

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

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

THE CLAIMANTS

v.

BOLIVARIAN REPUBLIC OF VENEZUELA
THE RESPONDENT

ICSID CASE NO. ARB/07/30

DECISION ON RESPONDENT'S REQUEST FOR RECONSIDERATION

Members of the Tribunal
Judge Kenneth Keith, President
Mr L. Yves Fortier, CC, QC
Professor Georges Abi-Saab

Secretary of the Tribunal
Mr Gonzalo Flores

Date: 10 March 2014

THE PARTIES' REPRESENTATIVES

CLAIMANTS' REPRESENTATIVES

Mr Jan Paulsson
Bahrain World Trade Centre
East Tower, 37th Floor
PO Box 20184
Manama
Bahrain
and
Mr Nigel Blackaby
Mr D. Brian King
Mr Alexander A. Yanos
Freshfields Bruckhaus Deringer LLP
601 Lexington Avenue, 31st Floor
New York, NY 10022
United States of America
and
Ms Lucy F. Reed
Freshfields Bruckhaus Deringer LLP
11th Floor Two Exchange Square
Hong Kong
and
Professor James Crawford, SC
Whewell Professor of International
Law
Matrix Chambers
Griffin Building, Gray's Inn
London WC1R 5LN
United Kingdom

RESPONDENT'S REPRESENTATIVES

Dr Manuel Enrique Galindo
Procurador General (E) de la República
Procuraduría General de la República
Paseo Los Ilustres c/c Av. Lazo Martí
Ed. Sede Procuraduría General de la
República
Piso 8
Urb. Santa Mónica
Caracas 1040
Venezuela
and
Mr George Kahale, III
Ms Miriam K. Harwood
Mr Mark H. O'Donoghue
Mr Benard V. Preziosi, Jr.
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178
United States of America
and
Ms Gabriela Álvarez-Ávila
Curtis, Mallet-Prevost, Colt & Mosle, S.C.
Rubén Darío 281, Pisos 8 & 9
Col. Bosque de Chapultepec
11580 Mexico, D.F.
Mexico

A. PROCEDURAL HISTORY

1. On 2 November 2007, Claimants submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or “**the Centre**”) a Request for Arbitration against the Bolivarian Republic of Venezuela (“**Venezuela**” or “**the Respondent**”) pursuant to Article 36 of the ICSID Convention. On 13 December 2007, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention.

2. The Tribunal was constituted on 23 July 2008. Its members were Judge Kenneth Keith, President, appointed by the Chairman of ICSID Administrative Council pursuant to Article 38 of the ICSID Convention; Mr L. Yves Fortier, CC, QC, appointed by the Claimants; and Sir Ian Brownlie, CBE, QC, appointed by the Respondent. On 1 February 2010, the Tribunal was reconstituted, with Professor Georges Abi-Saab being appointed by Respondent, following Sir Ian Brownlie’s passing.

3. On 3 September 2013, the Tribunal issued a Decision on Jurisdiction and the Merits, concluding as follows:

“...For the foregoing reasons, the Tribunal decides as follows:

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

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

Items (a), (b)(i), (b)(ii), (c), (f) and (g) above have been decided unanimously by the Tribunal. Items (d) and (e) have been decided by majority, with Arbitrator Georges Abi-Saab, dissenting.”

4. On 8 September 2013, counsel for Respondent submitted a letter requesting a clarification and further explanations from the Tribunal regarding certain findings in the Decision on Jurisdiction and the Merits (“**the September 8 letter**”). In its letter, counsel for Respondent also requested “a limited and focused hearing” to address the specific issues raised.

5. Counsel for the Claimants replied to the September 8 letter on 10 September 2013. Claimants opposed Respondent’s requests and proposed instead a briefing schedule for submissions on *quantum*.

6. On 11 September 2013, Respondent submitted further comments, to which Claimants replied on 12 September 2013. Additional comments were received from Respondent on 12, 16 and 23 September 2013 and from Claimants on 23 September 2013.

