

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.
AND
CONOCOPHILLIPS COMPANY
THE CLAIMANTS

v.

BOLIVARIAN REPUBLIC OF VENEZUELA
THE RESPONDENT

ICSID CASE No. ARB/07/30

DECISION ON JURISDICTION AND THE MERITS

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: 3 September, 2013

TABLE OF CONTENTS

| | |
|---|------------|
| TABLE OF CONTENTS | II |
| THE PARTIES' REPRESENTATIVES | VI |
| GLOSSARY OF ABBREVIATIONS | VII |
| I. INTRODUCTION | 1 |
| II. THE PARTIES | 3 |
| A. THE CLAIMANTS..... | 3 |
| B. THE RESPONDENT | 4 |
| C. THE PARTIES | 5 |
| III. PROCEDURAL HISTORY | 5 |
| IV. THE FACTUAL BACKGROUND TO THE DISPUTE | 19 |
| A. THE VENEZUELAN OIL INDUSTRY AND THE PRE-EXISTING LEGAL FRAMEWORK | 19 |
| B. THE OIL OPENING | 22 |
| C. THE PETROZUATA PROJECT..... | 23 |
| (1) Overview of the Petrozuata Project | 23 |
| (2) The Senate and Bicameral Reports | 24 |
| (3) The Congressional Authorisation | 26 |
| (4) Further Amendments to the Income Tax Law | 27 |
| (5) The Petrozuata Association Agreement..... | 28 |
| (6) Financing of the Petrozuata Project | 30 |
| (7) The Orinoco Belt Royalty Agreement | 31 |
| (8) Implementation of the Petrozuata Project and Commencement of Production | 32 |
| (9) The Insertion of the Claimant CPZ into the Chain of Ownership | 32 |
| D. THE HAMACA PROJECT | 33 |
| (1) Overview of the Hamaca Project | 33 |
| (2) Initial Discussions among Phillips and PdVSA Regarding the Hamaca Project.. | 34 |
| (3) The Congressional Authorisation of the Conditions for the Hamaca Project..... | 34 |
| (4) The Hamaca Association Agreement..... | 36 |
| (5) The Orinoco Belt Royalty Agreement | 38 |
| (6) Financing of the Hamaca Project..... | 39 |
| (7) Implementation of the Hamaca Project and Commencement of Production..... | 39 |
| (8) The Insertion of the Claimant CPH Into the Chain of Ownership..... | 40 |

| | | |
|-----------|---|-----------|
| E. | THE COROCORO PROJECT..... | 40 |
| | (1) Overview of the Corocoro Project | 40 |
| | (2) The Congressional Authorisation of Exploration at Risk in New Areas and Profit Sharing Agreements..... | 41 |
| | (3) Royalty Agreement for the New Areas..... | 42 |
| | (4) The Association Agreement for the Corocoro Project..... | 43 |
| | (5) Declaration of Commerciality With Respect to the Corocoro Project | 44 |
| | (6) The Corocoro Development Plan..... | 44 |
| | (7) The Insertion of the Claimant CGP Into the Chain of Ownership..... | 45 |
| F. | THE FACTS GIVING RISE TO THE DISPUTE | 45 |
| | (1) Election of President Chávez and Promulgation of the Investment and New Hydrocarbons Laws | 45 |
| | (a) Election of President Chávez | 45 |
| | (b) Promulgation of the Investment Law | 45 |
| | (c) Promulgation of the New Hydrocarbons law and Execution of the Procedure for Payment of Exploitation Tax (Royalty)..... | 46 |
| | (2) Measures Taken to Increase the Applicable Royalty Rate | 47 |
| | (a) Amendment of the Orinoco Belt Royalty Agreements | 47 |
| | (b) Imposition of a Higher Royalty Rate on Production of Between 120,000 and 145,000 Barrels Per Day | 48 |
| | (c) Further Increase in the Effective Royalty Rate - the Extraction Tax | 48 |
| | (3) Increase in the Income Tax Rate for Extra-Heavy Oil Projects..... | 49 |
| | (4) The Nationalisation Decree and Venezuela’s Taking of the Claimants’ Interests in the Petrozuata, Hamaca and Corocoro Projects | 49 |
| | (a) Draft Contracts for Conversion of the Projects Into Empresas Mixtas..... | 49 |
| | (b) The Claimants Notify the Respondent of the Existence of a Dispute Under the Investment Law and the Treaty | 50 |
| | (c) Promulgation of Decree Law 5,200 | 51 |
| | (d) Negotiations Regarding the Claimants’ Interests in the Project..... | 52 |
| | (e) PdVSA Assumes Operational Control of the Projects | 52 |
| | (f) Expiry of the Period for Reaching Agreement Under the Nationalisation Decree..... | 52 |
| V. | SUMMARY OF THE PARTIES’ POSITIONS..... | 54 |
| A. | THE CLAIMANTS’ REQUESTS FOR RELIEF..... | 54 |
| B. | THE RESPONDENT’S REQUESTS | 56 |

| | |
|---|-----------|
| VI. JURISDICTION | 57 |
| A. INTRODUCTION | 57 |
| B. ARTICLE 22 OF THE INVESTMENT LAW | 58 |
| (1) The Starting Point | 61 |
| (2) The Applicable Law | 62 |
| (3) The Text of Article 22 | 63 |
| C. ARTICLE 9 OF THE BILATERAL INVESTMENT TREATY BETWEEN THE NETHERLANDS AND VENEZUELA | 73 |
| (1) “Corporations of Convenience” | 75 |
| (2) Indirect Investment | 82 |
| (3) Ratione Temporis | 83 |
| D. CONCLUSION | 84 |
| VII. MERITS | 85 |
| A. CLAIMS FOR BREACH OF THE OBLIGATION OF FAIR AND EQUITABLE TREATMENT: ARTICLES 3 AND 4 OF THE NETHERLANDS-VENEZUELA TREATY | 85 |
| (1) Introduction | 85 |
| (2) The Relationship between Articles 3 and 4 | 87 |
| (3) The Effect of Article 4 | 88 |
| (4) The Ordinary Meanings and Purposes of Article 3 and Article 4 | 90 |
| (5) The Exceptions to Article 3 and Article 4 | 92 |
| (6) Effective Interpretation | 92 |
| (7) The Broader Context | 93 |
| (8) Conclusion Regarding the Scope of Article 3 and of Article 4 | 95 |
| (9) Do the Measures Adopted by Venezuela Relating to Taxes and Royalties Fall Within Article 4 of the BIT? | 97 |
| (a) The Relevant Provisions of Venezuelan Law and Related Agreements | 97 |
| (b) The Presentation of the Claimants’ Case With Respect to the Relevant Measures | 99 |
| (c) The Tribunal’s Conclusion That the Relevant Measures Fall Within Article 4 102 | |
| B. CLAIMS FOR BREACH OF THE OBLIGATION NOT TO EXPROPRIATE UNDER ARTICLE 6 OF THE NETHERLANDS-VENEZUELA TREATY | 103 |
| (1) The date of valuation of the investment taken by the Respondent | 105 |
| (2) Did the Respondents taking of the Claimants’ investments breach an “undertaking” in terms of Article 6(b) of the BIT? | 109 |

| | |
|--|------------|
| (3) Did the measures taken by the Respondent between 2004 and 2007 amount to a single taking and, as a consequence, was the taking unlawful, with the valuation of the investments being measured by applying the original royalty rate and income tax rate? | 111 |
| (4) Did the Respondent in the negotiations about compensation negotiate in good faith by reference to the standard in Article 6(c) of the BIT?..... | 114 |
| (a) The submissions of the Parties | 114 |
| (b) The Tribunal’s assessment of the evidence relating to the negotiations | 121 |
| VIII. COSTS | 130 |
| IX. THE TRIBUNAL’S DECISION..... | 130 |

