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April 20, 2016

Members of the Tribunal
c/o Mr. Gonzalo Flores
Secretary of the Tribunal
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30

Dear Members of the Tribunal:

The Bolivarian Republic of Venezuela ("Respondent" or "Venezuela") submits this Application for Reconsideration of the majority's decision of February 9, 2016 (the "Majority February 2016 Decision").

Background

1. On September 3, 2013, the Tribunal rendered its Decision on Jurisdiction and the Merits. In that decision, the Tribunal unanimously dismissed all claims against Respondent except for the expropriation claim based on the 2007 migration and nationalization process. With respect to expropriation, the Tribunal unanimously held that, contrary to Claimants' allegations, the expropriation did not violate any undertakings to Claimants and was not

discriminatory.[1] However, a majority of the Tribunal went on to find that Venezuela had breached an obligation to negotiate compensation in good faith, in particular by not agreeing to negotiate on the basis of fair market value (the "Majority 2013 Decision").[2]

2. Immediately thereafter, Respondent requested a hearing on the issue of good faith negotiation, pointing out, *inter alia*, that Claimants' allegations that Respondent would not negotiate fair market value were utterly false.[3] Respondent called the Tribunal's attention to a number of indisputable points established in the record that were simply irreconcilable with the finding of bad faith negotiation.[4] It also brought to the Tribunal's attention documentary evidence that left no doubt that the majority had been misled by Claimants' false statements concerning the negotiations. In particular, Respondent introduced the following cable from the U.S. Embassy in Caracas, reporting on a briefing it had received in April 2008 from ConocoPhillips' chief negotiator, Mr. Gregory Goff:

> According to Goff, CP [ConocoPhillips] has two basic claims: a claim for compensation for its expropriated assets and a claim based on the progressive expropriation of the underlying assets. Goff stated the BRV [Bolivarian Republic of Venezuela] has accepted that fair market value is the standard for the first claim. He said the BRV has moved away from using book value as the standard for compensation and has agreed on a fair market

[1] Decision on Jurisdiction and the Merits, dated September 3, 2013, ¶¶ 344-352.

[2] Majority 2013 Decision, ¶¶ 361-402.

[3] **Ex. R-313**, Respondent's Letter to the Tribunal, dated September 8, 2013, p. 5. Claimants themselves never alleged bad faith negotiation on the part of Respondent, but the majority nevertheless based its finding of breach of Article 6(c) of the Dutch Treaty on that ground, without any warning to the parties that it considered that issue to even be relevant. *Id.*, p. 1; Dissenting Opinion of Professor Andreas Bucher to the Majority February 2016 Decision, dated February 9, 2016 ("Bucher Dissenting Opinion"), ¶ 11 ("The Tribunal's Decision on the Merits has affirmed Respondent's breach of its obligation to negotiate in good faith for compensation based on the market value as required by Article 6(c) of the BIT. It can be easily verified that no such claim was contained in Claimants' Request for Relief. It is my understanding that no such claim has ever been made by Claimants elsewhere in the course of this proceeding."); Dissenting Opinion of Professor Georges Abi-Saab to the Majority 2013 Decision, dated February 19, 2015 ("Abi-Saab Merits Dissent"), ¶ 282 ("This is the very first time in the huge record of this case, comprising hundreds of thousands pages of written and oral proceedings, that the issue of good faith of the Respondent in the negotiations over compensation appears; in the Decision on the Merits. No such claim of bad faith appears in any of the Claimants' submissions, from the Request of Arbitration to the post-hearings briefs. Nor was it raised or contended by any of their Counsel and witnesses in the oral hearings. Nor was it raised by way of question to the Parties from the bench. An utter decision by surprise.").

[4] These included that: (i) Claimants had conceded that Respondent had made offers of compensation; (ii) those offers were unquestionably generous when viewed in light of the compensation terms established for the Petrozuata and Hamaca upgrading projects at their inception as a fundamental condition to their authorization by the Venezuelan Congress, and the majority had expressly left open the issue of the relevance of those terms, to be determined in a second phase of the proceeding; and (iii) the compensation offered also compared favorably with the values of the projects reflected in Claimants' own internal records shortly before the expropriation. **Ex. R-313**, Respondent's September 8, 2013 Letter, pp. 2-3, 8-11.

> methodology with discount rates for computing the compensation for the expropriated assets. However, given the recent increase in oil prices, the fair market value of the assets has increased.
>
> As for the claim based on the progressive expropriation of the assets, Goff said the claim was on top of the fair market value of the assets. CP has proposed a settlement number and the BRV appears to be open to it. Goff added that CP also plans on increasing the settlement number for the second claim due to recent increases in oil prices.[5]

3. In response, Claimants did not deny the content of the cable. Instead, they stated that they "will not engage on the substance," urging the Tribunal to ignore Respondent's application.[6]

4. After a series of further exchanges on the subject,[7] the Tribunal called for two rounds of briefs on Respondent's application, asking the parties specifically to address the question of whether the Tribunal had the power to reconsider the Majority 2013 Decision. The first brief was to be submitted on October 28, 2013, the second on November 25, 2013.[8]

5. In its briefs, Respondent made the following legal points, after reviewing the basic facts demonstrating both the lack of any basis for the majority's finding and the falsity of the representations made by Claimants regarding the compensation negotiations:

- In the ICSID system, only the final award has the status of an "award."[9] All prior decisions are only interim decisions which

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[5] **Ex. R-313**, Respondent's September 8, 2013 Letter, **Annex 4**, Cable dated April 4, 2008, *ConocoPhillips Briefs Ambassador on Compensation Negotiations*, ¶¶ 4-5. *See also id.*, **Annex 5**, Cable dated May 23, 2008, *Update on ConocoPhillips Negotiations*.

