to change the Committee's decision. Its Reply stated that "pursuant to the Law Reforming the Statute Governing the Transition to Democracy to Restore the Validity of the Constitution of the Bolivarian Republic of Venezuela, the Council for the Administration and Protection of Assets is the entity appointed by the legitimate representatives of the National Assembly of Venezuela to protect the assets of [the Republic] and to exercise the judicial representation of [the Republic] abroad."[4] De Jesús retorted that such a Council does not exist and that the communication addressed to the Committee by its coordinator simulates an official Act of the Republic, even using its official coat of arms.[5] It would, therefore, be difficult for the Committee to follow De Jesús' position that the situation of rivalry that existed until the time the Committee was deciding the representation issue has now ceased to exist. The Committee has no mandate to determine the political question of which De Jesús or Curtis is the legitimate representative of Venezuela.

123. The Committee turns to De Jesús' observations that failure to exclude Curtis would place the Republic "*in a grave situation since it would leave it at the mercy of a group of persons who, without having any authority granted by the Republic, with no regulation on the powers allegedly granted to it and with no limit to said powers, can only act –we assume– in their own interest.*"[6] The Committee is mindful of its role to ensure procedural fairness, as it mentioned in the Order of 3 April 2020.[7] However, it is difficult to proceed along the route indicated by De Jesús and exclude Curtis's right to be heard, given De Jesús's lack of substantiation regarding the integrity of its own right of defence.

124. The Committee notes that the Republic, through both representations, has sought the annulment of the Award. The arguments made by De Jesús or Curtis are similar and at times even identical. As anticipated by the Committee in its Order of 3 April 2020, even in the case of divergencies between De Jesús and Curtis, the Committee has heard

[4] Letters of 5 and 11 October 2023 of the Consejo de Administración y Protección de Activos de la República Bolivariana de Venezuela.

[5] Letter of 7 October 2023 of Attorney General Muñoz Pedroza.

[6] Letter of 11 September 2023 of Attorney General Muñoz Pedroza, p. 4.

[7] Order on the Applicant's Representation, 3 April 2020, ¶ 37.

their respective arguments. In short, Venezuela has had an opportunity, through both representations, to present extensively on its application for annulment; De Jesús and Curtis have made their own submissions and appeared separately at the Hearing on Annulment. As for Conoco, it agreed to bear the heavier burden of responding to the arguments made by Venezuela through the representations of De Jesús and Curtis.

125. The Committee consequently denies reconsidering its previous decisions and, thereby, maintains De Jesús and Curtis as counsel of record and will answer separately in this Decision the submissions made by De Jesús and Curtis as envisaged in the Order of 3 April 2020.[8]

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[8] Order on the Applicant's Representation, 3 April 2020, ¶ 36.

V. SUMMARY OF THE GROUNDS FOR ANNULMENT

126. Venezuela, as represented by De Jesús and Curtis, requests that the *ad hoc* Committee annul the Award based on the improper constitution of the Tribunal (Article 52(1)(a)); serious departure from a fundamental rule of procedure (Article 52(1)(d)); manifest excess of powers (Article 52(1)(b)); and failure to state reasons (Article 52(1)(e)).

127. Venezuela invokes several annulment grounds in relation to its annulment request, which include: the composition of the Tribunal **(A);** the Tribunal's exercise of jurisdiction **(B)**; the Tribunal's findings in relation to Article 6 of the Treaty **(C)**; the Tribunal's application of the compensation mechanism **(D);** the Tribunal's treatment of certain quantum inputs and the valuation date for compensation (**E**); and the Award on Costs (**F**).

128. **Section VI**, Part 1 and Part 2, respectively, contain a summary of the Parties' positions and the Committee's analysis of the annulment standards. **Section VII** summarizes the Parties' arguments and contains the Committee's analysis on the grounds invoked.

129. The summaries of the Parties' positions present the arguments separately advanced by Curtis and by the De Jesús representations, on one side, and by the Conoco Parties on the other side. In making its findings, the Committee has carefully considered the Parties' positions. References in this Decision to parts of the Parties' written and oral pleadings are not intended to be exhaustive. This summary is meant to give a general overview of this dispute. It does not claim to include all facts, laws, and arguments referenced by the Parties. These will be discussed, as far as considered relevant, in the context of the Committee's analysis of the disputed issues.

130. In its analysis, the Committee deals in separate sections with the arguments respectively advanced by Curtis and De Jesús, following the order in which their Applications for Annulment were filed,[9] with each section referring to arguments and responses advanced by the Conoco Parties, to avoid repetition.

[9] See Procedural History, ¶ 6 above.

VI. THE STANDARDS FOR ANNULMENT

PART 1: THE PARTIES' POSITIONS ON THE STANDARDS UNDER CONVENTION ARTICLE 52

A. THE STANDARD FOR ANNULMENT UNDER ART. 52(1)(A): IMPROPER CONSTITUTION OF THE TRIBUNAL

(a) Venezuela's Position

131. Venezuela (De Jesús and Curtis) argues that the Committee's review under Article 52(1)(a) requires assessing the entirety of the relevant facts pertaining to the constitution of the Tribunal, including compliance with Convention Article 14(1)'s requirement that arbitrators "may be relied upon to exercise independent judgment."[10] The standard of Article 14(1) includes the concepts of impartiality and independence.[11] An arbitrator's failure to possess the qualities of Article 14(1) warrants annulling an award on grounds of improper constitution under Article 52(1)(a).[12]

132. To support its position, Venezuela refers to the *ad hoc* committee in *Eiser v. Spain*, which annulled the award in that case on grounds of improper constitution, considering that "the Tribunal must have not only been correctly formed, initially, but must have also continued to remain so for the duration of its existence."[13]Venezuela also relies on the annulment decisions issued in *EDF v. Argentina* ("the fact that an arbitrator does not meet the standard required under Article 14(1)...is also a ground on which an award

[10] Memorial (De Jesús), ¶ 17; Reply (De Jesús), ¶ 25; Memorial (Curtis), ¶ 89.

[11] Memorial (De Jesús), ¶ 18; Memorial (Curtis), ¶ 89.

[12] Memorial (De Jesús), ¶ 21; Memorial (Curtis), ¶¶ 89, 90.

[13] Memorial (De Jesús), ¶ 15, 21; Reply (De Jesús), ¶ 27; Memorial (Curtis), ¶ 91. **A/RLA-41** [De Jesús], *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36 (Annulment Proceeding), Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, ("*Eiser Annulment Decision*"), ¶ 158.

might be annulled under Article 51(1)(a))"[14] and in *Suez v. Argentina* ("lack of the qualities in Article 14(1) may serve as ground for annulment under Article 52(1)(a)").[15]

133. Venezuela (Curtis) submits that the Committee must review the relevant facts and circumstances pertaining to the constitution of the Tribunal and giving rise to Venezuela's failed disqualification proposals, to assess if the arbitrators complied throughout the arbitration with the requirements of independence and impartiality.[16] Venezuela argues that the importance of analyzing an arbitrator's conduct in light of "cumulative circumstances" rather than each circumstance in isolation is well recognized and refers, among others, to *Suez v. Argentina*, *Tidewater v. Venezuela*, and writings by authors.[17]

134. Venezuela (Curtis) also argues that the *ad hoc* Committee is not bound by the outcome of Venezuela's failed disqualification proposals during the arbitration.[18]Further, the standards to disqualify arbitrators are directly applicable to determine if a tribunal was improperly constituted under Art. 52(1)(a).[19]

135. In its Reply, Venezuela (Curtis) argues that Conoco set a high bar for annulment under Article 52(1)(a). The decisions on challenges are entitled to a certain deference but the deference is not absolute. If a decision to deny disqualification is "plainly unreasonable," then annulment is appropriate.[20] In the underlying arbitration, the decision not to disqualify the challenged arbitrator was made by applying a wrong standard individually assessing each challenge in isolation from the prior facts.[21]

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[14] **A/RLA-5** [Curtis] / **A/RLA-29** [De Jesús], *EDF International S.A., Saur International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, ("*EDF Annulment Decision*"), ¶ 127.

[15] **A/RLA-43** [Curtis] / **A/RLA-77** [De Jesús], *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment, 5 May 2017, ("*Suez Annulment Decision*"), ¶ 77; Reply (De Jesús), ¶ 25.

[16] Memorial (De Jesús), ¶¶ 16, 22, 28.

[17] Memorial (Curtis), ¶ 104.

[18] Memorial (De Jesús), ¶¶ 25-27.

[19] Memorial (Curtis), ¶ 92.

[20] Reply (Curtis), ¶ 50.

[21] Reply (Curtis), ¶ 51.

136. In its Reply, Venezuela (De Jesús),reiterates its position that the Committee is not bound by prior decisions on disqualification but is empowered to assess the relevant facts and circumstances to verify whether the tribunal was properly constituted. The assessment of independence and impartiality under Convention Articles 14 and 57 requires an objective test that does not require proof of actual dependence or bias.[22]

137. In addition, the power to assess independence and impartiality is not, despite Conoco's assertion to the contrary, limited to a mere formal validation of disqualification decisions (*Azurix*). Such limitation would be contrary to the Committee's inherent mission to safeguard the integrity of the proceedings, which has been highlighted in *Eiser*.[23] Also, the Conoco Parties rely, in the alternative, on the "deferential approach" (*EDF*),but confuse it with a submissive approach where committees are bound by the prior decisions on disqualification made in the arbitration. The present Committee is free to assess and it is not bound by prior disqualification decisions, as reaffirmed by the *Mobil* decision.[24] In any event, even to apply the "plainly unreasonable" standard of the *EDF* decision, the Committee would have to consider factual elements to determine if a tribunal lacked independence and impartiality, including the factual and legal findings of the disqualification decisions made by the unchallenged arbitrators and the Chair.[25]

(b) The Conoco Parties' Position

138. Annulment on this ground cannot succeed unless there was a failure to comply with the provisions of the ICSID Convention and the ICSID Arbitration Rules relating to the constitution of the Tribunal.[26] In no event is Venezuela entitled to reargue its failed disqualification proposals. [27]

[22] Reply (De Jesús), ¶¶ 22-29, 33.

[23] Reply (De Jesús), ¶¶ 31, 32.

[24] Reply (De Jesús), ¶¶ 35-40.

[25] Reply (De Jesús), ¶¶ 41-44.

[26] Convention Articles 37 through 40 ("Constitution of the Tribunal"), Articles 56 through 58 ("Replacement and Disqualification of Conciliators and Arbitrators"), and Arbitration Rules 1 through 12 ("Establishment of the Tribunal").

[27] Counter-Memorial (Conoco), ¶ 84.

139. Conoco submits that two approaches have emerged in analysing an alleged improper constitution under Art. 52(1)(a). Both approaches preclude a *de novo* review of allegations underlying the proposals for disqualification, requiring committees to approach the issue of an arbitrator's independence and impartiality with deference to the tribunal's factual and legal findings.[28]

140. According to the first approach, the inquiry of improper constitution is purely procedural. If the procedures for the tribunal constitution were followed, that is the end of the matter. The *ad hoc* committees in *Azurix v. Argentina* and *OI European v. Venezuela* adopted this approach.[29]According to the second approach, an annulment under Art. 52(1)(a) fails "unless the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision."[30] The *ad hoc* committees *EDF v. Argentina, Suez II,* and *Mobil v. Argentina* adopted this approach.[31] The scope of the Committee's review is limited to the question of whether the rejection of the challenge is so facially unreasonable that no rational decision-maker could have reached the same result.[32]

141. In its Rejoinder, the Conoco Parties maintain their position that Venezuela is asking the Committee to make an impermissible *de novo* review of the allegations underlying the challenges, in circumstances that the challenges were raised and resolved in the arbitration. The two lines of authorities discussed *supra* (*Azurix*/ *OI European* and *EDF/Suez II/Mobil Exploration*) preclude a *de novo* review.[33] Under the *EDF* standard,

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[28] Counter-Memorial (Conoco), ¶¶ 85 and 87.

[29] **A/CLA-58**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment on the Application for Annulment of the Argentine Republic, 1 September 2009, ("*Azurix Annulment Decision*"), ¶¶ 279–80 (noting that the ground concerns whether the "tribunal was 'not properly constituted'" under the "procedures established by … the ICSID Convention"); see also **A/CLA-91**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela, 6 December 2018, ("*OI Annulment Decision*"), ¶ 108 (adopting the Azurix approach, noting that it "maintains the distinction between the rules and standards concerning tribunal formation, arbitrator challenges and annulment, thus facilitating the operation of the Convention and Rules").

[30] *EDF Annulment Decision*, ¶ 145

[31] *Suez Annulment Decision*, ¶¶ 92–94; **A/CLA-97 / A/RLA-45 [De Jesús]**, *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on the Application for Annulment by the Argentine Republic, 8 May 2019, ("*Mobil Annulment Decision*"), ¶ 44.

[32] Counter-Memorial (Conoco), ¶ 165.

[33] Rejoinder (Conoco), ¶ 25.

the Committee must proceed with deference, limited to the facts found in the original decisions on disqualification and only review if the decisions were "plainly unreasonable."[34]

142. Conoco submits, contrary to Venezuela's (Curtis) position, that the adjudicators did not apply the wrong standard. Venezuela advocates for a "cumulative circumstances" rule which does not exist in the ICSID Convention or any annulment decision, and which Venezuela argued many times in the arbitration and lost every time.[35] Venezuela (De Jesús) similarly argues that the disqualification proposals were decided under an incorrect standard. Venezuela requests the Committee to assess the facts and circumstances giving rise to the proposals for disqualification. Such a request amounts to an impermissible *de novo* review and is nowhere to be found in the ICSID Convention or decided cases.[36]

B. THE STANDARD FOR ANNULMENT UNDER ART. 52(1)(B): MANIFEST EXCESS OF POWERS

(a) Venezuela's Position

143. Venezuela (De Jesús) submits that two conditions must be met for an award to be annulled under Article 52(1)(b): first, the tribunal must have exceeded its powers; second, the excess must be manifest.[37]This Committee should, like other *ad hoc* committees have done in the past, adopt a 2-step approach to firstly, determine if the Tribunal exceeded its powers, and secondly, determine if the excess was manifest.[38]

144. Venezuela submits that a tribunal exceeds its powers when it goes beyond the scope of the parties' consent given by the arbitration agreement or parties' submissions, or when it fails to apply the applicable law.[39] Further, Venezuela (Curtis) argues that a manifest

[34] Rejoinder (Conoco), ¶ 28.
[35] Rejoinder (Conoco), ¶¶ 28(a), 34-38, 61.
[36] Rejoinder (Conoco), ¶ 28(b).
[37] Memorial (De Jesús), ¶ 136; Reply (De Jesús), ¶ 48.
[38] Memorial (De Jesús), ¶ 137; Reply (De Jesús), ¶ 48.
[39] Memorial (De Jesús), ¶ 138; Memorial (Curtis), ¶ 290, 291.

excess of powers exists when a tribunal invents a dispute or create its own facts out of the undisputed material facts agreed between the parties.[40]

145. Regarding excess of power as going beyond party agreement, Venezuela relies on the decision of the *Helnan ad hoc* committee, to argue that, in the case of an investment treaty claim the parties' agreement is constituted by the BIT, the ICSID Convention and the claims brought against the State.[41] In the present case, the Committee must first frame the scope of the Tribunal's powers and to that end it "must primarily consider the terms of the ICSID Convention and those of the BIT."[42]Venezuela argues this exercise requires the Committee to independently interpret the jurisdictional sources and to carefully analyze the relevant case and doctrine of other tribunals and *ad hoc* committees.[43]

146. Regarding excess of power as failure to apply the law, Venezuela argues that the Committee should not limit itself to listing the applicable rules; instead, it should verify that the Tribunal applied the rules under the specific circumstances of this case. Venezuela relies on the decision of the *ad hoc* committee in *Klöckner* which annulled the award under its scrutiny. According to the *Klöckner* committee, a tribunal fails to apply the law if it limits itself "to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form."[44]Venezuela also submits that there is manifest excess of powers in cases of gross or egregious misinterpretation or misapplication of the law, which is tantamount to failing to apply the proper law.[45]

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[40] Memorial (Curtis), ¶¶ 294, 696.

[41] Memorial (De Jesús), ¶ 138 and Memorial (Curtis), ¶ 290, citing **A/RLA-98 [Curtis]** / **A/RLA-59 [De Jesús]**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, 14 June 2010, ¶ 40.

[42] Memorial (De Jesús), ¶ 140; Reply (De Jesús), ¶ 52.

[43] Memorial (De Jesús), ¶ 140.

[44] Memorial (De Jesús), ¶ 141 and Memorial (Curtis), ¶ 292, citing **A/RLA-15 [Curtis]** / **A/RLA-39 [De Jesús]**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camérounaise des Engrais S.A.*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner Against the Arbitral Award, 3 May 1985, ("*Klöckner Annulment Decision*"), ¶ 79; Reply (De Jesús), ¶ 59.

[45] Memorial (De Jesús), ¶ 272; Memorial (Curtis), ¶ 291.

147. Regarding the second part of the test, Venezuela's view (De Jesús) argues that the "manifest" requirement may be deemed satisfied each time an excess of powers regarding jurisdiction is committed by an arbitral tribunal because jurisdictional issues are clear-cut issues: either a tribunal has jurisdiction, or it does not. In the latter case, if the tribunal nevertheless assumes jurisdiction, it necessarily exceeds its powers.[46]

148. In its Reply, Venezuela (Curtis), suggests that the annulment decisions in *Occidental v. Ecuador* and in *Mobil v. Venezuela* are instructive on the issue of manifest excess of power and they put to rest Conoco's premise that manifest excess cannot coexist with extensive argumentation and analysis.[47]

149. Venezuela also replies that the Conoco Parties fail to deal with the cases demonstrating that failure to apply the applicable law constitute a ground for annulment. They ignored the *Mobil* decision and failed to deal with *Soufraki*, according to which egregious misinterpretation or misapplication of the proper law may amount to failure to apply the proper law. Venezuela also refers to several authors and submits that a tribunal manifestly exceeds its authority if it disregards the agreement of the parties or goes beyond their submissions.[48]

150. Finally, Venezuela rebuts that the Tribunal disregarded the Parties' agreements and awarded compensation where it was not requested. Such excursions constitute an excess of authority, beyond any discretion they may be afforded to deal with quantum matters.[49]

151. In its Reply, Venezuela (De Jesús), reiterates that the Committee shall perform a two-step analysis, which requires starting by framing the limits of the Tribunal's powers under the BIT and the ICSID Convention. Venezuela submits that the Conoco Parties

[46] Memorial (De Jesús), ¶ 142.
[47] Reply (Curtis), ¶¶ 60-62.
[48] Reply (Curtis), ¶¶67-71.
[49] Reply (Curtis), ¶¶ 72-76.

have not presented other appropriate methodology, other than objecting to the Committee reviewing the sources of the Tribunal's jurisdiction and applicable law.[50]

152. Venezuela also replies that Conoco Parties' defense created confusion between the first and second steps of the analysis. Venezuela submits that a tribunal exceeds its powers if it makes a decision non-compliant with the scope of its jurisdiction or if it fails to apply the applicable law. Venezuela relies on *Soufraki* to argue that egregious misapplication of the proper law or partial application of the law constitute excess of power.[51]

153. Relying on *Caratube*, Venezuela argues that the assessment of whether the excess was "manifest" does not limit the Committee's analysis to a *prima facie* review and.[52] Venezuela submits that Conoco Parties impliedly acknowledge that the Committee is empowered to analyze the Award, when they posit that the relevant factor is whether the question resolved by the tribunal was "open to debate." However, Venezuela argues that jurisdictional issues are clear-cut and not open to debate.[53]¶¶

154. Despite to Conoco's contention to the contrary, Venezuela argues that a "manifest" excess does not require there to be substantive adverse consequences to the party seeking an annulment. Several authorities acknowledge that "manifest" does not relate to the seriousness of the excess. Furthermore, Venezuela argues under Article 52(1)(b), excesses such as failure to apply the applicable law are naturally adverse to the party seeking an annulment.[54]

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[50] Reply (De Jesús), ¶¶

[51] Reply (De Jesús), ¶¶ 56-61, citing at para. 61, **A/RLA-8 [Curtis] / A/RLA-32 [De Jesús]**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, ("*Soufraki Annulment Decision*"), ¶ 86.

[52] Reply (De Jesús), ¶ 65, citing **A/RLA-60 [De Jesús] / A/RLA-60 [Curtis]**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, ("*Caratube Annulment Decision*"), ¶ 84.

[53] Reply (De Jesús), ¶¶ 70-72.

[54] Reply (De Jesús), ¶ 74.

(b) The Conoco Parties' Position

155. Conoco's position is that the ground of Article 52(1)(b) does not empower *ad hoc* committees to supplant a tribunal's findings of fact or law. The ground of "manifest excess of powers" prevents the tribunal from "'stepp[ing] entirely outside the scope of its authority' as vested in it by the consent of the parties."[55]

156. Conoco agrees that under Article 52(1)(b), the Committee should make a two-step inquiry: first determine if the Tribunal exceeded its power; and second, if so, determine if the excess was "manifest."[56] This inquiry does not encompass an assessment of the evidence adduced before the tribunal and its probative value. Conoco argues that a tribunal's factual findings "are essentially unassailable on annulment."[57]

157. Conoco refers to the *ad hoc* committee in *Impregilo* to support its position that "manifest" means that the excess of power must be "obvious, self-evident, clear, flagrant and substantially serious." This is a high threshold which is reached if the excess of powers is discernible or obvious from a simple reading of the award, without requiring an elaborate analysis of the award.[58] In this regard, Conoco refers, among others, to the decisions of the *ad hoc* committees in *Standard Chartered Bank v. Tanzania*[59] and in *Repsol YPF v. Ecuador*.[60]

158. Also, the alleged excess of powers is not "manifest" unless a tribunal's opinion is so untenable that it cannot be supported by reasonable arguments. For Conoco, "[…] an

[55] Counter-Memorial (Conoco), ¶ 92, citing *Soufraki Annulment Decision*, ¶ 37.

[56] Counter-Memorial (Conoco), ¶ 94; Rejoinder (Conoco), ¶ 14.

[57] Counter-Memorial (Conoco), ¶ 99.

[58] Counter-Memorial (Conoco), ¶¶ 95, 96; Rejoinder (Conoco), ¶ 15.

[59] Counter-Memorial (Conoco), ¶ 96, citing **A/CLA-89 / A/RLA-187 [Curtis]**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018, ¶ 181 ("The excess is 'manifest' in nature if it is obvious, clear, self-evident, and discernible without the need for an elaborate analysis of the award.").

[60] Counter-Memorial (Conoco), ¶ 96, referring to **A/CLA-53**, *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment, 8 January 2007, ¶ 36 ("It is generally understood that exceeding one's powers is 'manifest' when it is 'obvious by itself' simply by reading the Award, that is, even prior to a detailed examination of its contents […].").

alleged error cannot constitute a 'manifest' excess of power if the underlying issue is subject to more than one reasonable interpretation or is otherwise open to debate."[61]

159. Conoco also identifies an additional cumulative requirement, namely that the excess of powers is "manifest" only if it had substantive consequences adverse to the party seeking an annulment. This requirement, Conoco argues, follows from the exceptional nature of annulment as a post-award remedy.[62]

160. Conoco's position is that an erroneous interpretation or application of the law is not a manifest excess of powers. Also, failure to apply the applicable law is not an excess of powers, unless a tribunal fails to apply the "proper law *in toto*."[63] A tribunal's decision not to address or apply a particular legal provision that it considers irrelevant does not constitute a failure to apply the applicable law.[64] Conoco submits that Venezuela insists on alleged errors in the Tribunal's application of the BIT provisions or customary international law, in an attempt to relitigate issues decided by the Tribunal.[65]

161. Finally, in Conoco's view, under an analysis under Article 52(1)(b), a tribunal maintains a broad margin of discretion in exercising its power to award and calculate damages. Committees are not permitted to review *de novo* a tribunal's damages assessment.[66]

162. In its Rejoinder, Conoco submits that the annulment decisions on which Venezuela relies did not engage a re-examination of the evidence and arguments presented to the

[61] Counter-Memorial (Conoco), ¶ 97, referring to **A/RLA-61 [Curtis]**, *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, ("*Duke Energy Annulment Decision*"), ¶ 99 ("A debatable solution is not amenable to annulment, since the excess of powers would not then be 'manifest.'").

[62] Counter-Memorial (Conoco), ¶ 98.

[63] Counter-Memorial (Conoco), ¶ 104, referring to **A/RLA-64** [De Jesús], *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision on Annulment, 29 June 2012, ("*AES Annulment Decision*"), ¶ 35;

[64] Counter-Memorial (Conoco), ¶ 105.

[65] Counter-Memorial (Conoco), ¶ 103.

[66] Counter-Memorial (Conoco), ¶ 107.

tribunal. Besides, the term "manifest" demands that the excess be obvious and discernible without the need for elaborate interpretation or analysis.[67]

163. Further, Conoco submits that Venezuela omits a part of the standard adopted in *Soufraki,* namely that an egregious error of law can amount to a failure to apply the proper law if the error is so gross that no reasonable person could accept it. Venezuela has not met that standard.[68] Finally, Conoco reiterates that tribunals have significant latitude in resolving legal questions, arriving at compensation amounts and pursuing the line of reasoning they find most convincing, without being limited to the specific arguments presented by the parties.[69]

C. THE STANDARD FOR ANNULMENT UNDER ART. 52(1)(D): SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

(a) Venezuela's Position

164. Venezuela (De Jesús and Curtis) submit that for annulment to proceed under Article 52(1)(d), there must be (i) a serious departure, and (ii) it must be of a fundamental rule of procedure.[70]

165. For Venezuela, a fundamental rule of procedure refers to a set of minimal procedural standards to be respected under international law. For example, equal treatment, the right to be heard and the right to an independent and impartial tribunal are fundamental rules of procedure. Venezuela relies on the annulment decisions in *Wena*, *Impregilo*, and *Orascom*.[71]

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[67] Rejoinder (Conoco), ¶ 15.

[68] Rejoinder (Conoco), ¶¶ 16, 17.

[69] Rejoinder (Conoco), ¶ 18.

[70] Memorial (Curtis), ¶ 110; Memorial (De Jesús), ¶ 97; Reply (De Jesús), ¶ 78.

[71] Memorial (De Jesús), ¶ 98; Memorial (Curtis), ¶¶ 112, 113; Reply (De Jesús), ¶ 80-82, citing **A/RLA-36 [De Jesús] / A/RLA-12 [Curtis]**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment, 24 January 2014, ("*Impregilo Annulment Decision*"), ¶ 165; **A/CLA-102***, Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, 17 September 2020, ("*Orascom Annulment Decision*"), ¶ 139; **A/RLA-51 [De Jesús]**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision, 5 February 2002, ("*Wena Annulment Decision*"), ¶ 57.

166. Venezuela's position is that a departure is serious if it deprives a party of the benefit or protection a rule intends to provide.[72] Further, referring to the decisions of the *ad hoc* committees in *Pey Casado v. Chile*[73] and in *Caratube v. Kazakhstan*,[74] Venezuela submits that a departure is serious if it had or if it could have had a material impact on the tribunal's decision.[75]

167. In its Reply (Curtis), clarifies that it invoked this ground for annulment in situations where Venezuela was denied the right to respond or the right to an impartial tribunal or to appoint a replacement arbitrator. Despite Conoco's position to the contrary, these are rules concerning the integrity and fairness of the arbitration.[76] Relying on the annulment decision in *Eiser v. Spain*, Venezuela submits that the denial of its right to appoint a replacement arbitrator or to have an impartial tribunal are "serious" departures, as they could have had a material effect on the arbitrators, their deliberations, and the outcome.[77]

168. In its Reply, Venezuela (De Jesús) asserts that the issue is not the need to satisfy any two-prong test but the scope and content concerning the fundamental rules of procedure.[78] Venezuela rebuts Conoco's proposition that Venezuela's right to appoint an arbitrator or to present its case should be excluded and are not concerned with the integrity and fairness of the procedure.[79] Venezuela also disputes Conoco's position that for the departure to be serious it must reach a substantially different result had the rule been observed. Venezuela instead posits, citing the annulment decisions in *Caratube, Orascom*, and *TECO* in support, that a departure is serious if compliance

[72] Memorial (De Jesús), ¶ 99; Memorial (Curtis), ¶ 110; Reply (De Jesús), ¶ 84.

[73] **A/RLA-14 [Curtis] / A/RLA-38 [De Jesús]**, *Víctor Pey Casado and Foundation "President Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, ("*Pey Casado Annulment Decision*"), ¶ 80.

[74] *Caratube Annulment Decision*, ¶ 99 (emphasis added) (quoting *Wena Annulment Decision*, ¶ 61).

[75] Memorial (De Jesús), ¶ 100; Memorial (Curtis), ¶ 110; Reply (De Jesús), ¶ 85.

[76] Reply (Curtis), ¶¶ 78, 79.

[77] Reply (Curtis), ¶¶ 81, 82.

[78] Reply (De Jesús), ¶ 79.

[79] Reply (De Jesús), ¶ 83.

with the rule could have potentially affected the award, without requiring a showing of a different outcome.[80]

(b) The Conoco's Parties' Position

169. According to Conoco, Article 52(1)(d) seeks to ensure that "minimal standards of procedure" are observed in arbitral proceedings,[81] under which the party seeking annulment must prove (i) the existence of a fundamental rule, and that (ii) the Tribunal or the Chairman seriously departed from such rule.[82]

170. Conoco's position is that the violated rule must be fundamental in the sense that it relates to a due process element, like equal treatment, the right to be heard, to respond or to an independent and impartial tribunal. Annulment under Article 52(1)(d) excludes ordinary rules not concerned with the integrity or fairness of the arbitration.[83] This ground is "restricted to the principles of natural justice, including the principles that both parties must be heard and that there must be adequate opportunity for rebuttal"[84]

171. A serious departure, Conoco submits, is one that causes the tribunal to reach a result substantially different from that which it would have reached had the rule been observed. A serious departure is not one which merely potentially impacts the outcome.[85]

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[80] Reply (De Jesús), ¶ 86-89, citing *Caratube Annulment Decision*, ¶ 43; *Orascom Annulment Decision*, ¶ 142; **A/RLA-65 [De Jesús] / A/RLA-115 [Curtis]** *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, ("*TECO Annulment Decision*"), ¶ 85.

[81] Counter-Memorial (Conoco), ¶¶ 110, 343, referring to **A/RLA-99 [Curtis] / A/RLA-76 [De Jesús]**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015, ("*Tza Yap Shum Annulment Decision*"), ¶ 116 (citing *Wena Annulment Decision*, ¶ 57).

[82] Counter-Memorial (Conoco), ¶ 110; Rejoinder (Conoco), ¶ 19.

[83] Counter-Memorial (Conoco), ¶ 111.

[84] Counter-Memorial (Conoco), ¶¶ 111, 343, referring to **A/RLA-9 [Curtis] / A/RLA-33 [De Jesús]**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, 23 December 2010, ¶ 186 (citing **A/CLA-33**, History of the ICSID Convention, Volume II, Part 1, Documents 1–43 (1968) (excerpt), pp. 271, 423, 480, 517).

[85] Counter-Memorial (Conoco), ¶¶ 114, 115.

D. THE STANDARD FOR ANNULMENT UNDER ART. 52(1)(E): FAILURE TO STATE REASONS

(a) Venezuela's Position

172. Convention Article 52(1)(e) must be read in conjunction with Convention Article 48(3), which requires that the award "'deal with every question submitted to the Tribunal and [to] state the reasons' on which the award is based."[86] At a minimum, Articles 48(3) and 52(1)(e) require that the reader can follow how the tribunal proceeded from Point A to Point B – a standard the committee in *MINE v. Guinea* adopted.[87] In its Reply, Venezuela (De Jesús) notes that Conoco Parties rely on the test articulated in *MINE*.[88] Venezuela (De Jesús) argues that contradictory or frivolous reasons do not meet this minimum standard articulated in *MINE*.[89] However, insufficient or inadequate reasons amount to a failure to state reasons,[90] and as the committee in *Soufraki* considered, can spur an annulment.[91]

173. Further, Articles 48(3) and 52(1)(e) oblige a tribunal to deal with the issues, arguments and evidence presented to it. For example, the committee in *MINE* annulled the damages section of the award due to the tribunal's failure to consider the parties' arguments. Similarly, the committee in *Occidental v. Ecuador* stressed the importance of addressing every question submitted to the tribunal, and the committee in *TECO v. Guatemala*, stresses that "a tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[92]

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[86] Memorial (Curtis), ¶ 296; Memorial (De Jesús), ¶ 292; Reply (De Jesús), ¶ 94.

[87] Memorial (Curtis), ¶ 297, Memorial (De Jesús), ¶ 196, respectively, citing and referring to **A/RLA-10 [Curtis] / A/RLA-34 [De Jesús],** *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, ("*MINE Annulment Decision*"), ¶ 5.09.

[88] Reply (De Jesús), ¶ 109.

[89] Memorial (Curtis), ¶ 297, citing *MINE Annulment Decision*, ¶ 5.08-5.09; Memorial (De Jesús), ¶ 196.

[90] Memorial (De Jesús), ¶ 357.

[91] Memorial (Curtis), ¶ 297, citing *Soufraki Annulment Decision*, ¶¶ 122-123.

[92] Memorial (Curtis), ¶¶ 300, 301, respectively, citing **A/RLA-114 [Curtis] / A/RLA-58 [De Jesús]**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ("*Occidental Annulment Decision*"), ¶ 64; and *TECO Annulment Decision*, ¶¶ 131, 135-136, 138.

174. In its Reply, Venezuela (Curtis) again refers to the annulment decision in *Mobil*, which the Conoco Parties failed to address along with other authorities. The committee in *Mobil* found that portions of the ICC award dealing with the relevance of the compensation provisions were unsupported by analysis and based on contradictory reasoning, and decided that it constituted a failure to state reasons. Venezuela also acknowledges that not every piece of evidence must make its way into the tribunal's analysis, but merely reciting documents in the record does not equal to addressing them. Venezuela refers to the annulment decision in *TECO* to argue that a tribunal cannot ignore key documents and critical arguments advanced by a party.[93]

175. In its Reply, Venezuela reiterates that the Committee is empowered to review if the Tribunal's reasons were contradictory, insufficient or inadequate so as to warrant annulment under Convention Article 52(1)(e).[94] Venezuela argues that the Conoco Parties misrepresent Venezuela's pleadings, insinuating the Republic is criticizing the quality (correctness) or persuasiveness of the Tribunal's reasoning, whereas Venezuela's arguments are grounded on the Award's inadequate or insufficient and its contradictory reasons.[95]

176. Venezuela submits that the Committee should apply the *Klöckner* test, which states that two genuinely contradictory reasons cancel each other out. Venezuela rejects Conoco's proposition to apply a heightened threshold, namely, that reasons must, firstly, be genuinely contradictory, and secondly, the issue relating to those reasons is necessary for the Tribunal's decision. This heightened threshold, Venezuela argues, is not a settled one.[96]

[93] Reply (Curtis), ¶¶ 83-87.
[94] Reply (De Jesús), ¶ 95-99.
[95] Reply (De Jesús), ¶¶ 101-107.
[96] Reply (De Jesús), ¶¶ 110, 111.

(b) The Conoco Parties' Position

177. Convention Article 48(3) requires the tribunal to provide a reasoned award. In limited circumstances, a violation of the duty to provide reasons leads to annulment under Convention Article 52(1)(e).

178. This annulment ground does not permit committees to review the quality or persuasiveness of the tribunal's reasoning. Failure to state reasons can arise when there is complete absence of reasons; when the reasoning is contradictory; or where the reasoning lacks coherence so that it cannot be followed from "Point A" to "Point B."[97]

179. Venezuela attacks the award on alleged failure to provide reasons, or for unintelligible reasons, but in reality, it disagrees with the Tribunal's reasoning and with the outcome of the Award. Article 52(1)(e) does not permit scrutinising the quality of the reasons or substituting the tribunal's judgment with the committee's own judgment.[98] *Ad hoc* committees have confirmed that there is no basis for annulment if it is possible to follow a tribunal's reasoning through to its conclusion- even if the award contains errors of fact or law. Conoco refers to the *Vivendi I* committee, which considered that the ground of "Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. […] [p]rovided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e)."[99]

180. Further, a tribunal is not required to address each argument raised under every claim, or any argument that is not relevant to its decision. Neither is the tribunal required to expressly address any particular piece of evidence.[100] Failure to state reasons must relate to a point that is essential to the tribunal's decision. A tribunal's reasons may be

[97] Counter-Memorial (Conoco), ¶ 121; Rejoinder (Conoco), ¶ 20.

[98] Counter-Memorial (Conoco), ¶ 122.

[99] Counter-Memorial (Conoco), ¶ 122, citing **A/CLA-43**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ("*Vivendi I, Annulment Decision*"), ¶ 647.

[100] Counter-Memorial (Conoco), ¶¶ 124, 125.

implicit, if they are understandable. Neither Article 48(3) nor Article 52(1)(e) specifies the manner in which a tribunal must state its reasons.[101]

181. Finally, the threshold for finding contradictory reasons amounting to a failure to state reasons is high. Conoco refers to the decision of the *Daimler* committee, which considered that annulment based on contradictory reasons requires "[f]irst, the reasons must be genuinely contradictory in that they cancel each other out so as to amount to no reasons at all. Second, the point with regard to which these reasons are given is necessary for the tribunal's decision."[102] In this regard, there is a difference between genuine contradictions and a tribunal's weighing of conflicting considerations (*Vivendi I*).[103]

182. In addition, the Daimler committee noted, "in reviewing the apparent contradictions, the ad hoc committee should, to the extent possible and considering each case, prefer an interpretation which confirms an award's consistency as opposed to its alleged inner contradictions."[104] In any event, in this case, there were no contradictions in the Tribunal's reasoning, so no interpretation is necessary.

183. In its Rejoinder, Conoco reiterates that the threshold for establishing a failure to state reasons is high, and committees are not permitted to review the persuasiveness or correctness of the tribunal's reasons. Conoco argues that Venezuela cites no authority to undermine this standard.[105]

184. Conoco also replies to Venezuela's contention that a tribunal cannot ignore key documents and critical arguments. Yet what constitutes a "key" document, or a "critical" argument is a determination left to the tribunal, which committees cannot

[101] Counter-Memorial (Conoco), ¶¶ 125, 126.

[102] Counter-Memorial (Conoco), ¶ 127, citing **A/RLA-58 [Curtis] / A/RLA-80 [De Jesús]**, *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, ("*Daimler Annulment Decision*"), ¶ 77.

[103] Counter-Memorial (Conoco), ¶ 128, referring to *Vivendi I*, *Annulment Decision*, ¶ 65 ("[T]ribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.").

[104] Counter-Memorial (Conoco), ¶ 128, citing *Daimler Annulment Decision*, ¶ 78.

[105] Rejoinder (Conoco), ¶ 20.

second guess on annulment. Also, *TECO*, on which Venezuela relies, is entirely different from this one. The *TECO* committee concluded that the tribunal had ignored 1,200 pages of evidence submitted by the parties' experts on an outcome-determinative issue, leaving the committee to guess the tribunal's reasoning, if any. Such a situation is not comparable to the Tribunal's approach in this case.[106]

PART 2: THE COMMITTEE'S ANALYSIS OF THE APPLICABLE STANDARDS

185. In this section on the standards of annulment, the Committee only wishes to discuss the areas of contention between the Parties and remind all of the generally accepted characteristics of the grounds of challenge raised by Venezuela. In Part 3 of this Decision, the Parties can find the Committee's analysis of the arguments made by the Parties for each ground of annulment invoked under Convention Article 52.

(a) Article 52(1)(a) – Improper Tribunal Constitution

186. *Ad hoc* committees are called under Convention Article 52 to safeguard the integrity of the process of dispute settlement. This objective forms the basic goal projected in the ICSID annulment mechanism of Convention Article 52. Independence and impartiality, qualities that every ICSID arbitrator should possess according to Convention Article 14(1) and Arbitration Rule 6, are quintessential to the dispensing of justice, in arbitration, and are regarded as prerequisites for a valid award under Article 52(1)(a).

187. This Committee considers that the test for an Article 52(1)(a) inquiry made based on the alleged lack of independence and impartiality, commences with the question of whether the right to raise the matter was waived because the party seeking annulment failed to raise it sufficiently promptly. Then, if not, whether the party seeking annulment could establish that a third party would find a manifest appearance of lack of independence or impartiality on the part of an arbitrator on a reasonable evaluation of the facts of the case; and then, if so, whether the manifestly apparent lack of

[106] Rejoinder (Conoco), ¶ 21.

impartiality or independence on the part of that arbitrator could have had a material effect on the award.[107]

188. The Parties are in dispute regarding the scope of the Committees' authority under Article 52(1)(a) when disqualification proposals already have been rejected in the arbitration regarding the impugned arbitrator. Conoco proposes to adopt the standard endorsed by the *ad hoc* committees in *Azurix v. Argentina*[108] and *OI European v. Venezuela*[109] which, having regard to the expression of Article 52(1)(a) "*the Tribunal is not properly constituted*," limited the review of *ad hoc* committees to the constitution of the arbitral tribunal, including the procedure for challenging arbitrators. In the present case, Conoco submits that Venezuela's challenge should fail as there is no argument concerning the procedure by which the five individual challenges to Mr Fortier and the two challenges to the Tribunal Majority were resolved.[110]

189. As Venezuela pertinently points out,[111] *ad hoc* committees would not be fulfilling their essential mission of ensuring the integrity of the arbitration proceedings and the legitimacy of the award if they shun from reviewing independence and impartiality which directly affect the legitimacy of awards. This was expressed with force by the *Eiser* committee:

> "*Thus, in light of the text, context and object and purpose of Article 52(1)(a) of the ICSID Convention, this Committee concludes that, for purposes of determining whether the Tribunal was properly constituted, it has the authority to examine whether the members of the Tribunal were and remained (and were seen to be/remain) impartial and independent throughout the proceedings. The role of an ad hoc committee is to ensure that the integrity of the proceedings and the legitimacy of the award was not undermined. The impartiality and independence of the arbitrators, being an essential requirement for a valid and legitimate award, can, therefore, be assessed in the context of annulment proceedings*."[112]

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[107] *Eiser Annulment Decision*, ¶ 180.

[108] *Azurix Annulment Decision*, ¶ 279.

[109] *OI Annulment Decision*, ¶ 108.

[110] Counter-Memorial (Conoco), ¶¶ 87, 133.

[111] Memorial (De Jesús), ¶ 16.

[112] *Eiser Annulment Decision*, ¶ 178.

190. Conoco concedes on the basis of the decisions of the *EDF v. Argentine*[113] and *Suez v. Argentine*[114] committees, that the substance of an arbitrator challenge may be subject to limited review when the decision not to disqualify the arbitrator is so plainly unreasonable that no reasonable decision-maker could have come to such a decision.[115]

191. Venezuela[116] reminds the decision of the *Mobil* committee clarifying the role of the remaining members of the tribunal or of the Chair of the Administrative Council under Articles 57 or 58 of the ICSID Convention and that of an ad hoc committee under Article 52(1)(a):

> "*The Chairman of the Administrative Council assists the parties with difficulties regarding the constitution of the arbitration tribunal during the arbitration procedure. An ad hoc committee plays a very different role. Its mandate under Article 52 of the ICSID Convention is to verify the integrity of the award. Therefore, the impartiality of the arbitral tribunal, which is an essential requirement for the validity of the award, can be assessed in the light of the procedural decisions taken by it in the context of the annulment proceedings. In examining this ground for annulment, the ad hoc Committee does not act as an appellate body in relation to the decision taken by the Chairman of the Administrative Council on a request for disqualification under Article 58 of the ICSID Convention.*" [117]

192. Whether or not an arbitrator should continue to sit is a matter for the remaining members of the tribunal or the Chair of the Administrative Council under Articles 57 or 58 of the ICSID Convention. When acting as a challenge authority, the other arbitrators or the Chair participate in the efficient and orderly administration of arbitration proceedings under the aegis of ICSID. The disqualification authority resolves difficulties in the constitution of the arbitral tribunal to permit the proceedings to move forward in furtherance of the parties' intention for an efficient arbitration process under the aegis of ICSID.

193. The ground for annulment under Convention Article 52(1)(a) is a remedy that concerns the award and not the decisions of tribunal members or of the President of the World

[113] *EDF Annulment Decision*, ¶ 145.
[114] *Suez Annulment Decision,* ¶ 94.
[115] Counter-Memorial (Conoco), ¶ 86.
[116] Memorial (De Jesús), ¶ 26.
[117] *Mobil Annulment Decision*, ¶ 44.

Bank in his capacity as Chair of the ICSID Administrative Council made on disqualification proposals under Article 58 of the Convention. This distinction notwithstanding, the *Azurix* committee suggested that an *ad hoc* committee should examine the correctness of the procedure followed rather than of the correctness of the decision, doing so on the latter would be tantamount to an appeal against the tribunal's decision.[118] The *EDF* committee substituted the compliance procedure followed by the body deciding on disqualification with the challenge procedure set out in the ICISD Convention, and adopted a narrow legal review of the reasonableness of the decision on disqualification. *EDF* falls in line with the same policy followed by *Azurix* which denies *ad hoc* committees the possibility to determine whether an arbitrator possesses the requisite qualities of independence and impartiality. The *EDF* committee viewed this function as being entrusted under Articles 57 and 58 of the Convention to the remaining members of the tribunal or the Chairman of the Administrative Council.[119] *EDF* was decided prior to *Eiser* which changed the situation, as otherwise, if its ruling had to be followed when no challenge happened in the arbitration, the co-arbitrators should be retroactively asked to decide the challenge, notwithstanding that the award has already been made.

194. Based on the foregoing, Conoco claims that Article 52(1)(a) does not permit a *de novo* review of the disqualification proposals decided in the underlying arbitration.[120] When examining the ground of Article 52(1)(a), an *ad hoc* committee does not review the decisions made by the Chair of the Administrative Council or of the other members of the arbitral tribunal on a proposal to disqualify an arbitrator. An *ad hoc* committee's duty under Article 52(1)(a) is to assess the independence and impartiality of the arbitral tribunal which conditions the integrity of the award and not the validity of the decisions of the disqualification authorities. As Venezuela notes,[121] Article 52(1)(a) does not restrict a committee's powers but requires that, in satisfaction of its mission to

[118] *Azurix Annulment Decision*, (¶ 282): "The Committee further is of the view that an ad hoc committee cannot decide for itself whether or not a decision under Article 58 was correct, as this would be tantamount to an appeal against such a decision".

[119] *EDF Annulment Decision*, ¶ 144.

[120] Counter-Memorial (Conoco), ¶ 85.

[121] Reply (De Jesús), ¶ 25.

safeguard the integrity of the award, a committee verifies whether the members of the arbitral tribunal exercised independent and impartial judgment.

195. Yet, Conoco remarks that the facts denounced by the Applicant in support of its attack against the independence and impartiality of Mr Fortier and Judge Keith are the same as those argued by Venezuela in front of the body deciding the disqualification proposals in its efforts to unseat these two arbitrators during the arbitration. Conoco described the Applicant's challenge against Mr Fortier as "*a single challenge regurgitated four times*."[122] Venezuela argues that the circumstances underlying its various disqualification proposals should be analysed collectively[123] or assessed in the aggregate, rather than in isolation, as the unchallenged members did when they refused to consider the "cumulative record" of prior proposals.[124] Conoco deplores that Venezuela would be given two bites at the apple and could raise several challenges which individually did not meet the standard for disqualification but on annulment argue that the accumulation of challenges warrants a reassessment by the Committee of the same challenge, as with an appeal, thus distorting the permitted degree of review on annulment, limited, per the *EDF* standard, to whether the challenge decisions in the arbitration were plainly unreasonable.

196. Venezuela remarks that the Committee, contrary to Conoco's approach, is not bound by the determinations of prior decisions on disqualifications.[125] The decisions of the body deciding on the disqualification proposals are not of a judicial type. They have an administrative nature and carry no *res judicata* effect which would preclude an *ad hoc* committee from examining an Article 52(1)(a) challenge.

197. The objective of the Committee under Article 52 is entirely different from that of a body deciding on a disqualification proposal whose intervention occurs during the

[122] Counter-Memorial (Conoco), ¶ 139.

[123] Reply (De Jesús), ¶ 38.

[124] **A/R-153 [Curtis] / A/R-174 [De Jesús]** Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 26 July 2016, ("*Challenge Decision - Fortier IV*"), ¶¶ 15-17; **A/R-148 [Curtis] / A/RLA-49 [De Jesús]** Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 15 December 2015, ("*Challenge Decision - Fortier II"*), ¶ 38; Memorial (Curtis), ¶¶ 106-108; Reply (Curtis), ¶¶ 51, 52.

[125] Reply (De Jesús), ¶ 35.

arbitration before the making of the award. After the award, the disqualification of an arbitrator becomes without purpose. All that remains to be checked is whether the award was made by independent and impartial arbitrators. The resolution of the isolated incidents by the various decisions on the disqualification proposals cleared the scene at the time they were made, they never purported to, and could not, assess the situation of the arbitrators in the contents of the award. The decisions denying the disqualification proposals may be taken into consideration for our purpose, but it remains a committee's role to evaluate the integrity of an arbitrator's situation and comportment during the entire proceedings from the moment the award has been made.[126] Venezuela adds that the Committee could not determine the unreasonableness of the decisions on disqualification without undertaking a review of the relevant facts and circumstances of the disqualification proposals.[127] As already noted, the test calls for a reasonable evaluation of the facts of the case for finding a manifest appearance of lack of independence and impartiality. Depending on the outcome of the Committee's decision under Article 52(1)(a), it can be inferred in retrospect whether the decisions on disqualification reached in the course of the arbitration proceedings could be regarded as plainly unreasonable (or the reverse).[128]

198. In making its analysis under Article 52(1)(a), the Committee observes that this is a case in which the Applicant filed in the underlying arbitration seven disqualification proposals (five directed to the same individual arbitrator and two included an additional arbitrator). Three out of the five arbitrators who sat on the Tribunal participated in decisions regarding its constitution which were later contested by Venezuela under Article 52(1)(a).[129] An approach limited to the reasonableness of the decisions would be all the more inappropriate in the circumstances as the decision makers are themselves under attack. With this unique background, the Committee finds

[126] Efficiency would not be served if a committee otherwise had to sift through the circumstances which were reasonably decided by the competent body during the arbitration for identifying the undecided issues left for its own review (see footnote No. 394 *infra*).

[127] Reply (De Jesús), ¶¶ 41, 44.

[128] Thus, the *Mobil v. Argentine* committee assessed for itself the independence and impartiality of the members of the arbitral tribunal before concluding that the Chairman's decision was not unreasonable (*Mobil Annulment Decision*, ¶ 46).

[129] Mr Fortier, Professor Bucher and Judge Keith.

compelling reasons to assess if the Tribunal was and remained properly constituted until the rendition of the Award. The Committee is mindful that this approach is limited to the specific circumstances of this actual case and should not be read as an invitation for disputing parties in other cases to file multiple disqualification proposals to later seek annulment of the award for alleged improper constitution of the tribunal.

199. The Committee will examine in **Section VII A.3** whether an Award rendered by an Arbitral Tribunal composed of Mr Fortier, Judge Keith and Professor Bucher withstands the Applicant's criticisms.

(b) Article 52(1)(b) – Manifest Excess of Powers

200. Article 52(1)(b) involves an excess of powers which must be manifest. The ground applies to issues of jurisdiction and merits alike, no distinction being made between these issues in Article 52. Some *ad hoc* committees have approached Article 52(1)(b) with a two-step analysis which requires, first to determine whether there had been an excess of powers, followed by assessing whether the excess of powers is also manifest. Others have considered a *prima facie* test under which a summary examination should be made to ascertain whether any alleged excess of powers is so egregious as to be manifest. Manifest may thus mean plain or evident, discernible without in-depth analysis. It may also refer to the strength or seriousness of the excess of powers.[130] Whichever the approach, the reprehensible excess of powers should not give rise to discussion. Hence the consensus of *ad hoc* committees is that a plausible, debatable or otherwise tenable decision escapes annulment. It follows that there is general agreement that errors of law are not deficiencies for Article 52(1)(b) purposes.

(c) Article 52(1)(d) – Serious Departure from a Fundamental Rule of Procedure

201. Article 52(1)(d) involves a departure, which must be serious, from a rule of procedure, which must be of a fundamental nature. Rules of natural justice concern the fairness and adversarial nature of the proceedings, and not all arbitration rules, are protected

[130] **A/RLA-42 [Curtis] / A/RLA-6 [De Jesús]**, Updated Background Paper on Annulment for the Administrative Council of ICSID ("*ICSID Annulment Paper*").

under Article 52(1)(d). As an example, the independence and impartiality of the arbitral tribunal is one of the facets of natural justice and due process. The right to an independent and impartial arbitral tribunal is recognized in the decisions of *ad hoc* committees as participating in the fundamental exigencies of a fair trial whose integrity is protected under Article 52(1)(d).[131]

202. The focus of an Article 52(1)(d) enquiry is not whether the arbitrators committed a fault in the arbitral process or could have done things differently, but whether the proceedings were conducted in a fair manner. A serious departure refers to meaningful breaches of the rules of natural justice which cause prejudice. The Applicant is not required to demonstrate that the award would have been different, absent the departure from the procedural rule. An immaterial breach which had no consequence will not justify an annulment of the Award.

(d) Article 52(1)(e) – Failure to State Reasons

203. The statement of reasons which is required by Article 52(1)(e) is the parties' guarantee against arbitrariness. Parties are entitled to be told why they have won or lost. The persuasiveness or the quality of the reasons escape the enquiry under Article 52(1)(e). The arbitral tribunal should deal with all issues that have a conclusive nature, rather than each and every argument made by the parties. It is accepted practice under Article 52(1)(e) that insufficient, inadequate or contradictory reasons which cancel each other are regarded as an absence of reasons. An *ad hoc* committee is not required to assiduously comb the award for Article 52(1)(e) purposes. Rather, an award should be read generously. If the motivation can be discerned or inferred from the context, there is no failure to state reasons.

[131] Memorial (De Jesús), ¶¶ 103-104; *Klöckner Annulment Decision*, ¶ 95; *Wena Annulment Decision*, ¶ 57; *Impregilo Annulment Decision*, ¶ 165; *EDF Annulment Decision*, ¶ 123; *Eiser Annulment Decision*, ¶ 254. Counter-Memorial (Conoco), ¶ 169: "*independence and impartiality of an arbitrator is a fundamental rule of procedure*."

VII. THE GROUNDS INVOKED

A. GROUNDS RELATED TO THE TRIBUNAL COMPOSITION: IMPROPER CONSTITUTION AND SERIOUS DEPARTURE

204. Venezuela submits that the Tribunal was improperly constituted (A.1) because **(a)** arbitrators Fortier and Keith could not be relied upon to exercise independent judgment, and, that Venezuela's disqualification proposals should have been sustained; and **(b)** arbitrator Bucher was improperly appointed since Venezuela had the right to appoint a replacement arbitrator after arbitrator Abi-Saab's resignation. Relying on the same facts, Venezuela also submits that there was a serious departure from a fundamental rule of procedure (A.2).

205. Regarding (a), Conoco counters that Venezuela is asking the Committee to make a *de novo* review of each of the decisions made on the failed disqualification proposals that Venezuela filed against Arbitrator Fortier individually,[132] and against Arbitrators Fortier and Keith as the Tribunal majority.[133] Regarding (b), Conoco argues that Venezuela had no right to appoint a replacement arbitrator because the Tribunal did not consent to Prof. Abi-Saab's resignation.[134]

A.1. THE PARTIES' POSITIONS ON THE IMPROPER CONSTITUTION

206. Venezuela invokes several arguments to support its contention that Arbitrators Keith and Fortier could not be relied upon to exercise impartial and independent judgment, that the appointment of Arbitrator Bucher was improper, and that the Committee should annul the Award for improper constitution.

[132] On 5 October 2011 Venezuela proposed to disqualify arbitrator Fortier. On 27 February 2012, the Tribunal majority, composed of arbitrators Keith and Abi-Saab, dismissed the proposal.

[133] On 11 March 2014 Venezuela proposed to disqualify arbitrators Fortier and arbitrator Keith. On 6 February 2015 Venezuela again proposed to disqualify arbitrator Fortier and on 25 March 2015 Venezuela extended its proposal to also seek the disqualification of arbitrator Keith.

[134] Counter-Memorial (Conoco), ¶ 5.

207. The Committee will first summarize the arguments advanced by Venezuela as represented by Curtis (A.1(1)); then by Venezuela as represented by De Jesús (A.1(2)) and then by the Conoco Parties (A.1(3)) in relation to **(i)** the disqualification proposals of arbitrator Fortier; **(ii)** the disqualification proposals of Arbitrators Fortier and Keith; and **(iii)** the appointment of Arbitrator Bucher. The Committee's analysis on this ground is in **Section** A. 1(4).

A.1(1) IMPROPER CONSTITUTION AS ARGUED BY VENEZUELA (CURTIS)

i. Arbitrator Fortier

(a) Arbitrator Fortier's failure to disclose the merger between Norton Rose and Macleod Dixon

208. For Venezuela, the accumulation of circumstances would have justified the disqualification of Arbitrator Fortier.[135] On 4 October 2011, Arbitrator Fortier disclosed the plans of his (then) law firm, Norton Rose, OR LLP to merge with Canadian law firm Macleod Dixon LLP. Arbitrator Fortier disclosed that he had learned that the Caracas office of Macleod Dixon was providing services to Conoco, acting adverse to Venezuela's interests in certain matters, and acting on behalf of Conoco in certain ICC proceedings against Petróleos de Venezuela (PDVSA).[136] On 5 October 2011, Venezuela proposed to disqualify Arbitrator Fortier as a result of his disclosure.

209. Venezuela asked Arbitrator Fortier to answer six questions, including the extent of Macleod Dixon's relationship with the Conoco Parties, the identity of the private oil companies represented by Macleod Dixon in connection with the migration of oil projects to *Empresas Mixtas* in 2007 and the nature of those assignments. Venezuela notes that Macleod Dixon continued to represent the Conoco Parties after the merger in an arbitration against PDVSA where the same Hamaca and Petrozuata Association

[135] Memorial (Curtis), ¶ 108. Tr. Hr. Day 1, 141:12-14.

[136] **A/R-52 [Curtis] / A/R-93 [De Jesús]**, E-mail from Mr. Fortier to Meg Kinnear, Secretary-General of ICSID, dated 4 October 2011 ("*Fortier email to ICSID SG*").

Agreements were disputed. Freshfields was Macleod Dixon's co-counsel in that case.[137]

210. On 18 October 2011, Arbitrator Fortier indicated he had not been involved in the negotiation leading to the merger and had no knowledge of the information sought in questions (i) to (v).[138] He also announced his resignation from Norton Rose, effective on 31 December 2011, and he would "thus cease to earn any remuneration from Norton Rose."[139]He also stated that there were members of Norton Rose who had assisted him in certain files in which he served as arbitrator, whom he may continue to call upon for assistance after 1 January 2012. He indicated that the only person who had assisted him in the case was Ms. Bendayan, a Norton Rose junior associate.[140]

211. On 27 February 2012, after the Parties had a chance to submit further observations on the proposal, Arbitrators Keith and Abi-Saab rejected the disqualification proposal.

212. Venezuela submits that Arbitrator Fortier's obligation to disclose arose long before the merger. The merger involved long negotiations between his then firm and a firm that was acting (and continued to act) adverse to Venezuela and PDVSA and acted as Freshfields' co-counsel against PDVSA.[141] Venezuela also maintains that Arbitrator's Fortier disclosure revealed an intention to remain at Norton Rose, and he resigned only after Venezuela filed to disqualify him and asked him questions.[142]

213. Venezuela submits that its first challenge was based on actual and objective facts that were undisputed, and instead of resigning as arbitrator, Mr. Fortier opted to resign from his (then) firm.[143]

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[137] Memorial (Curtis), ¶¶ 9-11.

[138] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, Mr. Fortier's Letter of 18 October 2011, p. 2 ("*Fortier October letter to co-arbs*").

[139] Memorial (Curtis), ¶ 11; **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*, p. 1.

[140] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*, p. 2.

[141] Memorial (Curtis), ¶ 15.

[142] Memorial (Curtis), ¶ 17.

[143] Memorial (Curtis), ¶ 18.

(b) Arbitrator Fortier's continued ties with Norton Rose

214. Venezuela maintains that Arbitrator Fortier kept ties with Norton Rose, which he failed to disclose. In the arbitration *Yukos v. The Russian Federation* presided by him, Arbitrator Fortier was assisted by a Norton Rose partner, Mr. Valasek. The respondent in that case questioned Mr. Valasek's assistance as exceeding mere administrative work.[144]

215. On 29 January 2015, Venezuela asked Arbitrator Fortier to disclose the extent of his relationship with Norton Rose. On 3 February 2015 Arbitrator Fortier replied that he had ceased any professional relationship with the firm, and had since January 2012 pursued a career as an independent arbitrator and was a door tenant at 20 Essex Street in London and a member of Arbitration Place in Toronto.[145]

216. On 6 February 2025, Venezuela proposed to disqualify Arbitrator Fortier.

217. On 16 April 2015, Arbitrator Fortier furnished explanations in connection with another proposal for disqualification filed on 25 March 2025 by Venezuela (concerning Arbitrators Keith and Fortier). In these explanations, arbitrator Fortier described Mr. Valasek's role and disclosed he was being assisted in another ICSID case by a Norton Rose lawyer, Ms. Fitzgerald. On 1 June 2015, upon Venezuela's insistence, he also disclosed that Ms. Bendayan, had assisted him in another ICSID case until the issuance of the decision on Jurisdiction in February 2013.[146]

218. Venezuela submits that Arbitrator Fortier from the beginning made incomplete, misleading, and inaccurate disclosures despite Venezuela's repeated requests and he did not fully sever ties with Norton Rose.[147]

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[144] Memorial (Curtis), ¶¶ 27, 28

[145] **A/R-131 [Curtis] / A/R-177 [De Jesús]**, E-mail of 3 February 2015, from Gonzalo Flores, (then) Secretary of the Tribunal to the Parties, forwarding Mr. Fortier's response of the same day.

[146] Memorial (Curtis), ¶ 42.

[147] Memorial (Curtis), ¶44.

219. On 1 July 2015, the Chair of the Administrative Council rejected the proposal to disqualify Arbitrator Fortier.[148] Venezuela argues that the Chair simply adopted Arbitrator Fortier's position. It also argues arbitrator Fortier's relationship with Norton Rose and assistance from Norton Rose lawyers was still ongoing as he admitted in his disclosure of 18 October 2011 that he may call certain members of the firm for administrative assistance.

220. Venezuela's view is that the Chair failed to explain how the 2011 disclosure "could constitute carte blanche for Mr. Fortier to continue his extensive substantive relationships with Norton Rose attorneys."[149]Venezuela also criticizes the Chair's observation that the allegations concerning Mr. Valasek were irrelevant because the Yukos case was unrelated to this one. For Venezuela, that observation missed the fact that Arbitrator Fortier "had a continuing, substantive and extensive professional relationship with a partner of Norton Rose whose opinions and writings on international law issues of direct relevance to this case were adverse to Venezuela and even cited by the Conoco Parties in their pleadings."[150]

221. In its Reply, Venezuela rebutting Conoco's *de novo* review argument asks the Committee to decide if under the cumulative circumstances giving rise to the earlier challenges, it was plainly unreasonable to allow Arbitrator Fortier to remain on the Tribunal.[151] Venezuela argues that prior arbitrators deciding on the challenges missed the point, and it was not that prior challenges or facts should be reconsidered, but that all facts should be considered together as if there were only one challenge based on cumulative facts in the record.[152]

222. Here, the decisions rejecting the disqualifications of Arbitrator Fortier were plainly unreasonable, due to the repeated inaccurate, incomplete and/or misleading disclosures

[148] In the meantime, on 20 February 2015, arbitrator Abi-Saab resigned. At the time of arbitrator Abi-Saab's resignation, he and arbitrator Keith had not yet decided Venezuela's pending proposal to disqualify arbitrator Fortier.
[149] Memorial (Curtis), ¶ 47.
[150] Memorial (Curtis), ¶ 48.
[151] Reply (Curtis), ¶ 117.
[152] Reply (Curtis), ¶ 116.

of Arbitrator Fortier. Also, this case is not merely about non-disclosure, but about affirmative disclosure which time after time was proven to be inaccurate, incomplete or misleading. Arbitrator Fortier was permitted to stay in the Tribunal due to the application of the wrong standard. The mentioned decisions judged each challenge individually in isolation from whatever facts came before and were the object of prior challenges.[153]

223. Venezuela also submits that, despite Conoco's contention to the contrary, Venezuela did not raise challenges that were irresponsible or opportunistically timed. The challenges arose from arbitrator Fortier's inaccurate, incomplete, and misleading disclosures. Venezuela also argues that the situation in this case, with Macleod Dixon, and the Conoco Parties is even more serious than that in the *Loewen* arbitration, from which Arbitrator Fortier resigned. In that case, the United States challenged him following the proposed merger of his firm (which did not materialize) with another firm that previously acted for the claimants.[154] Further, the challenges arose from Arbitrator Fortier's fortuitous disclosures of circumstances that should have been earlier disclosed by him. Venezuela raised the disqualification proposals promptly after learning of the relevant circumstances and was not aimed at causing any delay.[155]

ii. Arbitrators Keith and Fortier

(a) Refusal to reconsider Decision on Jurisdiction and Liability

224. On 11 March 2014, Venezuela proposed to disqualify Arbitrators Keith and Fortier. Venezuela's proposal was prompted by their refusal to reconsider the Decision on Jurisdiction and the Merits of 3 September 2013, made by the Tribunal Majority Arbitrators Keith and Fortier, with Arbitrator Abi-Saab dissenting.[156]In their Decision, the Tribunal Majority found that Venezuela had failed to negotiate the compensation

[153] Reply (Curtis), ¶¶ 51-53
[154] Reply (Curtis), ¶¶ 90, 91.
[155] Reply (Curtis), ¶ 97.
[156] Memorial (Curtis), ¶ 19.

for the 2007 oil nationalization in good faith by reference to the BIT's standard of market value.[157] Arbitrator Abi-Saab dissented on that point.[158]

225. On 8 September 2013, Venezuela requested that the Tribunal reconsider its Decision on the ground that the Decision was "based largely on certain misapprehensions […] [was] unsustainable both as a matter of fact and as matter of law."[159] For Venezuela the correction of any of the errors of the Decision would change the conclusion on the issue of bad faith negotiation.[160]

226. In its request for reconsideration, Venezuela referenced, among other alleged errors, evidence introduced after the 2010 main hearing, namely, leaked U.S. Embassy cables reporting on the briefing made by the ConocoPhillips negotiators to the U.S. Embassy in Caracas. Venezuela submits that the U.S. Embassy cables proved that the Conoco Parties made false representations to the Tribunal regarding Venezuela's supposed unwillingness to negotiate compensation based on fair market value.[161]

227. On 10 March 2024, the Majority of the Tribunal, composed of Arbitrators Keith and Fortier, rejected Venezuela's request for reconsideration. Arbitrator Abi-Saab dissented, stating, among others, that "I don't think that any self-respecting Tribunal […] can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence.[162]

228. Venezuela proposed to disqualify Arbitrators Keith and Fortier arguing that their refusal to reconsider the September 2013 Decision, regardless of the facts showed,

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[157] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, Decision on Jurisdiction and the Merits, 3 September 2013, ("*Decision on Jurisdiction and the Merits*"), ¶ 394.

[158] **A/R-4 [Curtis] / A/R-45 [De Jesús]**, Dissenting Opinion of Prof. Georges Abi-Saab to the Decision on Jurisdiction and the Merits of 3 September 2023, 19 February 2015, ("*Abi-Saab Dissenting Opinion*"), ¶ 85.

[159] **R-313**, Respondent's Letter to the Tribunal, 8 September 2013, p. 1.

[160] Memorial (Curtis), ¶ 21.

[161] Memorial (Curtis), ¶ 21, referring to **A/R-42 [Curtis]**, Respondent's Memorial in Support of Proposal to Disqualify Judge Keith and Mr. Fortier, 21 March 2014, ¶ 10.

[162] **A/R-41 [Curtis] / A/R-82 [De Jesús]**, Dissenting Opinion of Professor Georges Abi-Saab to the Decision on Respondent's Request for Reconsideration, 10 March 2014, ("*Abi-Saab Dissenting Opinion – Reconsideration Request*"), ¶ 66.

created at least the appearance of bias in the mind of any reasonable third party.[163]Venezuela submits that the basis for its disqualification proposal related to the nature of the decision-making process and the resulting rulings (with arbitrators refusing to consider the indisputable documentary evidence and misrepresentations made by the other party) and was not merely disagreement on legal and factual issues.[164]

229. On 5 May 2014, the Chairman of the Administrative Council rejected the proposal.[165]Venezuela submits that the Chair failed to address the merits of the proposal. Venezuela argues that the Chair simply found that the Tribunal, acting within its discretion, had adopted a reasonable procedure to deal with the request for reconsideration and that nothing in the Tribunal's reasoning or conclusions suggested a lack of impartiality. Venezuela also notes that the Chair's decision did not mention the observations Arbitrator Abi-Saab made in his dissent.[166]

230. In its Reply, Venezuela rebuts Conoco's argument that the request for reconsideration had no foundation in law or fact or the ICSID procedure. Venezuela submits that it should not be necessary to cite authority for the basic proposition that a tribunal may reconsider its own interim decision in case still pending before it, the more so, if it was based on false premises. Venezuela also argues that, when referring to its application for reconsideration, Conoco Parties disregarded the fact that Venezuela had introduced incontrovertible evidence of Venezuela's good faith negotiation per the BIT standard. Even Prof. Abi-Saab's dissent pointed to the obvious facts that Arbitrators Keith and Fortier overlooked. Venezuela filed its challenge the next day, based on the refusal to reconsider the merits of the application which reflected a lack of impartiality, fully aware that mere disagreement with a decision was not grounds for disqualification.[167]

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[163] Memorial (Curtis), ¶ 23.

[164] Memorial (Curtis), ¶ 24.

[165] **A/R-127 [Curtis] / A/R-181 [De Jesús]**, Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014 ("*Challenge Decision – Majority I*").

[166] Memorial (Curtis), ¶ 25.

[167] Reply (Curtis), ¶¶ 119-123.

(b) The withdrawal of consent to Arbitrator's Abi-Saab resignation

231. On 25 March 2015, Venezuela proposed to disqualify Arbitrators Keith and Fortier. At that point, another disqualification proposal filed by Venezuela individually with respect to Arbitrator Fortier was pending (proposal of 6 February 2015) and the proceeding had been suspended.

232. For the disqualification proposal of arbitrators Keith and Fortier, Venezuela submitted, relying on Arbitrator Abi-Saab's comments, that they had displayed a negative general attitude vis-à-vis Venezuela, had advanced the interests of the Claimants and relied almost exclusively on their representations, which included flagrant misrepresentations of fact.[168]Venezuela submitted that their denial of consent to Arbitrator Abi-Saab's resignation reaffirmed their appearance of lack of impartiality. For Venezuela, their denial should have led to disqualification.[169]

233. In its written pleadings, Venezuela (Curtis) speaks of the purported "withdrawal" of consent to Arbitrator Abi-Saab's resignation following the delivery of this dissent.[170]Venezuela submits that Arbitrator Abi-Saab resigned for serious health reasons and that Arbitrators Keith and Fortier knew that he wished to resign for those reasons after submitting his dissent. Venezuela relies on a letter from Arbitrator Keith to the Parties, stating that "[…] [o]ver a lengthy period the two Arbitrators, particularly the President, have urged Professor Abi-Saab to complete his dissent and then, as he had himself indicated, to resign from the Tribunal so that the Respondent could appoint a replacement arbitrator […]. In the course of those exchanges, the two Arbitrators plainly did consent to the proposed resignation."[171]

234. Arbitrator Abi-Saab submitted his dissent on 19 February 2015, to the September 2013 Decision on Liability and Merits (the "**19 February 2015 Dissent**") and resigned the

[168] **A/R-125 [Curtis] / A/R-98 [De Jesús]**, Respondent's Submission on the Proposal to Disqualify Judge Keith and Mr. Fortier, 2 April 2015, ¶ 3.

[169] Memorial (Curtis), ¶¶ 49, 120.

[170] *See* for example, Memorial (Curtis), ¶¶ 56, 116, 117, 147; Reply (Curtis), ¶ 133.

[171] **A/R-61 [Curtis] / A/R-102 [De Jesús]**, Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties, ("*ICSID March letter*"), 4 March 2015.

next day. Venezuela affirms, however, that after submitting his dissent Arbitrators Keith and Fortier withdrew their consent to the resignation. For Venezuela, it seems likely that they were influenced by Arbitrator Abi-Saab's dissent. This, Venezuela submits, was inexcusable, even if Arbitrator Abi-Saab's dissent played no role in their decision.[172]

235. The Chair of the Administrative Council considered that there was no proof of bias because Arbitrators Keith and Fortier sought comments from the Parties on the resignation, who submitted conflicting views on the correct procedure and outcome. The Arbitrators had considered these views and issued an informed decision on 4 March 2015, when they communicated to the Parties that they did not consent to Arbitrator Abi-Saab's resignation. The Chairman also noted that arbitrator Abi-Saab had indicated that he would complete his dissent by the end of November 2014 and resign by the end of 2014; yet his resignation was not tendered until 20 February 2015, seven weeks before the quantum hearing and when the disqualification proposal against Arbitrator Fortier remained pending.[173]

236. Venezuela questions that the Chair's decision ignored that Arbitrators Keith and Fortier had unconditionally ("plainly") consented to the resignation, and that Arbitrator Keith had urged Arbitrator Abi-Saab to resign by 6 February 2015, not 31 December 2014.[174]

237. In Venezuela's view, the Chair's decision failed to deal with the fact that Arbitrators Keith and Fortier asked for the Parties' comments related to the issues that formed the basis for the challenge, that it was inappropriate for Arbitrator Fortier, who was subject to a challenge, to take part in a decision, and that the Tribunal was in no position to decide anything, as the proceeding was suspended since 6 February 2015, when Venezuela proposed to individually disqualify arbitrator Fortier.[175]

[172] Reply (Curtis), ¶133.
[173] Memorial (Curtis), ¶¶54-56.
[174] Memorial (Curtis), ¶ 56.
[175] Reply (Curtis), ¶¶ 54-56; Reply (Curtis), ¶ 133.

238. Having restated the factual background underlying the seven disqualification proposals made against Arbitrator Fortier,[176] Venezuela submits in support of its annulment ground concerning Arbitrators Fortier and Keith that the facts questioning an arbitrator's independence and impartiality must not be considered in isolation but cumulatively, which the repeated decisions dismissing the disqualification proposals to Arbitrator Fortier failed to do.[177]

239. In its Reply, Venezuela argues, among others, that the Chairman considered the facts in isolation, disconnected from the circumstances underlying the prior challenges. Had the correct standard been applied, Arbitrators Fortier and Keith should have been disqualified.[178]

iii. The Appointment of Arbitrator Bucher

240. Convention Article 56(3) provides that where consent to the resignation of a party-appointed arbitrator is denied, the Chair of the Administrative Council shall appoint the replacement from a person from the Panel. Venezuela submits that the purpose of Convention Article 56(3) is to prevent a party and its appointed arbitrator from obstructing the proceeding by orchestrating a resignation, not to penalize a party by depriving its right to appoint. Venezuela supports this with various excerpts from the *Travaux Préparatoires* and commentaries on the ICSID Convention.[179]

241. Venezuela then refers to other four cases where the resignation of a party-appointed arbitrator has not been accepted (*Holiday Inns v. Morocco; Pey Casado v. Chile; Enron v. Argentina; Toto Construzioni v. Lebanon*). Venezuela distinguishes these cases, pointing out that Arbitrator Abi-Saab's resignation was made for health reasons and not under pressure of the party who had appointed him; not under collusion with that party; or with a party prevailing on the arbitrator to resign to slow down the proceeding or to get a replacement by a more tractable person; or resigning for tactical purposes or

[176] Memorial (Curtis), ¶¶ 3-85.
[177] Memorial (Curtis), ¶¶ 107, 108, 117.
[178] Reply (Curtis), ¶¶ 126, 127.
[179] Memorial (Curtis), ¶ 149.

following instructions from a government party. When the resignation is for a good cause, it follows from the *Travaux Préparatoires* that the other tribunal members would consent.[180]

242. However, in this case, Venezuela argues, those principles were not followed. The denial of consent, or rather the purported withdrawal of the consent which had been "plainly" given to Arbitrator Abi-Saab's resignation with the resulting appointment of a replacement arbitrator by the Chairman constitute a ground for annulment for improper constitution under Article 51(1)(a). This purported withdrawal of consent constitutes a serious departure from a fundamental rule of procedure (see **Section A.2(1)** below).[181]

243. In its Reply, Venezuela argues, among others, that the Conoco Parties do not dispute the fact that there never has been a denial of consent to a resignation for serious health reasons; and yet, they submit the Committee has no power to judge the legitimacy of the reasons behind the Tribunal's exercise of discretion under Convention Article 56(3) and Rule 8(2). This, Venezuela submits, is an untenable proposition, according to which no matter the circumstances, or the reasons for denying consent, or the inappropriate arbitrator conduct, the denial of consent followed by the denial to appoint a replacement arbitrator cannot be grounds for annulment.[182]

244. Venezuela also counters that it is shameful for the Conoco Parties to now seem to suggest that Arbitrator Abi-Saab was in good health pointing out that after his resignation, he attended a conference at which he was honored. Venezuela notes that one thing is to be honored at a conference, another thing is to serve the functions and carry the burdens of an arbitrator in a massive arbitration.[183]

245. On Conoco's point that Venezuela did not challenge the replacement arbitrator, Mr. Bucher, Venezuela replies that the issue is not whether Mr. Bucher could be challenged

[180] Memorial (Curtis), ¶¶ 150-153.
[181] Memorial (Curtis), ¶ 154.
[182] Reply (Curtis), ¶ 134.
[183] Reply (Curtis), ¶ 135.

based on personal qualifications, but whether Venezuela was deprived of its right to appoint an arbitrator of its choice, who certainly would not have been Mr. Bucher. Venezuela then refers to submissions it made in the arbitration expressing that it did not accept the appointment of Mr. Bucher.[184]

A.1(2) IMPROPER CONSTITUTION AS ARGUED BY VENEZUELA (DE JESÚS)

246. In its Reply, Venezuela reiterates that the standard of the review requires the Committee to assess the facts and circumstances in the arbitration and determine whether the Tribunal members were and remained impartial and independent, without regard to earlier decisions on proposals for disqualification.[185] Venezuela submits that **(i)** Arbitrator Fortier should have been disqualified for his relationship with Norton Rose OR LLP and that **(ii)** Arbitrators Keith and Fortier, together, demonstrated a general negative attitude towards Venezuela.[186]

i. Arbitrator Fortier

(a) Circumstances related to the Norton Rose – Macleod Dixon merger.