THE PARTIES' REPRESENTATIVES

THE 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

THE 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

GLOSSARY OF ABBREVIATIONS

| | |
|--|---|
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings |
| Association Agreement for the Corocoro Project | Association Agreement between Corporación Venezolana del Petróleo, S.A. and Conoco Venezuela B.V. dated 10 July 1996 |
| BPD | Barrels per day |
| Bicameral Report | Report Approved by the Bicameral Commission for the Study of the Strategic Associations of PdVSA concerning the Projects Maraven-Conoco and Maraven-Total-Itochu-Maraveni for the Exploitation and Upgrading of Extra-Heavy Petroleum of the Orinoco Oil Belt, dated 12 August 1993 |
| BIT or Treaty | Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela signed on 22 October 1991 |
| Claimants | ConocoPhillips Hamaca B.V., ConocoPhillips Petrozuata B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company, collectively |
| Cl. Mem. | The Claimants' Memorial dated 15 September 2008 |
| Closing Submissions | The hearing at which the Parties' presented their closing submissions held on 21 and 23 July 2010 |
| Cl. Reply | The Claimants' Reply Memorial dated 2 November 2009 |
| Congressional Authorisation for New Areas | Agreement Authorising the Execution of Association Agreements for Exploration at Risk of New Areas and Production of Hydrocarbons under the Shared Profits System, Official Gazette No. 35,754, published 17 July 1995 |
| CGP | ConocoPhillips Gulf of Paria B.V. |
| CPH | ConocoPhillips Hamaca B.V. |
| CPZ | ConocoPhillips Petrozuata B.V. |
| Enabling Law | The Law that Authorizes the President of the Republic to Issue Decrees Having Rank, |

| | |
|------------------------------|---|
| | Value, and Force of Law on the Matters Delegated Hereby, Official Gazette No. 38,617, published 1 February 2007 |
| Ex. C- | The Claimants' Exhibit |
| Ex. R- | The Respondent's Exhibit |
| Hamaca Association Agreement | Association Agreement between Corpoguanipa, S.A., Arco Orinoco Development Inc., Texaco Orinoco Resources Company, and Phillips Petroleum Company Venezuela Limited dated 9 July 1997 |
| Hamaca Authorisation | Agreement Approving the Framework of Conditions of the Association Agreement for the Production, Transportation and Upgrading of Extra-Heavy Crude to Be Produced in the Hamaca Area of the Orinoco Oil Belt, as well as the Marketing of the Upgraded Crude and Other Products Generated During the Process of Production and Upgrading of Such Crudes, to Be Entered into between Corpoven, S.A., a Subsidiary of Petróleos de Venezuela, and the Companies Atlantic Richfield Co. (ARCO), Phillips Petroleum Company and Texaco, Inc.), Official Gazette No. 36,209, published 20 May 1997 |
| Hamaca Bicameral Report | Report of the Bicameral Energy and Mines Committee of the Congress of the Republic of Venezuela on the Association Agreement among Corpoven S.A., Atlantic Richfield Company, Phillips Petroleum and Texaco, Inc. for the Exploration, Exploitation, Production, Blending, Processing, Transportation, Refining, Upgrading and Marketing of Extra-Heavy Crude from the Hamaca Area of the Orinoco Oil Belt, May 1997 |
| Hearing | The hearing on jurisdiction and the merits held from 31 May to 12 June 2010 |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of other States dated 18 March 1965 |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |

| | |
|--|--|
| Institution Rules | ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings |
| Investment Law | The Venezuelan Law on the Promotion and Protection of Investments, Decree No. 356, Official Gazette No. 5,390 (Extraordinary) published on 22 October 1999 |
| Law on the Effects of the Process of Migration | Law on the Effects of the Process of Migration into Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration at Risk and Profit Sharing Agreements, Official Gazette No. 38,785, published on 8 October 2007 |
| Ministry | The Ministry of Energy and Mines or the Ministry of Energy and Petroleum or the People's Ministry of Energy and Petroleum |
| New Hydrocarbons Law | Decree with Force of the Organic Hydrocarbons Law, Decree No. 1,510, Official Gazette No. 37,323, published 13 November 2001 |
| Nationalisation Law | Organic Law that Reserves to the State the Industry and the Trade of Hydrocarbons, Extraordinary Official Gazette No. 1,769, published 29 August 1975 (entered into force on 1 January 1976) |
| Nationalisation Decree or Decree 5,200 | Decree Having the Rank, Value and Force of Law of Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Risk and Profit Sharing Exploration Agreements, Decree No. 5.200, Official Gazette No. 38.632, published 26 February 2007 |
| Offtake Agreement | Contract for the Purchase and Sale of Upgraded Extra Heavy Crude Oil (F.O.B.) between Petrolera Zuata, Petrozuata C.A. as Seller and Conoco Inc., as Buyer, dated 27 June 1997 |
| Orinoco Belt Royalty Agreement | Royalty Agreement of the Strategic Associations of the Orinoco Oil Belt between the Ministry of Energy and Mines and Petróleos de Venezuela, S.A. dated 29 May 1998 |

| | |
|---|---|
| PdVSA | Petróleos de Venezuela, S.A. |
| Petrozuata C.A. | Petrolera Zuata, Petrozuata C.A. |
| Petrozuata Association Agreement | Association Agreement between Maraven, S.A. and Conoco Orinoco Inc., as modified 18 June 1997 |
| Petrozuata Authorisation | Authorisation of the Association Agreement between Maraven, S.A. and Conoco, Inc., Official Gazette No. 35,393, published 9 September 1993 |
| Procedure for Payment of Exploitation Tax (Royalty) | Procedure for Payment of Exploitation Tax (Royalty) for Extra Heavy Crude Produced and Sulfur Extracted by Petrolera Zuata, Petrozuata C.A., between Petrolera Zuata, Petrozuata C.A. and the Ministry of Energy and Mines, 14 January 2002 |
| RFA | The Claimants' Request for Arbitration dated 2 November 2007 |
| Resp. C-Mem. | Counter-Memorial of the Bolivarian Republic of Venezuela dated 27 July 2009 |
| Resp. Rej. | Rejoinder of the Bolivarian Republic of Venezuela dated 1 February 2010 |
| Resp. Mem. on Objections to Jurisdiction | Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction dated 1 December 2008 |
| Royalty Agreement for the New Areas | Royalty Agreement of the Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons Under the Shared Earnings Scheme between the Ministry of Energy and Mines and Petróleos de Venezuela, S.A., dated 5 December 1995 |
| Senate Report | Senate Permanent Environmental and Land Use Planning Committee, Association between the Companies Maraven and Conoco for the Exploitation and Upgrading of Extra-Heavy Crude from the Orinoco Belt, April 1993 |
| Tr. [Day]:page:line | Transcript of the Hearing |

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of (a) the Venezuelan Law on the Promotion and Protection of Investments (*Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones*) published on 22 October 1999 (the “Investment Law”);¹ and (b) the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela signed on 22 October 1991 (the “BIT” or the “Treaty”),² and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 (the “ICSID Convention”).
2. The dispute concerns the interests of Claimants in two extra-heavy oil projects located in the region in Venezuela known as the Orinoco Oil Belt (*Faja Petrolífera del Orinoco*) — the “Petrozuata Project” and the “Hamaca Project”, and in an offshore project for the extract of light to medium crude oil — the “Corocoro Project”.
3. The Petrozuata Project was conducted through the Petrozuata Association, which was granted the rights to engage in the exploration, development, production, exploitation, transportation and upgrading of extra-heavy crude oil, and the marketing of the resulting crude oils and products, in the Zuata area of the Orinoco Oil Belt.³
4. The Hamaca Project was conducted through the Hamaca Association, which held the rights to engage in the exploration, development, production, exploitation, blending, industrialisation, transportation, refining and upgrading and commercialisation of extra-heavy

¹ Ex. C-1 and Ex. R-12, *Decreto N° 356, Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones* (Decree No. 356, Decree with Rank and Force of Law on the Promotion and Protection of Investments) (the “Investment Law” or the “Decree Law”), Official Gazette No. 5,390 (Extraordinary), published 22 October 1999.

² Ex. C-2 and Ex. R-13, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (with Protocol) signed on 22 October 1991, entered into force 1 November 1993, 1788 U.N.T.S. 45.

³ The Claimants’ Request for Arbitration dated 2 November 2007 (“RFA”) ¶ 41(a).

crude oil, and the transportation and use or disposal of by-products, in the Hamaca area of the Orinoco Oil Belt.⁴

5. The Corocoro Project was one of eight joint ventures for the exploration and production of conventional crude oil under Profit Sharing Agreements.⁵ The Corocoro Project was conducted through the Corocoro Development Consortium, which had the rights to explore, discover, evaluate, develop and exploit commercial hydrocarbons reservoirs within the Gulf of Paria West, including the handling of any production from such reservoirs and the transportation of production.⁶

6. The principal events on which the Claimants base their claims for compensation under the Investment Law and the Treaty include the following:⁷

- a. Venezuela through various actions increased the effective royalty rate applicable to the extra-heavy oil production of the Petrozuata and Hamaca Associations from one percent to 33.33 percent.
- b. Venezuela amended the tax law so that the tax on income derived from extra-heavy oil production was raised from 34 percent to 50 percent.
- c. Venezuela by Decree Law (i) mandated PdVSA to assume operational control of oil projects, including the Petrozuata, Hamaca and Corocoro Projects, and (ii) provided for cancellation of the exploration, production and commercialisation rights of the Associations and the Corocoro Project, and the transfer of such rights to mixed companies controlled by PdVSA — “*Empresas Mixtas*” — on terms to be agreed by 26 June 2007. The compensation provided for in the Decree Law was a minority interest in the *Empresas Mixtas*.

⁴ RFA ¶ 41(b).