[6] Letter from Claimants to the Tribunal, dated September 23, 2013, p. 1.

[7] Letter from Claimants to the Tribunal, dated September 10, 2013; **Ex. R-316**, Respondent's Letter to the Tribunal, dated September 11, 2013; Letter from Claimants to the Tribunal, dated September 12, 2013; **Ex. R-317**, Respondent's Letter to the Tribunal, dated September 12, 2013; **Ex. R-318**, Respondent's Letter to the Tribunal, dated September 16, 2013; Letter from Claimants to the Tribunal, dated September 23, 2013; **Ex. R-319**, Respondent's E-mail to the Tribunal, dated September 23, 2013.

[8] Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties, dated October 1, 2013.

[9] **Ex. R-321**, Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY (2nd ed., Cambridge University Press 2009), Art. 48, p. 813, ¶ 27 ("A decision on liability that does not finally dispose of the issues in dispute is not properly to be called an award. . . . The Decision on Liability [in *LG&E v. Argentina*] did not address questions of quantum. . . . It is not an award, because it does not deal with 'every question submitted to the Tribunal'."); **Ex. R-327**, Lucy Reed, Jan Paulsson and Nigel Blackaby, GUIDE TO ICSID ARBITRATION (2nd ed., Kluwer Law International 2011), p. 182 ("[N]ot all ICSID decisions are awards, let alone final awards. Pursuant to Convention Article 48(3), an award is final if it disposes of all questions put to the tribunal."); **Ex. R-355**, R. Doak Bishop and Silvia M. Marchili, ANNULMENT UNDER THE ICSID CONVENTION (Oxford University Press 2012), p. 37, ¶ 4.01

can be reviewed by the tribunal. Rule 38(2) of the ICSID Arbitration Rules even provides for reopening the proceedings after closure but prior to the award, "on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points."[10] If the Tribunal has the power to reopen even a closed proceeding, there should be no question about its power to revisit a decision where the proceeding has not been closed, and this proceeding is a long way from being closed. As stated by Professor Schreuer: "The tribunal remains free to examine evidence up to the time it renders the award. Arbitration Rule 38 . . . provides that, even after the closure of the proceeding, the tribunal may exceptionally reopen the proceeding in order to take new evidence."[11] In addition, Article 44 of the ICSID Convention

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("Under Article 48 of the Convention, in turn an 'award' 'shall deal with every question submitted to the Tribunal'. . . . Therefore, preliminary decisions finding jurisdiction or decisions on liability that do not finally dispose of the issues in dispute, for example, do not constitute an 'award' for the purposes of ICSID Arbitration Rule 50 or 52."); **Ex. R-356**, Sébastien Manciaux, *Chronicle of Arbitral Awards*, 2 JOURNAL DU DROIT INTERNATIONAL 565 (2011), p. 4 ("[S]ince Rule 47(1)(i) of the ICSID arbitration rules specifies that an award contains 'the decision of the Tribunal on **every** question submitted to it' . . . , a decision of an ICSID arbitral tribunal establishing the liability of a party but reserving the question of the *quantum* of compensation does not constitute a partial, preliminary or interim award, but rather a decision on liability.") (emphasis in the original); **Ex. R-357**, Emmanuel Gaillard and John Savage (eds.), FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International 1999), p. 739, ¶ 1357 ("A peculiarity of ICSID arbitration should be noted . . . . Contrary to the position generally adopted in other types of arbitrations, a decision by the arbitrators on jurisdiction is not considered by the Centre as being an award."). This contrasts with the situation under other arbitration rules, such as the UNCITRAL or LCIA rules, which contemplate partial awards. **Ex. R-332**, UNCITRAL Arbitration Rules dated December 15, 1976, Article 32(1) ("In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards."); **Ex. R-333**, UNCITRAL Arbitration Rules as revised in 2010, Article 34(1) ("The arbitral tribunal may make separate awards on different issues at different times."); **Ex. R-338**, LCIA Arbitration Rules effective January 1, 1998, Article 26.7 ("The Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal."). *See also* First Brief of the Bolivarian Republic of Venezuela Pursuant to the Tribunal's Request of October 1, 2013, dated October 28, 2013 ("Respondent's First Brief on Reconsideration"), ¶¶ 16-26; Second Brief of the Bolivarian Republic of Venezuela Pursuant to the Tribunal's Request of October 1, 2013, dated November 25, 2013 ("Respondent's Second Brief on Reconsideration"), ¶¶ 5-29.

[10] *See* Respondent's First Brief on Reconsideration, ¶¶ 17-18; Respondent's Second Brief on Reconsideration, ¶¶ 25-27.