247. Venezuela submits that Arbitrator Fortier should have been disqualified at an early stage, since October 2011, because of his relationship with Norton Rose. Venezuela explains that it expects Arbitrator Fortier to resign from the Tribunal as a result of the conflict of interests arising from the Norton Rose-Macleod Dixon merger.[187]

248. Venezuela points out that Arbitrator Fortier accepted his appointment on 20 February 2008 when he was partner of Ogilvy Renault. At that point he made no disclosure. He nevertheless had the continuing obligation to disclose should there be any relationship or circumstance that could call his independence or impartiality into question. On 4 October 2011, with the merger which would become effective 1 January 2012, Arbitrator Fortier indicated that he had learned that Macleod Dixon's Caracas office

[184] Reply (Curtis), ¶¶ 138. 139.
[185] Reply (De Jesús), ¶ 117.
[186] Reply (De Jesús), ¶ 115.
[187] Memorial (De Jesús), ¶¶ 34, 40.

was representing ConocoPhillips in certain matters, including ICC cases involving Petróleos de Venezuela S.A., and that Macleod Dixon was also acting adverse to Venezuela in some other matters. Arbitrator Fortier indicated he had made the disclosure at the first possible opportunity after the merger had been voted favorably, and that he did not consider these facts had any bearing on his ability to exercise independent judgment.[188]

249. Venezuela argues that any reasonable observer would have considered the above facts and relationships to raise justifiable doubts as to arbitrator Fortier's independence and impartiality. Also, the fact that Macleod Dixon acted as co-counsel with Freshfields, the Conoco Parties' counsel, only aggravated the matter, in support of an apparent bias incompatible with the ICSID Convention requirements of independent judgment.[189]In its Reply, Venezuela argues that any reasonable observer would consider an apparent bias arising from the fact that Mr. Fortier's firm had publicly aligned its interest with a firm: (i) that was contemporaneously acting on behalf of ConocoPhillips in other cases; (ii) that was representing ConocoPhillips in a parallel ICC arbitration dealing with the same facts, subject matter and Association Agreements; (iii) was actively representing several claimants against Venezuela and PDVSA and its subsidiaries.[190]

250. Venezuela also questions the fact that Arbitrator Fortier did not resign from the Tribunal but instead resigned from his firm, Norton Rose.[191] Also, with his resignation, he sought to provide assurance that his ties with the law firm had ceased, and yet he continued his relationship with Norton Rose after his resignation became effective on 1 January 2012.[192]

251. Venezuela counters that the Conoco Parties omits the undeniable issue that there was a serious and extensive conflict of interest arising from the announced merger which was belatedly revealed by Arbitrator Fortier on 4 October 2011. Arbitrator Fortier also failed

[188] Memorial (De Jesús), ¶ 35.
[189] Memorial (De Jesús), ¶ 36.
[190] Reply (De Jesús), ¶ 129.
[191] Memorial (De Jesús), ¶ 38.
[192] Reply (De Jesús), ¶ 131.

his legal obligation under Convention Articles 14 and 57 to disclose the conflict of interest as soon as he became aware of it. Venezuela notes that the law firm partners had voted on the merger at least twice when arbitrator Fortier disclosed the situation.[193]

252. Venezuela also rebuts Conoco's critique that Venezuela's inquiries into Arbitrator Fortier were inappropriate procedural behavior.[194] It was only after Venezuela's requests for information that arbitrator Fortier announced his resignation from Norton Rose, and conceded he was aware of the conflicts of interests resulting from the merge a week before his initial disclosure on 4 October 2011.[195]

253. Venezuela also argues that the first disqualification decision failed to consider the circumstances surrounding the merger as creating an appearance of bias. The disqualification decision only evaluated the accuracy of Arbitrator Fortier's disclosures of October and November 2011.[196] The decision also failed to determine that Arbitrator Fortier had an ongoing duty to disclose and investigate potential conflicts of interest where a law firm merger was to occur.[197] The decision contravened the terms of Arbitration Rule 6, especially the *prompt* notice requirement, and wrongly limited the duty of disclosure to when an *actual* conflict of interest exists.[198] Also, the decision cannot be considered reasonable, as it excused Arbitrator Fortier's lack of investigation due to his lack of actual knowledge of the circumstances. Yet, as General Standard 7(c) of the IBA Guidelines states, a lack of knowledge does not excuse a failure to disclose if the arbitrator made no reasonable attempt to investigate.[199]

(b) Arbitrator Fortier's continued ties with Norton Rose

254. Venezuela further argues that Arbitrator Fortier offered only a partial explanation regarding his ties with Norton Rose. Venezuela submits that, after leaving the firm,

[193] Reply (De Jesús), ¶¶ 123-128.
[194] Reply (De Jesús), ¶ 132, referring to Counter-Memorial (Conoco), ¶ 148.
[195] Reply (De Jesús), ¶ 134.
[196] Reply (De Jesús), ¶¶ 136-147.
[197] Reply (De Jesús), ¶¶ 148-166.
[198] Reply (De Jesús), ¶¶ 151-155.
[199] Reply (De Jesús), ¶¶ 157-164.

Arbitrator Fortier maintained a substantive professional relationship with Norton Rose's senior lawyers, which he failed to disclose. Arbitrator Fortier kept a close relationship with Mr. Valasek, partner at Norton Rose who was his assistant in the Yukos case, and with Ms Fitzgerald and Ms. Bendayan who assisted him in other cases.[200]Venezuela argues that Arbitrator Fortier made misleading and incorrect statements and misrepresentations, while he was fully aware of his continued professional and financial ties with Norton Rose. Venezuela submits that this failure to disclose forms "part or pattern of circumstances" that should have prevented Arbitrator Fortier from continuing to sit in the Tribunal. In Venezuela's view, the failure to disclose and the misrepresentations raised serious doubts as to Arbitrator Fortier's reliability to exercise independent judgment in the arbitration.[201]

255. For Venezuela, the Committee's task under Article 52(1)(a) of the Convention is unaltered by the decisions of the unchallenged Tribunal Members rejecting the disqualification proposals, and the Committee should not "accept that they can be seized with a 'cumulative record'"[202]Venezuela recalls that the standard set by the *EDF* committee for assessing independence and impartiality under Article 14(1) is that of "a 'reasonable third person, with knowledge of all the facts.'"[203]

256. In its Reply, Venezuela notes that its second to fifth disqualification proposals were all related to the professional relationship Arbitrator Fortier kept with Norton Rose despite him knowing that the firm was representing ConocoPhillips and other claimants in matters against Venezuela and PDVSA and its subsidiaries.[204]

257. Venezuela argues that none of the decisions on the second, third, fourth and fifth proposals examined or assessed the ongoing relationship Arbitrator Fortier had with Norton Rose, instead, the Chair of the Administrative Council dismissed them without deciding on their merits. The Chaironly assessed the "new information" concerning Mr.

[200] Memorial (De Jesús), ¶¶ 49-55.
[201] Memorial (De Jesús), ¶ 57.
[202] Memorial (De Jesús), ¶ 59.
[203] Memorial (De Jesús), ¶ 59, referring to *EDF Annulment Decision*, ¶ 111.
[204] Reply (De Jesús), ¶¶ 169-172.

Valasek and dismissed the second disqualification proposal, finding the proposal was based on unsubstantiated allegations. The Chair overlooked the clear conflict of interest resulting from the ongoing professional relationship Arbitrator Fortier had with Norton Rose.[205] Similarly, the unchallenged arbitrators dismissed the third proposal, without considering the continued relationship with Norton Rose. Instead, they found that the proposal was not based on new facts, and it was a request for reconsideration of the second disqualification decision.[206] The unchallenged arbitrators dismissed the fourth proposal (prompted by the revelation of a relationship of Arbitrator Fortier had with a Norton Rose counsel) finding a "limited tie" to Norton Rose. This finding, Venezuela argues, shows the unchallenged arbitrators' failure to apply the correct standard.[207] The unchallenged arbitrators also dismissed the fifth disqualification proposal (based on arbitrator Fortier's benefit from the use of Norton Roses' administrative staff even after his resignation). Venezuela submits that they imposed a higher threshold than that required by Convention Articles 57 and 14 when they found only "an indirect and purely administrative tie with Norton Rose."[208]

258. Venezuela argues that the decisions regarding the second, third, fourth and fifth disqualification proposals against Arbitrator Fortier were unreasonable since none of them applied the correct standard, namely, whether there was an appearance of bias as a result of arbitrator Fortier's continued relationship with Norton Rose.[209] Instead, in the decision on the second proposal, the Chair decided whether Venezuela's allegations were substantiated and had merit.[210] In the decision on the third proposal, the unchallenged arbitrators required Venezuela to prove actual bias (not an appearance of bias).[211] In the decision on the fourth proposal, the unchallenged arbitrators required Venezuela to prove how a limited tie would lead to the conclusion of a manifest lack

[205] Reply (De Jesús), ¶¶ 173-176.

[206] Reply (De Jesús), ¶ 178.

[207] Reply (De Jesús), ¶¶ 179, 180.

[208] Reply (De Jesús), ¶¶ 181-184, citing **A/R-153 [Curtis] / A/R-174 [De Jesús]**, *Challenge Decision - Fortier IV*, ¶ 16 and ¶ 19(1).

[209] Reply (De Jesús), ¶¶ 187-199.

[210] Reply (De Jesús), ¶¶ 188, 189.

[211] Reply (De Jesús), ¶ 190.

of impartiality.[212] In the decision on the fifth proposal, the unchallenged arbitrators required Venezuela to prove a manifest lack of impartiality instead of an appearance of bias.[213]

259. Venezuela argues that the unchallenged arbitrators and the Chair failed to consider the cumulative record of the proposals, thereby contravening the standard that required them to consider "all the relevant facts."[214] Even under the *EDF* standard, advocated by the Conoco Parties, the decisions on the second, third, fourth and fifth disqualification proposals were unreasonable as they ignored the standard of Convention Articles 14 and 57. These decisions were also "plainly unreasonable" as since they allowed Arbitrator Fortier to refrain from disclosing facts and circumstances that created an appearance of bias to the detriment of Venezuela's rights, ignoring the disclosure guidance of the IBA Guidelines.[215]

260. Finally, in its Reply Venezuela reiterates that, despite Conoco's assertion to the contrary, Arbitrator Fortier represented multiple times that he had severed all ties with Norton Rose. Venezuela supports this by referring to different passages of Arbitrator Fortier's explanations. The Committee should not let his misrepresentations go unnoticed and should annul the Award for improper constitution of the Tribunal.[216]

ii. Arbitrators Keith and Fortier

(a) Refusal to reconsider decisions

261. Venezuela explains that on 3 September 2013, the Tribunal, by a Majority composed of Arbitrators Keith and Fortier, issued a Decision on Jurisdiction and Merits, to which Arbitrator Abi-Saab dissented. On 8 September 2013, Venezuela asked the Tribunal to clarify certain conclusions since, according to Venezuela, the Tribunal had concluded

[212] Reply (De Jesús), ¶ 191.
[213] Reply (De Jesús), ¶ 192.
[214] Reply (De Jesús), ¶ 193.
[215] Reply (De Jesús), ¶¶195-198.
[216] Reply (De Jesús), ¶¶ 203-207.

that Venezuela breached an obligation to negotiate in good faith based on Conoco's misrepresentations and misapprehension of the evidence on record.[217]

262. Venezuela submits that Arbitrators Keith and Fortier were aware that their September 2013 Decision was based on errors, yet they denied reconsidering it. For example, the effective date of the Confidentiality Agreement the Parties signed before the arbitration, prevented them from submitting evidence on the compensation negotiations undertaken. The arbitrators also failed to consider the U.S. Embassy cables, which Venezuela maintains, evidenced that the Conoco Parties had misrepresented the facts related to the compensation negotiations. According to Venezuela, when denying reconsidering their Decision, Arbitrators Keith and Fortier simply recounted the Parties' positions and failed to analyse the facts and evidence showing that the September 2013 Decision was based on false factual premises and misrepresentations.

263. Further, Venezuela notes that Arbitrator Abi-Saab remarked that he considered Arbitrators Keith and Fortier had displayed a "general attitude *vis-à-vis* the Respondent"[218] and had uncritically relied on the representations made by the Claimants in the arbitration.[219]

264. Venezuela submits that a reasonable observer would question the impartiality of arbitrators who decide on such a basis, and, in any event, any reasonable observer would conclude that the accumulation of circumstances tainted the integrity of the proceedings. Venezuela notes that also Arbitrator Bucher, who replaced Arbitrator Abi-Saab, later questioned the correctness of the legal determination made by Arbitrators Keith and Fortier not to reconsider the September 2013 Decision.[220]

[217] Memorial (De Jesús), ¶ 64.

[218] **A/R-82 [De Jesús]** / **A/R-41 [Curtis]**, *Abi-Saab Dissenting Opinion – Reconsideration Request*, ¶¶ 16-17.

[219] Memorial (De Jesús), ¶ 70.

[220] Memorial (De Jesús), ¶¶ 70, 72-75.

265. In these circumstances, Venezuela requests that the Committee annul the Award, as Arbitrators Keith and Fortier could not be relied upon to exercise independent judgment.

266. In its Reply, Venezuela argues that the Chair's decisions on Venezuela's first and second disqualification proposals failed to address the concerns Venezuela had raised in each of the respective proposals. Instead of addressing whether Arbitrators Fortier and Keith appeared biased, the Chair analysed whether the procedure followed by the Co-arbitrators to deny the reconsideration was reasonable or within the framework of their discretionary powers. Venezuela also reiterates that the statements of Prof. Abi-Saab and Mr. Bucher in relation to Arbitrators Keith and Fortier would make any reasonable observer doubt that Arbitrators Keith and Fortier could be relied upon to exercise independent and impact judgment.[221]

267. Even under the *EDF* standard, which the Conoco Parties support, the Chair's first decision was unreasonable. The Chair raised the threshold by requiring Venezuela to prove partiality instead of the appearance of partiality. The Chairman also failed to frame correctly the issues set forth by Venezuela, namely, Arbitrators Fortier and Keith's treatment of Venezuela's first request for reconsideration.[222]

(b) Withdrawal of consent to Arbitrator Abi-Saab's resignation

268. On 25 March 2025 Venezuela proposed to disqualify Arbitrators Keith and Fortier on the basis that they could not be relied upon to exercise independent judgment. The ground for this challenge as characterized by Venezuela, was the withdrawal of their consent to Arbitrator Abi-Saab's resignation of 20 February 2015. Arbitrator Abi-Saab resigned one day after the submission of his 19 February 2015 dissent on the September 2013 Decision in Liability and Merits.[223]

[221] Reply (De Jesús), ¶¶ 209-217.
[222] Reply (De Jesús), ¶¶ 218-221
[223] Memorial (De Jesús), ¶¶ 79-81.

269. Venezuela notes that it launched this challenged at a time when the proceeding was suspended because another challenge launched individually against Arbitrator Fortier (the 6 February 2015 disqualification proposal) was pending. On 21 February 2015, the Conoco Parties wrote to ICSID and requested that the challenge to arbitrator Fortier be submitted to the Chair of the Administrative Council.

270. On 23 February 2015, Venezuela informed that it intended to appoint a replacement arbitrator. On the same date, the Parties were invited to make observations on Arbitrator's Abi-Saab's resignation. Venezuela submits it repeatedly raised concerns to ICSID and the Chairman of the Administrative Council about whether Arbitrator Fortier who at that time was subject to a challenge could part take in matters related to Arbitrator Abi-Saab's resignation. Yet, on 4 March 2015, the Parties were informed that Arbitrators Keith and Fortier did not consent to the resignation.[224]

271. Venezuela submits that the 4 March 2015 letter revealed that Arbitrators Keith and Fortier had first *plainly* consented to the resignation and had subsequently withdrawn that consent. Venezuela's request for more information on the exchanges between Arbitrators Keith, Fortier and Abi-Saab was denied. On 25 March 2015 Arbitrator Abi-Saab expressed his surprise over the withdrawal of consent, indicating that the arbitrators were aware of his poor health and at no point had they conditioned their consent to him submitting his dissent by a certain time.[225]

272. In the circumstances, Venezuela submits, any reasonable observer would conclude that the Arbitrators Keith's and Fortier's withdrawal of consent was retaliation against Arbitrator Abi-Saab's dissent. Thereby, they could not be relied upon to exercise independent judgement and should have been disqualified.[226]

[224] Memorial (De Jesús), ¶¶ 83-86.
[225] Memorial (De Jesús), ¶¶ 86-89.
[226] Memorial (De Jesús), ¶ 92.

273. In its Reply, Venezuela rebuts Conoco Parties' account of facts about Prof. Abi-Saab's resignation. For Venezuela, the relevant facts concern the resignation on 20 February 2015, not the timeliness of the dissenting opinion, as argued by the Conoco Parties.[227]

274. Venezuela adds that despite the grave infringement that the withdrawal of consent entailed, the Chairman rejected Venezuela's second disqualification proposal. According to the *travaux préparatoires* of the ICSID Convention, the refusal to a resignation under Article 56(3) was designed to prevent collusion between the arbitrator and the party that appointed him. However, Prof. Abi Saab resigned for health reasons, a type of resignation which has been admitted in other proceedings. Besides, Arbitrators Keith and Fortier did not find collusion between Prof. Abi Saab and Venezuela.[228]

275. Further, Venezuela argues that if the arbitrators sought to protect the integrity of the proceeding, then it would have sufficed with the resignation, without any need to curtail Venezuela's right to appoint. Conoco's reliance on *Carnegie Minerals* is misguided, because in that case Gambia was deprived of the right to appoint an arbitrator due to its failure to honor appointment deadlines in a mechanism the parties separately had agreed upon.[229]

276. Venezuela also questions Arbitrator Fortier's participation in the decision of whether to consent to the resignation, given that he was at that time subject to a challenge. Neither Arbitrators Fortier and Keith should have sought comments from the Parties on the resignation. The ICSID Convention does not establish such a procedure.[230]

277. Venezuela argues that considered as a whole, the facts would lead a reasonable observer to conclude that Arbitrators Keith and Fortier could not be relied upon to exercise

[227] Reply (De Jesús), ¶¶ 223, 224.
[228] Reply (De Jesús), ¶¶ 228-232.
[229] Reply (De Jesús), ¶ 233.
[230] Reply (De Jesús), ¶ 235.

independent and impartial judgment. The Committee should as such annul the Award and all other decisions made by the Tribunal for its improper constitution.[231]

iii. The Appointment of Arbitrator Bucher

278. Venezuela also argues that the Chair improperly appointed arbitrator Bucher when the power to appoint belonged to Venezuela, and this constitutes a ground for annulment for improper constitution under Article 52(1)(a).[232]

279. Venezuela asserts that Arbitrators Keith and Fortier were aware that their withdrawal of consent to Prof. Abi-Saab's resignation would cause a vacancy which would be filled by the Chair of the Administrative Council under Convention Article 56, thus denying Venezuela's fundamental right to appoint a replacement arbitrator.[233]

A.1(3) NO IMPROPER CONSTITUTION (CONOCO)

280. Conoco notes that Venezuela is asking the Committee to make a de novo review of every alleged fact and argument made in the arbitration, yet that is not the Committee's role. Even if the questions of arbitrator independence and impartiality are of fundamental importance, that does not change the relationship between the role of the committee and that of the body tasked with making the original decision. The Committee's role is not to determine if an arbitrator possesses the requisite qualities; the Convention and Rules already entrust that role to the unchallenged tribunal members or to the Chair of the Administrative Council.[234]

[231] Reply (De Jesús), ¶¶ 236, 237.
[232] Memorial (De Jesús), ¶ 13.
[233] Memorial (De Jesús), ¶ 91.
[234] Counter-Memorial (Conoco), ¶ 140.

i. Arbitrator Fortier

(a) Arbitrator Fortier's disclosure of the merger between Norton Rose and Macleod Dixon

281. In their Counter-Memorial the Conoco Parties describe Venezuela's five proposals to disqualify arbitrator Fortier as a "prolonged tactical campaign" to delay the Award and plan its annulment application.[235]

282. Venezuela submitted the first challenge on 5 October 2011, while the Tribunal was working on the 2013 Decision. On 27 February 2012 Arbitrators Keith and Abi-Saab dismissed the challenge. The challenge followed Arbitrator Fortier's disclosure on 4 October 2011 that a merger between his firm Norton Rose OR LLP and Macleod Dixon LLP would become effective on 1 January 2012. He also disclosed that he had learned that Macleod Dixon's Caraca's office provided services to the ConocoPhillips Company, was acting adverse to Venezuela's interests in certain matters, and was acting on behalf of Conoco in certain ICC proceedings involving PDVSA.

283. Conoco asserts that Venezuela did not attempt to meet the applicable standard under the ICSID Convention to show why the law firm merger gave rise to a manifest lack of independence and impartiality.[236] Conoco puts forward its own account of the facts[237] and argued that Venezuela mischaracterized the facts related to the challenges.[238]

284. Conoco submits that following the standard applied in *Azurix* and *OI European*, Venezuela's application would fail on its face, because Venezuela never protested the procedures by which the disqualification proposal was resolved. Even if the standard applied in *EDF*, *Suez II*, and *Mobil Exploration* be followed, Venezuela still fails to show and cannot show that the arbitrators' rejection of the challenge was "so plainly

[235] Counter-Memorial (Conoco), ¶ 138.
[236] Counter-Memorial (Conoco), ¶ 145.
[237] Counter-Memorial (Conoco), ¶¶ 144-153.
[238] Counter-Memorial (Conoco), ¶ 154.

unreasonable that no reasonable decision-maker could have come to such a decision."[239]

285. Conoco argues that Venezuela's case for this challenge was that Arbitrator Fortier should have resigned, since he failed to disclose Norton Rose's communications with Macleod Dixon regarding the merger as soon as they occurred (no matter if he was involved in the communications or not). However, Arbitrators Keith and Abi-Saab reasonably concluded that those events could not form the basis for a disqualification. They referred to the relevant standards in Articles 14 and 57 of the ICSID Convention that Venezuela needed to meet. They also addressed the disclosure requirement under Arbitration Rule 6(2) and the IBA Guidelines. The arbitrators concluded that non-disclosure in this case did not lead to disqualification.[240]

286. Conoco asserts that Venezuela simply reargues the challenges and asks the Committee to make a new determination of Arbitrator Fortier's qualities under Convention Article 14(1). But whether Arbitrator Fortier met the requirements (which he did) is a question already decided by the unchallenged arbitrators; a decision they made based on the evidence and their factual findings.[241]

287. Conoco also submits that Venezuela's argument that the decision on the challenge also constitutes a serious departure fails. It fails because Venezuela did not undertake any meaningful application of the standard of Article 52(1)(d) to the facts; and because it took the view that any annullable error under Article 52(1)(a) automatically constitutes an annullable error under Article 52(1)(d) without any support. Yet, Venezuela did not dispute that Arbitrators Keith and Abi-Saab followed the proper procedures for hearing and deciding this first challenge. Venezuela does not claim it was denied an opportunity to present its case on Arbitrator's Fortier independence and impartiality. There was no departure from a fundamental rule, let alone a serious one.[242]

[239] Counter-Memorial (Conoco), ¶ 156, citing *EDF Annulment Decision*, ¶ 145.
[240] Counter-Memorial (Conoco), ¶¶ 158, 159.
[241] Counter-Memorial (Conoco), ¶ 165.
[242] Counter-Memorial (Conoco), ¶¶ 168, 169.

(b) Arbitrator Fortier's alleged continued ties with Norton Rose

288. Venezuela again sought to challenge Arbitrator Fortier on 6 February 2015, based on an alleged professional relationship with Norton Rose. On 1 July 2015 Chairman Kim dismissed the challenge.

289. Conoco summarizes the circumstances invoked for the challenge and submits that Venezuela fails to show that the Chair's decision on the challenge was so plainly unreasonable that no reasonable decision-maker could have come to such a decision.[243]

290. Conoco asserts that the Chair acted properly and reasonably when he concluded that there was no basis to disqualify Arbitrator Fortier. Conoco notes that he assessed the standards of Convention Articles 14(1) and 57; and rejected Venezuela's allegations regarding the scope of Ms. Valasek's role as "unsubstantiated."[244]

291. Conoco asserts that the question for the Committee is not whether the Chairman's reasoning was "cavalier," as Venezuela characterizes it, or if a third party may share Venezuela's concerns. The question is whether the Chairman's decision was plainly unreasonable.[245]

292. Further, the Chair's decision did not constitute a serious departure from a fundamental rule of procedure. Venezuela's arguments for annulment under Article 52(1)(d) are indistinguishable from those made under Article 52(1)(a). Here, Venezuela has failed to prove the existence of a fundamental rule of procedure or that the Chairman seriously departed from that fundamental rule.[246]

293. Conoco observes that on 9 November 2015, Venezuela sought for the third time to disqualify Arbitrator Fortier. On 15 December 2015, Arbitrators Keith and Bucher dismissed the proposal.

[243] Counter-Memorial (Conoco), ¶ 183.
[244] Counter-Memorial (Conoco), ¶¶ 185, 186.
[245] Counter-Memorial (Conoco), ¶ 189.
[246] Counter-Memorial (Conoco), ¶ 192.

294. Conoco notes that Venezuela submitted an expert report filed by Russia in the Yukos case supporting the allegation that Mr. Valasek had written portions of the Yukos awards. Venezuela's position is that if the report was true, then Arbitrator Fortier had failed to answer Venezuela's question about the authorship of the Yukos awards and the cumulative record showed that Arbitrator Fortier's disclosures were generally inadequate.[247]

295. In its Counter-Memorial, Conoco recounts the procedural background of the proposal,[248] and argues that Venezuela again has failed to meet the required standard and has not shown and cannot show, that the rejection of this challenge was so plainly unreasonable that no reasonable decision-maker would come to such a decision.[249]

296. Conoco[250] submits that Arbitrators Keith and Bucher acted properly and reasonably when concluding that the events referenced by Venezuela could not form a basis for disqualification. The Arbitrators recalled the standard of Convention Articles 14(1) and 57 and noted that Venezuela had not attempted to articulate that standard (paragraph 36 of the challenge Decision).[251]

297. Conoco submits that Arbitrators Keith and Bucher considered that the disclosure obligation was governed by Arbitration Rule 6(2) (not by Venezuela's interpretation of the IBA Guidelines), which requires arbitrators to promptly notify the Secretary-General of any relationships with the parties or any other circumstances that may cause the arbitrator's reliability for independent judgment to be questioned by a party. Conoco argues that Venezuela had not identified a specific breach of Arbitrator Fortier's duty to notify the Secretary-General. All allegations relating to this basis had already been presented to the Chair when he rejected the second challenge.

[247] Counter-Memorial (Conoco), ¶¶ 194, 195, 202.

[248] Counter-Memorial (Conoco), ¶¶ 195-200.

[249] Counter-Memorial (Conoco), ¶ 196.

[250] Counter-Memorial (Conoco), ¶ 204, citing **A/R-148 [Curtis] / A/RLA-49 [De Jesús]**, *Challenge Decision - Fortier II*, ¶ 36.

[251] Counter-Memorial (Conoco), ¶ 205.

Accordingly, the Arbitrators rejected the challenge based on the "cumulative record."[252]

298. In addition, Arbitrators Keith and Bucher did not depart from a fundamental rule of procedure. Venezuela's arguments for annulment under Article 52(1)(d) with respect to Arbitrator Fortier are indistinguishable from those it makes under Article 52(1)(a). Venezuela did not meet its burden of proving (i) the existence of a fundamental rule of procedure; and (ii) Arbitrators Keith and Bucher departed from that fundamental rule of procedure in a serious way.[253]

299. Then, again on 26 February 2016, Venezuela proposed to disqualify Arbitrator Fortier. On 15 March 2016 Arbitrators Keith and Bucher dismissed the challenge. This challenge was prompted by a remark made in the von *Pezold v. Zimbabwe* award, which noted that a Norton Rose attorney was appointed as an assistant to that tribunal in February 2012.

300. Conoco recounts the procedural background of the challenge[254]and then argues that again Venezuela failed to show that that "no reasonable decision-maker" could have come to the decision to reject this fourth disqualification proposal against Arbitrator Fortier.[255]

301. Conoco asserts that Arbitrators Keith and Bucher acted properly and reasonably when they concluded that the circumstances referenced by Venezuela did not form a basis for disqualification. Conoco notes that the Arbitrators recalled the standards of Convention Articles 14(1) and 57, and assessed whether Arbitrator Fortier had given an inaccurate account of the time that the assistant to the tribunal in the Zimbabwe case was appointed, thus creating the impression of lesser ties with Norton Rose than those that existed. But, by looking at the timeline of the assistant's appointment, which was in February 2012 with the parties' agreement, and the decision to appoint her by the

[252] Counter-Memorial (Conoco), ¶ 205.
[253] Counter-Memorial (Conoco), ¶ 208.
[254] Counter-Memorial (Conoco), ¶¶ 217-223.
[255] Counter-Memorial (Conoco), ¶ 224.

tribunal in December 2011, Arbitrators Keith and Bucher were satisfied with Arbitrator Fortier's explanation.[256]

302. Conoco submits that Arbitrators Keith and Bucher acted properly and reasonably, and their conclusion was not objectionable nor plainly unreasonable. Conoco notes that Venezuela did not argue any infirmities in the process by which the arbitrators rejected the challenge. Conoco notes that in the *Favianca* arbitration Venezuela also sought to disqualify Arbitrator Fortier on the same basis, and that the tribunal also rejected the challenge, being satisfied with Arbitrator Fortier's explanations.[257]

303. Finally, Conoco argues that Arbitrators Keith and Bucher did not depart from any fundamental rule of procedure. Venezuela's arguments for annulment under Article 52(1)(d) with respect to Arbitrator Fortier are indistinguishable from those it makes under Article 52(1)(a). Accordingly, Venezuela has not met its burden of proving (i) the existence of a fundamental rule of procedure, and (ii) that the arbitrators departed from that fundamental rule of procedure in a serious way.[258]

304. On 22 July 2026 Venezuela again sought to disqualify arbitrator Fortier. On 26 July 2016, the new Tribunal president, Arbitrator Zuleta, together with Arbitrator Bucher dismissed the challenge. According to Conoco, the challenge was based on Arbitrator Fortier's use of an administrative service firm also used by Norton Rose, which, in Venezuela's view, showed that Arbitrator Fortier had kept continued ties with that firm.[259] Venezuela's position was that there was an affiliation between Norton Rose and the administrative service firm, and that Arbitrator Fortier should have disclosed this information earlier.[260]

305. Conoco describes the procedural background for this challenge[261] and then turns to the Arbitrators' decision on the challenge. Again, recalling the standard, Conoco submits

[256] Counter-Memorial (Conoco), ¶¶ 227, 228.
[257] Counter-Memorial (Conoco), ¶ 231.
[258] Counter-Memorial (Conoco), ¶ 234.
[259] Counter-Memorial (Conoco), ¶ 235.
[260] Counter-Memorial (Conoco), ¶ 244.
[261] Counter-Memorial (Conoco), ¶¶ 237-242.

that Venezuela has not shown and cannot show that "no reasonable decision-maker" could have come to the decision to reject this challenge.[262]

306. Conoco asserts that Arbitrators Bucher and Zuleta acted properly and reasonably in concluding that the circumstances referenced by Venezuela could not form a basis for the disqualification. They relied on the standard of Convention Articles 14(1) and 57, noting that "[t]he allegation that serves as the basis for the challenge, assuming it can be established, must be capable of being related to the present case, that is, that the particular facts must give rise to a manifest lack of independence and impartiality in this case."[263]

307. Conoco submits there was nothing unreasonable in that decision. The reasonableness of the decision is further confirmed by the fact that in *Favianca v. Venezuela* the same challenge was raised, and the arbitrators in that case also dismissed the challenge, concluding that "a reasonable third person would not entertain serious doubts about Mr. Fortier's capacity to exercise independent and impartial judgement with knowledge of these facts."[264]

308. In addition, Arbitrators Bucher and Zuleta did not depart from any fundamental rule of procedure. Conoco submits that Venezuela's arguments for annulment under Article 52(1)(d) of Arbitrator Fortier are indistinguishable from those it makes under Article 52(1)(a). Accordingly, Venezuela has not met its burden of proving (i) the existence of a fundamental rule of procedure, and (ii) that Mr. Zuleta and Professor Bucher departed from that fundamental rule of procedure in a serious way.[265]

309. Finally, Conoco argues that Venezuela's "cumulative circumstances" argument also fails, because it is a mere attempt to engage the Committee in reviewing de novo the

[262] Counter-Memorial (Conoco), ¶ 243.

[263] Counter-Memorial (Conoco), ¶ 245, citing **A/R-153 [Curtis] / A/R-174 [De Jesús]**, *Challenge Decision - Fortier IV*, ¶ 12.

[264] Counter-Memorial (Conoco), ¶ 250, citing **A/CLA-83**, *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify L. Yves Fortier Q.C., Arbitrator, 12 September 2016, ("*Favianca Decision on the Proposal to Disqualify L. Yves Fortier*"), ¶¶ 59–60.

[265] Counter-Memorial (Conoco), ¶ 253.

disqualification proposals.[266]Contrary to Venezuela's suggestion that the Committee can reach its own conclusions, what the *EDF*, *Suez II* and *Eiser* committees have ruled is that "(i) where there was an opportunity to raise the relevant factual allegations during the underlying proceeding, they must be raised or are waived; and (ii) where a disqualification decision exists, an annulment committee "does not write on a blank sheet" but must approach a prior challenge decision with deference, overturning it if no reasonable decisionmaker could have come to the same conclusion."[267]

310. Accordingly, because all disqualification challenges were known during the arbitration, any challenge arguments raised and resolved must be treated with deference and reviewed against the "wholly unreasonably" standard, and any arguments not raised are now waived.[268]The Arbitrators rejected Venezuela's argument to revisit prior disqualification decisions to cumulatively consider the challenge.[269] The sources on which Venezuela relies, only support the proposition that factors regarding an arbitrator's independence and impartiality may in isolation be an insufficient basis for disqualification, but may be relevant when considered in the context of other facts.[270] Thus, Venezuela's attempt to relitigate its disqualification proposals on annulment fails as a matter of law and fact.

311. In its Rejoinder, Conoco notes that Venezuela brought four parallel challenges to arbitrator Fortier in *Favianca*, arising out of the same facts as in this case. All challenges were rejected. Conoco argues that other rational decision-makers reached the same conclusion confirming the reasonableness of the decisions by the unchallenged Tribunal members and the Chair.[271]

312. Conoco argues that, in any event, regardless of whether the Committee adopts a "cumulative circumstances" standard, the outcome would be the same, as the

[266] Counter-Memorial (Conoco), ¶ 254; Rejoinder (Conoco), ¶ 33.
[267] Counter-Memorial (Conoco), ¶ 255.
[268] Counter-Memorial (Conoco), ¶ 256.
[269] Counter-Memorial (Conoco), ¶ 259.
[270] Counter-Memorial (Conoco), ¶ 261.
[271] Rejoinder (Conoco), ¶¶ 32, 33. See *Favianca Decision on the Proposal to Disqualify L. Yves Fortier*, ¶¶ 59–60.

challenges to Arbitrator Fortier, whether assessed individually or collectively are unfounded in substance.[272]

313. Conoco further notes that there are many factual inaccuracies in Venezuela's "cumulative circumstances" argument, such as that Arbitrator Fortier made his original disclosure only after Venezuela learned of it on the internet, Arbitrator Fortier was unable to answer questions without evasion, or that he made inaccurate disclosures.[273] Contrary to Venezuela's assertion, the First challenge decision was not based on Arbitrator Fortier's resignation from Norton Rose, but rather on whether the content and timing of his October 2011 disclosure constituted grounds for disqualification, given that he had neither knowledge nor involvement in the merger.[274]

ii. Arbitrators Keith and Fortier

(a) The Reconsideration Decision

314. On 11 March 2014 Venezuela sought to disqualify arbitrator Keith and Fortier. On 5 May 2014, the Chair rejected the disqualification proposal. Conoco submits that this challenge was in response to the Arbitrators' decision of 10 March 2014 not to reconsider the Tribunal's 2013 Decision (the "**Reconsideration Decision**"), which held Venezuela in breach of Article 6(c) of the BIT by failing to negotiate in good faith with respect of the compensation payable for its expropriation of Claimants' investments.[275]

315. Conoco argues that the Chair acted properly and reasonably when he concluded that the circumstances referenced by Venezuela could not form the basis for disqualification. The Chair's decision underscores the standard of Convention Articles

[272] Rejoinder (Conoco), ¶ 39,
[273] Rejoinder (Conoco), ¶ 39
[274] Rejoinder (Conoco), ¶ 40.
[275] Counter-Memorial (Conoco), ¶¶ 264-270.

14(1) and 57, noting that the subjective belief of a party is not enough to satisfy the requirements under the Convention.[276]

316. Conoco asserts that, after reviewing Venezuela's arguments, the Chairman found that the basis for the challenge was that Venezuela was dissatisfied with the majority's Reconsideration Decision and with the procedure leading to it, including the Tribunal's decision not to convene an oral hearing. The Chair then found that the Tribunal had adopted a reasonable procedure within its discretion and that there was nothing in the reasoning or conclusion of the Reconsideration Decision suggesting an absence of impartiality. On that basis the Chair considered that a third party reasonably evaluating the facts would not conclude that there was a manifest lack of the qualities of Convention Articles 14(1) and 57.[277]

317. Conoco also submits that there is a tension between the arguments of Venezuela as represented by Curtis and as represented by De Jesús. Venezuela (Curtis) argues that the disqualification proposal was unrelated to the procedure adopted by the Tribunal; and criticizes that the Chair treated the proposal as a routine procedural issue failing to address its merits. This is despite the fact the Chair considered the reasoning and conclusions of the Reconsideration Decision and found nothing suggesting any absence of impartiality. In contrast, Venezuela (De Jesús) requests the Committee to review *de novo* the procedure adopted by the Tribunal, while Venezuela (Curtis) acknowledges that the Chair already examined that process and found no basis to uphold the disqualification.[278]

318. Contrary to Venezuela's contention, the Chair reviewed Venezuela's allegations in detail about Arbitrator Abi-Saab's dissent, and even quoted passages from Venezuela's pleading that incorporated his dissent. In any event, the Chair did not have an obligation to explicitly address each of Venezuela's contentions or to quote the dissent. Venezuela was heard, as it admits, and the Chair, having considered Venezuela's arguments,

[276] Counter-Memorial (Conoco), ¶ 278.
[277] Counter-Memorial (Conoco), ¶ 279.
[278] Counter-Memorial (Conoco), ¶¶ 280-281.

reached a conclusion that satisfies the relevant standard: a decision that is not so plainly unreasonable that no reasonable decision-maker could have come to.[279]

319. In addition, the Chair did not depart from a fundamental rule of procedure. The mechanism for ensuring the independence and impartiality of the tribunal is the arbitrator challenge mechanism, regulated by Convention Articles 57 and 58 and Arbitration Rule 9. Venezuela undertakes no meaningful application of the standard for annulment under Article 52(1)(d) to the facts relating to this challenge to Arbitrators Keith and Fortier; it merely, without support, argues that any annullable error under Article 52(1)(a) *ipso facto* constitutes an annullable error under Article 52(1)(d). Venezuela does not deny that the Chair followed the proper procedures for hearing and deciding on this challenge and it was offered an opportunity to present its case. The annulment should be rejected as Venezuela failed to prove (i) the existence of a fundamental rule of procedure, and (ii) that the Chair departed from that fundamental rule of procedure in any serious way.[280]

320. In its Rejoinder Conoco maintains that Venezuela's (Curtis) Reply did not make any new arguments about the Chair's dismissal of the First challenge to the Tribunal majority. Conoco also rebuts Venezuela's (De Jesús) allegation that the Chairman raised the standard in its decision, requiring that Venezuela prove partiality instead of the appearance of partiality. The Chair applied the standard of Articles 14 and 57, finding that "there is nothing in the reasoning or conclusions of the Decision on Reconsideration that suggests an absence of impartiality."[281] Conoco also submits, contrary to Venezuela's contention, that the Chair considered Venezuela's alleged "facts," including Venezuela's allegations regarding the Tribunal's First reconsideration decision, and concluded that those "facts" would not lead an objective third party to find a lack of impartiality, manifestly or otherwise.[282]

[279] Counter-Memorial (Conoco), ¶¶ 282, 283.
[280] Counter-Memorial (Conoco), ¶¶ 284, 285.
[281] Rejoinder (Conoco), ¶ 42.
[282] Rejoinder (Conoco), ¶ 44.

321. In ruling on the First challenge to the Tribunal majority, the Chair did consider Venezuela's allegation based on Prof. Abi-Saab's dissent referring to the arbitrator's "general attitude vis-à-vis the Respondent." In the decision on the Second challenge to the Tribunal majority, the Chair remarked that Prof. Abi-Saab's dissent only revealed a profound disagreement on points of law and evidence, but it was not proof of the arbitrators having a general negative attitude towards Venezuela. Venezuela has failed to explain how those conclusions were so plainly unreasonable that no decision-maker could reach them.[283]

(b) No consent to Arbitrator Abi-Saab's resignation

322. On 25 March 2015 Venezuela again sought to challenge Arbitrators Keith and Fortier. On 1 July 2015, the Chair of the Administrative Council issued a decision dismissing this challenge (and the second individual challenge to Arbitrator Fortier). Venezuela's challenge was based on an alleged general negative attitude of Arbitrators Keith and Fortier toward Venezuela, supposedly shown by their decision not to consent to Arbitrator Abi-Saab's resignation while the second challenge to Arbitrator Fortier's challenge was still pending.

323. Conoco argues, among others, that the Chair acted properly and reasonably when it concluded that the circumstances referenced by Venezuela could not form a basis for disqualification. Conoco submits that the Chairman assessed the challenge under the appropriate standard, which Venezuela does not contest. The Chair continued to examine the substance of Venezuela's proposal. The Chair determined that "[a] third party undertaking a reasonable evaluation of the facts in this case would not conclude that Judge Keith and Mr. Fortier lack the qualities required by Article 14(1) of the ICSID Convention."[284]

324. In its Rejoinder, the Conoco Parties emphasize that Prof Abi-Saab resigned at the most disruptive moment possible, after withholding his dissenting opinion for well over a

[283] Rejoinder (Conoco), ¶ 45.

[284] Counter-Memorial (Conoco), ¶ 328, citing **A/R-141 [Curtis] / A/R-175 [De Jesús]**, Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015, ("*Challenge Decision – Majority II*"), ¶ 97.

year. Conoco accounts the facts surrounding the resignation noting Prof Abi-Saab's participation in a conference four days after his resignation, where he made remarks indicative of disruptive conduct in relation to ICSID proceedings.[285]

325. Conoco also rejects Venezuela's position that Arbitrators Keith and Fortier "withdrew" their consent. They declined to consent to the resignation in the exercise of their discretion. They issued reasoned decision based on the resignation's disruptive timing and the unprecedented situation that ensued from the resignation. Consent could not have been "withdrawn," since the resignation Prof. Abi-Saab proposed months earlier never took place, and the actual resignation occurred under different circumstances to which the arbitrators never consented.[286]

326. Conoco adds that Venezuela's second challenge to Arbitrators Fortier and Keith was based on improper communications between Venezuela and Prof. Abi-Saab after his resignation, impropriety which Venezuela does not contest. The Committee should disregard Prof. Abi-Saab's email of 25 March , a communication which had no legal status in the arbitration. In any event, the arguments that Venezuela derives from that email are no basis for annulment.[287]The Conoco Parties also stress that Venezuela's position is difficult to reconcile: it acknowledges the "procedural morass" the resignation created during the pendency of the challenge while it claims a serious departure from a fundamental rule of procedure when Arbitrators Fortier and Keith decided not to consent to the resignation.[288]

327. Conoco reiterates that Venezuela failed to show that the Chairman's decision rejecting the Second challenge to the Tribunal majority did not follow the appropriate procedures (*Azurix and OI European* standards) or that it was plainly unreasonable (*EDF, Suez II, Mobil Exploration*). The Chairman determined that a third party making a reasonable evaluation of the facts (including the language in Prof. Abi-Saab's dissents) would not

[285] Rejoinder (Conoco), ¶¶ 51, 52.
[286] Rejoinder (Conoco), ¶ 53.
[287] Rejoinder (Conoco), ¶ 54.
[288] Rejoinder (Conoco), ¶ 57.

conclude that the arbitrators lacked the qualities required by Convention Article 14(1).[289]

iii. The Appointment of Arbitrator Bucher

328. Conoco argues that Venezuela has failed to show that the Tribunal was improperly constituted because of the Chairman's appointment of arbitrator Bucher. Conoco submits that the Committee's inquiry into the arbitrator appointments by ICSID is analogous to a review of prior decisions on arbitrator challenges, *i.e.*, if there was a failure to comply with Parties' arbitration agreement, which is governed by Convention Articles 37-40, 56-58 and Arbitration Rules 1-12.[290]

329. Conoco refers to the decision of the *ad hoc* committee in *Carnegie Minerals v. Gambia* to support its argument that the right to appoint a replacement arbitrator is conditional. In that case, ICSID appointed an arbitrator on the respondent's behalf after the respondent failed to appoint within the time required under the parties' arbitration agreement. The committee rejected the state's annulment application and held that the right to appoint an arbitrator can be described as fundamental, but it is not unconditional, and a party may waive or be deprived of the right under the terms of the parties' agreement. The committee found that under the applicable rules the state had lost its right to appoint, and the Secretary-General had properly appointed in substitution.[291]

330. Conoco argues that just as Gambia's right was conditional under the terms of the arbitration clause, Venezuela's right to appoint an arbitrator was conditional under the terms of the ICSID Convention and the Arbitration Rules. In this case, since the Tribunal did not consent to the resignation under Article 56(3) and Rule 8(2),

[289] Rejoinder (Conoco), ¶¶ 59, 60.

[290] Counter-Memorial (Conoco), ¶ 331.

[291] Counter-Memorial (Conoco), ¶ 332, citing **A/CLA-101**, *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Annulment, 7 July 2020, ("*Carnegie Annulment Decision*"), ¶¶ 126, 146.

Venezuela lost its conditional right to appoint under the rules to which it agreed, and the Chair appointed to fill the vacancy under Rule 11(2.[292]

331. Conoco argues that Venezuela's argument that a party may only be deprived of its right to appoint a replacement arbitrator in cases of improper conduct or collusion by the appointing party fails, because (i) Convention Article 56 and the Arbitration Rules do not define or limit the factors a tribunal may consider in deciding whether to consent to a resignation; (ii) there was no indication of collusion with or improper conduct by the appointing party when a party-appointed arbitrator's resignation was not accepted, and it is legitimate for a tribunal to consider procedural disruptions when deciding whether to consent; (iii) the commentaries Venezuela cites do not change the analysis and the language of Article 56(3) is unambiguous; (iv) the improper communications between Prof. Abi-Saab and Venezuela constitute improper conduct Prof. Abi-Saab's activities following his resignation are difficult to reconcile with his narrative.[293]

332. Conoco argues that the criteria Venezuela intends to graft onto Article 56(3) (improper conduct or collusion) do not exist and cannot as a matter of treaty interpretation be implied into the ICSID Convention. However, if the criteria exist, there is ample suggestion of improper conduct.[294]

333. In its Rejoinder, Conoco argues that Venezuela is requesting the Committee to make a *de novo* review of the Tribunal's decision not to consent to the resignation, which then led to the appointment of a replacement arbitrator. Conoco recalls that such a decision is at the Tribunal's discretion and Article 56(3) and Rule 8(2) do not delimit factors that a truncated tribunal may consider in deciding whether to consent to a resignation.[295]

[292] Counter-Memorial (Conoco), ¶ 333.

[293] Counter-Memorial (Conoco), ¶ 340, citing **A/CLA-78**, G. Abi-Saab, "The Third World intellectual in praxis: confrontation, participation, or operation behind enemy lines?," 37 Third World Quarterly (2016), No. 11, 1957–71, pp. 1962–64, 1967–69.

[294] Counter-Memorial (Conoco), ¶ 341.

[295] Rejoinder (Conoco), ¶¶ 67, 68.

334. Conoco also rebuts Venezuela's contention that Conoco's position regarding Article 56(3) is untenable. *First*, the plain text of Article 56(3) and Rule 8(2) do not define or limit the grounds a tribunal may consider, nor do they require to provide reasons. *Second*, Venezuela did not justify the standard it posits for the Tribunal's reasons or the review under Article 52. *Third*, no committee has ever reviewed the Tribunal's decision under Article 56(3) and the Committee need not do so here, since the Chairman already reviewed the Tribunal's exercise of discretion in connection with the decision on the Second challenge to the Tribunal majority. *Fourth*, if the Committee decided to review the Tribunal's decision under Article 56(3), the Committee should take guidance from the "plainly unreasonable" standard applied to the review of decisions on arbitrator challenges.[296]

335. Conoco also defends its reliance on *Carnegie Minerals*. The Claimants never suggested that the facts of that case were the same as this one, but the case elucidates the legal principle that any right to appoint an arbitrator is conditional and can be lost under the terms of the parties' arbitration agreement. Just like Gambia's right was conditional under the terms of the arbitration agreement, here Venezuela's rights were conditional under the terms of the ICSID Convention and Arbitration Rules.[297]

[296] Rejoinder (Conoco), ¶¶ 69-74.
[297] Rejoinder (Conoco), ¶¶ 78 79.

A.1(4) THE COMMITTEE'S ANALYSIS OF THE ALLEGED IMPROPER CONSTITUTION

336. Having analysed the standard for annulment on the ground of improper constitution of the tribunal (**Section VI. Part 2(a)**), the Committee now moves to examine whether an Award rendered by an Arbitral Tribunal composed of Mr Fortier, Judge Keith[298] and Professor Bucher withstands the Applicant's criticisms concerning improper constitution (**A.1(4)**).

337. The Committee will first analyse the arguments presented by the challenging Party, Venezuela, as represented by Curtis (**A.1(4)(1)**), then and as represented by De Jesús (**A.1(4)(2)**). As with all other challenges, the Committee devotes no specific section on Conoco's arguments which have been already summarized above under the Parties' positions. Not being the challenging Party, Conoco's arguments in defence are only dealt with as the Committee analyses the grounds advanced by Curtis and De Jesús in support of Venezuela's challenge whenever this is useful for the Committee's demonstration.

A.1(4)(1) THE COMMITTEE'S ANALYSIS OF THE ALLEGED IMPROPER CONSTITUTION OF THE TRIBUNAL AS ARGUED BY VENEZUELA (CURTIS)

i. Arbitrator Fortier (Independence and impartiality)

338. The improper constitution of the Arbitral Tribunal because of Mr Fortier essentially rests on a five-prong criticism concerning his association with the law firm of Norton Rose of which he was a partner. A conflict of interest issue arose when a merger occurred during the arbitration proceedings with the firm of Macleod Dixon which advised adverse interests to those of Venezuela.[299] Macleod Dixon notably represented Conoco, together with Freshfields, also Conoco's co-counsel in ARB/07/30, in a case

[298] Judge Keith was president of the Arbitral Tribunal from its initial constitution on 23 July 2008 until his resignation on 21 March 2016 (A/R-76).

[299] Memorial (Curtis), ¶¶ 106, 107.

against the state company Petróleos de Venzuela (PDVSA) involving the Hamaca and Petrozuata Association Agreements also on issue in this arbitration.[300]

339. Mr Fortier clarified in his letter of 18 October 2011, to Judge Keith and Professor Abi-Saab about his resignation from Norton Rose with effect on 31 December 2011:

> "*It should be of interest to you and to the parties to know that I have not been involved in any way in the negotiation which lead to the announcement of the Firm's forthcoming merger with Macleod Dixon. In addition, in reply to point (vi) of the Respondent's letter to you of 13 October 2011*[301]*, I have not taken part in or been privy to the plans (if any) 'for the coordination of the international arbitration group and the business plan for promoting the combined firm's expertise in this area.*'"[302]

340. Mr Fortier reaffirmed to the two other members of the Arbitral Tribunal on 17 November 2011, that he has "*no knowledge of any file (if indeed any exists) 'on which lawyers from Norton Rose and Macleod Dixon have already been working together.' I can categorically state that I have had no involvement whatsoever in any such file, nor have I been made privy to any information about any such file*".[303]

341. The Committee cannot accept the first prong of the Applicant's criticism[304] that Mr Fortier must have been involved in the merger discussions between the two firms which according to the press, dated back almost a year before Mr Fortier's disclosure to the Secretary-General of ICSID on 4 October 2011.[305] Macleod Dixon's presence in South America and Norton's Rose experience in arbitration with Mr Fortier's stature may provide explanations for the merger but not of Mr Fortier's involvement.[306]

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[300] Memorial (Curtis), ¶ 9.

[301] **A/R-122 [Curtis]**, Letter with Appendices from Respondent to Judge Keith and Professor Abi-Saab, 13 October 2011.

[302] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*.

[303] **A/R-139 [Curtis] / A/R-148 [De Jesús]**, Letter from Mr. Fortier to Judge Keith and Professor Abi-Saab, 17 November 2011 ("*Fortier November letter to co-arbs*").

[304] Memorial (Curtis), ¶ 14; **A/R-52 [Curtis] / A/R-93 [De Jesús]**, *Fortier email to ICSID SG*.

[305] **A/R-52 [Curtis] / A/R-93 [De Jesús]**, *Fortier email to ICSID SG*.

[306] Reply (Curtis), ¶ 91. Tr. Day 1, p. 153: 22-24.

342. Making a disclosure is not in any way an admission of an inability to serve. Quite to the contrary, the arbitrator feels capable to sit with independence and impartiality as the purpose of the disclosure is precisely to allow the parties to judge whether they agree with the evaluation of the arbitrator and to explore the situation further. It was not reprehensible for Mr Fortier to resign from Norton Rose, as he informed on 17 October 2011, after Venezuela challenged him on 5 October 2021, in reaction to the disclosure on 4 October 2011.[307]

343. In addition, Mr Fortier declared his relation to Norton Rose after his resignation in the same letter of 18 October 2011:

> *"There are members of Norton Rose OR who have assisted me in certain files in which I serve as an arbitrator - e.g. by acting as Administrative Secretary to the Tribunal -whom I may continue to call upon for assistance after 1 January 2012. In such event, I will make arrangements with Norton Rose Canada in order for the time of these individuals to be billed to me by Norton Rose Canada. The only person who has assisted me in the present file is Ms. Rachel Bendayan, a junior associate of the Firm's Litigation Group based in Montreal, and she has already signed the undertakings establishing the ethical wall in place since 5 October 2011. Ms. Bendayan has not done any work in this matter since August 2011 and I will not call upon her or any one else from Norton Rose OR/Norton Rose Canada to assist me in this matter in the future.*"[308]

Because Mr Fortier, Venezuela says, committed repeated non-disclosures in this regard, which were incomplete, misleading, or inaccurate,[309] it was forced to request clarifications from him about the extent of his relationship with Norton Rose after it discovered evidence of this continued relation.[310]

344. An arbitrator's failure to disclose certain facts and circumstances does not necessarily mean that a conflict of interest exists. Venezuela proposes the standard of an appearance

[307] Tr. Day 1, p. 154: 5-12. A/R-51; **A/R-52 [Curtis] / A/R-93 [De Jesús]**, *Fortier email to ICSID SG*; **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*.

[308] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*.

[309] Memorial (Curtis), ¶¶ 44, 102, 106. Tr. Day 3, p. 17:13-19.

[310] Memorial (Curtis), ¶¶ 30, 37, 41, 59.

of dependence or bias which is commonly used by *ad hoc* committees.[311] The disqualification test is not whether bias has affected the decision (actual bias) but whether there exists facts and circumstances that give rise to a reasonable suspicion or apprehension of bias in the fair-minded observer. The test is thus an objective one[312] as the fair-minded and informed observer does not have an interest in the outcome of the arbitration other than the interest of advancing natural justice and due process.

345. The next three prongs of the Applicant's criticism bear on Mr Fortier's disclosure obligations regarding the lawyers at Norton Rose who served as secretary to arbitral tribunals in the Yukos cases against Russia which were chaired by Mr Fortier, or, like Ms Bendayan, assisted him as chair of other ICSID tribunals. The fifth prong of Venezuela's attack is that Mr Fortier had besides billing arrangements with Services OR LP/SEC ("Services OR") a wholly owned subsidiary of Norton Rose, for secretarial and other support services.[313]

346. The Committee notes that the involvement of Norton Rose lawyers fell within the scope of the information provided by Mr Fortier on 18 October 2011 about continued assistance after his resignation of Norton Rose members to arbitral tribunals with the exception of the underlying arbitration. Ms Bendayan thus served from 18 October 2011 to 10 October 2014 as assistant to Mr Fortier in the Agility ICSID case[314] and Ms Fitzgerald, another Norton Rose lawyer, as assistant to two Zimbabwe ICSID cases.[315] Ms Fitzgerald's appointment, as pointed out by Venezuela, took effect on February 2012, however, her appointment was agreed before Mr Fortier's resignation on 31 December 2011.[316] With that precision, the conditions of Ms Fitzgerald's appointment

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[311] Memorial (Curtis), ¶¶ 93-96. *Eiser Annulment Decision*, ¶ 206; *EDF Annulment Decision*, ¶ 109; *Suez Annulment Decision*, ¶ 78.

[312] *Suez Annulment Decision*, ¶ 78; *EDF Annulment Decision*, ¶¶ 109-111; **A/RLA-47 [Curtis] / A/RLA-82 [De Jesús]**, *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, ("*Caratube Disqualification Decision*"), ¶¶ 54, 57: "'*an objective standard based on a reasonable evaluation of the evidence by a third party*' *or, in other words, on the* '*point of view of a reasonable and informed third person*'".

[313] Memorial (Curtis), ¶¶ 26-44, 57-66, 71-83.

[314] Memorial (Curtis), ¶¶ 42-43. Tr. Day 1, p. 157: 14-25.

[315] Memorial (Curtis), ¶¶ 39-41, 71-75. Tr. Day 1, p. 156: 22-25, p. 157: 1-13.

[316] **A/R-129 [Curtis] / A/R-176 [De Jesús]**, Mr. Yves Fortier's Explanations, 16 April 2015.

do not reveal an intrusion of Macleod Dixon in the proper discharge by Mr Fortier of his arbitrator's duties in the underlying arbitration. The same conclusion can be drawn for Ms Bendayan's appointment on the day when Mr Fortier informs of the assistance by Norton Rose's lawyers after his resignation. The Committee further concludes the same regarding Mr Valasek's role as secretary of the Yukos tribunals. The Applicant puts forward Russia's contentions in its efforts to resist the enforcement of the Yukos awards in 2015 which raised Mr Valasek's participation, far in excess of administrative tasks, as a "fourth arbitrator" in light of the remuneration received and of alleged authorship of the Yukos awards.[317] That is however if "*the expert report regarding the authorship of the Yukos awards were correct*."[318] Relationships between an arbitrator and another arbitrator who are lawyers in the same firm may be considered as presumably subject to disclosure in the arbitration in which they sit. This would not assume that Mr Fortier bore the identity of the combined firm of Norton Rose-Macleod Dixon, which would need to be demonstrated. Even if Mr Valasek effectively performed an arbitrator's role in *Yukos*, there would still be a missing link as to how the situation in the Yukos tribunals affected Mr Fortier's independence and impartiality in the underlying arbitration.[319]

347. The Committee now turns to the billing arrangements for Mr Fortier's secretarial staff who wished to continue participating in the insurance and other benefits offered by Services OR.[320] Venezuela's request for information on 24 October 2011 about the existence of "*any office* sharing *arrangements, arrangements for the provision of secretarial or other support services, or consulting or billing arrangements between Mr Fortier and the combined firm*"[321] was first answered by Mr Fortier on 17 November 2011 that he was looking for rental premises.[322] The Applicant lays great

[317] Memorial (Curtis), ¶¶ 26-35, 57-66. Tr. Day 1, p. 155: 4-19, p. 156: 1-21.

[318] Memorial (Curtis), ¶ 61.

[319] **A/R-141 [Curtis] / A/R-175 [De Jesús]**, *Challenge Decision – Majority II*, ¶ 95.

[320] Reply (Curtis), ¶ 95. Tr. Day 1, p. 158: 18-25, p. 159: 1-25, p. 160: 1-2.

[321] **A/R-121 [Curtis]**, Letter with Appendices from Respondent to Judge Keith and Professor Abi-Saab, 24 October 2011.

[322] **A/R-139 [Curtis] / A/R-148 [De Jesús],** *Fortier November letter to co-arbs*.

emphasis on the late disclosure in 2016[323] of the arrangement with Services OR, which provided Mr Fortier "*with the substantial benefits of allowing him to retain and hire new staff while relieving him of the burden and substantial additional cost involved in setting up an equivalent benefits plan*."[324] The contention fails to demonstrate how the practicalities of Mr Fortier's arrangement with Services OR as compared to a similar arrangement with another company for secretarial support would have affected his independence and impartiality. The Applicant puts forward the episode of a staff member who described herself on the social media as an employee of Norton Rose.[325] The billing arrangements between Mr Fortier's arbitrator practice and Services OR dispel any doubt that this was wholly erroneous. Mr Fortier had no financial interest in the activities of the combined Norton Rose-Macleod Dixon firm and the financial arrangements with Services OR do not disclose that Mr Fortier bore the identity of the combined firm. There is no causal nexus because we cannot find, as the Applicant claims, that the payment arrangements "*could only be possible through an affiliation between Norton Rose and Cabinet Yves Fortier.*"[326] Having knowledge of Mr Fortier's desire to avoid the least possible disruption in his activities after 31 December 2011 by enabling the staff of his arbitrator's practice to continue benefitting from the same advantages offered by Services OR,[327] the informed observer would not have regarded against the backdrop of Mr Fortier's resignation from Norton Rose the completion of his disclosure on services arrangements in 2016 as an indication of Mr Fortier's inclination towards interests adverse to those of Venezuela in the underlying arbitration.

348. Mr Fortier's letter of 18 October 2011, also clarified that he will cease receiving any remuneration from Norton Rose as of 31 December 2011, including any retirement benefit.[328] In the circumstances of Mr Fortier's relations with Norton Rose, a fair-

[323] Reply (Curtis), ¶¶ 106-108, 127.

[324] Memorial (Curtis), ¶ 83.

[325] Memorial (Curtis), ¶¶ 80-82. Tr. Day 1, p. 159:6-12.

[326] Memorial (Curtis), ¶ 82.

[327] **A/R-151 [Curtis] / A/R-151 [De Jesús]**, Letter of Mr Fortier to the ICSID Secretariat of 22 July 2016.

[328] "*As of that date* [31 December 2011]*, I will no longer be a member of the Firm and will thus cease to earn any remuneration from Norton Rose OR. For your additional information, I have no entitlement to any retirement benefit from the Firm.*" (**A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*).

minded observer would conclude, without undue complacence nor suspicion, that the existence of a conflict of interest has not been shown out of Mr Fortier's performance of his disclosure obligations.

349. Could the circumstances surrounding Mr Fortier's situation amount to a real possibility of a lack of impartiality, if compounded with the "*physical proximity*"[329] of Mr Fortier's professional abode in Montreal on the same floor as the reception area of Norton Rose[330] and with the emotional attitude attributed to Mr Fortier when he resigned?[331] The emotional ties are not however with Norton Rose but with Ogilvy Renault, the firm he stayed with for fifty years until it merged with Norton Rose in 2010.[332] This is confirmed by a Canadian magazine article: "*Fortier retains many good memories from his 50-year career with Ogilvy Renault where he was once chairman. There's still a strong sense of camaraderie with his former colleagues* […] *who first knew him as their mentor. They now know him as their friend*."[333] A fair-minded observer would not find that the situation creates a commonality of interest between Mr Fortier and his former colleagues on the same floor, other perhaps than in tenant-landlord discussions since they all leased from a client of Norton Rose, such as to influence him negatively towards Venezuela. Nor would a fair-minded observer find that Mr Fortier's memories from Ogilvy Renault would have instilled in his mind an antagonistic approach to Venezuela's interests in the underlying arbitration because of Macleod Dixon's representation of adverse interests to those of the Applicant.

350. Do the above circumstances display a negative attitude towards Venezuela on the part of Mr Fortier in the Award? The Conoco Parties suggest an answer: "*Zero plus zero remains zero*."[334] Venezuela argues that Mr Fortier should have been disqualified on the basis of the accumulation of these circumstances.[335] A fair-minded observer who

[329] Memorial (Curtis), ¶ 46.
[330] Memorial (Curtis), ¶ 45.
[331] Memorial (Curtis), ¶ 16.
[332] **A/R-139 [Curtis] / A/R-148 [De Jesús],** *Fortier November letter to co-arbs*.
[333] Memorial (Curtis), ¶ 45.
[334] Rejoinder (Conoco), ¶ 35.
[335] Memorial (Curtis), ¶ 108, Reply (Curtis), ¶ 101.

undertakes a holistic analysis of Mr Fortier's resignation from Norton Rose would not conclude in answering the Applicant's interrogation on the proper constitution of the Arbitral Tribunal, that it gives rise to justifiable doubts regarding Mr Fortier's ability to make the Award as an independent and impartial arbitrator because Mr Fortier's interests were aligned with those of the combined Norton Rose-Macleod Dixon firm against the interests of Venezuela.

351. Conoco highlights the reasoned and plainly reasonable character of the decision of Mr. Fortier's colleagues to reject his first challenge on 27 February 2012 in light of the forthcoming merger and the extent of Macleod Dixon's involvement in multiple matters adverse to Venezuela[336] and of the Chairman's decision which rejected on 1 July 2015 Venezuela's second Proposal to disqualify Mr Fortier because of his professional and emotional ties with Norton Rose after his resignation in 2011.[337] Conoco adds that Venezuela has also not shown that Judge Keith and Prof. Bucher reached a plainly unreasonable result in their rejection on 15 December 2015 of Mr. Fortier's third challenge by Venezuela by reason of Mr. Valasek's activity in the *Yukos* case[338] and of the fifth challenge on 15 March 2016 regarding his assistance in the *Zimbabwe* cases,[339] nor that Mr. Zuleta and Prof. Bucher reached a plainly unreasonable result when they rejected on 26 July 2016 Mr. Fortier's fifth disqualification proposal filed by Venezuela concerning the arrangement with Services OR.[340]

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[336] **A/R-119 [Curtis] / A/R-146 [De Jesús]**, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 27 February 2012. Counter-Memorial (Conoco), ¶¶ 156-166.

[337] Counter-Memorial (Conoco), ¶ 189.

[338] **A/R-148 [Curtis] / A/RLA-49 [De Jesús]**, *Challenge Decision - Fortier II*. Judge Keith and Prof. Bucher reasonably found that Mr Fortier had fully answered Venezuela's interrogatory, and that "[t]he allegation, assuming it can be established, must be capable of being related to the present case – that is, that the particular collaboration with Mr. Valasek gives rise to a manifest lack of independence and impartiality in this case" ¶ 40. Counter-Memorial (Conoco), ¶¶ 201-212.

[339] **A/R-150 [Curtis] / A/RLA-50 [De Jesús]**, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., 15 March 2016, Counter-Memorial (Conoco), ¶¶ 224-233.

[340] **A/R-153 [Curtis] / A/R-174 [De Jesús]**, *Challenge Decision - Fortier IV*. Mr Zuleta and Prof. Bucher considered the facts related to the administrative arrangement raised by Venezuela, and concluded that, even assuming the arrangement benefited Mr Fortier, Venezuela had failed to show why and in what respect such benefit would influence Mr Fortier's activity as arbitrator in the case. Further, Mr Zuleta and Prof. Bucher noted that they could not "see how the facts relating to those services […] would lead a reasonable third person with knowledge of those facts to the conclusion that Mr. Fortier is manifestly lacking in the ability to act impartially between the parties in the present arbitration." ¶¶ 15, 16. Counter-Memorial (Conoco), ¶¶ 243-250.

352. The Applicant provides no demonstration as to how the criticisms raised with regard to Mr Fortier's continued links with Norton Rose after his resignation evidence, even if considered in the aggregate, create a conflict of interest with Venezuela that would raise justifiable doubts as to his independence and impartiality which could have tainted the proceedings and materially affected the Award.

ii. Arbitrators Keith and Fortier (Independence and Impartiality)

353. The Committee therefore proceeds further with Mr Fortier's conduct in the underlying arbitration, this time because of his deeds with Judge Keith.

(a) Refusal to reconsider the 2013 Decision on Jurisdiction and Liability

354. There is at first Mr Fortier's refusal, together with Judge Keith, to reconsider their majority Decision on Jurisdiction and the Merits of 3 September 2013. Venezuela states that its attack is not disagreement on legal and factual issues but calls for a reasonable evaluation by a third-party observer of the evidence from which the conclusion of an appearance of lack of impartiality can only be drawn.[341] Venezuela is guided in its criticism by the declarations of Prof. Abi-Saab, the dissenting arbitrator who observed the attitude of his fellow arbitrators.[342] We take the dissenting arbitrator's most salient remarks underlined by Venezuela in its submission[343]:

> "*the Majority Decision predicated, not on the basis of positive proof, but by divination or sheer fiat, a presumption – drawn from a single misconceived instance involving an error of fact – of a constant pattern of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes* […] *relying almost exclusively and uncritically on the affirmations and uncritically on the affirmations and representations of the Claimants throughout the proceedings* […] *But in order for this version to prevail, the Majority Decision had to neutralize any contradictory evidence* […] *as well as c) denying any legal significance and effect to 'whatever confidentiality agreement there was'* […]
> *In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of*

[341] Memorial (Curtis), ¶¶ 24, 25, 116.

[342] Memorial (Curtis), ¶ 23; Reply (Curtis), ¶ 124. Tr. Day 1, p. 164: 19-25, p. 165-166:1-18.

[343] Memorial (Curtis), ¶ 23.

> *seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence.*
> *It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.*"[344]

355. Overlooking the degraded body of language within the Arbitral Tribunal, we note that the dissenting arbitrator's remarks question his colleagues' ability to exercise sound judgment in evaluating the evidence presented to them. The only allusion to the majority's state of mind is in the opening section of the above discourse:

> "*This reasoning (ground, motif) of the Majority Decision is revealing in more ways than one. Apart from a general attitude vis-à-vis the Respondent, it reveals an important error in the establishment of facts on the part of the Majority Decision, by assuming that the Confidentiality agreement was in effect in June 2007, while it had on record before it evidence to the contrary*."[345]

356. The expression "*Apart from the general attitude vis-à-vis Respondent*" depicts a negative perception of the Venezuela by the majority arbitrators, however, there are no indicators provided by the dissenting arbitrator of the suspected hostility that would comfort his subjective impression of these Colleagues' attitude. The developments on the supposed majority's gross error of judgment on which the dissenting opinion concentrates cannot be sufficient to show that these alleged procedural violations would be inspired by a will to do ill. A fair-minded observer would not find in such bare allegations, even if made by a co-arbitrator, a real possibility of a lack of impartiality. Venezuela brings no demonstration that the Award incorporating the 2017 Interim Decision which dismissed Venezuela's third application for reconsideration[346] was contaminated by the refusal of Judge Keith and Mr. Fortier to reconsider the 2013

[344] **A/R-41 [Curtis] / A/R-82 [De Jesús]**, *Abi-Saab Dissenting Opinion – Reconsideration Request*, ¶¶ 17, 22, 66-67.
[345] **A/R-41 [Curtis] / A/R-82 [De Jesús]**, *Abi-Saab Dissenting Opinion – Reconsideration Request*, ¶ 16.
[346] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, Award, dated 8 March 2019, ("*Award*"), ¶¶ 42-43.

Decision and not made by a properly constituted arbitral tribunal with Judge Keith and Mr. Fortier.

(b) No consent to Prof. Abi-Saab's resignation

357. According to the Applicant, Mr Fortier reaffirmed the appearance of a lack of impartiality when, he and Judge Keith withdrew their consent to Prof. Abi-Saab's resignation on 20 February 2015.[347] The decision of Mr Fortier and Judge Keith was conveyed to the Parties on 4 March 2015 with the following explanations:

> "*Over a very lengthy period the two Arbitrators, particularly the President, have urged Professor Abi-Saab to complete his dissent and then, as he had himself indicated, to resign from the Tribunal so that the Respondent could appoint a replacement arbitrator. The President kept stressing the urgency of the matter and Professor Abi-Saab in mid-November, while saying that he still expected to complete the dissent by the end of that month, indicated that if he had not completed by the end of the year, he would have to resign in any event. In the course of those exchanges, the two arbitrators plainly did consent to the proposed resignation.*
> *The two arbitrators did not however consent to a resignation in late February when the quantum hearing was only seven weeks away and a challenge to one of the arbitrators was pending*."[348]

The terms of this decision, which was confirmed on 23 March 2015,[349] make plain that Prof. Abi-Saab's resignation was ineluctable because of his health problems. The completion of his dissent to the Decision on Jurisdiction and the Merits of 3 September 2013, which he envisaged to do by the end of 2014 at the latest, was the only pending issue for Prof. Abi-Saab in order to formalize his resignation. The Applicant says that the issue before the Committee is whether Mr Fortier and Judge Keith had absolute discretion to deny consent when imperious health reasons are good cause for resignation.[350]

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[347] Memorial (Curtis), ¶¶ 49, 116-117; Reply (Curtis), ¶ 134. Tr. Day 1, p. 167:14-25, p. 168-169-170-171:1-19. Tr. Day 3, p. 21:15-25, pp. 22, 23.

[348] **A/R-61 [Curtis] / A/R-102 [De Jesús]**, *ICSID March letter*.

[349] **A/R-68 [Curtis]** / **A/R-109 [De Jesús]**, Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties, 23 March 2015 ("*ICSID March letter II*").

[350] Tr. Day 3, p. 24: 10-23; p. 25: 12-18.

358. The principle of Prof. Abi-Saab's resignation was endorsed by the Majority arbitrators, however not the time of his resignation. Withdrawal of consent was therefore not in issue. Prof. Abi-Saab himself admitted in his letter of resignation "*I hope that by resigning at this juncture, before the oral hearings on quantum, I mitigate to some extent the negative effect that my resignation might have*."[351] By disagreeing with Prof. Abi-Saab on the timing of his resignation with immediate effect on 20 February 2015[352] as disruptive of the forthcoming quantum hearing on 13-17 April 2015 that had been planned since 1 August 2014 with Prof. Abi-Saab's consent,[353] Mr Fortier and Judge Keith acted within the bounds of ICSID Convention Article 56(3) and ICSID Arbitration Rule 8(2). These provisions have a wider prospect than preventing the collusion between an arbitrator and the appointing party. They aim at the expediency and non-frustration of the proceedings as well as the preservation of the immutability of the arbitral tribunal which is further endorsed by the Convention's provisions on the death and incapacity and disqualification of arbitrators.[354] Prof. Abi-Saab's colleagues opined that a resignation in 2014 would not have disrupted the organization of the Hearing four months after but considered it disruptive even weeks before in February 2015. The Applicant's comment that "[w]*ith respect to the timing of the quantum hearing, if Prof. Abi-Saab had resigned at the end of 2014, as Judge Keith and Mr Fortier apparently would have preferred, and respondent had been granted the normal time period to appoint a replacement, there is simply no way in which anyone could reasonably have expected the quantum hearing to take place on April 13, 2015, unless the replacement arbitrator would have gone into the hearing wholly unprepared. That is not a serious way to conduct a hearing*"[355] is a matter of speculation about what

[351] **A/R-142 [Curtis] / A/R-154 [De Jesús]**, Letter from Professor Abi-Saab to Judge Keith and Mr. Fortier, 20 February 2015 ("*Prof. Abi-Saab letter to co-arbs*").

[352] **A/R-68 [Curtis]** / **A/R-109 [De Jesús]**, *ICSID March letter II*.

[353] **A/C-89**, Email from the ICSID Secretariat to the Parties, 20 February 2015.

[354] Counter-Memorial (Conoco), ¶¶ 321, 322.

[355] **A/R-60 [Curtis]** / **A/R-101 [De Jesús]**, Letter from Respondent to the Secretary of the Tribunal, dated 4 March 2015 ("*Respondent 4 March 2015 letter*"). Memorial (Curtis), ¶ 131.

would have happened, should a replacement arbitrator have been appointed early 2015. It raises no justifiable doubt of a lack of impartiality of Judge Keith and of Mr Fortier.

359. Was their refusal to consent to Prof. Abi-Saab's resignation made in retaliation for the challenge of Mr. Fortier which was pending since 6 February 2015?[356] The correspondence sent by Prof. Abi-Saab to ICSID's Secretary General on 25 March 2015 alludes to an exchange of correspondence with Judge Keith who insisted on the submittal of the dissenting opinion by 6 February before adding "[t]*he next step is for you to resign at that point*."[357] Prof Abi-Saab commented on this offer of resignation: "*But he did not write that otherwise, the acceptance of the resignation would be withdrawn*."[358] It cannot be concluded from Judge Keith's correspondence with Prof. Abi-Saab that Mr Fortier was more inspired by vengeance than by the expediency of the proceedings when deciding with Judge Keith to refuse the resignation. It remains the turn-about of Judge Keith narrated by Prof. Abi-Saab in the same correspondence, which Venezuela says, can only explain by retaliation against Mr Fortier's second challenge as there can be no justification to consent on 6 February and to withdraw consent in matter of days after on the pretence of severe disorganization of the forthcoming hearing.[359] We agree with Venezuela that, were this the case, the resignation sequence would be nonsensical.[360] Conoco considers that the Chair engendered no annullable error in rejecting the second challenge to the Tribunal majority in its Decision of 1 July 2015. [361] The Chair's Decision of 1 July 2015, pointed "[*i*] *n their reasons Judge Keith and Mr Fortier noted that Prof. Abi-Saab had indicated he would complete his dissent by the end of November and that he would resign by the end of 2014 in any event. However, the dissent was not issued until February 19, 2015 and the resignation was not tendered until February 20, 2015*."[362] The Chair found that

[356] Memorial (Curtis), ¶ 56. **A/R-43 and A/R-132 [Curtis]** / **A/R-84 [De Jesús]**, Letter from Respondent to the Secretary-General of ICSID, dated 6 February 2015. Tr. Day 1, p. 171: 13-19.

[357] **A/R-110 [De Jesús] / A/R-69 [Curtis]** *Abi-Saab email to ICSID*.

[358] **A/R-110 [De Jesús] / A/R-69 [Curtis]** *Abi-Saab email to ICSID*.

[359] Memorial (Curtis), ¶ 56; Counter-Memorial (Conoco), ¶ 302. Tr. Day 1, p. 167:4-13.

[360] Memorial (Curtis), ¶ 145.

[361] Counter-Memorial (Conoco), ¶¶ 326-329.

[362] **A/R-141 [Curtis] / A/R-175 [De Jesús]**, *Challenge Decision – Majority II*, ¶ 89.

"[i]*t is evident that the Respondent and the challenged arbitrators differ on the appropriate procedure and the circumstances that would warrant a refusal to consent to Prof. Abi-Saab's resignation under Article 56(3) of the ICSID Convention and ICSID Arbitration Rule 8(2). However, this difference of views does not demonstrate apparent or actual bias on the part of Judge Keith or Mr. Fortier*."[363]

360. In light of the position adopted by Mr Fortier and Judge Keith on 4 March 2015, the time of the consent needed to be agreed if the resignation came in 2015, it is unlikely that Judge Keith would have taken it upon himself to invite Prof. Abi-Saab to resign at whatever date immediately after he terminated his long-awaited dissenting opinion. Judge Keith's allusion to Prof Abi-Saab's resignation as "*the next step*" can only be understood in this overall context and does not, in isolation, disclose as the Applicant claims,[364] that he was ill-disposed against Venezuela to strip it of its right to appoint a substitute arbitrator. The refusal of resignation would not give rise to a reasonable apprehension of bias in the fair-minded observer. The Committee concludes that the decision of Judge Keith and Mr. Fortier has not tainted the arbitration and its outcome, Award.

iii. Arbitrator Bucher (constitution of the Arbitral Tribunal)

361. Venezuela's last contention on the count of Article 52(1)(a) concerns the appointment of Prof. Bucher by the Chairman of the ICSID Administrative Council, in violation of its fundamental right to appoint an arbitrator in replacement of Prof. Abi-Saab.[365] Venezuela questions the participation of Mr Fortier together with Judge Keith in the decision of 4 March 2015 as Mr Fortier was under challenge since 6 February 2015.[366]

362. Arbitration Rule 9(6) reads: "*The proceeding shall be suspended until a decision has been taken on the proposal*" [to disqualify an arbitrator]. Arbitration Rule 9(6) prevents the continuation of the proceeding and the making of awards with an improperly

[363] **A/R-141 [Curtis] / A/R-175 [De Jesús]**, *Challenge Decision – Majority II*, ¶ 90.
[364] Memorial (Curtis), ¶ 146.
[365] Memorial (Curtis), ¶¶ 148-154; Reply (Curtis), ¶ 138.
[366] Memorial (Curtis), ¶¶ 124, 136, 138, 144; Tr. Day 1, p. 162:11-23.

constituted arbitral tribunal, avoiding thereby the repetition of such procedural steps with the newly appointed arbitrator.

363. The Committee interprets the ICSID Convention and Rules in light of their objective and purpose to encourage procedural efficiency and economy in the parties' interest. Such objective is fully attained with the suspension of the proceeding as envisaged by Arbitration Rule 9(6). The proceeding which are suspended cover all the procedural provisions of the case, including the working of the tribunal on the case, not the provisions on the constitution of the arbitral tribunal, resignation, disqualification and vacancies. Procedural efficacy requires that these provisions remain fully operative in order to resume the proceeding with a properly constituted arbitral tribunal. Arbitration Rule 9(6) suspends the proceeding not the arbitrators.[367] It cannot be that Mr Fortier (and Judge Keith)[368] would be suspended as of 6 February 2015 from participating in the resignation process while Prof. Abi-Saab would not be suspended from tendering his resignation on 20 February 2015.[369] It would be otherwise hardly logical to give full force to Arbitration Rule 11 on filling the vacancy by calling a party to appoint a new arbitrator while freezing Arbitration Rule 8 which addresses the resignation process of the arbitrator prior to opening the vacancy and the manner of filling such vacancy.[370] Not without amusement, the Conoco Parties note: "*Venezuela is effectively asking this Committee to conclude that the Second Individual Fortier Challenge suspended the arbitration for everyone except Venezuela…* [If Venezuela's position were correct] *then every party-appointed arbitrator who resigned during the pendency of a challenge to a different arbitrator would automatically be replaced by the appointing party rendering Article 56(3) meaningless*."[371] Mr Fortier was under the

[367] Memorial (Curtis), ¶ 55. **A/R-60 [Curtis]** / **A/R-101 [De Jesús]**, *Respondent 4 March 2015 letter*.