⁵ Counter-Memorial of the Bolivarian Republic of Venezuela dated 27 July 2009 (“Resp. C-Mem”) ¶ 15.

⁶ RFA ¶ 40(c).

⁷ RFA ¶¶ 9-13.

- d. On 1 May 2007, a PdVSA subsidiary took control over operations at the Projects.
- e. On 26 June 2007, the four-month period for reaching agreement set in the Decree Law expired and Venezuela nationalised ConocoPhillips' interests in the Projects.

The factual context and details of these measures are discussed further at Section IV.F below.

II. THE PARTIES

A. THE CLAIMANTS

7. The Claimants are ConocoPhillips Petrozuata B.V. ("CPZ"), ConocoPhillips Hamaca B.V. ("CPH"), ConocoPhillips Gulf of Paria B.V. ("CGP"), and ConocoPhillips Company (collectively, "ConocoPhillips" or the "Claimants").

- a. CPZ is a limited liability company incorporated under the laws of the Kingdom of the Netherlands ("the Netherlands").⁸ Its registered office is at:

Zurich Tower (15th Floor)
Muzenstraat 89
2511 WB Den Haag
The Netherlands

CPZ held, through Petrolera Zuata, Petrozuata C.A., a 50.1 percent stake in the Petrozuata Association.⁹

- b. CPH is a limited liability company incorporated under the laws of the Netherlands.¹⁰ Its registered office is at:

Zurich Tower (15th Floor)
Muzenstraat 89
2511 WB Den Haag
The Netherlands

⁸ RFA ¶¶ 1, 18.

⁹ RFA ¶ 41(a).

¹⁰ RFA ¶¶ 1, 19.

CPH held through Hamaca Holding LLC, a Delaware company, and Phillips Petroleum Company Venezuela Ltd, a Bermuda company, a 40 percent stake in the Hamaca Association.¹¹

- c. CGP is a limited liability company incorporated under the laws of the Netherlands.¹² Its registered office is at:

Zurich Tower (15th Floor)
Muzenstraat 89
2511 WB Den Haag
The Netherlands

CGP held, through Conoco Venezuela C.A., a 32.2075 percent stake in the Corocoro Development Consortium.¹³

- d. ConocoPhillips Company is a corporation incorporated under the laws of the State of Delaware with its main office located at:¹⁴

600 North Dairy Ashford
Houston, TX 77079
United States of America

ConocoPhillips Company held interests in the Petrozuata, Hamaca and Corocoro Projects, through its subsidiaries CPZ, CPH and CGP.¹⁵

B. THE RESPONDENT

8. The Respondent is the Bolivarian Republic of Venezuela (the “Respondent” or “Venezuela”).

¹¹ RFA ¶ 41(b); The Claimants’ Reply Memorial dated 2 November 2009 (“Cl. Reply”) ¶ 17i.

¹² RFA ¶¶ 1, 20.

¹³ RFA ¶ 41(c).

¹⁴ RFA ¶¶ 1, 21.

¹⁵ The Claimants’ Memorial dated 15 September 2008 (“Cl. Mem.”) ¶ 274.

C. THE PARTIES

9. The Claimants and the Respondent are hereinafter collectively referred to as the “Parties”. The Parties’ respective representatives and their addresses are listed above.

III. PROCEDURAL HISTORY

10. On 2 November 2007, the Claimants submitted to the Centre a Request for Arbitration against Venezuela pursuant to Article 36 of the ICSID Convention.

11. The proceeding was brought under (a) the Venezuelan Law on the Promotion and Protection of Investments (*Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones*) published on 22 October 1999; and (b) the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela signed on 22 October 1991.

12. On 13 December 2007, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the Institution Rules. Pursuant to Rule 7(d) of the Institution Rules, the Secretary-General invited the Parties to proceed as soon as possible with the constitution of the tribunal in accordance with Articles 37 to 40 of the ICSID Convention.

13. By letter dated 12 February 2008, the Claimants requested that — in the absence of an agreement on the procedure for constitution of the tribunal — the tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention. By separate letter to the Respondent, the Claimants nominated, Mr L. Yves Fortier, CC, QC, a national of Canada, as arbitrator and proposed the appointment of Mr Emmanuel Gaillard, a national of France, as President of the Tribunal.

14. By letter dated 20 February 2008, the Centre notified the Parties that Mr Fortier had accepted his appointment as arbitrator and provided a copy of Mr Fortier’s declaration made in accordance with ICSID Arbitration Rule 6(2).

15. By letter dated 11 March 2008, the Respondent agreed that the tribunal would be composed of three arbitrators, the first two to be appointed by the parties and the president to be

appointed by agreement of the parties, in consultation with the two party-appointed arbitrators. The Respondent noted that it did not agree with the proposed appointment of Mr Gaillard as president of the tribunal, and requested additional time to designate its party-appointed arbitrator.

16. By letter dated 13 March 2008, the Claimants objected to the Respondent's request for the extension of the deadline for appointment of its party-appointed arbitrator. The Claimants also indicated that they did not consent to the Respondent's proposed procedure for appointment of the president of the tribunal and requested that, in accordance with Article 38 of the ICSID Convention, the Chairman of the Administrative Council appoint an arbitrator on behalf of the Respondent and a president of the tribunal.

17. By letter dated 14 March 2008, the Centre informed the Parties that, pursuant to Article 38 of the ICSID Convention, they would soon be consulted with respect to the appointment of the remaining arbitrators. The Centre also confirmed that, until the process for appointment under Article 38 was completed, the missing arbitrators could be appointed in accordance with Article 37(2)(b) of the Convention.

18. On 31 March 2008, the Respondent designated Sir Ian Brownlie, CBE, QC, a national of the United Kingdom, as arbitrator. By letter dated 3 April 2008, ICSID informed the Parties that Sir Ian Brownlie had accepted his appointment as arbitrator and provided a copy of Sir Ian Brownlie's declaration and accompanying statement made in accordance with ICSID Arbitration Rule 6(2).

19. By letter dated 15 April 2008, the Respondent stated that it was hopeful that the Parties would reach agreement on an appointee for president of the tribunal and suggested that ICSID refrain for a reasonable period of time from proposing a candidate. On 16 April 2008, the Claimants objected to any further delay in the appointment of a president of the tribunal and urged the Chairman of the Administrative Council to proceed with that appointment. On 2 May 2008, each Party informed the Centre that no agreement had been reached for the appointment of a presiding arbitrator.

20. By letter dated 8 May 2008, the Centre informed the Parties that the Permanent Court of Arbitration would be asked to provide the Chairman of the ICSID Administrative Council with a recommendation on the appointment of the presiding arbitrator.
21. On 29 May 2008, the Secretary-General of the Permanent Court of Arbitration invited the Parties to provide their views regarding the profile of an appropriate presiding arbitrator. Each Party provided its observations on 5 June 2008.
22. By letter dated 13 June 2008, the Secretary-General of the Permanent Court of Arbitration informed the Parties of its intention to recommend to the Chairman of the Administrative Council that Judge Kenneth Keith, a national of New Zealand, be appointed as presiding arbitrator, and invited them to make comments on this proposal.
23. On 1 July 2008, the Secretary-General of the Permanent Court of Arbitration recommended to the Chairman of the Administrative Council that he appoint Judge Keith as the presiding arbitrator. On 11 July 2008, the Centre informed the Parties that the Chairman of the Administrative Council had appointed Judge Keith as the president of the tribunal. By letter dated 18 July 2008, Judge Keith accepted his appointment as the presiding arbitrator.
24. By letter dated 23 July 2008, the Centre informed the Parties that all of the arbitrators had accepted their appointments and that, pursuant to ICSID Arbitration Rule 6(1), the Tribunal was deemed to have been constituted and the proceeding to have begun on that date. Mr Gonzalo Flores, ICSID, was designated by the Secretary-General of ICSID to serve as the Secretary of the Tribunal.
25. On 10 September 2008, Ms Katia Yannaca-Small, ICSID, was appointed as the Secretary of the Tribunal.
26. The First Session of the Tribunal was held at the Peace Palace in The Hague on 13 September 2008. Present at the first session were:

Members of the Tribunal

Judge Kenneth Keith, *President*
Mr L. Yves Fortier, CC, QC, *Arbitrator*
Sir Ian Brownlie, CBE, QC, *Arbitrator*

ICSID Secretariat

Ms Katia Yannaca-Small, *Secretary of the Tribunal*

For the Claimants

Prof. James Crawford, SC, *Matrix Chambers*
Mr Jan Paulsson, *Freshfields Bruckhaus Deringer LLP*
Ms Lucy F. Reed, *Freshfields Bruckhaus Deringer LLP*
Mr Alexander A. Yanos, *Freshfields Bruckhaus Deringer LLP*
Mr Jason Doughty, *ConocoPhillips*

For the Respondent

Mr George Kahale, III, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Mark O' Donoghue, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Miriam Harwood, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Gabriela Álvarez Ávila, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Hildegard Rondón de Sansó, *Bolivarian Republic of Venezuela*
Mr Armando Giraud, *Bolivarian Republic of Venezuela*
Ms Moreeliec Peña, *Bolivarian Republic of Venezuela*

27. During the First Session, the Tribunal determined several procedural matters and, with the Parties' agreement, set the following timetable for briefing: (a) the Claimants' Memorial to be submitted by 15 September 2008; (b) the Respondent's Memorial on Jurisdiction to be submitted by 1 December 2008; (c) the Claimants' Comments on Bifurcation to be submitted by 8 December 2008; and (d) the Respondent's Reply to the Claimants' Comments on Bifurcation to be submitted by 22 December 2008. It was also agreed that the Tribunal's Procedural Order on Bifurcation would be issued by mid-January 2009.

