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August 10, 2015

Rt. Hon. Justice Sir Kenneth J. Keith, K.B.E.  
Prof. Andreas Bucher  
Maître Yves Fortier, Q.C.

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 Tribunal’s Decision of March 10, 2014 (the “Majority Reconsideration Decision”),<sup>1</sup> which denied Respondent’s Request for Reconsideration of the

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<sup>1</sup> **Annex 1**, Majority Reconsideration Decision. For ease of reference, Respondent will be sending on August 11, 2015 by courier to ICSID and opposing counsel a flash drive containing all filings referenced in this Application, along with the Exhibits and Annexes thereto. Hard copies of those filings, without their attendant Exhibits and Annexes, also will be sent by courier along with the flash drive and a hard copy of this Application.

Tribunal's Decision on Jurisdiction and the Merits dated September 3, 2013 (the "Majority Merits Decision").<sup>2</sup>

In the Majority Merits Decision, Judge Keith and Mr. Fortier found that although the nationalization that is at the heart of this case was lawful in all other respects, it was rendered unlawful due to a purported failure of Respondent to negotiate compensation based on the principle of fair market value, which, according to the majority, meant that Respondent did not negotiate compensation in good faith.<sup>3</sup> Professor Abi-Saab dissented from that portion of the Majority Merits Decision, and delivered his detailed dissent before he resigned from the Tribunal for serious health reasons in February 2015.<sup>4</sup>

Immediately following the Majority Merits Decision, Respondent applied for reconsideration of that Decision, pointing out certain obvious factual, legal and logical errors, the correction of any one of which would require a change in the majority's conclusion on the issue of good faith negotiation.<sup>5</sup> Of particular relevance to this Application, Respondent pointed out that cables from the U.S. Embassy released after the hearing in this case in 2010, which reported on the briefings made by the chief ConocoPhillips negotiators to the U.S. Embassy in Caracas, left no doubt that the representations made by ConocoPhillips to the Tribunal regarding Respondent's supposed unwillingness to negotiate fair market value had been completely false, and that it was in fact ConocoPhillips which was seeking compensation "on top of the fair market value of the assets."<sup>6</sup> Since the majority had relied on Claimants' misrepresentations in

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<sup>2</sup> Annex 3, Majority Merits Decision.

<sup>3</sup> *Id.*, ¶¶ 361-402.

<sup>4</sup> Annex 4, Dissenting Opinion of Prof. Georges Abi-Saab, dissenting from the Majority Merits Decision, dated February 19, 2015 ("Abi-Saab Merits Dissent").

<sup>5</sup> Annex 5, Letter from Respondent to the Tribunal dated September 8, 2013. The issue of negotiation of compensation in good faith was not even before the Tribunal and had not even been argued by Claimants. Nevertheless, the majority decided to base its finding of unlawful expropriation on it without any warning to the parties. See Annex 4, 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.").

<sup>6</sup> Annex 6, Cable dated April 4, 2008, *ConocoPhillips Briefs Ambassador on Compensation Negotiations*, ¶¶ 4-5; Annex 5, Letter from Respondent to the Tribunal dated September 8, 2013, pp. 3-5; Annex 2,

reaching its conclusion on bad faith negotiation, Respondent assumed that the Tribunal would want to reconsider the Majority Merits Decision to avoid an obvious gross miscarriage of justice. That assumption was based on the premise that every tribunal has the power to correct its own decision while the case is still pending before it and should exercise that power if its decision were indeed based on patently false representations.

On October 1, 2013, after a series of exchanges between the parties had made plain that Claimants could not and would not even attempt to address the facts underlying the Application for Reconsideration,<sup>7</sup> the Tribunal requested the parties to brief the issue of whether it had the power to reconsider the Majority Merits Decision.<sup>8</sup> The parties did so in two rounds of briefs on October 28, 2013, and November 25, 2013.<sup>9</sup>

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Opinion of Prof. Georges Abi-Saab, dissenting from the Majority Reconsideration Decision, dated March 10, 2014 (“Abi-Saab Reconsideration Dissent”), ¶¶ 24-29.

<sup>7</sup> See Annex 5, Letter from Respondent to the Tribunal dated September 8, 2013; Annex 7, Letter from Claimants to the Tribunal dated September 10, 2013; Annex 8, Letter from Respondent to the Tribunal dated September 11, 2013; Annex 9, Letter from Claimants to the Tribunal dated September 12, 2013; Annex 10, Letter from Respondent to the Tribunal dated September 12, 2013; Annex 11, Letter from Respondent to the Tribunal dated September 16, 2013; Annex 12, Letter from Claimants to the Tribunal dated September 23, 2013; Annex 13, E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated September 23, 2013. The substance of Claimants’ position was best expressed in their September 23, 2013 letter (Annex 12), in which they stated: “We will not engage on the substance of Venezuela’s motion.”

<sup>8</sup> Annex 14, Letter from Gonzalo Flores, Secretary of the Tribunal, to the parties, dated October 1, 2013.