[368] Memorial (Curtis), ¶ 54. Tr. Day 3, p. 25:19-25, p. 26:1-2.

[369] **A/R-142 [Curtis] / A/R-154 [De Jesús]**, *Prof. Abi-Saab letter to co-arbs*. Counter-Memorial (Conoco), ¶¶ 353-354.

[370] Tr. Day 2, p. 135: 23-25, p. 136: 1-2.

[371] Rejoinder ¶ 90. Tr. Day 2, p. 136: 7-17: "First, consider Venezuela's solution, and that now appears on the left-hand side of the slide. Venezuela wanted step 1 to be its appointment of Professor Abi-Saab's replacement; step 2 to be a decision on Fortier challenge. But if that had occurred, there would have been no step 3: there would be no decision on the orange action, no decision on whether to consent to Professor Abi-Saab's resignation, because Venezuela would have already appointed a replacement arbitrator. So Venezuela's approach just reads Article 56(3) out of the Convention."

duty to participate in the resignation process of Prof. Abi-Saab in order to allow the filling of the vacancy on the Tribunal. This also applies to Judge Keith.

364. The appointment procedure of Prof. Bucher in replacement of Prof. Abi-Saab on 10 August 2015[372] accordingly complied with the ICSID Convention and Rules. We add that inviting the Parties to submit observations on the resignation of an arbitrator[373] is excellent practice considering the importance of the immutability of the arbitral tribunal in the ICSID Convention and Arbitration Rules. Besides, the Applicant does not state where and why the ICSID Convention and Arbitration Rules forbids arbitrators from addressing the parties on the issue.[374] Collecting the parties' views on events which affect the existence or the validity of the composition of the tribunal cannot be considered as weakening the replacement process of an arbitrator. The Committee thus concludes that the Arbitral Tribunal was also properly constituted with the appointment of Prof. Bucher.

A.1(4)(2) IMPROPER CONSTITUTION AS ARGUED BY VENEZUELA (DE JESÚS)

i. Arbitrator Fortier (Independence and Impartiality)

365. The improper constitution of the Arbitral Tribunal because of Mr Fortier, the arbitrator appointed by Conoco, essentially concerns Mr Fortier's association with the law firm of Norton Rose of which he was a partner. The issue arose when a merger occurred during the arbitration proceedings with the firm of Macleod Dixon which advised adverse interests to those of Venezuela, including Conoco in an ICC case together with Freshfields, Conoco's present co-counsel in ARB/07/30 against the state company Petróleos de Venzuela (PDVSA) involving the Hamaca and Petrozuata Association Agreements also on issue in the underlying arbitration. We address Venezuela's first criticism of Mr Fortier's relationship with Norton Rose at the time of the merger which should have led him to resign from the Arbitral Tribunal.[375] Instead, Mr Fortier decided

[372] **A/R-160 [Curtis]**, Letter from Meg Kinnear, Secretary-General of ICSID, to the Parties, dated 10 August 2015.

[373] **A/R-157 [Curtis] / A/R-158 [De Jesús]**, E -mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties, dated 23 February 2015 "*ICSID Email 23 February 2015*".

[374] Memorial (Curtis), ¶ 121.

[375] Memorial (De Jesús), ¶¶ 32-34. Reply (De Jesús), ¶¶ 129, 163.

to resign from Norton Rose as he explained to the other Members of the Arbitral Tribunal in a letter of 18 October 2011:

> "*My decision to resign from Norton Rose OR is motivated by my desire to continue my practice as arbitrator and mediator without having to contend with the risks of conflicts inherent to being a partner in a Firm associated with a global law practice. It is a decision which I have been considering very carefully since November 2010 when Ogilvy Renault announced that it would join the international law practice of Norton Rose Group through a Swiss Verein as of 1 June 2011, and again following the Firm's decision, announced on 5 October 2011, to merge with Macleod Dixon as of 1 January 2012.*"[376]

366. The purpose of a disclosure is to allow the parties to evaluate how much they agree or disagree with the arbitrator's assessment of the situation. Making a disclosure is not reprehensible and nothing in the facts and circumstances disclosed should be taken as an admission by the arbitrator of his inability to serve in an independent and impartial way, otherwise, the arbitrator should have resigned. Mr Fortier informed verbally the Secretary General of ICSID on 6 October 2011, the same day when the voting on the merger closed, then in writing on 4 October 2011[377] of the situation created by the merger with Venezuela but maintained that it would have no bearing on his ability to exercise independent judgment:

> "*I am making this disclosure at the first possible opportunity, the partners of the two partnerships involved in this merger having been presented with this possible transaction and called upon to vote on it between Saturday, 1 October 2011, and Monday 3 October 2011, and the merger having been announced on the morning of Tuesday, 4 October 2011.*"[378]

367. An arbitrator's failure to disclose certain facts and circumstances does not necessarily mean that a conflict of interest exists. Venezuela proposes the standard of an appearance of dependence or bias which is commonly used by *ad hoc* committees.[379]

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[376] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*.

[377] Tr. Day 2, p. 103: 1-9.

[378] **A/R-52 [Curtis] / A/R-93 [De Jesús]**, *Fortier email to ICSID SG*.

[379] Reply (De Jesús), ¶ 142. *Eiser Annulment Decision*, ¶ 206; *EDF Annulment Decision*, De Jesús ¶ 109.

The disqualification test is not whether bias has affected the decision (actual bias) but whether facts and circumstances exist giving rise to a reasonable suspicion or apprehension of bias in the fair-minded observer. The test is thus an objective one[380] as the fair-minded and informed observer does not have an interest in the outcome of the arbitration other than the interest of advancing natural justice and due process.

368. Mr Fortier indicated in a letter to his two other colleagues on 17 November 2011, that he only:

> "*apprised of the professional relationship between Macleod Dixon and ConocoPhillips Company late in the week of September 26* [2011]."[381]

The Applicant contends that Mr Fortier concealed an obvious conflict of interest for approximately ten days between 26 September and 3 October 2011, which allowed his bias to linger throughout the proceedings.[382]

369. The fair minded observer would take knowledge that Mr Fortier also indicated in his disclosure to the Secretary General on 4 October 2011, that he conducted conflict checks when he became aware of the merger to take effect on 1 January 2012, and that an ethical wall had been put in place the following day, on 5 October 2011.[383] In his letter of 18 October 2011, to the other members of the Arbitral Tribunal informing of his resignation from Norton Rose with effect on 31 December 2011,[384] Mr Fortier declared:

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[380] **A/RLA-47 [Curtis] / A/RLA-82 [De Jesús]**, *Caratube Disqualification Decision*, ¶ 54: "'*an objective standard based on a reasonable evaluation of the evidence by a third party*' *or, in other words, on the 'point of view of a reasonable and informed third person*'".

[381] **A/R-139 [Curtis] / A/R-148 [De Jesús],** *Fortier November letter to co-arbs*.

[382] Memorial (De Jesús), ¶ 128; Reply (De Jesús), ¶ 156.

[383] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*: "*I confirm that the ethical screen to which I referred in my disclosure letter of 4 October 2011 to the Secretary General of ICSID was, in fact, put in place on 5 October 2011 and will remain in place"*.

[384] As Mr Fortier explained in his letter of 18 October 2011, resignation from Norton Rose "*is a decision which I have been considering very carefully since November 2010 when Ogilvy Renault announced that it would join the international law practice of Norton Rose Group through a Swiss Verein as of 1 June 2011, and again following the*

> "*Yesterday, I informed the members of the Executive Committee of Norton Rose OR (known before 1 June 2011 as Ogilvy Renault and referred to herein as the "Firm") that I have decided to resign from the Firm, effective 31 December 2011* […] *It should be of interest to you and to the parties to know that I have not been involved in any way in the negotiation which lead to the announcement of the Firm's forthcoming merger with Macleod Dixon. In addition, in reply to point (vi) of the Respondent's letter to you of 13 October 2011, I have not taken part in or been privy to the plans (if any) 'for the coordination of the international arbitration group and the business plan for promoting the combined firm's expertise in this area.* "[385]

He reaffirmed to them on 17 November 12011, that he had:

> "*no knowledge of any file (if indeed any exists) 'on which lawyers from Norton Rose and Macleod Dixon have already been working together'. I can categorically state that I have had no involvement whatsoever in any such file, nor have I been made privy to any information about any such file.*"[386]

370. Mr Fortier conducted his duty to investigate about the consequences of the Norton Rose merger for his position as arbitrator and disclosed that Macleod Dixon was acting adversely to Venezuela. There was thus no failure to disclose by lack of knowledge which Mr Fortier could have made reasonable inquiries into.[387] Mr Fortier bore the identity of Norton Rose until 31 December 2011, when his resignation became effective. He however never had the identity of the combined Norton-Rose/ Macleod Dixon firm which came into existence only on 1 January 2012, and whose activities could not automatically have created a conflict of interest for Mr Fortier before that date. An ethical wall came into effect almost simultaneously with the public announcement of the merger. As the vote on the merger only occurred on 1 and 3 October 2011, a fair-minded observer, informed of such facts and circumstances, would not conclude that there would have been a real possibility of a lack of independence or impartiality on the part of Mr Fortier during the ten days which preceded his disclosure.

Firm's decision, announced on 5 October 2011, to merge with Macleod Dixon as of 1 January 2012." (**A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbitrators*).

[385] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*.

[386] **A/R-139 [Curtis] / A/R-148 [De Jesús],** *Fortier November letter to co-arbs*.

[387] Reply (De Jesús), ¶¶ 159, 160.

371. Still in his letter of 18 October 2011, to his colleagues, Mr Fortier further mentioned about his relation to Norton Rose after his resignation:

> *"There are members of Norton Rose OR who have assisted me in certain files in which I serve as an arbitrator - e.g. by acting as Administrative Secretary to the Tribunal - whom I may continue to call upon for assistance after 1 January 2012. In such event, I will make arrangements with Norton Rose Canada in order for the time of these individuals to be billed to me by Norton Rose Canada. The only person who has assisted me in the present file is Ms. Rachel Bendayan, a junior associate of the Firm's Litigation Group based in Montreal, and she has already signed the undertakings establishing the ethical wall in place since 5 October 2011. Ms. Bendayan has not done any work in this matter since August 2011 and I will not call upon her or anyone else from Norton Rose OR/Norton Rose Canada to assist me in this matter in the future.*"[388]

372. Mr Fortier, Venezuela says, continued to foster his professional relationship with Norton Rose despite his awareness that these constituted a conflict of interest. Mr Fortier maintained substantive professional relationships via close connections with three lawyers at Norton Rose which each demonstrate in themselves that he could not be relied upon to exercise independent judgment and that collectively demonstrate that Mr Fortier's participation in the Arbitral Tribunal deprived the Applicant of its right to an independent and impartial tribunal.[389]

373. The Committee notes that the involvement of the Norton Rose lawyers fell within the scope of the information provided by Mr Fortier on 18 October 2011, about continued assistance of Norton Rose members after his resignation to arbitral tribunals to the exception of the underlying arbitration. The Applicant's complaint that Mr Fortier's disclosure was not a licence to maintain an ongoing substantive professional relationship needs to be grounded on elements that would evidence the inaccuracy of

[388] **A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbitrators*.

[389] Memorial (De Jesús), ¶ 49. Reply (De Jesús), ¶ 202.

the information in his letter of 18 October 2011.[390] Venezuela speaks of disingenuous misrepresentations.[391]

374. Ms Bendayan served from 18 October 2011 to 10 October 2014, as assistant to Mr Fortier in the Agility ICSID case which does not detract from the disclosure even if her appointment was on the same day as Mr Fortier's announcement of his resignation from Norton Rose.[392] Ms Fitzgerald, another Norton Rose lawyer, served as assistant to two Zimbabwe ICSID cases. Ms Fitzgerald's appointment took effect on February 2012, two months after Mr Fortier left Norton Rose, long after Mr Fortier's resignation according to Venezuela. However, her appointment was agreed before Mr Fortier's resignation.[393] With that precision, the conditions of Ms Fitzgerald's appointment do not reveal an intrusion of Macleod Dixon in the proper discharge by Mr Fortier of his arbitrator's duties in the underlying arbitration.[394]

375. The same conclusion should be drawn from Mr Valasek's role as secretary of the Yukos tribunals. Conoco observes that the Chairman's Decision of 1 July 2015 which found that Venezuela's arguments on the scope of Mr Valasek's role were unsubstantiated and that, even if it was true that Mr Valasek acted beyond his stated role, there still was no causal relation between Mr Fortier's incapacity to exercise independent judgement and Mr Valasek's partnership in Norton Rose[395] was plainly reasonable.[396] We note the absence of a causal relation between Mr Fortier's incapacity to exercise independent

[390] Memorial (De Jesús), ¶ 49.

[391] Memorial (De Jesús), ¶ 54.

[392] Memorial (De Jesús), ¶ 55.

[393] Memorial (De Jesús), ¶ 54, Reply (De Jesús), ¶ 179.

[394] Counter-Memorial (Conoco), ¶ 189 refers to the Chairman's Decision of 1 July 2015 which noted that: "*The fact that certain members of Norton Rose were acting as tribunal assistant in arbitrations presided over by Mr. Fortier has been known since 2011 and was included in his disclosure of October 2011. This was raised in 2011 in the First Proposal, which proposal was rejected by Judge Keith and Prof. Abi-Saab. The Respondent has provided no new facts in this respect. Accordingly, to the extent the current Proposal is based on this assertion, it is untimely and is rejected*" (**A/R-141 [Curtis] / A/R-175 [De Jesús]**, *Challenge Decision – Majority II*, ¶ 66). This passage illustrates well the difference between the remits of a Disqualification Authority under ICSID Convention Articles 57-58 and of the Committee under Article 52(1)(a). It was plainly reasonable for the Chairman to reject a proposal as untimely. It would not be reasonable for the Committee not to examine the assertions made by Venezuela pertaining to Mr Fortier's independence and impartiality when its challenge of the Award under Article 52(1)(a) is admissible. It thus behoves the Committee to examine the facts in support of the challenge under Article 52(1)(a).

[395] **A/R-141 [Curtis] / A/R-175 [De Jesús]**, *Challenge Decision – Majority II*, ¶ 95.

[396] Counter-Memorial (Conoco), ¶ 189.

judgement and Mr Valasek's partnership in Norton Rose, the deduction proposed by Venezuela that Mr Valasek necessarily espouses the Conoco Parties' position in the underlying arbitration as would be demonstrated by his laudation of Conoco's experts in an article, or his purported acting as a fourth arbitrator in the Yukos arbitration according to the allegations made by Russia in its efforts to resist enforcement of the Yukos awards which, in the Applicant's view, involved very similar issues to those of the underlying arbitration.[397] There is no evidence that the continued implication of the Norton Rose lawyers under the above-mentioned circumstances gave rise to a financial interest for Mr Fortier in breach of the assurances given in the 18 October 2011 where he also disclosed that any remuneration would cease from Norton Rose as of 31 December 2011, including any retirement benefit.[398]

376. Mr Fortier, adds the Applicant, also continued to reap benefits through economic arrangements for secretarial and other support services made with Services OR LP/SEC ("Services OR"), a wholly owned subsidiary of Norton Rose. The Applicant submits that these business arrangements, like the continued relationship with Norton Rose lawyers, form part of a pattern of circumstances that should have prevented Mr Fortier's participation as an arbitrator.[399] The Applicant refers to these arrangements as enabling Mr Fortier to benefit from his secretaries' services while not himself paying for their salaries or benefits. Conoco points to the Decision of the Chair of 1 July 2015 which held that the proximity of office space was irrelevant for determining Mr Fortier's independence and impartiality[400] and to the Decision rendered by Mr Zuleta and Prof. Bucher on 26 July 2016 which considered that even if Venezuela's allegations on the benefits reaped by Mr Fortier from the arrangement were true, Venezuela had failed to show how those benefits affected Mr Fortier's ability as arbitrator or how they

[397] Memorial (De Jesús), ¶¶ 51-53, Reply (De Jesús), ¶¶ 175-177.

[398] "*As of* [31 December 2011] *I will no longer be a member of the Firm and will thus cease to earn any remuneration from Norton Rose OR. For your additional information, I have no entitlement to any retirement benefit from the Firm*" (**A/R-53 [Curtis] / A/R-94 [De Jesús]**, *Fortier October letter to co-arbs*).

[399] Memorial (De Jesús), ¶¶ 56, 57. Reply (De Jesús), ¶¶ 181-185.

[400] **A/R-141 [Curtis] / A/R-175 [De Jesús]**, *Challenge Decision – Majority II*, ¶ 96.

would lead a reasonable third person to conclude that Mr Fortier manifestly lacked the ability act impartially in the arbitration.[401]

377. The Committee notes that on 22 July 2016, Venezuela again proposed to disqualify Mr Fortier referencing those circumstances which were learned after receiving a disclosure from Mr Fortier on 22 July 2016. Mr Fortier had informed in a letter of 22 July 2016, to the Secretary General of ICSID that he had billing arrangements for the staff who wished to continue participating in the insurance and other benefits offered by Services OR.[402] On 26 July 2016, the unchallenged Tribunal members, Mr Zuleta and Mr Bucher dismissed the challenge,[403] in advance of the hearing which was scheduled for mid-August 2016. A fair-minded observer, having knowledge that Mr Fortier paid Services OR for the staff which worked for his arbitrator's practice, would not have regarded such arrangements as an indication of Mr Fortier's inclination towards interests adverse to those of Venezuela in the underlying arbitration. The erroneous self-description on the social media of one of his staff members as employed by Norton Rose and instead of Services OR does not change the conclusion. To sum up, a fair-minded observer, with knowledge of all the circumstances of Mr Fortier's disclosure of the merger, would conclude, that the facts surrounding his relationship with Norton Rose, before and after his resignation from that firm, do not give rise to justifiable doubts as to his independence or impartiality. No appearance of bias existed from an objective point of view.

378. Even assembled, futile facts and circumstances cannot give rise to a reasonable suspicion of bias and are irrelevant to ground a challenge under Article 52(1)(a). Venezuela has failed to demonstrate from all the above facts and circumstances denounced in support of its Article 52(1)(a) ground the existence of an appearance of bias on behalf of Mr Fortier that would have materially affected the Award of 8 March 2019.

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[401] **A/R-153 [Curtis] / A/R-174 [De Jesús]**, *Challenge Decision - Fortier IV*, ¶¶ 15-17

[402] **A/R-151 [Curtis]** / **A/R-151 [De Jesús]**, Letter of Mr Fortier to the ICSID Secretariat of 22 July 2016.

[403] **A/R-153 [Curtis] / A/R-174 [De Jesús]**, *Challenge Decision - Fortier IV*.

ii. Arbitrators Keith and Fortier (Independence and Impartiality)

379. The Committee therefore proceeds further with Mr Fortier's conduct in the underlying arbitration, this time because of his deeds with Judge Keith. The Applicant contends that the events demonstrate that neither of them could be relied upon to exercise independent judgment because of their general negative attitude towards Venezuela.[404]

(a) Refusal to reconsider the 2013 Decision on Jurisdiction and Liability

380. There is at first Mr Fortier's refusal, together with Judge Keith, to reconsider their majority Decision on Jurisdiction and the Merits of 3 September 2013. Venezuela finds guidance in the statements of Prof. Abi-Saab, the dissenting arbitrator, who characterized the attitude of his fellow arbitrators:

> "*Apart from a general attitude vis-à-vis the Respondent, [the majority's reasoning] reveals an important error in the establishment of facts on the part of the Majority Decision, by assuming that the Confidentiality agreement was in effect in June 2007, while it had on record before it evidence to the contrary. Indeed, the question of the date of entry into force of the Confidentiality agreement was put to Counsel for the Respondent during the oral hearings. His answer was that it did not come into force until November 2007. This answer was neither challenged nor contradicted by the Claimants during the Hearings and was even confirmed by them later on.*
>
> *Thus, the Majority Decision committed a material error in establishing the facts. But worse still, it drew from it by inference, a grave legal consequence: not only that the Respondent has breached its confidentiality obligation by submitting to the Tribunal the Claimants offers of June and August 2007, when that obligation had not yet come into effect; but also, and ex hypothesi, that the Respondent would not have hesitated to do the same, i.e. submit to the Tribunal any proposition it would have made during the final period of negotiations, had they existed, in violation of its confidentiality obligation which indeed covered that final period. In other words, the Majority Decision predicated, not on the basis of positive proof, but by divination or sheer fiat, a presumption – drawn from a single misconceived instance involving an error of fact – of a constant pattern of conduct attributable to the*

[404] Memorial (De Jesús), ¶¶ 61, 62.

> *Respondent, of not hesitating to violate its obligations whenever it suited its purposes*."[405]

381. The expression "[*a*] *part from the general attitude vis-à-vis Respondent*" depicts a negative perception of the Applicant by Mr Fortier and Judge Keith in the dissenting arbitrator's mind. On this point, the Committee considers that bare allegations, even made by a co-arbitrator,[406] cannot be sufficient. There are no indicators provided by the dissenting arbitrator of the suspected hostility that would confirm his subjective impression. The dissenting arbitrator concentrates on the following developments on the majority's alleged gross error of judgment and ability to exercise sound judgment in evaluating the evidence presented to them:

> "*22 – It is worth noting in this regard that, in order to reach its conclusions concerning the final period of negotiations, the Majority Decision, having admitted possessing no evidence at all for that period, had to make a leap of faith, encompassing three steps, a) relying almost* ***exclusively and uncritically*** *on the affirmations and representations of the Claimants throughout the proceedings, insisting that they did not receive any offer beyond the initial one concerning the Petrozuata and the Hamaca projects. But in order for this version to prevail, the Majority Decision had to neutralize any contradictory evidence by b) shedding away as lacking credibility the general statements of Dr. Mommer in his written and oral testimonies that Venezuela was always willing to pay just compensation, and that the negotiations failed because of the intransigent and exaggerated demand of the Claimants; as well as c) denying any legal significance and effect to "whatever confidentiality agreement there was."*
> *23 – The error committed by the Majority Decision as described above, was easily detectable from the record at the disposal of the Tribunal at the time that Decision was issued* […]."[407]

[405] **A/R-82 [De Jesús]** / **A/R-41 [Curtis]**, *Abi-Saab Dissenting Opinion – Reconsideration Request*, ¶¶ 16,17. Memorial (De Jesús), ¶ 68.

[406] Tr. Day 3, p. 4: 23-25, p. 5: 1-23.

[407] **A/R-82 [De Jesús]** / **A/R-41 [Curtis]**, *Abi-Saab Dissenting Opinion – Reconsideration Request*, ¶¶ 22, 23 (emphasis added).

382. Venezuela isolates the words "*exclusively and uncritically*" to allege that arbitrators who exercise their functions in that manner on the representations of one party lack independence and impartiality beyond doubt.[408] However, a fair-minded observer would not find in the dissenting arbitrator's remarks on his colleagues proof of apparent bias. If Prof. Abi-Saab had become apprised of facts that disclosed his colleagues' negative attitude, they are not found in his dissenting opinion. His conclusion that:

> "*It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication*"[409]

is no causal nexus between bias and the due process violations, especially the possibility that Mr Fortier and Judge Keith would have decided against Venezuela for reasons that are not in the arbitration record even if they would have performed poorly as adjudicators.

383. Venezuela also submits that the dissenting opinion of Prof. Bucher (appointed in replacement of arbitrator Abi-Saab) to Venezuela's second Request for Reconsideration,[410] shared the criticism of arbitrator Abi-Saab and would assist a reasonable observer to conclude that arbitrators Keith and Fortier were biased against Venezuela.[411] The Applicant elaborates more particularly on Prof. Bucher's characterization that his co-arbitrators' position was "categorical" to argue that Mr Fortier and Judge Keith's "*decision to deny Justice was '**categorical**',*"[412] so that Venezuela had no hope that arbitrator Keith and Fortier would hear Venezuela's case as fair and open-minded adjudicators. However, Prof. Bucher merely stated that the

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[408] Memorial (De Jesús), ¶ 70.

[409] **A/R-82 [De Jesús]** / **A/R-41 [Curtis]**, *Abi-Saab Dissenting Opinion – Reconsideration Request*, ¶ 67.

[410] **A/R-25 [Curtis]** / **A/R-66 [De Jesús]**, Dissenting Opinion of Professor Andreas Bucher to the Decision on Respondent's Request for Reconsideration, 9 February 2016, ("*Abi-Saab Dissenting Opinion II – Reconsideration Request*").

[411] Memorial (De Jesús), ¶ 72.

[412] Memorial (De Jesús), ¶ 75.

contents of a law article "*did not have the effect of changing* [his] *Colleagues' categorical position*."[413] This is a long way from facts raising a justifiable doubt that Mr Fortier and Judge Keith's refusal to reconsider was only motivated by hostility against Venezuela. Conoco reminds on that count that the First Individual Challenge of Mr Fortier was approached by the Chairman in a both reasoned and plainly reasonable manner.[414] The Chair dismissed the challenge based on arbitrators Keith's and Fortier's refusal to reconsider their September 2013 Decision as he was simply unpersuaded by Venezuela's arguments that relied on personal perceptions expressed in a dissenting opinion. [415] Venezuela has not shown how any appearance of bias on the part of Mr Fortier and Judge Keith having had a material effect on the Award which incorporates both the 2017 Interim Decision[416] dismissing Venezuela's application for reconsideration of the 2013 Decision, and the 2013 Decision itself.[417]

(b) No consent to Prof. Abi-Saab's resignation

384. There is however more to the overall negative attitude of Mr Fortier and Judge Keith which, according to Venezuela, would result from the withdrawal of consent by Mr Fortier and Judge Keith to Prof. Abi-Saab's resignation on 20 February 2015 as allegedly motivated by retaliation against Prof. Abi-Saab's Dissenting Opinion on the Decision on Jurisdiction and Merits.[418] The refusal of Mr Fortier and Judge Keith to

[413] **A/R-25 [Curtis]** / **A/R-66 [De Jesús]**, *Abi-Saab Dissenting Opinion II – Reconsideration Request*, ¶ 1.

[414] Counter-Memorial (Conoco), ¶ 163.

[415] **A/R-127 [Curtis] / A/R-181 [De Jesús]**, *Challenge Decision – Majority I*, ¶¶ 55-56. The Chairman recalled the relevant standards (Convention Articles 14(1) and 57), noting they do not require proof of actual bias, but appearance of dependence or bias (para. 52). The Chairman analysed under those standards the facts referenced by Venezuela in support of its challenge. The Chairman summarized Venezuela's arguments, finding that Venezuela was dissatisfied with the arbitrators' refusal to reconsider their Decision and to convene to a hearing on the request for reconsideration (para. 54). The Chairman found that the Tribunal had "adopted a reasonable procedure that was within its discretion to regulate the conduct of the proceeding." Further, the Chairman found that there was "nothing in the reasoning or conclusions of the Decision on Reconsideration that suggests an absence of impartiality." The Chairman, thereby, concluded that a third party undertaking a reasonable evaluation of the facts in the arbitration, would not conclude that they indicate a manifest lack of que qualities required under Convention Articles 57 and 14(1).

[416] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 42-43.

[417] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 38.

[418] Memorial (De Jesús), ¶¶ 78, 90.

consent to Prof. Abi-Saab's resignation was conveyed to the Parties on 4 March 2015 with the following explanations:

> "*Over a very lengthy period the two Arbitrators, particularly the President, have urged Professor Abi-Saab to complete his dissent and then, as he had himself indicated, to resign from the Tribunal so that the Respondent could appoint a replacement arbitrator. The President kept stressing the urgency of the matter and Professor Abi-Saab in mid-November, while saying that he still expected to complete the dissent by the end of that month, indicated that if he had not completed by the end of the year, he would have to resign in any event. In the course of those exchanges, the two arbitrators plainly did consent to the proposed resignation.*
> *The two arbitrators did not however consent to a resignation in late February when the quantum hearing was only seven weeks away and a challenge to one of the arbitrators was pending*."[419]

The terms of their decision make plain that Prof. Abi-Saab's resignation was ineluctable because of his health problems. The completion of his dissent to the Decision on Jurisdiction and the Merits of 3 September 2013 which Prof. Abi-Saab envisaged to do by the end of 2014 at the latest was the only pending issue for him in order to formalize his resignation.

385. The principle of Prof. Abi-Saab's resignation was endorsed by the Majority arbitrators, however not the time of his resignation. Prof. Abi-Saab himself admitted in his letter of resignation "*I hope that by resigning at this juncture, before the oral hearings on quantum, I mitigate to some extent the negative effect that my resignation might have*"[420] but referred to a "*surprise 'withdrawal of consent'*" in a later correspondence to ICSID.[421] Mr. Fortier and Judge Keith acted within the bounds of ICSID Convention Article 56(3) and ICSID Arbitration Rule 8(2) when they considered the timing of Prof. Abi-Saab's resignation (effective on 20 February 2015) as disruptive of the next steps of the proceedings, which consisted of the hearing on quantum that had been planned since 1 August 2014 to take place on 13-17 April 2015. These provisions have a wider

[419] **A/R-61 [Curtis] / A/R-102 [De Jesús]**, *ICSID March letter*.
[420] **A/R-142 [Curtis] / A/R-154 [De Jesús]**, *Prof. Abi-Saab letter to co-arbs*.
[421] **A/R-110 [De Jesús] / A/R-69 [Curtis]**, *Abi-Saab email to ICSID*.

prospect than preventing the collusion between an arbitrator and the appointing party. They aim at the expediency and non-frustration of the proceedings as well as the preservation of the immutability of the arbitral tribunal which is further endorsed by the Convention's provisions on the death and incapacity and disqualification of arbitrators.[422] Prof. Abi-Saab's colleagues opined that a resignation in 2014 would not have disrupted the organization of the Hearing four months after, but considered it disruptive two months before in February 2015. Whether this is unacceptable because as Venezuela wrote to ICSID on 4 March 2015, "[w]*ith respect to the timing of the quantum hearing, if Prof. Abi-Saab had resigned at the end of 2014, as Judge Keith and Mr Fortier apparently would have preferred, and Respondent had been given a normal time period to appoint a replacement, there is simply no way in which anyone could reasonably have expected the quantum hearing to take place on April 13, 2015, unless the replacement arbitrator would have gone into the hearing wholly unprepared. That is not a serious way to conduct a hearing*"[423] raises no justifiable doubt of a lack of impartiality of Judge Keith and of Mr Fortier who did not misuse their powers under Article 56(1) of the Convention for retaliatory action against Prof. Abi-Saab when health reasons are considered as good cause for resignation.[424] Their refusal of resignation, and not withdrawal of prior consent to resignation, would not give rise to a reasonable apprehension of bias in the fair-minded observer. In Conoco's opinion, the Chair's Decision of 1 July 2015 dismissing the disqualification proposal was reasonable.[425] The Chair acted properly when he referenced the applicable standards and then analyzed the facts referenced by Venezuela in light of those standards. On the arbitrators not consenting to Prof. Abi-Saab's resignation, the Chairman found no appearance of bias, but rather that Venezuela's "*conclusion of bias ignore[d] the reasons of Jude Keith and Mr. Fortier in the March 4, 2015 letter which expressly cite[d] the changed circumstances prevailing by March 2015*." For the Chairman, it was evident that Venezuela and the challenged arbitrators had differing views on the

[422] Counter-Memorial (Conoco), ¶¶ 321, 322.

[423] **A/R-60 [Curtis] / A/R-101 [De Jesús]**, *Respondent 4 March 2015 letter.*

[424] Reply (De Jesús), ¶¶ 229, 231.

[425] Counter-Memorial (Conoco), ¶ 328.

appropriate procedure and circumstances warranting a refusal to consent to the resignation; yet such differing views, the Chairman found, did not show apparent of actual bias.[426] Hence, Venezuela persists in failing to demonstrate how Mr Fortier and Judge Keith could not be relied upon to exercise independent and impartial judgment to make a valid Award because of an alleged negative attitude.[427]

iii. Arbitrator Bucher (Independence and Impartiality)

386. Venezuela's last contention on the count of Article 52(1)(a) concerns the appointment of Prof. Bucher by the Chairman of ICSID in violation of its fundamental right to appoint an arbitrator in replacement of Prof. Abi-Saab.[428]

387. The Applicant alleges a breach of ICISD Arbitration Rule 9(6). Because of the suspension of the arbitration proceeding following Mr Fortier's challenge on 6 February 2015, he should not have participated in the decision of 4 March 2015 together with Judge Keith.[429] It is beyond dispute that, not Mr Fortier, nor Judge Keith, but the proceedings were suspended on 6 February 2015 in accordance with ICSID Arbitration Rule 9(6) as a consequence of the disqualification proposal made by Venezuela on 5 October 2011.[430]

388. In ordering a suspension of the proceeding pending a decision on the disqualification proposal, Arbitration Rule 9(6) prevents the continuation of the proceedings and the making of awards with an improperly constituted arbitral tribunal and avoids the repetition of procedural steps with the newly appointed arbitrator. The proceeding which are suspended cover all the procedural provisions of the case, including the working of the tribunal on the case, not the provisions on the constitution of the arbitral tribunal, resignation, disqualification, and vacancies. Procedural efficacy requires that

[426] **A/R-141 [Curtis] / A/R-175 [De Jesús]**, *Challenge Decision – Majority II*, ¶¶ 78-84, 89, 90.

[427] Reply (De Jesús), ¶¶ 25, 208.

[428] Memorial (De Jesús), ¶ 91.

[429] Memorial (De Jesús), ¶¶ 83, 85.

[430] **A/R-142 [De Jesús]** / **A/R-101 [Curtis]**, ICSID letter to the Parties informing proceeding suspended, dated 6 February 2015.

these provisions remain fully operative in order to resume the proceeding with a properly constituted arbitral tribunal.

389. It cannot be that Mr Fortier would be suspended as of 6 February 2015 from participating in the resignation process while Prof. Abi-Saab would not be suspended from tendering his resignation on 20 February 2015.[431] Not without relevance, the Conoco Parties remark: "*Venezuela wanted step 1 to be its appointment of Professor Abi-Saab's replacement; step 2 to be a decision on Fortier challenge. But if that had occurred, there would have been no step 3: there would be no decision on the orange action, no decision on whether to consent to Professor Abi-Saab's resignation, because Venezuela would have already appointed a replacement arbitrator. So Venezuela's approach just reads Article 56(3) out of the Convention*."[432]

390. The appointment of Prof. Bucher in replacement of Prof. Abi-Saab was therefore made according to the ICSID Convention and Rules. We add that inviting the Parties to submit observations on the resignation of an arbitrator[433] is excellent practice considering the unique situation. The Applicant does not state where and why the ICSID Convention and Arbitration Rules forbids arbitrators from addressing the parties on the issue.[434] Collecting the parties' views on events which affect the composition of the tribunal cannot be considered as weakening the replacement process of an arbitrator.

[431] **A/R-142 [Curtis] / A/R-154 [De Jesús]**, *Prof. Abi-Saab letter to co-arbs*. Counter-Memorial (Conoco), ¶ 354, Rejoinder (Conoco), ¶ 90: "*Venezuela is effectively asking this Committee to conclude that the Second Individual Fortier Challenge suspended the arbitration for everyone except Venezuela* [If Venezuela's position were correct] *every party-appointed arbitrator who resigned during the pendency of a challenge to a different arbitrator would automatically be replaced by the appointing party -rendering Article 56(3) meaningless*."

[432] Tr. Day 2, p. 136: 8-17.

[433] **A/R-157 [Curtis] / A/R-158 [De Jesús]**, *ICSID Email 23 February 2015*.

[434] Reply (De Jesús), ¶ 235.

A.2. The Parties' Positions on a Serious Departure From a Fundamental Rule of Procedure in Relation to the Tribunal's Constitution

391. Venezuela (Curtis and De Jesús) argues that it was deprived of the right to an independent and impartial tribunal, warranting annulment due to improper constitution as well as a serious departure of a fundamental rule of procedure under Article 52(1)(d).[435]

392. The Committee will first summarize the arguments of Venezuela as represented by Curtis (**A.2(1)**) and, then as represented by De Jesús (**A.2(2)**) and then the arguments of the Conoco Parties (**A.2(3)**). The Committee's analysis of the Parties' arguments on serious departure on this issue is addressed in **Section A.2(4)**.

A.2(1) Serious Departure as Argued by Venezuela (Curtis)

393. The right of a party to participate in the selection of arbitrators is a fundamental rule of procedure. Venezuela refers to various commentaries on the selection of arbitrators as a fundamental attribute of arbitration.[436]

394. Venezuela argues that Arbitrators Keith's and Fortier's withdrawal of consent to arbitrator Abi-Saab's resignation deprived Venezuela of its right to appoint an arbitrator, thus constituting a serious departure from a fundamental rule which warrants annulment.[437]

395. A party may only be deprived of its right to appoint in exceptional circumstances caused by improper conduct of a party or the existence of collusion between a party and its appointed arbitrator. Venezuela was unjustifiably deprived of its right to appoint a replacement arbitrator after the resignation of arbitrator Abi-Saab for serious health reasons. The purported withdrawal of consent followed by ICSID's appointment of a

[435] Memorial (De Jesús), ¶ 103; Memorial (Curtis), ¶ 114.
[436] Memorial (Curtis), ¶ 156.
[437] Memorial (Curtis), ¶ 157; Reply (Curtis), ¶¶ 128-140.

replacement arbitrator constituted a serious departure giving rise to annulment under Convention Article 52(1)(d).[438]

A.2(2) SERIOUS DEPARTURE AS ARGUED BY VENEZUELA (DE JESÚS)

396. Venezuela argues that the facts of this case give rise to at least three circumstances in which serious departures from fundamental rules of procedure occurred. The first circumstance is the unreliability of Arbitrators Keith and Fortierin exercising independent judgment. The second is the participation of Arbitrators Keith and Fortier in deciding on Arbitrator Abi-Saab's resignation while the proceeding was suspended. Third, the Chair's decision to appoint a replacement arbitrator in lieu of Venezuela.[439]

397. On the first ground, Venezuela submits the same reasons that warrant the annulment of the Award on the grounds of improper constitution of the Tribunal also warrant the annulment on the grounds that they give rise to a serious departure from the fundamental right to be heard by an independent tribunal. This is recognized by international law and Convention Article 14. Venezuela refers to the *Klöckner I* committee, which held that "[i]mpartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is any sigh of partiality, must be considered to constitute, within the meaning of Article 52(1)(d), a 'serious departure from a fundamental rule of procedure' […]."[440] The committees in *Wena, Impregilo* and *Eiser* have also identified the right to be heard by an independent and impartial tribunal as a fundamental rule of procedure.[441]

398. An independent observer would find that arbitrator Keith and Fortier could not be relied upon to exercise independent judgment, given Arbitrator Fortier's concealment of his ongoing relationship with Norton Rose, and the negative attitude of both Arbitrators

[438] Memorial (Curtis), ¶ 158.

[439] Memorial (De Jesús), ¶ 95.

[440] Memorial (De Jesús), ¶ 103, citing *Klöckner Annulment Decision*, ¶ 95.

[441] Memorial (De Jesús), ¶ 104, referring to *Wena Annulment Decision*, ¶ 57; *Impregilo Annulment Decision*, ¶ 165; *Eiser Annulment Decision*, ¶ 239 quoting *EDF Annulment Decision*, ¶ 123.

Keith and Fortier towards Venezuela. The departure is serious because both arbitrators sat and deliberated when deciding on this dispute, including the 2013 Decision.[442]

399. In its Reply, Venezuela reiterates that if the Committee finds that there was improper constitution, it should also find that there was a serious departure under Article 52(1)(d) when Venezuela was deprived of its fundamental right to be heard by an independent and impartial tribunal.[443] Venezuela also argues that under the *EDF* standard, relied on by the Conoco Parties, the Committee can examine both the allegations that the procedure to determine a challenge was flawed and that the lack of independence of impartiality meant that there was a serious departure.[444]

400. On the second ground, Venezuela argues that Arbitrators Keith's and Fortier's withdrawal of consent to Arbitrator Abi-Saab's resignation deprived Venezuela of its fundamental right to appoint a replacement arbitrator.[445]

401. Arbitrators Keith and Fortier withdrew the plain consent they had already given to arbitrator Abi-Saab's resignation, relying on Convention Article 56(3) and Arbitration Rule 8(2). There has never been a situation where consent to a resignation for imperious health reasons has been withdrawn or refused on the grounds of Convention Article 56(3).[446]

402. Venezuela asserts that the resort to Convention Article 56(3) was improper as it disregarded the grave consequences to Venezuela's fundamental procedural rights. The *Travaux Préparatoires* show that this provision seeks to prevent a party from frustrating the arbitration and is intended to remove the suspicion that the party may be involved in the resignation of an arbitrator. The *Travaux Préparatoires* recognize health issues as "good cause" to resign in "good faith." In the underlying arbitration,

[442] Memorial (De Jesús), ¶¶ 105, 106.
[443] Reply (De Jesús), ¶ 245.
[444] Reply (De Jesús), ¶ 244.
[445] Memorial (De Jesús), ¶ 108.
[446] Memorial (De Jesús), ¶¶ 109, 110.

the resignation was for serious health issues, known to the Parties and the Tribunal. Therefore, the invocation of Article 56(3) was improper.[447]

403. In addition, Arbitrator Abi-Saab resigned *after* he submitted his Dissenting Opinion, as anticipated, and coordinated by the Tribunal. Arbitrator Abi-Saab confirmed that there was no deadline for his opinion.[448] However, when withdrawing their consent and, thereby, triggering Article 56(3), Arbitrators Keith and Fortier explained that the quantum hearing was only seven weeks away and a challenge to one of the arbitrators was pending.[449]

404. Venezuela submits that there was also a departure when the ICSID Secretary-General invited the Parties and the Arbitrators Keith and Fortier to submit observations on the resignation, in circumstances that Venezuela had already informed (three days after the resignation) that it would appoint an arbitrator within 30 days. In Venezuela's view, while the invitation to submit observations was made formally under the cover of Convention Article 56(3) and Arbitration Rule 8(2), in reality it disregarded their content. Nothing in those provisions calls for the ICSID Secretary-General to request for comments from the parties on the resignation.[450]

405. In its Reply, Venezuela submits that Conoco mistakenly relies on *Carnegie Minerals*. In that case, there was no debate that the right to appoint an arbitrator was a fundamental right and it does not support Conoco's proposition that a "conditional" right loses its "fundamental" quality.[451] Venezuela also rebuts Conoco's argument that by agreeing to the ICSID Convention, Venezuela waived its right to appoint. Such a right is fundamental, established in Convention Article 37(2) and Article 56(3) and is

[447] Memorial (De Jesús), ¶¶ 113-116.

[448] Memorial (De Jesús), ¶ 118, referring to **A/R-110 [De Jesús] / A/R-69 [Curtis]** E-mail from Professor Abi-Saab to the Secretary-General of ICSID, 25 March 2015, ("*Abi-Saab email to ICSID*"), p. 2.

[449] Memorial (De Jesús), ¶ 119.

[450] Memorial (De Jesús), ¶ 120.

[451] Reply (De Jesús), ¶ 250.

only conditional in exceptional circumstances like collusion or improper conduct, which are absent here.[452]

406. On the third ground, Venezuela argues that Arbitrators Keith and Fortier could not and should not have decided on the resignation while the proceeding was suspended. It asserts that Arbitrator Fortier was prevented from participating in any respect of the proceedings, which were suspended in accordance with Arbitration Rule 9(6) following the challenge pending against him. Venezuela refers to *AS Norvik v. Latvia*, where the unchallenged arbitrators noted that they could not entertain a request for provisional measures while the proceeding was suspended by operation of Rule 9(6).[453] The breach of Rule 9(6) is in itself a departure, and the participation of Arbitrators Keith and Fortier in the decision on the resignation was a serious departure from a fundamental rule of procedure which warrants annulment pursuant to Convention Article 52(1)(d).[454]

407. In its Reply, Venezuela reiterates that Arbitrators Keith and Fortier should have taken no action until Venezuela's second disqualification proposal against Arbitrator Fortier was resolved.[455] Venezuela also submits that the issue is not that the arbitrators remained on the tribunal pending the decision on the challenge, but that the truncated tribunal (Arbitrators Fortier and Keith) withdrew their consent to a resignation while the arbitration was suspended. For Venezuela, even if the situation was unprecedented, the Arbitrators did not have the license under the Arbitration Rules to fiddle with the process.[456]

408. Venezuela emphasizes that if the Committee followed the position of Conoco that it should limit review to whether the procedure under the ICSID Convention and Rules

[452] Reply (De Jesús), ¶ 251.

[453] Memorial (De Jesús), ¶ 129, citing **A/RLA-56 [De Jesús]**, *AS PNB Banka and others v. Republic of Latvia,* ICSID Case No. ARB/17/47, Ruling on Power of Tribunal to Issue Provisional Measures Whilst Proceedings are Suspended, 24 September 2018, ¶¶ 7-8.

[454] Memorial (De Jesús), ¶¶ 131, 132.

[455] Reply (De Jesús), ¶ 254.

[456] Reply (De Jesús), ¶¶ 255, 256.

has been followed (*quad non*), the Committee would also find that the violation of Rule 9(6) warrants annulment of the present Award in full.[457]

A.2(3) NO SERIOUS DEPARTURE (CONOCO)

409. In relation to the Chair's decision on the First challenge to the Tribunal majority (related to the reconsideration decisions), Conoco argues that the Chairdid not depart from a fundamental rule of procedure. Conoco asserts that Venezuela, again, simply relies on the same points it makes under Article 52(1)(a); and undertakes no meaningful application of the standard for annulment under Article 52(1)(d) to the facts relating to the challenge to Arbitrators Keith and Fortier. It merely asserts, without support, that any annullable error under Article 52(1)(a) *ipso facto* constitutes an annullable error under Article 52(1)(d). Thus, Venezuela has failed to prove (i) the existence of a fundamental rule of procedure, and (ii) that Chairdeparted from that fundamental rule of procedure in any serious way.[458]

410. In its Rejoinder, Conoco also rebuts Venezuela's argument that the Chairman's decision on the Second challenge to the Tribunal majority (related to the failure to consent to the resignation) constitutes a ground for annulment under Article 52(1)(d). Conoco submits this argument is indistinguishable from one under Article 52(1)(a) and Venezuela made no effort and cannot satisfy this ground for annulment. [459]

411. Regarding the appointment of Arbitrator Bucher, Conoco argues that his appointment by the Chair is consistent with Convention Article 56(3) and Arbitration Rules 8(2) and 11(2), and that there was no departure (less a serious one) from a fundamental rule of procedure.[460]

412. Venezuela has not shown that there is a "fundamental right to appoint a replacement arbitrator" in general, nor in the ICSID context, where the appointment right is

[457] Reply (De Jesús), ¶ 258.
[458] Counter-Memorial (Conoco), ¶¶ 284, 285.
[459] Rejoinder (Conoco), ¶ 62.
[460] Counter-Memorial (Conoco), ¶ 286.

expressly conditional. Convention Article 56(3) makes it clear that there is no fundamental unconditional right to appoint a replacement arbitrator. That provision expressly contemplates situations, such as here, where the right to appoint a replacement arbitrator ceases to exist. In this case, the conditions for Venezuela's right to appoint a replacement arbitrator were not satisfied.[461]

413. Conoco refers to the committees' decisions in *CDC v. Seychelles* and *MINE v. Guinea* to argue that only rules of natural justice are fundamental, but not all ICSID rules are fundamental for the purposes of Article 52(1)(d).[462] A party has a fundamental right to a fair proceeding before an independent and impartial adjudicator. Convention Articles 57 and 58 safeguard such fundamental right, and the mechanism those articles provide for was followed in this case.[463]In its Rejoinder, Conoco reiterates this point, noting that Venezuela did not identify any ICSID case where the appointment of a replacement arbitrator was held to be a fundamental right.[464]

414. The commentaries to which Venezuela refers confirm that the right to appoint an arbitrator is not absolute. The relevant principle of natural justice is the right to an independent and impartial tribunal and there is no dispute that Arbitrator Bucher was independent and impartial. There was no departure, much less a serious one from the fundamental rule of independence and impartiality of the tribunal.[465]

415. On Venezuela's contention that the failure to consent or the withdrawal of consent to Arbitrator's Abi-Saab's resignation was a serious departure, Conoco submits that there is a distinction between the body that decides whether to consent to a resignation, on the one hand, and the body that rules on a proposal to disqualify on the other hand. The proposal to disqualify is decided by *the other members* of the tribunal (except in cases

[461] Counter-Memorial (Conoco), ¶¶ 344, 345.

[462] Counter-Memorial (Conoco), ¶¶ 345, 346, citing **A/RLA-59 [Curtis]** / **A/RLA-91 [De Jesús]**, *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, 29 June 2005, ("*CDC Annulment Decision*"), ¶ 49 (internal citations omitted); *MINE Annulment Decision*, ¶ 5.06

[463] Counter-Memorial (Conoco), ¶ 347.

[464] Rejoinder (Conoco), ¶¶ 81-85.

[465] Counter-Memorial (Conoco), ¶ 349.

referred to the Chair), while the decision whether to consent to a resignation is made by the *tribunal* which is temporarily truncated. Conoco refers to Schreuer's commentary on that distinction. What follows from this distinction is that in this case, the Tribunal composed of Arbitrators Keith and Fortier continued to function following Arbitrator Abi-Saab's resignation and Arbitrator Fortier remained on that Tribunal pending Venezuela's overlapping proposal to disqualify him.[466]

416. The Tribunal's decision not to consent was not procedurally flawed. Venezuela recognized that Arbitrator Abi-Saab's resignation during the pendency of the second challenge to Arbitrator Fortier created an unprecedented "procedural morass," not covered by the Convention and the Rules. It therefore is absurd for Venezuela to argue that a procedural question beyond the scope of the Convention and/or the Rules could be a fundamental rule of procedure.[467]

417. Further, even if Arbitrator Fortier's participation in the decision was improper (it was not), it did not prejudice Venezuela, because Arbitrator Keith's withholding of consent to the resignation would have sufficed on its own. Under Convention Article 56(3), failure by the two remaining members to reach agreement would amount to a refusal of consent. Even if the pending challenge against Arbitrator Fortier had disabled him from taking a view on the resignation (which it did not), the result would have been the same, because Arbitrator Keith did not consent.[468]

418. Further, Venezuela's position is impossible and would render Convention Article 56(3) meaningless. Venezuela submits that during the suspension of the proceeding (which resulted from the pending challenge) Venezuela should have appointed a replacement arbitrator, and then the replacement and Arbitrator Keith would decide the challenge. But in that sequence, the Tribunal would never have an opportunity to consent or not consent to the resignation as provided under Convention Article 56. The proceeding would have been suspended for everyone except for Venezuela. Such a result cannot

[466] Counter-Memorial (Conoco), ¶ 351, citing **A/CLA-57**, C. Schreuer, The ICSID Convention: A Commentary (2009) (excerpt), p. 1211, ¶ 9.

[467] Counter-Memorial (Conoco), ¶ 352; Rejoinder (Conoco), ¶ 88.

[468] Counter-Memorial (Conoco), ¶ 353; Rejoinder (Conoco), ¶ 89.

be correct because it would entail that every party-appointed arbitrator who resigned during the pending challenge of a different arbitrator would automatically be replaced by the appointing party, thereby rendering Article 56(3) meaningless.[469]

419. Last, the sequence of events caused no prejudice to Venezuela and honoured the ICSID Convention and the Rules. The Convention and the Rules recognize that only the truncated tribunal shall determine consent to an arbitrator's resignation. By contrast, the Convention and the Rules recognize two ways to decide a disqualification proposal: either by the unchallenged co-arbitrators or, in certain circumstances, by the Chair (of the Administrative Council). In the underlying arbitration, the Chair rejected the second challenge to Arbitrator Fortier *after* the Tribunal decided not to consent to the resignation. Had the Chair first rejected the challenge, and the Tribunal decided not to consent later, the outcome would have been the same. In sum, the result reached in this case honored the governing provisions of the Convention and Arbitration Rules.[470]

A.2(4) The Committee's Analysis of a Serious Departure from Fundamental Rules of Procedure in Relation to the Appointment of Arbitrator Bucher

420. Having analyzed the standard for annulment on the ground of serious departure from a fundamental rule of procedure (**Section VI. Part 2(c)**), the Committee will now deal with Venezuela's (Curtis and De Jesús) argument that the appointment of Arbitrator Bucher was a serious departure from a fundamental rule of procedure. The Committee will first address the arguments of Venezuela as represented by Curtis (**A.2(4)(1)**) and then as represented by De Jesús (**A.2(4)(2)**), including in each section, where appropriate, references to Conoco's arguments.

A.2(4)(1) Serious Departure from a Fundamental Rule of Procedure as Argued by Venezuela (Curtis)

421. An unbiased and disinterested adjudicator is one of the pillars of natural justice. The Applicant rightly points to the decision of the *ad hoc* Committee in *Eiser v. Spain*, which held that the right to an independent and impartial arbitral tribunal participates

[469] Counter-Memorial (Conoco), ¶ 354; Rejoinder (Conoco), ¶¶ 90, 91.

[470] Counter-Memorial (Conoco), ¶ 355; Rejoinder (Conoco), ¶¶ 92, 93.

in the fundamental exigencies of a fair trial, the integrity of which is protected under Article 52(1)(d).[471] It is also a question of natural justice and due process of which the independence and impartiality of the arbitrator are key facets. This comports with the main Human Rights instruments which, as underlined on many occasions by *ad hoc* committees, are relevant to the interpretation of the concept of a fundamental rule of law as used in Article 52(1)(d).[472]

422. We however differ from the Applicant regarding to the categorization of a party's right to participate in the nomination process of the arbitral tribunal, especially the selection of arbitrators, as a fundamental rule of procedure.[473] As underlined by Chief Justice Menon, the parties' participation in appointing and constituting the tribunal is the cornerstone of arbitration.[474] Nevertheless, breaches of the principles governing the formation of the tribunal are sanctioned under Article 52(1)(a). The nature of a fundamental right for arbitration has been recognized in this context,[475] rather than under Article 52(1)(d) which preserves rules of natural justice.

423. With this reminder of the respective domains of the grievances of Article 52(1)(a) and (d), the Applicant's attack of Mr Fortier and Judge Keith under Article 52(1)(d) fails because of the rejection of its assertions under Article 52(1)(a). Independence and impartiality of both arbitrators are beyond the reach of the attacks that have been mounted. No irregularity affects the appointment process of Prof. Bucher which, as

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[471] Memorial (Curtis), ¶ 114, footnote 263, Counter-Memorial (Conoco), ¶ 169: "*independence and impartiality of an arbitrator is a fundamental rule of procedure*". *Eiser Annulment Decision*, ¶ 254; *CDC Annulment Decision*, ¶ 49; *EDF Annulment Decision*, ¶ 123.

[472] *Eiser Annulment Decision*, ¶¶ 176-178; **A/RLA-149 [Curtis]**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, ("*Tulip Annulment Decision*"), ¶¶ 87, 92; **A/RLA-154 [Curtis]**, *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40), Award, 6 December 2016, ¶ 179.

[473] Memorial (Curtis), ¶ 156; Reply (Curtis), ¶ 138.

[474] **A/RLA-88 [Curtis]**, Sundaresh Menon, *Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator*, 34(3) JOURNAL OF INTERNATIONAL ARBITRATION 347 (2017).

[475] *Carnegie Annulment Decision,* ¶ 126 ("The Committee agrees that in many respects the right to appoint an arbitrator can be described as fundamental and this is recognized by the authorities quoted by The Gambia. Thus, the importance of the right has to be taken into account in deciding the consequences of a party having been deprived of that right").

mentioned above, was made in accordance with the ICSID Convention and Rules.[476] There is no reason for the Committee to intervene.

A.2(4)(2) SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE AS ARGUED BY VENEZUELA (DE JESÚS)

424. The independence and impartiality of the arbitral tribunal is one of the facets of natural justice and due process. The right to an independent and impartial arbitral tribunal is recognized in the decisions of *ad hoc* committees as participating in the fundamental exigencies of a fair trial, in integrity of which is protected under Article 52(1)(d).[477] Here, we cannot find that the right to an impartial and independent Tribunal has been violated. The Committee disagrees with Venezuela's appreciation of Mr Fortier and Judge Keith's situation[478] that they could not be relied upon to exercise an independent and impartial judgment.

425. Independence and impartiality of an arbitrator are, like for any adjudicator, an essential aspect of due process. The parties' right to participate in the selection of arbitrators has been recognized as a fundamental right within the context of the formation of the arbitral tribunal.[479] Having rejected the Applicant's annulment ground under Article 52(1)(a) regarding Mr Fortier's and Judge Keith's attitude concerning their refusal to consent to Prof. Abi-Saab's resignation, their decision cannot have vitiated the reconstitution of the arbitral tribunal with the nomination of Prof. Bucher or caused any departure from a fundamental rule of procedure. Prof. Bucher was appointed in replacement of Prof. Abi-Saab in accordance with the ICSID Convention and Rules as already remarked.[480] We add that asking the parties for their comments on the resignation of an arbitrator is, as earlier remarked (see paras. 361, 387), not a breach of the ICSID Rules nor a breach of a fundamental rule of procedure. The frustration of

[476] See ¶ 364 above.

[477] Memorial (De Jesús), ¶¶ 103-104; *Klöckner Annulment Decision*, ¶ 95; *Wena Annulment Decision*, ¶ 57; *Impregilo Annulment Decision*, ¶ 165; *EDF Annulment Decision*, ¶ 123 ; *Eiser Annulment Decision*, ¶254. Counter-Memorial, (Conoco), ¶ 169: "*independence and impartiality of an arbitrator is a fundamental rule of procedure*".

[478] Memorial (De Jesús), ¶¶ 103-107, Reply (De Jesús), ¶¶ 240.

[479] *Carnegie Annulment Decision*, ¶ 126. Reply (De Jesús), ¶¶ 249-250.

[480] See ¶ 390 above.

Venezuela's right to appoint an arbitrator alleged under ICSID Convention Article 56 and Arbitration Rule 6 fails accordingly.[481]

426. As we rejected the claim of lack of independence and impartiality, the alleged improper participation of Mr Fortier and Judge Keith in the decision to refuse consent to Prof. Abi-Saab's resignation in breach of ICSID Arbitration Rule 9(6) on suspension of the proceeding during the disqualification of an arbitrator[482] is no ground for annulment under Article 52(1)(d).

[481] Memorial (De Jesús), ¶¶ 108-124; Reply (De Jesús), ¶¶ 247-252.

[482] Memorial (De Jesús), ¶¶ 126-132; Reply (De Jesús), ¶¶ 253-259.

B. GROUNDS RELATED TO THE TRIBUNAL'S EXERCISE OF JURISDICTION: MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS

427. Venezuela (De Jesús and Curtis) invokes two different grounds in relation to the Tribunal's findings on jurisdiction. On the one hand, it invokes the ground of manifest excess of powers under Article 52(1)(b) based on the Tribunal's exercise of jurisdiction over **(i)** the Conoco Phillips Dutch companies (CPZ, CPH and CGP) and **(ii)** the indirect investments of CPH and CGP.[483] On the other hand, it invokes failure to state reasons under Article 52(1)(e) for the Tribunal's findings on jurisdiction for each (i) and (ii).

428. The Committee summarizes the Parties' arguments on the alleged manifest excess of powers and failure to state reasons in relation to the Tribunal's jurisdictional findings regarding the Dutch companies' claims and Treaty Abuse (**B.1.**) and the indirect investments of CPH and CGP (**B.2**). Each section starts with the arguments advanced by Venezuela (Curtis) (**B.1(1)** and **B.2(1)**); then Venezuela (De Jesús) (**B.1(2)** and **B.2(2)**); followed by the Conoco Parties (**B.1(3)** and **B.2(3)**). The Committee's analysis of the grounds invoked in relation to the Tribunal's findings on jurisdiction is addressed in **Sections** **B.1(4)** (Dutch companies claims and Treaty Abuse) and **B.2(4)** (indirect investments).

B.1. GROUNDS RELATED TO THE TRIBUNAL'S EXERCISE OF JURISDICTION OVER THE DUTCH COMPANIES AND THE ALLEGED TREATY ABUSE

B.1(1) MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS AS ARGUED BY VENEZUELA (CURTIS)

MANIFEST EXCESS OF POWERS (CURTIS)

429. Venezuela's position is that the Tribunal manifestly exceeded its powers by asserting jurisdiction under the BIT by giving effect to ConocoPhillips's restructuring strategy made solely to gain ICSID access.[484]

[483] Memorial (De Jesús), ¶ 135; Memorial (Curtis), ¶ 762

[484] Memorial (Curtis), ¶ 770.

430. The ConocoPhillips Parties inserted ConocoPhillips Petrozueta B.V. ("**CPZ**"), ConocoPhillips Hamaca B.V. ("**CPH**") and ConocoPhillips Gulf of Paria B.V. ("**CGP**"), the Dutch companies, into the corporate structure solely to get the BIT's protection and access to ICSID, at a time when legal changes were taking place in Venezuela that affected ConocoPhillips' interests. Venezuela maintains that ConocoPhillips openly acknowledged having created the Dutch companies with that purpose in its Memorial on the Merits[485] and again in the 2010 Hearing in the testimony of the Conoco Parties' main witness, Mr. Goff.[486]

431. CPZ (with interests in the Petrozuata Project) and CGP (with interests in the Corocoro Project) were registered in the Netherlands on 26 July 2005, and CPH (with interests in the Hamaca Project) was registered on 17 July 2006. None of these companies had any business operations, business of any kind, or employees in the Netherlands.[487]

432. Venezuela recounts the transactions made in 2005 and 2006 to insert CPZ, CGP, and CPH into ConocoPhillips's corporate chain, respectively, into the Petrozuata, Corocoro and Hamaca Projects. Yet, it was not until 31 January 2007 that ConocoPhillips revealed the existence of Dutch companies CPZ, CGP and CPH, which subsequently became Claimants in the arbitration.[488]

433. In Venezuela's view, ConocoPhillips' corporate restructuring constituted treaty abuse and the Tribunal should have dismissed the claims based on the "corporations of convenience." In its 2013 Decision, the Tribunal recognized it had to prevent the abuse of the investment protection system under the ICSID Convention, so that only investments made in good faith are protected. The Tribunal recounted cases and concluded there was a "growing body of decisions placing some limits on the investor's

[485] Memorial (Curtis), ¶¶ 762, 763, citing **A/R-177 [Curtis] / A/R-166 [De Jesús]**, Claimants' Memorial on the Merits, dated 15 September 2008, ("*Claimants' Memorial on the Merits*"), ¶ 216.

[486] Reply (Curtis), ¶ 421, citing **A/R-9 [Curtis] / A/R-50 [De Jesús]**, Transcript of the Hearing on Jurisdiction, Merits and Quantum held on 31 May to 12 June and 21-23 July 2010, pp. 539-540, 542, 551-552.

[487] Memorial (Curtis), ¶ 764.

[488] Memorial (Curtis), ¶ 769, referring to **A/C-69** (previously **C-36)**, Letter from Roy Lyons, President of Conoco Phillips Latin America, to Rafael Ramírez, Minister of Popular Power for Energy and Petroleum, and others, 31 January 2007 ("*Mr. Lyons letter*").

choice of corporate form, even if it complies with the relevant technical definition in the treaty text."[489] In addition, Venezuela submits that the Tribunal noted in the 2013 Decision "that the only business purpose of the restructuring, as acknowledged by Claimants' principal witness on this matter, was to be able to have access to ICSID proceedings."[490] Thereby, the issue of treaty abuse turns entirely on the foreseeability of the disputes at the time of the restructuring.[491]

434. Venezuela recounts several cases of abuse of process and treaty abuse[492] to conclude that all factors identified in those cases were present also here: the timing of the restructuring (a decade after the Projects were entered and after the dispute had arisen or was foreseeable); no business purpose (sole motivation was to gain ICSID access); without Venezuela's consent (unlike other cases treaty abuse cases, here the host State did not consent and ConocoPhillips did not disclose the existence of the Dutch companies until October 2006); reshuffling of interests within a corporate family to gain ICSID access (there was no bona fide transfer of investments to a third party).[493] In its Reply, Venezuela again relies on *Phoenix v. Czech Republic* to submit that it is well settled that treaty abuse exists when an investment is restructured with the sole purpose of gaining ICSID access when the disputes have arisen or are foreseeable.[494]

435. Venezuela then recounts a series of events in chronological order to show that the expropriation claim was within ConocoPhillips' reasonable contemplation at the time of the restructuring. Venezuela's recounting of the facts starts on 10 October 2004, with Venezuela's suspension of the 1% royalty holiday, and ends with the 2007 January-

[489] Memorial (Curtis), ¶ 772 and Reply (Curtis), ¶ 418, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 274.

[490] Reply (Curtis), ¶ 422, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 279.

[491] Reply (Curtis), ¶ 422.

[492] Memorial (Curtis), ¶¶ 773-788

[493] Memorial (Curtis), ¶ 788.

[494] Reply (Curtis), ¶ 416, citing **R-120** (submitted by De Jesús as **A/RLA-88**), *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, ¶¶ 92, 106-107, 113, 143-144.

June migration and nationalization process, with the restructuring occurring in between.[495]

436. Venezuela concludes that given these events, it is not credible that Conoco did not reasonably foresee the expropriation claim, and the Tribunal's finding of jurisdiction under these circumstances was a manifest excess of powers that warrants annulment.[496] Venezuela notes that in their Memorial, the Conoco Parties do not dispute any of the facts or evidence on which Venezuela bases its position, Neither do the Conoco Parties dispute the legal principles invoked by Venezuela. The Tribunal's decision on treaty abuse should have been a straightforward application of the law to the undisputed facts.[497] However, the Tribunal refused to apply the principle of treaty abuse and ignored the foreseeability test.[498]

FAILURE TO STATE REASONS (CURTIS)

437. Venezuela argues that the Tribunal's decision to exercise jurisdiction over the Dutch companies notwithstanding the treaty abuse also suffers from a failure to state reasons.

438. Venezuela submits that the Tribunal concluded that there was no treaty abuse, notwithstanding its finding in the 2013 Decision that ConocoPhillips restructured its investments in 2005 and 2006 with the sole purpose of accessing ICSID arbitration and the Conoco Parties' admissions in relation to the foreseeability of the dispute.[499]

439. Paragraph 279 of the 2013 Decision expressly recognized that the only business purpose of the restructuring, as recognized by the Claimants, was access to ICSID proceedings.[500] Also, Venezuela maintains, that the Conoco Parties admitted in the arbitration that the disputes were foreseeable, when they acknowledged that (i) by the

[495] Memorial (Curtis), ¶ 789; Reply (Curtis), ¶ 424.

[496] Memorial (Curtis), ¶ 790.

[497] Reply (Curtis), ¶ 419.

[498] Reply (Curtis), ¶¶ 426, 433.

[499] Memorial (Curtis), ¶ 792.

[500] Memorial (Curtis), ¶ 792 and Reply (Curtis), ¶ 435, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 279.

Summer of 2005 ConocoPhillips concluded that there was a risk that Venezuela would take actions against their investments; (ii) the "patent aggressiveness" [501] of the government revealed a significant risk to the ConocoPhillips investments; and (iii) if the government repealed the Foreign Investment Law the company would be left without forum to pursue claims for expropriation.[502]

440. The Tribunal's conclusion that there was no abuse of right does not follow from the Tribunal's finding in its 2013 Decision, nor does it follow from the Conoco Parties' admissions in the arbitration. The lack of a cogent explanation constitutes a failure to state reasons under Article 52(1)(e).

441. Venezuela also argues that the 2013 Decision does not deal with the foreseeable nature of the expropriation claim. The Tribunal failed to address the argument that jurisdiction cannot be exercised by a restructuring into a treaty country where the claim is foreseeable. In its Reply, Venezuela submits that the Tribunal in the 2013 Decision only dealt with jurisdiction *ratione temporis*, and omitted the real issue of treaty abuse which concerns the transfer of ownership when a dispute is foreseeable.[503] Also, in the 2013 Decision the Tribunal attached relevance to the Conoco Parties' wish to continue to carry out the projects, yet that fact has nothing to do with the issue of foreseeability of the dispute.[504] The failure to address that material issue also constitutes a failure to state reasons within the meaning of Article 52(1)(e) and warrants annulment of the Award.[505]

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[501] Memorial (Curtis), ¶ 792, citing **A/R-183 [Curtis]** / **A/R-164 [De Jesús]**, ConocoPhillips Reply on the Merits, dated 2 November 2009, ("*Claimants' Reply on Merits*"), ¶ 120.

[502] Memorial (Curtis), ¶ 792, citing **A/R-183 [Curtis]** / **A/R-164 [De Jesús]**, *Claimants' Reply on Merits*, ¶ 337; Reply (Curtis), ¶ 427

[503] Reply (Curtis), ¶¶ 434-436, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 278, 279.

[504] Reply (Curtis), ¶¶ 437 citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 280; Reply (Curtis), ¶ 438,

[505] Memorial (Curtis), ¶ 793.

B.1(2) MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS AS ARGUED BY VENEZUELA (DE JESÚS)

MANIFEST EXCESS OF POWERS (DE JESÚS)

a) Manifest excess of powers for failure to apply the law, concerning the doctrine of treaty abuse.

442. Undergoing corporate restructuring for the sole purpose of gaining access to ICSID in anticipation of a dispute is treaty abuse.[506] In the arbitration, Venezuela argued that ConocoPhillips had abusively inserted the Dutch companies in the chain of ownership by creating CPZ, CPH and CGP, solely to gain access to ICSID arbitration at a time when legal changes were taking place in the Venezuelan petroleum industry and when ConocoPhillips foresaw the dispute it later referred to arbitration.[507]

443. Venezuela notes that ConocoPhillips admitted to inserting the Dutch companies solely to gain ICSID access under the BIT.[508] ConocoPhillips also acknowledged that before the restructuring it had asserted claims against Venezuela in relation to events that were later submitted to the Tribunal as part of the dispute.[509]

444. Pursuant to Article 9(5) of the BIT, "general principles of international law" formed part of the law applicable to the dispute. Venezuela submits that under Article 9(5) the Tribunal was required to apply the doctrine of treaty abuse in international law to resolve the jurisdictional dispute at hand. However, although the Tribunal identified Article 9(5) of the BIT as the primary source of applicable law, it simply listed the law but failed to demonstrate its application. This is the Tribunal's failure to apply the law and constitute a manifest excess of powers. [510]

[506] Memorial (Curtis), ¶ 771.
[507] Memorial (De Jesús), ¶ 147.
[508] Memorial (De Jesús), ¶ 149; Reply (De Jesús), ¶ 265.
[509] Memorial (De Jesús), ¶ 149.
[510] Memorial (De Jesús), ¶¶ 151, 152.

445. Venezuela characterizes in five steps how, in its view, the Tribunal had manifestly failed to apply the international law on treaty abuse under Article 9(5) of the BIT:[511]

- First step (paragraphs 268-270 of the 2013 Decision), the Tribunal oversimplified the Parties' positions on treaty abuse.

- Second step (paragraphs 271-274 of the 2013 Decision), the Tribunal made broad statements regarding the standards adopted by other tribunals to conclude at paragraph 274 of the 2013 Decision that there was a "growing body of decisions placing some limits on the investor's choice of corporate form, even if it complies with the relevant technical definition in the treaty."[512]

- Third step (paragraphs 276 and 277 of the 2013 Decision), the Tribunal lists facts starting from 2004, without analysing them or relating them to the broad standards.

- Fourth step (paragraphs 278-280 of the 2013 Decision), the Tribunal made three conclusory statements without linking them to the identified standard.

- Fifth step (paragraph 281 of the 2013 Decision), the Tribunal decided that no treaty abuse had occurred.

446. Venezuela explains that in its five-step approach, the Tribunal did not analyse or determine the rules through which any of the legal standards it identified took concrete form. The Tribunal failed to point to which (if any) of the principles it effectively applied to the present dispute and, thereby, it manifestly exceeded its powers.[513] Venezuela refers to the decision of the *ad hoc* committee in *Klöckner* which annulled the subject award and held that reliance on a principle of law requires "argumentation" and "touching on rules defining how this 'principle' is to be applied […] in general and in [a] particular case," rather than postulating the principle.[514]

[511] Memorial (De Jesús), ¶¶ 153-160.

[512] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 274.

[513] Memorial (De Jesús), 159; Reply (De Jesús), ¶ 268.

[514] Reply (De Jesús), ¶¶ 269-271, citing *Klöckner Annulment Decision*, ¶¶ 78-79.

447. Venezuela argues that excess is manifest, and it suffices to read paragraphs 271 to 280 of the 2013 Decision to find the Tribunal's failure to identify the law it purportedly applied. Venezuela counters that Conoco is misrepresenting Venezuela's position that the Tribunal misapplied the law, but Venezuela's argument is that the Tribunal did not identify the law it purportedly applied[515]

b) Manifest excess of powers for assuming jurisdiction over the claims of the Dutch companies CPH and CGP

448. The Tribunal also exceeded its powers when it upheld jurisdiction over the ConocoPhillips Dutch companies, CPH and CGP. Conoco abusively included the Dutch companies in the chain of ownership of the projects in 2005-2006, when ConocoPhillips had foreseen the dispute. Venezuela refers to four facts that demonstrate that the 2005-2006 restructurings were abusive, made only to gain access to ICSID in anticipation of the dispute.[516]

449. Venezuela submits that to determine if the Tribunal exceeded its powers, the Committee must make an independent interpretation of the jurisdictional sources, the BIT and the ICSID Convention. Here, one factor limiting the Tribunal's jurisdictional powers was the treaty abuse doctrine, which the Tribunal acknowledged in the 2013 Decision. Venezuela refers to a number of ICSID awards to submit that at least four criteria should be considered to assess if there was treaty abuse: (i) the temporality of the restructuring; (ii) the motive for the restructuring; (iii) if the host State consent to the restructuring; and (iv) if the dispute was foreseeable at the time of the restructuring.[517]

- The Tribunal failed to address the fact that the restructuring occurred after the investment was made, which was undisputed as reflected in paragraphs 276.a and 276.b of the 2013 Decision.[518]

[515] Reply (De Jesús), ¶ 273.
[516] Memorial (De Jesús), ¶¶ 163-165.
[517] Reply (De Jesús), ¶¶ 285-287.
[518] Memorial (De Jesús), ¶ 166.

- The Tribunal did not address the motives admitted by ConocoPhillips Companies for the restructuring of the chain of ownership, namely, to gain access to ICSID. Instead, the Tribunal focused on the existence of a claim at the time of the restructuring, whereas the dispute was about the foreseeability of such a claim.[519]

- The Tribunal did not address the issues of Venezuela never consented to the restructurings, or that Conoco only notified Venezuela of the restructuings after asserting asserted their rights under the BIT.[520]

- The Tribunal ignored or overlooked facts of the underlying arbitration showing that ConocoPhillips Companies foresaw the dispute at the time of the restructurings:

    - On 13 November 2001, before the restructurings, the Venezuelan Congress enacted the New Organic Law of Hydrocarbons, which provided that private companies were allowed to participate in oil projects in Venezuela only through mixed companies in which the State holds a majority stake (paragraph 188 of the 2013 Decision).[521]

    - On 22 November 2004, before the restructurings, ConocoPhillips Companies asserted claims against Venezuela in relation to the increase of the applicable royalty rate in October 2004 (paragraphs 191, 201, 277.a of the 2013 Decision). ConocoPhillips characterized the increase as "step one of the expropriation."[522]

    - On 12 April 2005, before the restructurings, the Minister of Energy and Mines initiated the migration process concerning the Projects (paragraph 277.a of the 2013 Decision). This, Venezuela argues, means that the Tribunal acknowledged that on that date the process that gave rise to the

[519] Memorial (De Jesús), ¶ 167.

[520] Memorial (De Jesús), ¶ 168.

[521] Memorial (De Jesús), ¶ 170; Reply (De Jesús), ¶ 288.

[522] Memorial (De Jesús), ¶ 171, citing **A/R-164 [De Jesús] / A/R-183 [Curtis]**, *Claimants' Reply on the Merits*, ¶ 336: "[…]. At the time that ConocoPhillips decided to incorporate in The Netherlands, there was no dispute. Venezuela had imposed what would be revealed as 'Step One' of the expropriation – the royalty increase. […]." Reply (De Jesús), ¶ 289.

dispute officially started. In turn, the 2001 New Organic Law of Hydrocarbons already hinted that the migration could result in an amicable migration or mandatory transfer to a mixed company.[523]

- The Tribunal acknowledged that there are "limits on the investor's choice of the corporate form, even if it complies with the relevant technical definition in the treaty text," such as "good faith", "détournement de pouvoir", "abuse of rights", "misuse of the system", "abuse of powers" and "equality of position" (paragraph 274 of the 2013 Decision).[524]

- On 31 January 2007, the ConocoPhillips Companies notified Venezuela of the existence of a dispute under investment law, a dispute which they acknowledged had started to emerge in 2004, before the 2005/2006 restructurings.[525]

- Venezuela emphasized in the arbitration that in May 2005 (before the 2005-2006 restructurings), counsel for the ConocoPhillips Companies foresaw that the 2001 New Organic Law of Hydrocarbons, the 2004 royalty rate increase, and the migration of the projects towards mixed companies would likely give rise to a dispute that was *in fine* referred to arbitration. This was publicized in a pamphlet in May 2005.[526]

450. Venezuela also argues that the excess was manifest because it can be easily perceived from reading the 2013 Decision that the Tribunal acknowledged that: (i) limits must be put to investors's rights to restructuring; and (ii) prior to the 2005/2006 restructurings ConocoPhillips had asserted claims against Venezuela in relation to the dispute that was later referred to arbitration. However, the Tribunal ignored these jurisdictional limits, thereby, manifestly exceeding its powers.[527] Contrary to Conoco's submission,

[523] Memorial (De Jesús), ¶ 173.

[524] Memorial (De Jesús), ¶ 175, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 274.

[525] Reply (De Jesús), ¶ 290.

[526] Reply (De Jesús), ¶ 291.

[527] Reply (De Jesús), ¶ 294.

Venezuela maintains that it is not asking the Committee to make a de novo review, but rather to carefully review the applicable jurisdictional sources and make its own assessment of the factual background.[528] Venezuela rejects Conoco's proposition that because under Convention Article 41(1) the tribunal's jurisdictional findings are conclusive, excess of powers are not annullable under Article 52(1)(b) of the ICSID Convention. Venezuela submits this would prevent the Committee from performing the first step of the analysis to engage in an independent analysis of the legal and factual sources to determine the applicable limits to the tribunal's jurisdiction.[529]

451. Venezuela also counters Conoco's argument that as long as a tribunal's jurisdictional findings are tenable, there would be no excess of powers. Venezuela submits that the "tenable test," entails a degree of review, thereby contradicting Conoco's position that the Committee cannot act as an appellate body. In any event, even applying the "tenable test," Venezuela has shown that no reasonable observer would consider it tenable to rule that the dispute was not foreseeable at the time of 2005/2006 restructurings.[530]

452. Venezuela argues that the Tribunal ascertained its jurisdiction at odds with the facts it had acknowledged, the applicable jurisdictional sources and logic, and, thereby, manifestly exceeded its powers. This excess, Venezuela submits, warrants that the Committee "annul the passages of the September 2013 Decision dealing with the Arbitral Tribunal's jurisdiction over the ConocoPhillips Dutch Companies under Article 9 of the BIT [and]. *Par voie de conséquence*, […] annul, in their entirety, the Interim Decision and the Award. These two decisions cannot stand without a positive finding of jurisdiction over the ConocoPhillips Dutch Companies."[531]

[528] Reply (De Jesús), ¶ 296.
[529] Reply (De Jesús), ¶ 299.
[530] Reply (De Jesús), ¶¶ 300-303.
[531] Memorial (De Jesús), ¶ 178.

FAILURE TO STATE REASONS (DE JESÚS)

453. Venezuela also argues that the Tribunal's decision on the issue of treaty abuse does not provide any adequate or sufficient reasons to understand its conclusions.