28. The Claimants submitted their Memorial and accompanying materials on 15 September 2008, as scheduled.

29. On 1 December 2008, the Respondent submitted its Memorial on Objections to Jurisdiction, in which the Respondent requested the Tribunal to suspend the proceedings and to determine the Tribunal's jurisdiction as a preliminary matter.

30. The Claimants submitted their observations on the Respondent's bifurcation request on 8 December 2008.
31. The Respondent submitted its reply to the Claimants' comments on the Respondent's request for bifurcation on 22 December 2008.
32. On 23 January 2009, the Tribunal issued Procedural Order No. 1, rejecting the Respondent's application to bifurcate the proceedings. The Tribunal also requested the Parties to consult about the timetable for the filing of further written pleadings and to report to the Tribunal on their proposals.
33. By letter dated 26 January 2009, the Respondent requested that the Tribunal reconsider its decision in Procedural Order No. 1 not to bifurcate the jurisdictional phase of the arbitration from the merits and quantum, and requested a hearing on the issue of bifurcation.
34. On 29 January 2009, the Claimants objected to the Respondent's requests in its letter of 26 January 2009 and submitted that the Tribunal's decision in Procedural Order No. 1 should stand.
35. By letter dated 29 January 2009, the Respondent submitted further observations on its request for reconsideration of Procedural Order No. 1.
36. On 9 February 2009, the Centre informed the Parties that the Tribunal had confirmed its decision in Procedural Order No. 1 and saw no reason to have a hearing on the matter. The Tribunal also requested the Parties to consult about the timetable on the filing of further written pleadings.
37. On 19 February 2009, the Respondent proposed a briefing schedule to the Tribunal. The Claimants made a counter-proposal on 20 February 2009.
38. On 26 February 2009, the Tribunal informed the Parties that it had fixed the following timetable: (a) the Respondent's Counter-Memorial to be filed by 24 July 2009; (b) the Claimants' Reply to be filed by 23 October 2009; and the Respondent's Rejoinder to be filed by 22 January 2010. The Tribunal also confirmed that the hearing dates would be determined at a later stage.

39. Having considered the Parties' observations, the Tribunal, by letter dated 7 May 2009, proposed to hold a two-week hearing in The Hague, from 31 May 2010 to 11 June 2010. These dates were later confirmed by the Tribunal.
40. On 7 July 2009, the Tribunal agreed to the Parties' request of 6 July 2009 to amend the briefing schedule.
41. The Respondent submitted its Counter-Memorial on 27 July 2009.
42. On 24 August 2009, the Claimants submitted their First Request for the Production of Documents. On 28 August 2009, the Tribunal invited the Respondent to provide its comments on the Claimants' First Request for the Production of Documents. On 14 September 2009, the Respondent submitted its Objections and Responses to the Claimants' First Request for the Production of Documents.
43. The Claimants submitted their Reply on the merits on 2 November 2009.
44. By letter of 4 January 2010, the Centre informed the Parties that Sir Ian Brownlie had passed away. Pursuant to Arbitration Rule 10(2), the proceeding was suspended and the Respondent was invited to fill the vacancy in accordance with Arbitration Rule 11(1).
45. By letter dated 29 January 2010, the Respondent appointed Professor Georges Abi-Saab, a national of Egypt, as arbitrator. On 1 February 2010, the Centre informed the Parties that Professor Abi-Saab had accepted his appointment and provided a copy of his declaration made in accordance with Arbitration Rule 6(2). The Centre also confirmed that, in accordance with Arbitration Rule 12, the proceeding had resumed as of that day.
46. One consequence of the replacement of an arbitrator at that stage of the proceedings was that the deliberations of the members of the Tribunal, following the hearings scheduled for May to July 2010, could not begin until early 2011.
47. The Respondent submitted its Rejoinder on 1 February 2010.
48. By letter dated 24 February 2010, the Respondent informed the Tribunal that the Parties had agreed to hold a pre-hearing conference for purposes of discussing hearing procedures.

49. A pre-hearing telephone conference was held on 11 March 2010.
50. On 19 March 2010, the Claimants submitted their Second Request for the Production of Documents.
51. On 23 March 2010, the Tribunal issued Procedural Order No. 2, which established a provisional agenda for the hearing scheduled to take place from 31 May to 12 June 2010. Procedural Order No. 2 also provided that a hearing would be scheduled for the presentation of closing arguments on 21 and 23 July, 2010 in The Hague. Further, Procedural Order No. 2 established a procedure and timetable for the submission of new testimony and documents to be used at the hearing.
52. The Respondent submitted its Objections and Responses to Claimants' Second Request for the Production of Documents on 26 March 2010. On 31 March 2010, the Claimants submitted a reply to the Respondent's Objections and Responses to their 26 March 2010 request for the production of documents.
53. On 31 March 2010, the Claimants filed an Exhibit Submission, introducing additional documents. By email dated 1 April 2010, the Respondent requested the Tribunal to rule on the admissibility of the Claimants' Exhibit Submission. On the same date, the Claimants responded to the Respondent's email.
54. By letter dated 12 April 2010, the Tribunal denied the Claimants' Second Request for the Production of Documents and also convened a telephone conference to be held on 15 April 2010 to discuss the Claimants' Exhibit Submission of 31 March 2010.
55. On 14 April 2010, the Respondent filed its Additional Exhibit Submission consisting of exhibits for possible use at the upcoming hearing.
56. On 15 April 2010, a telephone conference was held. Following the telephone conference, the Tribunal set deadlines for the Respondent to reply to the Claimants' Exhibit Submission of 31 March 2010 and to reply to the Claimants' Additional Exhibit Submission due that day.
57. Pursuant to Procedural Order No. 2, on 15 April 2010, the Claimants submitted supplemental testimony and made a further Exhibit Submission.

58. On 30 April 2010, the Respondent made a Partial Submission of Additional Exhibits.
59. On 17 May 2010, the Respondent made a Submission of Additional Testimony and Documents in Response to Claimants' Supplemental Testimony and Documents Submitted on 15 April 2010.
60. On 26 May 2010, the Claimants submitted an update to their experts' Valuation Reports of Claimants' Investments in Venezuela, as well as a New Legal Authorities Submission.
61. On 28 May 2012, the Parties submitted their Opening Skeletons, as envisaged in Procedural Order No 2.
62. The hearing on jurisdiction and merits was held in The Hague from 31 May to 12 June 2010. The following individuals were present at the hearing:

Members of the Tribunal

Judge Kenneth Keith, *President*
Mr L. Yves Fortier, CC, QC, *Arbitrator*
Prof. Georges Abi-Saab, *Arbitrator*

ICSID Secretariat

Ms Katia Yannaca-Small, *Secretary of the Tribunal*

For the Claimants

Prof. James Crawford, *SC Matrix Chambers*
Mr Jan Paulsson, *Freshfields Bruckhaus Deringer LLP*
Mr Noah Rubins, *Freshfields Bruckhaus Deringer LLP*
Ms Lucy F. Reed, *Freshfields Bruckhaus Deringer LLP*
Mr D. Brian King, *Freshfields Bruckhaus Deringer LLP*
Mr Alexander A. Yanos, *Freshfields Bruckhaus Deringer LLP*
Mr Giorgio Mandelli, *Freshfields Bruckhaus Deringer LLP*
Ms Jessica Bannon Vanto, *Freshfields Bruckhaus Deringer LLP*
Ms Lucy Martinez, *Freshfields Bruckhaus Deringer LLP*
Mr Phillip Riblett, *Freshfields Bruckhaus Deringer LLP*
Ms Ruth Teitelbaum, *Freshfields Bruckhaus Deringer LLP*
Mr Daniel Chertudi, *Freshfields Bruckhaus Deringer LLP*
Mr Claude Stansbury, *Freshfields Bruckhaus Deringer LLP*
Ms Janet Kelly, *ConocoPhillips*
Mr Clyde Lea, *ConocoPhillips*
Mr Jason Doughty, *ConocoPhillips*