[11] **Ex. R-316**, Respondent's September 11, 2013 Letter, **Annex 1**, C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, Art. 43, p. 650, ¶ 36. Schreuer also notes the following when discussing Article 51 of the ICSID Convention on revision of an award: "Art. 51 is designed specifically for situations in which the tribunal has terminated its activity. A tribunal that is still in session can always revise its preliminary decisions informally." **Ex. R-321**, C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, Art. 51, p. 880, ¶ 5. *See also* **Ex. R-316**, Respondent's September 11, 2013 Letter, **Annex 1**, C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, Art. 49, p. 850, ¶ 31 ("If the need for a supplementation or rectification of a preliminary decision arises while the proceedings are still pending, a party can always make an informal application to this effect.").

provides: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."[12]

- The concept of *res judicata* has no applicability to such an interim decision in a case that is still pending before the tribunal.[13] In any event, the inherent powers of any tribunal and fundamental principles of justice require that a tribunal that has based a decision upon manifestly incorrect facts or misrepresentations obviously has the power to reopen even a final decision. As stated in the *Sabotage Cases*: "[W]here the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules."[14]

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[12] *See* Respondent's First Brief on Reconsideration, ¶¶ 19-20; Respondent's Second Brief on Reconsideration, ¶ 16.

[13] Respondent's First Brief on Reconsideration, n. 51.

[14] **Ex. R-316**, Respondent's September 11, 2013 Letter, **Annex 2**, *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision dated December 15, 1933, VIII REPORTS OF INTERNATIONAL ARBITRAL AWARDS 160 (2006) ("*Sabotage Cases*"), p. 188. *See also* Respondent's First Brief on Reconsideration, ¶¶ 27-34; Respondent's Second Brief on Reconsideration, ¶¶ 23-24; **Ex. R-344**, *Waltraud Storck v. Germany*, Application No. 61603/00, European Court of Human Rights, Decision on Admissibility, dated October 26, 2004, pp. 13-14 ("The Court concedes that neither the Convention, nor the Rules of Court expressly provide a re-opening of proceedings before the Court. However, in exceptional circumstances, where there has been a manifest error of fact or in the assessment of the relevant admissibility requirements, the Court does have, in the interest of justice, the inherent power to re-open a case which had been declared inadmissible and to rectify those errors.") (internal citations omitted); **Ex. R-346**, James Castello, *UNCITRAL Rules*, in PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 1403 (Frank-Bernd Weigand ed., Oxford University Press 2010), p. 1512, ¶ 16.336 ("Even though it is often said that a tribunal is *functus officio* with respect to any issue that it has resolved on the merits by partial award, nevertheless – in a few cases – tribunals have held that they may revisit such issues when, for example, they believe a change in circumstances or in the factual record renders the initial award untenable."); **Ex. R-362**, Eric A. Schwartz, *Thoughts on the Finality of Arbitral Awards*, in LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 569 (L. Lévy and Y. Derains eds., Pedone 2011), p. 576 ("Should the principle of finality be allowed to trump the doing of justice when the arbitral tribunal is still in place and when the award in question has not yet been either judicially confirmed or set aside? In at least one reported instance, an ICC tribunal took it upon itself to revisit and modify its own earlier partial award in the same arbitration where, due to a change in the circumstances since its earlier award was rendered, it considered the modification to be necessary for the good administration of justice. The tribunal took the view that it had the authority to decide that it was not precluded from characterizing an earlier partial award as an interlocutory decision and that it could be altered . . . where common sense, fairness or arbitral due process require it if circumstances have changed."); **Ex. CL-39**, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Ad Hoc/UNCITRAL, Award on Damages and

6. In response, Claimants had nothing substantive to say about the Majority 2013 Decision. They simply argued that the interim decision could not be reopened because the ICSID Convention only contemplated certain specific remedies to review a decision, and none of them applied.[15] The remedies they referred to were interpretation (under Article 50 of the ICSID Convention), revision (Article 51), and annulment (Article 52). Those remedies applied only to an "award," which by definition is only the final award in the ICSID system, and the Majority