454. It is not possible to follow points A to B in the Tribunal's reasoning. Venezuela recounts that first, from paragraphs 216 to 218 of the 2013 Decision the Tribunal summarized the Parties' positions on treaty abuse (even though the Parties had devoted over 40 paragraphs to that issue). Second and third, the Tribunal included a catalogue of principles used by other tribunals on the issue of treaty abuse and broadly concludes at paragraph 274 of the 2013 Decision that the catalogue supports the limits placed on investors' choice of corporate form. Venezuela criticizes that despite this catalogue, the Tribunal failed to "explain the legal meaning, scope, application or relevance to the instant case of any of those standards, or even the rules allowing any of them to take concrete form."[532]

455. Venezuela identifies the conclusion at paragraph 274 as "Point A" of the Tribunal's reasoning and paragraphs 276 to 281 (a chronology of facts) as "Point B". At paragraph 275, Venezuela notes that the Tribunal made the "hollow announcement" that it would examine the facts against the standards in the catalogue, yet it failed to do so.[533]

456. Then, at paragraphs 278 to280 the Tribunal made three observations:

a. At paragraph 278 the Tribunal stated that the restructuring "did not attempt to transfer any right or claim arising under ICSID or a BIT from one owner to another. Indeed, at the time of the transfers, ConocoPhillips had withdrawn its only claim of breach." The Tribunal's observation at paragraph 278 has no connection to the catalogued standards. The Tribunal failed to explain how the observation at paragraph 278 may be reconciled with the fact that CPH had asserted claims before the Tribunal regarding measures that occurred before its incorporation. The Tribunal ignored the argument posited by Conoco Parties that the expropriation

[532] Memorial (De Jesús), ¶ 202; Reply (De Jesús), ¶ 328.

[533] Memorial (De Jesús), ¶¶ 203-205.

occurred from 2004, *i.e.*, before the restructuring. Finally, it failed to address the issue of foreseeability of the dispute, which was Venezuela's position.[534]

b. At paragraph 279 the Tribunal stated that "the only business purpose of the restructuring, as acknowledged by the Claimants' principal witness on this matter, was to be able to have access to ICSID proceedings. But […] no claim had been made at the time of the restructuring […]." Here, Venezuela argues that the Tribunal again failed to address the issue of the foreseeability of the dispute. Other tribunals in the absence of any business purpose view with scepticism a corporate restructuring; yet the Tribunal failed to address that point too. The Tribunal also ignored key facts, related to the foreseeability of the claim. The Tribunal did not consider the fact that the Ministry of Hydrocarbons had announced to the ConocoPhillips companies that if the migration under the 2011 New Organic Hydrocarbons Law failed, Venezuela would exercise its sovereign powers over its resources. Even the Conoco Parties themselves considered that the expropriation process had started as early as 2004.[535]

c. At paragraph 280 the Tribunal considered as a "major factor" that the Conoco Parties invested approximately USD 434 million after their decision to restructure. The Tribunal viewed this as indicative of the Conoco Parties wishing to carry out the projects and that proceedings under the BIT were not in prospect at that time. Venezuela submits that the Tribunal failed to explain why this factor would entail an absence of treaty abuse.[536]

457. Venezuela argues that Conoco takes an unduly restrictive approach towards Article 52(1)(e) when it argues that the Committee has no powers to review the reasoning nor to annul the Award, unless the Award is entirely unreasoned. Venezuela clarifies that its position is not that the Tribunal should have dealt with every argument raised by the Party, that for reasoning to pass the sufficiency test of Convention Article 52(1)(e), the

[534] Memorial (De Jesús), ¶¶ 207-209.
[535] Memorial (De Jesús), ¶¶ 213-215.
[536] Memorial (De Jesús), ¶¶ 216, 217.

Tribunal must have expressly addressed the arguments that might have an impact on the reasoning, failing which a reader of the 2013 Decision simply cannot understand the Tribunal's reasoning. [537] Further, the Tribunal's reasoning was inadequate, by merely finding that Conoco's "evidence it found most persuasive" when it ignored the fact of Conoco's abuse of the corporate structure to secure treaty protection when a dispute was foreseeable.[538] Venezuela emphasizes that the Tribunal also failed to indicate how the Freshfields May 2005 pamphlet was irrelevant to their assessment on the issue of treaty abuse.[539]

458. In light of the above, Venezuela requests the Committee to annul the 2013 Decision dealing with jurisdiction over the Dutch companies, and *par voie de consequence* the Interim Decision and the Award in accordance with Convention Article 52(1)(e).

B.1(3) NO MANIFEST EXCESS OF POWERS AND NO FAILURE TO STATE REASONS (CONOCO PARTIES)

NO MANIFEST EXCESS OF POWERS (CONOCO)

a) No manifest excess of powers in the Tribunal's findings on treaty abuse

459. Conoco argues that Venezuela is retrying two jurisdictional arguments that the Tribunal unanimously rejected in its 2013 Decision. The Tribunal rejected Venezuela's arguments (i) that the Claimants abused their corporate form and restructured their investments solely to gain access to ICSID arbitration under the BIT; and (ii) that the BIT did not cover *indirect* investments of CPH and CGP in the Hamaca and Corocoro Project.

460. Conoco recounts the facts related to the restructurings of its investments in Venezuela between July 2005 and September 2006, all of which occurred before the expropriation.[540]

[537] Reply (De Jesús), ¶¶ 329, 330.
[538] Reply (De Jesús), ¶ 331, citing Counter-Memorial (Conoco), ¶ 760.
[539] Reply (De Jesús), ¶ 333.
[540] Counter-Memorial (Conoco), ¶¶ 736, 737.

461. According to Conoco, in August 2006 Venezuela sent the proposed terms of the migration of the Association Agreements to mixed companies, and at that point the Claimants did not know that the migration would result in the expropriation. It is Conoco's position that only in January 2007 when Venezuela announced the nationalization program that culminated with the taking of Claimants' investments, Conoco then notified Venezuela of the existence of the dispute. Subsequently on 1 May 2007, Venezuela seized physical control of the projects, and on 26 June 2007, it "formally expropriated Claimants' interests […] when the negotiation period to reach an agreement on the proposed migration expired."[541]

462. In its Counter-Memorial and Rejoinder on Annulment, Conoco describes how the Tribunal reasoned in its 2013 Decision on the issue of treaty abuse:[542]

- The Tribunal identified Article 9 of the BIT as the applicable law;

- The Tribunal went through the Parties' arguments. The Parties disagreed on whether, at the time of the restructurings, the dispute was foreseeable. Venezuela's position was that the dispute was foreseeable, with Conoco having admitted to restructuring its investments to gain the BIT's protection. The Claimants argued that, at the time of the restructuring, no dispute had arisen or was foreseeable, and nothing prohibits corporations from altering their investment structure to benefit from treaty protections.

- The Tribunal turned to Article 1 of the BIT's jurisdictional requirements and cases referenced by the Parties on treaty abuse. The Tribunal recognized that "a growing body of decisions" support the existing limits to the investor's choice of corporate form, even if it complies with the treaty's definition.

- Then, the Tribunal assessed if the Claimants had abused their corporate form when they brought their BIT claim. The Tribunal looked at the timeline of the

[541] Counter-Memorial (Conoco), ¶ 737.

[542] Counter-Memorial (Conoco), ¶ 738(a)-(g); Rejoinder (Conoco), ¶ 302.

restructurings, including a chronology of regulatory changes that took place between 2004 and 2007.

- The Tribunal found no treaty abuse, because (i) the restructurings in 2005 and 2006 did to transfer any right or claim under the BIT or the ICSID Convention from one owner to another; and (ii) no claim was made and "none was in prospect"[543] at the time of the restructurings, even if the Claimants had admitted that their motivation for restricting was to gain BIT protection. The Tribunal referred to Conoco documented expectation that the Projects would continue, having made continued expenditure on the Projects. The Tribunal characterized that continued expenditure as "a very weighty factor in its decision […]."[544]

463. Conoco argues that Venezuela simply disagrees with the Tribunal's factual and legal conclusions on treaty abuse. Even if Venezuela's criticisms were correct (which they are not), they are not grounds for annulment.[545]

b) No manifest excess of powers in exercising jurisdiction over the Dutch companies CPH and CGP

464. Conoco further argues that the Tribunal identified the applicable law and applied it, which is clear from paragraphs 271 to 280 of the 2013 Decision. Partial non-application or an erroneous application of the law does not constitute grounds for annulment.

465. Conoco also counters Venezuela's argument that the Tribunal failed to apply the law because its legal analysis was not elaborate,[546] noting that tribunals are not obliged to spell out the connection between each legal principle it identified, nor the conclusion drawn from it.[547]

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[543] Counter-Memorial (Conoco), ¶ 738(f), citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the* Merits, ¶¶ 278–79.

[544] Counter-Memorial (Conoco), ¶ 738(g), **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 280.

[545] Counter-Memorial (Conoco), ¶ 739.

[546] Counter-Memorial (Conoco), ¶ 742, referring to Memorial (De Jesús), ¶¶ 152, 159.

[547] Counter-Memorial (Conoco), ¶ 752.

466. Venezuela, Conoco maintains, is asking the Committee to review *de novo* the Tribunal's findings on fact and law regarding the treaty abuse issue, which exceeds the scope of annulment review. In the jurisdictional context, an excess of powers must be manifest, obvious on its face and evident from a simple reading of the award, not susceptible to more than one interpretation or tenable so that it can be supported by reasonable arguments.[548]

467. Conoco refers to the decisions of the committee in *Azurix*, in that the issue of jurisdiction "[…] falls to be resolved definitely by the tribunal in exercise of its power under Article 41 before the award is given, rather than by an *ad hoc* committee under Article 51(1)(b) after the award has been given."[549]

468. Conoco refers to the decision of the committee in *Mobil*, which rejected Venezuela's request to annul the award for manifest excess of powers alleging that the claimant's 2005 restructurings amounted to treaty abuse. The *Mobil* committee found that it "ha[d] no legitimate power to control the [t]ribunal's specific findings [on jurisdiction] […] either the legal theory […] applied in order to distinguish between legitimate corporate planning and abuse of right, or the application of that theory to the particular circumstances of the case."[550]

469. Conoco also refers to the decisions of the *ad hoc* committees in *Orascom v. Algeria* (rejecting manifest excess of powers in declining jurisdiction, concluding that if the committee involves itself in assessing whether the evidence the tribunal gathered justified a finding of abuse of rights, this would transform the committee into an appellate body)[551] and in *Alapli v. Turkey* (committees are not empowered to review the tribunal's appreciation of the law and determination of relevant facts). [552]

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[548] Counter-Memorial (Conoco), ¶¶ 744, 750.

[549] Counter-Memorial (Conoco), ¶ 745, citing *Azurix Annulment Decision*, ¶ 68.

[550] Counter-Memorial (Conoco), ¶ 747, citing **A/RLA-74** [De Jesús], *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, ("*Venezuela Holdings Decision on Annulment*"), ¶ 115.

[551] Counter-Memorial (Conoco), ¶ 748, citing *Orascom Annulment Decision*, ¶ 317.

[552] Counter-Memorial (Conoco), ¶ 749, citing **A/RLA-151 [Curtis]**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, ("*Alapli Annulment Decision*"), ¶ 245.

470. Furthermore, a tribunal need not address every argument of evidence before it, and Venezuela's claim that the Tribunal manifestly exceeded its powers by not addressing specific points of its case on treaty abuse should fail. It is not the Committee's role to review the Tribunal's factual findings against the record or the parties' arguments. For an inquiry under Article 52(1)(b), it is irrelevant whether the Committee agrees with the Tribunal's conclusions on fact, law, or the Tribunal's appreciation of the evidence.[553]

471. In its Rejoinder, Conoco reiterates that Venezuela is asking the Committee to make a *de novo* review of the Tribunal's decisions on jurisdiction, noting that even if there was a mere error (there is not), it would not meet the annulment standard of Convention Article 52(1)(b). Venezuela would have to show that the Tribunal's decision was one that no reasonable person could accept. Despite Venezuela's contention to the contrary, is it not the Committee's role to perform a thorough and independent review of the evidence, the Parties' arguments, or the Tribunal's conclusions. The Committee can only assess whether the decision constitutes an excess of powers that is so obvious on its face as to allow no debate among reasonable persons.[554]

NO FAILURE TO STATE REASONS (CONOCO)

472. Conoco submits that the Tribunal's reasons for upholding jurisdiction were clear and not contradictory. The Tribunal's reasons can be followed from A to B.[555] The Tribunal's finding of no abuse of right was permissible, because no dispute had commenced and "none was in prospect at the time of the restructurings," even though the acknowledged business purpose of the restructuring was to access the treaty protections for Dutch investors.[556]

[553] Counter-Memorial (Conoco), ¶ 752.

[554] Rejoinder (Conoco), ¶¶ 300, 301.

[555] Rejoinder (Conoco), ¶ 303.

[556] Counter-Memorial (Conoco), ¶ 756, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 279–80.

473. Contrary to what Venezuela maintains, the Claimants did not admit in the arbitration that the dispute was foreseeable. The issue of the foreseeability of the dispute was key in the arbitration. The Tribunal simply found Venezuela's arguments on that issue unconvincing and Venezuela is not entitled to reopen those findings.[557]

474. There is also no contradiction in the Tribunal's finding that there was no dispute at the time of the restructuring, while also acknowledging that ConocoPhillips had previously withdrawn. Conoco explains that the Parties agreed during the arbitration that the standard for treaty abuse demanded that the specific dispute put before the Tribunal existed or was foreseeable at the time of the restructuring. In its 2013 Decision, the Tribunal noted that in January 2005 ConocoPhillips withdrew its objection to the increased royalty rates approved by Venezuela in October 2004 "in the clearest of terms." That objection was separate and apart from the specific dispute resolved by the Tribunal relating to the 2007 expropriation.[558]

475. Further, the Tribunal did not fail to state reasons regarding its treatment of Venezuela's arguments on foreseeability. First, as the Orascom committee stated, tribunals are not required to deal with every detail of every argument made by a party.[559] Second, contrary to Venezuela's assertion, the Tribunal considered the treaty abuse allegation and found that there was no abuse since at the time of the restructuring "no claim had been made" and "none was in prospect".[560] Third, the Tribunal need not provide reasons for its reasons, and Venezuela's allegation that the Tribunal failed to explain why it considered the continued investment in the Projects as a major factor fails. In any event, the answer is obvious, namely, that no reasonable investor will continue to invest hundreds of millions of dollars long-term if it expects an imminent taking of its investment.[561]

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[557] Counter-Memorial (Conoco), ¶ 757.

[558] Counter-Memorial (Conoco), ¶ 758, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278.

[559] Counter-Memorial (Conoco), 759, citing *Orascom Annulment Decision*, ¶ 319.

[560] Counter-Memorial (Conoco), ¶ 760, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 279.

[561] Counter-Memorial (Conoco), ¶ 769.

476. In its Rejoinder, Conoco argues that Venezuela attempts, without any support, to reinterpret Article 52(1)(e) to suggest that the Tribunal must at least have addressed any arguments that could impact its reasoning. However, Conoco views this asa step-by-step attempt to resuscitate the arbitration, searching for arguments that Venezuela believes could have had such impact.[562]

B.1(4) THE COMMITTEE'S ANALYSIS OF THE GROUNDS RELATED TO THE TRIBUNAL'S EXERCISE OF JURISDICTION IN RELATION TO THE DUTCH COMPANIES CLAIMS AND ALLEGED TREATY ABUSE: MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS

B.1(4)(1) THE COMMITTEE'S ANALYSIS OF MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS AS ARGUED BY VENEZUELA (CURTIS)

MANIFEST EXCESS OF POWERS

477. ConocoPhillips' investment in Venezuela in the 1990s and 2000s was restructured in 2005 and 2006 with the incorporation in the Netherlands of CPZ and CGP on 26July 2005, and CPH on 17 July 2006. The Applicant contends that these companies were corporations of convenience formed for the sole purpose of gaining access to ICSID arbitration under the Treaty. In the Applicant's view, by upholding jurisdiction over the ConocoPhillips Parties under the dispute settlement provisions of Article 9 of the Treaty, the Arbitral Tribunal gave effect to Claimants' strategy and condoned treaty abuse, thereby, manifestly exceeding its powers.[563]

478. The Arbitral Tribunal discussed the ICSID awards in *Aucoven v. Venezuela*, *Tokios Tokeles v. Ukraine*, *Aguas del Tunari v. Bolivia*, *Phoenix v. Czech Republic* on which the Applicant notably relies in support of its manifest excess of powers criticism.[564] The Arbitral Tribunal identified in these awards a "*growing body of decisions placing some limits on the investor's choice of corporate form, even if it complies with the relevant technical definition in the treaty text*".[565] The Arbitral Tribunal has not eschewed discussion of legal authority, despite the submission by the Applicant that

[562] Rejoinder (Conoco), ¶ 304.

[563] Memorial (Curtis), ¶¶ 762-769.

[564] Memorial (Curtis), ¶¶ 773-781.

[565] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 274.

the Arbitral Tribunal only paid lip service to the principle that a restructuring of an investment for the sole purpose of gaining access to ICSID constitutes treaty abuse where the transfer is made before a claim arises but when a dispute is foreseeable.[566]

479. The grounds of annulment enumerated in Article 52 make no distinction between issues of jurisdiction and issues on the merits. None is specific to jurisdiction. *Ad hoc* committees consider jurisdictional questions like any other issue for the purpose of Article 52.[567] An arbitral tribunal's findings on treaty abuse cannot be reviewed and overruled for errors in fact or law:

> *"It is not the role of the annulment Committee to review the Tribunal's specific findings on the relevant facts of the case to which the Tribunal applied the concept of abuse of rights. Neither is it the role of the annulment Committee to assess whether the evidence gathered by the Tribunal justify a finding of abuse of rights. This would transform the Committee into an appellate body*."[568]

It is within such context that the Committee examines Venezuela's challenge of jurisdiction.

480. The 2013 Decision already dealt with Venezuela's arguments on treaty abuse. The Applicant proposes a chronology of events starting on 10 October 2014 (with Venezuela's announcement of the royalty increase) which the Tribunal did not accept as sufficiently supporting its contention that the Conoco Parties' expropriation claim was within the reasonable contemplation of the investor at the time of the restructuring.[569] The Tribunal considered that at the time of the restructuring, "ConocoPhillips had withdrawn its only claim of breach and had done that in the clearest of terms."[570] The Tribunal then continued: "[i]t was not until May 2006 that

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[566] Reply (Curtis), ¶ 426.

[567] **A/RLA 100 [Curtis]**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, Decision on the Application for Annulment, 19 October 2009, ("*MCI Annulment Decision*"), ¶ 55; *Tza Yap Shum Annulment Decision*, ¶ 79; *Alapli Annulment Decision*, ¶ 238; **A/RLA-75 [Curtis]**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶ 101.

[568] *Orascom Annulment Decision*, ¶ 317. See Counter-Memorial (Conoco), ¶ 748.

[569] Memorial (Curtis), ¶ 789.

[570] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278.

the first of the actions which were later to be the subject of the letters from ConocoPhillips notifying the Venezuelan government of a dispute, was taken."[571] The Committee's mission under Article 52(1)(b) is to check the validity of the Award as it was decided by the Arbitral Tribunal. Whether the Arbitral Tribunal's conclusions on the expropriation claim actually "*defies credulity*"[572] is an invitation to the Committee to make its own appraisal based on the chain of events presented by the Applicant in its submissions on annulment. It is not within the Committee's remit to reach its own conclusion on jurisdiction on the basis of facts reargued by the Applicant in the annulment proceeding and, in case the Committee would find, as invited by Venezuela, that the expropriation claim was reasonably foreseeable for the investors, conclude that the Tribunal committed a manifest excess of powers.[573] If such were our mission, the word "manifest" would only depict the discrepancy between the Committee's own reassessment of the facts in light of the foreseeability test and the assessment made by the Arbitral Tribunal.

481. Venezuela argues that the Arbitral Tribunal applied a wrong test. It ignored the foreseeability test which it earlier acknowledged as germane to treaty abuse and applied instead the test for jurisdiction *ratione temporis*.[574] The impugned passages (paragraphs 278-279) of the 2013 Decision which follow the Arbitral Tribunal's recapitulation of the significant events from 10 October 2004 to 26 June 2007, read:

> "*Against that chronology and bearing in mind the matters weighed by other tribunals considering objections to jurisdiction made on the basis of 'treaty abuse', this Tribunal makes a number of observations. The first is that the transfers of ownership in 2005 and 2006 did not attempt to transfer any right or claim arising under ICSID or a BIT from one owner to another. Indeed, at the time of the transfers, ConocoPhillips had withdrawn its only claim of breach and had done that in the clearest of terms. It was not until May 2006 that the first of the actions, which were later to be the*

[571] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278.

[572] Memorial (Curtis), ¶ 790.

[573] Reply (Curtis), ¶ 423: "On that issue, it is difficult to understand how the Tribunal could avoid the conclusion that the restructuring was a classic example of treaty abuse. The Tribunal did not deal with the material facts set forth in the table in paragraph 789 of the Memorial, which were not in dispute. One cannot look at that table and come to the conclusion that the migration process initiated by Decree-Law 5.200 was not foreseeable."

[574] Reply (Curtis), ¶¶ 433, 434, 436.

> *subject of the letters from ConocoPhillips notifying the Venezuelan government of a dispute, was taken. The Tribunal later considers the significance of the date of that measure and of 29 August 2006 for the CPH claim.*
>
> *It is the case, to turn to a second matter, that the only business purpose of the restructuring, as acknowledged by the Claimants' principal witness on this matter, was to be able to have access to ICSID proceedings. But as against that, as already noted, no claim had been made at the time of the restructuring and, subject to the qualification made in respect of the claims by CPH about the two measures taken in 2006, none was in prospect at the times of the restructurings*."[575]

482. The Committee considers that the Arbitral Tribunal was not testing temporal jurisdiction in relation to various critical dates such as when the dispute arose, when the investment was made, or the date of the alleged breach. As stated in paragraph 278 of the 2013 Decision,[576] the Tribunal examined the temporal jurisdiction regarding the CPH claim based on the increase in income tax in respect of the dates of the alleged breach and of the acquisition of ownership interest by CPH.[577] By claiming that the Arbitral Tribunal should have addressed foreseeability of the income tax claim and the migration process for the associations[578] the Applicant tries to substitute its own assessment of the circumstances of the foreseeability of the dispute to that of the Tribunal, without demonstrating an excess of powers.

483. The Applicant last alleges[579] that the fact that the Tribunal attached importance to the ConocoPhillips Parties' continued expenditure on the Projects after the restructurings, which the Tribunal singled out as a "*major factor*", does not mean that ConocoPhillips did not foresee disputes coming. The Tribunal took the opposite view by considering ConocoPhillips' continued investment in the project as telling evidence against any finding of treaty abuse.[580] The Applicant's challenge is an invitation to review the

[575] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 278-279.

[576] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278 ("*The Tribunal later considers the significance of the date of that measure and of 29 August 2006 for the CPH claim*.")

[577] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 287-289.

[578] Reply (Curtis), ¶ 436.

[579] Reply (Curtis), ¶¶ 437, 438.

[580] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 280.

application of the foreseeability test undertaken by the Tribunal against the chronology of events adopted in the 2013 Decision in consideration of "*the matters weighed by other tribunals considering objections to jurisdiction made on the basis of 'treaty abuse'*."[581] The Tribunal's findings of fact are final and immune from review unless there has been a breach of rules of natural justice in the fact-finding process in the arbitration, which is not contended here. The wrongful application of the treaty abuse test argument overlaps with Venezuela's attack on treaty abuse for failure to state reasons which the Committee now examines.

FAILURE TO STATE REASONS

484. The requirement of reasons in ICSID Convention Article 48(3) enables an *ad hoc* committee to review the award under Article 52(1)(e) as a safeguard against arbitrariness. As stressed by the *Wena ad hoc* committee, the purpose of Article 52(1)(e) is not to have the award reversed on its merits, it is to allow the parties to understand the arbitrators' decision.[582]

485. The Applicant contends that, due to a lack of cogent explanations, the Tribunal's conclusion on the absence of treaty abuse does not align with the facts found in the 2013 Decision, the admissions made by the Conoco Parties, or the legal principles relied upon. The Applicant also argues that the Tribunal failed to address the foreseeability of the expropriation claim, asserting that jurisdiction cannot be exercised by virtue of a restructuring into a treaty country when the claim is foreseeable.[583]

486. The Committee finds that the reasons the Tribunal used to compare the chronology of the ConocoPhillips Companies restructuring with the significant events between October 2004 and June 2007 - and to infer that no claim had been made and none was in prospect at the time of the restructurings- are clear and not contradictory. Furthermore, they are sufficient to explain the conclusion reached by the Arbitral Tribunal on the absence of treaty abuse, without conflating this with jurisdiction *ratione*

[581] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278.
[582] *Wena Annulment Decision*, ¶ 83.
[583] Memorial (Curtis), ¶¶ 791-793.

temporis, which concerns the temporal scope of f treaty protection. At paragraphs 278 and 279 of the 2013 Decision, the Tribunal assessed the facts to determine whether the specific dispute put before it already existed or was foreseeable at the time of the restructuring. The Tribunal viewed ConocoPhillips's January 2005 withdrawal of the claim in relation to the 2004 increased royalty rates as a separate dispute, distinguishing from the specific dispute brought before the Tribunal concerning expropriation. This follows from the statement that "[i]t was not until May 2006 that the first of the actions, **which were later to be the subject of the letters from ConocoPhillips notifying the Venezuelan government of a dispute**, was taken" (emphasis added).[584]

487. On the alleged failure to address the foreseeability of the expropriation claim, the Committee first notes that tribunals are not required to deal with every argument made. However, the Committee considers that this Tribunal addressed the argument. At paragraph 279 of the 2013 Decision, the Tribunal weighed the fact that "no claim had been made at the time of the restructuring and […] none was in prospect at the times of the restructurings" against the admitted fact that the restructuring's only business purpose was ICSID access.[585] The Committee's view is that the Tribunal gave sufficient reasons which enable a reasonable reader to understand that the Decision on Jurisdiction was not guided by arbitrariness.

B.1(4)(2) THE COMMITTEE'S ANALYSIS OF MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS AS ARGUED BY VENEZUELA (DE JESÚS)

MANIFEST EXCESS OF POWERS

a) Regarding the failure to apply the law.

488. With regard to the allegation of treaty abuse by the Dutch companies, the Applicant remarks that the Arbitral Tribunal considered the general principles of international law mentioned at Article 9(5) of the BIT on the law applicable to the dispute as constituting the primary source of law. Yet, it is impossible in the Applicant's view, to detect the

[584] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278.
[585] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 279.

actual law, if any, which the Arbitral Tribunal applied to resolve the jurisdictional objection.[586] To support its contention, the Applicant alleges that the Arbitral Tribunal oversimplified the Parties' position on Treaty abuse at paragraphs 268-270 (first step) before making a broad presentation of the standards adopted by other tribunals to conclude that the treaty abuse doctrine forms part of the applicable international law at paragraphs 271-274 (second step). The Arbitral Tribunal immediately listed the facts at paragraphs 276 and 277 without measuring them against the above broad standards (third step). The Arbitral Tribunal next made three conclusory statements at paragraphs 278-280 without linking them to the standard that it had previously identified (fourth step). Finally, the Arbitral Tribunal decided at paragraph 281 that no treaty abuse had occurred (fifth step). In undertaking this five-step approach, the Arbitral Tribunal failed to analyse or determine the rules through which any of the six broad standards it mentioned take concrete form and the way they operate remained wholly unexplored. In fact, the Arbitral Tribunal failed to point to which (if any) of those principles it effectively applied to the present dispute.[587]

489. Since the first prong of the treaty abuse challenge rests on failure to apply the proper law, it is important for the Committee to first clarify that *how* a tribunal applies the applicable law is not a matter falling under Article 52(1)(b), which does not allow an appeal on the substantive correctness of the award. It is noteworthy that, the Arbitral Tribunal considered at paragraphs 271-274 the investor-State case decisions and other decisions of international organs discussed by the Parties before drawing the consequences for treaty abuse of the standards identified in these decisions, such as "*good faith*," "*détournement de pouvoir*," "*abuse of treaty right*," "*misuse of the system of international investment protection*," "*abuse of powers*," and "*equality of position*."[588]

490. The Arbitral Tribunal also recalled the chronology of the incorporation of the Conoco Dutch companies in 2005-2006 and the chronology of the significant measures adopted

[586] Memorial (De Jesús), ¶¶ 150-152, 160; Reply (De Jesús), ¶ 272.

[587] Memorial (De Jesús), ¶ 159.

[588] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 273.

by the Venezuelan public powers throughout the years 2004-2007 (at paragraphs 276 and 277). The Tribunal concluded at paragraph 279 that "*no claim had been made at the time of the restructuring and, subject to the qualification made in respect of the claims by CPH about the two measures taken in 2006, none was in prospect at the times of the restructurings.*" It supported its dismissal of the jurisdictional objection by referencing ConocoPhillips' continued investment in the project after the restructuring, which it considered at paragraph 280 as evidence "*telling strongly against any finding of treaty abuse*." The Applicant indeed alleges that the Tribunal "*erred*" in deciding that although the ConocoPhillips companies had withdrawn their reserve regarding some claims prior to the restructurings, the dispute was not foreseeable at the time in 2005-2006.[589] In essence, the Applicant takes issue with the Tribunal's "*close examination*"[590] of all the circumstances of the case in relation to the identified legal standards on treaty abuse. It challenges the application of the proper law to the facts as the Arbitral Tribunal found them, which is wholly distinct from a failure to apply the proper law within the meaning of Article 52(1)(b).

b) Regarding the jurisdiction assumed over the claims of the Dutch companies CPH and CGP

491. The Applicant's second prong of its challenge on treaty abuse is based on usurpation of powers. Reminiscent of its submissions in the arbitration,[591] the Applicant says that the facts acknowledged by the Arbitral Tribunal at paragraphs 188, 191, 201 and 277.a of the 2013 Decision support the conclusion that the ConocoPhillips companies considered the dispute to have emerged as early as in 2004 and that they asserted claims in relation to this dispute well before the restructurings.[592] The Applicant acknowledges that the Arbitral Tribunal noted at paragraph 277.a of the 2013 Decision withdrawal of the protest regarding the royalty tax increase on 14 January 2005. Notwithstanding the Tribunal's finding that no claim existed or was in prospect at the times of the

[589] Reply (De Jesús), ¶ 277.

[590] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 275.

[591] Memorial (De Jesús), ¶¶ 165-169.

[592] Memorial (De Jesús), ¶¶ 170-177. See also ¶¶ 165-169.

restructurings,[593] the Applicant urges the Committee to consider the withdrawal of a reservation of rights as only affecting one's rights to assert claims in relation to a controversy but not as erasing the factual situation having given rise to the claim which, the Applicant submits, made the dispute foreseeable.[594] In its view, by acknowledging that the Minister of Energy initiated on 12 April 2005 the migration process (which had been hinted at in the 2001 New Organic Law Hydrocarbons), the Tribunal necessarily acknowledged that on 12 April 2005 the process giving rise to the dispute referred to arbitration, *i.e.*, an unsuccessful migration process, had started.[595] The Applicant further invites the Committee to interpret ConocoPhillips' notification on 31 January 2007 regarding the existence of a dispute under the Investment Law and the Treaty demonstrating that the ConocoPhillips Parties themselves considered the dispute to had already emerged in 2004.[596]

492. The Committee cannot accept Venezuela's invitation to reassess the facts of the case which escapes its powers under Article 52(1)(b). Arbitration Rule 34(1) provides that the arbitral tribunal is the judge of the admissibility of any evidence adduced and of its probative value. Evaluation of the evidence, thus, falls within the province of the arbitral tribunal.[597]

493. The Applicant's statement that the Committee must perform "*a thorough analysis*" of all factual and legal aspects of the case[598] is too ambitious in the context of Article 52(1)(b). A manifest excess of power inquiry focuses on the award motives and dispositive sections which come under the committee's scrutiny, rather than on the underlying dispute, as doing so would turn annulment into an appeal of fact and law. Any *de novo* review of the case on jurisdiction or on the merits is excluded. The Applicant confused the contours of Article 52 through its invocation of a "*reasonable*

[593] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 279.

[594] Memorial (De Jesús), ¶ 172, footnote 190.

[595] Memorial (De Jesús), ¶ 173.

[596] Memorial (De Jesús), ¶ 171.

[597] **A/CLA-63**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment, 25 March 2010, ("*Rumeli Annulment Decision*"), ¶ 139.

[598] Memorial (De Jesús), ¶¶ 140, 144.

observer" to assess an arbitrator's bias, to review the entire file, particularly a May 2005 Freshfields pamphlet, to prove that the measures implemented in the oil and gas sector since 2001 could give rise to a dispute.[599] The Committee finds that the Applicant wishes for the Committee to substitute the Applicant's views on the existence of a dispute prior to the incorporation of the Dutch companies for those of the Arbitral Tribunal, without demonstrating an excess of powers. This is impermissible and as such, the Committee needs not address whether the alleged excess was manifest.

FAILURE TO STATE REASONS

494. The Applicant declares that it is impossible to understand with the reasons provided in paragraphs 276-280 of the 2013 Decision which motivated the Arbitral Tribunal's rejection of the jurisdictional challenge concerning the Dutch companies.

495. The Applicant would have liked to read in the 2013 Decision why the Arbitral Tribunal did not share the scepticism of other arbitral tribunals regarding the restructuring chain of ownership in the absence of any business purpose.[600] It would also like to know why the Tribunal drew its legal findings without assessing whether the Conoco Parties, who considered that the expropriation process began in 2004, were not anticipating the prospect of a dispute in circumstances where the Ministry of Hydrocarbons had officially announced months before the restructuring that the migration process envisaged by the 2001 New Organic Law had been initiated for the Conoco projects and that, unless the migration was successful, Venezuela would exercise its sovereign powers over its resources.[601] It would have liked to see explanations as to why the "*major factor*" of Conoco' continued investment entailed an absence of treaty abuse.[602]

[599] Reply (De Jesús), ¶¶ 291, *see also* ¶¶ 294, 303.
[600] Memorial (De Jesús), ¶ 213.
[601] Memorial (De Jesús), ¶ 215.
[602] Memorial (De Jesús), ¶ 216.

496. The Committee recalls, as accepted by other *ad hoc* committees, that while the arbitral tribunal's reasoning may be terse and the reasons succinctly expressed,[603] the Convention does not prescribe for the way in which the reasons are to be expressed in the award. Provided that the parties understand the reasoning, [604] its persuasiveness escapes review. The Applicant's challenge raises considerations that belong to an appeal procedure and are inadmissible in an annulment review. To illustrate the point, we find that the Applicant's remark[605] - the Arbitral Tribunal's allegedly isolated finding that the restructurings "*did not attempt to transfer any right or claim arising under ICSID or a BIT from one owner to another*" from the "*circumstances of the case*" at paragraph 278- disregards paragraph 275 where the Tribunal expressly sated that the "*circumstances of the case*" would be examined to determine the existence of treat abuse. The Applicant's remark serves as a direct invitation for the Committee to re-evaluate the consequences attributed by the Arbitral Tribunal to the factual chronology at paragraphs 276-277, particularly, the Arbitral Tribunal's inference that there was neither an actual nor a prospective dispute at the times of the restructurings, based on the fact that ConocoPhillips Companies withdrew their October 2004 protest regarding the royalty tax increase on 14 January 2005.[606]

497. The contradiction raised by the Applicant between the fact that the transfers of ownership according to the Tribunal "*did not attempt to transfer any right or claim arising under ICSID or a BIT*"[607] and the fact that CPH has asserted claims in the arbitration regarding measures that had occurred prior to its incorporation[608] confuses the issue of treaty abuse with that of temporal jurisdiction of the CPH claims examined

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[603] **A/CLA-95 / A/RLA-189 [Curtis]**, *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 March 2019, ("*Churchill Annulment Decision*"), ¶ 254.

[604] *Wena Annulment Decision*, ¶¶ 75-83, 79-80.

[605] Memorial (De Jesús), ¶ 212.

[606] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 277 "*a. 10 October 2004: the royalty rate increase announced on Venezuelan television, which was protested by letter from ConocoPhillips on 22 November 2004, following which the protest was withdrawn on 14 January 2005*."

[607] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278.

[608] Memorial (De Jesús), ¶ 209.

in other sections of the 2013 Decision.[609] The Applicant further contends that there is a contradiction between stating at paragraph 278 that a claim was made (although it had been withdrawn) prior to the restructurings and stating at paragraph 279 that no "*claim was made […] prior to the restructurings*."[610] The Committee disagrees. The reasoning of the above paragraphs enables the reader to understand the Tribunal's motives. The ConocoPhillips Companies protested in November 2004 against the royalty tax increase announced but withdrew their protest in January 2005, before the restructuring process began. The inescapable conclusion is that at that time no claim existed. As the *ad hoc* Committee in *Wena* clarified, "*reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision*."[611]

498. The reproach made against the Arbitral Tribunal for drawing its legal findings on treaty abuse without assessing the key facts of the case -specifically, the announcement made by the Minister of Hydrocarbons months before the restructurings that the Republic would exercise its sovereign powers over its resources unless the migration process announced in 2001 was successful, is an inadmissible criticism of the Tribunal's assessment of evidence.[612] The assertion that the Tribunal failed to consider the restructurings with scepticism, as other tribunals have done[613] also constitutes an impermissible review of how the Tribunal assessed the facts and concluded that no contentious situation existed or was in prospect at the time of the restructuring.[614]

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[609] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 289: "*While the income tax increase was enacted before CPH was inserted into the chain of ownership in the following month, September 2006, the increase did not come into effect until 1 January 2007. Which date is decisive? The date of the enactment of the law providing for the increase or the date it took effect in the law? In principle, the Tribunal considers that a breach of obligation does not occur until the law in issue is actually applied in breach of that obligation and that cannot happen before the law in question is in force. In this particular context the relevant date was 1 January 2007, some months after CPH acquired its ownership interest*."

[610] Memorial (De Jesús), ¶ 214 and footnote 219.

[611] *Wena Annulment Decision*, ¶ 81.

[612] Memorial (De Jesús), ¶ 215.

[613] Memorial (De Jesús), ¶ 213.

[614] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 274, 279.

499. Arbitration Rule 34 entrusts the arbitral tribunal as the sole judge of the probative value of evidence; unless essential to resolve the question at issue, tribunals are not required to provide reasons on each piece of evidence which is not relied upon by them. The Applicant raises the letter of ConocoPhillips Latin America President regarding the occurrence of the expropriation process which came out in 2004.[615] The dispute notification letter of 31 January 2007 has a subtitle reading "*Beginning In 2004, The Venezuelan Government Adopted A Series Of Measures That Severely Impaired ConocoPhillips' Investments In Venezuela And Frustrated Its Legitimate Expectations In Respect Of These Investments*." The only 2004 event which is mentioned is the October 2004 increase of the royalty payment followed by the indication that "*ConocoPhillips agreed to waive its right to contest this action in January 2005 in good faith* […]"[616] That event was also mentioned by the Tribunal in its chronology of events at paragraph 277.a and the omission of the letter itself could not affect the Tribunal's reasoning. The Tribunal inferred from Conoco's waiver the inexistence of any dispute at the times of the restructurings: "*Indeed, at the time of transfers, ConocoPhillips had withdrawn its only claim of breach and had done that in the clearest terms.*"[617] In the same vein, the Applicant argues that the Tribunal failed to explain how the May 2005 Freshfield pamphlet was not relevant in assessing whether the dispute described in that document was foreseeable following the release of the brochure "*Venezuela: Proposed Measures Against Oil and Gas Investors*."[618] It was incumbent upon Venezuela to bring to the Tribunal's attention the allegedly decisive nature of the Freshfield's four pages communication leaflet[619] in relation to Conoco's decision to restructure its investment to circumvent the Treaty's jurisdictional clause. It is not the Committee's task to determine the relevance of the evidence produced in the arbitration as that would turn the Committee into an appellate body.

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[615] Memorial (De Jesús), ¶ 210. **A/C-69** (previously **C-36),** *Mr. Lyons letter* (footnote 217).

[616] **A/C-69** (previously **C-36),** *Mr. Lyons letter*.

[617] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 278.

[618] Reply (De Jesús), ¶ 333.

[619] **R-14**, *Freshfields Bruckhaus Deringer, Venezuela: Proposed Measures Against Oil And Gas Investors* (May 2005).

500. The Applicant denounces the imbalance between paragraphs 216, 217 and 218 which recapitulate the Parties' respective positions on jurisdiction over the Dutch companies and the forty paragraphs in the Parties' submissions dedicated to this jurisdictional objection. The Applicant alleges this imbalance as an indication that the Arbitral Tribunal preferred to follow its preconceived view and infers that the Majority's "*conclusory postulations make evident a lack of legal reasons*."[620] The Applicant further alleges a lack of connection between the Tribunal's jurisdictional finding and the catalogued standards at paragraphs 272 and 273 for detection of treaty abuse identified in ICSID and other international cases. Although the Tribunal recognized the limits on the investor's choice of corporate form at paragraph 274, the Applicant argues that the Tribunal failed to make further reference to any of the standards. Instead, it only presented a chronology of events, followed by three observations: firstly, at paragraph 278, that the restructurings "*did not attempt to transfer any right or claim arising under ICSID or a BIT from one owner to another*;" secondly, at paragraph 279, the absence of business purpose was irrelevant because "*no claim had been made at the time of the restructurings*" and "*none was in prospect*;" thirdly, at paragraph 280, the "*major factor*" consisting of Conoco's wish to continue carrying out the projects entails an absence of treaty abuse.[621] The Applicant considers that the reader's inability to follow the reasoning results from the Tribunal's failure to explain the meaning of the "*good faith*," "*détournement de pouvoirs*," "*abuse of treaty rights*," "*misuse of the system*," "*abuse of powers*," and "*equality of position*," standards, making it impossible to understand why these standards were considered relevant or whether they were applied at all in the Tribunal's reasoning.[622]

501. The Committee's reading is that the Tribunal first recounted at paragraphs 272-273 the decisions which recognized the concepts in relation to the misuse of law. It then added at paragraph 274 the equality of position between the parties as an additional factor to

[620] Memorial (De Jesús), ¶ 200.

[621] Memorial (De Jesús), ¶¶ 203-204.

[622] Memorial (De Jesús), ¶ 202 ; Reply (De Jesús), ¶ 328.

determine whether the doctrine of abuse should be invoked in the actions of a corporate body like the Conoco companies. The Tribunal then declared at paragraph 275:

> "*Whether those limits have been breached must turn on a close examination of all of the circumstances of the case, circumstances to which the parties in this arbitration have given particular attention. The Tribunal now turns to that examination. It will do that bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one.*"[623]

502. Venezuela argues that at this juncture such close examination was not performed by the Arbitral Tribunal,[624] an argument this Committee has earlier dispelled given it constitutes an attempt to re-evaluate the Tribunal's judgment on evidence. The Arbitral Tribunal summarized the Parties' respective contentions, referred to the relevant legal principles and applied the relevant legal authorities. The Tribunal's reasoning on the absence of treaty abuse begins in paragraph 275 and reads without difficulty: the circumstances of the restructuring and the events which preceded the submission of the Request for Arbitration are detailed at paragraphs 276-277, and are contextualised with the legal principles of treaty abuse. This ultimately enables the Tribunal to conclude at paragaphs 278-279 that no claim existed or was in prospect at the time of the restructurings.

503. For the Tribunal, the existence of Conoco's substantial investment *after* the restructuring further demonstrates that Conoco's intention was not to abuse the ICSID Process. As the ConocoPhillips Parties remark,[625] an investor would have disengaged if a contentious situation had existed. Having drawn the limits of an investor's choice of corporate form and found that in the present case, these had not been exceeded, the Arbitral Tribunal explained to the Parties how and why it rejected Venezuela's jurisdictional objection considering the facts of the case and the applicable law on treaty abuse.

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[623] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 275.

[624] Memorial (De Jesús), ¶ 205.

[625] Counter-Memorial (Conoco), ¶ 761.

B.2 GROUNDS RELATED TO THE TRIBUNAL'S EXERCISE OF JURISDICTION OVER INDIRECT INVESTMENTS

B.2(1) MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS IN RELATION TO THE TRIBUNAL'S JURISDICTIONAL FINDINGS ON THE INDIRECT INVESTMENTS AS ARGUED BY VENEZUELA (CURTIS)

MANIFEST EXCESS OF POWERS (CURTIS)

504. Venezuela notes that the BIT does not cover indirect investments, as such the Tribunal manifestly exceeded its powers when exercising jurisdiction over the indirect investments of CHP and CGP.

505. The BIT's Article 1(a) defined "investment" as "every kind of asset" and enumerates five categories within its scope. In its 2013 Decision, the Tribunal found that the BIT covered indirect investments because the BIT's definition of "investment" is written in broad terms and is "clear beyond question." Venezuela argues that the breadth of the definition only goes to the type of assets covered, not how the assets are held. The logical interpretation of "investment" is that it covers assets of foreign nationals asserting a claim against a Contracting Party, not assets indirectly owned or controlled through subsidiaries of that national.[626]

506. The Tribunal erroneously assumed that there was no difference between a treaty expressly covering "direct or indirect" investments, as many treaties do, and one that does not. However, when Venezuela and the Netherlands intended to grant treaty protection to indirect investments, they did so expressly in the relevant instrument. Other treaties they entered into explicitly refer to "direct or indirect" investments (for example, Venezuela's bilateral investment treaties with Canada, Paraguay, France and Belgium-Luxembourg, or the Netherlands's bilateral investment treaties with Hong Kong, Kuwait and Tunisia).[627]

507. Venezuela argues that the BIT's Contracting Parties were conscious of the need to incorporate the concept of indirectness when they wanted to depart from the normal

[626] Memorial (Curtis), ¶ 798.

[627] Memorial (Curtis), ¶ 797.

meaning of terms used, but they did so only with respect to the term "national" in Article 1(b)(iii). Under that provision Dutch nationals can structure their investments through an entity owned or controlled by them even in other countries, but the entity bringing the claim must still be the direct owner of the investment.[628]

508. The Tribunal ignored the distinction between investment treaties expressly covering direct or indirect investments and those, such as the BIT, that do not, thereby, violating the principle "*verba aliquid operari debent*" as a canon of treaty interpretation. The Tribunal's interpretation was illogical, given the fact that the same countries negotiated other treaties expressly referring to "indirect" investments, and it could not have simply assumed that the same country intends the same result in other treaties which omit such specific language.[629]Venezuela then refers to scholars who have recognized the significance of the presence or absence of language expressly incorporating the concept of indirect investment.[630]

509. Venezuela also asserts that the Tribunal failed to deal with the issue that the BIT establishes that the obligations of a Contracting Party run to nationals of the other Contracting Party only with respect to their investments located in the territory of the first Contracting Party. Venezuela refers to the BIT's recitals, to Articles 2, 4 and 7, all of which, refer to investments made in the territory of the other Contracting Party. This, Venezuela submits, indicates that the BIT protects entities having an investment in Venezuela, and not their various parent companies holding interests in entities in other countries.[631]

510. Venezuela argues that by considering that the Treaty was to be interpreted as if the words "directly or indirectly" were included in Article 1(a), the Tribunal rewrote the BIT to expand its scope.[632]

[628] Memorial (Curtis), ¶ 798; Reply (Curtis), ¶ 444.
[629] Memorial (Curtis), ¶ 800; Reply (Curtis), ¶ 447.
[630] See Memorial (Curtis), ¶ 801.
[631] Memorial (Curtis), ¶ 803.
[632] Memorial (Curtis), ¶ 805.

511. Further, the Tribunal wrongly relied on *Fedax v. Venezuela*, stating that it supported the "plain meaning" of Article 1 of the Treaty advocated by the Conoco Parties when the comment of the Fedax tribunal was related to the issue whether the type of asset constituted an investment, whereas here the issue is whether the purported investor owned the investment at issue.[633]

FAILURE TO STATE REASONS (CURTIS)

512. Venezuela argues that the reasoning of the Tribunal with respect to the protection of indirect investments under the BIT cannot be followed "from point A. to point B." Venezuela asserts that the Tribunal concluded, without any analysis, that "the words of the definition [of Article 1] are clear beyond question" and there was "no need to interpret" the provision. It offered no explanation why absent the words "directly or indirectly," Article 1 also afforded protection to indirect investments, when the literal and logical interpretation of the term "investment" is that it only covers assets owned directly by persons falling within the definition of the term "nationals." In that exercise, the Tribunal did not meaningfully take into consideration Venezuela's and the Netherlands' treaty practice.[634]

513. In addition, the Tribunal failed to address Venezuela's argument that the BIT's broad definition of "investment" was merely relevant to the rights or assets afforded protection, but not to the way such rights or assets are held (*i.e.*, directly or indirectly). This was a fundamental point omitted by the Tribunal, which constitutes a failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention, an additional ground to annul the Award with respect to the claims of CPH and CGP.[635]

[633] Memorial (Curtis), ¶ 806; Reply (Curtis), ¶ 448.

[634] Memorial (Curtis), ¶ 809, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 285; Reply (Curtis), ¶ 449.

[635] Memorial (Curtis), ¶ 810; Reply (Curtis), ¶ 449.

B.2(2) MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS IN RELATION TO THE TRIBUNAL'S JURISDICTIONAL FINDINGS ON THE INDIRECT INVESTMENTS AS ARGUED BY VENEZUELA (DE JESÚS)

MANIFEST EXCESS OF POWERS (DE JESÚS)

514. Venezuela argues that the Tribunal manifestly exceeded its powers when (a) it failed to apply the applicable law and (b) usurped powers it did not have over the direct investments.[636]

a) Regarding the failure to apply the law

515. Venezuela argues that the Tribunal failed to perform any form of interpretation of the BIT's relevant terms when it found that the BIT covered *indirect* investments by CPH and CGP in the Hamaca and Corocoro Projects.

516. Venezuela notes that the indirect nature of the investments was undisputed. Also, each Party made submissions on the interpretation of the relevant terms of the BIT under Article 31 of the Vienna Convention on the Law of the Treaties ("**VLCT**"), which, Venezuela submits, was the applicable law for the interpretation of the BIT. Yet, the Tribunal failed to apply the VCLT, or any other law, to address Venezuela's jurisdictional objection regarding the indirect nature of the investments of CPG and CGP.[637]

517. Venezuela submits that in its 2013 Decision, the Tribunal based its findings concerning CPH and CGP's indirect investments relying exclusively on "the words of Vattel,"[638] which were not submitted by the Parties into the record, and which do not constitute "principles of international law," applicable to resolve the dispute under Article 9(5) of the BIT.

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[636] Reply (De Jesús), ¶ 308.

[637] Memorial (De Jesús), ¶¶ 184-187; Reply (De Jesús), ¶¶ 309, 310.

[638] Memorial (De Jesús), ¶ 188, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 285.

518. In its Reply, Venezuela counters that the "tenability" test proposed by Conoco is misplaced. The relevant question is not if other tribunals, applying other rules of law to other facts have also considered indirect investments as qualifying for protection under the applicable instrument. The issue is whether the Tribunal applied the applicable law to resolve the jurisdictional issue in the arbitration. Venezuela emphasizes that its position is not that the Tribunal misapplied the applicable law to the issue of jurisdiction, but that it failed to apply the applicable law at all. Also, Conoco's argument that the Tribunal identified that BIT Articles 1 and 9 should apply to the jurisdiction challenge fails, since applying the law requires more than just pointing to the law. Finally, Venezuela submits that Conoco's defense that the Tribunal applied the VCLT by referring to *Fedax* is misplaced. In *Fedax*, although the tribunal mentioned the VCLT to discuss the meaning of "investment" under ICSID Convention Article 25, the term "investment" was purportedly construed by the tribunal under Article I of the relevant Treaty.[639]

b) Regarding the usurpation of powers

519. Venezuela also argues that the Tribunal manifestly exceeded its powers when it concluded that the BIT covered indirect investments of CPH and CGP. Venezuela's position was that (a) the BIT only covered investments "located in the territory" of Venezuela. In this regard, Venezuela pointed to the BIT's preamble, and Articles 2, 4 and 7; and (b) the BIT's exclusion of indirect investments was consistent with the BIT's own purpose and object, since "no substantive benefit is achieved by permitting companies to utilize layers of holding companies to manufacture multiple claimants making duplicative claims for alleged treaty violations."[640]

520. On the issue of the BIT not covering indirect investments, Venezuela "incorporate[d] by reference" the submissions from its Memorial on Objections to Jurisdiction

[639] Reply (De Jesús), ¶¶ 311-316.

[640] Memorial (De Jesús), ¶ 191, citing **A/R-49 [De Jesús] / A/R-8 [Curtis]**, Respondent's Rejoinder on the Merits, 1 February 2010, ("*Respondent's Rejoinder*"), ¶ 140; Reply (De Jesús), ¶ 320.

(paragraphs 172-181).[641]For example, among those arguments, Venezuela submitted that although the term "investment" in Article 1(a) of the BIT was broad and encompasses "every kind of asset," unlike other treaties executed by Venezuela and the Netherlands, it did not cover assets owned or controlled "directly or indirectly" by a national of the other Contracting Party. Venezuela explained that the omission was meaningful considering that Venezuela's treaties with Canada, Paraguay, France, and Belgium-Luxembourg, all of which explicitly cover investments in Venezuela held *indirectly* by a national of those countries.[642]

521. Venezuela maintains that the Tribunal completely failed to engage with its arguments and to apply the BIT's definition of investment, to the extent that there is no reasoning at all on the issue.[643] Venezuela counters Conoco in that it is not asking the Committee to make a *de novo* review, which as explained *supra* (paragraph 457) it is a restrictive position on the Committee's power to review the Tribunal's findings.[644]

522. Therefore, Venezuela asks that the Committee annul the passages of the 2013 Decision dealing with CPH and CGP's indirect investments and the claims related to the same pursuant to Article 52(1)(b) of the ICSID Convention. *Par voie de conséquence,* it requests that the Committee also annul the passages of the Interim Decision and the Award dealing with claims related to CPH and CGP's indirect investments.[645]

FAILURE TO STATE REASONS (DE JESÚS)

523. The Tribunal did not provide any reason to the interpretation of the BIT. It dealt with the matter in five paragraphs (282-286) in the 2013 Decision, and did not address Venezuela's objection on the issue of indirect investments of CPH and CGP. Venezuela's objection was based on the interpretation of the ordinary meaning of the

[641] Memorial (De Jesús), ¶ 192, referring to **A/R-47] / A/R-6 [Curtis]**, Respondent's Memorial on Objections to Jurisdiction, 1 December 2008, ("*Respondent's Memorial on Jurisdiction*"), ¶¶ 172-181.

[642] **A/R-47 [De Jesús] / A/R-6 [Curtis]**, *Respondent's Memorial on Jurisdiction*, ¶ 174.

[643]Memorial (De Jesús), ¶ 192; Reply (De Jesús), ¶ 321

[644] Reply (De Jesús), ¶¶ 322, 323.

[645] Memorial (De Jesús), ¶ 194.

terms of the BIT in the context and in light of the BIT's object and purpose in accordance with the VCLT.[646]

524. The Tribunal only made a conclusory statement that "for the Tribunal the words of the definition are clear beyond question" which falls short of satisfying the Tribunal's obligation to provide reasons under Convention Article 43(1).[647]This, Venezuela argues, warrants an annulment of the 2013 Decision of the portion dealing with CPH's and CGP's indirect investments and the portions dealing with their indirect investments in the Interim Decision and the Award.[648]

525. In its Reply, Venezuela counters that Conoco Parties tries to construct reasons to attribute to the Arbitral Tribunal by suggesting that the Tribunal's reference to *Fedax* was sufficient since in that case the tribunal undertook the interpretation that was required from the Tribunal.[649] Venezuela submits that Convention Article 52(1)(e) requires that a statement of reasons must have some substance to enable parties' comprehension; mere references to other cases, without any form of argumentation do not amount to stating reasons. On this point, Venezuela refers to the decision of the *ad hoc* committee in *Klöckner*[650] and the dissenting opinion to the majority award issued in *Watkins v. Spain*.[651]

B.2(3) NO MANIFEST EXCESS OF POWERS AND NO FAILURE TO STATE REASONS REGARDING THE TRIBUNAL'S JURISDICTIONAL FINDINGS ON INDIRECT INVESTMENTS (CONOCO PARTIES)

NO MANIFEST EXCESS OF POWERS (CONOCO)

526. Conoco maintains that Venezuela again tries to appeal the Tribunal's findings in jurisdiction. In the arbitration, the Tribunal rejected Venezuela's jurisdictional

[646] Memorial (De Jesús), ¶ 219; Reply (De Jesús), ¶ 336.

[647] Memorial (De Jesús), ¶ 220; Reply (De Jesús), ¶ 336.

[648] Memorial (De Jesús), ¶ 222.

[649] Reply (De Jesús), ¶ 337.

[650] Reply (De Jesús), ¶ 339, citing *Klöckner Annulment Decision*, ¶ 119.

[651] Reply (De Jesús), ¶ 338, citing **A/RLA-89 [De Jesús]**, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Dissent on Liability and Quantum of Prof. Dr. Hélène Ruiz Fabri, 9 January 2020, ¶ 4.

objection that the BIT did not offer protection to *indirect* investments, like those of CPH and CGP, since Article 1 of the treaty omitted any reference to *indirect* investments, unlike other treaties concluded by Venezuela and the Netherlands. For Venezuela argues that by extending the BIT's protection to indirect investments, the Tribunal disregards the BIT's ordinary meaning, considering its object and purpose.[652]

527. Conoco explains that both CPH and CGP were indirect investors in the Hamaca and Corocoro Projects. CPH held 57% of shares in Hamaca Holding LLC, which in turn was the sole shareholder of Phillips Petroleum Company Venezuela Ltd., which in turn held 40% interest in the Hamaca Project. CGP was since August 2005 the sole shareholder of Conoco Venezuela C.A., which in turn held 32.2075% interest in the Corocoro Project.[653]

528. Conoco describes the Tribunal's analysis of Venezuela's argument. The Tribunal started by noting that treaty drafting practice varies, and went on to consider Venezuela's argument that some Dutch treaties covered indirect investments, yet noted that the model Dutch treaty contained language identical to Article 1 of the BIT. The Tribunal considered *Fedax v. Venezuela* as the case "directly on point" and supported the Claimants' position of the plain meaning of Article 1 ("every kind of asset"). For the Tribunal, the language used in the definition of investment in Article 1 of the BIT was clearly written in broad terms and beyond question, and that there was no need to interpret when such a need did not exist.[654]

529. Conoco argues that Venezuela is retrying its case on jurisdiction, and that Venezuela's allegations that the Tribunal failed to apply the applicable law and sufficiently address Venezuela's arguments are meritless. Conoco adds that Venezuela's request to

[652] Counter-Memorial (Conoco), ¶ 765.

[653] Counter-Memorial (Conoco), ¶ 764.

[654] Counter-Memorial (Conoco), ¶ 766, referring to and citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 284, 285.

incorporate its submissions on jurisdiction from the arbitration is improper and impermissible in annulment proceedings.[655]

530. In Conoco's view, the Tribunal identified the Treaty as the law applying to jurisdictional objection, in particular, BIT's Articles 1 and 9. Then, the Tribunal interpreted the term "investment " of Article 1 in accordance with the plain meaning of the words of Article 1, and agreed with Claimants' argument and the reasoning of the *Fedax* tribunal that the broad term "every kind of asset" covers every kind of asset, including indirect investments.

531. On the interpretation under the VCLT, Conoco submits that even if Venezuela's allegation (that the Tribunal failed to apply the VCLT to interpret Article 1 of the BIT) was true, it would not amount to an annullable ground; it would be at most an error made when interpreting and applying the applicable law, *i.e.*, the BIT.[656]

532. Conoco's position is that the Tribunal's reference to the decision of the *Fedax* tribunal shows that the Tribunal did not ignore the VCLT, accepted the reasoning of the *Fedax* tribunal and applied that reasoning to the case: the *Fedax* tribunal interpreted the same treaty language in accordance with the VCLT and in light of treaty practice in the Netherlands and in Venezuela. In this regard, Conoco relies on the decision of the committee in Impregilo that […] "[s]tating that [the tribunal] has no ground to disagree with decisions in another case means that the [t]ribunal accepted the reasoning in those decisions and applied that to the specific case submitted to it."[657]

533. Conoco asserts that Venezuela's real complaint is that the Tribunal did not cite the VCLT; yet the Tribunal's reasoning was faithful to the VCLT, since it interpreted the BIT in accordance with the ordinary meaning given to its terms, consistent with Article 31(1) VCLT.[658]

[655] Counter-Memorial (Conoco), ¶ 769.
[656] Counter-Memorial (Conoco), ¶ 771.
[657] Counter-Memorial (Conoco), ¶772, citing *Impregilo Annulment Decision*, ¶ 201.
[658] Counter-Memorial (Conoco), ¶ 773.

534. Also, Venezuela's objection that the Tribunal erred in assuming there is no difference between a treaty that covers "direct or indirect" investment and one that does not, is an objection that has no place in annulment. In any event, as long as the Tribunal's decision is tenable and reasonable arguments can be made, the decision must stand.[659]

535. In its Rejoinder, Conoco reiterates that Venezuela is rearguing its case on jurisdiction, which has no place in annulment. At most, Venezuela has alleged an error in the interpretation or application of law, which cannot lead to annulment. Also, Venezuela's contention that the Tribunal ignored certain of its arguments is irrelevant. The Tribunal considered the Parties' thoroughly and found Venezuela's arguments unconvincing.[660]

NO FAILURE TO STATE REASONS (CONOCO)

536. Venezuela (De Jesús) asserts that the Tribunal provided no reasons to its decision on the meaning of the term "investment;" while Venezuela (Curtis) accepts that there were reasons but asserts that those were unclear. Conoco submits that Venezuela's real claim is neither that the Tribunal failed to state reasons, nor that those were unintelligible, but rather that the Tribunal adopted the wrong reasons, which is not a basis for annulment.[661]

537. The Tribunal provided reasons for finding that the BIT protected indirect investments, interpreting the BIT's definition of "investments" in line with treaty practice and in accordance with the plain meaning of the words in the Treaty. The Tribunal also referenced the case law cited by the parties, and relied on a decision it found relevant, which in turn concluded that the same BIT protected indirect investments on the basis of (i) the plain meaning of the definition of "investment;" (ii) the VCLT; (iii) the treaty practice of both the Netherlands and Venezuela; and (iv) the World Bank guidelines on foreign investment.[662]

[659] Counter-Memorial (Conoco), ¶ 775.
[660] Rejoinder (Conoco), ¶¶ 306, 307.
[661] Counter-Memorial (Conoco), ¶ 777; Rejoinder (Conoco), ¶ 308.
[662] Counter-Memorial (Conoco), ¶ 778; Rejoinder (Conoco), ¶ 308.

538. As for the sufficiency of that reasoning, the issue before the Tribunal was whether Article 1 of BIT, which was silent on the point, covered indirect investments. The Tribunal provided reasons for concluding that it did and among other reasons given, the Tribunal relied on *Fedax*, which in turn recognized "that every time the Republic of Venezuela has wished to exclude [from investment treaties] investments that are not manifestly direct, it has done so in unequivocal terms."[663] In its Rejoinder, Conoco notes that Venezuela (Curtis) takes issue with the Tribunal's reliance on *Fedax*, which at most is an (incorrect) allegation of error in application of the law. And while Venezuela's (De Jesús) critiques that the Tribunal's reference to *Fedax* lacks any substance, the Tribunal provided reasons which are intelligible and can be followed.[664]

539. Conoco also submits that, contrary to Venezuela's allegation, the Tribunal did note both Venezuela's view on treaty practice and its argument as to the relevance of treaties containing express provisions on indirect investments. But the Tribunal was not persuaded by these arguments; that is not a ground for annulment.[665]Similarly, Conoco counters that Venezuela may disagree with the Tribunal's reference to the Dutch model treaty on the issue of indirect investments, but disagreeing with the reasons is not a failure to state reasons.[666]

540. Conoco also counters Venezuela's argument that the Tribunal failed to address the argument that Article 1's breadth is relevant only to the type of rights or assets that could constitute an investment, and not the way (directly or indirectly) they were held, explaining that the Tribunal is not required to explicitly address all points raised by the parties. The fact that the Tribunal was not convinced by Venezuela's arguments is not a reason to annul the decision.[667]

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[663] Counter-Memorial (Conoco), ¶ 779, citing **A/CLA-40**, *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ("*Fedax Decision on Jurisdiction*"), ¶ 36.

[664] Rejoinder (Conoco), ¶ 309.

[665] Counter-Memorial (Conoco), ¶ 780.

[666] Rejoinder (Conoco), ¶ 310.

[667] Counter-Memorial (Conoco), ¶ 781.

541. In sum, the Tribunal provided reasons for its findings on the issue of indirect investment and those reasons are sufficient to discharge the Tribunal's limited duty under Convention Article 48(3) to provide reasons. Venezuela has not demonstrated that the Tribunal failed to state reasons, and its request for annulment should be dismissed.[668]

[668] Counter-Memorial (Conoco), ¶ 782.

B.2(4) THE COMMITTEE'S ANALYSIS OF THE GROUNDS RELATED TO THE EXERCISE OF JURISDICTION REGARDING INDIRECT INVESTMENTS: MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS

B.2(4)(1) THE COMMITTEE'S ANALYSIS OF MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS AS ARGUED BY VENEZUELA (CURTIS)

MANIFEST EXCESS OF POWERS

542. Venezuela disputes that the Tribunal exceeded its powers by exercising its jurisdiction over the indirect interests of CPH and CGP in the Hamaca and Corocoro Projects, despite the Treaty not covering indirect investments. The Applicant remarks that, unlike other treaties entered by Venezuela and the Netherlands, the definition at Article 1(a) of the Treaty does not refer to direct or indirect investment ownership or control. However, the Arbitral Tribunal did not analyse the effect of these different formulations or the treaty practice of both Venezuela and the Netherlands, nor did it take into account the principle "*verba aliquid operari debent*" as a canon of interpretation. The Arbitral Tribunal therefore rewrote the Treaty to expand its scope.[669]

543. Here lies the answer of the Arbitral Tribunal on the indirect investments of CPH and CGP:

> "*The Tribunal remarks in respect of treaty practice that this demonstrates that there is no single way of drafting definitions. Different formulations may have precisely the same effect. Drafting practice varies. While, as the Respondent notes, some of the Dutch bilateral investment treaties use a different formula, its model bilateral investment treaty, along with very many others, uses exactly the wording to be found in the treaty with Venezuela. The one case which is directly in point — Fedax — also supports the Claimants' 'plain meaning'.*
>
> *For the Tribunal the words of the definition are clear beyond question. They are written in broad terms, as indeed the Respondent accepts. In the words of Vattel, there is no need to interpret that which has no need of interpretation.*

[669] Memorial (Curtis), ¶¶ 804, 805.

Accordingly, this objection to jurisdiction in respect of the claims of CPH and CGP fails."[670]

544. The application of interpretative rules was not in issue as the Arbitral Tribunal found that there was no need for interpretation of Article 1: "*In the words of Vattel, there is no need to interpret that which has no need of interpretation.*" Venezuela's contention is that the Arbitral Tribunal, quite to the contrary, should have engaged in an interpretative exercise of the Treaty scope. The underlying idea of Vattel's general maxim may be understood as holding interpretation a secondary process which only comes into play when it is impossible to make sense of the plain meaning of the treaty. As the Tribunal accepted the "*plain meaning*" of Article 1 of the Treaty which defines investment "*as every kind of assets*," it rejected Venezuela's interpretation in support of the exclusion of indirect investments without committing an excess of powers.

545. The Applicant also takes issue with the Tribunal's use of the *Fedax v. Venezuela* Decision on Objections to Jurisdiction as addressing limits on the type of the assets which is not the issue here.[671] This criticism alludes to an error of law which is not reviewable and does not amount to a manifest excess of powers.

FAILURE TO STATE REASONS

546. The Committee's conclusion on manifest excess of powers also entails the rejection of the Applicant's argument that the Arbitral Tribunal's determination with respect to Article 1(a) lacks reasons.

547. Absent any necessity to interpret the Treaty, the Arbitral Tribunal had no obligation to explain beyond an iteration of the Treaty's terms why indirect investments could be protected by the Treaty. As remarked by the *ad hoc* Committee in *Hydro v. Albania*,[672] there is no need for tribunals to express reasons for reasons. The Treaty words which

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[670] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 284-286.

[671] *Fedax Decision on Jurisdiction*, ¶ 32. "*This definition* [of investment at Article 1(a)] *evidences that the Contracting parties to the* [Kingdom of the Netherlands and Republic of Venezuela] *Agreement intended a very broad meaning for the term 'investment'*". Memorial (Curtis), ¶ 806; Reply (Curtis), ¶ 448.

[672] **A/CLA-114**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, ("*Hydro Annulment Decision*"), ¶ 126.

define a protected investment as every kind of investment without distinction constitute *ipse dixit* the Tribunal's reasoning of the inclusion of indirect investments. This answers the Applicant's concerns that the Tribunal did not explain why indirect investments could be protected in the absence of the words "directly or indirectly," given that the Applicant believes that a logical interpretation of the term "investment" only covers assets directly owned by nationals.[673]

548. An arbitral tribunal has no obligation to address all points raised by the parties,[674] especially where, as here, where the conclusion by the Arbitral Tribunal on the broadest definition of "investment" in the Treaty rendered unnecessary Venezuela's argument that the broad definition pertains to only the rights or assets that are afforded protection, not as to the manner in which such rights or assets are held.[675]

B.2(4)(2) THE COMMITTEE'S ANALYSIS OF MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS AS ARGUED BY VENEZUELA (DE JESÚS)

MANIFEST EXCESS OF POWERS

549. The Committee comes now to Venezuela' second jurisdictional challenge concerning the indirect investments of CPH and CGP. The Applicant challenges at first the Tribunal's refusal to perform any interpretation of the Treaty relevant terms, postulating instead that such interpretation was not necessary because the terms were clear. According to the Applicant, this constituted a manifest excess of powers by failure to apply any law because the Tribunal was required to construe the terms of the treaty in accordance with the rules of interpretation embedded in the VCLT which qualify as general principles of law in the terms of Article 9(5) of the Treaty.[676]

550. The Committee finds beyond contestation that the Tribunal's decision was not omission or neglect but a conscious choice not to engage in an interpretative exercise

[673] Memorial (Curtis), ¶ 809.

[674] *Rumeli Annulment Decision*, ¶ 84; *MCI Annulment Decision*, ¶ 67.

[675] Memorial (Curtis), ¶¶ 809-810.

[676] Memorial (De Jesús), ¶¶ 185-187; Reply (De Jesús), ¶¶ 309-310.

beyond the plain terms of the Treaty. The Arbitral Tribunal's 2013 Decision explains "*there is no need to interpret that which has no need of interpretation*."[677]

551. Article 9(5) of the Treaty is a choice of law clause which includes "*the general principles of international law*" in conjunction with the Treaty.[678] The VCLT reflects international customary law which was confused by the Applicant with the general principles of international law. It is not the Committee's task to rewrite the challenge, but we may observe that the Tribunal applied the Treaty's clear and precise terms, specifically Article 1(a) of the Treaty which reads "*the term 'investments' shall comprise every kind of asset*." A literal interpretation following which every kind of asset means direct and indirect investments in the absence of precision is a plausible explanation of what the Tribunal has reached. This is not how Venezuela understood as the ordinary meaning of the Treaty words. However, neither the failure of the Tribunal to follow the Applicant's proposed approach, nor the Applicant's claim of an inappropriate reference at paragraph 284 to the *Fedax* award[679] constitute an egregious misapplication of the applicable law or a non-application of any law, as Venezuela would suggest.[680]

552. Venezuela next grounds the challenge on the Tribunal's refusal to engage with its arguments in the arbitration on the exclusion of indirect investments. It pleaded in the arbitration that only investments located in the territory of Venezuela are covered by the Treaty and that exclusion of indirect investments is consistent with the purpose and object of the Treaty because "*no substantive benefit is achieved by permitting companies to utilize layers of holding companies to manufacture multiple claimants making duplicative claims for alleged treaty violations*."[681] In support of its

[677] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 285.

[678] Article 9(5) reads: "*5. The arbitral award shall be based on:*
- the law of the Contracting Party concerned;
- the provisions of this Agreement and other relevant Agreements between the Contacting Parties;
- the provisions of special agreements relating to the investments;
- the general principles of international law; and
- such rules of law as may be agreed by the parties to the dispute."

[679] Reply (De Jesús), ¶ 316.

[680] Reply (De Jesús), ¶ 313.

[681] **A/R-49 [De Jesús] / A/R-8 [Curtis]**, *Respondent's Rejoinder*, ¶ 140 cited in Memorial (De Jesús), ¶ 191.

demonstration, the Applicant "*incorporates by reference its previous submissions on this specific issue*".[682] However, submissions made by the Applicant during the arbitration proceeding cannot be re-submitted to the Committee as if it were an appeal board.[683] By presenting before the Committee the arguments that were unsuccessful in the arbitration, the Applicant's criticisms are indeed an indirect attack against the reasons of the Decision, which forms the basis for Venezuela's next ground for annulment. According to Venezuela, the "*mere reading*" of the paragraphs on the indirect investments demonstrate that a usurpation of powers[684] occurred.

FAILURE TO STATE REASONS

553. The Applicant finally denounces the brevity of the reasoning which rejects Venezuela's jurisdictional objection over CPH and CGP's indirect investments as a failure to provide any reasons on the interpretation of the Treaty and failure to explain the conclusory statement that "[f]*or the Tribunal the words of the definition are clear beyond question*."[685]

554. The Committee considers that the Tribunal did not deem necessary to interpret because the definition of investment was clear under the Treaty. Parties are entitled to be informed why they have won or lost, but arbitrators are not required to express reasons for their reasons.[686] There was no obligation to go beyond an iteration of the Treaty terms of "*every kind of investment*" in the definition of a protected investment. The Tribunal provided at paragraphs 284-285 reasons regarding the inclusion of indirect investments which are accessible to reasonably intelligent people. Having noted that the Dutch model BIT uses the same terms as the Dutch-Venezuela Treaty despite different formulations in Dutch drafting practices, and having emphasized that Venezuela consistently uses unequivocal terms to exclude indirect investments,[687] the

[682] Memorial (De Jesús), ¶ 192.
[683] See Counter-Memorial (Conoco) ¶ 769.
[684] Reply (De Jesús), ¶ 321.
[685] Memorial (De Jesús), ¶¶ 219-220.
[686] *Hydro Annulment Decision,* ¶ 126.
[687] *Fedax Decision on Jurisdiction*, ¶ 36.

Tribunal dismissed the jurisdictional objection on the grounds that Article 1 of the Treaty does not make any express distinction between direct and indirect investments. The Tribunal decision is therefore easily understood.

C. GROUNDS RELATED TO THE TRIBUNAL'S FINDINGS IN RESPECT OF ARTICLE 6 OF THE TREATY: MANIFEST EXCESS OF POWERS; SERIOUS DEPARTURE; AND FAILURE TO STATE REASONS

C.1. THE PARTIES' POSITIONS ON THE TRIBUNAL'S FINDINGS UNDER ARTICLE 6 OF THE TREATY

555. In its 2013 Decision, the Tribunal Majority concluded that Venezuela "[…] 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, and that the date of the valuation is the date of the Award."[688] Venezuela, unsuccessfully, requested three times that the Tribunal reconsider the 2013 Decision.

556. On 17 January 2017, a reconstituted Tribunal issued its Interim Decision, where it rejected Venezuela's third request for reconsideration and clarified what it considered to be the "true meaning of the 2013 Decision."[689] The Tribunal stated that "[b]ased on the above analysis of the 2013 Decision, the conclusion is that the Tribunal did not find a lack of good faith on the part of the Respondent for its breach of an obligation to negotiate on the basis of market value as required by Article 6(c) of the BIT. The Tribunal stated simply that the Respondent failed to be involved in negotiations leading to an offer complying with the requirements of 'just compensation' and 'market value.'"[690] The Tribunal thus declared that "[…] Venezuela has breached Article 6 of the BIT by unlawfully expropriating the Claimants' investments in the three Projects in the Orinoco Belt in Venezuela."[691]

557. Venezuela (Curtis and De Jesús) submits, that the Tribunal manifestly exceeded its powers (Article 52(1)(b)) and seriously departed from a fundamental rule of procedure

[688] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 401.

[689] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, Interim Decision, 17 January 2017, ("*Interim Decision*"), ¶¶ 39-66.

[690] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 60.

[691] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 156(3).

(Article 52(1)(d)) by finding that Venezuela had failed to negotiate in good faith; also, it failed to state the reasons for its findings (Article 52(1)(e)).

558. The Committee summarizes the Parties' arguments on the grounds invoked. Each section starts with the arguments advanced by Venezuela (Curtis) (**C.1(1)**); then Venezuela (De Jesús) (**C.1(2)**) and finally, the Conoco Parties (**C.1(3)**). The Committee's analysis of the grounds invoked in relation to the Tribunal's findings in respect of Article 6 of the BIT is addressed in **C.1(4)(1)** (Curtis) and **C.1(4)(2)** (De Jesús).

C.1(1) THE TRIBUNAL'S FINDINGS UNDER ARTICLE 6 OF THE TREATY AS ARGUED BY VENEZUELA (CURTIS)

MANIFEST EXCESS OF POWERS

559. Venezuela (Curtis) argues that the Tribunal Majority manifestly exceeded its powers when (i) it found that Venezuela had failed to negotiate in good faith and that, thereby, the expropriation was unlawful; (ii) it disregarded the BIT's provisions and any customary international law principles applicable for the valuation date; and (iii) it disregarded the Parties' agreement on the applicable legal principles on the valuation date.

560. For Venezuela, the finding that the expropriation was unlawful for failure to negotiate in good faith for compensation, results from a failure to apply the applicable law. Venezuela refers, among others, to the dissenting opinions of Prof. Abi-Saab and arbitrator Bucher. Both arbitrators considered that the Conoco Parties never had advanced the issue of good faith negotiations.[692]

561. Once the Tribunal unanimously held that the expropriation was carried out in accordance with due process of law and did not violate undertakings to the Conoco Parties, the Majority's finding of illegality in the expropriation had no basis. The only missing element in the expropriation was compensation, and yet (i) Venezuela always

[692] Memorial (Curtis), ¶ 590.

acknowledged that the Conoco Parties were entitled to compensation; (ii) Venezuela made substantial compensation offers; and (iii) it is accepted that a disagreement over the compensation does not render an expropriation unlawful.[693]Therefore, the argument that the expropriation was unlawful due to failure to agree on the compensation cannot be taken seriously, and the Tribunal's decision on this point is tantamount to a manifest excess of powers due to failure to apply the applicable law.[694]

562. Venezuela submits, contrary to Conoco's position, that it is not asking the Committee to review the Award like an appeal.[695] Also, Venezuela counters Conoco's argument, submitting that an egregious error of law can amount to failure to apply the law. Venezuela refers to the annulment decision in *Mobil*, which focused on the failure of the tribunal to consider the compensation provisions of the Cerro Negro project. Venezuela notes that while it may be true that different tribunals assessing different facts may come to different conclusions, the Mobil case is practically identical to the present case.[696]

563. The Tribunal Majority also manifestly exceeded its powers by fixing the date of the Award as the valuation date and, thereby, disregarding the applicable law on the issue of the valuation date. The Tribunal disregarded Article 6(c) of the BIT, which provides that the valuation date should be determined as of a time immediately prior to the expropriation. It also disregarded Article 9(3), which limits the Tribunal's jurisdiction to awarding anything other than damages for a breach of the BIT.[697]

564. The Tribunal disregarded Article 9(3) because designating the date of the Award as the valuation date, rather than the date of the expropriation, led to an excess of compensation for the alleged treaty breach. Such decision had no basis in the BIT or in any customary international law. Even if customary international law applied, the Tribunal had failed to apply the applicable principle of customary international law.

[693] Memorial (Curtis), ¶ 591, 594.
[694] Memorial (Curtis), ¶ 595.
[695] Reply (Curtis), ¶ 271.
[696] Reply (Curtis), ¶¶ 273-275.
[697] Memorial (Curtis), ¶ 597; Reply (Curtis), ¶ 279.