7. By letter of 1 October 2013, the Tribunal fixed a schedule for the parties to file submissions on: (i) the Tribunal’s power to reconsider the Decision on Jurisdiction and the Merits of 3 September 2013; and (ii) a possible scheduling for *quantum* briefs.

8. In accordance with the schedule, the Parties simultaneously filed briefs on 28 October and 25 November 2013

B. PARTIES' ARGUMENTS

9. So far as the first matter set out in paragraph 7 is concerned, this 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 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.

10. The Parties referred to a number of provisions of the ICSID Convention and the ICSID Arbitration Rules, as well as to commentaries, matters of principle and decisions of various international courts and tribunals. It is convenient to set out the relevant ICSID provisions at this stage:

Convention, Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Convention, Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. 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.

Convention, Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Arbitration Rules, Rule 38(2)

(2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such

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

11. The Respondent places major emphasis on Article 44 of the Convention and in particular on its second sentence. That provision, it says, recognises the well-established principle that tribunals have inherent powers to make decisions regarding the conduct of proceedings going beyond the specific rules under which they are constituted provided that such decisions do not contradict those specific rules. It quotes a well known commentator: “An ICSID tribunal’s power to close gaps in the rules of procedure is declaratory of the inherent power of any tribunal to resolve procedural questions in the event of *lacunae*”.¹ In support of the proposition that under Article 44, or the inherent powers reflected in it, the Tribunal has power to reconsider the Decision, it cited a number of cases. The Tribunal will return to them.

12. The Respondent also contends that a tribunal that is still in session can always revise its “interim” and “preliminary” decisions.² It sees the Decision as an interim one rendered far before the closure of proceedings. Under article 44 of the Convention, it says, the Tribunal remains free to examine evidence up to the time it renders its award.³

13. In relation to ICSID Arbitration Rule 38(2) which enables the tribunal to reopen even a closed proceeding before an award is rendered on the ground that new evidence is forthcoming or certain points must be clarified, the Respondent quotes this passage from the ICSID official commentary:

“Closure of the proceeding is considered to be without prejudice to the discretionary power of the Tribunal to re-open it on its own initiative or on motion of either party. However, paragraph (2) emphasises the exceptional character of re-opening. Since the new evidence, or the need for clarification, may require both further written and further oral procedures, it is the ‘proceeding’ that may be re-opened.”⁴

¹ *First Brief of the Bolivarian Republic of Venezuela Pursuant to the Tribunal’s request of October 1, 2013*, of 28 October 2013 ¶19 (“**Respondent’s First Brief**”), quoting C. Schreuer, *The ICSID Convention*, Second Edition (2009), p. 880.

² *Second Brief of the Bolivarian Republic of Venezuela Pursuant to the Tribunal’s request of October 1, 2013*, of 25 November 2013 ¶¶2,13 and 25 (“**Respondent’s Second Brief**”).

³ *Id.* ¶25, quoting C. Schreuer *supra* note 1 p. 650.

⁴ *ICSID REGULATIONS AND RULES (ICSID 1975)*, *Commentary to Rule 38(2)*, Ex. R-320 to Respondent’s First Brief, at footnote 35.

14. The Respondent continues in these terms: “if an ICSID Tribunal has the power to reopen even a closed proceeding, there can be no question that it has the power to reconsider an interim decision rendered far before the closing of the proceedings.”⁵

15. The Claimants submit in respect of Article 44 of the Convention that it “is no licence for a Tribunal to adopt procedures at variance with the ICSID system”⁶ and that “gap-filling cannot be used to overcome an express prohibition in the ICSID Convention and the ICSID Arbitration Rules.”⁷ That prohibition is seen as arising from article 53: “the ordinary meaning of this provision favors the finality of decisions on merit issues”⁸. Further, “when the ICSID Convention provides that there are no appeals, it means that there are no appeals ... [T]he limited review that is permissible is reserved for after the final award is issued.”⁹ While the Claimants recognised that Article 53 does not explicitly prohibit Parties from appealing decisions rendered in an intermediate phase, that does not mean that there is a “gap” in the rules to be filed using Article 44. “There is an outright prohibition that Venezuela seeks to elide.”¹⁰

