

Note by Arbitrator Kenneth Keith and Arbitrator Yves Fortier

1. We add this note as a comment on Part III of the dissenting opinion of Arbitrator Andreas Bucher.
2. The Respondent's Application which is to be decided by the Tribunal is "for Reconsideration of the Tribunal's Decision of March 10, 2014 (the Majority Reconsideration Decision...)". The Respondent stressed 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" (see para 13 above for the remainder of that passage). Given the limited scope of the Application before the Tribunal we cannot see that the passage of Arbitrator Bucher's dissent headed "The Tribunal's Decision" is relevant.
3. We also need to make it clear that we do not interpret the 2013 Decision in the way Arbitrator Bucher does. Nor indeed do the Parties, as he indeed recognises (paras 17-19 of his opinion). The Tribunal ruled that the Respondent had acted unlawfully by reference to Article 6(c) of the BIT. That requires that the measures be taken against just compensation. The Tribunal said this about that provision:

The requirements [in Article 6(c)] 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. (para 362)

Having reviewed the evidence and the Parties' submissions, the Tribunal concluded that the Respondent had breached its obligation to negotiate in good faith for compensation for its taking of the assets on the basis of market value as required by the BIT (para 401). It included that conclusion in its Decision (para 404(d)).

With respect, Arbitrator Bucher errs when he writes in paragraph 11 of his dissenting opinion that the Claimants made no claim in their Request for Relief for a declaration that

Respondent breached its obligation to negotiate in good faith for compensation based on market value. In their Request for Relief, the Claimants asked the Tribunal for a declaration “that Venezuela has breached ... Article 6 of the Treaty by unlawfully [emphasis added] expropriating ...” their investments in Venezuela. This is precisely what the majority found in paragraph 404(d) of the Decision.

[Signed]

[Signed]

Mr L. Yves Fortier, CC, QC
Arbitrator

Judge Kenneth J. Keith
President