Mr Fernando Ávila, *ConocoPhillips*
Ms Laura Robertson, *ConocoPhillips*
Ms Angela McGinnis, *ConocoPhillips*

For the Respondent

Mr George Kahale, III, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Benard V. Preziosi Jr., *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Miriam Harwood, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Gabriela Álvarez Ávila, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Fernando Tupa, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Kabir Duggal, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Bernardo M Cremades Román, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Cristina Ferraro, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Lilliana Dealbert, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Dr Gustavo Álvarez, *Bolivarian Republic of Venezuela*
Dr Bernard Mommer, *Bolivarian Republic of Venezuela*
Dra Hildegard Rondón de Sansó, *Bolivarian Republic of Venezuela*
Dra Beatrice Sansó, *Bolivarian Republic of Venezuela*
Dr Joaquín Parra, *Bolivarian Republic of Venezuela*
Dr Armando Giraud, *Bolivarian Republic of Venezuela*
Dra Moreeliec Peña, *Bolivarian Republic of Venezuela*
Dra Natalia Linares, *Bolivarian Republic of Venezuela*

63. On 12 June 2010, the Tribunal issued Procedural Order No. 3, which required each Party by 16 July 2010 to submit a skeleton of the issues to be addressed at the hearing to be held on 21 and 23 July 2010. Procedural Order No. 3 also provided that:

The Tribunal will order a final award at this stage, only if all claims are dismissed. If all claims are not dismissed, then the Tribunal, if it is at all possible, is planning to decide the following issues at this stage:

- (i) All jurisdictional issues;
- (ii) All issues relating to the merits of any claim not dismissed for lack of jurisdiction;
- (iii) The valuation date;
- (iv) The relevance of the compensation provisions in the Petrozuata and Hamaca Projects;
- (v) The discount rate;

(vi) Whatever part of the production profile the Tribunal feels it has heard sufficiently.

64. On 16 June and 12 July 2010, the Respondent submitted further legal authorities. On 16 July 2010, the Claimants submitted further exhibits.

65. The Parties submitted their Post-Hearing Skeletons on 16 July 2010.

66. The hearing on the closing arguments was held in The Hague on 21 July and 23 July, 2010. The following individuals were present at the hearing:

Members of the Tribunal

Judge Kenneth Keith, *President*
Mr L. Yves Fortier, CC, QC, *Arbitrator*
Prof. Georges Abi-Saab, *Arbitrator*

ICSID Secretariat

Ms Katia Yannaca-Small, *Secretary of the Tribunal*

For the Claimants

Prof. James Crawford, SC, *Matrix Chambers*
Mr Jan Paulsson, *Freshfields Bruckhaus Deringer LLP*
Ms Lucy F. Reed, *Freshfields Bruckhaus Deringer LLP*
Mr D. Brian King, *Freshfields Bruckhaus Deringer LLP*
Mr Alexander A. Yanos, *Freshfields Bruckhaus Deringer LLP*
Mr Giorgio Mandelli, *Freshfields Bruckhaus Deringer LLP*
Ms Jessica Bannon Vanto, *Freshfields Bruckhaus Deringer LLP*
Ms Lucy Martinez, *Freshfields Bruckhaus Deringer LLP*
Mr Phillip Riblett, *Freshfields Bruckhaus Deringer LLP*
Ms Ruth Teitelbaum, *Freshfields Bruckhaus Deringer LLP*
Mr Daniel Chertudi, *Freshfields Bruckhaus Deringer LLP*
Ms Janet Kelly, *ConocoPhillips*
Mr Clyde Lea, *ConocoPhillips*
Mr Jason Doughty, *ConocoPhillips*
Mr Fernando Ávila, *ConocoPhillips*
Ms Laura Robertson, *ConocoPhillips*
Ms Angela McGinnis, *ConocoPhillips*
Mr Jared Richards, *ConocoPhillips*

For the Respondent

Mr George Kahale, III, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Benard V. Preziosi Jr., *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Miriam Harwood, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Gabriela Álvarez Ávila, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Eloy Barbará de Parres, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Fernando Tupa, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Kabir Duggal, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Gloria Diaz-Bujan, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms Katiria Calderón, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr Christopher Grech, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Dr Bernard Mommer, *Bolivarian Republic of Venezuela*
Dra Hildegard Rondón de Sansó, *Bolivarian Republic of Venezuela*
Dra Beatrice Sansó, *Bolivarian Republic of Venezuela*
Dr Joaquín Parra, *Bolivarian Republic of Venezuela*
Dr Armando Giraud, *Bolivarian Republic of Venezuela*
Ms Moreeliec Peña, *Bolivarian Republic of Venezuela*
Dra Natalia Linares, *Bolivarian Republic of Venezuela*

67. On 9 September 2010, Ms Janet Whittaker, ICSID, was appointed as Secretary of the Tribunal, following Ms Yannaca-Small departure from ICSID's Secretariat.
68. On 4 October 2011, Mr Fortier wrote to the Secretary-General of ICSID to make the disclosure that the firm of which he was a partner, Norton Rose OR LLP, had announced that it would merge with the firm Macleod Dixon LLP, with effect from 1 January 2012. Mr Fortier stated that it had been brought to his attention as a result of conflict checks that had been conducted that Macleod Dixon LLP had provided and continued to provide legal services to ConocoPhillips Company, and was also acting adverse to the interests of the Respondent in other matters, including in a separate ICSID arbitration. On the same day, the Centre communicated Mr Fortier's disclosure to the Parties.
69. By letter dated 5 October 2011, the Respondent proposed the disqualification of Mr Fortier pursuant to Article 57 of the ICSID Convention.
70. On 6 October 2011, the Centre informed the Parties that the proceeding was suspended in accordance with ICSID Arbitration Rule 9(6).

71. On 12 October 2011, the President of the Tribunal, having consulted with Professor Abi-Saab, set a timetable for the Parties to submit observations and Mr Fortier to furnish explanations as provided for under Arbitration Rule 9.
72. On 13 October 2011, the Respondent made a further submission and provided details of the legal authorities upon which it relied in support of its disqualification proposal.
73. On 14 October 2011, the Parties were requested by Judge Keith and Professor Abi-Saab to submit any observations that they wished to make within the framework of the existing briefing schedule.
74. On 18 October 2011, Mr Fortier informed Judge Keith, Professor Abi-Saab and the Parties of his decision to resign from the firm Norton Rose OR LLP effective as of 31 December 2011. Mr Fortier confirmed that, as of that date, his relationship with the firm would cease entirely.
75. By letter dated 19 October 2011, the Claimants asserted that, in light of Mr Fortier's 18 October 2011 letter, no basis remained for the Respondent's proposal to disqualify Mr Fortier and invited the Respondent to confirm the same.
76. On 19 October 2011, the Respondent stated that it was considering the issue and requested responses to the questions raised in its 13 October 2011 submission.
77. By letter dated 24 October 2011, the Respondent stated that it continued to propose the disqualification of Mr Fortier as an arbitrator.
78. The Claimants submitted their Reply to the Respondent's Disqualification Proposal on 25 October 2011.
79. On 27 October 2011, in view of the Parties' correspondence of 26 October 2011, the Parties were requested to make their further submissions within the timetable established by Judge Keith and Professor Abi-Saab on 12 October 2011.

80. On 28 October 2011, Mr Fortier requested an extension of the date for submission of his explanations. On 31 October 2011, Judge Keith and Professor Abi-Saab granted the extension requested.
81. On 18 November 2011, Mr Fortier submitted his further explanations in connection with the Respondent's disqualification proposal.
82. On 1 December, 2011, the Respondent submitted its final observations in response to the Claimants' submission of 25 October 2011 and Mr Fortier's explanations of 18 November 2011.
83. Claimants submitted their Additional Observations Concerning the Respondent's Disqualification Proposal on 2 December 2011.
84. In their decision dated 27 February 2012, Judge Keith and Professor Abi-Saab rejected the Respondent's proposal for disqualification of Mr Fortier. By letter of even date, the Centre informed the Parties that the proceeding was no longer suspended and had resumed.
85. The challenge and the process leading to its determination had as a consequence a further delay in the deliberation of the members of the Tribunal.
86. On 28 February 2012, the Respondent submitted evidence regarding recent developments that it claimed had a bearing on issues in the case relating to quantum. On the same day, the Claimants requested the Tribunal to rule that the Respondent's submission was inadmissible and otherwise to have an opportunity to respond. Later that day, the Respondent made observations regarding the Claimants' request to declare the Respondent's submission inadmissible. By letter dated 2 March 2012, the Tribunal admitted the Respondent's submission and invited the Claimants to submit observations on the recent developments that the Respondent's submission addressed. On 16 March 2012, the Claimants submitted observations on the Respondent's submission. On 18 March 2012, the Respondent submitted further observations on its submission. On 19 March 2012, the Claimants objected to the Respondent's most recent observations and requested an opportunity to respond. By letter dated 20 March 2012, the Tribunal invited the Claimants to provide any further comments that they might have. On 27 March 2012, the Claimants filed their supplemental observations. On 28 March 2012, the

Respondent indicated that it would be ready to conduct a further hearing on quantum issues should the Tribunal have questions regarding the materials that it had submitted.