Under *Chorzów Factory* where the only wrongful act is the failure to pay compensation and the expropriation is lawful in other respects, the date of dispossession serves as the valuation date.[698] Conoco submits that Article 9(3) does not prevent a tribunal from awarding other damages, such as those under customary international law. However, as Venezuela submits, nothing in customary international law (including the *Chorzów Factory* case), or any other law allows a tribunal to award double, triple, or quadruple or more damages beyond the principal amount due.[699]

565. The Tribunal recognized *Chorzów Factory* as setting forth the applicable principles of customary international law and the Conoco Parties relied on that case for the purposes of the valuation date. Both parties cited many cases showing that the damage caused by failure to pay compensation is awarding interest from the date of expropriation to the date of payment of the compensation. Yet, the Tribunal failed to cite a single case involving an expropriation where the only wrongful act was the failure to pay compensation, and the valuation date was moved.[700]

566. Finally, the Tribunal Majority and later the reconstituted Tribunal exceeded their powers by disregarding the Parties' agreement reached in the 2010 Hearing on the legal difference between expropriation unlawful *per se* and unlawful *sub modo* (*i.e.*, only for failure to pay compensation). In a case of expropriation *sub modo*, compensation must be measured as of the date of expropriation, with interest due until the date of payment.[701] In its Reply, Venezuela submits that Conoco tries to limit the scope of the Tribunal's discussion to situations of expropriations unlawful *per se* and the "full reparation" standard of *Chorzów Factory*; yet the Tribunal's discussion in the Award is not so limited. According to Venezuela, the Tribunal adopted a market value concept when compensation is not paid on the date of expropriation, even if the expropriation was lawful, without specifying any authority supporting its position.[702]

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[698] Memorial (Curtis), ¶ 600- 603; Reply (Curtis), ¶ 278.
[699] Reply (Curtis), ¶ 279.
[700] Memorial (Curtis), ¶¶ 603-607.
[701] Memorial (Curtis), ¶ 609.
[702] Reply (Curtis), ¶ 285.

567. Venezuela notes that the Conoco Parties argued throughout the first phase of the case that the expropriation was unlawful *per se* and the valuation date should be moved to the date of the Award. But they never contested that if they were wrong on that point, then the valuation date should not be moved. After the 2010 Hearing, the Tribunal found the expropriation lawful in all respects other than payment of compensation (*i.e.*, *sub modo*). Nevertheless, the Majority in 2013 and the subsequently reconstituted Tribunal ignored, without warning, the Parties' agreement on the basis for calculating compensation and, exceeding its powers, obliterated the distinction between expropriation unlawful *per se* and *sub modo*.[703]

FAILURE TO STATE REASONS

568. Venezuela (Curtis) argues that the Tribunal Majority had no basis to state in the operative part of the 2013 Decision that "the Respondent breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value as required by Article 6(c) of the BIT."[704] Venezuela refers to the dissenting opinion of Prof. Abi-Saab, who characterized that as an "utter decision by surprise."[705] Venezuela argues, contrary to Conoco, that the issue is not if the Tribunal Majority stated reasons for their decision that the parties must engage in good faith negotiations; the issue is how the Tribunal came to that conclusion -for which the Tribunal provided no rational explanation.[706]

569. Further, the finding of failure to negotiate in good faith was the sole basis for determining that the date of valuation should be the date of the Award (rather than the date of expropriation).[707]Venezuela submits that after the finding of the 2013 Decision, the Conoco Parties proceeded to argue bad faith negotiation, while Venezuela countered with three requests for reconsideration and during the 2016 hearings.[708]

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[703] Memorial (Curtis), ¶¶ 610-615.
[704] Memorial (Curtis), ¶¶ 411, 491.
[705] Memorial (Curtis), ¶ 617, citing **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶ 282.
[706] Reply (Curtis), ¶ 293.
[707] Memorial (Curtis), ¶ 617.
[708] Memorial (Curtis), ¶ 618.

570. Venezuela argues that there is contemporaneous evidence that Venezuela negotiated in good faith based on fair market value and refers to the witness testimony of Mr. Goff and to the information the Conoco Parties' negotiators conveyed to the U.S. Embassy in Caracas. Yet, the reconstituted Tribunal in the 2017 Interim Decision decided - against the clear terms of the 2013 Decision- that the 2013 Decision did not find a lack of good faith, failing to explain why it had allowed the Parties to litigate for over three years based on a presumed misunderstanding. In Venezuela's view the "clarification" of the issue of good faith negotiation in the 2017 Interim Decision was an improper attempt to salvage the fundamentally flawed 2013 Decision, which the Tribunal refused to reconsider.[709]

571. Importantly, if, as the 2017 Interim Decision ruled, there was no lack of good faith negotiation, it follows, according to the unanimous view of the Tribunal in 2013, that the expropriation was not illegal, and the valuation date must be the date of the expropriation. It is therefore impossible to follow the Tribunal's reasoning from the 2013 Majority to the 2017 Interim Decision and the Award, which warrants annulment within the meaning of Convention Article 52(1)(e).

572. Further, Venezuela argues that the rulings of the reconstituted Tribunal on the illegality of the expropriation and valuation date are incomprehensible. Those rulings were based on the finding that Venezuela made no compensation offers or that those were inadequate, not based on market valuation. Yet, Venezuela refers to undisputed facts on the record pointing to the contrary, including: the U.S. Embassy cables showing that Venezuela was negotiating fair market value; the Executive Vice President for Exploration and Production of ConocoPhillips announcing at an investors' conference that Venezuela was negotiating on the basis of fair market value; and testimony from Venezuela's and the Conoco Parties' witnesses that Venezuela was negotiating fair market value. It is therefore impossible to understand how the reconstituted Tribunal

[709] Memorial (Curtis), ¶¶ 619-622

concluded that Venezuela failed to negotiate on the basis of fair market value principle.[710]

573. Finally, the Tribunal failed to state sufficient reasons for moving the valuation date. Even if Venezuela had not negotiated fair market value and even if it had not made compensation offers, the valuation date should have remained to be the expropriation date.[711]

574. Article 6(c) of the BIT mandates that valuation in the case of expropriation be done as within a time immediately prior to the expropriation. Even if customary international law is applied instead of the BIT's valuation date, as held by the Tribunal, in accordance with the *Chrozów Factory* principle, the valuation date still remains as the date of dispossession, unless the expropriation is unlawful *per se*.[712]The Parties and the Tribunal relied on *Chorzów Factory*; however, without any colorable reasons, the Tribunal moved the valuation date forward to the Award's date, resulting in a huge increase in the amount of the Award.[713]The Tribunal overlooked that when failure to compensate is the only wrongful act and the expropriation is not unlawful *per se*, the valuation date remains unchanged.

575. For Venezuela it is impossible to follow the Tribunal's reasoning from its acknowledgement of *Chorzów Factory* principle to the conclusion that the valuation date should be moved, which warrants annulment pursuant to Convention Article 52(1)(e) for failure to state reasons.

576. In its Reply, Venezuela submits, among others, that Conoco merely answers that the Committee cannot reassess evidence nor substitute findings for those of the Tribunal, nor evaluate the correctness or adequacy of the reasoning. But Venezuela's position is that the Tribunal may not make decisions and render Awards totally disconnected from facts and contradicted by the record. In this vein, Venezuela refers, among other facts

[710] Memorial (Curtis), ¶¶ 628-630; Reply (Curtis), ¶¶ 296, 306.
[711] Memorial (Curtis), ¶ 633.
[712] Memorial (Curtis), ¶ 634; Reply (Curtis), ¶ 292.
[713] Memorial (Curtis), ¶¶ 635, 636.

of the record,[714] to Conocos' own 2007 valuations whose combined value of USD 5.855 billion, Venezuela submits, were not that far from Venezuela's offer of USD 4 billion recorded in Conoco's Request for Arbitration. There is thus no rational explanation for a finding that Venezuela failed to negotiate on a fair market value basis. Venezuela also argues that Conoco fails to deal with the indicia of fair market value, including their valuations, and simply recites the Tribunal's statements of the 2017 Interim Decision, which Venezuela labels as "incomprehensible."[715]

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

577. Venezuela (Curtis) submits that the reconstituted Tribunal seriously departed from a fundamental rule of procedure by ordering the Parties to produce documents covered by their Confidentiality Agreement.[716]

578. The protection of settlement privilege is a fundamental rule of procedure, the more so if the parties have entered into a confidentiality agreement to expressly preserve confidentiality as with the present case. Venezuela refers to scholarly articles on the subject, proposing that a tribunal's failure to respect settlement privilege can be a ground for setting aside an award.[717] Venezuela refers to orders by arbitral tribunals in investment arbitrations that documents covered by settlement privilege should be shield from document production.[718] Venezuela also relies on the committee's decision in *Libananco v. Turkey*, in which, Venezuela submits, the committee fully endorsed the tribunal's decision to exclude from evidence all privileged documents.[719]

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[714] See Reply (Curtis), ¶ 306.

[715] Reply (Curtis), ¶¶ 303-306, 309.

[716] Memorial (Curtis), ¶ 638.

[717] Memorial (Curtis), ¶ 640.

[718] Memorial (Curtis), ¶¶ 641, 642, citing **A/RLA-137 [Curtis]**, *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Confidentiality Order, 18 February 2008, ¶ 22; A/RLA-138 [Curtis], *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Procedural Order No. 3, 12 July 2018, ¶ 26.

[719] Memorial (Curtis), ¶ 643, citing **A/RLA-143 [Curtis]**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Excerpts of Decision on Annulment, 22 May 2013, ("*Libananco Annulment Decision*"), ¶ 157.

579. Here, the Tribunal ordered Venezuela to produced documents covered by the Confidentiality Agreement, with the penalty of adverse inferences drawn against Venezuela. In Venezuela's view, the Tribunal's justification for its decision was frivolous, and the Tribunal misconstrued and relied on confidential documents for its 2017 Interim Decision. This conduct, Venezuela submits, was a serious departure from a fundamental rule of procedure warranting annulment pursuant to Convention Article 52(1)(d).[720]

580. In its Reply, Venezuela argues that it would set a dangerous precedent if ICSID tribunals could simply overlook settlement privilege and attorney-client privilege. Besides, the issue here is the Tribunal disregarded the Parties' express agreement prohibiting the production of documents exchanged in compensation negotiations. Further, Venezuela maintains that it was clear that Venezuela was negotiating compensation in good faith based on fair market value. As such, regarding the production of those documents, Venezuela's concern was that the Tribunal would be influenced by the amounts of compensation Venezuela offered to avoid litigation, causing the Tribunal to view that Conoco's interests in the Projects were greater than the compensation offered. The proposed monetary amounts of compensation, according to Venezuela, were based on assumptions that did not reflect the reality of the fields or other factors that bore upon fair market value.[721]

581. Also, contrary to Conoco's position, Venezuela argues that it did not waive its right to invoke settlement privilege by relying on the U.S. Embassy cables. The Confidentiality Agreement does not cease to exist because the Conoco Parties breached it by talking to the U.S. Embassy. The U.S. Embassy cables became public through no fault of Venezuela and Venezuela introduced the cables to show that the Conoco Parties had misrepresented Venezuela's position in the negotiations.[722]

[720] Memorial (Curtis), ¶ 644.
[721] Reply (Curtis), ¶¶ 347, 348.
[722] Reply (Curtis), ¶ 350.

C.1(2) THE TRIBUNAL'S FINDINGS UNDER ARTICLE 6 OF THE TREATY AS ARGUED BY VENEZUELA (DE JESÚS)

MANIFEST EXCESS OF POWERS

582. Venezuela (De Jesús) argues that the Tribunal manifestly exceeded its powers (i) by deciding *ultra petita* that the Republic had "breached its obligation to negotiate in good faith. […]"[723]; and (ii) by failing to apply the proper law regarding Article 6 of the BIT. Also, the reconstituted Tribunal manifestly exceeded its powers by (iii) failing to apply the proper law to the issue of expropriation.

583. For Venezuela, the issue of "good faith" was the foundation upon which the Tribunal Majority cemented its finding that Venezuela had breached Article 6(c) of the BIT. In other words, without the interpretation by the Tribunal Majority that Article 6 of the BIT requires "good faith," there would have been no breach of that Article of the Treaty.[724]

584. On the issue of *ultra petita,* Venezuela relies on the decision of the *ad hoc* committee in *Occidental*,[725] to argue that a manifest excess of powers occurs when tribunals decide on matters the parties have not raised. Here, the Conoco Parties did not claim that Venezuela had breached its good faith obligation to negotiate. Venezuela finds support by referring to the dissenting opinions of Prof. Abi-Saab and Mr. Bucher, both of which stated that Article 6 of the BIT did not include an obligation to negotiate in good faith, and that the Claimants had not made such claim.[726] In these circumstances, Venezuela submits, there is no doubt as to the "manifest" nature of the excess.

585. In its Reply, Venezuela stated that Conoco's generic claim that Venezuela had unlawfully expropriated their assets in breach of BIT Article 6 is substantially different

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[723] Memorial (De Jesús), ¶ 244, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 404(d).

[724] Memorial (De Jesús), ¶¶ 256, 257.

[725] Memorial (De Jesús), ¶ 242, citing *Occidental Annulment Decision*, ¶¶ 50-51.

[726] Memorial (De Jesús), ¶¶ 247-254, citing **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶ 282; and **A/R-25 [Curtis]** / **A/R-66 [De Jesús]**, *Abi-Saab Dissenting Opinion II – Reconsideration Request*, ¶ 11; Reply (De Jesús), ¶¶ 353-355.

from the specific claim that Venezuela breached the BIT's obligation to negotiate compensation in good faith.[727] Also, Venezuela submits that the legal framework set out by the Parties' in the arbitration did not include an alleged breach of the non-existent obligation to negotiate compensation in good faith. Thus, the Committee cannot allow the Conoco Parties to expand on the legal framework of Venezuela's liability in the arbitration to deny that there was *ultra petita*.[728] Conoco's reliance on *Klöckner* is misplaced. That case referred to a tribunal's examination of the jurisdictional "legal framework," while here the issue is that the Tribunal decided that Venezuela had breached the BIT based on an argument not made by either Party, which is also beyond the legal framework of Venezuela's liability.[729] Venezuela also argues that the transcript of the 2010 Hearing reveals that Conoco did not claim that the Republic had breached an alleged obligation to negotiate in good faith embedded in the BIT. The Conoco Parties simply did not make that claim in the arbitration and neither did Venezuela respond that it had complies with the BIT's non-existent obligation to negotiate in good faith.[730] Lastly, the *ultra petita* is not cured by Venezuela's three reconsideration requests. The excess of powers, in Venezueal's view, occurred with the issuance of the 2013 Decision.[731]

586. Further, Venezuela argues the Tribunal Majority exceeded its powers when in the 2013 Decision it egregiously misapplied the terms of Article 6 of the BIT to declare that Venezuela had breached a non-existing "obligation to negotiate in good faith for compensation." Venezuela submits that the Majority constructed, without support, Article 6 as encompassing three conditions: first, an obligation to negotiate; second, a negotiation in good faith; and third, a negotiation in reference to the standard of "market value" set out in the BIT. None of these conditions are found in Article 6 of the BIT, which were also pointed out by Prof. Abi-Saab and Mr. Bucher in their respective dissents. These opinions serve as contemporaneous evidence on the egregious

[727] Reply (De Jesús), ¶ 358.
[728] Reply (De Jesús), ¶¶ 359, 360.
[729] Reply (De Jesús), ¶ 361.
[730] Reply (De Jesús), ¶ 362-366.
[731] Reply (De Jesús), ¶ 367.

misapplication of Article 6 of the BIT. Besides, the excess is "manifest" as it can be easily perceived from a reading of Article 6, which does not enshrine these three obligations.[732]

587. Also, the finding that Venezuela "breached its obligation to negotiate in good faith" contradicts Article 9(3) of the BIT, which requires that the award "shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement."[733]Yet, the Majority did not refer to any ground in Article 6(c) of the BIT as a basis for its finding that the provision encompasses an obligation to negotiate in good faith. Such gross misapplication of the law is tantamount to failure to apply the proper law and annullable pursuant to Article 52(1)(b).

588. Venezuela also argues excess of powers on part of the reconstituted Tribunal, specifically when in the Interim Decision it decided that Venezuela had "unlawfully expropriated" the ConocoPhillips Dutch Companies' assets. Venezuela submits that such finding resulted from an egregious misapplication of the law that is tantamount to failure to apply the proper law. Venezuela submits that the U.S. Embassy cables pertaining to the negotiations between the Conoco Parties and Venezuela was objective and contemporaneous evidence that belied the finding that Venezuela had breached its obligation to negotiate in good faith.[734]

589. Further, the Tribunal denied Venezuela's third request for reconsideration as well as Venezuela's claim that the Conoco Parties had made misrepresentations to the Tribunal. Instead, the reconstituted Tribunal in its Interim Decision modified the *dispositif* of the 2013 Decision, and simply replaced the breach "to negotiate in good faith" for a breach of "Article 6 of the BIT by unlawfully expropriating the Claimant's [sic] investments in the three Projects in the Orinoco Beltin [sic] Venezuela."[735]

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[732] Memorial (De Jesús), ¶¶ 282-284; Reply (De Jesús), ¶¶ 394-402.

[733] Memorial (De Jesús), ¶ 438, citing R-013 (**A/C-63**), Agreement on Encouragement and Reciprocal Protection of Investments (with Protocol), Venezuela - Netherlands, 22 October 1991, entered into force 1 November 1993, 1788 U.N.T.S. 45, Article 9.3.

[734] Memorial (De Jesús), ¶ 326

[735] Memorial (De Jesús), ¶¶ 328, 329.

590. Venezuela submits that the Tribunal identified conditions in Article 6(c) of the BIT which the Majority had failed to identify, including that the state must negotiate proactively, making concrete proposals which are likely to meet the required level of compensation (market value) and which should have a chance to be approved by the investor.[736] Venezuela argues that the reconstituted Tribunal added conditions to Article 6(c) of the BIT to convert its terms into an *obligation de résultat* to justify its finding that Venezuela had "unlawfully expropriated" the Conoco Parties. However, the terms of Article 6(c) only require measures "against just compensation" allowing host States to meet the requirement by establishing a procedure or by offering a sum; Article 6(c) does not require a specific reference to a calculation method in making an offer to the expropriated investor.[737]Venezuela made several offers of compensation, all of which were found inadequate by the Conoco Parties.[738]Also, as evidenced from the testimonies of the Conoco Parties' witness (Mr. Geoff) and Venezuela's witnesses (Dr. Mommer and Dr. Boué), Venezuela was not negotiating "book value."[739]

591. Additionally, the Tribunal failed to apply the terms of Article 6(c) of the BIT and incorrectly interpreted it as requiring the compensation amount offered by the host State to be calculated in a specific method. This is a gross misapplication of the law as shown by Prof. Abi-Saab in his Dissenting Opinion to the 2013 Decision. Venezuela also refers to the *Exxon Mobil* case to argue that the Tribunal should have, like in that case, determined whether the offers made were compatible with just compensation under Article 6 of the BIT. If the Tribunal had done so, it would have found the expropriation to be lawful.[740]

592. Venezuela asks that the Committee pursuant to Convention Article 52(1)(b) annul the *ultra petita* finding in the 2013 Decision that the "Republic breached its obligation to negotiate in good faith compensation," which also constitutes a failure to apply the

[736] Memorial (De Jesús), ¶334.

[737] Memorial (De Jesús), ¶ 337.

[738] Memorial (De Jesús), ¶ 341.

[739] Memorial (De Jesús), ¶¶ 350, 351.

[740] Memorial (De Jesús), ¶¶ 344-346, citing **A/CLA-75** (CL-348), *Venezuela Holdings, B.V., and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, ("*Venezuela Holdings Award*").

proper law; Venezuela also submits that, *par voie de conséquence*, such annulment will affect the Interim Decision and the Award that draws the consequences of the 2013 Decision seeking to provide compensation for an alleged breach of Article 6 of the BIT.[741] Venezuela also requests annulment of the Interim Decision's declaration that Venezuela "unlawfully expropriated" the Conoco Parties' assets and *par voie de conséquence*, annulment of the Award seeking to quantify the compensation due for such unlawful expropriation.[742]

593. Venezuela also argues that the Tribunal manifestly exceeded its powers by determining the valuation date pursuant to international law rather than pursuant to the BIT. The Tribunal failed to apply the applicable law *in toto*, disregarding the express terms of Article 6(c) of the BIT that require compensation for expropriation to be assessed at the date of dispossession.

594. Further, by applying customary international law and the standard of "full compensation" (*Chorzów Factory*) instead of the standard of Article 6(c) of the BIT, the Tribunal exceeded the limits of the powers vested upon it under Article 9(3) of the BIT. Under Article 9(3) the Tribunal lacked authority to award damages beyond those caused by a breach of the Treaty and was, therefore, prevented from moving the valuation date from the date of dispossession to the date of the Award. The Tribunal accepted that the ConocoPhillips Dutch Companies were entitled to compensation for the *lucrum cessans*, reinstating the Companies to the position they would have occupied but for the entire expropriation, rather than just Venezuela's failure to provide just compensation. Yet, it was undisputed that Venezuela had complied with Articles 6(a) and (b), save for the issue of just compensation of Article 6(c).[743]

595. In any event, the Tribunal failed to apply the international customary principles it purported to apply regarding full reparation. Full reparation seeks to reinstate the injured party to the position it would have occupied but for the breach, and not in a

[741] Memorial (De Jesús), ¶¶ 259, 289.
[742] Memorial (De Jesús), ¶ 355.
[743] Memorial (De Jesús), ¶¶ 427-440.

more favorable position. However, the Tribunal reinstated the Companies to the position they would be have occupied had they retained their interest in the Projects after the expropriation, whereas the correct condition in the but for test is the lack of payment of just compensation.[744]

596. Further, the Tribunal usurped powers by determining the valuation date. The Tribunal decided the valuation date *ex aequo et bono*, fixing it on the date of the Award because rising oil prices after the date of the expropriation gave a more favorable compensation. This decision was not based on the proper law, but on an unauthorized and wrong *aequo ex bono* consideration.[745]

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

597. Venezuela argues that the *ultra petita* finding that Venezuela "breached its obligation to negotiate in good faith" also constitutes a serious departure from a fundamental rule of procedure, because the Tribunal Majority deprived Venezuela of its right to be heard and its right to defense. Venezuela relies on the decision of the *Wena* committee defining the "right to be heard" as a fundamental right and part of a minimal standard of procedure to be respected under Convention Article 52(1)(d).[746] Venezuela also refers to the decision of the *ad hoc* committee in *Pey Casado v. Chile*, to argue that in the face of a serious departure from a fundamental rule, a committee has no discretion not to annul an award.[747]

598. Venezuela explains that the Conoco Parties did not address the issue of good faith negotiations in their submissions or during the 2010 Hearing, nor did the Republic.[748] The Tribunal Majority failed to submit the issue of good faith negotiation to the Parties' consideration before issuance of the 2013 Decision. Thereby, the Tribunal deprived Venezuela of its due process right to be heard, to defend itself or to submit evidence on

[744] Memorial (De Jesús), ¶¶ 444-451.
[745] Memorial (De Jesús), ¶ 456.
[746] Memorial (De Jesús), ¶ 263, citing *Wena Annulment Decision*, ¶ 57.
[747] Memorial (De Jesús), ¶ 268, citing *Pey Casado Annulment Decision*, ¶ 80.
[748] Memorial (De Jesús), ¶ 265.

that crucial issue.[749] Venezuela also submits that Prof. Abi-Saab noted in his dissent that the Tribunal's *ultra petita* finding violated the Parties' procedural rights.[750]

599. Venezuela argues that the departure is serious since it deprived Venezuela of the protection envisaged under the rule i. In Venezuela's Reply, it argues that despite Conoco's allegations to the contrary, Venezuela's actions after the departure (*i.e.*, the issuance of the 2013 Decision) cannot have any bearing on such departure. The Tribunal might have reached a different conclusion in the 2013 Decision and later in the Award, had it allowed Venezuela to state its case and present evidence on that issue. Venezuela submits in the present case, the Conoco Parties posit a heightened standard requiring that the departure leads to a substantially different result, which restricts annulment in the presence of departures from fundamental rules. Venezuela refers to the standards adopted in *Caratube* and *Pey Casado* and argues that a party is not required to prove that the violation of the rule was decisive for the outcome or that it would have won the case.[751]

600. In summary, Venezuela submits that deciding on an issue not raised nor discussed by the Parties is a serious departure which vitiates the 2013 Decision, and *par voie de conséquence* also vitiates the Interim Decision that sought to clarify the "true meaning" of the Majority's finding on the issue of good faith negotiation under Article 6 of the BIT.[752]

FAILURE TO STATE REASONS

601. Venezuela (De Jesús) also asks the Committee to annul the 2013 Decision, the Interim Decision, and the Award, pursuant to Article 52(1)(e). Venezuela submits they should be annulled because: (i) the Tribunal Majority failed to provide any reasons for its finding in the 2013 Decision that Venezuela had "breached its obligation to negotiate

[749] Memorial (De Jesús), ¶ 267; Reply (De Jesús), ¶¶ 373-376.
[750] Reply (De Jesús), ¶ 375, citing **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶¶ 282-284.
[751] Reply (De Jesús), ¶ 380.
[752] Memorial (De Jesús), ¶ 269; Reply (De Jesús), ¶ 385.

in good faith for compensation […] on the basis of market value,"[753] and (ii) the reconstituted Tribunal failed to provide reasons for its finding in the Interim Decision that Venezuela had "unlawfully expropriated the Conoco Parties' assets."[754]

602. Venezuela submits that, as explained by the *Amco* committee, there must be a "reasonable connection between the bases invoked by a tribunal and the conclusions reached by it."[755]Yet, the Tribunal failed to provide any reasons, or it provided inadequate reasons for its finding. Venezuela argues that the Tribunal, without referring to any law, case law, authority, or arguments by either Party, affirmed that: "[I]t is also commonly accepted that the Parties must engage in good faith negotiations to fix the compensation in terms of the standard set, in this case, in the BIT, if a payment satisfactory to the investor is not proposed at the outset."[756]This sentence, Venezuela submits, is the extent of the Tribunal's "reasoning," which offers no "reasonable connection" regarding the breach of the BIT.[757]

603. Furthermore, Venezuela questions, among others, the following points: How did the Tribunal reach its conclusion regarding "good faith negotiations" when if neither Party raised it? How did the Tribunal interpret Article 6(c) of the BIT to entail the "commonly accepted notion" of good faith negotiation when "good faith" was not mentioned in that article? To whom was the Tribunal referring in its statement "it is commonly accepted…?" and how did the Tribunal conclude that Venezuela had not offered a satisfactory payment at the outset of the expropriation or migration? Applying the test in *MINE*, it is not possible to follow the reasons from point A to B, even assuming that the Tribunal applied the law.[758]

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[753] Memorial (De Jesús), ¶ 290.

[754] Memorial (De Jesús), ¶ 356.

[755] Memorial (De Jesús), ¶ 293, citing **A/RLA-62 [De Jesús] / A/RLA-113 [Curtis]**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad Hoc Committee Decision on the Application for Annulment, 16 May 1986, ¶ 43.

[756] Memorial (De Jesús), ¶ 298, citing **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 362.

[757] Reply (De Jesús), ¶¶ 413-415.

[758] Memorial (De Jesús), ¶¶ 300-310; Reply (De Jesús), ¶¶ 411-418.

604. Contrary to Conoco's view, Venezuela affirms that these are not rhetorical questions, and Prof. Abi-Saab and Mr. Bucher raised them in their respective dissents.[759] Moreover, several committees, notably in *Soufraki*, have found that inadequate or insufficient reasoning can lead to annulment, despite Conoco's contention for a heightened standard that would prevent committees from reviewing such reasons. Venezuela also refutes Conoco's contention that there was "common acceptance" that the legality of the expropriation was contingent on whether Venezuela had negotiated compensation in good faith.[760]

605. Venezuela recalls that it requested three times the reconsideration of the 2013 Decision, and while all requests were rejected, the Tribunal still found itself at odds with the 2013 Decision's untenable finding, which led to the Interim Decision in an attempt to find its "true meaning."[761] Even the Interim Decision denotes the serious faults of the 2013 Decision, which failed to define "good faith" or to legally examine its components in relation to the evidence.[762]

606. Regarding the Interim Decision, Venezuela submits it should be annulled because the reconstituted Tribunal gave contradictory statements concerning the 2013 Decision, which were integrated into the Award.[763]Venezuela argues that to assess if a tribunal has failed to state reasons, the Committee is empowered to review the award's reasoning. On this point, Venezuela refers to the decision of the *Caratube* committee, according to which "… [c]ontradictory reasons cancel each other and will not enable the reader to understand the tribunal's motives. […]"[764]

607. Here, the Tribunal's reasons cancel each other out in respect to its determination as to "the true meaning of the 2013 Decision on Jurisdiction and Merits." In the Interim Decision the reconstituted Tribunal concluded -against the explicit terms of the 2013

[759] Reply (De Jesús), ¶ 417
[760] Reply (De Jesús), ¶ 419-427.
[761] Memorial (De Jesús), ¶¶ 313-316.
[762] Memorial (De Jesús), ¶ 319.
[763] Memorial (De Jesús), ¶ 356.
[764] Memorial (De Jesús), ¶ 358, citing *Caratube Annulment Decision*, ¶ 102.

Decision- that the Majority did not mean that there was lack of good faith, but "simply" that Venezuela failed to be involved in negotiations leading to an offer complying with the requirements of "just compensation" and "market value." Yet, the reconstituted Tribunal also stated that "2013 Decision's conclusion is to be taken for what it says and nothing more."[765] Then, in the Award paragraph 1009 incorporates the 2013 Decision *in toto* and the Interim Decision *in toto* - with the contradiction that the 2013 Decision found a breach of good faith negotiation (at paragraph 404(d)) and the Interim Decision did not (at paragraph 60).[766]

608. Venezuela asks that the Committee annul the 2013 Decision for failure to state reasons for the finding that Venezuela "breached its obligation to negotiate in good faith for compensation […]." And *par voie de conséquence,* that the Committee annul the Interim Decision and the Award which seeks to provide compensation for an alleged breach under Article 6 of the BIT.

609. Venezuela also asks that the Committee annul the Interim Decision for failing to state reasons regarding its decision to "clarify" the "true meaning of the 2013 Decision on Jurisdiction and the Merits" and *par voie de conséquence*, the Award, which seeks to determine the compensation due for the breach of Article 6 of the BIT.[767]

610. For Venezuela, Conoco's argument that the 2013 Decision and Interim Decision are "wholly consistent" can be summarily disposed of by comparing their dispositive parts: both found Venezuela in breach of BIT's Article 6, yet each grounded the breach in different non-existent requirements. Additionally, if the decisions were wholly consistent, there would be no need for the Interim Decision to clarify the 2013 Decision. Venezuela notes that its claims target the Award's incorporations of the contradictory operative parts of each Decision; thus Conoco's argument that the Interim Decision confirmed the 2013 Decision misses the point.[768]

[765] Memorial (De Jesús), ¶ 359-362, citing **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 65.
[766] Memorial (De Jesús), ¶¶ 361-363; Reply (De Jesús), ¶ 468-473.
[767] Memorial (De Jesús), ¶ 365.
[768] Reply (De Jesús), ¶¶ 482, 483.

C.1(3) THE TRIBUNAL'S FINDINGS UNDER ARTICLE 6 OF THE TREATY (CONOCO)

NO MANIFEST EXCESS OF POWERS

611. Conoco counters that Venezuela's arguments on the alleged manifest excess of powers are complaints on the Tribunal's interpretation or application of Article 6 of the BIT. Even if the complaints were correct (they are not), they would not be a basis for annulment. An error of law is no ground for annulment. Venezuela tries to argue that the error was so egregious tantamount to non-application of the law.[769]

612. Here, the Tribunal correctly identified the applicable law and applied it reaching the correct outcome (but it would not make a difference if the Tribunal had erred in the outcome). The Tribunal's decision was not made with a manifest (obvious, self-evident, clear, flagrant) disregard of the applicable law. The Tribunal Majority recounted the general criteria for lawful expropriation in Article 6 of the BIT and then specifically considered what Venezuela had to do to satisfy the compensation requirements in Article 6(c). The Tribunal's interpretation of Article 6(c) is "payment is not required at the precise moment of expropriation" because Article 6(c) also includes "requirements for prompt payment and for interest." As such, the Tribunal Majority came to the view that if payment is not made at the precise moment of expropriation, the State must negotiate compensation in good faith based on the BIT's fair market value standard. The Tribunal applied the applicable law (Article 6 of the BIT), even if a party may agree or disagree with the Tribunal's interpretation of the BIT. [770] In its Rejoinder, Conoco argues that the Tribunal clearly interpreted and applied Article 6, which Venezuela acknowledges is the applicable law. The Tribunal's interpretation and legal determination made on the basis of Article 6 are within the exclusive purview of the Tribunal which cannot be reconsidered on annulment.[771]

613. The Tribunal Majority correctly interpreted Article 6, as confirmed by the reconstituted Tribunal, so that even if a *de novo* review of the Award were permitted on annulment,

[769] Counter-Memorial (Conoco), ¶¶ 505, 506.

[770] Counter-Memorial (Conoco), ¶¶ 506, 507; Rejoinder (Conoco), 162.

[771] Rejoinder (Conoco), ¶ 167.

Venezuela's argument would fail. Conoco argues that the *Mobil* case accords with the analysis of the 2013 Decision and the 2017 Interim Decision, even though in that case the tribunal majority did not find a breach of Article 6 of the BIT. In both cases (*Mobil* and the present case) the finding as to whether Venezuela had breached Article 6 turns on the question of whether Venezuela had made adequate compensation offers during negotiations. Even if Article 52(1)(b) permitted a review of a tribunal's reasoning, *Mobil* shows that the reasoning in this case was correct, or at least consistent with the conclusions of other tribunals. In these circumstances, there can be no manifest excess of powers.[772] In its Rejoinder, Conoco characterizes Venezuela's reliance on *Mobil a*s superficial, in that it fails to accept that different facts in different cases can lead to different outcomes. Contrary to Venezuela's submission, the *Mobil* tribunal did not rule that Article 6 is satisfied when a state acknowledges its obligation to compensate and makes compensation offers. Instead, it ruled that the precise terms of a compensation offer must be evaluated to determine Venezuela's compliance with Article 6(c), and this is precisely what this Tribunal did.[773]

614. Conoco asserts that the Tribunal considered the arguments and evidence produced and concluded that Venezuela had failed to offer market value compensation as required by Article 6. Venezuela's excess of powers argument is a criticism of the Tribunal's assessment of the evidence. *Ad hoc* committees have no power to review the Tribunal's evaluation of the evidence. Under ICSID Arbitration Rule 34, an ICSID tribunal is the sole judge of the admissibility of any evidence adduced and of its probative value.[774] Even if the Committee engaged in an impermissible review, such review would show that the Tribunal reasonably assessed the evidence, including the U.S. Embassy cables and Mr. Goff's testimony.[775]

615. In its Rejoinder, Conoco notes that Venezuela's argument that the Tribunal should have evaluated the lawfulness of the taking by looking at whether Venezuela had made offers

[772] Counter-Memorial (Conoco), ¶ 511.
[773] Rejoinder (Conoco), ¶¶ 164, 165.
[774] Counter-Memorial (Conoco), ¶¶ 512-515.
[775] Rejoinder (Conoco), ¶ 169.

prima facie reasonable or compliant with "just compensation" (as opposed to assessing the offers made against "a specific calculation method," *i.e.*, market value). Conoco submits that this was an argument advanced by Venezuela for the first time in the annulment proceeding. In any case, disputes about the proper interpretation of Article 6 are beside the point, and all that is relevant to the Committee's present inquiry is whether the Tribunal identified and sought to apply the applicable law.[776]

616. Also, the Tribunal did not rule *ultra petita* when deciding that Venezuela "breached its obligation to negotiate in good faith for compensation … on the basis of market value as required by Article 6(c) of the BIT." That finding, Conoco submits, was well within the legal framework established by the Parties' claims and allegations in this case. The Claimants asked the Tribunal to declare that Venezuela unlawfully expropriated the investments under Article 6, including by "never offer[ing]- let alone provid[ing]- fair, prompt and adequate compensation to the Claimants even though that obligation was codified in … Article 6 of the Treaty."[777]In the merits phase, the Claimants expressly argued Venezuela's breach of Article 6 for failure to pay fair market value compensation or to negotiate in good faith according to that standard.[778]Venezuela countered that it had negotiated in good faith and offered fair market value compensation, but the parties disagreed on the amount.[779] The Parties also relitigated the legality of the expropriation between the issuance of the 2013 Decision and the issuance of the 2017 Interim Decision. Specifically, the question of the scope of the Tribunal's finding that Article 6 had been breached was raised at the 2016 organizational hearing, was briefed by the Parties in multiple rounds between March and May 2016, was debated at the August 2016 Hearing, and was argued in the September 2019 post-hearing Briefs.[780]

[776] Rejoinder (Conoco), ¶ 171.

[777] Counter-Memorial (Conoco), ¶ 518, citing **A/R-177 [Curtis]** / **A/R-166 [De Jesús]**, *Claimants' Memorial on the Merits*, ¶ 309.

[778] Counter-Memorial (Conoco), ¶ 519.

[779] Counter-Memorial (Conoco), ¶ 520.

[780] Counter-Memorial (Conoco), ¶ 523; Rejoinder (Conoco), ¶ 175.

617. In its Rejoinder Conoco counters Venezuela's argument that Conoco's claim was too generic to support the Tribunal's ruling that Venezuela failed to negotiate compensation in good faith. Conoco maintains that the Tribunal's decision was within the legal framework of the Parties' submissions, as the Claimants argued unlawful expropriation in breach of Article 6, inter alia, by Venezuela's failure to comply with the compensation requirement. Conoco submits that, in any event, the Parties did debate if the expropriation was lawful by reference to whether Venezuela negotiated in good faith against the appropriate standard of compensation, as expressly noted in the 2013 Decision (paragraphs 379, 381).[781]

618. Even if Venezuela showed that the finding of the 2013 Decision was an excess of powers, its claim still fails because the excess is not manifest. Both the 2013 Decision and the 2017 Interim Decision recount the Claimants' request that the Tribunal "declare that Venezuela has breached … Article 6 of the Treaty by unlawfully expropriating ConocoPhillips' investments in Venezuela." As such, it cannot be argued that the 2013 Decision obviously or clearly contains a manifest excess of power.[782]

619. Conoco also argues that the Tribunal did not exceed its powers by fixing the date of Award as the valuation date. The decision on the appropriate valuation date was not made *ex aequo et bono* and Venezuela's arguments (De Jesús) are meritless.[783] Venezuela's claims that the Tribunal's failure to apply the valuation date under Article 6 of the BIT or as required under customary international law (*Chrozów Factory*) are assertions of errors of lawin the interpretation of Article 6 of the BIT and customary international law. However, an annulment application is not an opportunity to reargue points of law, or wrong application of the law. An annulment application should be based on failure to apply the law *in toto*, not an error in applying the applicable law.[784]

620. In any event, the Tribunal reached the correct result (although it would not matter if it had not). The Tribunal used the date of the Award as the valuation date after

[781] Rejoinder (Conoco), ¶ 177.

[782] Counter-Memorial (Conoco), ¶ 522.

[783] Counter-Memorial (Conoco) ¶¶ 543-548, Rejoinder (Conoco) ¶¶ 187-188.

[784] Counter-Memorial (Conoco), ¶¶ 525-527; Rejoinder (Conoco), ¶¶ 180, 181.

considering that (i) the provision of Article 6 of the BIT was silent on the appropriate method to calculate the compensation for unlawful expropriation; (ii) the requirement of customary international law on remedial consequences in the event of an unlawful expropriation; and (iii) that in this case the requirement of "full reparation" under customary international law require a date-of-award taking, since oil prices had increased in the period following the unlawful expropriation.[785] The Tribunal interpreted Article 6 of the BIT, finding that it did not govern the particular circumstances of this case and turned to customary international law. It is not the Committee's role to assess the correctness of the approach the Tribunal took.[786] In its Rejoinder, Conoco argues that Venezuela's claim that the Tribunal failed to apply Article 6 *in toto* when it determined the valuation date based on customary international law misses the mark. Conoco submits that the Tribunal considered the source of law (Article 6) and decided that by its own terms, it did not apply under the circumstances of the case, which does not constitute a failure to apply the law.[787]

621. Conoco further submits that Article 9(3) of the BIT says nothing about the principles governing a finding of a breach of Article 6 and the award of compensation for damages. Even if it were true that Article 9(3) restricted the Tribunal's ability to award damages based on the date of Award, such critique would again be an error of law. Further, as shown by paragraph 90 of the Award, the Tribunal applied Article 9(3) of the BIT: it identified the provision, considered that provision, and dismissed Venezuela's claim that its terms mandated a date-of-taking valuation.[788] In its Rejoinder Conoco notes that Venezuela fails to engage with the Tribunal's holdings on Article 9(3) and Conoco's submission in the Counter-Memorial.[789]

622. Conoco also submits that it was never its position that, if the expropriation was unlawful *sub modo*, compensation would be required only on a date-of-taking basis.

[785] Counter-Memorial (Conoco), ¶ 526; Rejoinder (Conoco), ¶ 182.
[786] Counter-Memorial (Conoco). ¶ 527.
[787] Rejoinder (Conoco), ¶ 183.
[788] Counter-Memorial (Conoco), ¶¶ 529, 530.
[789] Rejoinder (Conoco), ¶ 184.

Conoco argues that Venezuela has used truncated quotations from the Claimants' arguments at the 2010 Hearing, to wrongly assert that the Parties agreed on the legal principles relevant to the appropriate valuation date. But there never was an agreement on the date-of-taking valuation, and the Tribunal did not exceed its powers when it ruled as it did. [790]

623. Even if there was such an agreement, that would still not constitute an excess of powers under Article 52(1)(b). For the Tribunal to have manifestly exceeded its powers it must have acted "beyond the limits of its constituent instrument."[791]Conoco submits that the type of party agreement implicated by this annulment ground in an agreement on the applicable law, falling within the scope of Convention Article 42. The fact that the parties might have similar views on the interpretation of the law is not the kind of party agreement that might limit a tribunal's authority to decide an issue in a particular way. Even if the Parties had a common ground for the interpretation of Article 6 of the BIT and customary international law, it would not bind the Tribunal's interpretative powers.[792]

NO FAILURE TO STATE REASONS

624. Conoco submits that Venezuela's (De Jesús) failure to state reasons argument is meritless. The Tribunal stated its reasons for its finding in the 2013 Decision that Venezuela breached Article 6 of the BIT, but Venezuela disagrees with the reasons. Both Parties presented arguments -and authorities in support- on the question of whether the lawfulness of expropriation by virtue of Venezuela having failed to offer fair market value compensation in good faith. The Tribunal was correct that it was "commonly accepted" that if payment is not made at the outset, an expropriating state must at least engage in good faith negotiation to pay the compensation under the treaty standard. The Tribunal was not, however, required to provide references supporting that proposition, which had already been provided by the Parties.[793] Parties have

[790] Counter-Memorial (Conoco), ¶¶ 531-539.

[791] Counter-Memorial (Conoco), ¶ 541, citing *Churchill Annulment Decision*, ¶ 239.

[792] Counter-Memorial (Conoco), ¶ 542.

[793] Counter-Memorial (Conoco), ¶¶ 551-554.

demonstrated their "common acceptance" in respect of the requirements of Article 6 as shown by their positions on Article 6(c), which turned on whether Venezuela had offered fair market value compensation in good faith.[794]

625. In its Rejoinder, Conoco asserts that Venezuela's arguments fail because an inquiry under Article 52(1)(e) is limited to whether reasons exist and can be followed; it is not about the sufficiency of the reasons (*i.e.*, *why* and *how* the Tribunal reached certain conclusions). Tribunals are not required to provide reasons for reasons. Besides, contrary to Venezuela's contention, the Tribunal's reasoning can be followed from Point A (Article 6) to point B (the finding that if Venezuela did not pay compensation, it had at least an obligation to negotiate to fix compensation under the Treaty standard). Venezuela may disagree with the decision, but the reasons exist and can be understood.[795]

626. In its Rejoinder, Conoco also replies that Venezuela's (Curtis) argument that the Tribunal failed to provide reasons for its 2013 Decision is inadmissible. In any event, the arguments that the Tribunal did not explain *how* it concluded that Venezuela did not engage in good faith negotiations and that the 2013 Decision cannot be reconciled with the case record, are arguments that the Tribunal erred in its assessment of the evidence. Such inquiry is outside the scope of annulment.[796]

627. Conoco also submits, contrary to Venezuela (Curtis), that the Tribunal did consider if the Discriminatory Action provisions were relevant to the question of Venezuela's compliance with the duty to negotiate compensation in good faith under the BIT's standard. The Tribunal provided coherent reasons which can be followed and concluded that there was no evidence that the compensation formulas played a role in the negotiations.[797] On Venezuela's argument that "the Tribunal never explained how it could possibly arrive at the conclusion that Venezuela did not negotiate fair market value in good faith when Conoco Parties themselves had not presented any valuation

[794] Rejoinder (Conoco), ¶ 194.
[795] Rejoinder (Conoco), ¶ 196.
[796] Rejoinder (Conoco), ¶ 199, 200.
[797] Rejoinder (Conoco), ¶¶ 201, 202.

using the Treaty valuation date to compare with Venezuela's offer", and "[a]ll of the *indicia* in the record as to fair market value as of the date of expropriation supported Venezuela's position and negated any notion that there was a lack of good faith negotiation, as well as any notion that Venezuela was not offering fair market value compensation," Conoco replies these are but disagreements with the Tribunal's reasoning, assessment of the evidence and conclusions and not grounds for annulment.[798]

628. Conoco also argues that the Tribunal did not fail to state reasons in its 2017 Interim Decision reconfirming the 2013 Decision's finding on the breach of Article 6 of the BIT. For Conoco, the Tribunal's explanation of the 2013 Decision's findings is logical and consistent with the 2013 Decision. Venezuela's disagreement with the Tribunal's reasoning does not constitute grounds for annulment.[799]

629. In its Rejoinder, Conoco submits that Venezuela fails to explain how the Tribunal's argument does not satisfy the standard of Article 52(1)(e) (reasoning capable of being followed from Point A to Point B). Besides, Venezuela's critique ignores the evidence that contradicts its position, the Claimants' submissions, and the Tribunal's reasoning regarding the breach of Article 6. According to Conoco, Venezuela's repetitive requests for annulment were not based on the actual reasons provided by the Tribunal in its 2017 Interim Decision, but rather on the assertion that the Tribunal did not spend enough time rebutting Venezuela's arguments. That is a perversion of Article 52(1)(e), which concerns whether reasons exist, not whether they are convincing or as thorough as a party might have wished.[800]

630. Furthermore, Conoco submits that the 2013 Decision and the 2017 Interim Decision are not contradictory. The 2017 Interim Decision explains the meaning of the 2013 Decision's finding that Venezuela "breached its obligation to negotiate in good faith." It was based not on a finding of subjective bad faith, but rather on a finding that

[798] Rejoinder (Conoco), ¶¶ 203, 204.
[799] Counter-Memorial (Conoco), ¶¶ 555-564.
[800] Rejoinder (Conoco), ¶¶ 209-211.

Venezuela "failed to be involved in negotiations leading to an offer complying with the requirements of 'just compensation' and 'market value'" as required by Article 6. This conclusion was already clear from the *dispositif* of the 2013 Decision.[801]

631. In its Rejoinder, Conoco counters Venezuela's argument that the 2013 and 2017 Decisions are inconsistent because the 2013 Decision found a breach of non-existent obligation, while the 2017 Decision found no breach of such non-existent obligation to negotiate compensation in good faith. This argument, Conoco submits, ignores that the Tribunal consistently found across both Decisions that Venezuela failed to negotiate or offer compensation according to the BIT standard.[802]

632. Conoco further counters that the Tribunal did not fail to state reasons in its 2017 Interim Decision that Venezuela breached Article 6 of the BIT (failure to negotiate based on fair market value). The Tribunal's decision that Venezuela had not complied with any of the requirements of Article 6(c) and thereby breached Article 6 was correct, and supported by evidence. Conoco submits that the Tribunal considered evidence and arguments presented by both Parties (Embassy cables, the witness testimony of Venezuela's witness and Mr. Goff) but was not persuaded that the evidence demonstrated that Venezuela had offered fair market value compensation. The Tribunal also dismissed the argument that the Claimants' compensation demands were excessive and based on a wrong standard for failure to account for changes in the fiscal regime before the expropriation.[803]

633. In its Rejoinder, Conoco rebuts Venezuela's allegation that it was "undisputed" that Venezuela was negotiating on fair market value. Conoco refers to conclusions drawn by the Tribunal in its 2017 Interim Decision from facts of the record which showed that the Tribunal had given comprehensible and correct reasoning for its finding that Venezuela failed to negotiate on the basis of fair market value. The records include Mr. Del Pino's September 2007 statement that Venezuela would not pay more than book

[801] Counter-Memorial (Conoco), ¶¶ 565, 566; Rejoinder (Conoco), ¶ 206.
[802] Rejoinder (Conoco), ¶ 208.
[803] Counter-Memorial (Conoco), ¶¶ 567-573; Rejoinder (Conoco), ¶ 212.

value for Claimants' Projects, Mr. Ramírez February 2008 speech confirming Venezuela would not provide more than book value compensation, Dr. Mommer's admission at the 2016 Hearing that Venezuela did not make a binding compensation offer, and other WikiLeaks cables demonstrating that by September 2008 Venezuela went to its original position to only pay book value.[804]

634. Lastly, Conoco argues that the Tribunal provided reasons for its decision in the Award that the valuation date should be the date of the Award. Venezuela's real complaint, Conoco submits, is that the Tribunal erred in its decision. Conoco explains how the reasons given by the Tribunal in the Award can be followed. Besides, the Tribunal's decision to set the valuation on the date of award is consistent with the *Chorzów Factory* case and the Tribunal's correct understanding of that case. *Chorzów Factory* limited the appropriateness of a date-of-taking valuation to cases where the expropriation in question was not carried out in violation of a treaty; whereas in this case, the expropriation was done in violation of the Treaty.[805] In its Rejoinder, Conoco notes that Venezuela (Curtis) had abandoned this argument as it did not address it in its Reply.[806]

NO SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

635. Conoco argues that the Tribunal did not breach a fundamental rule of procedure in its 2013 Decision regarding its finding of Venezuela's breach of Article 6 of the BIT. That finding, contrary to Venezuela's contention, was not taken *ultra petita.* Venezuela was heard on issue of whether it had breached Article 6 by expropriating Claimants' investments and whether it had negotiated fair market value compensation in good faith.[807]

636. Even if Venezuela had been deprived of its right to be heard in 2013 (which it was not), it was heard on the same issues in the context of the 2017 Interim Decision. Venezuela

[804] Rejoinder (Conoco), ¶¶ 212, 213.
[805] Counter-Memorial (Conoco), ¶¶ 575-578.
[806] Rejoinder (Conoco), ¶ 218.
[807] Counter-Memorial (Conoco), ¶¶ 582, 583; Rejoinder (Conoco), ¶¶ 219, 220.

was given opportunities during, before and after the August 2016 Hearing to be heard on the issue. There cannot be a serious departure unless the departure leads (or could lead) to a substantially different outcome which would have occurred absent such a breach. Given that the Tribunal heard Venezuela's arguments on this issue and rejected them in the 2017 Interim Decision, there is no basis to claim that any denial of the right to be heard had an impact on the outcome of this case.[808]

637. In its Rejoinder, Conoco notes that it did not mischaracterize Venezuela's argument. Conoco pointed to the references and quotations in its Counter-Memorial demonstrating that the Parties had debated the lawfulness of Venezuela's expropriation based on the evidence in the record regarding compensation negotiations before the 2013 Decision. Even if the Parties had not debated this point, the Tribunal was still free to rule as it did in the 2013 Decision.[809]

638. Conoco also refutes Venezuela's argument that the Tribunal departed from a fundamental rule of procedure by asking the Parties to produce documents that were covered by a confidentiality agreement and exchanged in their settlement discussions between November 2007 and September 2018.[810]

639. Conoco alleges that it was Venezuela who put at issue the period covered by the confidentiality agreement. In the context of its reconsideration requests of the 2013 Decision, Venezuela referred to the Embassy cables reporting on settlement discussions from April and May 2008 to support its position that Venezuela had made fair market value offers and that the Claimants had misled the Tribunal. To determine whether the Claimants have mispresented the facts, the Tribunal asked the Parties for the documents exchanged in the compensation negotiations between November 2007 and September 2008.

640. Venezuela also fails to establish that settlement privilege is a fundamental rule of procedure in ICSID arbitration. As observed by the *Azurix, Tenaris II* and *Teinver ad*

[808] Counter-Memorial (Conoco), ¶¶ 582-585; Rejoinder (Conoco), ¶¶ 220(b), 222.

[809] Rejoinder (Conoco), ¶ 221.

[810] Counter-Memorial (Conoco), ¶ 586.

hoc committees, Arbitration Rule 34 grants tribunals wide discretion to order the production of evidence and to determine its admissibility.[811] In its Rejoinder, Conoco submits that even if the Tribunal's order had ignored the Parties' Confidentiality Agreement, Venezuela has failed to explain how that would violate Convention Article 52(1)(d) or any other procedural rule since Venezuela only refers to settlement privilege, which is not a fundamental rule of procedure.[812] Further, even if settlement privilege were considered a fundamental rule, the Tribunal did not seriously depart from it. Settlement privilege allows for exceptions, and both the abuse of privilege and the waiver exceptions apply in the present case.[813] Venezuela admits there can be exceptions but disagrees that they apply in this case, yet that debate is irrelevant since it is beyond the Committee's mandate to review the merits of the Tribunal's evidentiary rulings.[814]

641. Finally, even if there had been a departure, such departure was not serious and Venezuela has failed to show how the outcome of the arbitration would or could have been different absent the Tribunal's request that Venezuela produce the documents. The Tribunal's conclusion that Venezuela failed to comply with its Treaty obligations did not rely on documents presented by the Parties during the compensation negotiations.[815] Conoco submits that Venezuela's defence that only the Tribunal knows the extent to which the produced documents influenced its decision is an empty assertion and does not meet the standard to annul the Award under Article 52(1)(d).[816]

[811] Counter-Memorial (Conoco), ¶¶ 594, 595, respectively citing *Azurix Annulment Decision*, ¶¶ 208–10, 217; and **A/CLA-93**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, ¶ 89; **A/RLA-63 [Curtis] / ARLA-78 [De Jesús]**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, ("*Teinver Annulment Decision*"), ¶ 199.

[812] Rejoinder (Conoco), ¶ 226.

[813] Counter-Memorial (Conoco), ¶¶ 598-601; Rejoinder (Conoco), ¶¶ 223(a), (b), 225.

[814] Rejoinder (Conoco), ¶ 228.

[815] Counter-Memorial (Conoco), ¶ 605; Rejoinder (Conoco), ¶ 223(c).

[816] Rejoinder (Conoco), ¶ 229.

C.1(4) THE COMMITTEE'S ANALYSIS OF THE GROUNDS RELATED TO THE TRIBUNAL'S FINDINGS WITH RESPECT OF ARTICLE 6 OF THE BIT

642. The Committee examines the challenges brought by both Representations of Venezuela (Curtis and De Jesús) against the findings of the Arbitral Tribunal that: (i) expropriation by Venezuela of the ConocoPhillips' interests was done in breach of the Treaty because Venezuela never paid or offered fair market value compensation as required by Article 6(c);[817] (ii) such breach of the Treaty obligation rendered the expropriation unlawful;[818] (iii) the Treaty only sets compensation standards for a lawful compensation while standards for unlawful expropriation are found in customary international law which provides for full compensation;[819]and (iv) that full reparation necessitates a valuation of the expropriated assets at the date of the award and not at the date of the expropriation.[820]

C.1(4)(1) THE COMMITTEE'S ANALYSIS OF THE GROUNDS INVOKED BY VENEZUELA (CURTIS)

643. The same aspects of an award may fall under several grounds of annulment, such as the challenge of the Tribunal's decisions on the legality of expropriation and valuation date. However, the Applicant is mistaken if it believes that annulment could be achieved by compounding the effect of deficiencies because "grounds reinforce each other,"[821]even when each ground, by itself would not otherwise give rise to annulment.[822] Each ground for challenge must be analyzed separately as they raise different problems and need to be addressed independently. That does not preclude that

[817] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 352, 362, 401, 404(d); **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶¶ 60-63.

[818] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶¶ 153-156.

[819] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 223-228, 244-247.

[820] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 404(e); Counter-Memorial (Conoco), ¶ 431.

[821] Tr. Day 2, 52: 4-6.

[822] *Soufraki Annulment Decision*, ¶ 116 ("*a series of errors is no more necessarily a ground for annulment than a single error*").

the Committee from regrouping the challenges into an argument that can be analyzed under more than one ground.

(a) The unlawfulness of the expropriation

MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS

644. How the Tribunal could reach its conclusion on the compensation negotiations is incomprehensible to the Applicant. According to the Applicant, Venezuela made substantial compensation offers under the applicable Treaty standard of fair market value while ConocoPhillips was negotiating on top of the fair market value of the assets and constantly moving the valuation date in an attempt to take advantage of the post-expropriation oil price increases.[823] The Applicant has restated in its submissions before the Committee[824] the same facts advanced in the arbitration regarding Venezuela's negotiation offers to prove that the Parties' inability to reach a compensation agreement "*was due mainly to the Conoco Parties' insistence on applying the wrong legal standard, disregarding the Fiscal Measures that the Tribunal unanimously found to be perfectly lawful and insisting on constantly increasing their compensation demands in accordance with post-expropriation events rather than accepting the Treaty and customary international law standard of fair market value as of the date of expropriation*."[825]

645. As ConocoPhillips' remarks are not without pertinence, the Applicant first brought the Committee through the factual allegations and legal arguments that were advanced in the arbitration and rejected by the Tribunal.[826] There consist of the Applicant's factual contentions that there is no serious dispute on the substance of the compensation negotiations, Conoco's exaggerated claims on top of the fair market value, and the false accusation of negotiating book value instead of fair market value. The Tribunal's

[823] Memorial (Curtis), ¶ 472; Reply (Curtis), ¶¶ 201, 205. Tr. Day 2, 22: 7-25, 23:1-6, 33:22-25, 34:1-6, 36 :19-22, 38:21-25, 39:15-25.

[824] Memorial (Curtis), ¶¶ 339-449; Reply (Curtis), ¶¶ 194-216. Tr. Day 2, pp. 20:22-25, 21-48.

[825] Memorial (Curtis), footnote 1228.

[826] Tr. Day 2, 77:4-7.

factual findings concerning the negotiations are detailed at paragraphs 94-136 of the 2017 Interim Decision, which the Committee will refers to in the forthcoming discussions.

646. Venezuela argued before the Tribunal that the Parties' offers were not fundamentally different, with evaluations a few months before expropriation in late 2006 at US$ 2.07 billion following Conoco's cash flow methodology of the Upgrading Projects, and at US$2,3 billion by Venezuela in early 2007 after enactment of the nationalization decree.[827] The Tribunal explained that Conoco's figures referred to internal valuations prepared in 2006, before nationalization was decreed when only offers had been made to initiate the process of migration of foreign investments into state companies.[828] The Tribunal at paragraph 96 recalled the findings in the 2013 Decision that none of the proposals submitted by Venezuela for valuation in August 2006 and January 2007 was based on compensation in a form other than through the acquisition of minority stakes in the state entities to be formed.

647. The Tribunal at paragraph 97 emphasized that a valuation made for a minority holding in a state entity is considerably different from a valuation of the investor's interests held in a company controlled by a majority of foreign investors and enjoying the protection of an investment treaty. The Tribunal in the 2017 Interim Decision further noted that Venezuela admitted the difference between migration and expropriation. One would have therefore expected, according to the Tribunal, (at paragraphs 110 and 111 of its Decision) that the difference between the valuation of compensation for nationalization and for migration to be reflected in the negotiations on expropriation which had been ongoing in 2007; however, this appeared not to be the case in Venezuela's consideration.

648. The Tribunal further explained at paragraphs 111 and 112 that expropriation triggered compensation for the value of the asset and profit over the whole of the remaining life of the projects, and that while Venezuela's insistence on book value or similar lower

[827] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 76.

[828] The migration process was launched in February 2007 (Memorial (Curtis), ¶ 339; Reply (Curtis), ¶ 191).

value levels had a short-term future in light of possible arbitration claims. At paragraphs 112 of the 2017 Interim Decision, the Tribunal could not find any evidence that Venezuela was considering a shift towards fair market valuation. The Applicant argues that the Tribunal ignored the agreement emerging from testimony on both sides that Venezuela was not walking away from fair market value.[829] The truth is that the Tribunal could not find any agreement from its factual assessment of the negotiation history. It instead noted that, as of June toAugust 2007, the Parties were reported to be billions of dollars apart.[830]

649. In challenging these findings, the Applicant alleges that the Tribunal ignored the fact that Conoco's experts were told to withhold their 2007 valuation from the Tribunal. The Applicant argues before the Committee that ConocoPhillips never submitted a fair market value at the Treaty date of valuation on January 2007 and instead threw around fantasy numbers of US $ 40, 46 or 28 billion, until they were requested at the August 2016 quantum hearing to disclose the valuation prepared for purposes of the arbitration, which revealed figures of US$ 2.477 billion giving effect to the compensation provision, and US$ 5.855 billion without the cap of the compensation provisions.[831] The Applicant asserts that it is incomprehensible how the Tribunal could find that Venezuela's offers were so far away from fair market value as to render the expropriation unlawful and that the offers of US$ 4 billion and 3.1 billion reported in the Request for Arbitration[832] were tantamount to no offer at all.[833]

650. Before the Tribunal, Venezuela raised ConocoPhillips' misrepresentations of the relevant facts and information which would have led the Tribunal to decide otherwise in the 2013 Decision that the Republic was not offering compensation based on fair market value, notably because it offered in 2007 five per cent of fair market value indicating a value of US$46 billion (paragraphs 79-80). The Tribunal noted that

[829] Tr. Day 2, 30:14-20.

[830] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 103.

[831] Tr. Day 2, pp. 32: 16-22, 44: 21-25, 45, 46: 1-19; Tr. Day 3, pp. 45:21-25, 46-47:1-5. Memorial (Curtis), ¶¶ 379-382, 483-487; Reply (Curtis), ¶¶ 259, 325.

[832] **A/R-22 [Curtis] / A/R-63 [De Jesús]**, Claimants' Request for Arbitration, dated 2 November 2007.

[833] Tr. Day 2, pp. 22:19-25, 23: 1-15, 36:19-25, 37: 1-2. Reply (Curtis), ¶¶ 201, 205, 230, 254.

Venezuela made offers of US$4 billion and US$6.7 billion in the context of an asset swap in June-August 2007 and US$3.1 billion on 2 August 2007 while Conoco claimed US$ 20 billion in August-October 2007 and about US$ 30 billion in September 2008 (paragraphs 103, 105, 128). [834] The Tribunal explained that expropriation accounted for Conoco's claim on higher amounts than for migration based on market value including request for forthcoming oil price increases (paragraph 111). Its assessment of the negotiation scene was that Venezuela changed its position from a more market-oriented approach to the original book value or similar lower value levels because the first active steps of the arbitration were looming in September 2008 at the time the negotiations were breaking down and Conoco was not prepared to settle for a much lesser amount than US$30 billion which they were going to claim (paragraph 128). The Tribunal found that Venezuela had failed to provide any convincing evidence in respect of the relevant facts alleged in support of its misrepresentation claims (paragraph 135).

651. The Committee notes that the Applicant's essential argument concerns the fact that the Tribunal could not see that an offer of US$ 4 billion was not unreasonable when ConocoPhillips was not doing a 2007 valuation.[835] This will be examined by the Committee bearing in mind the Tribunal's declaration at paragraph 135 of the 2017 Interim Decision that ConocoPhillips' alleged misrepresentations "*appears reduced to the simple question whether or not Venezuela had submitted an offer based on fair market value during its negotiations with ConocoPhillips' representatives*." Venezuela contested in the underlying arbitration that never made fair market value offers. The Tribunal noted (at paragraph 120) of the Interim Decision the statements made by Conoco's chief negotiator, whose testimony was relied on heavily by the Applicant to counter the finding that Venezuela insisted on book value during the negotiations,[836] that "[*w*]*hile Venezuela is said to accept fair market methodology, the 4 April 2008 cable also says that this observation does not apply to the totality of ConocoPhillips' claims,"* and the April 2008 Embassy cable was "*not always easy to understand*." The

[834] See also Memorial (Curtis), ¶ 348.

[835] Tr. Day 2, p. 44: 4-10.

[836] Reply (Curtis), ¶ 259. Tr. Day 3, pp. 61:10-24, 62-63:1-18.

Tribunal found that the cable was certainly not as clear as Venezuela argued. While Venezuela's acceptance of fair market methodology is reported in the cable for the expropriated assets, the Tribunal emphasized that the cable did not refer to any proposal or offer actually made on Venezuela's behalf. Furthermore, the May 2008 cable did not report on any offer submitted by Venezuela and neither of these two cables included evidence that Venezuela had submitted any concrete offer based on fair market value. In summary (at paragraphs 121 and 122), the Tribunal found as matters of fact that no evidence had been supplied in support of an allegation that an offer based on fair market values was submitted after November 2007, that Venezuela backtracked to its original position to pay only book value (paragraph 123). These findings of fact should further be read with the Tribunal's understanding (at paragraph 109) that the term 'book value' was used to describe Venezuela's position that it will object to any compensation based on fair market value as determined by Conoco which is more than one derived through its accounting method of valuation.[837]

652. An arbitrator's findings of fact are final and immune from review by an *ad hoc* committee. The Committee has no authority to perform a *de novo* review of the factual questions or evidential records that have already been assessed by the Tribunal.[838] In the same vein, the Committee could not overrule the Tribunal's evaluation of the evidence, including witness testimony, regarding Venezuela's failure to offer compensation on fair market value in the negotiations.[839] Notably, the Applicant points to the Committee the cavalier dismissal of the internal valuations made by ConocoPhillips, the confusion of Venezuela's position and offers in connection with the migration process, the Tribunal's ignorance of the closeness of the US$ 2.3 billion March 2007 offer to ConocoPhillips' internal valuations, ignorance of Venezuela's offers of US$ 3.1 and 4 billion, its ignorance of the reasonableness of all Venezuela's offers and ignorance of witness testimony, its failures to appreciate the U.S. Embassy cables as well as factors of major importance relating to the Parties' different

[837] Reply (Curtis), ¶ 208.

[838] *Suez Annulment Decision*, ¶¶ 133, 299; *Tulip Annulment Decision*, ¶ 85.

[839] Counter-Memorial (Conoco), ¶¶ 454-455.

assumptions of the compensation provisions as well as the impact of post-nationalization oil price increases and the relevant fiscal regime and, finally, sweeping ConocoPhillips' misrepresentations under the rug.[840] To the Committee, these are attempts by the Applicant to substitute its own assessment of the circumstances surrounding the negotiations to that of the Tribunal , without showing that the Tribunal failed to state reasons for its conclusions. The Applicant's contention that the Tribunal made "*indefensible findings regarding the negotiations, culminating with its unsustainable conclusion that Venezuela had failed to make any reasonable offers of compensation*"[841] is beyond the Committee's reach under Article 52.

653. Coming now to the claim of a manifest excess of powers, the Applicant views the Tribunal's finding of an alleged failure to negotiate compensation in good faith in the 2013 Decision as an excess of authority due to failure to apply the applicable law. The Applicant argues that the Tribunal invented (at paragraphs 401, 404(d) of the 2013 Decision) a new legal principle, namely, failure to negotiate compensation in good faith means that expropriation should be considered unlawful, which was later acknowledged by the Tribunal to be incorrect in the 2017 Decision.[842] Since, according to the Applicant, the incorrect standard of good faith negotiations was abandoned in 2017, the argument misses the mark. The Applicant submits that the Tribunal overlooked two universally accepted principles when assessing claims of expropriation: failure to receive compensation and a disagreement over the compensation alone does not render an expropriation unlawful.[843]

654. In support of the first principle, the Applicant refers to the *Mobil* award which concluded against the same factual background regarding migration from private participation to mixed company structure in the oil production sector, that the expropriation was lawful as the only missing element was compensation.[844] In both

[840] Memorial (Curtis), ¶¶ 507, 511-513, 517, 519-524, 526-529; Reply (Curtis), ¶ 255.
[841] Memorial (Curtis), ¶ 506, see also ¶¶ 628-630.
[842] Memorial (Curtis), ¶ 590.
[843] Memorial (Curtis), ¶¶ 589, 591, 594; Reply (Curtis), ¶¶ 222, 224.
[844] *Venezuela Holdings Award*, ¶¶ 288-306. Memorial (Curtis), ¶ 588. Tr. Day 1, pp. 130:20-25, 131:1-19.

cases, it is undisputed that, although Venezuela admitted that ConocoPhillips, like the *Mobil* parties, were entitled to compensation and made substantial compensation offers, no payment was made.[845]

655. The Applicant adds that Prof. Abi-Saab in his dissent to the 2013 Decision also pointed out that the only question *"is whether the expropriating State provided for compensation, and if it did, to ascertain that what was offered was not 'illusory' amounting to a refusal to pay compensation*."[846] In support, the Applicant declares that "[t]*here is no case or authority anywhere that holds that a disagreement on the amount of compensation under circumstances remotely resembling this case, where the obligation to compensate was acknowledged and substantial compensation offers were indisputably made, renders an expropriation unlawful*".[847] In any event, the Applicant alleges that the inability to reach an agreement on compensation was due to Conoco's insistence on constantly revaluating their interests in accordance with post-expropriation increases in oil prices.[848]

656. The factual analysis that the Committee should take into consideration for answering the Applicant's argument of manifest excess of powers is not the one proposed by the Applicant. The Committee must do with the Tribunal's conclusions in the 2017 Decision that, as previously determined in the 2013 Decision, Venezuela did not envisage, conduct or propose to ConocoPhillips a market valuation as required by Article 6(c) of the Treaty, nor did it make any offer based upon such valuation (see paragraph 113 of the 2017 Interim Decision). Furthermore, Venezuela made no reasonable offer for compensation or other equivalent contribution in the near future, either through negotiations that had been conducted or on its own initiative (see paragraph 129 of the 2017 Interim Decision).

657. As remarked by the Mobil Tribunal, "[i]*n order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the*

[845] *Venezuela Holdings Award*, ¶ 301; **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim* Decision, ¶ 129.
[846] **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶ 252.
[847] Memorial (Curtis), ¶ 593; see **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶ 253.
[848] Reply (Curtis), ¶¶ 199-200.

facts of the case."[849] In the Committee's view, the marked difference between the *Mobil* case and the present case is that the tribunal in *Mobil* case did not find that Venezuela's proposals were incompatible with the requirement of just compensation of Article 6(c) of the Treaty.[850] This was not the finding of the Tribunal in the underlying arbitration. The Applicant's reference to the *Mobil* award would become relevant if the Tribunal, like the *Mobil* tribunal, had acknowledged that Venezuela's offers met the requirement of Article 6(c). However, the Committee is bound by the Tribunal's opposing factual finding and cannot overturn this conclusion.

658. The Committee notes further that by applying his legal analysis of Article 6(c) of the Treaty to the facts of the case, Prof. Abi-Saab took the view that "*an offer of 2.3 billion US dollars is hardly negligible, and in spite of the wide ranging estimations of the Claimants, it is worth recalling that this offer corresponded almost exactly to the internal estimates of the two Projects by the Claimants themselves* […] *just a few months before the expropriation*."[851] The Committee feels obliged to clarify that while a dissenting arbitrator, as an adjudicator of the merits of the dispute, may take contrary factual observations, this Committee is not permitted to do the same, whether by agreeing with the dissenting arbitrator or coming to a different assessment of the fact as the Tribunal had done.

659. The same reasoning applies to the Applicant's assertion that the documentary and oral record concerning Venezuela's substantial offers that did not come to fruition was due to Conoco's negotiation position of taking an above fair market value standard. In the Committee's view, had the Tribunal found that Venezuela's offers complied with Article 6(c), there could be room for Venezuela to advance such a criticism. However, it was Venezuela's failure "*to be involved in negotiations leading to an offer complying with the requirements of 'just compensation' and 'market value'*"[852] which led the

[849] *Venezuela Holdings Award*, ¶ 301.

[850] *Venezuela Holdings Award*, ¶ 305.

[851] **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶ 261.

[852] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 60, ¶ 151: "*There is no dispute about the fact that the measures enforced on 26 June 2007 have not been taken against 'just compensation' as required by Article 6(c). In fact, no compensation has been paid at all. Therefore, the question whether compensation was provided that meets the threshold of market value is irrelevant*."

Tribunal to declare the expropriation as unlawful. The Tribunal was therefore not only dealing with a situation of a mere failure to receive compensation or any disagreement over compensation. The criticism made against the Tribunal is therefore unsustainable.[853] Again, the Committee's task is to review the Award as it was made by the Tribunal, not as it should have been made following the Applicant's indications.

(b) The valuation date

MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS

660. The Applicant denounces the Tribunal's invention of a constantly changing fair market value for moving the valuation date as another expression of a manifest excess of powers.[854] According to it, moving the valuation date from the date of expropriation to the date of the Award lacks any basis in the applicable law, as this disregarded Articles 6(c) and 9(3) of the Treaty and instead relied on customary international law. It further argues that even if the Tribunal could be said to have applied international law, it failed to actually apply its principles.[855]

661. The Committee reminds that Article 6 of the Treaty, which sets out three conditions for the lawfulness of expropriation or nationalization:[856]

> "*(a) the measures are taken in the public interest and under due process of law;*
> *(b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given;*
> *(c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier; it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the*

[853] Memorial (Curtis), ¶¶ 587, 595.

[854] Tr. Day 2, 18:7-11. Reply (Curtis), ¶ 270.

[855] Memorial (Curtis), ¶¶ 546, 558, 596-598, 608; Reply (Curtis), ¶¶ 267-268, 279.

[856] "*Neither Contracting Party shall take any measures to expropriate or nationalise investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with:*"

> *claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants*"

has been interpretated in the following manner by the Tribunal:

> "*Article 6 of the BIT is structured in three parts, each part representing one of the three conditions to be fulfilled to render an expropriation admissible under the BIT. The allocation of a 'just compensation' is one of those requirements.*"[857]

> "*Indeed, a breach of an obligation contained in Article 6(c), as stated in the 2013 Decision, does not have the effect of providing the aggrieved party with a claim for damages based on such breach. The legal effect of such breach appears exclusively in the overall context of Article 6, because the non-compliance with the requirements of letter (c) means that the measures taken by the host State do not comply with the conditions set out in this provision*."[858]

It follows that the Treaty provides compensation only for expropriations carried out on the basis of Article 6 requirements.

662. The Tribunal, who held in the 2017 Decision that Venezuela was in breach of the "*just compensation*" condition Article 6(c) of the Treaty due to its failure to make offers on fair market value,[859] declared in the Award:

> "*As the Tribunal has concluded and explained in its 2017 Interim Decision, this requirement has not been fulfilled by the Respondent. Therefore, one of the three cumulatively applicable requirements has not been met, and Article 6 of the BIT has been breached. Such unlawful act calls for reparation of the Claimants' losses*."[860]

663. Having explained in the 2013 Decision the consequences of the compensation provision of Article 6(c) of a breach of Article 6 as a whole:

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[857] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 223.

[858] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 142. See also ¶ 147 ("*the finding that one of these conditions has not been met must be understood as having the effect of rendering the expropriation in June 2007 unlawful*").

[859] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 60.

[860] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 223.

> "*The Tribunal, coming back to the terms of the BIT, does not consider that the extent of the compensation payable in respect of an unlawful taking of an investment, for instance because it is in breach of an "undertaking" in terms of Article 6(b), is to be determined under Article 6(c): that provision establishes a condition to be met if the expropriation is in all other respects in accordance with Article 6*."[861]

the Tribunal further stated in the Award regarding compensation of an unlawful expropriation:

> "*If* […] *the right to compensation was limited to the amount of 'just compensation' referred to in Article 6(c) of the BIT, there would be no reparation of the wrong committed by the Respondent. The resulting compensation would simply be deferred from July 2007 to the date of this Award, together with interest. There would be no sanction of a manifest breach of the provision of Article 6(c) of the BIT, which implies a breach of Article 6 as a whole when prohibiting expropriation as long as one of the three pertinent conditions is not fulfilled. In the meantime, in the period between the taking and the rendering of this Award, the Projects would operate as decided by the Venezuelan Government and with all the benefits accruing to them, in particular when taking into account the increase in oil prices. This is not what the BIT provides and international law allows*."[862]

The distinction between lawful/unlawful expropriation matters and leads to a difference of financial outcome.

664. The Tribunal thus added that in case of an unlawful expropriation, the investor cannot be deprived of the difference between the market value at the time of taking and the benefit of the Projects accruing since the expropriation and the date of the award and in the future until the end of the Projects' lifetime. In particular, the Tribunal notes:

> "*For this part of the expropriation, no compensation would ever be paid. Such a result is implied in a compensation scheme as provided by Article 6(c) of the BIT, provided payment occurs at the same time. If such compensation is not effectively made or differed, the expropriating State would take on both levels: no account is provided for the market value at the date of the taking, and the full*

[861] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 342.

[862] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 226.

> *actual and future value of the Projects as from that date accrues to the State*."[863]

665. In the Committee's view, to the extent that the Applicant claims that the Tribunal disregarded Article 6, the above extracts from the 2013 and 2017 Decisions and the Award clearly demonstrate that the Tribunal did not omit or neglect Article 6 and it had considered this provision as applying to the 26 June 2007 expropriation.

666. As to the Applicant's other contention for awarding compensation far beyond the alleged Treaty breach in disregard of Article 9(3) of the Treaty, the Committee considers that this provision which reads:

> "*The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and, if such is the case, the amount of compensation*"

spells out the Tribunal's scope of findings which excludes any consideration of breaches of non-Treaty obligations. Contrary to the Applicant's assertion, the Tribunal only considered compensation for failure to pay for expropriation in breach of the Treaty to interest from the date payment was due until the date of payment.[864] The Tribunal had applied no law other than the one agreed to by the Parties in Article 9(5).

667. The Applicant's challenge of an incorrect statement on compensation at the above quoted paragraph 226 of the Award that inclusion of profits accrued subsequent to the act of expropriation into compensation is neither provided under the BIT nor the international law. According to the Applicant, this is an invention by the Tribunal beyond the terms of Article 6(c) evincing a "*gross misunderstandings of fundamental principles of international law*."[865] The Tribunal should have considered the Applicant's argument that where negotiations in good faith are taking place on the basis of fair market value, the valuation date does not move just because there is a

[863] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 227.

[864] Memorial (Curtis), ¶¶ 558, 600; Reply (Curtis), ¶ 279. Tr. Day 2, 6:10-22. Counter-Memorial (Conoco), ¶ 528.

[865] Memorial (Curtis), ¶ 558.

disagreement on the precise amount of that amount.[866] It bears recalling that the Tribunal did not find a breach of Article 6 because there was a disagreement about the amount of compensation, but because Venezuela's obligations to negotiate against the right standard had been breached.[867] The Tribunal already considered in the 2013 Decision the consequences of such unlawfulness for valuing compensation with decisions declaring customary international law on the matter:

> "*The Tribunal, on the basis of principle and the authorities reviewed above, concludes that if the taking was unlawful, the date of valuation is in general the date of the award.*"[868]

668. The Applicant relies on the *Chorzów Factory* decision,[869] international jurisprudence, awards and academic writings to demonstrate that the date of valuation is the date of dispossession when the only wrongful act is the failure to pay compensation and when the expropriation is lawful in other respects. The Applicant's argumentation rests on a distinction between expropriation unlawful *per se* as in *Chorzów Factory* and expropriation unlawful *sub modo*.[870]

669. The Committee has no hesitation to dispose of the Applicant's invocation of a Parties' agreement during the 2010 Hearing that if the expropriation is unlawful *sub modo*, delayed payment should be calculated by a valuation at the date of expropriation plus interest.[871] If Conoco companies had accepted that an expropriation *sub modo* only entitles them to a claim for the amount due plus interest for delayed payment, they would never have agreed that their situation fell within that category of expropriation.[872] There is therefore no manifest excess of power when the Tribunal,

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[866] Reply (Curtis), ¶ 268.

[867] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 60.

[868] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 343.

[869] **A/CLA-103**, *Case Concerning The Factory At Chorzów* (*Germany/Poland*) [1928] PCIJ Series A. No. 17 (previously CL-84), 13 September 1928 ("*Chorzów Factory Judgment*").

[870] Memorial (Curtis), ¶¶ 460-464, 540-544, 551-585, 596, 603, 608; Reply (Curtis), ¶¶ 219, 221, 233, 264, 268, 278. Tr. Day 2, 7:4-25, 8-14:1-15.

[871] Memorial (Curtis), ¶¶ 384-385, 389, 398, 465, 610, 614; Reply (Curtis), ¶¶ 238, 287. Tr. Day 2, 17:19-22.