<sup>9</sup> Annex 15, First Brief of the Bolivarian Republic of Venezuela Pursuant to the Tribunal’s Request of October 1, 2013, dated October 28, 2013; Annex 16, Claimants’ First 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; Annex 17, Second Brief of the Bolivarian Republic of Venezuela Pursuant to the Tribunal’s Request of October 1, 2013, dated November 25, 2013; Annex 18, 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. See also Annex 19, Letter from Respondent to the Tribunal dated January 31, 2014; Annex 20, Letter from Claimants to the Tribunal dated February 5, 2014; Annex 21, Letter from Respondent to the Tribunal dated February 5, 2014. In addition to briefing the reasons why the Majority Merits Decision should be reconsidered, including the material misrepresentations made by Claimants to the Tribunal, Respondent called upon Claimants to correct the record as provided in Guidelines 9 and 10 of the IBA Guidelines on Party Representation in International Arbitration (“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

On March 10, 2014, the Tribunal rendered the Majority Reconsideration Decision, again by majority vote of Judge Keith and Mr. Fortier, with Professor Abi-Saab dissenting. Without in any way addressing the facts underlying the application, the majority held that the Tribunal had no power to reconsider the Majority Merits Decision, apparently no matter what the circumstances and no matter whether that decision had been based on misrepresentations made to it by Claimants.<sup>10</sup>

Professor Abi-Saab strongly disagreed with the majority, pointing out that the evidence presented by Respondent had shown that the Majority Merits Decision had indeed been based upon material misrepresentations and that Claimants had not even challenged that evidence.<sup>11</sup> Focusing on the significance of the U.S. Embassy cables that exposed the misrepresentations, Professor Abi-Saab stated the following:

However, the 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.

It reveals, once verified by the Tribunal to be true (but its veracity was not contested by the Claimants, only its relevance and 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

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Representative should, subject to countervailing considerations of confidentiality and privilege. promptly correct such submission.”).

<sup>10</sup> Annex 1, Majority Reconsideration Decision, ¶ 9 (“The decision does not address the grounds the Respondent invokes for reconsidering the part of the [Majority September] Decision which it challenges and the evidence which it sees as supporting those grounds.”).

<sup>11</sup> Annex 2, Abi-Saab Reconsideration Dissent.

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.<sup>12</sup>

As the Tribunal is aware, Respondent does not accept that the Tribunal is properly constituted and considers that Respondent has been inexplicably and indefensibly stripped of its right to appoint a replacement arbitrator for Professor Abi-Saab.<sup>13</sup> However, without prejudice

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<sup>12</sup> *Id.*, ¶¶ 64-67 (emphasis added).

<sup>13</sup> After Professor Abi-Saab resigned for health reasons on February 20, 2015, Judge Keith and Mr. Fortier, at Claimants' invitation, purported to deny consent to the resignation. Apart from the unprecedented nature of such a decision, it was made even though consent had previously been granted and even though Mr. Fortier was under challenge at the time. Respondent has challenged Mr. Fortier and Judge Keith on a number of grounds, including the circumstances surrounding the denial of consent to Professor Abi-Saab's resignation. See [Annex 22](#), Respondent's Submission on the Proposal to Disqualify Judge Keith and Mr. Fortier, dated April 2, 2015; [Annex 23](#), Claimants' Reply to Respondent's Third and Fourth Proposals to Disqualify Mr. Yves Fortier QC and Second Proposal to Disqualify Judge Kenneth Keith, dated April 9, 2015; [Annex 24](#), E-mail from Respondent to Meg Kinnear, Secretary-General of ICSID, dated April 10, 2015; [Annex 25](#), E-mail from Prof. Abi-Saab to Meg Kinnear, Secretary-General of ICSID, dated April 15, 2015; [Annex 26](#), Explanations of Judge Keith pursuant to ICSID Arbitration Rule 9(3), dated April 16, 2015; [Annex 27](#), Explanations of Mr. Fortier pursuant to ICSID Arbitration Rule 9(3), dated April 16, 2015; [Annex 28](#), Letter from Respondent to Meg Kinnear, Secretary-General of ICSID, dated April 23, 2015; [Annex 29](#), Letter from Claimants to the Chairman of the ICSID Administrative Council dated April 23, 2015; [Annex 30](#), E-mail from Respondent to Meg Kinnear, Secretary-General of ICSID, dated April 29, 2015; [Annex 31](#), E-mail from Respondent to Meg Kinnear, Secretary-General of ICSID, dated May 27, 2015; [Annex 32](#), Letter from Gonzalo Flores, Secretary of the Tribunal, to the Parties dated June 1, 2015; [Annex 33](#), E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties forwarding Mr. Fortier's comments, dated June 1, 2015; [Annex 34](#), E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated June 1, 2015; [Annex 35](#), Letter from Claimants to Gonzalo Flores, Secretary of the Tribunal, and Meg Kinnear, Secretary-General of ICSID, dated June 3, 2015; [Annex 36](#), E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, and Meg Kinnear, Secretary-General of ICSID, dated June 3, 2015; [Annex 37](#), E-mail from Respondent to Gonzalo Flores, Secretary of the Tribunal, dated June 16, 2015; [Annex 38](#), First E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties forwarding Mr. Fortier's comments, dated June 18, 2015; [Annex 39](#), E-mail from Respondent to

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to that objection, as to which Respondent fully reserves all of its rights, Respondent requests the reconstituted Tribunal to deliberate on and decide this Application for Reconsideration of the Majority Reconsideration Decision.

In making this Application, Respondent stresses that the issue for decision at this stage is a narrow one. It is not necessary for this Tribunal now to revisit the merits of the Majority Merits Decision. 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 Merits 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.

Respondent respectfully requests a hearing on this Application at the earliest convenient date.

Very truly yours,



George Kahale, III

Enclosures

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Gonzalo Flores, Secretary of the Tribunal, dated June 18, 2015; **Annex 40**, Second E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties forwarding Mr. Fortier's comments, dated June 18, 2015; **Annex 41**, Third E-mail from Gonzalo Flores, Secretary of the Tribunal, to the Parties forwarding Mr. Fortier's comments, dated June 18, 2015; **Annex 42**, Decision on the Proposal to Disqualify a Majority of the Tribunal dated July 1, 2015.