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Costs, dated June 30, 1990, 93 INTERNATIONAL LAW REPORTS 184 (1993), p. 222 ("[A] court or tribunal, including this international arbitral tribunal, has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other egregious 'fraud on the tribunal'. Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action.") (internal citations omitted); **Ex. CL-283**, Kaiyan Homi Kaikobad, INTERPRETATION AND REVISION OF INTERNATIONAL BOUNDARY DECISIONS (Cambridge University Press 2007), p. 257 ("[I]t may be that, where the discovery of the fact constitutes discovery of the existence and submission of false evidence, the tribunal has an inherent right to revise its decision, the rationale being that a decision tainted by fraud and perjury is no decision in law and, accordingly, the right and indeed the duty to render a valid judgment or award must be seen to continue. The argument that, in such circumstances, the reopening of the case can hardly be described as revision in the normal understanding of the notion is clearly a strong one."); **Annex 1**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Stevens & Sons Limited 1953) (reprinted, Cambridge University Press 2006), p. 159 ("A judgment, which in principle calls for the greatest respect, will not be upheld if it is the result of fraud."); **Annex 2**, Kenneth S. Carlston, THE PROCESS OF INTERNATIONAL ARBITRATION (Greenwood Press, Inc. 1972), p. 58 ("The principle that an award procured through false evidence or other fraud is void has been sustained by a number of writers. . . . It is clear that authority and practice sustain the conclusion that an award fraudulently procured is without obligatory force."); **Annex 3**, L. Oppenheim, INTERNATIONAL LAW: A TREATISE, VOL. II (4th ed., A. McNair ed., Longmans, Green and Co. Ltd. 1926), p. 28 ("[S]hould one of the parties have intentionally and maliciously led the arbitrators into an essential material error, the award would have no binding force whatever."); **Annex 4**, International Law Association, *Final Report on Res Judicata and Arbitration*, Toronto Conference (2006), p. 37, ¶ 65 ("Finally, the Committee accepts that there ought to be exceptions to conclusive and preclusive effects of arbitral awards, for instance if the award was procured by fraud."); **Annex 5**, Jeffrey Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION (Kluwer Law International 2012), pp. 697, 1348 ("An example where tribunals have considered that they may reopen final determinations as awards is where there is corruption or fraud. . . . If the tribunal is aware of fraud prior to becoming *functus officio*, it seems reasonable to allow it to reopen its proceedings. All arbitration agreement[s] are properly presumed to be agreed to in good faith. This would suggest an implied term that if one party acts fraudulently and misleads the tribunal, at least as long as the tribunal has some remaining duties, these can include correction of determinations induced by fraud."); **Annex 6**, *Fougerolle S.A. v. Procofrance S.A.*, Court of Cassation (France), Decision dated May 25, 1992, XIX YEARBOOK COMMERCIAL ARBITRATION 205 (1994), p. 207 ("As a consequence of the general principles of law relating to fraud – notwithstanding the exclusion of review by Art. 1507 of the New Code of Civil Procedure – the rescinding of an award made in France concerning international arbitration is by way of exception to be admitted in the case of fraud, as long as the arbitral tribunal remains constituted after the making of the award (or can be reconstituted)."); **Annex 7**, *Riehle v. Margolies*, U.S. Supreme Court, Decision dated April 8, 1929, 279 U.S. 218, p. 225 (only "in the absence of fraud or collusion" does a judgment from a court with jurisdiction operate as *res judicata*).

[15] Claimants' Submission on Respondent's Application for Reconsideration of the Decision on Jurisdiction and the Merits and Suspension of the Quantum Proceedings, dated October 28, 2013, ¶¶ 9-25; Claimants' Second Submission on Respondent's Application for Reconsideration of the Decision on Jurisdiction and the Merits and Suspension of the Quantum Proceedings, dated November 25, 2013, ¶¶ 8-17.

2013 Decision was not a final award.[16] In other words, in Claimants' view, there was no way to correct the obvious mistake in the Majority 2013 Decision other than to await an annulment proceeding after a final award has been issued based upon the misrepresentations that had been made.

7. On March 10, 2014, the same majority that had found bad faith negotiation on the part of Venezuela held that it had no power to reconsider the Majority 2013 Decision. In doing so, it made clear that it was not examining the substance of Respondent's complaint that misrepresentations had been made to the Tribunal because, in its view, it had no power to do so since that power had not been expressly conferred by the ICSID Convention or Arbitration Rules.[17] In a strong dissent, Professor Abi-Saab, then a member of this Tribunal, pointed out the following with respect to the Tribunal's power:

> Finality [in the ICSID system] thus comes with the closure of this all inclusive package in the form of an instrument it calls "award"; and attaches to the whole as well as to its constitutive parts simultaneously; but only from that moment on. Until that moment, according to the inner logic of this chosen system or *lex specialis*, all the components of the package, whether decided upon or not, remain on the table (or the Bench), amenable to rectification and adjustment by the Tribunal, in order to fit better in, and to perfect as much as possible the final product, which is the package as a whole.
>
> . . . .
>
> Article 44 is examined by the Majority . . . in the context of establishing whether or not the Tribunal has a general power of reconsideration. But this article is relevant *in casu* in another meaningful way, as a partial codification and specific application of the *inherent jurisdiction or powers* of any judicial or adjudicative organ. A jurisdiction which was first incarnated by and evolved through the development of the general principle of *Kompetenz-Kompetenz* (la competence de la competence), but which transcended this principle, to a much wider ambit, as articulated particularly by the ICJ.

[16] Respondent's Second Brief on Reconsideration, ¶¶ 5-29.

[17] Majority Decision on Respondent's Request for Reconsideration, dated March 10, 2014 ("Majority 2014 Decision"), ¶ 9 ("[T]his decision is limited to answering the question whether the Tribunal has the power which the Respondent would have it exercise. The decision does not address the grounds the Respondent invokes for reconsidering the part of the [Majority 2013 Decision] which it challenges and the evidence which it sees as supporting those grounds. The power must be shown to exist before it can be exercised.").

. . . .

> It is precisely in fulfilling this task and discharging its duty of safeguarding the credibility and integrity of its adjudicative function, that lies the power of a tribunal to reconsider a prior decision whether interlocutory or not, whether it is considered final or not, and whether such a reconsideration is provided for in its statute or not, i.e. regardless of all these distinctions; if the tribunal becomes aware that it had committed an error of law or of fact that led it astray in its conclusions, or in case of new evidence or changed circumstances having the same effect.
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> . . . .
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> In sum, in certain contingencies which put or risk putting the credibility and integrity of the tribunal into question – such as its becoming aware that it had committed an error in interpreting evidence or in establishing the facts that led it astray in its legal findings; that the decision did not follow from the facts as determined; that new credible evidence demonstrate that the facts as established by the tribunal were based on wrong premises; or that changed circumstances have rendered the decision otherwise untenable – inherent jurisdiction empowers and even mandate the tribunal to reconsider the prior decision.[18]