16. The Claimants next submit that to grant the Respondent the relief it seeks would treat the Parties unequally. For instance, had the Respondent prevailed on jurisdiction or the merits, the Tribunal would have issued an award dismissing the claim and the Claimants would have had no right of appeal.¹¹

17. Further, the Claimants submit that the Respondent’s analogy to the power to reopen under Rule 38(2) is groundless; the stage which that provision refers to has passed: the Tribunal has rendered a decision resolving the merits issues submitted to it.¹²

18. By contrast to the Respondent’s characterisation of the decision as interim or preliminary, the Claimants see it as having res judicata effect and challengeable only through the post award remedies provided for in Articles 49 to 52 of the Convention.¹³ It

⁵ Respondent’s First Brief ¶18; Respondent’s Second Brief ¶25.

⁶ Claimants’ *Submission on Respondent’s Application for Reconsideration of the Decision on Jurisdiction and the Merits and Suspension of the Quantum Proceedings* of 28 October 2013 (“**Claimants’ First Brief**”) ¶9.

⁷ Claimants’ First Brief ¶4.

⁸ *Id.* ¶10.

⁹ *Id.* ¶11.

¹⁰ *Id.* ¶13.

¹¹ *Id.* ¶14.

¹² *Id.* ¶15.

¹³ Claimants’ *Second Submission on Respondent’s Application for Reconsideration of the Decision on Jurisdiction and the Merits, and Suspension of the Quantum Proceedings* ¶4 (“**Claimants’ Second Brief**”).

points out that the relief the Respondent is seeking is unprecedented in ICSID practice.¹⁴ The ICSID system, they say, “forbids appeal entirely, and restricts even the extraordinary review mechanisms provided for in the Convention until after a final award is issued.”¹⁵ It provides this background:

That is not the result of accident or oversight. Unlike other systems of international arbitration, the drafters of the Convention consciously chose to permit only one instrument called an award and to defer any remedies until after its issuance.

The Convention’s drafters expressly contemplated, for example, that Tribunals could issue decisions on jurisdictions prior to the award. They just as consciously rejected proposals to permit applications for the annulment or challenge of jurisdictional decisions. Among the reasons for this deliberate choice was to avoid the “unfortunate” circumstance of “open[ing] endless possibilities of one Party to frustrate or delay the proceedings”. Thus decisions – be they on jurisdiction or the merits – are meant finally to settle a subset of issues that are later incorporated in the final award, and may then, and only then, be subject to review as part of the award.

...

The drafters of the Convention themselves stressed “[T]he binding character of any decision by [an arbitral tribunal] on preliminary questions or merits.”¹⁶

C. ANALYSIS

19. The Tribunal begins with the elements of the question which it is to answer. The question relates to the “Decision of 3 September 2013”. It does not relate to an award, which, in terms of the Convention, is the form of the decision reached at the end of the whole proceeding; as the second issue put to the Parties in the letter of 1 October 2013 confirms, the proceeding has still to reach that stage. Accordingly, the provisions of Article 53 of the Convention, within a Section headed *Recognition and Enforcement of the Award*, which provides that “[T]he Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except for those provided for in the Convention”, are not directly applicable. There are the further points that what the Respondent is seeking is not an “appeal” but a “reconsideration” and not by a distinct appeal body, but by the original tribunal. While those points may also indicate that Article 53 is inapplicable, given the limited meaning of the word “Award” in the Convention, the

¹⁴ *Id.* ¶9 and footnote 6.

¹⁵ *Id.*

¹⁶ *Id.* ¶¶10-12, **CL-269**, *History of The ICSID Convention*, Volume II-1, at 408 (1968).

Tribunal need not address them. But the fact that Article 53 and other provisions in Section 5 of Part IV of the Convention do not apply in a direct sense does not mean that it may not be relevant in a more general sense. The Tribunal will return to that matter.