87. By letter dated 25 May 2012, the Claimants requested permission from the Tribunal to submit new information. By letter dated 8 June 2012, the Respondent submitted its observations on the Claimants' request. On 4 July 2012, the Tribunal granted the Claimants' request and set a timetable for the Claimants to submit the relevant evidence and for the Respondent to submit a response to that evidence. The Claimants filed their new evidence on 11 July 2012. On 25 July 2012, the Respondent provided its responsive observations. On 3 August and 5 August 2012, the Claimants and the Respondent, respectively, submitted further observations. By letter dated 7 August 2012, the Tribunal indicated that it did not at that time require additional information but would revert to the Parties should the need arise.

88. On 22 October 2012, the Tribunal informed the Parties that it had made significant progress in its decision-making and envisaged issuing findings early in 2013.

89. On 21 November 2012, Mr Gonzalo Flores was re-appointed as Secretary of the Tribunal, following Ms Janet Whittaker's departure from ICSID's Secretariat.

90. By letter of 27 December 2012, Respondent brought to the Tribunal's attention a decision on liability issued on 14 December 2012 in ICSID Case No. ARB/08/5 (*Burlington Resources, Inc. v. Republic of Ecuador*). Claimants' submitted observations to Respondent's letter on 3 January 2013. By letter of 4 January 2013, Respondent replied to Claimants' letter of 3 January 2013.

91. By letter of 11 February 2013, Respondent brought to the Tribunal's attention a decision on jurisdiction issued of 8 February 2013 in ICSID Case No. ARB/10/5 (*Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*). Claimants' submitted observations to Respondent's letter on 18 February 2013 and, on that same date, Respondent submitted a brief reply.

92. By letters of 26 March and 26 July 2013, the Tribunal reported further on the progress made with respect to its deliberation, informing the parties of a medical proceeding undergone

by Professor Georges Abi-Saab and of the impact of such proceeding in the progress of the Tribunal's work.

IV. THE FACTUAL BACKGROUND TO THE DISPUTE

93. This summary provides a general outline of the facts relevant to those aspects of the Parties' dispute that are considered in this Decision.¹⁶ The facts relevant to the remaining issues for consideration by the Tribunal will be addressed in the context of future findings by the Tribunal.

94. Additionally, this summary is not intended to address all of the factual issues of potential relevance. Specifically, it does not exhaustively cover all factual matters arising from the testimony of witnesses given at the hearing. The Tribunal may address additional facts from that testimony or otherwise in the course of its analysis of the Parties' claims.

A. THE VENEZUELAN OIL INDUSTRY AND THE PRE-EXISTING LEGAL FRAMEWORK

95. Venezuela is home to one of the world's largest oil reserves, located in the Orinoco Oil Belt in Eastern Venezuela, north of the Orinoco River.¹⁷ The deposits are of extra-heavy oil, which "is a tar-like substance that acts as a dense liquid underground, but solidifies once brought to the surface, and contains large amounts of sulfur and other impurities".¹⁸

96. The Venezuelan petroleum industry is a strategic sector of vital importance to the national economy.¹⁹ Article 302 of the Venezuelan Constitution gives special recognition to the petroleum industry:²⁰

¹⁶ The Tribunal notes that certain materials have been submitted by both the Claimants and the Respondent. In such instances, no significance should be attached to the Tribunal's citation to one or other of the Party's exhibits.

¹⁷ Cl. Reply ¶ 17a.

¹⁸ Cl. Mem. ¶ 6.

¹⁹ The Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction dated 1 December 2008 ("Resp. Mem. on Objections to Jurisdiction") ¶ 12.

The State reserves to itself, through the pertinent organic law, and for reasons of national convenience, petroleum activity and other industries, operations, services and goods which are in the public interest and of a strategic character.

97. In 1943, Venezuela enacted its first hydrocarbons law (the “1943 Hydrocarbons Law”), which reformed industry regulations and the contractual arrangements between the State and oil companies.²¹ The 1943 Hydrocarbons law instituted a Production Tax, which was set at 16 $\frac{2}{3}$ percent, subject to the possible reduction of the rate in certain circumstances.²²
98. In 1971, the government adopted the Law of Reversion, providing that all Venezuelan oil assets would revert to the State at the end of their terms of concession.²³
99. In 1975, the Venezuelan government enacted the Organic Law That Reserves to the State the Industry and the Trade of Hydrocarbons (the “Nationalisation Law”), nationalising its hydrocarbons sector.²⁴ Pursuant to Article 1 of the Nationalisation Law, which superseded the 1971 Law of Reversion, the State reserved to itself:²⁵

²⁰ Ex. R-16, Constitución de la República Bolivariana de Venezuela, Official Gazette No. 36.860, published 30 December 1999, Art. 302.

²¹ Cl. Mem. ¶ 23, citing the 1943 Hydrocarbons Law as amended in 1955 (Law Partially Reforming the Hydrocarbons Law, Extraordinary Official Gazette No. 471, published 13 October 1955) and in 1967 (*see* Ex. C-50, *Ley de Reforma Parcial de la Ley de Hidrocarburos* (Law Partially Reforming the Hydrocarbons Law), Extraordinary Official Gazette No. 1,149, published 15 September 1967). *See also* Cl. Reply ¶ 17b.

²² Ex. C-50, *Ley de Reforma Parcial de la Ley de Hidrocarburos* (Law Partially Reforming the Hydrocarbons Law), Extraordinary Official Gazette No. 1,149, published 15 September 1967 at Art. 41.

²³ Cl. Mem. ¶ 29.

²⁴ Cl. Reply ¶ 17c.

²⁵ Ex. C-6 and Ex. R-19, *Ley Orgánica que Reserva al Estado la Industria y el Comercio de los Hidrocarburos*, (Organic Law That Reserves to the State the Industry and the Trade of Hydrocarbons), Extraordinary Official Gazette No. 1,769, published 29 August 1975 (entered into force on 1 January 1976) (the “Nationalisation Law”). *See also* Resp. Mem. on Objections to Jurisdiction ¶ 13; Resp. C-Mem. ¶¶ 16–17 (stating also that the 1975 Nationalization Law implemented Article 97 of the 1961 Venezuelan Constitution, which states that: “[t]he State may reserve certain industries, exploitations or services of public interest for reasons of national interest and shall foster the creation and development of a basic heavy industry under its control. The Law shall provide what is relative to the industries promoted and directed by the State”).

[E]verything related to the exploitation of national territory in search of oil, asphalt and other hydrocarbons; the exploitation of fields of the same, the manufacture or refining, transportation through special means and storage; domestic and foreign trade of the exploited and refined substances, and all of the works required for the management thereof, in the terms set forth by this law.

Article 5 provided for an exception in “special cases”, as follows:²⁶

The State shall carry out the activities indicated in Article 1 of this Law directly through the National Executive or through state-owned entities, being able to enter into operating agreements necessary for the better performance of its functions, but in no case shall such transactions affect the essence of the reserved activities.

In special cases and as deemed advisable to the public interests, the National Executive or the mentioned state entities may, during the exercise of the activities indicated above, execute association agreements with private entities wherein the State will have a participation that guarantees the control of such agreements for a fixed term. The prior authorization of both Chambers [of Congress] in a joint session shall be required for the execution of such agreements, under the terms established and once the National Executive has been informed with regard to all aspects related therewith.

100. The 1975 Nationalisation law also mandated the creation of a new national oil company — *Petróleos de Venezuela, S.A.* (“PdVSA”) — whose purpose was to coordinate, supervise and control all oil-related activities in Venezuela, and whose sole Shareholder was and remains the State.²⁷ PdVSA acquired a number of operating subsidiaries, including *Lagoven, S.A.* (“Lagoven”), *Maraven, S.A.* (“Maraven”) and *Corpoven, S.A.* (“Corpoven”).²⁸ As of 1978, Corpoven was responsible for the Machete region and, subsequently, the Hamaca region; Maraven, the Zuata region; and Lagoven, the Cerro Negro region.²⁹

²⁶ Ex. C-6, Nationalisation Law, Art. 5. *See also* Cl. Mem. ¶ 32; Resp. Mem. on Objections to Jurisdiction ¶¶ 14–15; and Resp. C-Mem. ¶ 18.

²⁷ Ex. C-6 and Ex. R-19, Nationalisation Law, Art. 6. *See also* Cl. Reply ¶ 17c.