8. Professor Abi-Saab went on to underscore that there had been a gross miscarriage of justice and that the evidence presented had shown that if anyone had been acting in bad faith, it was Claimants, not Respondent:

> [T]he revelations of Wikileaks cables change the situation radically in dimension and seriousness. Here we have a full narrative of the negotiations, with a high degree of credibility, given the level of detail that tallies perfectly with what we know of the rest of the record. It is a narrative that radically confutes the one reconstructed by the Majority, relying almost exclusively on the assertions of the Claimants throughout their pleadings that the Respondent did not budge from its initial offer.
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> It reveals, once verified by the Tribunal to be true (but its veracity was not contested by the Claimants, only its relevance and

[18] Dissenting Opinion of Professor Georges Abi-Saab to the Majority 2014 Decision, dated March 10, 2014 ("Abi-Saab Reconsideration Dissent"), ¶¶ 44, 54, 57, 61. Professor Abi-Saab also noted that ICSID Arbitration Rule 38(2) made clear that the Tribunal had the power to reconsider. *Id.*, n. 19.

> admissibility), that if there was bad faith, it is not attributable to the Respondent, but to the Claimants who misled the Majority by their misrepresentations, in full awareness of their falsity[.]
>
> In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of 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.[19]

9. On February 20, 2015, Professor Abi-Saab resigned from this Tribunal for serious reasons of health. The remaining two arbitrators, Judge Keith and Mr. Fortier, refused to consent to his resignation, thereby denying Respondent the right to appoint a replacement arbitrator. Professor Abi-Saab's replacement, Professor Bucher, was then appointed to this Tribunal by ICSID.

10. On August 10, 2015, Respondent applied to the Tribunal for reconsideration of the Majority 2014 Decision that it did not have the power to reconsider the Majority 2013 Decision. In its application, Respondent stressed that no system of justice could tolerate a

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[19] *Id.*, ¶¶ 64-67 (internal citations omitted). *See also* **Annex 8**, Charles N. Brower and Paula F. Henin, *Res Judicata: ConocoPhillips v. Venezuela, ICSID Case No. ARB/07/30*, in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 55 (M. Kinnear *et al.* eds., ICSID and Wolters Kluwer 2016), pp. 67-69 ("Professor Abi-Saab's Dissenting Opinion rightly points out that the majority's Decision on Reconsideration underplays the specific characteristics of the ICSID system and its *lex specialis*, and in particular Article 48(3) of the ICSID Convention. . . . [B]ased on the provisions of the ICSID *lex specialis*, there is no apparent reason to give *res judicata* effect to decisions rendered in the course of a pending ICSID arbitration. . . . [W]hen tribunals have attributed *res judicata* effect to a decision they previously issued in the same proceedings, they have also considered themselves to possess what Professor Abi-Saab calls a 'specific power' to revisit such decision under certain limited and exigent circumstances, such as where new material evidence emerges calling into question the correctness of their prior findings. As such, it may not be right to suggest, as the majority in *ConocoPhillips v. Venezuela* did, that the question of a tribunal's power to revisit its own findings can be considered in isolation from the context of that very request. . . . The other exigent circumstances which might justify re-opening a merits issue previously decided in the same proceedings include the submission of evidence that the previous decision is vitiated by a fundamental flaw, such as being tainted by corruption or fraud, resulting from a procedure inconsistent with fundamental due process principles, or having been rendered by a tribunal lacking jurisdiction. . . . Professor Abi-Saab's position was, under the specific circumstances of the case under review, more sensible than the majority's reasoning and conclusions.").

situation where an interim decision could never be reconsidered, no matter what the circumstances. It stated:

> What is necessary is for this Tribunal to determine whether, assuming that Claimants did make material misrepresentations to the Tribunal as to Respondent's willingness to negotiate fair market value, the Tribunal did, and still does, have the power to reconsider the [Majority 2013 Decision]. A negative answer to this question would mean that there are no circumstances under which a tribunal can reconsider its own decision in a case still pending before it, irrespective of material misrepresentations made to it and, indeed, presumably irrespective of any other egregious conduct. That is a principle that cannot be sustained under any legal system.[20]

11. On February 9, 2016, the same majority that made the Majority 2013 Decision and found that it had no power to reconsider that decision in 2014, again held that it had no power to reconsider any interim decision. It stated:

> The Tribunal also does not see the essentially procedural character of Article 43 of the Convention and Rule 38(2) of the Arbitration Rules as supporting the existence of the power of substantive decisions which the Respondent invokes. Moreover, those provisions would not have been applicable in their own terms; the Tribunal has no reason to exercise the power to call evidence provided in Article 43(a), and in terms of Rule 38(2), the proceedings had not been declared closed. On the role of Rule 38(2) the Tribunal also expresses its general agreement with what the *Perenco Ecuador* tribunal says about that provision. The Tribunal notes that the Respondent did not seek support for its power of reconsideration from Rule 19.
>
> The Tribunal has approached this matter, as have the parties, in terms of seeking the existence and source of the power the Respondent would have it exercise. It is not a matter of finding a rule prohibiting the existence or exercise of such a power. That power has to be found to exist.[21]

[20] Letter from Respondent to the Tribunal, dated August 10, 2015, p. 6.

[21] Majority February 2016 Decision, ¶¶ 36-37.