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

(i) in paragraph 262 “concludes that it does not have jurisdiction under Article 22 of the Investment Law”; one consequence is that it does not have jurisdiction over certain tax matters (para. 263);

(ii) in paragraphs 281, 286 and 289 finds that certain objections to jurisdiction under the BIT fail (see also para. 290);

(iii) in paragraph 332 “concludes” that certain measures do not fall within the scope of Article 3 of the BIT;

(iv) in paragraph 343 “concludes” that if the taking was unlawful, the date of valuation is in general the date of the Award;

(v) in paragraph 352 finds that the part of the claim based on “undertakings” fails;

(vi) in paragraph 359 finds that the single taking contention fails;

(vii) in paragraph 401 concludes that the Respondent breached its obligation to negotiate in good faith on the basis of market value.

Under the heading **The Tribunal’s Decision**, paragraph 404 begins with these words.

“For the foregoing reasons, the Tribunal decides as follows:. . .”

The paragraph then lists seven matters, including those listed above.

21. Those decisions in accordance with practice are to be incorporated in the Award. It is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect. “They are intended to be final and not

to be revisited by the Parties or the Tribunal in any later phase of their arbitration proceedings.”¹⁷

22. Do the provisions of the Convention and Rules to which the Respondent referred make any difference to that position? The Tribunal does not think so, for two reasons. The first is that those provisions are about procedural matters. Article 44 of the ICSID Convention makes explicit the tribunal’s powers to address procedural issues not dealt with in the Convention or the Rules. And ICSID Arbitration Rule 38(2) has a much more limited function. Their essentially procedural character appears from the cases on which the Respondent relied. Those concerning Article 44 were about stay, allowing *amicus curiae* submissions and participation of counsel.¹⁸ Article 44, it is frequently said, is designed to enable gaps in the procedure to be filled. It cannot be seen as conferring a broad unexpressed power of substantive decision.

23. That gap filling character of the provision relates to the second reason for the Tribunal’s conclusion that those procedural provisions cannot be the source of a power to reconsider. The overall structure and the detailed provisions of the ICSID Convention were plainly designed to provide for review or actions in respect of decisions of a tribunal only once the Award was rendered. There is no gap to be filled by the power proposed here. Section 3 of Part IV of the ICSID Convention sets out the Powers and Functions of the Tribunal, with nothing among its provisions even hinting at such a power. Section 4 deals succinctly with the Award itself. And it is only in Section 5 that powers are conferred on the Tribunal to interpret and revise the Award and on an *ad hoc* Committee to annul an Award on prescribed grounds. It is in those ways and those alone that decisions such as that in September 2013 can be questioned, changed or set aside. Those various post-award remedies are, of course, available to both Parties. Those provisions and that structure exclude the possibility of the proposed powers of reconsideration being read into the Convention. That reading of the Convention is also supported by the drafting history mentioned above (paragraph 18).

¹⁷ *Electrabel S.A. v. Hungary* (ICSID Case No. ARB 07/19), Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012 ¶10.1.

¹⁸ Respondent’s First Brief, footnotes 42 and 43.

D. DECISION

24. For the foregoing reasons, the majority of the Tribunal concludes that it does not have the power to reconsider the Decision of 3 September 2013, with Professor Georges Abi-Saab dissenting.

25. The following schedule for *quantum* briefs is fixed:

- a. The Claimants shall file a Memorial on *Quantum* (including all supporting evidence and legal authorities) within ten (10) weeks from the date of the present Decision;
- b. Respondent shall file a Counter-Memorial on *Quantum* within ten (10) weeks from their receipt of Claimants' full Memorial on *Quantum* (including all supporting evidence and legal authorities);
- c. Claimants shall file a Reply on *Quantum* within four (4) weeks from their receipt of Respondent's full Counter-Memorial on *Quantum* (including all supporting evidence and legal authorities); and
- d. Respondent shall file a Rejoinder on *Quantum* within four (4) weeks from their receipt of Claimants' full Reply on *Quantum* (including all supporting evidence and legal authorities).
- e. The Tribunal will fix a date for a hearing on *quantum*, in consultation with the parties, in due course.

26. Costs are reserved for future determination.

[signed]

For the Majority of the Tribunal
Kenneth Keith
President of the Tribunal