[872] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶ 379. Counter-Memorial (Conoco), ¶¶ 531-538.

having found no effective agreement between the Parties, fixed the valuation date to the date of the award.

670. The Tribunal considered the *Chorzów Factory* case as well as the other authorities in the 2013 Decision[873] and in the Award on which the Applicant relies again in these annulment proceedings.[874] The Tribunal read the *Chorzów Factory* judgment where the Court noted that in the situation of an expropriation, the payment of a fair compensation would have rendered it lawful whereas its omission would have kept it unlawful.[875] It discussed expropriation unlawful *sub modo* identified by academic writers in situations where expropriation is not accompanied by compensation at the time of taking, in contrast to an expropriation unlawful *per se*. The Tribunal remarked that the time factor is not addressed in the expropriation *sub modo* but only the situation of a missing payment at the time of the taking, which is therefore not saying "*that an expropriation is lawful if only payment of effective compensation is missing and that it remains so for the future*."[876] The Tribunal considered that the terminology "lawful expropriation" might not be the most appropriate when one of the key elements of an expropriation, such as compensation, is missing. It observed that the term, as used in a number of awards, means that an investor that suffered an expropriation otherwise "lawful," save for the non-payment of compensation, is not entitled to claim more than the payment of such compensation reflecting the market value of the investment at the moment of the expropriation plus the interest to the day of the payment.[877] The Tribunal distinguished cases where the difference between compensation is determined at the moment of expropriation and the assessment of damages resulting from the omission to provide such payment at that time, from cases, such as the present one, where the

[873] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 340-342.
[874] Memorial (Curtis), ¶¶ 384, 455, 460-464, 550-556.
[875] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 217.
[876] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 218.
[877] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 219.

requirement of negotiating "just compensation," which is one of the three conditions to render an expropriation lawful under the Treaty, has not been fulfilled by Venezuela.[878]

671. The Committee notes that the Applicant's challenge is that, without finding a *per se* violation of anything, the Tribunal decided to move the valuation date when Article 6(c) provides for valuation as of the time immediately prior to the date of expropriation and not after expropriation.[879] The Applicant also alleged at the Hearing on annulment that "*there is a debate in the international law community as to whether to characterize an expropriation as unlawful because of the failure to pay compensation, or whether to say it's lawful but subject to the payment of expropriation*."[880] The Applicant asked: "*Does that make it unlawful, rather than lawful subject to the payment, if you've actually flatly denied an obligation to pay?*"[881] In the Applicant's interpretation of the *Chorzów* and international cases, if the only wrongful act is failure to pay compensation (unlawful *sub modo*), then compensation must be based on the value of the property at the time of dispossession.[882] One of the two academics quoted by the Applicant in support of the distinction between the *sub modo* and *per se* expropriation[883] stated the position that is not that disagreement on the amount of compensation renders the taking, *per se*, unlawful but that a grossly, inadequate offer of compensation will do so.[884] The Applicant has demonstrated that academic commentaries make reference to the lawful/unlawful distinction as a key to the determination of damages,[885] but the standards of illegal expropriation which may lead to damages different from the value of the asset at the time of the taking give rise to different approaches. There is thus room for debate on the principles of customary international law which would have

[878] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 221-223. See also **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 145 ("*The conclusion of this analysis is that the term 'obligation', as it is used in paragraph 404(d) of the 2013 Decision, must be understood as having the same meaning as the term 'condition' found in Article 6 of the BIT. If and to the extent that the requirements of Article 6(c) have not been complied with, one of the three cumulative conditions set out in Article 6 has not been fulfilled, and the effect is that Article 6 has been breached*").

[879] Reply, (Curtis), ¶ 278. Tr. Day 2, p. 15:6-25, p. 16, 17:1-18.

[880] Tr. Day 2, p. 5:9-14.

[881] Tr. Day 2, p. 5: 22-24.

[882] Tr. Day 2, p. 6:12-14.

[883] Memorial (Curtis), ¶¶ 462-464, 541, 553; Reply (Curtis), ¶ 281. Tr. Day. 3, pp. 59:8-25, 60.

[884] Counter-Memorial (Conoco), ¶¶ 536-537.

[885] Memorial (Curtis), ¶ 460.

been neglected by the Tribunal in characterizing the expropriation as unlawful and drawing consequences on the valuation date.[886]

672. The Applicant also alleges that the Tribunal has moved the valuation date without any discernible reasons and it is impossible to follow the Tribunal's reasoning from its acknowledgement of the *Chorzów Factory* principle (that the valuation date should be the date of dispossession unless the expropriation is unlawful *per se*) to the conclusion that the valuation date should be moved. [887] This Committee, however, can find no justification for Conoco's suggestion that Venezuela would have modified the scope of its submissions in this regard in its Reply Memorial.[888] The Applicant refers the Committee to paragraphs 210-211 of the Award which restate the *Chorzów Factory* judgment for Poland's seizure of a German owned factory in violation of the 1922 Geneva Convention concerning Upper Silesia as evidencing Venezuela's above-mentioned understanding. The Applicant says that the Tribunal, "*engaged in an erroneous and convoluted reinterpretation of Chorzów Factory as supporting the view that it would be 'unjust' if an expropriating State was ordered to pay compensation limited to the value of the investment as of the date of the taking plus interest*."[889]

673. In the following passages of the Award, the Tribunal noted at paragraph 217 that the *Chorzów* Court made the distinction between lawful and unlawful expropriation when the Court suggested[890] that if Poland's wrongful act had merely been nonpayment of the value at the moment of taking, that amount plus interest would be all that was due, even though a denial of payment is a wrongful act as well. The Tribunal refused to treat certain treaty breaches, such as those concerning the compensation obligation, as non-violations. The Tribunal declared that the difference for the aggrieved party between an expropriation legally carried out, except for the non-payment of compensation, and

[886] *MCI Annulment Decision*, ¶ 51 ("*An egregious violation of the law would assume that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations. Any other type of violation would not amount to a manifest excess of power*").

[887] Memorial (Curtis), ¶¶ 633-637.

[888] See Rejoinder (Conoco), ¶ 218.

[889] Memorial (Curtis), ¶¶ 550-552.

[890] *Chorzów Factory Judgment*, p. 47.

an expropriation made in compliance with all legal requirements could not be reduced to a simple matter of interest to be paid. At paragraphs 213 and 214 of the Award, the Tribunal determined that at a later date following expropriation, the value of the expropriated property, given its investment nature, should be calculated by a reference to a higher market price, unlike normal deposit accumulating with the rate of interest in the bank account. The Tribunal observed at paragraph 215 of the Award that, while the *Chorzów* Court did not elaborate on whether the full value of expropriation should be determine only through information at the time of the taking, or with the information that later became available, the *Chorzów* Court was of the view that the aggrieved investor should not be put into the unfavourable position with entitlement to only "just compensation" plus interest, when it is protected from expropriation without compensation determined by reference to the market price or value at the time of the taking. [891]

674. The Tribunal reminded at paragraphs 224 and 225 of the Award that the *Chorzów* Court instructed the experts on reparation to consider all consequences of an unlawful act with two valuation options, one based on the value on the date of expropriation plus profits from the date of expropriation to the date of the judgment and another based on the value of the expropriated asset at the time of the judgment. At paragraph 230 of the Award, the Tribunal noted that the Parties' debate over the valuation date centred on the distinction between an *ex-ante* valuation, as of the date of the taking, or an *ex-post* valuation, which include all available actual and future data. The Committee notes that determining the full value at the date of expropriation could involve the investment value at the date of expropriation based solely on information known at the date of expropriation (*ex-ante* information), or the investment's value as of the date of expropriation using information available at the award date (*ex-post* information). The latter approach would yield the same result to the award date, and a valuation on the date of the award was ultimately selected by the Tribunal at paragraph 244 of the Award

[891] See also **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 216 ("If compensation was awarded a certain time after the taking as the 'just price' for what was expropriated, together with interest, the hots State would be treated more favourably than the situation it would face with an expropriation that should not have taken place without compensation").

for determining the compensation amount. The Tribunal found (paragraph 241 of the Award), that none of the *ex-ante* or *ex post* valuations can be conducted according to its own logic and, at paragraph 243 of the Award, that the Parties' debate showed that one or the other method cannot be adopted without a number of adjustments. In light of its finding that the State could take advantage of the difference between profits from the operation of the expropriated projects and the applicable interest if payment was deferred beyond the expropriation date, the Tribunal (see paragraphs 250 and 251) declared that an *ex-post* valuation corrects the unequal treatment by determining the deferred payment based on the prevailing market value at the time.

675. Before examining how the Tribunal conducted this debate on the basis of investment jurisprudence for translating into monetary compensation the full reparation standard of *Chorzów*, the Committee concludes that it cannot share the view that it is impossible to follow the Tribunal's reasoning. Under the cloak of an argument of failure to state reasons, the Applicant expresses disagreement with the Tribunal's appreciation of the *Chorzów* judgment and on the criteria for illegality and the consequences of the illegality for damages.

676. The Tribunal identified cases in investment jurisprudence where compensation was treated as one of the conditions for an expropriation not prohibited under the treaty, with the effect, that if no compensation has been paid, an unlawful expropriation would result as if the other requirements had not been met.[892] The Applicant says that the Tribunal distorted this body of authorities to reach its decision on the valuation date.[893] In support of its manifest excess of powers contention, the Applicant refers to other passages[894] of the same decisions than those cited and footnoted in the Award.[895] None of the quotes in the Applicant's submissions or the Award are inaccurate. The

[892] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 257.

[893] Memorial (Curtis), ¶ 586.

[894] Memorial (Curtis), ¶¶ 571-581 ¶¶ 601-607. Tr Day 3, pp. 165:18-25, 166-167: 1-18, 176-183: 1-22. See also **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 255 ("[c]*ontrary to what has been suggested, the view that an expropriation incompatible with the BIT for the only reason that no compensation has been paid calls for a valuation at the date of the expropriation is not as broadly shared as this is sometimes argued*").

[895] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 256-260.

Applicant links together the passages it has chosen as demonstrating that the valuation date does not move in case of expropriations merely lacking compensation. The Tribunal's selection aimed at demonstrating that the Treaty standard does not apply in case of unlawful expropriation, a notion which includes when compensation as one of the cumulative requirements to be met, has not been paid, and that an ex-post valuation is required in accordance with the full reparation principle under customary law.

677. The Committee notes, for example, that some tribunals considered the lack of payment of just compensation to be a breach of the treaty conditions for expropriation but still referred to the treaty valuation date of expropriation due to distinct facts of those cases, such as an agreement between the parties in *Crystallex*,[896] or the sale of the business at that time in *Kardassopoulos*,[897] or the lack of appreciation in the investment since the taking in *Funnekotter*.[898] Others, like *Gemplus* found the customary international law standard the same as the treaty standard.[899] Yet others, like *ADC,*[900] *Yukos,*[901] or *Quiborax,*[902] used the lawful/unlawful distinction for determining damages at the date of the award.[903] The points of difference between the Applicant and the Tribunal over

[896] **A/RLA-122 [Curtis]**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 716-717, 816; **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 256, 257.

[897] **CL-331**, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia,* ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 390 (noting that absence of due process is sufficient to support a finding that the expropriation was wrongful), 514-517.

[898] **CL-229**, *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, ¶ 98 ("*The Tribunal observes that the conditions enumerated in Article 6 are cumulative. In other terms, if any of those conditions is violated, there is a breach of Article 6.*"), 108-123.

[899] **CL-326**, *Gemplus, S.A. SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, and Talsud, S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award, 16 June 2010, ¶ 8-25 ("*The Tribunal concludes that these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 of both treaties regarding the payment of adequate compensation*") ¶¶ 12-43, 12-53, 13-93.

[900] **A/CLA-105**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶¶ 426-444, 481, 483-499 .

[901] **R-425**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, ¶¶ 1581-1585, 1758-1769 giving a choice to the investor between valuation at the expropriation or at the award (Tr. Day 3, p. 166:7, 167:4-12, 176:7, 183:4-18).

[902] **R-577**, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 227, 240-255, 325-330, 343-347, 370-386.

[903] **A/RLA-124 [Curtis]**, See also *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 481 (unlawful expropriation for failure to pay compensation), ¶¶ 542-549 (part of the valuation based on *Chorzów* and not merely on treaty for some companies).

these jurisprudential authorities underline the diversity of situations and investments which make each case unique. The Award which found that the Treaty requires negotiations with the investor leading to an offer complying with the requirements of just compensation and market value and damages based on value at the award date is another illustration of the distinction between lawful/unlawful distinction with effect on damages. That the Award is not the carbon copy of a previous decision of another tribunal is no indication of a manifest excess of powers. The respective use of the same decisions as illustration of the distinction between lawful and unlawful expropriation in case of lack of compensation and of the consequences on the application of the treaty standards of compensation demonstrates that denaturation of these authorities is not at stake. It points instead to the pertinence of the grouping together of the selective choice of decisions made by the Tribunal and the interpretation it gave to the interrelationship of this body of decisions in the complex area of expropriation compensation. It remains open to debate whether a Treaty compensation obligation requires the State to be involved in negotiations with the investor leading to an offer complying with just compensation and market value, should have treated as violations the same in terms of remedy under the full reparation standard or if nuances should have been introduced.

678. Striking the balance between the best incentive to induce the State's compliance with the Treaty and crossing the line of impermissible punishment for exercising sovereignty over natural resources with the risk of the investor's overcompensation is the challenge of any reparation model. Such discussion is entirely appropriate on appeal but escapes the reviewing powers of the Committee under the ground of manifest excess of powers which does not extend to the substantive correctness of the award and the appropriateness of the of the decision.

(c) The 2013 Decision and the 2017 Interim Decision

FAILURE TO STATE REASONS

679. The Applicant underlines an absence of logic for finding that Venezuela did not negotiate in good faith in the 2013 Decision without having first decided the relevance of the compensation formulas of the Petrozuata and Hamaca Association Agreements

to the determination of the quantum of compensation payable in the case.[904] The Tribunal indeed reserved any finding at that stage regarding the relevance of the compensation provisions and postponed it to the determination of the quantum.

680. The Committee observes the alleged premature finding is in the same award as the finding that the expropriation is not covered by the compensation provisions of the Association Agreements.[905] This would render the Applicant's argument moot, or unacceptable as an attempt to review the correctness of the approach taken by the Tribunal under Article 52(1)(e).[906] The Committee, nevertheless, answers by remarking that the Tribunal's focus was on whether the Parties' attitude in the negotiations complied with the requirements of Article 6(c) and not on the determination of compensation. The evidence before the Tribunal was that these formulas were not brought into the negotiations, in particular by Venezuela.[907] The Tribunal elaborated further in the 2017 Decision on the lack of relevance, influence and impact of these provisions on any concrete offer.[908] Against this situation where the formulas were not relied upon in support of its contention that its offers complied with fair market value, the Applicant's challenge on that count is devoid of any relevance.

681. The Applicant's next allegation regarding the absence of reasons pertains to the Tribunal's interpretation of the 2013 Decision in the 2017 Interlocutory Decision and its impact on the Award. Before coming to the substance of the Applicant's grievance, we examine the complaint regarding the lack of explanations for how the Tribunal discovered in 2017 a power the majority had twice said before it did not have and why, if the only basis for unlawfulness in 2013 had been incorrect, the Tribunal could simply adopt a new basis for unlawfulness.[909]

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[904] Memorial (Curtis), ¶¶ 397, 631; Reply (Curtis), ¶¶ 294, 321, 327. Tr. Day 2, 49:19-24.

[905] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 38, 171.

[906] **A/RLA-57 [Curtis]**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, 1 February 2016, ¶ 196.

[907] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 394, 402.

[908] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 130.

[909] Reply (Curtis), ¶ 300.

682. On 10 March 2014, the Tribunal denied Venezuela's first reconsideration request[910] and on 9 February 2016, its second reconsideration request,[911] before deciding on 19 August 2016 to hear Venezuela's third request of 20 April 2016.[912] As Venezuela pleaded in the arbitration that there was no justification for not reconsidering the wrong 2013 Decision, it cannot now complain in the annulment about the Tribunal's decision to reconsider the 2013 Decision. We nonetheless understand the Applicant's complaint as directed against the confirmation of the unlawfulness of the expropriation in the 2017 Decision, albeit for other motives than in the 2013 Decision.

683. According to the Applicant, the statements in the operative part of the 2013 Decision that Venezuela has breached its obligation to negotiate in good faith for compensation on the basis of the fair market value as required by Article 6(c) of the Treaty and the statements in the 2017 Interim Decision that the Tribunal did not find a lack of good faith on the part of Venezuela for its breach of an obligation to negotiate on the basis of fair market value[913] are incomprehensible and cannot explain why everyone understood para. 404(d) of the 2013 Decision as a finding of bad faith negotiations.[914] The Tribunal acknowledged in the 2017 Decision that the true meaning and effects of the 2013 Decision's statements in para. 404(d) "*remained a matter of debate*".[915] The Tribunal's reasons for clarification are found at paras. 52-66 of the 2017 Decision. The Tribunal more particularly explained that the term "bad faith" was never used in the 2013 Decision in connection with the negotiations. It noted that it never identified the term "good faith" which appeared in connection with negotiations in the Parties' submissions and stated that the quotations of the term "good faith" as used by the

[910] **A/R-40 [Curtis]** / **A/R-81 [De Jesús]**, Decision on Respondent's Request for Reconsideration, 10 March 2014 ("*Reconsideration Decision*").

[911] **A/R-217 [Curtis] / A/R-182 [De Jesús]**, Decision on Respondent's Request for Reconsideration of the Tribunal's Decision of 10 March 2014, 9 February 2016.

[912] **A/R-98 [Curtis] / A/R-139 [De Jesús]**, Procedural Order No. 4, 19 August 2016 ("*PO4*").

[913] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 60 ("*Based on the above analysis of the 2013 Decision, the conclusion is that the Tribunal did not find a lack of good faith on the part of the Respondent for its breach of an obligation to negotiate on the basis of market value as required by Article 6(c) of the BIT. The Tribunal stated simply that the Respondent failed to be involved in negotiations leading to an offer complying with the requirements of 'just compensation' and 'market value'*). Tr. Day 3, pp. 179: 20-25, 180:1-13.

[914] Memorial (Curtis), ¶¶ 488-498, 616-621.

[915] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 38.

Tribunal in the 2013 Decision demonstrate that no distinction was ever made between "negotiating" and "good faith" which have always been used conjunctively. This meant for the Tribunal that para. 404(d) was based on Venezuela's failure to negotiate on the basis of market value and not on a purported attitude of bad faith on part of Venezuela during the exchange of views that actually took place.[916] The Tribunal's reasoning can be followed, even if it does not do justice to Venezuela's claims that, absent a finding of bad faith, it should have followed that the expropriation was not illegal and that the valuation date should be the date of expropriation.

684. The Applicant says then that the Tribunal issued in the 2017 Decision a clarification which changed the meaning of the lack of good faith negotiation finding which became a failure to negotiate based on the fair market value principle. The Tribunal redefined through reinterpretation the finding of lack of good faith negotiation and therefore the basis of unlawfulness of the expropriation despite the record of the case which shows that Venezuela was negotiating on the basis of fair market value[917]. In support of its allegation that the Tribunal's conclusions following which Venezuela's offers were so grossly inadequate as to be tantamount to a denial of compensation are irreconcilable with the undisputed facts of the case, the Applicant refers us to a table reproducing Venezuela's compensation offers.[918]

685. The Committee has already examined, under the unlawfulness of the expropriation, the Tribunal's evaluation of the Parties' respective offers both before and after the filing of the request for Arbitration which runs through paras. 94-136 of the 2017 Decision. We may therefore be brief. Failure to state reasons exists whenever a pertinent piece of evidence has been left unaddressed by the Tribunal without discussion of its probative value.[919] An arbitral tribunal has otherwise no duty to motivate why it did not consider

[916] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶¶ 53, 55, 57-58.
[917] Memorial (Curtis), ¶¶ 622, 628-629; Reply (Curtis), ¶¶ 299, 301-304.
[918] Memorial (Curtis), ¶ 631; Reply (Curtis), ¶ 204.
[919] *TECO Annulment Decision*, ¶¶ 130-133.

each and every piece of evidence introduced in the case by the parties.[920] The Applicant however adds that the Tribunal cannot make decisions totally disconnected from reality and contradicted by the record.[921] The situation denounced by the Applicant actually addresses an alleged misunderstanding on the part of the Tribunal of the whole record on the Parties' offers and negotiations. This is different from an omission of relevant items for the decision due to oversight or inadvertence. It does not however behoove the Committee to assess the evidentiary value of these offers. This is well stated law[922] and does not concern a failure to state reasons.

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

686. The right to propose evidence on pertinent facts and the tribunal's duty to examine and address pertinent issues are aspects of the right to be heard. The admissibility of evidence bears direct relationship with the fundamental rules of due process which the Applicant prays us to examine regarding the protection of the settlement privilege which, it says, the Tribunal violated in ordering the production by Venezuela[923] of documents covered by the Confidentiality Agreement as of 27 November 2007,[924] on pain of drawing adverse influences.[925] According to the Applicant, the Tribunal had no excuse to cast aside an express agreement of the parties prohibiting the production of documents exchanged in the compensation negotiations which it relied on in the 2017 Decision.[926]

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[920] *Rumeli Annulment Decision*, ¶ 104; **A/CLA-77**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, 14 July 2015, ("*Kilic Annulment Decision*"), ¶ 139.

[921] Reply (Curtis), ¶¶ 305-307, 309, 311.

[922] *Duke Energy Annulment Decision* ¶ 214: "*an ad hoc committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties*".

[923] **A/R-98 [Curtis] / A/R-139 [De Jesús]**, *PO4*.

[924] **A/C-73**, Confidentiality Agreement Among the Bolivarian Republic of Venezuela, by Means of the Ministry for the Popular Power of Energy and Oil, and ConocoPhillips Company (previously C-579), 18 January 2008.

[925] Memorial (Curtis), ¶¶ 396, 478-480, 499-505.

[926] Memorial (Curtis), ¶¶ 638, 644; Reply (Curtis), ¶¶ 333, 348, 351. Tr. Day 2, pp. 54:1-7, 56:1-5; Day 3, pp. 65:3-25, 65-66.

687. The 2017 Decision recounts the differences of interpretation between the Parties regarding the scope of the confidentiality obligation for their own statements or those of the other side, with ConocoPhillips emphasizing the right to defend themselves against Venezuela's misrepresentation claims.[927] The Applicant's challenge that the Tribunal ordered the production of documents wrongly considered as not containing sensitive information[928] is focused on a presentation submitted during the negotiations showing an amount of US$ 2.283 billion identified by the Tribunal as representing the book value of the three Projects which served to refute Venezuela's witness statement that an offer of US$ 2.3 billion represented a reasonable fair market value of the two Upgrading Projects.[929] ConocoPhillips claims that a settlement privilege is not a rule of procedure and much less a fundamental one.[930] The Applicant[931] cites legal writings and investment cases, including an *ad hoc* committee decision,[932] from which it can indeed be held that respect of confidentiality is an aspect of procedural fairness which is affected by Article 52(1)(d). Even assuming the materiality of the breach, the Tribunal's decision of an unlawful expropriation would still rest on other evidence of the non-compliance of Venezuela's offers which can be read at paragraphs 94-135 of the 2017 Decision.[933] At any rate, the Applicant has not established the serious nature of the departure from confidentiality which might have been caused by the Tribunal's assessment of the evidentiary weight of Venezuela's offers.

[927] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶¶ 70-75.

[928] Memorial (Curtis), ¶ 503.

[929] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 100. Memorial (Curtis), ¶ 509.

[930] Rejoinder (Conoco), ¶ 225.

[931] Memorial (Curtis, ¶¶ 639-643.

[932] *Libananco Annulment Decision*, ¶¶ 88-89.

[933] Counter-Memorial (Conoco), ¶ 606.

C.1(4)(2) THE COMMITTEE'S ANALYSIS OF THE GROUNDS INVOKED BY VENEZUELA (DE JESÚS)

MANIFEST EXCESS OF POWERS; FAILURE TO STATE REASONS; SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

688. Relying on the dissenting opinions of Prof. Abi Saab to the 2013 Decision and of Prof. Bucher to the Decision on Venezuela's second Request for Reconsideration of 9 February 2016, the Applicant denounces the Tribunal's *ultra petita* decision regarding Venezuela's breach of a non-existent obligation in the Treaty to negotiate in good faith for compensation.[934]

689. The Committee observes that the minority arbitrator did not have at the time of the dissent, the benefit of the 2017 Decision. Negotiation in good faith was raised at para. 334 (4) of the 2013 Decision as one of the four issues to be determined in answering ConocoPhillips' claim that Venezuela breached Article 6 of the Treaty with the expropriation. Issues to be determined, which describe the steps in a tribunal's reasoning, should not be confused with claims which delimit the tribunal's mission. Only decisions beyond the mission limits are *ultra petita*. Having clarified in the 2017 Decision that the operative part of the 2013 Decision at para. 404(d) is based on Venezuela's failure to negotiate on the basis of a fair market value and not on a purported attitude of bad faith on its part during the exchanges of views that took place during the negotiations,[935] the Tribunal did not draw *ultra petita* legal consequences from the facts introduced by the Parties into the case regarding the negotiations nor denatured ConocoPhillips' submissions on Article 6(c) by deciding a claim that was not submitted by the investor.[936] The Tribunal's decision not having been made *ultra petita* and in excess of its powers could not as a consequence have deprived Venezuela of its right to be heard and to submit evidence.[937]

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[934] Memorial (De Jesús), ¶¶ 252, 258; Reply (De Jesús), ¶¶ 351, 353-356. Tr. Day 1, pp. 106:17-25, 107-109:1-14.

[935] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶¶ 53, 55.

[936] Memorial (De Jesús), ¶¶ 244, 251, 256.

[937] Memorial (De Jesús), ¶ 265; Reply (De Jesús), ¶¶ 373, 374. Tr. Day 1, pp. 91:12-22, 95:23-25, 96-99:1-24.

690. The Applicant otherwise makes clear that it targets the Award's incorporation of the contradictory operative parts of the 2013 and 2017 Decisions and not the inconsistency of the two Decisions.[938] Indeed, the ICSID Convention allows requests for annulment against awards but not in respect of other decisions. Preliminary decisions, such as the 2013 Decision and the 2017 Interim Decision, are not subject to an independent request for annulment. Having been subsequently incorporated in the Award,[939] they are only subject to annulment as parts of the Award.

691. The Applicant emphasizes an egregious application of Article 6(c) by the Tribunal due to a construction of its terms in para. 362 of the 2013 Decision which enshrines three unwritten, yet cumulative, conditions of (1) an obligation of the host State to negotiate (2) which must be performed in good faith and (3) by reference to the market value standard set out in the Treaty.[940]

692. Para. 362 of the 2013 Decision, which reads:

> "*362. The requirements for prompt payment and for interest recognise, in accordance with the general understanding of such standard provisions, that payment is not required at the precise moment of expropriation. But* ***it is also commonly accepted that the Parties must engage in good faith negotiations to fix the compensation*** *in terms of the standard set, in this case, in the BIT, if a payment satisfactory to the investor is not proposed at the outset*."[941]

appears in the opening section of the Decision entitled as compensation negotiations in good faith by reference to the standard in Article 6(c). Para. 362 echoes the fourth issue to be determined by the Tribunal at para. 334(4) of the 2013 Decision to resolve ConocoPhillips' claim for breach of Article 6. Para. 362 introduces further developments on the Tribunal's construction of Article 6(c) which are found in the 2013 Decision and in the 2017 Decision, both incorporated in the Award. The Applicant's attack must be properly placed against that background. The Tribunal

[938] Reply (De Jesús), ¶ 483.

[939] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 38, 43, 1009.

[940] Memorial (De Jesús), ¶¶ 276, 282, 287; Reply (De Jesús), ¶¶ 396-397.

[941] Emphasis added.

decided to clarify in the 2017 Decision its rather infelicitous expression "*obligation to negotiate in good faith for compensation*" which, it reckoned, "*remained a matter of debate*" between the Parties.[942] It explained "*that the Tribunal did not find a lack of good faith on the part of the Respondent for its breach of an obligation to negotiate on the basis of market value as required by Article 6(c) of the BIT. The Tribunal stated simply that the Respondent failed to be involved in negotiations leading to an offer complying with the requirements of 'just compensation' and 'market value.'*"[943] We cannot follow the Applicant's invitation to find the Tribunal's interpretation of 2013 untenable in isolation[944] when the true meaning of para. 404(c) of the 2013 Decision has been interpreted in the 2017 Decision which are all parts of the same Award. The Applicant's argument[945] that the Tribunal's interpretation of Article 6(c) would contradict Article 9(3) of the Treaty which limits the award to breaches of the Treaty only fails accordingly.

693. We hold the same for the Applicant's attack on lack of reasons for remarking that the expression "*it is also commonly accepted that the Parties must engage in good faith negotiations to fix the compensation*" in para. 362 does not meet the threshold of a reasonable connection regarding a breach of Article 6(c), absent any reference to a particular law or case law or authority or arguments by either party.[946] Failure to cite specific authority is not in itself a ground of annulment, and more particularly since the argument is made in relation of a manifest excess of powers allegation,[947] there can be no failure to apply the proper law if the rule applied pertains to such law.[948] Here, it cannot be seriously disputed that good faith is a norm of general and fundamental character which is reflected in the general principles of law universally recognized by

[942] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶¶ 37-39.

[943] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 60.

[944] Memorial (De Jesús), ¶ 283.

[945] Memorial (De Jesús), ¶ 286.

[946] Memorial (De Jesús), ¶ 298; Reply (De Jesús), ¶¶ 414-415, 427. Tr. Day 1, pp. 105:22-25, 106:1-8.

[947] Memorial (De Jesús), ¶ 281.

[948] *Soufraki Annulment Decision*, ¶ 128; **A/CLA-88**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on Annulment, 8 August 2018, ¶ 236. See also Counter-Memorial (Conoco), ¶¶ 551-554.

nations as one of the sources of international law mentioned in Article 9(5) of the Treaty.[949] Besides the Tribunal was not required to provide references when documentation was provided by the parties in their submissions.[950]

694. ConocoPhillips has pointed out the Parties submissions at the May-June and July 2010 hearings where good faith offers and negotiations were debated[951] and the 2017 Decision echoes the Parties' positions on negotiating in good faith.[952] Reverting to the whole sentence which, says the Applicant, constitutes all of the extent of the Tribunal's reasoning concerning the existence of a duty to negotiate in good faith,[953] the Committee considers it must be read in light of the Tribunal's interpretation of good faith negotiations in the 2017 Decision as part of the same Award which explains that, when the 2013 Decision states that Venezuela was not negotiating in good faith, it referred to facts demonstrating that the State failed to engage in negotiations leading to just compensation based on market value as required by Article 6(c)[954].

695. We therefore examine at this stage the Applicant's alleged contradiction in the Award between the 2013 Decision and the 2017 Interim Decision regarding the interpretation of the obligation to negotiate in good faith.[955] Under the title "*The True Meaning of the 2013 Decision's Findings in Respect of the Negotiations on Compensation*" in the 2017 Decision,[956] the Tribunal declared that the 2013 Decision does not mention the notion of bad faith in relation to the negotiations on the part of Venezuela (paragraph 53). The Tribunal recapitulated all occasions where the term "*good faith*" was used throughout the 2013 Decision, including at para. 362 (paragraphs 55-56) and held that these quotations demonstrate that no distinction was ever made between "*negotiating*" and

[949] "*The arbitral award shall be based on: …. iv. the general principles of international law*"

[950] *Soufraki Annulment Decision*, ¶ 128.

[951] Counter-Memorial (Conoco), ¶ 553; Rejoinder (Conoco), ¶ 198. ConocoPhillips has also suggested that there was common acceptance between the Parties of a good faith participation requirement for a lawful expropriation (Counter-Memorial (Conoco), ¶ 553) which has been contested by the Applicant (Reply (De Jesús), ¶ 424.

[952] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 55.

[953] Memorial (De Jesús), ¶ 299.

[954] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 59.

[955] Memorial (De Jesús), ¶¶ 359, 361, 363; Reply (De Jesús), ¶ 468. Tr. Day 1, pp. 115, 116: 1-19.

[956] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, p. 10.

"*good faith*" which were always used conjunctively (paragraph 57), before concluding (paragraph 59) that, when the 2013 Decision states that the Respondent was not negotiating in good faith, reference was made to facts demonstrating that the Respondent failed to engage in negotiations leading to just compensation based on market value as required by Article 6 (c) and that nowhere does the 2013 Decision say, in relation to such failure, that Venezuela was acting in bad faith. The Tribunal consequently considered Venezuela's third Application for Reconsideration as moot to the extent it required it to review an assessment of lack of good faith in negotiating for compensation (paragraphs 62-63). The Tribunal's interpretation in 2017 of the 2013 Decision ruling is supported by a sequence of reasons which can be perfectly understood by the Parties. The Committee cannot follow the Applicant's view that the reasons of the 2013 and 2017 Decisions cancel each other out.

696. The Applicant further says that the 2017 Interim Decision nonetheless contains two internal contradictions on the matter of good faith.[957] It detects a first contradiction between the Tribunal's decision to clarify the 2013 Decision at para. 38 and the finding at para. 65 that "*the 2013 Decision's conclusion is to be taken for what it says and no more*". The expression which is thus singled out follows the Tribunal's prior clarification at para. 60 that Venezuela failed to be involved in negotiations leading to an offer complying with the requirements of just compensation and market value. In the Committee's view, this reads in that context without any contradiction. The second contradiction pointed out by the Applicant is with the Decision of 10 March 2014[958] which rejected Venezuela's first Request for Reconsideration of the 2013 Decision.[959] This was not the end of the matter, since the Tribunal accepted at the 2016 August hearing on quantum to hear Venezuela's third Request for Reconsideration.[960] At any rate, the Applicant does not explain how the Award, inasmuch as it incorporates the motives of the 2017 Decision, would be defective in its reasoning because it would

[957] Reply (De Jesús), ¶¶ 477-480.

[958] **A/R-40 [Curtis] / A/R-81 [De Jesús]**, *Reconsideration Decision*.

[959] Memorial (De Jesús), ¶ 364; Reply (De Jesús), ¶ 479.

[960] **A/R-98 [Curtis] / A/R-139 [De Jesús]**, *PO4*.

contradict another decision which forms no part of the Award, when the ground of Article 52 (1)(e) is directed against the award's failure to state reasons.

697. We now concentrate on the Applicant's further challenge of the 2017 Interim Decision for egregiously misapplying the terms of Article 6(c) of the Treaty with other added and unwritten conditions, following which (1) the host State must take a pro-active approach (2) which implies concrete proposals (3) likely to meet the required level of compensation (e.g. market value) and (4) to have a chance to be approved by the investor.[961] The Applicant more particularly relies on two expressions found in para. 152 of the 2017 Decision: "*exclusively if it leads to positive results*" to justify its previous finding that Venezuela unlawfully expropriated ConocoPhillips when Article 6(c) does not impose an "obligation de résultat" and "*having a chance to be approved by the investor*" when said Article does not impose an outcome to the negotiations.[962]

698. Those expressions must be looked at in the context of the full sentence in which they appear and of paragraph 152 which reads:

> "*The Tribunal, in its 2013 Decision, recognized a margin of flexibility and accepted,* ***by reference to experience in investment practice****, that the requirement of compensation provided on time is still complied with if the Parties 'engage in good faith negotiations to fix the compensation in terms of the standard set, in this case, in the BIT' (para. 362). When referring to the language used in Article 6(c), such negotiation should be engaged either immediately before the measures were taken or when the impending measures became public knowledge, which, in the instant case, refers to a date shortly before 26 June 2007. However, such negotiation that might serve as a transitory substitute for actual payment must be of a nature resulting in providing satisfaction to the investors with equal or with similar effects than actual payment. Article 6(c) further requires that payment shall be made 'without undue delay'; compared to a situation where compensation is addressed through negotiation, such substitute of actual payment is acceptable in the context of Article 6(c)* ***exclusively if it leads to positive results*** *without undue delay. In the normal course of proceeding with such negotiations efficiently and without delay, the host State must necessarily take a pro-active approach, which implies that it should put forward*

[961] Memorial (De Jesús), ¶ 334; Reply (De Jesús), ¶¶ 438, 442.

[962] Memorial (De Jesús), ¶¶ 335-337.

> *concrete proposals likely to meet the required level of compensation (e.g. market value)* ***and having a chance to be approved by the investor***."[963]

699. We recall that paragraph 362 of the 2013 Decision, which is mentioned in the first sentence, stated that payment of compensation is not required at the precise moment of expropriation as it is commonly accepted that the Parties must engage in good faith negotiations to fix the compensation in terms of the standards set in the Treaty if a payment not satisfactory is not proposed at the outset. The end sentence of paragraph 152 completes and concludes that negotiation as "*a transitory substitute for actual payment, is acceptable in the context of Article 6(c) exclusively if it leads to positive results without undue delay*" and that "[i]*n the normal course of proceeding with such negotiations efficiently and without delay*", "*the host State should put forward concrete proposals likely to meet the required level of compensation (e.g. market value) and having a chance to be approved by the investor*". The Applicant gives no clue as to why the Tribunal's interpretation of Article 6(c) sets a threshold beyond what the Parties consented to under the Treaty. Some evidence that the Contracting Parties meant the reverse of what the Tribunal interpreted would have been a useful guide to the Committee for enquiring whether the Tribunal distorted the Treaty's terms. Under the guise of manifest excess of powers, the Applicant invites the Committee to come to a different interpretation of Article 6(c) than that of the Tribunal. Before continuing with the manifest excess of powers ground raised by the Applicant, we deal with its in passing remark on the absence of information provided in the Tribunal's insert "*by reference to experience in investment practice*"[964] in the opening sentence of para. 152.[965] Matters of common knowledge may be noticed without any request by a party. The reader of the sentence is moreover referred to the following quote "*it is commonly accepted that the Parties must engage in good faith negotiations*" from para. 362 of the

[963] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 152 (Emphasis added).

[964] Memorial (De Jesús), ¶ 336.

[965] "*The Tribunal, in its 2013 Decision, recognized a margin of flexibility and accepted, by reference to experience in investment practice, that the requirement of compensation provided on time is still complied with if the Parties 'engage in good faith negotiations to fix the compensation in terms of the standard set, in this case, in the BIT' (para. 362).*"

2013 Decision. We have already answered in that context the Applicant's argument about the absence of authority to support the statement.

700. The Applicant's grievance for failure to apply the terms of Article 6 rests on the Tribunal's alleged evasion of its duty to review the underlying uncontested facts that Venezuela made offers which constituted a reasonable amount of compensation for the negotiations regardless of the valuation methodology.[966] The Applicant wrapped up its argument at the Hearing as the one thing the Tribunal "*missed was to say that there had been an offer*."[967] In support of its allegation that the Tribunal, when finding that no specific reference was made to market value in the negotiations, wrongfully interpreted that Article 6(c) requires a specific method of calculation for the compensation offered by the State,[968] the Applicant relies notably here again on Prof. Abi-Saab's dissent that what matters is the magnitude of the sums offered regardless of the accounting method used to calculate such magnitude.[969] Nonetheless, to further quote Prof. Abi-Saab's call for examining whether the actual magnitude of the sum "*reasonably corresponds to a standard of compensation that is prima facie objectively and legally credible in casu*,"[970] the Committee is unable, under the limited relief of an annulment action as contrasted with appeal, to agree with the dissenting arbitrator for overruling the Tribunal's alleged misapprehension of the evidence[971] or else find that Venezuela's

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[966] Memorial (De Jesús), ¶¶ 347, 348, 349; Reply (De Jesús), ¶ 455. See **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*,¶ 153 ("*The Respondent has not complied with any of these requirements. The negotiations that took place before the taking over of ConocoPhillips's assets and interests were conducted by Venezuela on a model representing a migration into empresas mixtas, based on a substance and an amount of compensation that had nothing to do with a compensation representing market values covering the loss of profits that were to be earned by ConocoPhillips' companies until the end of the lifetime of the Projects. When the negotiations were engaged in parallel to the arbitration proceeding, Venezuela never made a concrete proposal. The evidence before the Tribunal demonstrates with stringent clarity that no offer was ever made by Venezuela in order to put a positive end to the negotiation. In addition, Witness Mommer never referred to any written offer submitted by Venezuela's representatives, while admitting that the Government of Venezuela was not authorized to make any monetary commitment without formalizing it in writing. Finally, when Venezuela decided to abandon the negotiations on 8 September 2008, this was a clear sign of its preference to have the matter settled through arbitration, which had no other meaning than admitting that the requirement for just and timely compensation based on market value, as contained in Article 6(c) of the BIT, had not been complied with*").

[967] Tr. Day 1, p. 92:18:19. See also Memorial (De Jesús), ¶¶ 326, 331.

[968] Memorial (De Jesús), ¶¶ 343-346, 352; Reply (De Jesús), ¶¶ 443, 464.

[969] **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶ 199 (cited at ¶ 344 Memorial (De Jesús); Reply (De Jesús), ¶ 450).

[970] **A/R-4 [Curtis] / A/R-45 [De Jesús]**, *Abi-Saab Dissenting Opinion*, ¶ 199.

[971] Memorial (De Jesús), ¶ 331.

proposals complied with the just compensation standard as the *Exxon Mobil* tribunal elicited from the evidence before it,[972] before censoring the Tribunal's interpretation of Article 6 as wrong.[973] Such redress cannot be provided by the Committee.[974]

701. The Applicant raises the existence of a further manifest excess of powers regarding the Tribunal's findings on the valuation date of ConocoPhillips' assets. The Tribunal allegedly failed to apply the proper law of the Treaty *in toto* in applying a simplistic and inaccurate approach in its determination of the compensation for breach of Article 6(c) pursuant to the customary international law standard of full compensation, instead of applying the market value at the date of taking Treaty standard embedded in Article 6(c). In doing so, the Tribunal thus circumvented the Treaty provisions and exceeded the limits of the powers vested on it by Article 9(3) of the Treaty to sanction Venezuela.[975]

702. The Applicant's challenge actually asserts an *in toto* failure "*to apply the proper law, that is the BIT*,"[976] but which is only part of the proper law designated by the Treaty at Article 9(5) mentioning the general principles of international law in addition to the Treaty provisions,[977] such as Articles 6 or 9(3). As stated elsewhere in this Decision, non-application of provisions of the proper law, no more than its erroneous application, which are appellate type arguments that question the tribunal's manner of applying the proper law, amount to a manifest excess of power.[978] The Committee nevertheless addresses the arguments raised by the Applicant inasmuch as they challenge partial

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[972] Memorial (De Jesús), ¶ 344; Reply (De Jesús), ¶¶ 448, 451-452, 459-462.

[973] Memorial (De Jesús), ¶ 354; Reply (De Jesús), ¶ 449.

[974] *Daimler Annulment Decision*, ¶ 186. See also Counter-Memorial (Conoco), ¶ 516.

[975] Memorial (De Jesús), ¶¶ 434-440; Reply (De Jesús), ¶¶ 553-554, 556.

[976] Reply (De Jesús), ¶ 553.

[977] Article 9, 5): "*The arbitral award shall be based on: i. the law of the Contracting Party concerned; ii. the provisions of this Agreement and other relevant Agreements between the Contracting Parties; iii. the provisions of special agreements relating to the investments; iv. the general principles of international law; and v. such rules of law as may be agreed by the parties to the dispute*".

[978] **A/CLA-85**, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Annulment, 19 December 2016, ¶ 289; **A/CLA-67**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application of Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, ¶ 91; *AES Annulment Decision*, ¶ 35. See Counter-Memorial (Conoco), ¶ 502.

non-application as having the same consequences for the Tribunal's decision on the valuation date as total non-application.

703. Moving the date completely, which modified the contours of the but-for-scenario relevant to determine compensation and unduly opened the scope of compensation, is a failure to apply the proper law according to the Applicant. By accepting that ConocoPhillips could receive compensation for the "*lucrum cessans*," the investor was compensated not only for the consequences of a breach of Article 6(c) but also as if it had found that Venezuela had breached Article 6(a) and (b).[979] The Applicant recalls that this is in contradiction with the 2013 Decision which found that Venezuela did not incur any breach of its other undertakings under the Treaty save for providing just compensation under Article 6(c). By using the full compensation standard rather than the one of Article 6(c) as if as if the expropriation was unlawful *per se* and not an expropriation *sub modo*, the Tribunal supplemented the terms of the Treaty with international customary law.[980]

704. We briefly account for the Tribunal's reasoning regarding Article 6. The Tribunal interpreted Article 6 in the Award as laying down three cumulative requirements for making expropriation measures admissible under the Treaty: (a) public interest and due process, (b) absence of discrimination, (c) just compensation representing the market value of the investment at the time of taking, with the consequence that if one of them has not been met, Article 6 is considered as breached.[981] The extent of compensation payable in case of an unlawful taking of an investment cannot be any longer determined under Article 6(c) which only applies if the expropriation accords in all other respects with Article 6. As a result, if the taking is unlawful, the date of valuation for compensation is no more the date of taking envisaged at Article 6(c), it is now the date of the award in compliance with customary international law.[982] Having determined in the event that Venezuela breached Article 6, the Tribunal consequently decided that it

[979] Memorial (De Jesús), ¶¶ 439-440, 447; Reply (De Jesús), ¶¶ 557, 561, 563.

[980] Memorial (De Jesús), ¶¶ 440-442.

[981] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 223.

[982] **A/R-2 [Curtis] / A/R-43 [De Jesús]**, *Decision on Jurisdiction and the Merits*, ¶¶ 342, 343.

need not address any breach of Article 6(c) that relates only to one of the three conditions required for a lawful taking.[983] The Tribunal accordingly proceeded to determine the standard of reparation and the valuation date under international law.[984] We cannot follow the Applicant when it explains the Tribunal's decision to apply international law as disregarding Article 6, "*not because it considered that this provision did not apply, but simply because it considered that the standard of compensation provided therein was not adequate since it focused on making the Conoco Parties whole and not sanctioning the Republic*" for its failure to pay just compensation pursuant to Article 6(c).[985] The progression of the Tribunal's interpretation leaves no room for the possibility of a usurpation of power by substituting a standard for any other reasons than repairing the harm caused to the Conoco Parties with a treaty violation expropriation. It is only within this meaning that a punitive element could be discerned for putting the incentive on the State for not following the Treaty. Reaffirming the importance of expropriation only according to Treaty is within the goals of reparation as will be examined below with the Applicant's further contestation of the Tribunal's interpretation of the *Chorzów* judgment. No demonstration has been made at this stage that the Tribunal's interpretation of Article 6 would exceed the contours of the applicable law provision of Article 9(5) of the Treaty.

705. The Applicant regards the Tribunal's approach as an absurd application of the principle of full reparation enshrined in the *Chorzów Factory* judgment as if the expropriation was unlawful *per se* and not an expropriation *sub modo*[986] as appears from the following passage in para. 226 of the Award:

> *"In the meantime, in the period between the taking and the rendering of this Award, the Projects would operate as decided by the Venezuelan Government and with all the benefits accruing to them, in particular when taking into account the increase in oil*

[983] **A/R-3 [Curtis] / A/R-44 [De Jesús]**, *Interim Decision*, ¶ 155.

[984] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 195, 244.

[985] Reply (De Jesús), ¶ 554.

[986] Memorial (De Jesús), ¶¶ 444, 445, 447.

prices. This is not what the BIT provides and international law allows."[987]

706. The Applicant takes issue with the application of the lawful/unlawful distinction by the Tribunal regarding the criteria of illegality and the consequences for the damages for giving full effect to the *Chorzów* judgment imperative of making whole the aggrieved party. [988]

707. The Committee notes the irreconcilable approaches of the Applicant and of the Tribunal regarding the characterization of the violation of Article 6(c) committed by Venezuela and as a consequence of finding the expropriation illegal, triggering the international customary law duty to provide full reparation calculated above the value at the date of expropriation. As contrasted with a treaty compliant expropriation for which the harm is covered according to the Treaty by value at the date of expropriation:

"*The Tribunal adds that the proper identification of the remedy for a violation of the BIT should respect the object and purpose of the BIT as this must apply to the BIT's provisions on investment protection in general. If 'just compensation' is determined as per the date of the expropriation, and taken forward through a simple rate of interest, the host State would draw a clear advantage from its taking, as it did in the present case. Thus, such interpretation would result in an incentive for host States to expropriate investments and to defer payment of compensation until an undetermined future date. Such an approach would defeat the purpose of 'protection of investment' that is the object of the BIT as stated in its Preamble*."[989]

708. Inclusion of the income from the expropriation to the award in the calculation of damages as the measure of full reparation which is more than the amount in the Treaty for expropriations which respect legal commitments does not give justification to the

[987] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 226.

[988] "According to the well-known principle settled in the Chorzów judgment, 'reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation, which would, in all probability have existed if that act had not been committed'" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 224). "[…] *that when considering 'wiping-out' all the consequences of an unlawful expropriation, the situation of the investor has to be addressed as it would, in all probability, have existed if that unlawful taking had not taken place*" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 225).

[989] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 228.

Applicant's grievance of an overcompensation of the Conoco companies[990] that would be indicative of a failure to apply the international customary the Tribunal purported to apply.[991] More than expressions of condemnation and disagreement with the Tribunal's interpretation of international jurisprudence would be needed to support an assertion made under Article 52(1)(b).

709. The Applicant's grievances about the Tribunal's decision on the valuation date and its consequences on the standard of compensation challenge how the Tribunal combined the different limbs of the proper law designated under Article 9(5) of the Treaty and applied each of them in light of an alleged wrong finding of an unlawful expropriation. The Tribunal's allocation of the respective roles of the Treaty provisions and of the general principles of international law in Article 9(5) is not censurable for annulment. A manifest excess of power challenge raises the question of which other law than the proper law was applied by the tribunal, not the manner in which the proper law and its provisions was interpreted and applied by the tribunal.[992]

710. The Committees' conclusion further entails rejection of the Applicant's challenge regarding the non-application of Article 9(3) of the Treaty limiting the award to the amount of compensation of the damages caused by a breach of an obligation which was raised as a consequence of the disregard of the Treaty provisions on compensation because of the Tribunal's lack of authority to award damages by moving the valuation date.[993]

711. The Applicant finally challenges the decision on the valuation date issue for manifest excess of powers because of the Tribunal's usurpation of *ex aequo et bono* powers with reasons based not on the law, but on the rising oil prices after the date of the taking to provide for a more favorable compensation that would otherwise be due. Thus, the

[990] Memorial (De Jesús), ¶ 448.

[991] Memorial (De Jesús), ¶ 444.

[992] *MCI Annulment Decision*, ¶ 42 ("*A distinction should therefore be drawn between, on the one hand, what was decided by the tribunal, which concerns a manifest excess of powers, and, on the other hand, how it was decided by the tribunal, which in principle escapes the scrutiny of annulment under Article 52(1)(b) as concerning the reasoning of the tribunal*").

[993] Memorial (De Jesús), ¶ 438 (see also ¶ 286); Reply (De Jesús), ¶¶ 555-556.

decision is not a misinterpretation of the full compensation standard under customary international law but is based on the objective to sanction Venezuela for the advantage it may have obtained from the 2007 taking due to the increase of oil prices.[994]

712. The Committee agrees with the Applicant that an *ex aequo et bono* decision without the parties' authorization is an excess of power for failure to apply the proper law.[995] In the present case, *ex aequo et bono* powers are not envisaged by Article 9(5) of the Treaty on the proper law. We find the Applicant's accusation purely inferential as the Tribunal never claimed to have the power to decide *ex aequo et bono* or had in fact attempted to do so. The Applicant cannot identify terminology in paragraph 229 of the Award that would denote that the Tribunal used equitable considerations in its reasoning on making the investor whole as a consequence of the unlawful expropriation. By holding that "*in the present case, the rising oil prices are the main factor which informs the debate on the fixing of the appropriate valuation date*,"[996] the Tribunal applied to the facts of the case the approach of using information known at the date of the award which it adopted in "*taking account of the future economics of the Project*."[997] The Applicant's contention that, had the prices decreased instead of increased, the valuation would have been different,[998] assumes that worsened business conditions, such as a fall in oil prices in the event, would have been excluded by the Tribunal from *ex post* information. The Applicant does not demonstrate that the Tribunal, who was not discussing the floor on the remedy, would have adopted such an absurd result for *ex aequo et bono* considerations notwithstanding its choice of the valuation date on the basis of an unlawful expropriation and of an increase in the value of the expropriated asset since the date of expropriation.

[994] Memorial (De Jesús), ¶¶ 452, 456; Reply (De Jesús), ¶¶ 568, 569. Tr. Day 1, pp. 117:11-22.
[995] *Klöckner Annulment Decision*, ¶ 59.
[996] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 229.
[997] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 229.
[998] Memorial (De Jesús), ¶ 456; Reply (De Jesús), ¶ 568.

D. GROUNDS RELATED TO THE APPLICATION OF THE COMPENSATION MECHANISM

713. The Committee summarizes the Parties' arguments on the alleged manifest excess of powers, failure to state reasons and serious departure from a fundamental rule of procedure in relation to the Tribunal's findings regarding the application of the compensation mechanism. Each section starts with the arguments advanced by Venezuela (Curtis) (**D.1**); followed by those of Venezuela (De Jesús) (**D.2**) and concludes with the arguments of the Conoco Parties (**D.3**). The Committee's analysis of the grounds related to the compensation mechanism is in **Section D.4(1)** (Curtis) and **D.4(2)** (De Jesús).

D.1 MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS AS ARGUED BY CURTIS

MANIFEST EXCESS OF POWERS REGARDING THE COMPENSATION MECHANISM

714. Venezuela submits that the Tribunal manifestly exceeded its powers by failing to apply the applicable law, specifically, the compensation mechanism established in the Hamaca and Petrozuata Projects, which the Venezuelan Congress had established as an essential condition for their authorization.[999] The Tribunal failed to give effect to Article 9(5) of the BIT, which expressly enumerates that the law of the Contracting Party concerned (*i.e.*, Venezuelan law) and the provisions of special agreements relating to the investments (*i.e.*, the Association Agreements) as part of the laws on which the award shall be based. The Tribunal failed to apply the Venezuelan law, the special agreements on compensation applicable to those Projects, and it failed to apply any part of the BIT's governing law clause.[1000]

715. Venezuela also argues that there was manifest excess of power resulting from the Tribunal's disregard of the Parties' agreement that "expropriation" was covered by the "Discriminatory Action" provisions of the Association Agreements, as well as the

[999] Memorial (Curtis), ¶ 159.

[1000] Memorial (Curtis), ¶¶ 303-307.

compensation provisions. Venezuela clarifies that it does not request the Committee to determine the correctness of the Tribunal's conclusion that "expropriation" was not covered by the "Discriminatory Action" provisions, but to assess the Tribunal's departure from the Parties' express agreement that the expropriation in this case unquestionably fell within the definition of "Discriminatory Action."[1001]

716. Venezuela refers, among others, to the following evidence in support of its position (i) statements made in the 2016 and 2017 Hearings to the effect that the Parties agreed that the "Discriminatory Action" provisions covered expropriation;[1002] (ii) the summary of the ICC award -presented by the Conoco Parties- with the finding that the progressive expropriation of the tax incentives constituted "Discriminatory Actions" within the meaning of the Association Agreements; (iii) the Conoco Parties' post-hearing brief for the 2016 Hearing speak of "Discriminatory Actions Claim" under the Association Agreements by the ICC Claimants; and (iv) the expert reports after the 2016 Hearing, both of which assumed that the 2007 expropriation was a "Discriminatory Action."[1003]

717. In its Reply, Venezuela also reiterates that in the ICC and ICSID arbitrations the Conoco Parties took the position that expropriation was included within the definition of "Discriminatory Action" in the Association Agreements. Venezuela refers to different submissions, reports, and interventions during hearings in the ICSID and ICC arbitrations which in its view show that there was express party agreement on this point.[1004]

718. In its Reply, Venezuela argues that this is not a matter of Venezuela disagreeing with and seeking review of the decision; this is a matter of the Tribunal disregarding party agreement and submissions. The principle *iura novit curia* on which Conoco relies to

[1001] Memorial (Curtis), ¶ 319; Reply (Curtis), ¶ 170.
[1002] Memorial (Curtis), ¶¶ 311, 312.
[1003] Memorial (Curtis), ¶¶ 312-314.
[1004] Reply (Curtis), ¶¶ 157, 158, 159.

defend the Tribunal's decision does not deal with the unanimous authorities holding the position that a tribunal may not go beyond or disregard party agreement.[1005]

FAILURE TO STATE REASONS REGARDING THE COMPENSATION MECHANISM

719. Venezuela also argues that the Tribunal failed to state sufficient reasons for its decision to disregard the Parties' agreement that "Discriminatory Actions" covered expropriation and to, thereby, disregard the compensation provisions of the Association Agreements for the Hamaca and Petrozuata Projects. The Tribunal also disregarded the documentary evidence showing that the basis on which the Venezuelan Congress authorized the Petrozuata and Hamaca Projects was that compensation for adverse actions would be on "equitable terms" and not "full compensation." The Tribunal also ignored witness testimony on the compensation provisions in its analysis and did not even address the annulment decision in the *Mobil* case, in circumstances that the Conoco Parties had heavily relied on the *Mobil* award.[1006]

720. Venezuela submits that the Parties had in fact agreed on the meaning of the "Discriminatory Action" provisions, contrary to Conoco's characterization of it as a "purported" agreement.[1007] Venezuela argues that Conoco cannot invoke *iura novit curia* to avoid the consequences of the Tribunal's failure to state reasons for disregarding the Parties' agreement.[1008] Venezuela submits the meaning of the provisions was not, like Conoco maintains, a legal issue "vigorously contested." The contested legal question was whether the Tribunal could consider the compensation provisions in its analysis under the Treaty, as Conoco's position was that the compensation provisions were only relevant to the contractual claims in the ICC arbitration. However, Venezuela submits that both Parties agreed that "expropriation" was a "Discriminatory Action," and the Tribunal failed to provide any reason to explain

[1005] Reply (Curtis), ¶¶ 173-175.
[1006] Memorial (Curtis), ¶¶ 322-329.
[1007] Reply (Curtis), ¶ 184.
[1008] Reply (Curtis), ¶ 184.

why it ignored Parties' agreement and decided that expropriation was not a "Discriminatory Action."[1009]

D.2 MANIFEST EXCESS OF POWERS, FAILURE TO STATE REASONS AND SERIOUS DEPARTURE AS ARGUED BY DE JESÚS

721. Venezuela argues that the Tribunal (i) manifestly exceeded its powers; (ii) failed to state reasons; and (iii) seriously departed from a fundamental rule of procedure regarding its findings on the issue of compensation as a result of the rights expropriated from the ConocoPhillips Dutch Companies.

MANIFEST EXCESS REGARDING COMPENSATION MECHANISM

722. Venezuela submits that the reconstituted Tribunal manifestly exceeded its powers when, contrary to the clear terms of Article 9(5) of the BIT, it failed to apply the "provisions of special agreements relating to the investments" (*i.e.*, the provisions of the Association Agreements) and the law of the "Contracting State concerned" (*i.e.*, the Venezuelan Congress Authorizations) to the valuation of the compensation for the expropriation of the rights of the ConocoPhillips Dutch Companies.[1010]

723. Venezuela argues that the Tribunal applied international law to the issue of compensation, even though it had already determined that under Article 9(5) of the BIT, "the law of the Contracting State concerned" and "the provisions of special agreements relating to the investments" were the pertinent or applicable sources of law in respect of compensation.[1011]

724. Venezuela submits that the Tribunal found that Article 6 prevailed over any Venezuelan law on the same subject matter, yet valued the rights of the ConocoPhillips Dutch Companies and fixed compensation for expropriation pursuant to international

[1009] Reply (Curtis), ¶¶ 185-187.

[1010] Memorial (De Jesús), ¶¶ 372, 373; Reply (De Jesús), ¶ 490.

[1011] Memorial (De Jesús), ¶ 374, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 178-179; Reply (De Jesús), ¶ 487.

law in a vacuum.[1012] The Tribunal considered that Article 9(5) does not provide a hierarchy of the sources of law it enumerates; and that international law must prevail over domestic law, meaning that a State may not invoke its internal law to absolve itself from an international law obligation.[1013] But, by doing so, the reconstituted Tribunal failed to interpret Article 9(5) pursuant to the VCLT and created a conflict of laws where there was none. The terms of Article 9(5) are clear, containing the conjunction "and" between each source of law it enumerates, which indicates that the sources are cumulative and were to be applied jointly if two or more were apt to cover similar issues.[1014]

725. Venezuela submits that this failure of the Tribunal to apply the law it had identified constitutes a manifest excess of the powers, warranting annulment of the quantum sections of the Award and associated sections of the *dispositif* pursuant to Convention Article 52(1)(b).[1015]

726. The manifest nature of this excess can be perceived through reading paragraphs 170 and 179-190 of the Award. At paragraph 170 of the Award, the Tribunal stated it would apply international law to value the Conoco Parties' rights, however, at paragraphs 179 and 180, it acknowledged that Venezuelan law and the Association Agreements were the proper law to apply.[1016]

727. Venezuela also asserts that it is contesting the application of the proper law itself; rather than merely disagreeing with the conclusion reached by the Tribunal, as Conoco claims. Also, what is relevant is whether the Tribunal specifically applied Venezuelan law and the Association Agreements to value the Conoco Parties' rights; not, like Conoco posits, that the Tribunal applied BIT Articles 9(5) and 6 in general, taking into consideration Venezuelan law and the Association Agreements.[1017]

[1012] Memorial (De Jesús), ¶ 377; Reply (De Jesús), ¶¶ 491, 492.
[1013] Memorial (De Jesús), ¶ 377, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 85, 88.
[1014] Memorial (De Jesús), ¶ 376; Reply (De Jesús), ¶ 492.
[1015] Memorial (De Jesús), ¶ 378.
[1016] Reply (De Jesús), ¶ 494.
[1017] Reply (De Jesús), ¶¶ 496, 497.

728. Venezuela submits the Tribunal merged into one issue: (i) the valuation of Conoco's rights subject to Venezuelan law and the Association Agreements; and (ii) the standard of compensation that is exclusively relevant to international law. At best, Venezuela claims that the Tribunal considered if the Association Agreements were such as to reshape international law standard of "full compensation," but that does not equate to applying Venezuelan law and the Association Agreements to value the Conoco Parties' rights.[1018]

729. Further, Venezuela submits that the Tribunal also manifestly exceeded its powers by egregiously misapplying the Association Agreements. The Tribunal (incorrectly) decided to analyse the compensation standard in Article 6 under international law; however, it relied on the Association Agreements to fix the contour of the valuation of the ConocoPhillips Dutch Companies' rights in the Projects. The Petrozuata and the Hamaca Association Agreements had compensation provisions limiting compensation to be granted through a price cap mechanism for measures included in the contractual definitions of "Discriminatory Actions."[1019]

730. Relying on arguments made during the 2016 and the 2017 Hearings, Venezuela submits that the Parties agreed that "expropriation" is a "Discriminatory Action." Venezuela also relies on the finding of the ICC tribunal that expropriation was a "Discriminatory Action" under either Association Agreement. Also, the compensation provisions expressly mention "expropriation" (for Hamaca) and any governmental action (for Petrozuata). Nevertheless, the Tribunal determined that expropriation was not a "Discriminatory Action" under the Association Agreements. Venezuela argues that this constitutes an egregious error of law, equivalent to failure to apply the law, and therefore amounts to a manifest excess of powers.[1020]

731. Venezuela counters Conoco's defence on this point arguing that the issue is not if the Tribunal had the power to exercise independent judgment on whether the compensation

[1018] Reply (De Jesús), ¶ 499.

[1019] Memorial (De Jesús), ¶¶ 390-395.

[1020] Memorial (De Jesús), ¶¶ 389-405; Reply (De Jesús), ¶¶ 520, 521.

clauses governed the 2007 taking, but rather whether the Tribunal's use of that power passed the "failure-to-apply-the-law" test of Convention Article 52(1)(b).[1021] Additionally, contrary to Conoco's contention, the failure to apply the law was significant; the Tribunal never made the alternative determination posited by Conoco, namely, that even if the expropriation had been a "Discriminatory Action," the "Discriminatory Action" provisions do not represent an exclusive remedy.[1022]

FAILURE TO STATE REASONS REGARDING THE COMPENSATION MECHANISM

732. Even if the Committee finds that the Tribunal's application of international law to the issue of compensation is not subject to annulment, the quantum sections must still be annulled due to the Tribunal's contradictory reasoning regarding compensation. The Tribunal found that international law prevailed over domestic law and, thereby, it governed the issue of compensation, it however selectively applied cherry-picked provisions from the Association Agreements and Venezuelan law (specifically, the Venezuelan Congress Authorizations), to assess the Windfall Profits Tax. One cannot follow from Point A (international law applies and not the Venezuelan Congress Authorizations) to Point B (application of international law and certain provisions of Venezuelan law). This warrants annulment of the Award's quantum sections in relation to the issue of compensation.[1023]

733. Venezuela submits, contrary to Conoco, that the Tribunal's reasoning did not follow from Venezuela's own argumentation in the arbitration. Venezuela's position, as Prof. Abi-Saab noted in his dissent, focused on the fact that the provisions of the Association Agreements impacted the "market value" (BIT Article 6) of Conoco's rights. However, , this does not explain *why* the Tribunal selectively applied the Association Agreements and the Congressional Authorization to a specific sub-issue as the Windfall Profits Tax but chose not to do so in relation to the Conoco Parties' expropriation claim.[1024]

[1021] Reply (De Jesús), ¶ 525.

[1022] Reply (De Jesús), ¶¶ 527, 528.

[1023] Memorial (De Jesús), ¶¶ 380-388; Reply (De Jesús), ¶¶ 502, 503.

[1024] Reply (De Jesús), ¶¶ 504-506.

734. Venezuela also argues failure to state reasons for the Tribunal's decision that expropriation was not a "Discriminatory Action" within the meaning of the Petrozuata and Hamaca Association Agreements. Venezuela characterizes the two paragraphs in which the Tribunal devoted to exclude expropriation from the definition of "Discriminatory Actions" as "lapidary." These paragraphs neither analyse the terms included in the "Discriminatory Actions," which for the Hamaca project expressly includes the term "expropriation," nor refer to any pre-contractual documentation the Parties provided. [1025]

735. Venezuela argues that the only reasons the Tribunal gave for excluding the expropriation from the compensation provisions of the Association Agreements are conclusory. Regarding the Petrozuata Agreement, the Tribunal postulated that the compensation provision applied only to a "Development Decision" while an expropriation, including the 2007 taking, was not a "Development Decision." This reason is not sufficient nor adequate, as no reader can understand how "Development Decision" in the Petrozuata Agreement could be relevant to determine whether an expropriation constitutes a governmental action under the the same provision.[1026] For Hamaca, the Tribunal circumvented the facts that the compensation provision expressly refers to "expropriation," that the Parties agreed that the 2007 taking fell under the compensation provision of the Hamaca agreement and that the ICC tribunal had confirmed this to that extent. The Tribunal did not explain why, while acknowledging that the compensation provisions referred to "expropriation," it considered that this term included "*only assets or interests as part of the Association"* and not *"the entire Project governed by the Association Agreement*."[1027]

736. Finally, Venezuela also argues that the Tribunal failed to provide reasons its decision not to accept the ICC evidence in the record and to ascribe no probative value to evidence to which it had already been privy.[1028] Venezuela notes that, only a few days

[1025] Memorial (De Jesús), ¶¶ 405-410; Reply (De Jesús), ¶¶ 523, 530.
[1026] Reply (De Jesús), ¶ 522.
[1027] Reply (De Jesús), ¶ 523.
[1028] Memorial (De Jesús), ¶ 422; Reply (De Jesús), ¶ 522.

after receiving the transcript, the Tribunal notified the Parties of its decision, without providing any reasons either at that time or later when the it rendered the Award. For Venezuela, the only logical conclusion for such omission is that the decision was arbitrary and, as such, subject to annulment under Convention Article 52(1)(e).

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE REGARDING THE COMPENSATION MECHANISM

737. Venezuela argues that the Tribunal seriously departed from a fundamental rule of procedure, when it decided not to accept in the record the ICC evidence, including the ICC award, against the Parties' agreement as to the evidentiary weight to be accorded. In Venezuela's view the value of the ICC Award in the ICSID arbitration was undeniable, considering that the ICC tribunal was the appropriate forum for the determination of what constituted an expropriation under the definition of "Discriminatory Actions" in the Association Agreements. The Tribunal's decision to not allow the Parties to produce evidence they both considered relevant deprived them of their fundamental right to be heard.[1029] Venezuela submits the departure prevented Venezuela from producing the ICC hearing transcripts in support of its Brief on Quantum and making arguments in relation to the ICC arbitration in its brief.[1030]

738. Venezuela contends that the Tribunal arbitrarily denied its right to present freely the documents it deemed relevant to support its position on the Association Agreements. Therefore, Venezuela argues, that Conoco's assertion that Venezuela had several occasions to present its case on the Association Agreements and the "Discriminatory Action" is irrelevant.[1031]

739. Additionally, in accordance with the test under Convention Article 52(1)(d), the departure of the Tribunal was serious as it potentially affected the Award. Venezuela submits that it is likely the Tribunal could have reached a different conclusion had it

[1029] Memorial (De Jesús), ¶¶ 412-422.
[1030] Reply (De Jesús), ¶ 538.
[1031] Reply (De Jesús), ¶¶ 542, 543.

considered the analysis of the Association Agreements on the notion of "Discriminatory Action" made by the ICC tribunal.[1032]

D.3 NO MANIFEST EXCESS OF POWERS, NO FAILURE TO STATE REASONS AND NO SERIOUS DEPARTURE AS ARGUED BY CONOCO

NO MANIFEST EXCESS OF POWERS

740. Conoco argues that the Tribunal did not manifestly exceed its powers in its findings on the "Discrimination Action" provisions. The Tribunal examined and applied Article 9(5) of the BIT and determined that the compensation standard for expropriation was governed by the BIT and international law, while the Claimants' rights under the Association Agreements were governed by Venezuelan law. The Tribunal concluded that the "Discriminatory Action" provisions were not the only remedy available in case of nationalization and did not limit the compensation that could be awarded by the Tribunal against a different party under a different non-contractual cause of action in international law. Venezuela's challenge to the Tribunal's treatment of the applicable law or the relevance of the Association Agreements' "Discriminatory Action" provision is meritless and not a valid ground for annulment.[1033]

741. In its Rejoinder, Conoco argues that the Tribunal identified and applied the correct law. Venezuela's complaint that the Tribunal either did not apply the "Discriminatory Action" provisions or failed to consider them is defeated by Venezuela's observation that the Tribunal "increase[ed] compensation for the Petrozuata Project by … apply[ing] the compensation provisions for that Project."[1034] Venezuela's real complaint, according to Conoco, is that the Tribunal did not apply the compensation provisions the way it preferred.

742. Neither did the Tribunal manifestly exceed its powers in the way it treated the *Mobil* annulment decision. The *Mobil ad hoc* committee annulled nine paragraphs of the *Mobil* award relating to the determination of the amount of compensation. The *Mobil*

[1032] Reply (De Jesús), ¶ 544.

[1033] Counter-Memorial (Conoco), ¶¶ 386-390; Rejoinder (Conoco), ¶¶ 107, 94.

[1034] Rejoinder (Conoco), ¶ 100(a), citing Reply (Curtis), ¶ 371.

committee found that the *Mobil* tribunal had failed to take into account the relevant compensation provisions of Mobil's association agreements in awarding compensation under the BIT. Importantly, the *Mobil* committee acknowledged that it was beyond its competence to determine in that case the substantive question of the relevance of the "Discriminatory Action" provisions on the compensation owing under international law. In the present case, however, the Tribunal did consider the effect of the "Discriminatory Action" provisions on an award for compensation under the Treaty. In the arbitration, the Parties addressed the "Discriminatory Action" provisions in numerous written submissions, at four oral hearings, and the Tribunal devoted seven pages of the Award to identifying and applying the law, including the "Discriminatory Action" provisions.[1035]

743. Conoco also argues that the Tribunal did not exceed the Parties' mandate by making its own determination on the relevance of the "Discriminatory Action" provisions to compensation under the BIT. Based on the principle of *iura novit curia*, the Tribunal was empowered to ascertain the content and application of the applicable law, not being bound by the parties' pleading and arguments. Conoco submits that the question as to what effect, if any, the "Discrimination Action" provisions have on the compensation available under the BIT was a contentious point of law (not fact) between the Parties. The Tribunal was persuaded by Conoco's position, that the "Discriminatory Action" provisions did not impose a cap on the compensation owed for Venezuela's breach of the BIT. In making its determination, the Tribunal afforded the Parties the opportunity to address the issue at the hearings held in August 2016, February 2017, and March 2017.[1036]

744. In its Rejoinder, Conoco notes that Venezuela (Curtis) was unable to marshal a single authority for the proposition that a tribunal manifestly exceeds its powers when it arrives at its conclusion on a question law. Conoco argues that the interpretation of the "Discriminatory Action" provisions was a question of law, not fact, and the authorities

[1035] Counter-Memorial (Conoco), ¶¶ 391-394.

[1036] Counter-Memorial (Conoco), ¶¶ 395-399, 406; Rejoinder (Conoco), ¶ 100(b).

on which Venezuela relies are inapposite.[1037] Conoco also argues that in the present case, the Tribunal's powers flow from the arbitration clause in the BIT, the ICSID Convention and the Arbitration Rules, and the Tribunal did not exercise its powers beyond these instruments.[1038] Moreover, Conoco notes that in the underlying proceeding, it had addressed at length the effect of the "Discriminatory Action" provision on their international law claim, arguing that it did not limit their entitlement to compensation under international law. Conoco also notes that Venezuela had also thoroughly addressed whether expropriation constituted a "Discriminatory Action" within the meaning of the Association Agreements.[1039]

745. Conoco submits that even if, *arguendo*, the Tribunal misapplied the "Discriminatory Action" provisions, the Committee would have no basis to annul the Award. The Tribunal's conclusion remains valid unless it is so untenable that it cannot be supported by reasonable arguments -which is not the case here. Further, Venezuela's complaint is inconsequential, and the Award remains valid because the Tribunal made clear that even if it had concluded that the expropriation was a "Discriminatory Action" it would not have accepted Venezuela's attempt to limit the compensation under the BIT.[1040] The Tribunal specifically held that the "Discriminatory Action" provisions were not an exclusive remedy and that they "offered an additional layer of protection;"[1041] Claimants had rights under both domestic and international law. The Tribunal found that the Claimants had not waived their "international law rights" or "rights contained in the BIT" by their participation in the Projects.[1042]

746. In its Rejoinder, Conoco rebuts Venezuela's (De Jesús) argument that the Tribunal manifestly exceeded its powers by egregiously misapplying the Association Agreements. Conoco argues that Venezuela's disagreement with the Tribunal's interpretation of specific provisions in the Association Agreements does not constitute

[1037] Rejoinder (Conoco), ¶ 118.
[1038] Rejoinder (Conoco), 123.
[1039] Rejoinder (Conoco), ¶¶ 124, 125.
[1040] Counter-Memorial (Conoco), ¶¶ 408-411.
[1041] Rejoinder (Conoco), ¶ 137, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 940.
[1042] Rejoinder (Conoco), ¶ 133, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 183.

a ground for annulment. Venezuela is asking the Committee to reopen the merits of the Tribunal's decision on the "Discriminatory Action" provisions, when incorrect application of the law is not a ground for annulment.[1043]

NO FAILURE TO STATE REASONS

747. Conoco submits that the Tribunal gave extensive reasoning at paragraphs 160 to 175 of the Award for its conclusion that the expropriation does not constitute a "Discriminatory Action." The Tribunal's reasonings were readily comprehensible, internally consistent and flowed directly from its evaluation of the express terms of the Association Agreements. Venezuela's disagreement with the result of these reasonings does not mean that the Tribunal failed to state its reasons.[1044]

748. Conoco also maintains that the Tribunal did refer to the evidence on which were Venezuela relied regarding pre-contractual negotiations, specifically at paragraphs 113 to 139 of the Award. The Tribunal also explained why consideration of Venezuela's pre-contractual negotiation evidence was irrelevant to its analysis.[1045]

749. Further, Conoco submits that Venezuela's argument that the Tribunal allegedly failed to address the annulment decision in *Mobil* is irrelevant. The Tribunal was neither bound by that decision, nor was it required to discuss it, particularly as the decision did not address the merits of the issue before the Tribunal.[1046]

750. Additionally, Conoco submits that there was no contradiction in the Tribunal's reasoning to resort to Venezuelan law on the issue of the Windfall Profits Tax. The Tribunal determined that international law applied to the BIT claim, establishing the compensation standard of "full compensation" while the Association Agreements and Venezuelan law were relevant to determining what constituted "full compensation" under international law for the expropriated national law rights. In short, the Tribunal

[1043] Rejoinder (Conoco), ¶¶ 140, 141.
[1044] Counter-Memorial (Conoco), ¶¶ 412-416.
[1045] Counter-Memorial (Conoco), ¶ 417.
[1046] Counter-Memorial (Conoco), ¶ 418.

did not hold that international law applied exclusively, but rather that different laws applied to different aspects of the case.[1047]

751. Finally, Conoco notes that the Tribunal afforded Parties ample opportunities to make submissions on the relevance of the ICC arbitration and allowed them to submit evidence from the ICC arbitration, including the valuation reports filed therein. Conoco recounts instances in which the Tribunal invited the Parties to inform the Tribunal about the ICC arbitration, including an invitation to submit a list of documents, mentioned in the ICC transcripts, on which they wished to rely. Conoco explains that given that the Tribunal concluded that the expropriation was not a "Discriminatory Action," the Tribunal saw no need to give any evidentiary weight to the material from the ICC arbitration. Conoco maintains that *ad-hoc* committees have no power to review a Tribunal's evaluation of the evidence.[1048]

752. In its Rejoinder Conoco rebuts Venezuela's (Curtis) argument that the Tribunal was bound by the ICC award because of collateral estoppel. Conoco argues that this was a fresh argument that had not been argued before by Venezuela, furthermore, none of the elements for the application of the doctrine are met. In addition, Conoco argues that the ICC arbitration involved different parties and different claims under different governing law.[1049]

NO SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE REGARDING THE COMPENSATION MECHANISM

753. The Tribunal did not seriously depart from a fundamental rule of procedure by receiving the ICC record for information only. Venezuela has failed to show that there was a departure from the procedure, let alone one that is serious. The Tribunal received various documents from the ICC procedure, including the valuation reports, the hearing transcript and the ICC award. The Tribunal allowed Parties the opportunity to comment on the impact, if any, the ICC proceedings would have on the ICSID

[1047] Counter-Memorial (Conoco), ¶¶ 420, 421; Rejoinder (Conoco), ¶ 146.
[1048] Counter-Memorial (Conoco), ¶ 422; Rejoinder (Conoco), ¶ 153.
[1049] Rejoinder (Conoco), ¶ 154.

arbitration. Conoco notes that the ICC proceeding was with different parties than those in the ICSID case. In any event, the Tribunal was not bound to assign any specific value to the ICC record.[1050]

754. In its Rejoinder, Conoco notes that: (i) by the time the ICC award was rendered, the underlying arbitration had been pending for a decade, and Parties had ample opportunity to present arguments and evidence regarding the relevance of the "Discriminatory Action" provisions during the underlying arbitration proceeding (ii) the Parties had the opportunity to comment on whether expropriation constituted a "Discriminatory Action" within the meaning of the Association Agreements; (iii) the ICC award was not binding on the Tribunal, and the Tribunal would have committed an error susceptible to annulment if it had abdicated its decision-making authority to the ICC tribunal; (iv) in the arbitration Venezuela agreed that no new documents should be admitted after 15 April 2016, unless the Tribunal granted leave; and (v) before the issuance of the Award, Venezuela never objected to the Tribunal's decision to not allow the ICC award into the record on some broader or different basis.[1051]

D.4. THE COMMITTEE'S ANALYSIS OF THE GROUNDS RELATED TO THE TRIBUNAL'S FINDINGS WITH RESPECT TO THE DISCRIMINATORY ACTION PROVISIONS OF THE ASSOCIATION AGREEMENTS (COMPENSATION MECHANISM)

D.4(1) THE COMMITTEE'S ANALYSIS OF THE GROUNDS INVOKED BY VENEZUELA (CURTIS)

MANIFEST EXCESS OF POWERS

755. The Applicant challenges what it considers as the Tribunal's failure to apply the compensation formulas based on price caps in the Association Agreements under the Congressional Authorizations required by the 1975 Nationalization Law for the Petrozuata and Hamaca Projects (the Upgrading Projects). The Association Agreements established a compensation mechanism arising from any Discriminatory

[1050] Counter-Memorial (Conoco), ¶¶ 424-428.