²⁸ Cl. Mem. ¶ 31.

²⁹ Cl. Mem. ¶ 35. As of 1 January 1998, PdVSA merged Lagoven and Maraven into Corpoven, which was renamed PdVSA *Petróleo y Gas, S.A.* It was later renamed PdVSA *Petróleo, S.A.* *See* Cl. Mem. ¶ 78, fn. 121.

101. After the passage of the 1975 Nationalisation Law, PdVSA and its subsidiaries carried out activities in the Venezuelan petroleum industry largely on their own, without the equity participation of private parties, for about the next 15 years.³⁰

B. THE OIL OPENING

102. Due, *inter alia*, to a lack of the technology required for exploiting heavy and extra-heavy oil and the high investment costs, Venezuela was unable properly to commercialise its large oil reserves in the Orinoco Oil Belt,³¹ or to explore oil production in new areas. In order to improve Venezuela's oil production, it was considered necessary to: (a) encourage private investment in the oil sector; (b) rejuvenate existing fields; (c) develop Venezuela's oil resources of extra-heavy crude oil; and (d) explore new fields of light and medium crude.³²

103. The *Apertura Petrolera* — or “Oil Opening” — was intended to pursue these objectives by enabling foreign investors to invest in the Venezuelan oil industry.³³ The exception for associations in “special cases” in Article 5 of the 1975 Nationalisation Law provided the opening for foreign companies to enter the industry.³⁴

104. Accordingly, to facilitate investment in the Venezuelan oil industry and to make it more internationally competitive, various economic reforms were made.³⁵ As set forth below, these reforms included: (1) the reduction in the income tax rate such that participants in vertically integrated heavy and extra-heavy oil projects would be subject to the general corporate tax rate

³⁰ Resp. Mem. on Objections to Jurisdiction ¶ 16.

³¹ Cl. Mem. ¶¶ 37–38; Cl. Reply ¶ 17d. *See also* Ex. C-66, PdVSA Presentation by Carlos Jordá, *The Outlook for Heavy Crude Oil Business Opportunities*, February 1998.

³² Cl. Mem. ¶ 39 (referencing Ex. C-59, Bernard Mommer, *The Political Role of National Oil Companies in Exporting Countries: The Venezuelan Case*, Oxford Institute for Energy Studies, September 1994 at 18–23). *See also* Cl. Reply ¶ 17d, fn. 6 (“The *Apertura* also sought development of ‘New Areas,’ including offshore reserves”).

³³ Cl. Mem. ¶¶ 39–43. *See also* Cl. Reply ¶ 17g.

³⁴ Resp. C-Mem. ¶ 19.

³⁵ *See* Ex. C-66 (mentioning “Fiscal incentives” among the changes made). *See also* Cl. Mem. ¶ 46.

rather than the rate applicable to other oil activities; and (2) the temporary reduction of the royalty rate applicable to such projects.³⁶

105. With respect to the income tax rate, in 1991, the Venezuelan Congress enacted amendments to the income tax law, reducing the applicable tax rate for vertically integrated heavy and extra-heavy oil projects in the Orinoco Belt. Accordingly, projects involving both extraction and refining of petroleum would be subject to the corporate income tax rate (then 30 percent) rather than the rate applicable to upstream projects involving the extraction of light and medium crude oil (67.7 percent).³⁷

C. THE PETROZUATA PROJECT

(1) Overview of the Petrozuata Project

106. The Petrozuata Project was a vertically integrated project in the Orinoco Belt involved in the extraction, transportation, refining of extra-heavy crude oil, and the marketing of the upgraded crude oil (known as “syncrude”).³⁸ ConocoPhillips held a 50.1 percent interest in the Petrozuata Project, with the remaining 49.9% held by a PdVSA affiliate. The Petrozuata Project was designed to extract about 120,000 barrels per day (“BPD”) of extra-heavy crude and to upgrade it into 104,000 BPD of syncrude. The Project’s term was 35 years. Petrozuata syncrude was sold to ConocoPhillips under an offtake agreement for further refining at its Lake Charles refinery, which ConocoPhillips reconfigured to process Petrozuata syncrude.³⁹ Further details about the Petrozuata Project are set forth below.

³⁶ Cl. Reply ¶ 17g.

³⁷ Cl. Mem. ¶ 48 (referencing Ex. C-38, *Ley de Reforma Parcial de la Ley de Impuesto sobre la Renta* (Law Partially Reforming the Income Tax Law), Extraordinary Official Gazette No. 4,300, published 13 August 1991, Arts. 7 and 30).

³⁸ *See generally* Cl. Closing Skeleton, Annex, “An Overview of the Projects”.

³⁹ The Claimants assert that Conoco invested hundreds of millions of dollars to modify its Lake Charles refinery so that it could process the Petrozuata syncrude. *See* Cl. Mem. ¶ 8.

(2) The Senate and Bicameral Reports

107. In September 1990, Conoco sent a letter to PdVSA expressing interest in conducting feasibility studies on oil projects.⁴⁰ In early 1991, a Strategic Associations Unit was established to oversee the commercialisation of the Orinoco Belt.⁴¹ Following various meetings in 1991 between Conoco representatives and the Strategic Associations Unit,⁴² on 17 November 1991, Conoco and PdVSA executed letters of intent indicating their interest in examining the feasibility of developing an extra-heavy oil project in the Orinoco Oil Belt using Conoco Delayed Coking Technology.⁴³ The letters of intent envisaged three phases of project development, all of which would involve sharing costs.

108. A Joint Steering Committee comprising Conoco and Maraven representatives negotiated and concluded a Joint Study Agreement with respect to the proposed project.⁴⁴ In August 1992, Conoco and Maraven produced a report on the “Venezuela Heavy Oil Feasibility Study”.⁴⁵

109. In April 1993, the Venezuelan Senate’s Permanent Environmental and Land Use Planning Committee issued a report with respect to the proposed Petrozuata Project (“Senate Report”).⁴⁶ The Senate Report was submitted to the Venezuelan Congress in May 1993.⁴⁷ The Senate Report stated that PdVSA had “decided to promote the creation of ... ‘Strategic Associations’ between operating subsidiaries and some foreign companies. ... Making this

⁴⁰ Ex. C-68, Letter from Curt D. Baker to Antonio T. Cassella, 28 September 1990.

⁴¹ Cl. Mem. ¶ 47.

⁴² Cl. Mem. ¶¶ 49–50, 52–53.

⁴³ Ex. C-71, Letter of Intent between PdVSA and Conoco Inc., 17 November 1991; Ex. C-72, Letter of Intent between PdVSA and Conoco Inc., 17 November 1991.

⁴⁴ Cl. Mem. ¶ 55. Ex. C-74, Joint Study Agreement between Conoco Inc. and Maraven, S.A., 1 January 1992.

⁴⁵ Cl. Ex. C-73, Conoco Inc. and Maraven, S.A. Venezuela Heavy Oil Feasibility Study, Final Report, Volume 1, August 1992.

⁴⁶ Ex. C-54, Senate Permanent Environmental and Land Use Planning Committee, *Asociación entre las Empresas Maraven y Conoco para la Explotación y Mejoramiento de Crudo Extrapesado de la Faja del Orinoco* (Association between the Companies Maraven and Conoco for the Exploitation and Upgrading of Extra-Heavy Crude from the Orinoco Belt), April 1993 (“Senate Report”).

⁴⁷ Cl. Mem. ¶ 61.

decision will enable PdVSA to complement its efforts with the technological and financial resources of third parties and reactivate, with the least degree of risk, the development strategy for the Orinoco Belt ...”.⁴⁸ The Senate Report also proposed that “the granting of certain fiscal incentives for a certain period of time ... could make the projects economically viable by improving their competitiveness in comparison with other options that the companies might have internationally”.⁴⁹ The Senate Report stated that the Petrozuata Project “represents a ‘special case’ and is in the public interest” under Article 5 of the 1975 Nationalisation Law.⁵⁰

110. In August 1993, the Bicameral Commission of Energy and Mines of the Senate of the Republic — a standing congressional committee — issued a report (the “Bicameral Report”).⁵¹ The Bicameral Commission recommended the Petrozuata Project (referred to in the Bicameral Report as the “Maraven-Conoco Project”) for approval by Congress in accordance with Article 5 of the 1975 Nationalisation Law.⁵²

111. The Bicameral Report provided a description of the legal framework governing and the technical aspects of the Petrozuata Project, as well as a summary of the basic aspects of the potential association agreement, including:⁵³ (1) “a protection mechanism for foreign shareholders in the case that discriminatory actions take place through laws or administrative actions by national, state or municipal authorities that establish a discriminating unfavourable treatment ... which translate into significant economic damage”;⁵⁴ and (2) a term of no longer

⁴⁸ Ex. C-54, Senate Report at p. 3.