12. Professor Bucher, like Professor Abi-Saab before him, dissented from the majority's view. He incorporated Professor Abi-Saab's dissent to the Majority 2014 Decision "to the extent it covers the same subject matter"[22] and also explained in detail his own approach to the issue. With respect to *res judicata*, Professor Bucher pointed out the following:

> The use of the terms *res judicata* is subject to questions. This concept applies to situations where the same claim decided between the same parties and based on the same cause of action is raised in a distinct or successive proceeding. This notion does not apply to decisions to be made before the same court or tribunal in the same proceeding.[23]

13. Professor Bucher then went on to analyze the ICSID Convention and Arbitration Rules to show that the power to reconsider does exist and that the presence of post-award remedies obviously does not mean that pre-award power to reconsider does not exist.[24] He pointed out that by not exercising that power, the Tribunal had failed to comply with its mission:

> Going one step further in this analysis, it appears that the Tribunal refused to make any assessment about Respondent's Request for Reconsideration because it did not see any provision in the ICSID Convention and the Arbitration Rules that would allow the Tribunal to so proceed. This statement affirms that the Tribunal is faced with a case of silence of the Law, which implies that it cannot take a power nowhere that is not provided by the Law. Such a conclusion is not compatible with Article 42(2) of the ICSID Convention, which states firmly that the Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. As explained above, this provision is supplemented in matters of procedure by Article 44 instructing the Tribunal in such a case that it "shall decide the question", a direction also given by Arbitration Rule 19. None of these provisions prohibits entering into an examination on reconsideration of a pre-award decision. There is no qualified silence to such an effect. The Tribunal, conducted by its Majority, fails to comply with its mission when declining to affirm its power to deal with Respondent's Application.[25]

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[22] Bucher Dissenting Opinion, ¶ 34.

[23] *Id.*, ¶ 40 (emphasis in original).

[24] *Id.*, ¶¶ 40-78.

[25] *Id.*, ¶ 73. *See also id.*, ¶ 45 ("It appears also remarkable that the Majority does not consider Arbitration Rule 19, instructing the Tribunal to 'make the orders required for the conduct of the proceeding', without any restriction. Both provisions, Article 44 of the Convention and Rule 19, are to be understood as the procedural addition to the

14. Referring to the *prima facie* showing Respondent had made to support reconsideration, Professor Bucher stated:

> Respondent invokes in this respect the occurrence of "gross miscarriage of justice" and effects given to "patently false representations" on part of Claimants. I assume that the Tribunal is faced with a *prima facie* showing of such deficiencies. The Majority Reconsideration Decision does not state otherwise, and while Claimants reject Respondent's Request strongly, they do not offer evidence showing that such a *prima facie* view is clearly beyond any reasonable understanding.[26]

15. The penultimate paragraph of Professor Bucher's opinion strikes the same chord as Professor Abi-Saab at the end of his opinion on the subject:

> Finally, the question may also be raised whether the refusal to deal with Respondent's request and the lack of available remedies in this respect does not result in a violation of a fundamental right of a party to get access to justice. It is my submission that the ICSID Convention has to be interpreted so far as possible in harmony with other rules of international law of which it forms part. I also submit that a fundamental rule of Law provides for a possibility to submit to court an application for reconsideration or revision of a decision that has been induced by illegal behavior or based on facts nonexistent at the time of the decision and ignored by the aggrieved party and the Tribunal for reasons not due to the negligence of the party later invoking the true facts, further assuming that the submission for reconsideration or revision, if accepted, would cause to modify in significant part the prior decision. This is certainly a principle that the Tribunal must have in mind when it takes a decision on Respondent's Application, be it on the basis of Article 44 of the ICSID Convention or on the basis of the "rules of international law as may be applicable", on which Article 42(1) relies. Faced with a *prima facie* serious allegation of a clear and fundamental violation of Justice, no Tribunal or Arbitrator can stand by and affirm that it is left with "no power" to deal with the matter.[27]

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principle stated in Article 42(2) of the Convention, prohibiting the Tribunal to adopt a finding of *non liquet* on the ground of silence or obscurity of the law. There is thus no power given to an ICSID Tribunal to decline exercising its mission on a purported lack of power that no rule supports.").

[26] *Id.*, ¶ 36.

[27] *Id.*, ¶ 79.

16. Professor Bucher also noted that, although the majority had found bad faith negotiation on the part of Respondent in the Majority 2013 Decision, it had never made a finding of unlawful expropriation.[28] Claimants' request for relief had been that the Tribunal should declare that "Venezuela has breached Article 11 of the Foreign Investment Law and Article 6 of the Treaty by unlawfully expropriating and/or taking measures equivalent to expropriation with respect to ConocoPhillips' investments in Venezuela."[29] But the Majority 2013 Decision did not match up with that request. Indeed, it could not have matched up with Claimants' request since nowhere in the record was there even a claim of bad faith negotiation.[30]

17. At a hearing held on February 24, 2016, Professor Bucher again raised this issue and requested the parties to comment.[31] Claimants could not answer at that time, and requested a week to respond.[32] They did so on March 2, 2016, but could not point to any request for relief that would match the Tribunal's finding of bad faith negotiation. Nor could they point to any finding of unlawful expropriation in the Majority 2013 Decision.[33] In the course of their response, Claimants repeated their misrepresentations regarding the negotiations, stating that Venezuela "failed to take the necessary first step of acknowledging the governing principle that compensation had to accord with fair market value" and "made clear that it rejected the possibility of negotiations compliant with the international law standard."[34]