[1051] Rejoinder (Conoco), ¶ 158.

Action against the State's sovereign right to regulate and legislate the Project.[1052] It is not the Treaty's function to change the terms freely agreed upon by investors under the laws under which the investment was created.[1053] The Applicant argues that, by failing to apply Venezuelan law, the special agreements on compensation applicable to the Upgrading Projects and international law, the Tribunal failed apply Article 9(5) of the Treaty[1054] which prescribes that the applicable law should be the national law of the host State, the provisions of the Treaty and the general principles of law.[1055]

756. The Committee now turns to examine the Tribunal's decisions regarding the compensation provision of the Association Agreements. The Tribunal considered Article 9 in deciding the applicable law governing the available remedy. It recognized that "*international law does not prevail over national law in a matter not governed by international law in which case national law may apply, in accordance with Article 9(5) of the BIT*". It asked itself the following questions regarding the "*much debated issue*" of the relevance of the compensation provisions in determining the remedies for the Projects expropriation: "*Are these provisions capable of governing the effects of an expropriation of the participants' assets held in the Projects? Or are these provisions relevant to the determination of the assets subject to such an expropriation when considered in the framework of Article 6 of the BIT?*"[1056] In light of the terms and purposes of the compensation provisions of the Association Agreements, the Tribunal refuted Venezuela's arguments that they govern the economic consequences of the 26 June 2007 expropriation.[1057] However, the Tribunal agreed with Venezuela "*that 'the issue before this Tribunal is not to determine whether the Association Agreements have been breached, but whether the compensation mechanisms established pursuant to the Congressional Authorizations as conditions to entering into the upgrading Projects are*

[1052] Memorial (Curtis), ¶¶ 159-164, 224-228, 289. Tr. Day 1, p. 171:20-25, p. 172: 1-8, 24-25, 173: 1-4.

[1053] Memorial (Curtis), ¶¶ 273, 306.

[1054] Memorial (Curtis), ¶¶ 305-307.

[1055] "*The arbitral award shall be based on: − the law of the Contracting Party concerned; − the provisions of this Agreement and other relevant Agreements between the Contracting Parties; − the provisions of special agreements relating to the investments; − the general principles of international law; and − such rules of law as may be agreed by the parties to the dispute*" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 73).

[1056] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award,* ¶¶ 71, 89.

[1057] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award,* ¶ 171.

relevant in determining quantum.'"[1058] To answer that question, the Tribunal clarified that full reparation cannot represent more than compensation of the rights and assets held by the investor under the Association Agreements governed by Venezuelan law. By accepting their investment through the Association Agreements and the Congressional Authorizations on which they are based, ConocoPhillips acquired the rights contained in these instruments, along with the investment protection embedded in the Treaty. While the protection of the investors' rights is governed by the Treaty, the Tribunal decided that the content is determined by the Association Agreements governed by the laws of Venezuela.[1059]

757. The Applicant puts forward the annulment decision in the *Mobil* case to suggest that it is indisputable that when a bundle of rights in relation to the investment was created under Venezuelan law, it became a type of property protected by international law in the form of the Treaty.[1060]

758. The Tribunal's analysis matches up so far with Venezuela's recognition that if certain issues are governed by international law, this does not mean that considerations of national law or the special agreements entered regarding the investment would not be allowed, such as expropriation affecting property rights which are defined by the local law under which they were created.[1061]

759. The Applicant submits that the Tribunal missed the fundamental point when it brushed aside the Applicant's argument that the limitations attached to a right under national law should be given effect, and instead insisted on the principle that a State may not invoke its domestic law to escape its international obligations.[1062] The Applicant argues that this principle cited by the Tribunal is not relevant in the underlying arbitration, as there is no conflict between national law and international law. Further, the investors

[1058] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award,* ¶ 178.

[1059] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 180, 183.

[1060] Memorial (Curtis), ¶¶ 308-309 (*Venezuela Holdings Decision on Annulment*).

[1061] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award,* ¶ 140; Counter-Memorial (Conoco), ¶ 387. Tr. Day 3, p. 109: 9-25, pp. 110-112: 1-11.

[1062] Memorial (Curtis), ¶ 306; Reply (Curtis), ¶ 153.

entered into the projects with "*eyes wide open*," accepting the limitations on compensation that were not imposed by Venezuela after the investment was made.[1063] The Applicant disputes the following passage of the Award: "*One important factor of hierarchy is the principle that international law must prevail over domestic law, and that a State may not invoke its internal law to extract itself from an international law obligation. As a matter of principle, this is not disputed between the Parties, nor is there any controversy that such principle results from the international law itself and not from Article 9(5) of the BIT*."[1064] The Applicant also points to ConocoPhillips' position on Article 9 in supporting the application of international law, which states that "[s] *tate responsibility entails a secondary obligation of full reparation. This principle was codified in Article 32 of the ILC Articles*."[1065]

760. ConocoPhillips relied on the same arguments in the *Mobil v. Venezuela* ICSID arbitration in support of their contention that the compensation provisions were not relevant to their Treaty claim.[1066] In the present case, the Tribunal did not apply international law to the standard of compensation because the compensation provisions of the Association Agreements could not exempt or excuse Venezuela from its international obligation under the Treaty, but decided that the expropriation of 26 June 2007 could not be a Discriminatory Action within the meaning such term has in the compensation provisions of the Association Agreements.[1067]

761. The Applicant alleges that the Tribunal disregarded a key agreement between the Parties that expropriation fell within the definition of the term Discriminatory Action in the Association Agreements. When the Parties have agreed on a set of facts, the Applicant argues, that the Tribunal cannot make up its own facts and decide in excess of the mandate given by the Parties.[1068]

[1063] Memorial (Curtis), ¶¶ 165-166, 306 (footnote 615); Reply (Curtis), ¶ 153.

[1064] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 88.

[1065] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 76 (Article 32 ILC (Irrelevance of internal law)).

[1066] Memorial (Curtis), ¶¶ 270- 273. Tr. Day 1, p. 130:20-25, pp. 131-140:1-10, p. 172:15-23.

[1067] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 171-175. Tr. Day 1, p. 154: 3-15. Counter-Memorial (Conoco), ¶ 419.

[1068] Memorial (Curtis), ¶¶ 319-320. Tr. Day 1, p. 148: 5-23; Tr. Day 3, p. 34:1-9.

762. The Committee observes that it behooves parties to choose and present the facts on which they base their allegations, and the arbitrators to base their decision exclusively on the facts introduced by the parties in the debate.[1069] The Applicant's contention under Article 52(1)(b) focuses on whether the Tribunal exceeded its limits of competence. The answer depends on whether the Tribunal decided beyond the scope of the Parties' request and, if so, on which ground.

763. The Applicant stresses that ConocoPhillips agreed with PDVSA in the ICC arbitration and with Venezuela in the underlying ICSID arbitration that expropriation was included within the definition of Discriminatory Action, as noted by the Tribunal at paragraph 173 in the Award.[1070] As evidence of an agreement, the Applicant relies on a dialogue between the Parties' counsel at the two hearings on quantum in August 2016 and March 2017 on which the Parties' experts proceeded thereafter for their calculations.[1071]The August 2016 Hearing transcripts make apparent Venezuela's counsel declaration regarding the Parties' "*agreement that expropriation is within the scope of the Discriminatory Action Clauses of the Association Agreement*."[1072] The transcripts also make apparent that the purported agreement cannot be attributed the role which the Applicant wishes it to play in the circumstances. At the August 2016 Hearing, ConocoPhillips' representatives retorted that the extent to which Venezuela's statement could be considered correct was in the understanding that the Discriminatory Action provisions were not the exclusive remedy.[1073] When at the March 2017 hearing, the Tribunal again raised the question whether the expropriation is governed by the compensation provisions , ConocoPhillips' counsel answered in the negative, explaining that the expropriation claim was not governed by the Discriminatory Action mechanism because the legal basis is different.[1074] When ConocoPhillips was again

[1069] Counter-Memorial (Conoco), ¶ 399.

[1070] Reply (Curtis), ¶¶ 157-163, 165, 180. Tr. Day 1, p. 176: 13-25, pp. 177-190: 1-17.

[1071] Memorial (Curtis), ¶¶ 312-315.

[1072] **A/R-26 [Curtis] / A/R-67 [De Jesús]**, Transcript of the Hearing held 15-19 August 2016, ("*August 2016 Hearing*"), p. 459: 9-14.

[1073] **A/R-26 [Curtis] / A/R-67 [De Jesús]**, *August 2016 Hearing*, p. 459: 15-18.

[1074] **A/R-93 [Curtis] / A/R-134 [De Jesús]**, Transcript of the Hearing held 27-31 March 2017, ("*March 2017 Hearing*"), p. 4514: 12-22, p. 4515: 6-19.

asked whether it maintained that the expropriation came under the scope of the compensation provisions, its response dispelled any ambiguity: it considered that, while expropriation qualifies as a Discriminatory Action only insofar as it entitles it to an additional layer of compensation from PDVSA, "*that does not in any way inhibit the remedy that is seekable against the State itself without limit*" and "*that the DA mechanism is not the exclusive remedy in those circumstances* […] *which […] on their terms make clear that there is another remedy*."[1075]

764. The Committee is unable to conclude that the Tribunal's interpretation relies on a distortion of a "*complete and express agreement*."[1076] ConocoPhillips's submission that expropriation qualifies as a Discriminatory Action was premised on the understanding that contractual remedies are non-exclusive and, as such, cannot be interpreted as a general acceptance that compensation would be capped by the Discriminatory Action mechanism.[1077] ConocoPhillips' approach to the Discriminatory Action provisions could not prevent the Tribunal from interpreting the terms and purposes of the compensation provisions as excluding coverage for total expropriation.

765. The Committee turns now to ConocoPhillips' argument that the contractual mechanism is an additional layer of protection against PDVSA, not limiting compensation against Venezuela under the Treaty for Discriminatory Action.[1078]

766. ConocoPhillips submits that even if the Tribunal had found that the expropriation of 26 June 2007 was a Discriminatory Action and that the contractual clauses apply, these contractual clauses could not, as a non-exclusive contractual mechanism, constitute a cap on the investor's international rights unless ConocoPhillips waives remedy under international law and the Treaty,[1079] which it did not.[1080] ConocoPhillips states that its

[1075] **A/R-93 [Curtis] / A/R-134 [De Jesús]**, *March 2017 Hearing*, p. 4518: 5-22, pp. 4519, 4521: 9-16, 4522: 6-19 (**A/R-97 [Curtis] / A/R-138 [De Jesús]**, Errata Sheet for the August 2016, February 2017, and March 2017 Hearings). Tr. Day 3, p. 113:22-25, p. 114-117: 1-19.

[1076] Memorial (Curtis), ¶ 312.

[1077] Tr. Day 2, p. 169: 14-25.

[1078] Including from De Jesús, see Reply (De Jesús), ¶¶ 527, 528.

[1079] Tr. Day 2, p. 146: 16-25, p. 147:1-9; Day 3, pp. 111-112.

[1080] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 183 ("*The Claimants state correctly, as a principle, that they had not waived their rights under international law*").

analysis was endorsed by the Tribunal, which concluded that even if the expropriation was a Discriminatory Action, the Applicant's complaint would be inconsequential.[1081]

767. The Applicant argues that the Tribunal's refusal to apply the compensation provisions to expropriation, when such provisions clearly covered expropriation, would be a manifest excess of powers and a failure to state reasons.[1082] This, in the Committee's view, would be a challenge to the Tribunal's decisions on the respective roles of the rules of law designated by Article 9(5) to the effect of its decision that the application of the contractual compensation provisions with PDVSA would not constitute the total value of the rights taken away from the investor. In the Committee's view, the Applicant's proposition is more akin to an appeal against the Tribunal's legal characterization of the compensation provisions as a non-exclusive remedy. In any case, this challenge remains moot, as it would only need to be considered if the Tribunal found that the application of the compensation mechanisms was contrary to the Parties' agreement.

768. The Committee returns to the extract from paragraph 173 of the Award on the existence of a Parties' agreement on compensation, relied on by the Applicant, which is reproduced as follows:

> "*The Respondent further confirmed that this means that the compensation provisions apply to the expropriation 'in this case' – this meaning 'exclusively'. This position does not reflect the Claimants' claim in the present case. It can only relate to the dispute brought before the ICC Arbitration Tribunal. It is of no concern in the present case.[…] where the expropriation at the origin of the dispute is the single taking of 26 June 2007 which led the Claimants to claim for a breach of Article 6 of the BIT*."[1083]

[1081] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 174, 183 and 940. Tr. Day 2, p. 159: 7-25, pp. 160, 161: 1-8. Counter-Memorial (Conoco), ¶ 409.

[1082] Tr. Day 3 p. 41:8-14.

[1083] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 173.

Notwithstanding the Applicant's affirmation of an agreement,[1084] it appears from the ICC Award that PDVSA only admitted that Expropriation constituted a Discriminatory Action to refute ConocoPhillips' Overall Expropriation (comprised of the Royalty Measure, the Extraction Tax and the Expropriation which progressively affected the value of the Projects) Discriminatory Action claim.[1085] The cumulative effect of which was regarded by ConocoPhillips in the ICC arbitration as equivalent to an indirect or creeping expropriation, and the Tribunal at paragraph 173 noted that "*whether the compensation provisions would govern an expropriation different from the one enforced through a single taking on 26 June 2007, consisting of an agglomerate of a number of Governmental actions, to be qualified together as Discriminatory Action, while certain components would, as such, not meet the conditions set forth in the pertinent definition*."

769. The impugned reasoning by the Tribunal on the compensation provisions should also be understood and analysed within the context of the requests of the Parties: "[S]*ince the very beginning of this proceeding, the Parties have been deeply divided in their respective understanding of the content and effects of these compensation provisions* […]."[1086] Quite clearly, the Tribunal's analysis remains within the scope of the dispute that the Parties agreed to submit.

FAILURE TO STATE REASONS

770. The Applicant contends that the Tribunal gave no reasons for ignoring the Parties' agreement and concluded that expropriation was not a Discriminatory Action within the meaning of the compensation provisions. The Applicant argues that having acknowledged the principles that property rights are created under domestic law and only protected under international law, as well as that compensation is unavailable for

[1084] Memorial (Curtis), ¶¶ 316-317.

[1085] **A/R-17 [Curtis] / A/R-58 [De Jesús]**, *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela, S.A., Corpoguanipa, S.A., PDVSAPetróleo, S.A.*, ICC Case No. 20549/ASM/JPA (C-20550/ASM), Final Award, 24 April 2018, ("*Conoco ICC Final Award*"), ¶¶ 112, 113, 122, 123, 128, 167, 195.

[1086] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 93. Tr. Day 2, p. 168: 10-25.

rights that were never owned or that exceeded those rights, the Tribunal should have upheld the terms and conditions agreed upon the Upgrading Projects investments, including the compensation provisions.[1087]

771. The Tribunal cannot be expected to give reasons for ignoring an agreement that does not exist. Having noted that the relevance of the compensation agreements goes to the heart of the question of the limitations of the priority of international law over national law,[1088] the Tribunal determined that, irrespective of whether the standard of compensation is "just compensation" under Article 6(c) of the Treaty or "full" reparation under customary international law, the investor's rights and their contents are based on the Association Agreements and governed by Venezuelan law. Their compensation provisions are relevant for determining quantum to the extent that the government measure meets the requirements for their application; such is so with regard to the Windfall Profits Tax. However, the Tribunal found that expropriation is not a Discriminatory Action within the meaning of the compensation provisions.[1089] The Committee is satisfied that the Tribunal set out how and why it reached its decision and what the decision was. The requirement under Article 52(1)(e) does not extend to reasons for the reasons.

772. Aside from a general attack on the reasons adopted by the Tribunal, the Applicant specifically denounced as "nonsensical" and as exemplifying both a failure to state reasons and a manifest excess of power, the statement in paragraph 176 of the Award that: "*The Investment Law must prevail over the Association Agreements in the hypothesis that one would consider that these Agreements would govern the effects of their own expropriation*."[1090] The sentence is about the role of the Venezuelan Investment Law at paragraph 176, where the Tribunal appreciated that Venezuela denied that the Investment Law had any role to play in respect of the 2007 expropriation since it appeared to be correct that the Conoco Parties were not subject to it. The

[1087] Memorial (Curtis), ¶¶ 323, 324; Reply (Curtis), ¶¶ 186, 187. Tr. Day 3, p. 41: 2-8.
[1088] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 89.
[1089] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 171-175, 179-180, 184, 188.
[1090] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 176. Memorial (Curtis), ¶¶ 310, 323.

Tribunal, however, reserved a prevailing role of the Investment Law for the joint ventures operating the Petrozuata, Hamaca and Corocoro Projects as entities receiving the investment in the above hypothesis.[1091] Whatever the correctness of the Tribunal's deduction, the Applicant has not explained the consequences of the hypothetical application considered for the joint ventures heading each of the three Projects, including the Corocoro Project whose Association Agreement has no compensation provisions,[1092] on the Tribunal's approach of the Discriminatory Action provisions of the Petrozuata and Hamaca Association Agreements for setting the standard of compensation regarding the Upgrading Projects. This apart, the Applicant does not address any particular defects in the above reasoning on the relevance of the compensation provisions other than the general insufficiency of it which would also give rise to a manifest excess of power.[1093] Reasons are required to permit the reader to observe what the Tribunal has done or not done to apply the proper law and more generally comply with the prohibition of manifest excess of power.[1094] The reasons provided by the Tribunal offer such an explanation.

773. It is further alleged by the Applicant that the Tribunal failed to take into account all the documents in the record making clear that the Government would retain unfettered its sovereign powers with only compensation on equitable terms for action adversely affecting the parties.[1095] In support of its interpretation that the Parties accepted a cap on compensation and reserved the government's right to capture any windfall profits, the Applicant gives a general survey of the record regarding the Petrozuata and Hamaca

[1091] "*It appears correct that the Claimants in the present case were not subject to the Investment Law. However, the joint ventures conducting each of the three Projects were in the opposite position. It has been explained by the Respondent in the jurisdictional phase of this proceeding that pursuant to Article 5 of Decree No. 1.867 of 11 July 2002 on Investment Law Regulation the three joint ventures heading each of the three Projects were to be considered as entities receiving the investment (empresa receptora de la inversion). These entities were therefore holding investments 'owned by or actually controlled by a Venezuelan or foreign individual or legal entity' and thus subject to the Investment Law (Art. 3, last and sole paragraph – R-12). The Investment Law must prevail over the Association Agreements in the hypothesis that one would consider that these Agreements would govern the effects of their own expropriation*" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 176).

[1092] Memorial (Curtis), ¶ 159.

[1093] Memorial (Curtis), ¶¶ 322; Reply (Curtis), ¶ 188.

[1094] *Soufraki Annulment Decision*, ¶ 127.

[1095] Memorial (Curtis), ¶¶ 325-329; Reply (Curtis), ¶¶ 147-152.

Association Agreements, which are recited in the Award,[1096] as well as the ICC award[1097] and investment cases, notably the *Mobil* saga.[1098] There is no necessity for a tribunal to deal with every piece of evidence, particularly if not relevant, nor to engage in the analysis of each item. The Applicant's grievance regarding the Tribunal's failure to address key issues, including virtually the entire documentary and testimonial record on the compensation provisions,[1099] is a thinly veiled challenge against the merits of the decision.[1100]

[1096] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 115-139.

[1097] **A/R-17 [Curtis] / A/R-58 [De Jesús]**, *Conoco ICC Final Award*. Reply (Curtis), ¶¶ 162-164.

[1098] Memorial (Curtis), ¶¶ 167-287.

[1099] Memorial (Curtis), ¶ 330.

[1100] See Reply (Curtis), ¶ 164.

D.4(2) THE COMMITTEE'S ANALYSIS OF THE GROUNDS INVOKED BY VENEZUELA (DE JESÚS)

MANIFEST EXCESS OF POWERS

774. The Applicant challenges the Tribunal's decision on the applicable law governing remedy as exclusively applying international law and ignoring Venezuelan law and the provisions of the Association Agreements. Notwithstanding the Tribunal's purported application of Venezuelan law and the Association Agreements to value the Dutch companies' rights and of international law to determine the compensation standard, it merged the two issues into one and exclusively applied international law to both matters.[1101] The Applicant stresses how the compensation provisions of the Association Agreements are essential to the operation of three principles: the State's sovereign rights over natural resources; compensation for the exercise of these rights to be paid by PDVSA and affiliates as national partners of the investor; and price-capped compensation for the taking of the bundle of rights exclusively authorized by Congress to the investor.[1102] The compensation provisions actually define the protected investment and the investor's legitimate expectation to get benefit from normal and not windfall profits.[1103] The Applicant denounces an abusive arbitration to capture the windfall profits which are reserved to the State as owner of the resources.[1104]

775. The Tribunal's decision to only apply international law which, according the Applicant,[1105] forgot about the compensation provisions of the Association Agreements notwithstanding that they come within the terms of Article 9(5) not only as national law but also as special agreements relating to the investments ,[1106] derives from its interpretation of Article 9(5) of the Treaty which ignores the terms of said Article providing for a cumulative application of the five bodies of rules listed which are "*the law of the Contracting Party concerned; − the provisions of this Agreement and other*

[1101] Memorial (De Jesús), ¶¶ 373-374, 377; Reply (De Jesús), ¶¶ 491, 498-499.
[1102] Tr Day 1, p. 36: 16-25, 37-38, 39 :1-19, 42: 18-25, 43:1-5,
[1103] Tr Day 1, p. 47: 19-25, 48: 15-20.
[1104] Tr Day 1, p. 48: 1-10, p. 69: 22-25,
[1105] Memorial (De Jesús), ¶ 376; Reply (De Jesús), ¶¶ 491-493.
[1106] Tr Day 1, p. 49: 13-19, p. 120: 1-16.

relevant Agreements between the Contracting Parties; − the provisions of special agreements relating to the investments; − the general principles of international law; − such rules of law as may be agreed by the parties to the dispute."[1107] The Tribunal acknowledged that the first source of law to be considered for the applicable law governing remedy is Article 9(5) which it interpreted in the following manner:

> "*The Tribunal notes that the wording and the list set out in paragraph 5 of Article 9 of the BIT do not establish any order of priority among the five sources of law that are mentioned. The provision contains an enumeration, without any hierarchy. When considered as a rule on the applicable law, or on conflicts of law, the rule has its own limitations: it determines the possible applicable sources of law, but it does not determine which one is applicable in a particular context that is relevant for rendering the award*."[1108]

776. It is not possible to conclude, as the Applicant asks the Committee,[1109] that a manifest excess of power results from the Tribunal's alleged construction of Article 9(5) without the VCLT.[1110] This is moreover that the Applicant disputes the Tribunal's otherwise correct interpretation of Article 9(5) as creating no hierarchy on the sources of law because it fell into the "*straw man*" of the national/international law argument creating a hierarchy that does not exist on the basis of Article 27 VCLT following which a State cannot invoke its national law to escape its international obligation.[1111] The argument is incorrect as a matter of fact. The compensation provisions of the Upgrading Projects were not excluded by the Tribunal because the Petrozuata and Hamaca Association Agreements cannot excuse or exempt Venezuela from its obligations under the Treaty or international law but because the Tribunal interpreted the terms and purposes of the compensation provisions of the Association Agreements as not applicable to the

[1107] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 71-72.

[1108] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 85.

[1109] Memorial (De Jesús), ¶ 376.

[1110] The Tribunal noted that the BIT has to be interpreted in light of its rules of interpretation, and more particularly the systemic integration rule of Article 31(3)(c) to take account of the relevant rules of international law (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 91).

[1111] Tr Day 1, p. 26: 18-25, p. 27: 1-4; p. 119: 7-22.

expropriation of 26 June 2007 which did not come within the meaning of Discriminatory Action.[1112]

777. We summarise here the Tribunal's decision on the standard of compensation. The Tribunal first noted that a breach of Article 6 of the Treaty and compensation therefore are only defined by this provision notwithstanding the applicable standard under domestic law.[1113] The Tribunal also noted that if ConocoPhillips' claim for compensation was governed by the compensation provision of the Association Agreements instead of Article 6 of the Treaty, it would be covered by the arbitration clauses in those Agreements.[1114] The Applicant identifies a "*second straw man*" for not bringing the compensation clauses because the Association Agreements are entered between ConocoPhillips and PDVSA and not with Venezuela, which introduces into the discussion the notion of contract claim/treaty claim that has no place at all.[1115] The Committee notes, however, that the Tribunal does not relate the application of international law to the ICSID arbitration agreement in the Treaty. Instead, the Award states that, notwithstanding the absence of any claim based on the Association Agreements provisions before the ICSID Tribunal, this "*does not mean that these provisions are irrelevant for this Tribunal's ruling on the consequences of the expropriation that breached Article 6(c)*".[1116] The Tribunal held relevant the compensation provisions of the Association Agreements in determining quantum to the extent that a particular governmental measure meets the requirement for their application, because international sources of law cannot govern exclusively the determination and amount of compensation which reflects a value corresponding to the loss suffered by those whose rights affected by the expropriation are based on the Association Agreements.[1117]

[1112] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 171-175.
[1113] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 169-170.
[1114] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 169, 177.
[1115] Tr Day 1, p. 49: 22-25, p. 50: 1-4.
[1116] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 177.
[1117] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 177, 179-180, 184.

778. The Applicant recognizes that the Tribunal correctly identified, but failed to apply, the applicable rules of law at para. 179 of the Award where it stated that "*the Respondent submits correctly that Article 9(5) of the BIT has to be given full effect when it refers to 'the law of the Contracting State concerned' and to …the Association Agreements and related provisions of the laws of Venezuela. None of the other sources of law enumerated in Article 9(5) are pertinent or applicable in this respect*." [1118]

779. The challenge of a tribunal's choice between the applicable rules of the proper law raises the question of the demarcation line between annulment and appeal. In this case, the Tribunal has not excluded any of the rules designated by Article 9(5) from the determination of the law governing remedy. The Applicant's attack is against the combination made of these rules and the proportion in which they govern the issue of compensation of the 26 June 2007 expropriation. The challenge is directed at how and in which manner the Tribunal applied the components of the proper law. This is very different from a partial application of the proper law having the same consequences as total non-application. Under the guise of a failure to apply Venezuelan law,[1119] the Applicant discusses how the Tribunal exercised its judgment regarding the applicability of the contractual compensation mechanism of the Association Agreements in respect of expropriation. The irrelevance of the compensation provisions to expropriation which does not come within the meaning of discriminatory action is not tantamount to a failure to apply Venezuelan law as the governing law of the Association Agreements in which they are embedded and to apply the provisions of these Agreements.

780. The Committee turns then to the Applicant's claim regarding an egregious misapplication of the law tantamount to a failure to apply the law and on a failure to give reasons regarding the Tribunal's decision to exclude expropriation from the scope of the Discriminatory Actions while it recognized the importance of the Association Agreements in the determination of compensation.[1120]

[1118] Tr Day 1, pp. 119:2-10.

[1119] Memorial (De Jesús), ¶ 371.

[1120] Memorial (De Jesús), ¶¶ 392, 403-405; Reply (De Jesús), ¶¶ 521, 522.

781. The Applicant alleges at first that the Tribunal distorted the Parties' agreement that the 2007 expropriation fell under the compensation provisions of the Association Agreements and disregarded the ICC award which decided at odds with its interpretation of the provisions but was not given probative value.[1121] The Committee cannot find in the extracts of the exchanges between the Parties and the Tribunal at the 2016 and 2017 Hearings on quantum any agreement as alluded to by the Applicant[1122] in light of ConocoPhillips counsel's repeated opposition to consider that their expropriation claim is governed by the Discriminatory Action mechanism.[1123] Neither can it be concluded that the Tribunal disregarded the ICC award.[1124] The Tribunal considered the role of the ICC award regarding ConocoPhillips' purported agreement to the application of the compensation provisions to expropriation as relating to the dispute brought before the ICC tribunal which is of no concern in the present case where the expropriation governs an expropriation enforced through a single taking on 26 June 2007 and not one consisting of an agglomerate number of governmental actions to qualify as Discriminatory Action.[1125]

FAILURE TO STATE REASONS

782. The Committee examines the Applicant's further grievance concerning the impossibility to follow the Tribunal's reasoning on compensation due to the two following contradictory statements identified as para. 170:

> "*Moreover, the Tribunal observes that the application of Article 6 of the BIT to the present dispute prevails over any Venezuelan domestic law on the same subject matter. A breach of Article 6 of the BIT is defined solely by this provision without any consideration of the domestic law of the host State. The same principle must necessarily apply to the compensation due as a consequence of an expropriation, notwithstanding what the applicable standard may be under domestic law. The standard of the BIT prevails over any*

[1121] Memorial (De Jesús), ¶¶ 402, 408; Reply (De Jesús), ¶¶ 516, 520, 522.

[1122] Reply (De Jesús), ¶¶ 515 (footnote no. 668), 521 (footnote no. 678).

[1123] **A/R-93 [Curtis] / A/R-134 [De Jesús]**, *March 2017 Hearing*, pp. 4514: 18 - 4515: 11.

[1124] **A/R-17 [Curtis] / A/R-58 [De Jesús]**, *Conoco ICC Final Award*.

[1125] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 173.

> *standard the host State may claim to be applicable under its national law*." [1126]

and para. 179:

> "*Irrespective of whether the standard of compensation is 'just compensation' under Article 6(c) of the BIT or 'full' reparation based on customary international law, both sources of law cannot govern exclusively the determination of the compensation and its amount. In one way or the other, compensation reflects a value corresponding to the loss suffered by those whose rights are affected by the expropriation.*"[1127]

which it says give no reasons for first postulating that Venezuelan law and the Association Agreements did not have to be considered for determining the contours of just compensation and taking after the contradictory view that Venezuelan law and the Association Agreements needed to be considered to determine what full compensation meant in the case.[1128]

783. The Tribunal's reasons lie in the developments found in between the two above passages selected by the Applicant which explain why and how the Tribunal came to its decision. The Committee recalls that the Tribunal admitted that application of the Treaty standard of compensation did not make the provisions of the Association Agreements irrelevant for ruling on the consequences of the expropriation conducted in breach of Article 6(c) of the Treaty.[1129] More particularly, the Tribunal deemed as correctly framed, Venezuela's question as to whether the compensation mechanisms established pursuant to the Congressional Authorizations as conditions to entering into the Upgrading Projects are relevant in determining quantum for the bundle of rights which have been taken away by the expropriation.[1130] The Tribunal's explanation on how international law cannot govern exclusively the determination of compensation and its amount would be better understood in reading the impugned passage of para.

[1126] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 170.
[1127] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 179.
[1128] Reply (De Jesús), ¶¶ 502-503.
[1129] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 177.
[1130] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 178.

179 of the Award in its entirety with what follows the above quotation which dispels any lack of clarity as to the role of national law:

> "*These rights are not determined and have not been acquired on the basis of either Article 6 of the BIT or general or customary international law. These are rights, mostly rights in rem or based on contractual undertakings that have been created and are held under national law. In this respect, the Respondent submits correctly that Article 9(5) of the BIT has to be given full effect when it refers to 'the law of the Contracting State concerned' and to 'the provisions of special agreements relating to the investments', thus relying upon the provisions of the Association Agreements and related provisions of the laws of Venezuela. None of the other sources of law enumerated in Article 9(5) are pertinent or applicable in this respect.*" [1131]

The Tribunal gave reasons on how it applied the different parts of the proper law to the question of the standard of compensation and to the determination of the substance of the expropriated rights in a manner which permits to understand the relation between paras. 170 and 179[1132] before concluding:

> "*In other words, 'full compensation', as the term is frequently used by the Claimants, cannot represent more than compensation of the rights and assets held by the Claimants at the relevant time and including revenues deriving therefrom in the future to an extent yet to be determined. Those rights were based on the Association Agreements, which are governed by Venezuelan law*".[1133]

784. The Applicant next queries about the reasons why the Tribunal cherry-picked provisions of Venezuelan law and the Association Agreements such as the Windfall Profit Tax ("WPT") and left others aside such as for expropriation.[1134] A plain reading of the Award will find all explanations in this regard in paras. 171-175 and 184-188 where the Tribunal declared that the compensation provisions become relevant to the extent that a particular government measure meets all the requirement for their

[1131] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 179.

[1132] Rejoinder (Conoco), ¶ 145.

[1133] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 180.

[1134] Memorial (De Jesús), ¶¶ 384-386; Reply (De Jesús), ¶¶ 503-510.

application[1135] and that in the event, the WPT is the only hypothesis where the compensation provisions may have played a role or may need to be considered when determining the value of the Projects and the revenues of its participants.[1136] Further considerations on why the WPT is a Discriminatory Action are found in a later part of the Award,[1137] and explanations have been given by the Tribunal on the basis of its interpretation of the terms and purposes of the compensation provisions of the Association Agreements as to why this is not the case for the 26 June 2007 expropriation.[1138]

785. The Applicant next says that the Tribunal engaged in two paragraphs of conclusory statements regarding the compensation clauses of the Association Agreements without analyzing the Discriminatory Actions definition in the Association Agreement.[1139] The Tribunal's interpretation of the Agreements and reasons for dismissing Venezuela's position that the compensation provisions govern the consequences of the expropriation of 26 June 2007 appear at paras. 171 and 172 of the Award. The Tribunal explained why expropriation of the Project cannot be a Discriminatory Action within the meaning of such term in the compensation provisions.[1140] Under the Petrozuata Association Agreement, Discriminatory Action, inasmuch as it should follow a Development Decision, cannot mean expropriation.[1141] Under the Hamaca Association Agreement, Discriminatory Action which affects net cash flow supposes that the project has not ceased to exist.[1142] The payment provisions make sense only in case of the Projects'

[1135] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 184.

[1136] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 188.

[1137] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 718 and ¶¶ 780-786 ("*The Impact of the Compensation Provisions*").

[1138] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 171-175.

[1139] Memorial (De Jesús), ¶¶ 405-407; Reply (De Jesús), ¶¶ 517-519.

[1140] Counter-Memorial (Conoco), ¶¶ 375-378.

[1141] "*For Petrozuata, such Discriminatory Action should follow a 'Development Decision' (Sec. 1.01); such a decision has nothing in common with an expropriation*" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 171).

[1142] "*For Hamaca, such Action must be 'applicable to the Association' (Sec. 14.1(b)) and affect net cash flow (Sec. 14.2(a)); the cash is no longer flowing when the Project ceases to exist* […]" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 171).

continued existence.[1143] The language of the Hamaca compensation provisions referring to expropriation of a party's assets or interests as part of the Association cannot include the entire Project because it is necessarily based on the existence of an on-going Project and consequently completely incompatible with its taking by the Government through an expropriation of the totality of the investor's rights such as the taking of 26 June 2007.[1144] The Tribunal finally noted that the Association Agreements were terminated on the expropriation date and ConocoPhillips' rights held through the Association Agreements including those contained in the compensation provisions were extinguished.[1145] It is possible to agree or disagree with the Tribunal's analysis and reasons.

786. The Applicant asserts that the reasons are not a legal demonstration but it has no argument as to how the foregoing would be a distortion of the clear text of the Discriminatory Actions provisions which would not need interpretation.[1146] This would be contradictory with Venezuela's position in the underlying arbitration where it admitted that the drafting of the compensation provisions is not a model of clarity.[1147] Interpretation falls within the exclusive province of the Tribunal as interpretative errors do not give rise to a manifest excess of power. Parties agree to have arbitrators interpret their agreements and their decisions, even arguably construing or applying contractual

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[1143] "*In the case of Petrozuata, the compensation is paid through the provision of dividends, or out of general funds accumulating payments differed for later (Sec. 9.07)*. (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 171).

"*In the case of Hamaca, the notification by the foreign party of a material adverse effect caused by a Discriminatory Action is followed by negotiations directed toward the agreement of amendments to the parties' relation, which is therefore considered as being ongoing (Sec. 14.3(c)). If the affected party's claim is not withdrawn, its damages are to be paid out of Corpoven Sub's net cash flow from the Project (Sec. 14.5(a/1)) which therefore continues to exist. In case the parties were unable to agree upon modified terms of their agreement or to accept an arbitral decision, a by-out had to be triggered; however, in the case of an expropriation, the shares to be sold no longer exist*" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 171).

[1144] "*The Hamaca compensation provision refers, indeed, to 'the expropriation of the assets of, or a Party's interest in, the Association or Association Entities' (Sec. 14.1(b/1)). However, these terms include only assets or interests as part of the Association. This expression, not contained in the Petrozuata Agreement, does not include the entire Project governed by the Association Agreement. Finally, the buy-out regime of the Association Agreement is based necessarily on the existence of an on-going Project, and completely incompatible with its taking by the Government through an expropriation*" (**A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 172).

[1145] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 175. Tr. Day 2, pp. 157-158:1-22.

[1146] Reply (De Jesús), ¶¶ 516, 522.

[1147] **A/C-140 / A/R-91 [Curtis] / A/R-132 [De Jesús]**, Transcript of the Hearing on Quantum held 19-21 September 2017, pp. 5263:22, 5264: 1.

provisions, must stand regardless of an *ad hoc* committee's views of their merits or demerits. Explanations at length are unnecessary as the Applicant and as the itself concedes, the Tribunal's interpretation is an error of law which is distinct from non-application of the proper law.[1148]

787. The Applicant's last contentions regarding defective reasons challenge the extent of the legal reasoning provided in a single sentence of para. 171 concerning the analysis of the scope of Discriminatory Action in relation to the Petrozuata Project: "*For Petrozuata, such Discriminatory Action should follow a 'Development Decision' (Sec. 1.01); such a decision has nothing in common with an expropriation.*"[1149] The sentence is clear,[1150] its persuasiveness is not subject to review under Article 52(1)(e) and the expression should be understood within the context of the other explanations given through paras. 171 and 175 on why the expropriation of the Project could not come within the meaning of Discriminatory Action in the compensation provisions of the Petrozuata Association Agreement.

788. Another allegation of an absence of reasons concerns the Tribunal's explanations regarding the Hamaca Project that the terms of the compensation provisions included "*only assets or interests as part of the Association*" and not "*the entire Project governed by the Association Agreement*." It is impossible, says the Applicant, to follow how the Tribunal found in para. 172 that the subject matter of the claims was the expropriation of ConocoPhillips' assets as part of the Association while concluding that this provision did not apply to an expropriation of the entire Hamaca Project. The position that expropriation may only refer to part of the rights arising from the Association Agreement is in the Applicant's view nonsensical because the Project corresponds to a bundle of rights which ConocoPhillips held under the Association Agreements which

[1148] Memorial (De Jesús), ¶¶ 392, 408.

[1149] Memorial (De Jesús), ¶ 409; Reply (De Jesús), ¶ 522.

[1150] Footnote 31 at para. 171 of the Award indicates that Venezuela considered that the definition of Discriminatory Action did not cover non-economic measures such as change in operatorship (**A/R-7 [Curtis] / A/R-48 [De Jesús]**, Respondent's Counter-Memorial, dated 27 July 2009, ¶ 278).

leaves no room for distinguishing between the expropriation of one right and the entire bundle.[1151]

789. These sentences should not be taken out of context. The ending statement of para. 172 that "*the buy-out regime of the Hamaca Association Agreement is based necessarily on the existence of an ongoing Project, and completely incompatible with its taking by the Government through an expropriation*" follows the finding at para. 171 that the compensation provisions of the Hamaca Association Agreement assumed the continued existence of the Project. It would not have been without some contradiction if the Tribunal had in between these two passages interpreted the case of expropriation illustrated in the Discriminatory Action of the Hamaca Project as applying to the entire Project, which corresponds to the investor's rights conferred by Congressional authorizations,[1152] because the Project could no longer be ongoing, but terminated. The Applicant chooses to concentrate on the convincing nature and quality of the reasons which are irrelevant under Article 52(1)(e) as further illustrated by its disputation of the distinction made between "*assets*" and "*Project*".[1153]

790. Finally, the Applicant's allusion to the Tribunal's failure to refer to the pre-contractual documentation provided by the Parties in its analysis of the Discriminatory Action definitions[1154] is clearly a challenge of the Tribunal's interpretation of the compensation provisions of the Association Agreements. It is for the Parties to draw the Tribunal's attention to the pertinent documents. The relevance of the documentary evidence is not reviewed in annulment proceedings which are not a continuation of the arbitration proceedings. The Award enumerates the evidence which was put forward by Venezuela for the Petrozuata and the Hamaca Projects.[1155] It is well settled law that failure to address each and every piece of evidence does not amount to a failure to state reasons.[1156] Absent any substantiation of the significance of a specific item of omitted

[1151] Reply (De Jesús), ¶¶ 518, 523-524.
[1152] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 178.
[1153] *Duke Energy Annulment Decision*, ¶ 162.
[1154] Memorial (De Jesús), ¶ 407.
[1155] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 115-139.
[1156] *Rumeli Annulment Decision*, ¶ 104.

evidence to the disputed issue,[1157] this assertion appears to invite the Committee to substitute the Applicant's interpretation to that of the Tribunal. This the Committee would not and could not do. The Applicant's further arguments concerning the admission of the ICC Award as evidence are regrouped in the following section.

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

791. The Applicant denounces the Tribunal's plain failure and violation of its right to be heard by the arbitrary refusal to give any evidentiary value to the ICC arbitration transcripts and award, which it says is a refusal to allow the Parties to produce evidence they both considered relevant.[1158]

792. The Award recapitulates the steps for the introduction of the material concerning the ICC arbitration which "*has been received for information purposes only and not, accordingly, to be* accorded *any evidentiary value*" pursuant to decisions made at the Organizational Hearing of 24 February 2016. It recites that the Parties were informed on 23 December 2016 that further submittal of documents referred to during the ICC hearing or other documents not on record in the ICC arbitration would not be granted leave by the Tribunal. When ConocoPhillips took the initiative to file the ICC Award rendered on 24 April 2018, the Tribunal ended the discussion between the Parties on the role of the ICC tribunal's decision by reconfirming that the ICC Award could only be submitted for the information of the Tribunal.[1159] Any "*reasonable, attentive and willing reader*"[1160] can understand the above motivation even, if like the Applicant, it would not share the Tribunal's decision as to the introduction in the underlying proceedings of the ICC award rendered between the Conoco Parties and PDVSA.

[1157] *Tza Yap Shum Annulment Decision*, ¶ 110 ("*Article 52(1)(e) of the ICSID Convention does not require that an arbitral tribunal explains itself in respect of each piece of evidence adduced by either party which is not outcome determinative or to give reasons for preferring some evidence over other evidence.*"

[1158] Memorial (De Jesús), ¶¶ 417, 418, 421.

[1159] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 35-36. See also **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 18.

[1160] **A/RLA-116 [Curtis] / A/RLA-94 [De Jesús]**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ("*Tidewater Annulment Decision*"), ¶ 169.

793. The Applicant underlines the arbitrariness of the Tribunal's treatment of the ICC arbitration material as a serious departure from a fundamental rule of procedure.[1161] The Award recalls that the Tribunal replied to Venezuela's complain that it was prevented from updating its information and allegations as per 31 December 2016, that the introduction of new evidence would not have been allowed according to ICSID Arbitration Rules 34 and 35, in particular because no further cross-examination would have been possible.[1162] The Committee does not consider the Tribunal to have exercised its powers to assess the admissibility of evidence as being in breach of the rules of natural justice which includes the right to submit evidence. The Tribunal's decision to avoid the discussion of new evidence after the filing of the ICC award a decade after the beginning of the ICSID arbitration did not prevent the Tribunal from being informed about the reasons which led the ICC Tribunal to hold expropriation as a Discriminatory Action. As a result, the Applicant's alleged negation of its right to present the ICC award in support of its position on the Association Agreements lacks materiality. Quite to the contrary, the Tribunal took into consideration the expropriation through an agglomerate of governmental measures examined in the ICC arbitration when it discussed the possibility of a Parties' agreement on the scope of the compensation provisions.[1163] The Tribunal had ample opportunity to learn of the ICC Tribunal's reasons regarding the qualification of measures as Discriminatory Action in the contractual relations with PDVSA.

[1161] Memorial (De Jesús), ¶ 421; Reply (De Jesús), ¶¶ 537-538.

[1162] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 35, footnote no. 7.

[1163] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 173.

E. GROUNDS RELATED TO THE TRIBUNAL'S FINDING IN RELATION TO INPUTS ON QUANTUM AND VALUATION

794. Venezuela (Curtis) invokes the grounds of manifest excess of powers, failure to state reasons and serious departure from a fundamental rule of procedure in relation to various quantum inputs (E.1). In addition, Venezuela (Curtis and De Jesús) invoke manifest excess of powers, failure to state reasons and serious departure from a fundamental rule of procedure in relation to the Tribunal's application of the valuation date for the compensation of the expropriation of Conoco's assets (E.2).

795. The summary of the arguments advanced by Venezuela (Curtis) can be found in **Sections** E.1(1) and E.2(2), those by Venezuela (De Jesús) in **Section** E.2(1), and the arguments by the Conoco Parties are in **Sections** E.1(2) and E.2(3). The Committee's analysis of the grounds invoked in relation to the Tribunal's findings on quantum inputs is addressed in **Section** E.1(3). The analysis related to the valuation date is in section E.2(4)(1) (De Jesús) and E.2(4)(2)(Curtis).

E.1 GROUNDS RELATED TO THE INPUTS ON QUANTUM

E.1(1) GROUNDS RELATED TO THE INPUTS ON QUANTUM (CURTIS)

796. Venezuela argues that the Tribunal (i) manifestly exceeded its powers; (ii) failed to state reasons; and (iii) seriously departed from a fundamental rule of procedure with respect to the Tribunal's treatments of (a) the Windfall Profits Tax (WPT); (b) the Shadow Tax; (b) the Negative Cash Flows; and (d) the Profit-Sharing Agreement.

MANIFEST EXCESS OF POWERS

i. In relation to the Windfall Profit Tax

797. Venezuela argues that the Tribunal exceeded the scope of its authority (i) by making up its own Budget Price of US$60 when both sides had calculated the impact of the WPT using a Budget Price of US$40; (ii) by disregarding the finding of the ICC Tribunal, which the Parties agreed had the "exclusive adjudicatory authority" to determine the meaning of the Discriminatory Action provisions, their application, and whether a

governmental act fell within the ambit of those provisions; and (iii) by awarding *ultra petita* an additional US$140 million in compensation to the Conoco Parties,[1164] since no party requested such relief.[1165]

798. On the issue of the Budget Price, Venezuela argues, contrary to Conoco, that the issue is not about the Tribunal's discretion to assess the probative value of documents and evidence; rather it is the Tribunal's departure from the Budget Price accepted by the Parties and their experts, as well as the free invention of its own Budget Price which resulted in an increase in compensation by USD 495 million.[1166]

799. On the findings of the ICC tribunal, Venezuela asserts that it is irrelevant that Conoco made the statement that the ICC tribunal had the "exclusive adjudicatory authority" in their Memorial on Quantum before the ICC arbitration existed. Conoco's argument that the ICSID Tribunal had exclusive jurisdiction regarding Venezuela's Treaty breaches does not alter Conoco's acknowledgment that the ICC tribunal had "exclusive adjudicatory authority" on the meaning of "Discriminatory Action."[1167] It was not disputed between the Parties that the ICC tribunal should determine the interpretation of the meaning of the compensation provisions, including if a particular governmental action (whether expropriation or the WPT) adversely affecting the Upgrading Projects constituted a "Discriminatory Action."[1168] Conoco's argument that the Tribunal would not have been bound by Parties' agreement even if there had been one is not credible. Earlier decisions are unanimous that a tribunal may not disregard party agreements or exceed their submissions.[1169] The ICC and ICSID arbitrations involved the same issue, namely whether the WPT was a "Discriminatory Action" within the meaning of the

[1164] Memorial (Curtis), ¶ 697.
[1165] Memorial (Curtis), ¶ 698.
[1166] Reply (Curtis), ¶¶ 383, 384.
[1167] Reply (Curtis), ¶ 378.
[1168] Reply (Curtis), ¶ 380.
[1169] Reply (Curtis), ¶ 381.

compensation provisions and shared, in part, the same parties, namely, CPH's wholly owned subsidiary and CPZ.[1170]

800. On the issue of *ultra petita*, Venezuela adds that the Tribunal went beyond the Conoco Parties' submissions and request for relief, when it granted compensation for the WPT on the ground that it was a "Discriminatory Action,"[1171] even though the Conoco Parties did not seek compensation on that ground; something which the Tribunal expressly noted in the Award.[1172]

ii. In relation to the Shadow Tax

801. Venezuela also argues the Tribunal manifestly exceeded its powers when it excluded the Shadow Tax from the damages calculation, When Parties agreed that an *ex-post* valuation of the fiscal regime for the Projects should include the Shadow Tax and that the the Shadow Tax should be calculated throughout the life of the Projects using the agreed mechanisms.[1173]

802. In its Reply, Venezuela refers to various expert reports and submissions on record regarding the application of the Shadow Tax in an *ex-post* valuation. However, the Tribunal decided not to apply the Shadow Tax, reasoning that the Parties' explanation of the tax lacked precision and documentary support. This, according to Venezuela totally disregarded the Parties' common understanding. Venezuela refutes Conoco's position that the Tribunal was not bound to accept any position of the parties. For Venezuela, the Tribunal has no discretion to disregard uncontested parameters like this one. Venezuela argues, contrary to Conoco, that the tribunal's authority is not solely determined by the arbitration clause or the applicable law; agreements made between the parties modifying the scope of the tribunal's authority can be made at any time

[1170] Reply (Curtis), ¶ 382.
[1171] Reply (Curtis), ¶ 375.
[1172] Reply (Curtis), ¶ 374, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 765.
[1173] Memorial (Curtis), ¶¶ 721, 722.

during the cause of arbitration. Venezuela argues that a tribunal will be deciding *ultra petita* if it exceeds the parties' submissions and their requests for relief.[1174]

iii. In relation to the Negative Cash Flows

803. Venezuela argues that the Tribunal's failure to account for the negative cash flows in its compensation calculation constituted an additional reason for the annulment of the Award. Venezuela submits that the Conoco Parties never disputed their obligation to contribute to the Projects during years of negative cash flows, and their calculations acknowledged that negative cash flows need to be considered.[1175]

804. Venezuela submits the Tribunal had artificially inflated the compensation value by USD 181 million. This resulted from the Tribunal treating as zero, instead of deducting them, the negative cash flows that occurred in the Corocoro Project in 2007, 2008 and 2015 for all Projects. However, Venezuela notes that the Conoco Parties disputed this, stating that negative cash flows only occurred with the Corocoro Project in 2007 and 2008.[1176]

805. In its Reply, Venezuela notes that both parties acknowledged negative cash flows in their valuations. It conceded that, unlike other quantum issues raised as grounds for challenge, the Parties did not have an express agreement on the issue of negative cash flow. As a matter of fact, Venezuela notes that the cash flows excluded were the same as the Tribunal had calculated at paragraphs 716 (in relation to the Corocoro Project) and 777 (in relation to the Petrozuata and Hamaca Projects) of the Award before excluding them in the final Award.[1177]

iv. In relation to the Application of the "Participación del Estado en Ganancias" per the Profit-Sharing Agreement

806. Venezuela submits that in its calculation of the compensation due for the expropriation of the Corocoro Project, the Tribunal ignored that, as established by the Congressional

[1174] Reply (Curtis), ¶¶ 395-397.
[1175] Memorial (Curtis), ¶ 729.
[1176] Memorial (Curtis), ¶ 730.
[1177] Reply (Curtis), ¶ 402.

Authorization and as agreed by the Parties in the Profit Sharing Agreement, the "Participación del Estado en las Ganancias" ("PEG") would be paid to the Government.[1178] Venezuela stresses that the Parties had agreed that the PEG was an essential element of the fiscal regime for the Corocoro Project, which had to be considered in the valuation. According to Venezuela, the Tribunal also disregarded the Parties' agreement that the PEG would be calculated at 50% throughout the life of the Profit-Sharing Agreement and the mechanics for calculating the PEG.[1179]

807. In its Reply, Venezuela argues that the Tribunal's disregard of the PEG was not a mere oversight.[1180] Venezuela refers to Conoco's expert reports and submissions, which acknowledged the PEG and accounted for it in their valuations.[1181] Contrary to Conoco's argument that the Tribunal was not bound to follow the Parties' quantum calculation methods even when the Parties adopted compatible approaches, Venezuela argues that the PEG was an essential feature of the Corocoro Project. Venezuela submits that the PEG was not an agreement reached during the arbitration; instead it was a "special agreement" governing investments under Article 9 of BIT, created under the Congressional Authorization for the Project and incorporated into the Profit-Sharing Agreement from the outset. Venezuela submits that ignoring such agreement was not a mere exercise of discretion by the Tribunal, but a manifest excess of authority which warrants annulment of the Award.[1182]

FAILURE TO STATE REASONS

i. In relation to the Windfall Profits Tax

808. Venezuela argues that the Tribunal's determination regarding the WPT is incoherent and cannot be reconciled with its decision on liability. For Venezuela, "there is no plausible explanation for the Tribunal to (i) award damages for the Windfall Profits

[1178] Memorial (Curtis), ¶ 755.
[1179] Memorial (Curtis), ¶ 756.
[1180] Reply (Curtis), ¶ 408.
[1181] Reply (Curtis), ¶ 409.
[1182] Reply (Curtis), ¶ 413.

Tax after finding that tax to be lawful, (ii) ignore the treatment by both parties of the Budget Price in calculating the Windfall Profits Tax, (iii) award any damages for the Windfall Profits Tax under the compensation provisions of the Petrozuata Association Agreement when the Conoco Parties 'do not rely on the very specific provisions on discriminatory action contained in the Association Agreements of Petrozuata and Hamaca' to claim such damages, or (iv) disregard the decision of the ICC Tribunal that the Windfall Profits Tax was not a 'Discriminatory Action' within the meaning of those compensation provisions, despite the fact that the Conoco Parties had agreed that the ICC Tribunal was the 'exclusive adjudicatory authority' on this issue and 'the forum which would be empowered to determine, for example, what the Discriminatory Action provisions mean.'"[1183]

ii. In relation to the Shadow tax

809. Venezuela also submits that the Tribunal's explanations to cast aside the Shadow Tax from the calculation are incomprehensible. Venezuela maintains that there is an extensive record of both Parties applying and calculating the Shadow Tax in their submissions and in their economic models, showing how each one took the Shadow Tax into account in their calculations. And yet, the Tribunal disregarded the Shadow Tax characterizing the explanation of the experts "lack[ed] precision" or suggesting they were not sufficiently detailed. For Venezuela, the Tribunal's failure to account for the Shadow Tax without any colorable reason warrants annulment under Convention Article 52(1)(e).[1184]

810. Venezuela argues the Tribunal failed to explain why it felt free to disregard the Parties' clear agreement on the applicability of the Shadow Tax. Conoco's interpretation that a tribunal has the discretion to decide beyond parties' agreement, submissions or requests for relief has no support in any recognized authority.[1185]

[1183] Memorial (Curtis), ¶ 701; Reply (Curtis), ¶¶ 386-389.
[1184] Memorial (Curtis), ¶ 724.
[1185] Reply (Curtis), ¶ 399.

iii. In relation to the Negative Cash Flows

811. Venezuela maintains that the Tribunal failed to state reasons for excluding the negative cash flows of the Projects in calculating compensation. Venezuela notes that the Award provides no reasons for treating negative cash flows as zero, nor as to why the Tribunal would make the decision to exclude negative cash flows when the Parties themselves had given effect to them in their respective calculations. It is irrelevant if negative cash flows occurred only in two years, that does not change the fact for the lack of rationale for their exclusion. This failure to provide reasons also constitutes grounds for annulment under Convention Article 52(1)(e).[1186]

iv. In relation to the Application of the PEG per the Profit-Sharing Agreement

812. Venezuela also submits that the Tribunal's reasons for its decision to ignore the PEG in determining compensation for the Corocoro Project were insufficient, and cannot be followed from Point A to Point B.

813. The Tribunal's purported explanation that none of the experts went beyond the definition of the rate under Article I of the Association Agreement, only gives rise to additional grounds for annulment under Convention Article 52(1)(e) of the ICSID Convention.[1187] Venezuela adds that stating that the Parties did not adequately explain the PEG is not a reason for departing from the Parties' agreement on the substantive point of the applicability of the PEG and the method to apply it.[1188]

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

i. In relation to the Windfall Profits Tax

814. The Tribunal seriously departed from a fundamental rule of procedure by not respecting Venezuela's right to be heard regarding the Tribunal's decision to adopt the US$60 Budget Price for calculating the WPT Tax even though both sides had used a Budget

[1186] Memorial (Curtis), ¶ 732; Reply (Curtis), ¶¶ 403, 404.
[1187] Memorial (Curtis), ¶¶ 758, 760.
[1188] Reply (Curtis), ¶ 414.

Price of US$40. Venezuela's position is that if the Tribunal intended to depart from the Parties' and the Experts' Budget Price, it should have first given Venezuela an opportunity to respond. Had it done so, in Venezuela's view, the US$60 Budget Price would not have been applied. Yet, the Tribunal deprived Venezuela from the right to be heard on that point, thereby, seriously departing from a fundamental rule of procedure.[1189]

815. Venezuela submits, contrary to Conoco's position, that the issue is not if there were quantum hearings and briefs, but how the Tribunal could -without warning and without giving Venezuela an opportunity to comment- adopt its own Budget Price even after seeing the Parties' common assumption as to the Budget Price for the period after 2016.[1190]

ii. In relation to the Shadow Tax

816. Venezuela argues that if the Tribunal considered that it needed more information on the Shadow Tax, it should have requested the Parties to provide additional information, rather than to ignore the Shadow Tax. Venezuela therefore argues that the Tribunal's decision to not give effect to the Shadow Tax also constitutes a serious departure from a fundamental rule of procedure.[1191] Venezuela counters Conoco, arguing that the issue is not about how many hearings were held or briefs were filed; but rather how the Tribunal, without warning, disregarded the tax agreed upon by the Parties, which consequently inflated compensation by approximately USD 675 million.[1192]

iii. In relation to the Negative Cash Flows

817. For Venezuela, if the Tribunal intended to disregard the negative cash flows and treat them as zero, it should have given the Parties an opportunity to be heard on that point. If the Tribunal had done so, Venezuela would have pointed out that both sides had

[1189] Memorial (Curtis), ¶ 711.
[1190] Reply (Curtis), ¶ 390.
[1191] Memorial (Curtis), ¶ 725.
[1192] Reply (Curtis), ¶¶ 400, 401.

accounted for negative cash flows in their presentations and that failure to account for the negative cash flows would lead to overcompensating the Conoco Parties in the *ex-post* valuation. The Tribunal's decision to not give effect to the negative cash flows constitutes a serious departure from a fundamental rule of procedure.[1193]

iv. In relation to the Application of the PEG per the Profit-Sharing Agreement

818. Venezuela also asserts that the Tribunal's decision to not give effect to the PEG constitutes a serious departure from a fundamental rule of procedure. Venezuela argues that, if the Tribunal intended to depart from the agreement and submissions of the Parties and their experts, it should have first given Venezuela an opportunity to respond, and if it had done so, the PEG would have been applied and the result on Corocoro would have been different, even assuming that all other parts of the Tribunal's decision on the Corocoro Project were correct, which in any event is not the case.[1194]

E.1(2) NO ANNULLABLE ERROR IN THE TRIBUNAL'S TREATMENT OF QUANTUM INPUTS (CONOCO)

NO MANIFEST EXCESS OF POWERS

i. In relation to the Windfall Profits Tax

819. Conoco maintains that it is false that the Tribunal acted *ultra petita* going beyond Claimants' submissions in relation to the WPT. Conoco submits that both Parties addressed the issue of whether the WPT as constituted a Discriminatory Action, and the Tribunal was entitled to answer the question. Conoco affirms its argument made during the arbitration that if the WPT were applicable, it would constitute a Discriminatory Action within the meaning of the Association Agreements. Conoco supports this by referring to the transcript of the March 2017 Hearing.[1195]

[1193] Memorial (Curtis), ¶ 733; Reply (Curtis), ¶ 403.

[1194] Memorial (Curtis), ¶ 761; Reply (Curtis), ¶ 415

[1195] Counter-Memorial (Conoco), ¶¶ 657, 658, citing **A/R-93 [Curtis] / A/R-134 [De Jesús]**, *March 2017 Hearing*, pp. 4394:19–4395:6 (Claimants' Closing) (PDF p. 337); and Counter-Memorial (Conoco), ¶ 660, citing **A/R-93**

820. Further, Conoco notes that Venezuela responded in its Post-Hearing Brief of May 2017 that the WPT operated as an additional royalty (rather than a tax) and could thus not be a Discriminatory Action.[1196] Venezuela agreed that the valuation should account for the compensation provisions agreed established under the Congressional Authorization and acknowledged that if the WPT were considered a Discriminatory Action within the meaning of the Association Agreements, then the Claimants would be eligible to receive compensation for its effects.[1197]

821. In any event, even if the Claimant had not argued that the WPT would constitute a Discriminatory Action, the Tribunal's decision would not be *ultra petita* because this issue cannot be distinguished from the Claimant's broader request for full compensation under international law.[1198]

822. Additionally, the Tribunal was not bound by the conclusions of the ICC Tribunal, and the Parties never agreed that the ICSID Tribunal would be bound by the decisions of another Tribunal. The ICC arbitration involved different parties and claims and could not have had *res judicata* effect as to the ICSID Tribunal. Venezuela relies on a statement made in Claimants' Memorial on Quantum on May 2014 before the ICC arbitration existed, that "[j]urisdiction over the Association Agreements" was not vested in the ICSID Tribunal because the "[t]he Association Agreements vest exclusive adjudicatory authority in arbitral tribunals established under the auspices of the ICC."[1199]However, the Claimants also stated that the ICSID Tribunal had exclusive jurisdiction over Venezuela's Treaty breaches, which is the claim assessed by the ICSID Tribunal.[1200]

[Curtis] / A/R-134 [De Jesús], *March 2017 Hearing*, pp. 4538:2–8 (Tribunal questions to Parties) (PDF p. 373); Rejoinder (Conoco), ¶ 248.

[1196] Counter-Memorial (Conoco), ¶ 661, referring to **A/R-92 [Curtis] / A/R-133 [De Jesús]**, Venezuela's Post-Hearing Brief (previously R-765), 19 May 2017, ("*Respondent's PHB*"), ¶ 199.

[1197] Counter-Memorial (Conoco), ¶ 661, citing **A/R-92 [Curtis] / A/R-133 [De Jesús]**, *Respondent's PHB*, ¶ 201; Rejoinder (Conoco), ¶ 249.

[1198] Rejoinder (Conoco), ¶¶ 251, 252.

[1199] Counter-Memorial (Conoco), ¶ 667, citing **A/R-85 [Curtis] / A/R-126 [De Jesús]**, Claimants' Memorial on Quantum (previously R-758), 19 May 2014, ("*Claimants' Memorial on Quantum*"), ¶ 95.

[1200] Counter-Memorial (Conoco), ¶ 667.

823. Besides, Claimants' unilateral declaration is not an agreement between the Parties. Nowhere in its submissions shows that Venezuela agreed to this position.[1201]Like all international tribunals, the Tribunal was competent to determine its own jurisdiction, and one party's unilateral statement does not define the contours of the Tribunal's power to decide.[1202]

824. Regarding the Budget Price of US$ 60, Conoco argues that the Tribunal was entitled to exercise its discretion in evaluating the evidence on record and to arrive at its own conclusion. The discretion to assess the evidence is a general principal of law, recognized by the International Court of Justice and ICSID jurisprudence.[1203]In its Rejoinder, Conoco notes that Venezuela did not offer a response on the authorities showing that the tribunal have a wide margin of discretion on quantum issues.[1204]

825. Besides, Parties did not agree on the applicable Budget Price. Claimants' experts in its valuation model applied the WPT assumptions made by Venezuela's experts solely to present "a sensitivity showing the economic effects" of applying the WPT in the manner Venezuela proposed.[1205] In its Rejoinder, Conoco reiterates that the Claimant did not 'accept' any particular Budget Price.[1206]

ii. In relation to the Shadow Tax

826. Conoco submits that it was within the Tribunal's discretion not to apply the Shadow Taw because doing so would be too speculative, since the Parties had failed to provide documentation substantiating the existence of the tax under Venezuelan law, nor evidence on how the tax was meant to be applied to the Projects. Despite the Shadow Tax being an input into the quantum calculation, its non-application does not amount to a failure to apply the law. Conoco refers to Rule 34 of the ICSID Rules to maintain that the Tribunal had discretion to determine the damages owed. It also refers to the *ad*

[1201] Rejoinder (Conoco), ¶ 254(a).
[1202] Rejoinder (Conoco), ¶ 254(b).
[1203] Counter-Memorial (Conoco), ¶ 674.
[1204] Rejoinder (Conoco), ¶ 259.
[1205] Counter-Memorial (Conoco), ¶ 675.
[1206] Rejoinder (Conoco), ¶ 258.

hoc committee's decision in *Dogan v. Turkmenistan*, which rejected Turkmenistan's claim that the tribunal had exceeded its powers by awarding damages based on a methodology that neither party advanced, finding that the valuation process followed by the tribunal was based on the tribunal's appreciation of the evidence.[1207]

827. In its Rejoinder, Conoco submits that Venezuela offers no support for its assertion that it is "a manifestly incorrect statement of the law" to contend that the parties' quantum calculations do not constitute the kind of agreement on applicable law restricting a tribunal's discretion.[1208] Conoco also argues that since it had requested relief in the form of compensation for the expropriation, the Tribunal was tasked to decide the quantum of that compensation using its discretion.[1209]

iii. In relation to the Negative Cash Flows

828. Conoco argues that the Tribunal had discretion to deal with quantum issues and errors in calculating compensation are not grounds for annulment. Conoco notes that Venezuela's actual complaint is not that the Tribunal excluded negative cash flows from its compensation calculations, but rather that it did not include *pro rata* cash call obligations under the Association Agreements for the one-and-a-half years in which net cash flows were negative under the Tribunal's calculations. This failure, according to Venezuela, resulted in overcompensation.[1210] However, Conoco argues that (i) a tribunal is not bound to follow the parties' quantum calculation methods, even if they adopt compatible approaches, since they do not constituted an "agreement" that is binding on a tribunal and capable of giving rise to an excess of powers; (ii) the Tribunal had considerable discretion on matters of quantum, especially to decide on the admissibility of any evidence adduced and its probative value; (iii) the Tribunal's decision fell within the "legal framework" established in the case and was not beyond the Parties' submissions; (iv) Venezuela had no right to preview the Tribunal's

[1207] Counter-Memorial (Conoco), ¶ 705, referring to **A/CLA-79**, *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 January 2016, ¶¶ 165–66; Rejoinder (Conoco), ¶ 277.

[1208] Rejoinder (Conoco), ¶ 278, citing Reply (Curtis), ¶ 395.

[1209] Rejoinder (Conoco), ¶ 279.

[1210] Counter-Memorial (Conoco), ¶ 722.

quantum decisions and provide additional submissions on their accuracy prior to the Final Award being rendered; and (v) the Tribunal was free to adopt a quantum calculation method that it considered to be the most appropriate in the circumstances, based on the evidence submitted and the arguments made by the parties and their experts.[1211]

829. Conoco argues that Venezuela's true complaint is that the Tribunal made a clerical or arithmetical error by incorrectly excluding the same cash flows it had previously calculated at paragraph. 716 (in relation to Corocoro) and 777 (in relation to Petrozuata and Hamaca) of the Award. However , Conoco argues that the proper remedy to Venezuela's complaint is an application under Article 49(2) of the ICSID Convention, not an annulment under Article 52(1).[1212]

iv. In relation to the Application of the PEG per the Profit-Sharing Agreement

830. The Tribunal's failure to apply the PEG does not amount to failure to apply the applicable law. There is no such failure when a tribunal decides that it would be too speculative under the law to apply particular provisions of the accounting procedures contained in a contract, when the operation of those provisions has not been adequately substantiated or explained to it. Conoco submits that paragraph 721 of the Award makes clear that the Tribunal did not apply the PEG because it found that the Parties' experts failed to provide the Tribunal with sufficient evidence or explanations as to how the PEG could or should have been applied. In any event, tribunals are not obliged to deal with every piece of evidence or contractual provision invoked by a party.[1213]

831. In its Rejoinder, Conoco submits that Venezuela (Curtis) raised no new arguments on its Reply concerning the PEG, but that Venezuela (De Jesús) raised in its Reply

[1211] Counter-Memorial (Conoco), ¶ 719.

[1212] Rejoinder (Conoco), ¶ 283.

[1213] Counter-Memorial (Conoco), ¶¶ 725-729.

complaints about the Tribunal's treatment of the PEG.[1214] Conoco's rebuttal to Venezuela's (De Jesús) arguments on this point are addressed below in **Section E.2(3)**.

NO FAILURE TO STATE REASONS

i. In relation to the Windfall Profits Tax

832. The Tribunal provided sufficient reasons for the decision on WPT, based on the following observations: (i) the conclusion that the WPT was lawful under international law does not preclude the conclusion that the WPT was a Discriminatory Action under the Association Agreements. Conoco refers to paragraph 783 of the Award which clarifies that while Venezuela was autonomous to exercise its sovereign power to adopt the WPT, the imposition of such tax on the Claimants while other oil companies were exempt would be a Discriminatory Action within the meaning of the Association Agreements;[1215] (ii) the Parties had not agreed on a Budget Price that would have triggered the application of the WPT,[1216] and the Tribunal did not fail to give reasons for adopting a Budget Price of USD 60 per barrel. Venezuela's complaints are based on *incorrect* reasons, whereas annulment does not concern itself with the correctness of a decision;[1217] (iii) the Tribunal recognized that while the compensation provisions of the Petrozuata and Hamaca Association Agreements do not govern the Claimants' right to compensation under the BIT, they may be considered if certain taxes constitute discriminatory actions that trigger a right for compensation and offset the taxes themselves,[1218]and (iv) the Tribunal was not obliged explain why it did not adopt the ICC tribunal's reasoning, as it was not bound by the ICC tribunal's decision.[1219]

[1214] Rejoinder (Conoco), ¶ 284.
[1215] Counter-Memorial (Conoco), ¶ 680(a).
[1216] Counter-Memorial (Conoco), ¶ 680(b).
[1217] Rejoinder (Conoco), ¶ 267.
[1218] Counter-Memorial (Conoco), ¶ 680(c), citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 718.
[1219] Counter-Memorial (Conoco), ¶ 680(d); Rejoinder (Conoco), ¶ 266.

ii. In relation to the Shadow Tax

833. An award cannot be annulled because a party is unconvinced by the reasons provided. It is possible to follow the Tribunal's reasoning from Point A to Point B: the Tribunal decided not to apply the Shadow Tax in its calculations because the parties' experts' explanations "lack[ed] precision," had "no documentary support" and were unsupported "by any reference to legal or other sources."[1220]

834. In its Rejoinder, Conoco submits it appears that Venezuela changed its case regarding Article 52(1)(e) to argue that the Tribunal gave reasons but failed to explain why it disregarded the Parties' agreement on the applicability of the Shadow Tax. Conoco counters that there is no requirement to provide "reasons for reasons," and in any event, the Tribunal explained Parties had failed to substantiate their positions on the application of the tax.[1221]

iii. In relation to the Negative Cash Flows

835. Conoco submits that the discretion afforded to tribunals in all matters of quantum calculations permits a tribunal to provide terse or even no reasoning regarding individual inputs into a quantum analysis. Conoco refers to the decision of the ad hoc committee in *Rumeli Telekom* which found no grounds to annul the award even where the damages figure was "baldly stated in the Award, without an explanation of a mathematical calculation undertaken by the Tribunal in arriving at it."[1222] Conoco argues that annulment should not be granted, regardless of whether the parties' experts included negative cash flows in their quantum calculations, or whether the Tribunal provided reasons for not including those cash flows in its own calculations.[1223]

[1220] Counter-Memorial (Conoco), ¶ 709, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 719, footnote no. 536.
[1221] Rejoinder (Conoco), ¶ 281.
[1222] Counter-Memorial (Conoco), ¶ 720, citing *Rumeli Annulment Decision*, ¶ 178.
[1223] Counter-Memorial (Conoco), ¶ 721.

iv. In relation to the Application of the PEG per the Profit-Sharing Agreement

836. The Tribunal's reasons for its decision to not apply the PEG are clear. Tribunal observed that the parties had failed to evidence and explain the applicability of the PEG to the Corocoro project. While the PEG may have been included in the Excel spreadsheets provided by the Parties' experts, that did not address the Tribunal's concern that the application of PEG was not explained, leaving the Tribunal to consider the figure in its calculation of damages without engaging in speculation. Conoco relies on paragraph 270 of the Award in support of the foregoing argument.[1224]

NO SERIOUS DEPARTURE

i. In relation to the Windfall Profit Tax

837. There was no departure from the right to be heard, less a serious departure with material impact on the outcome of the Award. The parties' right to be heard does not entitle them to limitless presentations nor does it obligate a tribunal to submit its reasoning for parties' approval before rendering the award. The Tribunal gave Venezuela ample opportunity to ventilate its arguments on compensation, including the calculation of the WPT, in four hearings, five separate briefs and responses to the Tribunal's questions.[1225]

838. In its Rejoinder, Conoco argues that Venezuela's own experts had initially advocated for a Budget Price of USD 60, therefore not only did Venezuela have the opportunity to comment on the precise Budget Price adopted by the Tribunal, but it had also at one point advocated for that Budget Price.[1226]

ii. In relation to the Shadow Tax

839. Conoco submits that the right to be heard refers to the opportunity given to the parties to present their position, not how tribunals deal with the arguments and evidence

[1224] Counter-Memorial (Conoco), ¶ 730.
[1225] Counter-Memorial (Conoco), ¶ 691.
[1226] Rejoinder (Conoco), ¶ 272.

presented to them[1227] Conoco argues that the Tribunal afforded Parties and their respective experts multiple opportunities to explain and substantiate their positions on the Shadow Tax and all other quantum issues, through experts' briefs and reports, oral arguments and presentations at five separate hearings between 2008 and 2017. The Tribunal cautioned Parties not to include figures in their valuation models that were not substantiated by evidence, yet Venezuela failed to provide the Tribunal with necessary evidence and explanations on the Shadow Tax.[1228]

iii. In relation to the Negative Cash Flows

840. Conoco argues that the Tribunal cannot be blamed for not including in its assessment a calculation that was not detailed in the Parties' submissions or the experts' reports. Venezuela failed to bring clearly to the attention of the Tribunal information that it wished the Tribunal to considered, and Venezuela cannot cure that failure in the annulment proceeding. According to Conoco, the Tribunal considered both sets of experts to have taken unrealistic positions on certain quantum inputs, and that they had not provided evidence in a form helpful to the Tribunal. Therefore, in Conoco's view, the Tribunal was entitled to exercise its discretion on quantum inputs, including by not replicating every calculation performed, but not explained, by those experts.[1229]

iv. In relation to the Application of the PEG per the Profit-Sharing Agreement

841. Conoco submits that a tribunal is not bound to follow the parties' quantum calculation methods, even if they adopt compatible approaches. Venezuela had no right to preview the Tribunal's quantum decisions and provide additional submissions on their validity prior to issuing the Award; instead, the Tribunal had the discretion to adopt a calculation it considered most appropriate based on the evidence adduced and arguments the parties and their experts made.[1230]

[1227] Counter-Memorial (Conoco), ¶ 713, citing *Tulip Annulment Decision*, ¶ 82.
[1228] Counter-Memorial (Conoco), ¶ 715.
[1229] Counter-Memorial (Conoco), ¶ 723.
[1230] Counter-Memorial (Conoco), ¶ 730.

E.1(3) COMMITTEE'S ANALYSIS ON GROUNDS RELATED TO INPUTS ON QUANTUM

MANIFEST EXCESS OF POWERS

842. The Applicant challenges decisions made by the Arbitral Tribunal in the determination of royalties and taxes which, as stated in the Award, constitute a part of the economic value of the three Projects that impact on the valuation of ConocoPhillips' loss.[1231] The impugned decisions concern:

a. the WPT which operated as an additional royalty when oil prices exceeded the Budget Price annually approved by the National Assembly in the Budget Law;
b. the Shadow Tax which was a fiscal measure requiring each Project to pay the excess, if any, of 50% of the gross income over the sum of all royalties, taxes and contributions paid by the Project;
c. the Negative Cash Flows; and
d. the PEG, which was a profit share granted to the State for the Corocoro Project.

843. The Applicant alleges that these decisions were all made in disregard of the Parties' common approach in their valuation calculations.[1232].

- WPT: The Applicant explains that its experts had throughout the arbitration, relied on the Budget Price of crude at US$ 40 per barrel based for the year 2017 on the last observable data included in the 2016 Budget Law. The Conoco Parties never challenged the use of the last Budget Price as approved by the National Assembly for 2017 and that Conoco's experts explicitly incorporated into their valuation model the same Budget Price used by Venezuela's experts. Despite the recognition by the Parties' agreement of the price of US$40 per barrel, the Tribunal made its projection based on a price 50% higher than the Budget Price used by both parties in their respective calculations. It set the threshold price of crude oil at US$60 per barrel in years after 2016 which then reduced the WPT that would have applied to the Projects for collection

[1231] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 718.
[1232] Memorial (Curtis), ¶¶ 673-675, 683, 712, 726, 734, 747.

and thus increased the damages awarded for the expropriation by approximately US$ 495 million.[1233]

- Shadow Tax: The Applicant says that this tax was incorporated by both Parties into every valuation and presentation submitted. Although the Tribunal acknowledged the lack of dispute between the Parties and the fact that the Conoco Parties did not ask for specific relief for these measures, the Tribunal excluded from the calculation of compensation the effect of the Shadow Tax mechanism which was designed to ensure that the overall tax burden would not be less than 50% of the gross income. This resulted in an increased compensation of US$ 675 million awarded to the Conoco Parties.[1234]
- Negative Cash Flow: The Applicants says that the Tribunal departed from the Parties' approach regarding the treatment of negative cash flows which in a but-for world would have forced ConocoPhillips to inject cash into the Projects. This had the effect of increasing the compensation by US$ 181 million.[1235]
- PEG: The Tribunal's refusal to apply the PEG which would require that 50% of annual operating income go to the Government despite the fact that each Party's experts accounted for it in their valuation models, and arrived at more than US$ 552 million as the principal amount of compensation for the Corocoro Project.[1236]

844. Dealing first with the WPT, the use of the same Budget Price by both Parties' experts for the WPT should be understood in context. The Parties were in dispute about the application of the WPT[1237] with Conoco submitting that the measure enacted after the expropriation would artificially reduce Venezuela's compensation in breach of its full reparation obligation under international law.[1238] The Applicant emphasizes the following wording in paragraph 767 of the Award, which states that: "[t]*he Tribunal notes while the Claimants object to the application of the WPT in the present case, they*

[1233] Memorial (Curtis), ¶¶ 683-684, 687; Reply (Curtis), ¶¶ 383, 385. Tr. Day 2, 64:21-25, 65:1-4.
[1234] Memorial (Curtis), ¶¶ 713, 715-717, 720. Tr. Day 2, 66:4-22.
[1235] Memorial (Curtis), ¶ 726, 729.
[1236] Memorial (Curtis), ¶ 745-748. 758. Tr. Day 3, 68:23-25, 69: 1-4.
[1237] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 722.
[1238] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 729.

did not raise objections to the application as it has been submitted by the Respondent's experts in their reports and in their calculations as per December 2016," to argue that ConocoPhillips accepted the Budget Price as US$ 40 per barrel.[1239]

845. The Committee notes that the wording cited by the Applicant is preceded by the following passage:

> *"The Tribunal notes that the Claimants' experts were instructed not to examine the Windfall Profit Tax. They must have done so nevertheless because they reported to the Tribunal that whether or not the WPT is applied, the difference in taxation is 21%, which would be in the Claimant's case a reduction compared to the Respondent's position.*"[1240]

As the Applicant acknowledges and Conoco clarifies,[1241] Conoco's experts applied the WPT assumptions used by Venezuela's experts for the sole purpose of "*presenting a sensitivity showing the economic effects*" of applying the WPT in the manner proposed by Venezuela.[1242] Conoco referred to the US$ 40 per barrel only to illustrate the economic effects of their client's legal instruction not to include the WPT, which was the major difference between the instructions given to the experts on both sides when preparing their valuations.