18. For its part, Respondent provided its brief comments to the issue raised by Professor Bucher at the February 24, 2016 hearing and then responded further on March 11, 2016, as scheduled at the hearing.[35] Respondent pointed out that: (i) Claimants had never even argued bad faith negotiation on the part of Respondent; (ii) even if there had been a breach of some obligation to negotiate in good faith, there was no causal relationship between that breach and the damages sought; and (iii) the Tribunal should decide the issue of lawfulness of the expropriation on the basis of the entire record now before it.[36] In addition, with respect to the renewed misrepresentations made by Claimants, Respondent introduced another document that it

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[28] *Id.*, ¶ 21 ("The interim assessment is therefore that the issue relating to the nature and legality of the disputed nationalization has not yet been ruled upon. In this respect, the ruling made under letter d) of the Decision on Jurisdiction and the Merits has no impact. Indeed, no 'obligation to negotiate in good faith' is contained in Article 6 of the BIT or more particularly in its letter c) and the Tribunal does not mention any."). Professor Abi-Saab raised a similar point in his dissent on the merits. Abi-Saab Merits Dissent, ¶¶ 247-267.

[29] Claimants' Request for Arbitration, dated November 2, 2007, ¶ 130(a)(i).

[30] *See* n. 3, *supra*.

[31] Transcript of February 24, 2016 Hearing, pp. 187-200.

[32] *Id.*, p. 190.

[33] Letter from Claimants to the Tribunal, dated March 2, 2016.

[34] *Id.*, ¶ 3.

[35] Transcript of February 24, 2016 Hearing, pp. 190-196; Letter from Respondent to the Tribunal, dated March 11, 2016.

[36] Letter from Respondent to the Tribunal, dated March 11, 2016, pp. 1-6.

was able to find from 2007, this time a *Dow Jones Newswires* report of a ConocoPhillips investors conference in which ConocoPhillips' Executive Vice President for Exploration and Production informed investors that Venezuela was negotiating fair market value.[37] The very heading of the news report was "ConocoPhillips: Venezuela Agrees to Pay 'Market Value' for Orinoco."[38]

Application

19. The question before the Tribunal on this Application is straightforward: whether in the ICSID system a tribunal which has a case still pending before it can ever revisit a finding it previously made in an interim decision that does not constitute an "award," or whether it lacks the power to do so under any and all circumstances, including fraud or other egregious conduct. Four arbitrators have addressed this issue so far. Two, the same majority that made the erroneous finding of bad faith negotiation in the Majority 2013 Decision, have decided that they do not have the power to reconsider that finding in a case still pending before them, no matter what the circumstances; the other two have strongly disagreed.

20. Claimants have never had anything substantive to say about the misrepresentations they made to the Tribunal concerning the compensation negotiations. Nor have they ever challenged the other points that leave no doubt that the finding of bad faith negotiation on the part of Respondent is unsustainable. Thus, rather than argue the substance, Claimants have taken the position that the Tribunal has no choice but to proceed without disturbing the majority's finding and that Respondent must await an annulment proceeding to air its grievances. That position defies common sense, perverts the concept of justice, and makes a mockery of the ICSID system.

21. The irrefutable fact is that the ICSID Convention and Arbitration Rules clearly permit the Tribunal to reconsider an interim decision. Indeed, the Tribunal is required to exercise that power and to fulfill its mission under Articles 42(1), 42(2) and 44 of the ICSID

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[37] **Ex. R-602**, Isabel Ordonez, *ConocoPhillips: Venezuela Agrees to Pay 'Market Value' for Orinoco*, DOW JONES NEWSWIRES, dated September 5, 2007; Letter from Respondent to the Tribunal, dated March 11, 2016, p. 8.

[38] **Ex. R-602**, Isabel Ordonez, *ConocoPhillips: Venezuela Agrees to Pay 'Market Value' for Orinoco*, DOW JONES NEWSWIRES, dated September 5, 2007. At the February 24, 2016 hearing, Claimants seemed to argue that the U.S. Embassy cables do not actually show misrepresentations because they were from April and May 2008, coming "far too late in the process" because they were "five months after ConocoPhillips had been compelled to initiate this arbitration," which was in November of 2007. Transcript of February 24, 2016 Hearing, p. 72. That argument is obviously belied by **Ex. R-602**, which is dated September 5, 2007. In their second round filing on the issue raised by Professor Bucher, Claimants brushed aside the new document, saying that it "does nothing to advance Venezuela's misplaced 'misrepresentation' allegation or undermine the Majority's Decision on Liability." Letter from Claimants to the Tribunal, dated April 15, 2016, p. 6. That is typical of the cavalier manner in which Claimants dismiss any facts that cannot be reconciled with their assertions. But the document, which quotes ConocoPhillips' Executive Vice President for Exploration and Production, like the U.S. Embassy cable reporting on the briefing from ConocoPhillips' chief negotiator, speaks for itself. Claimants do not and cannot deny or dispute its contents, which is why they refuse to engage on the substance.

Convention and ICSID Arbitration Rule 19. Moreover, there is no principle of *res judicata* that would prohibit reconsideration. Even if there had been an "award" in this case, there are well established exceptions to the operation of the principle of *res judicata*. An award or judgment based on misrepresentations is one of those exceptions.[39] As Professor Abi-Saab said: "[No] self-respecting Tribunal that takes seriously its overriding legal and moral task of 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."[40] And as stated by Professor Bucher: "Faced with a *prima facie* serious allegation of a clear and fundamental violation of Justice, no Tribunal or Arbitrator can stand by and affirm that it is left with 'no power' to deal with the matter."[41]

22. On several occasions, most recently in its submission of March 11, 2016,[42] Respondent has called upon Claimants themselves to correct the record in this case. The IBA Guidelines on Party Representation provide as follows:

> A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.
>
> In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.[43]

23. National and local rules are to the same effect. For example, the New York Rules of Professional Conduct state:

> A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact

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[39] *See* ¶ 5 and n. 14, *supra*. This conclusion is all the more obvious when the challenge to a prior decision is before the same tribunal that rendered it. That was made clear by the *Sabotage Cases*. **Ex. R-316**, Respondent's September 11, 2013 Letter, **Annex 2**, *Sabotage Cases*, pp. 189-190 ("The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.").

[40] Abi-Saab Reconsideration Dissent, ¶ 66.

[41] Bucher Dissenting Opinion, ¶ 79.

[42] Letter from Respondent to the Tribunal, dated March 11, 2016, p. 8.

[43] **Ex. R-315**, International Bar Association Guidelines on Party Representation in International Arbitration, adopted by a resolution of the IBA Council on May 25, 2013, Guidelines 9-10 (at pp. 8-9).

> or law previously made to the tribunal by the lawyer; . . . (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.[44]

24. Obviously, these rules require correction of misstatements not just as window dressing, but in order for the court or tribunal to be able to take appropriate action to correct errors that may have been committed based on the misstatements.[45] To date, Claimants have ignored Respondent's calls to correct the record, but their failure to do so does not alter the fact that the Tribunal has the power to reconsider the majority's finding on bad faith negotiation.

Proposed Procedure

25. Prior to the resignation of Judge Keith, a hearing on quantum, which was first to address the impact on quantum of the special arrangements established for compensation for governmental action at the outset of the Petrozuata and Hamaca Projects and the misrepresentations issue, and then to proceed to other matters related to quantum, was scheduled for the period June 6-17, 2016.[46]

26. At the same time, on March 17, 2016, the parties received a communication from the Tribunal requesting a second round of briefs on the issue raised by Professor Bucher at the February 24, 2016 hearing referred to above. Claimants were to submit their brief on April 15, 2016 (which they have done), and Respondent was to submit its brief on May 15, 2016. On

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[44] **Ex. R-371**, New York Rules of Professional Conduct, effective April 1, 2009, as amended May 4, 2010, Rule 3.3(a). The definition of "Tribunal" includes an arbitral panel. *Id.*, Rule 1.0(w). This obligation of disclosure is not subject to any exception for information protected as confidential information but may be satisfied by withdrawal of a statement or evidence. *See* **Ex. R-372**, Roy D. Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED (West 2013), Annotations on Rule 3.3(a)(3), pp. 858-859. The lawyer must seek the client's cooperation to correct the record and, if that is not forthcoming, withdraw or correct the false statements or evidence. **Ex. R-370**, The Association of the Bar of the City of New York Committee on Professional Ethics, *Formal Opinion 2013-2: A Lawyer's Obligation to Take Action If, After the Conclusion of a Proceeding, the Lawyer Comes to Know that Material Evidence Offered by the Lawyer, the Lawyer's Client or a Witness Called by the Lawyer during the Proceeding Was False, available at* www.nycbar.org ("Formal Opinion 2013-2"). *See also id.*, p. 2 (of the .PDF) (stating that lawyers admitted to the New York bar have an ethical obligation under the New York Rules of Professional Conduct to inform the tribunal as to evidence they come to know is false and that is "material," *i.e.*, "of a kind that could have changed the result" in a particular matter.).

[45] *See* **Ex. R-370**, Formal Opinion 2013-2, pp. 3-4 (of the .PDF) ("The rule is intended to protect the integrity of the adjudicative process by preventing the trier of fact from being misled by false evidence. . . . [T]he obligations of a lawyer under Rule 3.3 end only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on the new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence.").

[46] Transcript of February 24, 2016 Hearing, pp. 107-113; Minutes of the Organizational Hearing held in Washington, D.C. on February 24, 2016, dated March 2, 2016, ¶ 4.

March 19, 2016, Respondent wrote to the Tribunal to request further detail on the precise points the Tribunal wished the parties to address in that second round, as well as guidance as to the potential impact of the issue to be briefed on the scheduled June hearing, given that Respondent's second round submission was to come only three weeks before the start of that hearing. That guidance has not been received, as Judge Keith resigned on March 21, 2016.

27. Clearly, the resolution of both this Application and of the issue to be briefed by the parties as stated above is critical to any hearing on quantum. The form and content of the hearing on quantum, and even whether such a hearing is necessary, depend entirely upon the outcome of these threshold questions. In addition, if this Application for Reconsideration is granted, it may not be necessary to address the issue of whether there has ever been a finding of unlawful expropriation.

28. Therefore, Respondent proposes that the Tribunal first address this Application for Reconsideration, and requests a hearing on the Application.

Very truly yours,

George Kahale, III

Enclosures

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