846. Some enlightenment may be found in the following decision of the *ad hoc* committee in *Teco v. Guatemala*:

> "[Claimant] *surmises that such agreement existed from fragments of Guatemala's expert reports. However, it is quite common in international arbitration for opposing parties' experts to verify each other's methodologies and for opposing parties to present a tribunal with various hypotheses to use in its final calculations. In the*

[1239] Memorial (Curtis), ¶ 687; Reply (Curtis), ¶ 385.

[1240] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 767.

[1241] Memorial (Curtis), ¶ 691; Counter-Memorial (Conoco), ¶ 675.

[1242] **A/R-99 [Curtis] / A/R-140 [De Jesús]**, Consolidated Update Report of Manuel A. Abdala & Pablo T. Spiller, dated 17 November 2016 ("*Abdala/Spiller November 2016 Report*"): "we have been instructed by Counsel to the Claimants as follows: a. For the valuations not taking the DAP [Discriminatory Action Provisions] formulas into account: to include all taxes applicable and known as each date of valuation, with the exception of the Windfall Profits Tax (***WPT***), which was introduced in 2008 and subsequently amended" (¶ 3, precising that instruction from Claimants' Counsel not to include the WPT in the valuations was only relevant for the 2016 valuation).

> *Committee's view, there being no clear agreement between the Parties on this issue, the Tribunal was within its powers to appreciate that interest was disputed and to decide the starting date and which interest rate to apply*."[1243]

847. The Committee considers that, under the circumstances, the Tribunal was entitled to draw inferences regarding the Budget Price that differed from the assumption made by Venezuela's experts "*or indeed any experts*."[1244] The Tribunal also noted that Venezuela's experts failed to explain their assumption that such a price would apply until the end of the Projects.[1245] Conoco experts' reference to the Budget Price as used by Venezuela could not be interpreted as an agreement on applying the WPT unless they overstepped their instructions, which they did not.[1246] The Committee finds that there was indeed no agreement on the Budget Price over the application of the WPT.

848. The Applicant further argues that the Tribunal ignored the Parties' agreement in footnote 536 of the Award regarding the Shadow Tax[1247]and paragraph 721 of the Award regarding the PEG.[1248] The Applicant submits that the Shadow Tax was first introduced in Venezuela's experts report of 18 August 2014[1249] and thereafter incorporated in each valuation by the Parties' expert.[1250]The Applicant further argues that there was "*no disagreement"*[1251] between the Parties regarding the applicability of

[1243] *TECO Annulment Decision*, ¶ 178.

[1244] Counter-Memorial (Conoco), ¶ 676.

[1245] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 771.

[1246] **A/R-263 [Curtis]**, Damages Assessment for the Taking of ConocoPhillips' Investments in Venezuela, March 2016 Update, Prepared by Manuel A. Abdala and Pablo T. Spiller, dated 18 March 2016, ("*Abdala/Spiller March 2016 Report*"), ¶ 29: "The only difference in the taxation regime applied by Brailovsky and Flores and ourselves relates to the windfall profit tax: Brailovsky and Flores apply the windfall profit tax and we [were] instructed not to."

[1247] Memorial (Curtis), ¶ 721.

[1248] Reply (Curtis), ¶ 407.

[1249] **A/R-234 [Curtis]**, Expert Report on Valuation Prepared by Vladimir Brailovsky and Daniel Flores, dated 18 August 2014, ¶ 215.

[1250] **A/R-256 [Curtis]**, Supplemental Report by Manuel A. Abdala and Pablo T. Spiller, dated 13 October 2014, ¶ 251; **A/R-263 [Curtis]**, *Abdala/Spiller March 2016 Report*, ¶ 28 i. **A/R-99 [Curtis] / A/R-140 [De Jesús]**, *Abdala/Spiller November 2016 Report*, ¶¶ 140 g. 341. **A/R-192 [Curtis]**, Consolidated Expert Report on Valuation Prepared by Vladimir Brailovsky and Daniel Flores, dated 17 November 2016.

[1251] Memorial (Curtis), ¶ 713. Tr. Day 2, 66: 11-13, 67:7-10.

the Shadow Tax, and the Parties were in complete agreement to account for PEG in the determining compensation, as demonstrated by their expert's economic models.[1252]

849. The Committee notes that the existence of an agreement is nowhere expressly mentioned by the Parties, rather it is inferred by Venezuela from Parties' expert reports. The Applicant softens its language when describing a "*lack of dispute"*[1253] over the inclusion of the Shadow Tax in the calculation of damages and even acknowledges there was only a "*common"* or "*plain*" understanding between the parties on its application.[1254] In a like manner, the Applicant alludes to a departure in the chart at paragraph 954 of the Award "*from the approach of both sides in the Arbitration*,"[1255] disregarding of a "*not express*" agreement[1256] that it infers from the inclusion of the negative cash flows in the historical years of the Projects with in the Conoco Parties' valuation models.

850. The Committee cannot follow the Applicant in its attempt to qualify the above-alleged lapses of the Tribunal as expressions of a manifest excess of powers. The Committee must dispel the polysemic wording in the Applicant's contentions concerning the Tribunal's disregard for the parties' purported agreements on valuation issues. Acting beyond the scope of authority in contravention of the parties' consent to arbitration is a manifest excess of powers[1257] because the arbitral tribunal decides a claim without the parties' authorization. In contrast, the situation described by the Applicant is a question that was not submitted to the parties, but rather one in which a question was withdrawn from the Tribunal's jurisdiction by agreement of the Parties. It is noteworthy that the Applicant does not argue that that the Parties modified by common agreement the claims on quantum submitted to the Arbitral Tribunal. The contentious point regarding ConocoPhillips' compensation claims for expropriation remained unchanged, despite the alleged common understanding or shared approach on the

[1252] Memorial (Curtis), ¶¶ 745,746. Tr. Day 2, 73:16-22.
[1253] Memorial (Curtis), ¶ 716.
[1254] Reply (Curtis), ¶¶ 392, 394.
[1255] Memorial (Curtis), ¶¶ 726, 728, footnote 1467.
[1256] Reply (Curtis), ¶ 403.
[1257] Memorial (Curtis), ¶ 696.

valuation assumptions of the Shadow Tax or the PEG. The Committee agrees with the Claimant that the Tribunal was not "*disempowered*" from determining the Budget Price used in the valuation.[1258]

851. Regarding the Shadow Tax, it is worth noting the Tribunal's remark introducing the discussion on the valuation date and method, stating that "*while the Parties present their respective positions with strong arguments, they are not always consistent*."[1259] Against this background, the Arbitral Tribunal was acting within the confines of the debate between the Parties on the damages calculations when it noted the Shadow Tax in footnote 536 of paragraph 719 (1)[1260]:

> *"The Respondent's experts state that the Projects 'would have been' subject to a 'Special Advantage' tax to be calculated in relation to the amount of royalties, taxes and contributions paid, but their explanation lacks precision and has no documentary support (cf. Consolidated Expert Report on Valuation, 17 November 2016, para. 140/g, further noting that this tax would not apply to Hamaca, cf. footnote 322). This tax seems to be comparable to the 'Shadow Tax' noted by the Claimants' experts, but not explained either, nor supplied by any reference to legal or other sources (Abdala/Spiller, Damages Assessment for the Takings of ConocoPhillips' Investments in Venezuela, Supplemental Report, 13 October 2014, para. 251/d).*"

852. The Tribunal was also within the confines of the debate between the Parties when noting there again that it did not have sufficient information for inclusion in the damage calculation, it stated regarding the PEG at paragraph 721 of the Award:

> "*For Corocoro, the experts on both sides mention a 'PEG Tax' equal to 50% of the annual operating income. However, none of the experts went beyond the definition of the rate under Article I of the Association Agreement. Such rate would need to be examined and determined on the basis of Article 9 of the Association Agreement's Accounting Procedures, which have not been looked at by any*

[1258] Tr. Day 3, 128:15.

[1259] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 238.

[1260] The Tribunal took into account (1)"*Royalties and Extraction Tax, both together operating as a royalty at a rate of 33.33%*"on the basis of the list of royalties and taxes established by valuation experts on both sides according to their respective Party's position.

expert. Without such an analysis, accounting for a PEG rate would be pure speculation."[1261]

853. The Applicant's reproach relates to the merits of the dispute which escapes an *ad hoc* committee's permissible review under Article 52. A further illustration is the Applicant's contention of the incorrect exclusion of negative cash flows in a DCF valuation,[1262] which ConocoPhillips argues is at most a computational error that falls under Article 49(2) of the Convention.[1263] The Committee considers that the Tribunal simply employed a different methodology, as Parties' calculations were distinctly different from one another. The Committee concludes that the Applicant's complaint regarding the Parties' agreement could not establish an excess of powers by the Tribunal acting without the basis of an agreement between the Parties.[1264]

854. The Applicant further argues that the Tribunal acted beyond the scope of authority when it disregarded the valuation positions of both Parties regarding the WPT and the PEG.[1265] The Applicant cites legal writings which purport to establish that a factual matrix agreed upon by the parties is binding for the tribunal.[1266]

855. The Committee recognizes that it is up to Parties to introduce the relevant facts in the proceedings and that facts not presented by the parties cannot be relied upon. However, the gist of Venezuela's challenge is that, by disregarding facts which were not in dispute, the Tribunal modified the Parties' submissions as reflected in each side's expert reports. The Committee disagrees. Expert reports of an evidentiary nature should be distinguished from parties' submissions, which define the scope of the dispute; only violations of the latter may give rise to an excess of powers. The alleged ignorance by

[1261] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 721.

[1262] Tr. Day 2, 68:16-25, 69: 1-8. Memorial (Curtis), ¶ 728, footnote 1467; Reply (Curtis): "*the cash flows incorrectly excluded by the Tribunal were the same cash flows that the Tribunal previously calculated in paragraphs 716 (Corocoro) and 777 (Petrozuata and Hamaca)*" (¶ 402). Rejoinder (Conoco), ¶ 283.

[1263] Tr. Day 3, 102: 2-10. Errors happen within and not beyond a tribunal's scope of authority and it is a well settled law under Article 52 that an excess of powers is distinct from a factual or legal error (**A/RLA-42 [Curtis] / A/RLA-6 [De Jesús]**, *ICSID Annulment Paper*.

[1264] *Tza Yap Shum Annulment Decision*, ¶ 76: "*an excess of powers occurs every time the powers exercised by the arbitrators are not those which have been granted to them*."

[1265] Memorial (Curtis), ¶¶ 696, 752.

[1266] Memorial (Curtis), ¶ 294.

the Tribunal of the damage calculation in the expert reports does not constitute a ground for excess of powers.

856. The Applicant further complains that the Tribunal overlooked the fact that Conoco did not rely on the Discriminatory Action provisions of the Association Agreements, which both sides considered to be within the exclusive jurisdiction of the ICC Tribunal in the arbitration against PDVSA. The ICC tribunal found, in contrast to the Tribunal's finding, that no compensation was due for the WPT under the Discriminatory Action provisions.[1267] Venezuela points to Conoco's argument that the dispute resolution clause of the Association Agreement granted exclusive jurisdiction to the ICC tribunal to determine the ambit of the Discriminatory Action provisions. This argument was made by Conoco in reply to Venezuela's allegation that said provisions denied or limited the recoverable amounts and that the distinction between treaty and contract claims was irrelevant for determining the compensation recoverable.[1268] ConocoPhillips reminds that during the hearing on quantum, it repeatedly argued that the WPT, if applied, would constitute unequal treatment and entitle it to compensation under the Discriminatory Action provisions. ConocoPhillips further recalls that Venezuela rebutted that argument by claiming that the WPT could not fall under the Discriminatory Action because it operated as a royalty rather than a tax.[1269]

857. The compensation provisions of the Association Agreements were discussed in the arbitration in various contexts and are echoed in different sections of the Award. The Tribunal found that these provisions did not govern Conoco's right for compensation under the Treaty, as it stated at paragraph 718, "[h]*owever, these provisions may have a role to play in case certain taxes constitute discriminatory actions triggering a right for compensation that might counterbalance the impact of such taxes*."[1270] The

[1267] Memorial (Curtis), ¶¶ 692, 697; Reply (Curtis), ¶¶ 374, 379, 382.

[1268] **A/R-85 [Curtis] / A/R-126 [De Jesús]**, *Claimants' Memorial on Quantum*, ¶¶ 84, 94-95. **A/R-10 [Curtis] / A/R-51 [De Jesús]**, Respondent's Counter-Memorial on Quantum, dated 18 August 2014, ¶¶ 154, 155 (under section 4. Claimants' Arguments on the Distinction Between Treaty and Contract Claims Are Irrelevant, p. 116).

[1269] Counter-Memorial (Conoco), ¶¶ 658-662; Rejoinder (Conoco), ¶¶ 248-252; Tr. Day 2, 178:21-25, 179: 1-25, 180: 1-18.

[1270] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 718.

Tribunal added at paragraph 766 that the WPT would have been applicable to the Projects for no case for an exemption had been demonstrated but that their potential relevance remains to be examined at a later stage. At paragraphs 780 to 786, the Tribunal found that unequal treatment was established where there were operators who were exempted from the WPT under the WPT law. The Tribunal effectively concluded that "[t]*he simple fact of unequal treatment, including unequal treatment based on the law, is sufficient to cause the situation to become a discriminatory action under the* [Petrozuata] *Agreement.*"[1271] The Tribunal further ordered compensation for approximately US$ 140 million based on the provisions of the Petrozuata Association Agreement because the Hamaca compensation system was less protective of the WPT.[1272] The Applicant's contention that Conoco "*never claimed compensation for the [WPT] on the ground that it was a 'Discriminatory Action' in this case*"[1273] is demonstrably false.

858. The Applicant further draws the Committee's attention to the fact that Conoco did not request the Tribunal to award compensation under the Discriminatory Action provisions of the Petrozuata Association Agreement, whether in relation to the Windfall Profits Tax or any other governmental measure that was at issue in the arbitration.[1274] These arguments which were made in the arbitration were addressed by the Tribunal at paragraph 765 of the Award which states that:

> "*The Tribunal notes that while the Claimants insist on having been treated less favorably than other investors who had taken advantage of the available exemptions, they nonetheless do not rely on the very specific provisions on discriminatory action contained in the Association Agreements of Petrozuata and Hamaca. In fact, these provisions may, if the applicable requirements are fulfilled, provide for a legal treatment different from the Claimants' understanding of the WPT and applicable under a but-for scenario*."[1275]

[1271] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 783.

[1272] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 786, 1010(3).

[1273] Reply (Curtis), ¶ 373. Tr. Day 2 64:2-18.

[1274] Memorial (Curtis), ¶¶ 689-690.

[1275] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 765. Reply (Curtis), ¶ 374.

859. The impugned passage follows a finding by the Tribunal in paragraphs 760-763 of the Award that the WPT statute exemptions which Conoco unsuccessfully availed themselves of[1276] "*demonstrate that the statute can be applied differently to different investors, depending upon whether or not they comply with the full set of requirements*."[1277] As earlier recounted, to decide on the compensation for the imposition of the WPT in a but-for world under the Discriminatory Action provisions was within the Parties' arbitration submissions. The Tribunal closed the discussion on the WPT by finding that, contrary to what ConocoPhillips argued, "*the Windfall Profit Tax would have been applicable to the Projects. No case for an exemption has been demonstrated or supported by evidence.*"[1278] Inasmuch as the challenge of the Tribunal's decision to grant compensation for the WPT based on the Discriminatory Action provisions is directed at the clause following which Conoco "*nonetheless do not rely on the very specific provisions on discriminatory action contained in the Association Agreements of Petrozuata and Hamaca*," it is inadmissible. The Applicant may not criticize the Tribunal for not following its adversary's submissions.

860. The Applicant has also not explained how a manifest excess of powers can arise from the absence of mention in the Award a document presented in the proceedings, such as here the ICC tribunal's award.[1279] Even if the Committee is to assume that disregard of the *res judicata* conclusive effect might amount to a manifest excess of powers, such effect would not be applicable here because the ICC PDVSA arbitration under the Association Agreements to which Venezuela was not a signatory, involved different parties, claims and cause of action.[1280]

[1276] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 763: "*the Claimants' arguments that when complying with the requirements, they would have been entitled to an exemption from the WPT by operation of law, cannot succeed.*"

[1277] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 764.

[1278] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 766.

[1279] Memorial (Curtis), ¶ 695.

[1280] Reply (Curtis), ¶ 382 (see also ¶ 164 alluding to collateral estoppel in refutation of Conoco's *res judicata* argument). Counter-Memorial (Conoco), ¶ 666.

861. The Applicant has additional contentions under the manifest excess of powers ground regarding the WPT and the Shadow Tax treatment by the Tribunal. The excess of powers which is alluded to relates to the object of the dispute when a tribunal goes beyond the parties' submissions in awarding damages which exceed the amount claimed. The Applicant contends that the Tribunal decided *ultra petita* twice. It first awarded additional compensation in respect of the WPT by increasing the damages awarded for the expropriation by approximately US$ 495 million and an additional US$ 140 million compensation which the Conoco Parties never sought on the compensation provisions of the Petrozuata Association Agreement.[1281] Second, the Tribunal granted compensation which was not requested by ConocoPhillips when it excluded the Shadow Tax from the calculation of damages[1282] which resulted in an increased compensation of US$ 675 million awarded to the Conoco Parties.

862. The Committee disagrees. Conoco in the arbitration sought full reparation of Venezuela's unlawful expropriation of the Projects, requesting no less than US$ 16.010 billion for historical losses up to the date of the Award, US$ 5.276 billion for lost profits from the date of the Award to the expiration of the Association Agreements, including post-award interest, and a declaration that the amount awarded is net of taxes.[1283] While the Committee agrees that awarding unrequested remedies goes beyond the parties' reliefs sought, this is not the case here. The amounts awarded are without contestation within the relief sought.[1284] The conclusion is that the Tribunal acted plainly within the scope of its authority.

863. The Applicant's final challenge regarding the PEG is that the Tribunal arbitrarily disregarded the applicable law by ignoring the fact that the PEG was established by the Congressional Authorization and incorporated into the Profit Sharing Agreement, which formed the legal framework defining Conoco's rights in the Corocoro

[1281] Memorial (Curtis), ¶¶ 687, 697, 698; Reply (Curtis), ¶ 372. **A/R-5 [Curtis] / A/R-46 [De Jesús]**, Decision on Rectification, dated 19 August 2019, ("*Decision on Rectification*"), ¶ 64.2.

[1282] Memorial (Curtis), ¶¶ 716, 723.

[1283] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 202.

[1284] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 1010, **A/R-5 [Curtis] / A/R-46 [De Jesús]**, *Decision on Rectification*, ¶ 64.

Project.[1285] The excess of powers complained of relates to the legal norms applied by the Tribunal to the PEG, which was a special agreement within the meaning of Article 9(5) of the Treaty.[1286] It is trite law that under Article 52(1)(b), a manifest excess of powers may arise when an arbitral tribunal decides claims under a different category of legal norms than those contemplated by the parties' agreement for the dispute.[1287]

864. The Committee finds no such case here, since the Tribunal at paragraph 721 of the Award effectively decide that accounting for a PEG rate would be pure speculation without an analysis of the rate under the Association Agreements. The Applicant's argument is accordingly meritless . The Tribunal did not apply any other legal norms to the PEG as it had excluded this factor from the damage calculation due to insufficient information.

FAILURE TO STATE REASONS

865. The Applicant alludes to an absence of rational explanation regarding the award of US$ 140 million under the compensation provisions of the Petrozuata Association Agreement, despite the fact the ICC tribunal had already determined that the WPT was not a Discriminatory Action.[1288] The Committee notes that Conoco argued that the WPT was contrary to international law as it artificially reduced Venezuela's compensation obligation by taking away the benefit of much of the increase in value of the investment due to improved market conditions between the dates of expropriation and valuation,[1289]and that "*by no means established that the WPT was a wrongful act*."[1290] The Tribunal also did not find a case for an exemption from the WPT statute which Conoco claimed, would have made the royalty inapplicable by operation of law.[1291] The Tribunal remarked that Conoco's arguments on exemption "*nonetheless*

[1285] Memorial (Curtis), ¶ 755; Reply (Curtis), ¶ 411. Tr. Day 2, 72: 18-25; Tr. Day 3, 68:11-21, 70:6-12.

[1286] Article 9 para. 5 The arbitral award shall be based on the provisions of special agreements relating to the investments.

[1287] **A/RLA-42 [Curtis] / A/RLA-6 [De Jesús]**, *ICSID Annulment Paper*.

[1288] Memorial (Curtis), ¶ 693.

[1289] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 729.

[1290] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 757.

[1291] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 729.

do not rely on the very specific provisions on discriminatory action contained in the Association Agreements of Petrozuata and Hamaca."[1292] The Tribunal then concluded that the WPT was applicable to the Projects, as there is "[n]*o case for an exemption has been demonstrated or supported by evidence. The potential relevance of the compensation provisions of the Association Agreements of Petrozuata and Hamaca remains to be examined at a later stage.*"[1293] The Tribunal found at a later stage that the WPT Law provides for unequal treatment from the viewpoint of the rules of the Petrozuata Association Agreements which, "*when using the expression 'equally applies' does not distinguish depending whether such circumstance is legal or illegal. The simple fact of unequal treatment, including unequal treatment based on the law, is sufficient to cause the situation to become a discriminatory action*."[1294] The Tribunal thus explained why it awarded damages for the WPT after finding the tax lawful.[1295]

866. The Tribunal explained how it awarded damages for the WPT under the compensation provisions of the Association Agreements without contradictory reasons or the need to give any additional reasons as Venezuela claims, including reasons based on the ICC award which the Tribunal had no obligation to mention.[1296]

867. The Applicant says that there is no plausible explanation for ignoring the treatment by both sides of the Budget Price.[1297] The Tribunal explained that ConocoPhillips' non-objection to the application of the WPT made by Venezuela's experts must be understood in the context of Conoco's instructions to its experts not to examine the WPT.[1298] The inclusion by Conoco's experts of Venezuela's expert valuation assumption of the Budget Price was only made for, as the Applicant remarks, "*a sensitivity showing how their ex post valuation assuming that the Discriminatory*

[1292] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 765.
[1293] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 766.
[1294] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 783.
[1295] Memorial (Curtis), ¶ 701 (i).
[1296] Memorial (Curtis), ¶¶ 701 (iii) and (iv), 702.
[1297] Memorial (Curtis), ¶ 701 (ii).
[1298] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 767.

Action provisions did not apply would be affected if the Windfall Profits Tax was applicable to the Projects."[1299]

868. The fixing of the Budget Price which determines the minimum level at which the WPT can operate was made by the Tribunal within the limits of the debate presented by the Parties in the following terms which appear at paragraph 771 of the Award:

> "*A cursory look at the rare budget explanations found on the Tribunal's record demonstrates the political and economic component of the Budget Price. When this price was set at US$ 60 in the years 2014 and 2015, it was said that with such price, the expectations and the uncertainties of the international oil market were valued, also taking into account the vulnerability of oil prices. For these two years, the Venezuelan Basket Price was US$ 88.54 in 2014 and US$ 44.69 in 2015. Noting the decrease of prices in 2015, the Government must have been sensitive to the potential over pricing of the Budget Price in 2015. This had a strong consequence in year 2016, when the Basket Price went down to US$ 32.02: The Government took the Budget Price down to US$ 40, explaining this was a consequence of the decrease of crude oil prices on international markets. This experience demonstrates that a Budget Price of US$ 40 is manifestly linked to a period of low market prices, when the Government must be careful not to raise taxes above reasonable proportions. The stability of the fiscal regime confronted with highly volatile pricing was also a consideration. Thus, when the Budget Price was set at US$ 40 in 2011, it was with the intention of taking maximum profit from increasing prices, but this approach was then corrected in 2012 when it was noted that a more prudent approach was to be preferred, resulting in a price level of US$ 50 that was further raised to US$ 55 in year 2013, before it went up again in 2014 to US$ 60. Therefore, when in years after 2016, prices went up or can be expected to go up again it is unconvincing to retain a low Budget Price of US$ 40 for all future years as a flat rate. The Respondent's experts have no explanation for their assumption that such a flat price would apply until the end of the life of the Projects. Their position is untenable when contrasted to the Budget Price the same experts had adopted two years earlier: Indeed, in their calculations annexed to their Second Report of 7 January 2015 and to their Expert Report of 18 August 2014, the Budget Price was set at a flat level of US$ 60 as from 2014 and until the end of the Projects. Therefore, these experts' own assumptions support a view that the Budget Price of US$ 40 was exceptional for*

[1299] Memorial (Curtis), ¶ 691.

> *the low-price year of 2016, while prices as experienced in 2014 and 2015 (between US$ 45 and 90) can have the effect of raising the Budget Price to the level of about US$ 60, in order not to overcharge the financial benefit of oil production in Venezuela. The Tribunal concludes that the most reasonable assumption of the Budget Prices retained as from year 2017 is US$ 60, which corresponds to the actual price in the years 2014 and 2015 and to the amount the Respondent's experts have envisaged before oil prices crashed in 2016.*"[1300]

869. The Applicant' view is that this reasoning is impossible to follow, full of contradictions and even incorrect.[1301] However, the complaint about correctness is no ground in support of a challenge under Article 52(1)(e). As is well established in the decisions of the *ad hoc* committees, evaluating the correctness of the reasons draws a committee into reviewing the substance of the decision. Contradictory reasons which cancel each other out should be distinguished from dissatisfaction with the reasons expressed in the award.[1302]

870. The Committee finds nothing contradictory in the Tribunal's explanation in paragraph 771 of its Award. The Tribunal criticized Venezuela, not for using a flat rate *per se* from 2016 through the end of the Projects, but for a flat rate fixed at US$40. There is no contradiction with the Tribunal's use of a flat rate of US$60.[1303] The Tribunal had examined and explained how the Budget Price was fixed and linked to the low market price of crude (in fact at its lowest) and that when such prices went up it is reasonable to expect that the Budget Price would then be revised upwards. It came to a view that the "*most reasonable assumption of the Budget Prices retained as from year 2017 is US$ 60, which corresponds to the actual price in the years 2014 and 2015 and to the amount the Respondent's experts have envisaged before oil prices crashed in*

[1300] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 771.

[1301] Memorial (Curtis), ¶ 688; Reply (Curtis), ¶ 389.

[1302] *Duke Energy Annulment Decision*, ¶ 166.

[1303] Counter-Memorial (Conoco), ¶ 682.

2016".[1304] The Applicant may not like the reasoning but reasons expressed by the Tribunal are clear and unassailable.

871. The Applicant also attacks the Tribunal's decisions for excluding the Shadow Tax, negative cash flows and the PEG without stating reasons. The Applicant is dissatisfied with the explanation given for the Shadow Tax by the Tribunal at footnote 536 of the Award and wishes to find explanations of the Tribunal's disregard of the Parties' agreement on the applicability of the Shadow Tax.[1305] The Applicant also states that the negative cash flows were eliminated without reason despite the Parties' giving them effect in their respective calculations.[1306] The Applicant submits that the Tribunal took an unreasoned departure from the agreement of the Parties regarding the application of the PEG for the Corocoro Project.[1307]

872. As the Committee could not infer any agreement on the Shadow Tax or the PEG from the Parties calculations, there is therefore no basis to expect the Tribunal to decide on or give effect to non-existent factors. The Tribunal explained with sufficient clarity at footnote 536 of the Award that the Shadow Tax had "*not been explained nor supplied by reference to legal or other sources*" and at paragraph 721 that, without an analysis of the PEG rate under the Association Agreements, accounting for it "*would be pure speculation*". In both cases, the Tribunal stated that the Parties' experts did not provide sufficient evidence or explanations for the consideration of these two factors in the valuation process,[1308] a situation which it plainly exposed when discussing the valuation method with the evidence marshalled by the Parties' experts:

> *"The Tribunal further notes that the remedy it will retain must be connected to actual facts and reflect the Tribunal's knowledge. The Award "shall state the reasons upon which it is based" (Art. 48(3) of the ICSID Convention, Arbitration Rule 47(1)(i)). Members of the Tribunal must be capable of exercising independent judgment (Art. 14(1), 40(2) ICSID Convention). When reading these provisions*

[1304] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 771.
[1305] Memorial (Curtis), ¶ 724; Reply (Curtis), ¶ 399.
[1306] Memorial (Curtis), ¶ 732; Reply (Curtis), ¶ 403.
[1307] Memorial (Curtis), ¶ 758; Reply (Curtis), ¶ 414.
[1308] Counter-Memorial (Conoco), ¶¶ 709, 725, 728; Rejoinder (Conoco), ¶ 277 (b).

> *together, it means that the opinion of experts must be capable of being translated into reasons to be provided by the Tribunal. Such reasons cannot be based, for instance, on mathematical formulae not accompanied by explanations serving as evidence or reasons of law on which an award can be based. The Tribunal cannot reach conclusions based on simple excel-sheets not accompanied by explanations and incapable of being operated on an interactive mode. This is all the more difficult when the response of the experts is limited to stating that the reports have been prepared following a party's instruction. The Tribunal has on several occasions made the Parties aware of such deficiencies.*"[1309]

873. The Applicant says with regard to the omission of negative cash flows that there is no rationale for excluding the two years during which the negative cash flows occurred.[1310] The Committee notes that a calculation error needs no explanations.

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

874. The Applicant alleges that the decision to adopt the US$60 Budget Price without giving Venezuela an opportunity to comment violated its right to be heard.[1311] We note that while tribunals have a duty to offer the parties a right to be heard, this does not require them to allow the parties to comment on the Tribunal's reasoning. Otherwise, as noted by *ad hoc* committees, the tribunal would never reach the stage of making an award, had it to submit its reasoning to the parties for their observations prior to making the decision.[1312] This would exactly happen here if we were to follow the Applicant. The Tribunal fixed the Budget Price in consideration of each Party's expert assumptions and the royalty reference price of US$ 60 and its decision is related to the arguments presented by both sides.

[1309] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 270.

[1310] Tr. Day 2, 69: 9-15.

[1311] Memorial (Curtis), ¶ 711, Reply (Curtis), ¶ 390.

[1312] *Tza Yap Shum Annulment Decision*, ¶¶ 130-131; *Tulip Annulment Decision*, ¶ 82.

875. The Applicant finally attacks the Tribunal's decisions on the Shadow Tax,[1313] the negative cash flows[1314] and the PEG[1315] for seriously departing from a fundamental rule of procedure because the Tribunal did not return to the Parties for further information. The Tribunal is now criticized for not having given Venezuela an opportunity to clear up any confusion. However, the law under Article 52(1)(d) is that the opportunity to be heard is not an unlimited opportunity to present its case.[1316] As the Applicant also hints at the surprise caused to both sides,[1317] the Committee's response is that surprise in itself does not justify annulment when,[1318] as in this case, the Tribunal's reasoning on the quantum issues is derived from the Parties' arguments.

E.2 GROUNDS RELATED TO THE TRIBUNAL'S VALUATION OF THE ASSETS

E.2(1) MANIFEST EXCESS OF POWERS; FAILURE TO STATE REASONS AND SERIOUS DEPARTURE AS ARGUED BY DE JESÚS

876. Venezuela argues that the Tribunal (i) manifestly exceeded its powers; (ii) failed to state reasons; and (iii) seriously departed from a fundamental rule of procedure, regarding the finding on the valuation of the ConocoPhillips Dutch Companies' expropriated assets.

MANIFEST EXCESS OF POWERS

877. Venezuela argues that the Tribunal manifestly exceeded its powers by failing to apply the law, when it decided to refrain from requesting an update of the date required for an *ex-post* valuation.[1319]

[1313] Memorial (Curtis), ¶ 725; Reply (Curtis), ¶ 400.

[1314] Memorial (Curtis), ¶ 733.

[1315] Memorial (Curtis), ¶ 761; Reply (Curtis), ¶ 414.

[1316] *Churchill Annulment Decision*, ¶ 178; **A/CLA-90**, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, ("*Pezold Annulment Decision*"), ¶ 255. Tr. Day 3, 99: 1-25, 100:1.

[1317] Reply (Curtis), ¶ 400.

[1318] *Caratube Annulment Decision*, ¶ 96.

[1319] Memorial (De Jesús), ¶ 462; Reply (De Jesús), ¶¶ 579, 580.

878. The Tribunal set the Award date as the date for the valuation of damages and assessed the calculation of damages relying on an *ex-post* valuation. The Tribunal affirmed that such an approach allowed it to "place [] the focus on actual terms"[1320] such as the rising oil prices, adding that "for easily understandable practical reasons, the date of such valuation cannot be the precise date of the Award."[1321] Venezuela notes that the Tribunal also indicated in the Award that an *ex-post* damages assessment may under specific circumstances be based on projections "where actual data are either not available or not reliable."[1322]

879. However, Venezuela submits that the Tribunal failed to perform the date-of-award valuation it had indicated it would conduct, thereby, manifestly failing to apply the applicable law to the damages assessment. The reconstituted Tribunal considered actual data between the 2007 taking and the Parties' latest update of 30 December 2016, while it only considered projections for 2017 and 2018 and the first quarter of 2019. Yet, according to Venezuela, actual data was available and reliable for 2017, 2018 and 2019, but the Tribunal decided not to ask the Parties for the updated data.[1323] A simple reading of the Award reveals this defect as well as the Tribunal's manifest excess of powers.[1324]

880. Furthermore, the Tribunal ignored one of the undisputed quantum inputs, namely the PEG ("Participación del Estado en las Ganancias"). According to Venezuela, the Parties and their experts agreed that in the but-for scenario, a 50% PEG tax would have had to be paid to Venezuela for the Corocoro Project. Yet, the Tribunal disregarded the PEG, thereby failing to apply the applicable law, which resulted in doubling the compensation for the Corocoro Project.[1325]

[1320] Memorial (De Jesús), ¶ 463, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 263.
[1321] Memorial (De Jesús), ¶ 463, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 265.
[1322] Reply (De Jesús), ¶ 579, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 241.
[1323] Reply (De Jesús), ¶ 580.
[1324] Reply (De Jesús), ¶ 584.
[1325] Reply (De Jesús), ¶ 581.

881. Venezuela refers to the decision of the *ad hoc* committee in *Soufraki*, to submit that the Tribunal's decision to ignore the 50% PEG tax is a gross misapplication that "no reasonable person […] could accept," [1326] given the importance of the matter. It maintains that a reasonable person would consider that the Tribunal in making projections should utilise all available actual data No reasonable person would accept an error consisting of refusing to apply a critical factor of quantification -the PEG- when such factor was not disputed by the Parties and their experts.[1327]

FAILURE TO STATE REASONS

882. Venezuela submits that the Tribunal provided contradictory reasons when it decided not to ask for an update of the data required for *ex-post* valuation, after stating that the date for an *ex-post* valuation cannot be the precise date of the Award.

883. Venezuela argues that the premise that the date of the valuation cannot coincide with the precise date of the Award is incompatible with the decision to "not ask for a subsequent update" of the valuation of damages. The Tribunal decided to rely on obsolete data, which was over two years old and affirmed, without further explanation, that any additional information (had an update been provided) would not have significantly impacted the overall assessment of damages.[1328]

884. Venezuela observes that the Tribunal indicated it was reluctant to further delay the proceeding by asking for an update. However, it observes that the proceedings continued after the Parties presented their updated quantum reports with projections for 31 December 2016. There were two quantum hearings in 2017 after which the Tribunal asked for quantum reports and in June 2017 it sent questions regarding the quantum phase to the Parties. By not asking for an update, the Tribunal failed to abide by its decision that the valuation date is the date of the Award or to provide adequate reasons

[1326] Reply (De Jesús), ¶ 582 citing *Soufraki Annulment Decision*, ¶ 86.

[1327] Reply (De Jesús), ¶ 583.

[1328] Memorial (De Jesús), ¶¶ 464, 465, citing A **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 265; Reply (De Jesús), ¶ 590.

for doing so.[1329] The Tribunal relied on reasons of "efficiency" while stating that the actual data would not have had a significant impact on the overall damages assessment. However, no reasonable reader could understand how the Tribunal concluded that the data it did not possess would not have had a significant impact. If the Tribunal had the data, it would have been obligated to give the Parties an opportunity to opine on it, which it failed to do.[1330]

885. On the PEG, Venezuela submits that the Tribunal failed to state adequate reasons for its decision to ignore the application of the 50% PEG factor in the but-for scenario.[1331] Venezuela argues that the Tribunal arbitrarily refused to consider the PEG, claiming that the experts had not discussed part of the contractual documentation. However, the experts agreed to factor in a 50% PEG and neither the experts nor the Parties ever considered that the PEG rate required further examination. For Venezuela, the Tribunal fabricated an excuse to "examine and determine" the PEG rate, failing to meet the standard set forth in Article 52(1)(e).[1332]

886. Venezuela counters Conoco's defense that the Tribunal considered the application of the PEG too speculative and that the Committee is not empowered to assess the quality of the Tribunal's reasoning. Conoco cannot submit now that they had not agreed to apply the PEG factor, since the Parties' experts and the Parties agreed at all relevant times that the PEG factor was 50%.[1333]

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

887. Venezuela maintains that the Tribunal's decision not to request an update of the data for an *ex-post* valuation hindered Venezuela's due process right, including its right to be heard and present evidence, without any apparent reason. This constitutes a serious

[1329] Memorial (De Jesús), ¶ 466.
[1330] Reply (De Jesús), ¶ 590.
[1331] Reply (De Jesús), ¶ 594.
[1332] Reply (De Jesús), ¶ 594.
[1333] Reply (De Jesús), ¶¶ 595, 596.

departure from a rule of procedure which warrants annulment pursuant to Convention Article 52(1)(d).[1334]

888. In its Reply Venezuela argues that in refusing to request actual data after December 2016 the reconstituted Tribunal seriously violated the right to be heard. The Tribunal simply formed an opinion on the impact of data, which was greater than two years, without ever granting Venezuela an opportunity to provide its own opinion.[1335] Venezuela agues that the use of actual data for a period greater than two years would undoubtedly have had an impact on the purported Award valuation. Venezuela argues that Conoco misses the point, and this is not about having an opportunity to be heard on other issues, but about an opportunity to (i) present updated and actual data after 31 December 2016, and before the Award on 8 March 2019; and (ii) be heard on the alleged absence of any such data on the overall valuation made.[1336]

889. The Tribunal also seriously violated Venezuela's right to be heard when it ignored the PEG factor in its valuation. The Tribunal waited until the Award to inform that it had overlooked the PEG factor due to an alleged lack of consideration by the Parties' experts. Venezuela had no opportunity to clarify any questions the Tribunal purportedly needed addressed, even though the Tribunal asked questions regarding the quantum issues at the 2017 Hearing, yet none of these questions referred to the PEG factor. The Tribunal should have afforded the Parties the opportunity to examine and determine the PEG factor and help the Tribunal overcome any difficulties it had on this point.[1337]

E.2(2) MANIFEST EXCESS OF POWERS; FAILURE TO STATE REASONS AND SERIOUS DEPARTURE AS ARGUED BY CURTIS

MANIFEST EXCESS OF POWERS

890. Venezuela submits that the Tribunal not only failed to apply the applicable law but also disregarded the clear understanding of the parties as to the meaning of an *ex-post* (date-

[1334] Memorial (De Jesús), ¶ 469.
[1335] Reply (De Jesús), ¶ 599.
[1336] Reply (De Jesús), ¶¶ 600, 601.
[1337] Reply (De Jesús), ¶¶ 603, 604.

of-award) valuation. The Parties disagreed on which post-expropriation events should be considered in the valuation; however, they did not dispute that post-expropriation events not attributable to Venezuela's or PDVSA's conduct or alleged mismanagement of the Projects must be considered.[1338]

891. Venezuela argues that the Tribunal did not conduct any *ex-post* valuation, as it refused to consider historical data for over two years before the date of the Award concerning the field operations, including production, costs and revenues which would have affected the Projects, and effectively applying the valuation date of 30 December 2016 instead of the date-of-award. Furthermore, the Tribunal did not discount the future years to 30 December 2016, but to 1 January 2019, thereby inflating the compensation for the three Projects.[1339]

892. Venezuela argues, contrary to Conoco's defense, that it is not asking the Committee to assess or question the Tribunal's handling of the evidence or damages calculation.[1340] Venezuela emphasized that the key issue is whether the Tribunal was free to disregard years of post-expropriation data in an *ex-post* valuation when the Parties could have submitted an update reasonably close to the date of the Award.[1341]

SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

893. Venezuela argues that the Tribunal's refusal to accept any update of the valuations with the Award was a serious departure. In the 2017 Hearing, Venezuela emphasized to the Tribunal that the data was outdated and argued that, while it saw no basis for making an *ex-post* valuation, any such valuation, should be a date-of-the-award valuation based on updated data. Venezuela reiterated its position in January 2019 (two months before the Award) regarding the valuation of the Corocoro Project, yet again, the Tribunal refused to update the valuations.[1342]

[1338] Memorial (Curtis), ¶¶ 661, 662.
[1339] Reply (Curtis), ¶ 354.
[1340] Reply (Curtis), ¶¶ 361, 362.
[1341] Reply (Curtis), ¶¶ 363, 364.
[1342] Memorial (Curtis), ¶¶ 663-668; Reply (Curtis), ¶ 358.

894. Venezuela submits that Conoco misconstrues Venezuela's argument on serious departure. For Venezuela, the issue is not, like Conoco posits, if Venezuela had an opportunity to be heard on quantum generally, but whether it was appropriate for the Tribunal to deny Venezuela's right to present an updated valuation considering the changes that occurred in the years since Parties' last valuations. Venezuela notes that the Tribunal specifically denied the opportunity to present updated reports despite Venezuela having reminded the Tribunal at the September 2017 Hearing that an *ex-post* valuation would require a date-of-award valuation with updated reports.[1343]

FAILURE TO STATE REASONS

895. Venezuela also argues that the Tribunal failed to state sufficient reasons for its decision not to update the valuations. The reasons given by the Tribunal were to avoid delay and the lack of significant impact of events that occurred between the last data and the date of the Award. In Venezuela's view, for a case that has been going on for over a decade, the avoidance of delay is non-sensical, and it would take only two or three weeks to update the valuations. As to the purported lack of impact, without seeing the data and its effect, the Tribunal could not know at that time what the impact of two, three or even four years of additional data would have on the valuations.[1344]

896. Venezuela submits, contrary to Conoco, that "woefully insufficient" reasons also warrant annulment, and that the reasons the Tribunal provided are insufficient to justify the Tribunal's failure to accept the updated data to perform the *ex-post* valuation.[1345]

897. According to Venezuela, the Tribunal's only explanation for not discounting the 2017 and 2018 projected cash flows to the effective valuation date of 30 December 2016 (the date of the last quantum submissions), was its assumption that the projections reflected actual events. Venezuela refutes this as it was a period of rapid change in Venezuela, which is why a valuation update was necessary to make a date-of-award valuation. Instead, the Tribunal treated 2017 and 2018 as part of the historical period, even though

[1343] Reply (Curtis), ¶¶ 368, 369.

[1344] Memorial (Curtis), ¶¶ 669, 670; Reply (Curtis), ¶ 360

[1345] Reply (Curtis), ¶¶ 365, 366.

actual data from that period was not used, and future years were only discounted to 1 January 2019, thereby inflating the value by approximately USD 871 million.[1346]

898. Venezuela refutes Conoco's affirmation that the Tribunal adopted the valuation date of 1 January 2019. Venezuela notes that while the Tribunal kept 1 January 2019, as the nominal valuation date and discounted subsequent years to that date, the issue remains: using 1 January 2019 as the valuation date meant that all prior years (including 2017 and 2018) were considered part of the historical period, for which the Tribunal refused to accept the actual data. By declining to accept actual data for much of the historical period and treating it as part of the projection period, the Tribunal effectively used 30 December 2016, as the valuation date.[1347]

E.2(3) NO ANNULLABLE ERROR IN THE TRIBUNAL'S APPLICATION OF THE VALUATION DATE (CONOCO)

NO MANIFEST EXCESS OF POWERS

899. Conoco submits that the Tribunal did not manifestly exceed its powers when conducting *ex-post* valuation. Venezuela's (Curtis) complaint that the Tribunal failed to consider all post-expropriation events and conditions is a complaint regarding the Tribunal's procedural decisions and treatment of the evidence, which cannot be reviewed on annulment. The Tribunal's *ex-post* valuation falls within the discretion afforded to tribunals in quantifying damages.[1348] In its Rejoinder, Conoco submits that *ex-post* valuations rely on projections and adjustments to the "actual data" to approximate a hypothetical but-for scenario. Accordingly, in its *ex-post* valuation the Tribunal was not required to consider the actual date from a date close to the date of the Award.[1349]

900. Further, the fact that the Parties did not dispute the principle that post-expropriation events that were not attributable to Venezuela's or PDVSA's conduct or alleged

[1346] Memorial (Curtis), ¶ 671.
[1347] Reply (Curtis), ¶ 367.
[1348] Counter-Memorial (Conoco), ¶ 624.
[1349] Rejoinder (Conoco), ¶ 232.

mismanagement of the Projects must be considered, is unrelated to Venezuela's complaint that the Tribunal relied on outdated data to perform its date-of-award quantification of damages. Even if the Parties had agreed to provide the Tribunal with updates for a date-of-award valuation, the Tribunal would not have been bound by that agreement. The tribunals are the sole judges of the admissibility of the evidence and are given considerable discretion to make quantum calculations.[1350] While the Tribunal may seek updates on quantum inputs in a decade-long arbitration, it was not required to request such updates until the issuance of the Award, and there is no evidence of an agreement between the Parties that these updates would continue.[1351]

901. In its Rejoinder, Conoco counters Venezuela's (Curtis) objections concerning disagreements with the Tribunal's conduct of the proceeding. The Tribunal determined that additional quantum submissions were not warranted, as they would require further hearings and cause delay. That was not an excess of powers, less a manifest one. Venezuela disagrees with what the Tribunal viewed as a date as close to the Award as possible which, to Conoco, is a disagreement with the treatment of the evidence, not a manifest excess of powers.[1352]

902. Conoco also counters Venezuela's (De Jesús) claim that the Tribunal was obligated to base the calculation on actual data instead of projections. For Conoco Venezuela's argument fails because it pertains to an alleged error of law in the Tribunal's calculation of quantum, rather than a matter of applicable law. The argument also fails because Venezuela omits an important quotation, in which the Tribunal notes that *ex post* valuation focuses on actual data "however, it cannot be conducted without retaining approximate assumptions and projections."[1353]

[1350] Counter-Memorial (Conoco), ¶¶ 625-627.

[1351] Rejoinder (Conoco), ¶ 233.

[1352] Rejoinder (Conoco), ¶ 234.

[1353] Rejoinder (Conoco), ¶ 235(b), citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 263; see Counter-Memorial (Conoco), ¶ 635.

903. Specifically, on the PEG, Conoco submits that Venezuela's (De Jesús) complaints regarding the Tribunal's treatment of the PEG should be deemed waived and disregarded by the Committee, as they were raised for the first time in a reply brief.[1354]

904. In any event, Conoco refutes Venezuela's (De Jesús) argument that the Tribunal's failure to apply the PEG amounts to failure to apply the applicable law. There is no excess of power when a tribunal finds that accounting procedures or contractual provisions have not been adequately substantiated or explained so it would be speculative to apply them.[1355] Also, a tribunal is not bound to accept any party's position, concerning the quantum inputs or the overall quantum calculation methodology. The determination of the damage is a matter for the tribunal's informed estimation based on the available evidence.[1356]

NO FAILURE TO STATE REASONS

905. Conoco argues that the Tribunal's reasons for not requesting more evidence or submissions on quantum were sufficient and not contradictory. In the Award the Tribunal explained that it was reluctant to further delay the proceeding and that the additional information provided would not have had a significant impact on the overall damages assessment. The Tribunal also explained it was not convinced by Venezuela's arguments at the 2017 Hearing regarding the submission of additional quantum data, noting that Venezuela had the opportunity to make that request a year earlier when the Tribunal sought comments on a draft procedural order at the August 2016 Hearing.[1357] Conoco argues that dissatisfaction with the reasoning is not a ground for annulment.[1358]

906. Conoco also submits that the Tribunal's decision was comprehensible and reasonable. Gathering data and allowing the Parties to respond to the other side's submission would have caused a lengthy delay. Conoco illustrates this with the submission of the Parties'

[1354] Rejoinder (Conoco), ¶ 285.
[1355] Rejoinder (Conoco), ¶ 290.
[1356] Rejoinder (Conoco), ¶¶ 291, 292.
[1357] Counter-Memorial (Conoco), ¶ 629.
[1358] Rejoinder (Conoco), ¶ 237(a).

experts' consolidated reports in November 2016, which was followed by three hearings, additional charts, tables, expert reports post-hearing briefs, and responses to further quantum-related questions from the Tribunal.[1359]

907. Also, there was no contradiction in the Tribunal's statement that an *ex-post* valuation focuses on actual terms and the Tribunal's decision not to order updated quantum data before rendering the date-of-award (*ex-post*) valuation.[1360]

908. Venezuela disputes the merits of the Tribunal's conclusion by arguing that it is unclear how the Tribunal could conclude that additional information would not have had a significant impact on the damages assessment if it had not received that data. This critique, in Conoco's view, disputes the merits of the conclusion. In any event, the Tribunal's decision was sensible since (i) the Tribunal disagreed with Venezuela that actual data from the fields reflected the hypothetical but-for scenario in which the Claimants continued to operate the Projects; and (ii) submission of more quantum data would have caused significant delay.[1361]

909. In its Rejoinder, Conoco submits that Venezuela seeks to distort the standard for annulment by arguing that insufficient or inadequate reasons are grounds for annulment. However, such a position would give committees the power to assess the quality of reasoning and overturn awards on that basis, which is the opposite of the standard for annulment under Article 52(1)(e).[1362]

910. Also, Venezuela's (Curtis) criticism that the Tribunal did not discount the cash flows from 2017 and 2018 is based on the premise that the Tribunal used a valuation date of 30 December 2016, when in fact it adopted 1 January 2019. Therefore, the Tribunal

[1359] Counter-Memorial (Conoco), ¶ 632; Rejoinder (Conoco), ¶ 237(b).

[1360] Counter-Memorial (Conoco), ¶ 635, citing **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 263; Rejoinder (Conoco), ¶ 237(c).

[1361] Rejoinder (Conoco), ¶ 239.

[1362] Rejoinder (Conoco), ¶ 238.

treated the 2017 and 2018 cash flows as part of the historical period to which an update factor (or interest rate) was applied, rather than a discount rate.[1363]

911. In its Rejoinder, Conoco submits that using estimates rather than actual data for the 2017 and 2018 cash flows does not move the valuation date and does not turn a historical period into a future period. Even if Venezuela was correct (it is not), it would still not give rise to annulment, as it would only amount to an error in the application of the discount and interest rates. Disagreements with computation of damages, even if well-founded, cannot lead to annulment.[1364]

912. On the issue of the PEG as argued by Venezuela (De Jesús), Conoco rebuts that the reasons by the Tribunal are easily comprehensible. Conoco argues that although Venezuela disagrees with the reasons provided, there is no absence of reasons.[1365]

NO SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

913. The Tribunal did not violate Venezuela's right to be heard by not seeking additional evidence or submissions on the quantum issues before rendering its Award. Conoco submits that Venezuela was afforded "extraordinary, and perhaps unprecedented opportunities to be heard on the quantum calculation"[1366] and recounts the instances in which Venezuela made submissions on the issue of quantum. The right to be heard requires an equal opportunity to present one's case, not that a guarantee that every request to submit additional evidence will be granted. The Tribunal is charged with deciding on the admissibility of evidence and procedural directions, which decisions are not reviewable on annulment.[1367]

914. In its Rejoinder, Conoco notes that the parties made in total no fewer than 18 submissions in the quantum phase of the arbitration, excluding additional expert reports. Conoco again submits that due process requires the tribunal to provide the

[1363] Counter-Memorial (Conoco), ¶¶ 636, 637.
[1364] Rejoinder (Conoco), ¶ 241.
[1365] Rejoinder (Conoco), ¶ 296.
[1366] Counter-Memorial (Conoco), ¶ 639.
[1367] Counter-Memorial (Conoco), ¶ 641.

parties with an adequate opportunity to present their case, it does not require that a party be given "an unlimited opportunity to present its case."[1368]

915. On the PEG issue, Conoco submits Venezuela (De Jesús) had no right to preview the Tribunal's quantum decisions or to provide additional submissions before the issuance of the Award. The Tribunal was free to adopt the valuation method it considered appropriate in circumstances where Venezuela failed to substantiate its position.[1369]

E.2(4) THE COMMITTEE'S ANALYSIS OF THE GROUNDS RELATED TO THE TRIBUNAL'S FINDINGS ON VALUATION

E.2(4)(1) COMMITTEE'S ANALYSIS OF GROUNDS INVOKED AS ARGUED BY VENEZUELA (DE JESÚS)

916. The Applicant declares that the Tribunal used obsolete data for the period between 1 January 2017 and the Award date of 8 March 2019 although it determined that damages had to be assessed *ex post* based on actual terms on or about the date of the Award. Actual data was available for 2017, 2018 and the first quarter of 2019 when the Tribunal closed the proceedings and decided not to request them from the Parties. The Applicant contends that the Tribunal's decision to consider actual data for the years between the taking and 30 December 2016 and projections for the years 2017, 2018 as well as the first quarter of 2019 constitutes a misapplication of customary international law applicable to the assessment of damages. [1370] The Applicant contends that the Tribunal disregarded the law applicable to valuation by ignoring the PEG and doubled compensation for the Corocoro Project. The Applicant criticizes the Tribunal's failure to apply a critical quantification that in the Tribunal's opinion required further examination and determination, despite there being no dispute between the Parties and their experts that the PEG factor was 50%.[1371]

[1368] Rejoinder (Conoco), ¶ 242.

[1369] Rejoinder (Conoco), ¶ 297.

[1370] Memorial (De Jesús), ¶¶ 465-466; Reply (De Jesús), ¶¶ 576-577, 580.

[1371] Reply (De Jesús), ¶¶ 581, 583-584.

917. The Applicant next argues that the Tribunal failed to state adequate reasons for its decisions not to request actual data and to ignore the PEG rate. The Applicant argues that there is no explanations for how the Tribunal could base its valuation on outdated data rather than actual data, while simultaneously stating that the actual data would not have significantly impacted its overall situation. The Tribunal made contradictory statements by emphasizing focus on actual terms while relying on information over two years old. Likewise, the Tribunal arbitrarily refused to consider the PEG, based on the reason that the Parties' experts who agreed to factor 50% PEG in the valuation of damages had not discussed part of the contractual documentation. However, the Tribunal failed to explain how a consideration by the Parties' expert of contractual documents they had not needed to determine the PEG factor at 50% would have had an impact on their assessment. [1372]

918. Lastly, the Applicant contends that its right to be heard has been violated because it was prevented from presenting actual data with a period of more than two years. The Applicant argues that the period in question was critical for the Tribunal's date-of-award valuation, and the use of actual data for more than two years would have had a significant impact on the purported date-of-award valuation. Similarly, the Tribunal should have offered the Parties an opportunity to examine and determine the PEG factor to assist the Tribunal in understanding this aspect of the dispute.[1373]

919. Conoco points out that Venezuela only raised the argument on PEG in its Reply Memorial.[1374] The Committee views the contention as a new argument that does not fall out of the alleged grounds for annulment and observes that Conoco does not claim that its rights of defense have been jeopardized by the further arguments in the Applicant's Reply.

920. The Committee wishes to emphasize that correcting the wrongful application of the law and redressing legal errors escapes its remit under Article 52. The Applicant

[1372] Reply (De Jesús), ¶¶ 592, 594, 596.

[1373] Memorial (De Jesús), ¶ 467; Reply (De Jesús), ¶¶ 599, 600, 604.

[1374] Rejoinder (Conoco), ¶ 285.

engages in a plain review of the merits of the Award when it discusses the valuation factors used by the Tribunal. It even acknowledges doing so when it denounces the treatment of PEG by the Tribunal as "*an error consisting in refusing to apply a critical factor of quantification on the basis that it needed to be further examined and determined when there was no dispute amongst the Parties and their experts on this very same factor*."[1375]

921. Under the guise of a "*manifest egregious misapplication of the proper law*,"[1376] the Applicant discusses the merits of the Tribunal's decision (at paragraph 265 of the Award) and accuses the Tribunal of failing to ask the Parties for a subsequent update of their *ex post* valuations after 31 December 2016 as well as for an analysis of the PEG rate under the Association Agreements Accounting Procedures (at paragraph 721 of the Award). As observed by Conoco, these questions relate to the decision on the inputs that were to be used.[1377] The Applicant's allegation for a failure to state reasons by the Tribunal is nothing but a plain refusal to accept the Tribunal's reasons on the PEG (at paragraph 721) or on subsequent updates (at paragraph 265) that it had decided not to ask for subsequent updates because it was "*reluctant to engage in a further delay in the proceedings and considering that the additional information they provide would not have had a significant impact on the overall assessment of damages*".

922. Finally, as we already observed, parties do not enjoy unlimited opportunities to present their cases.[1378] Venezuela besides did not deny it had ample opportunity to present its case on the valuation factors. No violation of the right to be heard occurred in the circumstances.

[1375] Reply (De Jesús), ¶ 583.

[1376] Reply (De Jesús), ¶ 579.

[1377] Tr. Day 3, 97:3-8.

[1378] *Churchill Annulment Decision*, ¶ 178; *Pezold Annulment Decision*, ¶ 255.

E.2(4)(2) COMMITTEE'S ANALYSIS OF GROUNDS INVOKED AS ARGUED BY VENEZUELA (CURTIS)

923. The Applicant states that any *ex-post* analysis may not be exactly the date of the award but must be as close to that day as possible. The last actual production data for the three Projects were from December 2015, so as the last actual cost data for the Upgrading Projects, and the last actual costs for the Corocoro Project were from December 2013. The last actual price, inflation and exchange rate data used in the expert reports were from mid-2016. By treating 2017 and 2018 as part of the historical period even though those years were based on projections rather than actual historical data, and by not discounting those and subsequent cash flows to 31 December 2016, the Applicant alleges that the Tribunal inflated damages by almost US$ 871 million.[1379]

924. By conducting an *ex-post* valuation without taking into account major post-expropriation events, such as hyperinflation after 2016 that have an impact on the value up to the date of the award, the Applicant alleges that the Tribunal committed a manifest excess of powers. In particular, the Applicant argues that the Tribunal failed to apply the applicable law and disregarded the clear understanding between the parties that *ex post* valuation entails a valuation as of the date of the Award. The Applicant argues that the Tribunal's failure to accept the updated data constitutes a serious departure from a fundamental rule of procedure. Lastly, it was argued by the Applicant that the Tribunal introduced a nonsensical excuse of avoiding delay when updating would not have exceeded a few weeks and gave no reason for its arbitrary assumption that the updates would have no significant impact.[1380] The Applicant wraps up its arguments as a question "*not whether it was necessary to have an update precisely on the date of the Award; it is whether the tribunal was free to disregard years of data when it was perfectly possible for the parties to provide an update reasonably close to the date of the Award*."[1381]

[1379] Memorial (Curtis), ¶¶ 649, 652, 660; Reply (Curtis), ¶¶ 354.
[1380] Memorial (Curtis), ¶¶ 658, 661-662, 664, 668.
[1381] Reply (Curtis), ¶ 363.

925. Before answering, it is useful to read the impugned passage of paragraph 265 of the Award where the Tribunal explained:

> "*One of the characteristics of an ex post valuation is that for easily understandable practical reasons, the date of such valuation cannot be the precise date of the Award. The Tribunal has instructed the Parties in Procedural Order No. 4 to provide their ex post valuations on damages updated on 31 December 2016 (para. 6). The Parties have prepared their submissions accordingly. The Tribunal has decided not to ask for a subsequent update, being reluctant to engage in a further delay of the proceeding, and considering that the additional information then provided would not have had a significant impact on the overall assessment of damages. Therefore, the assessment of relevant evidence between early 2017 and the date of this Award is based on the information and projections available for the preceding period and the up-date requested for 31 December 2016.*"[1382]

926. *Ad hoc* committees have early recognized that the right to be heard is one of the affected rules of procedure under Article 52(1)(d).[1383] The right to be heard includes notably the right for a party to propose evidence on pertinent facts. The right to be heard must be "*interpreted reasonably, namely as requiring tribunals to provide each party with an adequate opportunity to be heard but not necessarily with an unlimited opportunity to present its case. In this perspective, the right to be heard is commonly considered as not absolute, but rather subject to possible limitations, provided that they are reasonable and proportional to the aim to be achieved*."[1384] This is exactly what the Tribunal did. It spelled out its refusal of other opportunities "*being reluctant to engage in a further delay of the proceeding, and considering that the additional information then provided would not have had a significant impact on the overall assessment of damages*."[1385]

[1382] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 265.

[1383] **A/RLA-150 [Curtis] / A/RLA-73 [De Jesús]**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application by Indonesia and Amco respectively for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Indonesia for Annulment of the Supplemental Award of October 17, 1990, 17 December 1992, ¶¶9.08-9.09. ¶¶

[1384] *Churchill Annulment Decision*, ¶ 178. See also *Pezold Annulment Decision*, ¶ 255.

[1385] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶ 265.

927. The Tribunal did not overlook offers of evidence from Venezuela. It refused them only after giving Venezuela the opportunity to express its views, submit arguments and to prove its factual allegation on quantum.[1386] A tribunal may refuse to admit evidence without violating the right to be heard if the fact is already established or if the evidence is without pertinence to the issue at hand. During the underlying arbitration, the Tribunal made clear that the result of the evidence proposed would not have modified its assessment of damages.

928. The Applicant denounces the reasons provided by the Tribunal as woefully insufficient when it was perfectly possible for the parties to provide an update reasonably close to the date of the Award, and further hearings and delays do not mean that the Tribunal could disregard years of expropriation data in an *ex post* valuation.[1387] The Committee observes that the binding nature of ICSID awards at Article 53 would be illusory if they could be overturned in all cases where the losing party would consider the rightfulness of its arguments as self-evident.

929. The Committee's response is that under the guise of arguments of manifest excess of powers, violation of the right to be heard, and failure to state reasons, the Applicant is effectively challenging the Tribunal's decision on the admission of new evidence and its evaluation of the probative value of the evidence presented, both of which escapes the Committee's review under Article 52.[1388]

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F. ANNULMENT OF THE AWARD ON COSTS

930. The summary of Venezuela's (Curtis) arguments in relation to the Award on Costs is in **Section F.1**; the summary of Venezuela's (De Jesús) arguments on that issue is in

[1386] Counter-Memorial (Conoco), ¶¶ 639-640.

[1387] Reply (Curtis), ¶¶ 363, 366.

[1388] *Duke Energy Annulment Decision*, ¶ 258; *Teinver Annulment Decision*, ¶ 175.

Section F.2; the summary of Conoco's arguments is in **Section F.3** and Committee's analysis is in **Section F.4**.

F.1 ANNULMENT OF THE AWARD ON COSTS (CURTIS)

931. Venezuela (Curtis) notes that most of the annulment grounds apply to the entire Award. As such, if the Award is annulled in its entirety on any of the grounds for such annulment, the entire costs award should also be annulled.[1389]

F.2 ANNULMENT OF THE AWARD ON COSTS (DE JESÚS)

932. Venezuela's (De Jesús) position is that if the Committee annuls any Award or the Decisions, or any part thereof, the premises on which the Tribunal grounded the costs decision would cease to exist. Venezuela notes that the Tribunal adopted the costs follow the event approach, considering that the Claimants had prevailed in most of their claims. Yet a total or partial annulment of the Award or the impugned Decisions would have the effect of annulling the premises that justified the costs follow the event approach and thereby the decision on costs. On this point, Venezuela refers to the annulment decisions issued in *MINE* and in *TECO*.[1390]

933. Venezuela submits that the Committee would not be drawing the legal consequences arising from its own findings if it partially annulled the Award but kept the Tribunal's decision on costs intact. Venezuela's argument is that the premise on which the Tribunal based its decision on costs would cease to exist if the Committee annulled the Award. That premise consists in the Tribunal's application of the costs follow the event principle, specifically, the premise that the Conoco Parties had partially succeeded in most of their claims.[1391] Besides, if the Committee also annulled the Tribunal's costs decision, the Parties would have the opportunity under Arbitration Rule 55(3) to

[1389] Reply (Curtis), ¶ 452.

[1390] Memorial (De Jesús), ¶¶ 471-478, citing *MINE Annulment Decision*, ¶ 6.112 and *TECO Annulment Decision*, ¶¶ 358-362 (emphasis added) (citations omitted); Reply (De Jesús), ¶ 606.

[1391] Reply (De Jesús), ¶ 608.

resubmit the case, including on the issue of costs. This approach would also be consistent with Convention Article 61, which entrusts the decision on the costs of the arbitration to the tribunals, not the committees.[1392]

F.3 NO ANNULMENT OF THE AWARD ON COSTS (CONOCO)

934. Conoco submits that the request to annul the decision on costs in case of partial or total annulment of the Award should be rejected. Conoco notes that Venezuela has failed to identify any annulment ground under Article 52 or any other basis to substantiate its request. Conoco argues that when applying the costs follow the event approach the Tribunal also considered the Parties' conduct and the outcome of the proceedings as a whole. Conoco argues that if the Committee annulled the Award in part, the Claimants would remain the successful party in the arbitration and as such the costs decision should remain unaltered. Conoco refers to the annulment decisions in *Pey Casado v. Chile* and *Enron v. Argentina*, in which the committees upheld the decisions on costs even after partially annulled the awards.[1393]

935. In its Rejoinder, Conoco submits that Venezuela fails to engage with the principle that the Tribunal had the discretion to award costs. *MINE* and *TECO*, on which Venezuela relies, are outliers in the jurisprudence. If the justification for a costs award based on the cost-follow-the event principle ceased to exist with a partial annulment, as Venezuela argues, then committees that have partially annulled awards but have left the costs award undisturbed have all erred.[1394]

[1392] Reply (De Jesús), ¶ 609.

[1393] Counter-Memorial (Conoco), ¶¶ 783-787, referring to *Pey Casado Annulment Decision*, ¶ 354; and **A/RLA-63 [De Jesús]**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010, ("*Enron Annulment Decision*"), ¶ 417; Rejoinder (Conoco), ¶ 313.

[1394] Rejoinder (Conoco), ¶ 314.

F.4 THE COMMITTEE'S ANALYSIS

936. The Applicant requests annulment of the cost section of the Award as a necessary consequence of any partial annulment of the Award. It explains that the Tribunal following "*the costs follow the event*" approach allocated the costs between the Parties.[1395] The Applicant grounds its argument on fairness and unjust enrichment considerations. It contends that there would be no basis to entitle Conoco to the amount of its legal fees and costs that Venezuela was ordered to contribute if part of the Award, on which the Tribunal based its apportionment, were annulled by the Committee.[1396]

937. Provided that one of the grounds in Article 52 exists, [1397]there is nothing in the ICSID Convention that would prevent annulment of costs decisions notwithstanding the arbitrators' wide discretion to allocate them under Article 61(2) of the ICSID Convention.[1398] The Applicant's contention pertains to the costs section of the Award, specifically addressing the consequences of partial annulment on this section, rather than defects within it that might justify an annulment ground. As Conoco points out, a partial annulment does not automatically lead to an annulment of the cost section of the award.[1399] However, if the annulled part of the award affects another section of the award on which the latter is premised, this other section cannot be allowed to stand. The consequences on the scope of annulment between interrelated parts of the award have been highlighted as early as in the *MINE* Decision, where it was decided that the costs section cannot survive the annulment of the part of the award to which it has an inseparable link.[1400] Whenever the basis for one section such as the costs section has

[1395] **A/R-1 [Curtis] / A/R-42 [De Jesús]**, *Award*, ¶¶ 987-1004.

[1396] Reply [De Jesús], ¶ 608.

[1397] *TECO Annulment Decision*, ¶ 359.

[1398] *Kilic Annulment Decision*, ¶ 195.

[1399] Counter-Memorial (Conoco), ¶¶ 785-786, citing *Tidewater Annulment Decision,* ¶ 230; *Occidental Annulment Decision*, Section IX; **A/RLA-69 [De Jesús]**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic , 25 September 2007, ¶ 161; *Pey Casado Annulment Decision*, ¶ 354.

[1400] *MINE Annulment Decision*, ¶¶ 6.110-6.112.

disappeared because of the annulment of the part of the award on which it was premised, annulment of such interrelated section necessarily follows.[1401]

938. Here, the Committee annulled no part of the Award. The Applicant's claim is accordingly moot.

G. COSTS OF THE ANNULMENT PROCEEDING

G.1 ALLOCATION OF THE COSTS OF THE ANNULMENT PROCEEDING (CURTIS)

939. In its submissions on costs, Venezuela (Curtis) argues that the costs of this annulment proceeding should be awarded against Conoco.[1402] The Applicant has submitted the following claims for legal and other costs (excluding advances made to ICSID):

CATEGORY	TOTAL HOURS	BILLED AMOUNTS (US$)
Partners	6,009.00	4,110,650.00
Associates	5,520.00	1,745,753.75
Counsel	814.00	434,852.25
Paralegals	1,265.00	253,138.00
TOTAL TIME CHARGED	**13,608.00**	**6,544,394.00**
Quadrant Economics		50,131.00
Travel and Other Charges		100,547.67
ICSID Application Fee		25,000.00
TOTAL COSTS CLAIMED		**6,720,072.67**

G.2 ALLOCATION OF THE COSTS OF THE ANNULMENT PROCEEDING (DE JESÚS)

940. In its submissions, Venezuela (De Jesús) argues that Conoco should pay all of the Applicant's costs associated with the annulment proceedings, including the Committee's fees and expenses and all legal fees and expenses incurred by

[1401] *TECO Annulment Decision*, ¶¶ 360-362. See *Enron Annulment Decision*, ¶¶ 416-417 for an absence of such implication when partial annulment is not the logical premise of the findings of the costs section.

[1402] Reply (Curtis), ¶ 454.

Venezuela.[1403] Venezuela (De Jesús) adds that Conoco has purposefully increased the Applicant's costs by distorting the reality of facts surrounding the request to lift the stay of enforcement of the Award.[1404] Venezuela (De Jesús) also requests an order that Conoco pay interest as deemed appropriate by the Committee between its decision on costs and the date on which the amount will be effectively paid to Venezuela. Venezuela (De Jesús) has submitted the following claims for legal and other costs (excluding advances made to ICSID):

ITEM	AMOUNT (USD)
Legal fees	USD 8,715,275
Institutional Costs	USD 1,025,000
Expenses	USD 30,332 *(EUR 27,842- EUR/USD = 1.089)*
TOTAL	**USD 9,770,607**

G.3 ALLOCATION OF THE COSTS OF THE ANNULMENT PROCEEDING (CONOCO)

941. In its submissions on costs,[1405] the Conoco Parties submit that Venezuela should bear all the costs and expenses of these proceedings, including Conoco's legal fees and costs. The Conoco Parties argue first that unsuccessful applicants are, according to *ad hoc* committee's numerous decisions, required to pay all or part of the prevailing's party costs. Second, they argue that holding Venezuela, which has sought annulment of every ICSID award rendered against it since 2003, accountable for the costs will discourage future abusive requests for annulment.[1406] The Conoco Parties further add

[1403] Memorial (De Jesús), ¶¶ 482, 483; Reply (De Jesús), ¶ 621.
[1404] Reply (De Jesús), ¶¶ 622, 623.
[1405] Counter-Memorial (Conoco), ¶¶ 788-793; Rejoinder (Conoco), ¶¶ 315-318.
[1406] Counter-Memorial (Conoco), ¶¶ 791-793.

that Venezuela's approach of raising any argument without regard either for the coherence or accuracy of the allegation or the number of times the argument has been tested and rejected has driven costs up. The Respondents on Annulment further allude to Venezuela's unfounded accusations of bad faith behaviour in intentionally misleading the Committee with respect to its receipt of OFAC authorizations to enforce the Award before November 2020 as another basis for awarding it an indemnity of costs.[1407]

942. The Conoco Parties have submitted the following claims for legal and other costs:

Category	**Incurred amount (US$)**
Legal fees	
Freshfields US LLP[1408]	892,691.10 (Stay)[1409] 4,838,963.04 (Annulment) **5,731,654.14 (Total)**
Three Crowns LLP	531,599.50
Total legal fees	**6,263,253.64**
Disbursements and other charges	
Freshfields US LLP	94,922.76
Three Crowns LLP	25,413.59
Claimants' Travel & Expenses	26,265.77
Hearing graphics vendor	51,119.10
Total disbursements and other charges	**197,721.22**
Total costs claimed (Stay) **Total costs claimed (Annulment)** **GRAND TOTAL**	**892,691.10** **5,568,283.76** **6,460,974.86**

[1407] Rejoinder (Conoco), ¶¶ 316-317.

[1408] Includes legal fees for Mr. King.

[1409] Freshfields's legal fees are broken down into: (*i*) those relating to lifting the stay of enforcement (***Stay***); and (*ii*) those relating to responding to the annulment application (***Annulment***). *See* Decision on the Applicant's Request to Continue the Stay of Enforcement of the Award, 2 November 2020, ¶ 69 ("[…] all questions concerning the costs and expenses of the Committee and of the Parties in connection with this request are reserved for subsequent determination, together with the Application for Annulment").

G.4 THE COMMITTEE'S ANALYSIS

943. The Committee approved on 23 November 2023 the Parties' proposals communicated on 17 November (Conoco), 18 November (Curtis) and 20 November 2023 (De Jesus) to file on 15 December 2023 simultaneous submissions on the costs of the annulment proceedings. Each submission would consist of a summary table of costs incurred, accompanied by a certification from counsel that the summary is complete and accurate, without any need for underlying documentation unless subsequently requested by the Committee.

944. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

945. This provision, together with Arbitration Rule 47(1)(j) (applied by virtue of Arbitration Rule 53) gives the Committee discretion to allocate all costs of the proceeding, including attorney's fees and other costs, between the Parties as it deems appropriate.

946. Venezuela and Conoco submit that the other party should bear all the costs and expenses associated with these proceedings and all the costs of the other party's legal representation. The Parties have adopted an approach of the apportionment of costs relying on the cost-follow-the-event principle. The underlying policy of this principle is to compensate the winner. Venezuela's grievances against the Award have all been rejected as well as its Request to continue the stay of enforcement of the Award. Therefore, Conoco should not have consequently been put to the cost of defending itself in an unmeritorious annulment.

947. Conoco declares that having the Applicant bear the burden of all costs will dissuade Venezuela from abusing any longer the annulment process to seek escape from the

numerous awards made against it or defer its payment obligations.[1410] The Committee accepts that compensation alone is not the only objective of imposing costs on the losing party. Another objective concerns the enforcement of the basic policies of the review of awards in the ICSID Convention aiming at the preservation of the integrity and quality of ICSID arbitration. The deterrent effect Conoco seeks is aimed less at discouraging potential parties from challenging awards to delay enforcement and more at condemning Venezuela's general conduct in ICSID arbitration since 2003. However, that does not come within the Committee's consideration since it needs only consider factors germane to the annulment of the Award of 8 March February 2019 in allocating costs.

948. It is certain that parties will incur legal costs whenever the Article 52 annulment mechanism is triggered. As acknowledged by Conoco, to bring an annulment proceeding under Article 52 is within the parties' rights.[1411] The question is how to hold the balance between the interests of the opposing parties. Conoco suggests that Venezuela's "scorched earth" approach substantially increased the costs. Added to that is its baseless allegations that Conoco was not in possession of OFAC authorizations to enforce the Award prior to receiving the Committee's Decision on the stay of enforcement of 2 November 2020, which is disproved by Conoco in its letter to the Committee of 17 June 2021.[1412] Bearing in mind that in the Decision of 2 November 2020 the Committee expressly warned the Parties that it will take their comportment into consideration for the apportionment of the costs in these proceedings.[1413]

949. Costs are fact-sensitive to the issues raised and the way these issues are run. Whether counsel in the annulment proceedings also represented parties in the arbitration is a not insignificant factor in cost assessment. The Conoco Parties are represented by the same counsel and the re-run of already tested and rejected arguments could not have significantly enhanced their costs; there were no novel issues raised for annulment

[1410] Counter-Memorial (Conoco), ¶ 793.

[1411] Counter-Memorial (Conoco), ¶ 792.

[1412] Rejoinder (Conoco), ¶¶ 316-317.

[1413] See also message from the Committee to the Parties dated 3 March 2021.

purposes. There is no evidence that Venezuela conducted its arguments on annulment by attrition, even if their appellate nature in many instances has extended and added to the length of the proceeding.

950. It remains that compensation of the successful party includes the costs incurred for the maintenance of a defence, such as Conoco's, that is meritorious. The Committee finds no sign of Conoco's bad faith conduct in the proceeding that would have justified the awarding costs of the proceeding or legal fees against it. Venezuela (De Jesús) has in particular brought no evidence to show that it incurred increased costs or legal fees due to Conoco's production of the OFAC license, which was required by the Committee before it ultimately decided to discontinue the stay of enforcement as requested by Conoco[1414] in satisfaction with the document provided.[1415]

951. In determining the level of costs that Conoco could recover, the Committee should be responsive to the actual costs incurred by the Respondent in its defence. Notably, the legal costs and expenses are proportionate (Venezuela (Curtis): USD 6,544,394; Conoco: USD 6,263,253.64). The incremental difference with Venezuela's additional costs (De Jesús) (USD 8,715,275) can be explained by De Jesús's non-involvement in the initial arbitration and the work that had been expanded by counsel to familiarise themselves with the case. Venezuela makes no complaint about how Conoco ran its defence and does not seek recovery of wasted costs.

952. The Committee therefore holds that Venezuela, having failed on all grounds to annul the Award, has to bear the legal fees and expenses of its representations and shall compensate Conoco for its legal representation costs and expenses (USD 6,460,974.86) spent in defending itself against an unsuccessful challenge of the Award. Venezuela shall also bear the costs of the annulment proceeding, including the costs of the

[1414] Email from the Committee to the Parties dated 29 September 2021.

[1415] Email from the Committee to the Parties dated 26 July 2021: "The Committee is of the view that the relationship between the Conoco Parties, ConocoPhillips and ConocoPhillips Company is sufficiently clarified. Any ambiguity among these entities have now been dispelled and we therefore see no necessity to require another license from OFAC which would be delivered to ConocoPhillips, as proposed by Venezuela in its reply comments of 23 July 2021. We remind that the focus was on the scope of application of the OFAC license to the Conoco Parties as stated in the Decision of 2 November 2020 and pertinently underscored by Venezuela in its previous correspondence (letters of 5 and 26 February, 21 May 2021)."

application for the stay of enforcement and those of the application for representation which were reserved with the Application for Annulment, which are detailed below. Its request of interest on the costs to be paid by Conoco is consequently rejected.

953. The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):[1416]

Committee Members' fees and expenses	881,538.87
ICSID's administrative fee	249,324.28
Direct expenses	193,147.16
Other expenses	22,557.99
Total	**1,346,568.30**

954. The above costs have been paid out of the advances made by the Republic of Venezuela pursuant to Administrative and Financial Regulation 15(5).[1417]

955. Accordingly, the Committee orders the Applicant, as represented by Curtis and as represented by De Jesús, to bear their own respective costs and all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses of USD 1,346,568.30 and USD 6,460,974.86 to cover the legal fees and expenses of the Respondents on Annulment.

[1416] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account.

[1417] The remaining balance, if any, will be reimbursed to the Applicant.

VIII. DECISION

956. For the reasons set out above, the Committee unanimously hereby orders as follows:

1. Venezuela's Applications to annul the Award are dismissed;

2. Venezuela shall bear their own costs, fees, and the costs of the annulment proceedings (USD 1,346,568.30) and shall pay the Respondents on Annulment USD 6,460,974.86 for legal fees and for expenses.

3. All other claims and requests are dismissed.

[signed]

Mr. Lawrence Boo
Member of the *ad hoc* Committee

Date: 22 January 2025

Prof. Diego Fernández Arroyo
Member of the *ad hoc* Committee

Date:

Judge Dominique Hascher
President of the *ad hoc* Committee

Date:

[signed]

Mr. Lawrence Boo
Member of the *ad hoc* Committee

Date:

Prof. Diego Fernández Arroyo
Member of the *ad hoc* Committee

Date: 22 January 2025

Judge Dominique Hascher
President of the *ad hoc* Committee

Date:

Mr. Lawrence Boo
Member of the *ad hoc* Committee

Date:

Prof. Diego Fernández Arroyo
Member of the *ad hoc* Committee

Date:

[signed]

Judge Dominique Hascher
President of the *ad hoc* Committee

Date: 22 January 2025