⁴⁹ Ex. C-54, Senate Report at p. 17.

⁵⁰ Ex. C-54, Senate Report at p. 34.

⁵¹ Ex. C-8, *Informe Aprobado por la Comisión Bicameral para el Estudio de las Asociaciones Estratégicas de PdVSA sobre los Proyectos Maraven-Conoco y Maraven-Total-Itochu-Maruvani para la Explotación y Mejoramiento de Petróleos Extrapesados de la Faja Petrolífera del Orinoco* (Report Approved by the Bicameral Commission for the Study of the Strategic Associations of PdVSA concerning the Projects Maraven-Conoco and Maraven-Total-Itochu-Maruvani for the Exploitation and Upgrading of Extra-Heavy Petroleum of the Orinoco Oil Belt), dated 12 August 1993 (“Bicameral Report”).

⁵² Ex. C-8, Bicameral Report at Section II.

⁵³ Ex. C-8, Bicameral Report at Section VII.

⁵⁴ Ex. C-8, Bicameral Report at Section VII, sub-section D.

than 35 years from the first commercial load.⁵⁵ The Bicameral Report also recommended that Maraven hold a minority interest in the project.⁵⁶

112. The Bicameral Report recommended that the strategic associations under consideration should be exempt from the income tax rate usually applicable to hydrocarbons exploitation (67.7 percent),⁵⁷ such that the lower income tax rate introduced in 1991 (as subsequently amended) would apply.⁵⁸ The Bicameral Report also stated that “the Associations will process, through the respective institutional channels, possible incentives for the first years in the royalty segment”.⁵⁹

(3) The Congressional Authorisation

113. On 10 August 1993, the Venezuelan Congress, having reviewed the Bicameral Report,⁶⁰ authorised the strategic association between Conoco and Maraven. The congressional authorisation (“Petrozuata Authorisation”) confirmed that “this authorization shall be exercised within the legal framework of the ‘terms and conditions’ stated exhaustively in [the Bicameral] Report”.⁶¹

114. The Petrozuata Authorisation set forth the terms and conditions for the proposed association agreement between Maraven and Conoco.⁶² The Petrozuata Authorisation approved up to 35 years of commercial production for the Petrozuata Project,⁶³ and stated that it would be

⁵⁵ Ex. C-8, Bicameral Report at Section VII, sub-section F.

⁵⁶ Ex. C-8, Bicameral Report at Section VI.

⁵⁷ Ex. C-8, Bicameral Report at Section II, sub-section F and Section VIII.

⁵⁸ *See supra* ¶ 105.

⁵⁹ Ex. C-8, Bicameral Report at Section VIII. *See also* Cl. Mem. ¶ 66b.

⁶⁰ Ex. C-10 and C-10A, *Autorización del Convenio de Asociación entre las Empresas Maraven, S.A. y Conoco, Inc* (Authorization of the Association Agreement between Maraven, S.A. and Conoco, Inc.), Official Gazette No. 35,293, published 9 September 1993 (“Petrozuata Authorisation”) at Preamble.

⁶¹ Ex. C-10 and C-10A, Petrozuata Authorisation at Preamble.

⁶² Ex. C-10 and C-10A, Petrozuata Authorisation at Preamble. *See also* Cl. Mem. ¶¶ 68–69; Resp. C-Mem. ¶¶ 23–25.

⁶³ Ex. C-10 and C-10A, Petrozuata Authorisation, Third Condition.

subject to Venezuelan tax law, the royalty provisions of the 1943 Hydrocarbons Law, and all other Venezuelan laws.⁶⁴

115. Further, the Sixteenth Condition stated:⁶⁵

Provisions shall be included in the Association Agreement that enable Maraven to compensate the other parties, on equitable terms, for significant adverse economic consequences directly resulting from decisions made by national, state or municipal administrative agencies or any changes in the law that, because of their content or purpose, result in an unjust discriminatory treatment of the Company or such other parties, always understood in their Capacity as such and as parties to the Association Agreement, all without prejudice to the sovereign right to legislate inherent in the very existence of the national, state and municipal legislative branches.

116. The Eighteen Condition stated:⁶⁶

The Association Agreement to be signed, the commercial company that will be created and the activities of various sorts based on such legal acts, in particular commercial activities, are operations and businesses that are within the jurisdiction of, or obligate, Maraven, or Petróleos de Venezuela, S.A. (PdVSA) only, to the extent of the guarantees that it grants under Condition Ten [*sic*, the Spanish version refers to the Seventeenth Condition]; in no case do they alone bind the Republic of Venezuela, which can occur only in the event that such responsibility were to be assumed by the valid express legal act of its representatives.

(4) Further Amendments to the Income Tax Law

117. On 11 August 1993, the Venezuelan Congress passed an enabling law authorising the President to amend the income tax law to provide that the strategic associations should be “excluded from the tax regime applicable to taxpayers that are engaged in the production of hydrocarbons and related activities and instead, are included within the ordinary tax regime established in the [income tax] law for corporations and taxpayers similar to such”.⁶⁷

⁶⁴ Ex. C-10 and C-10A, Petrozuata Authorisation, Twenty-Fifth Condition.

⁶⁵ Ex. C-10 and C-10A, Petrozuata Authorisation, Sixteenth Condition. *See also* Resp. C-Mem. ¶ 25; Cl. Reply ¶ 18a.

⁶⁶ Ex. C-10 and C-10A, Petrozuata Authorisation, Eighteenth Condition.

⁶⁷ Ex. C-79, *Ley que Autoriza al Presidente de la República para Dictar Medidas Extraordinarias en Materia Económica y Financiera* (Law Authorising the President of the Republic to Adopt

118. On 26 August 1993, the then-President Velasquez issued a Decree Law to provide, similarly to the 1991 Income Tax Law, that entities involved in “vertically-integrated projects in the field of producing, refining, emulsification, transportation or marketing of extra-heavy crude oil” would be subject to the general corporate income tax rate.⁶⁸ In 1994, the general corporate income tax rate was set at 34 percent.⁶⁹

(5) The Petrozuata Association Agreement

119. After Congress issued the Petrozuata Authorisation, negotiations ensued among Conoco and Maraven with respect to the potential terms of the Association Agreement.⁷⁰ On 31 May 1995, Conoco and Maraven signed an Agreement in Principle confirming the parties’ concurrence on the terms that would govern the joint venture and stating their intention to conclude an Association Agreement within the year.⁷¹

120. On 10 November 1995, Maraven and a Conoco subsidiary, Conoco Orinoco, Inc., concluded an Association Agreement to develop a part of the Zuata region of the Orinoco Oil Belt through a corporation known as Petrozuata (the “Petrozuata Association Agreement”).⁷²

121. The Association’s purpose was as follows:

[T]o produce, transport, and upgrade Extra Heavy Oil obtained from the Assigned Area and to market and sell Upgraded Crude Oil and other by-products pursuant to [an Offtake Agreement] with Conoco Inc.⁷³

Extraordinary Measures in Economic and Financial Matters), Official Gazette, No. 35,280, published 23 August 1993 at Art. 1(3).

⁶⁸ Ex. C-11 and Ex. C-11A, *Decreto-Ley No. 3.113, Mediante el cual se Dicta la Ley de Reforma Parcial de la Ley de Impuesto sobre la Renta* (Decree Law No. 3,113, Issuing the Law Partially Amending the Income Tax Law), Extraordinary Official Gazette No. 4,628, published 9 September 1993 at Art. 9. *See also* Cl. Mem. ¶ 71.

⁶⁹ Ex. C-39, *Decreto de Reforma de la Ley de Impuesto Sobre la Renta* (Decree Reforming the Income Tax Law), Decree No. 188, Extraordinary Official Gazette No 4,727, published 27 May 1994.

⁷⁰ *See, e.g.*, Cl. Mem. ¶¶ 72-74; Resp. C-Mem. ¶¶ 28-40.

⁷¹ Ex. C-83, Agreement in Principle between Maraven, S.A. and Conoco Inc., 31 May 1995.

⁷² Ex. C-21, *Convenio de Asociación entre Maraven S.A. y Conoco Orinoco Inc.*, (Association Agreement between Maraven, S.A. and Conoco Orinoco Inc.), as modified 18 June 1997 (“Petrozuata Association Agreement”).

122. An Offtake Agreement was signed on 27 June 1997 and it provided that Conoco would purchase all of the upgraded crude oil produced by the Petrozuata Project, for refining in its Lake Charles refinery.⁷⁴ The lenders to the Project were given a lien on the proceeds received by the Project under the Offtake Agreement.⁷⁵

123. The Petrozuata Association Agreement was for a 35-year term from the date of the first commercial production. The agreement governed the relationship between Maraven and Conoco and established the corporate structure of the Petrozuata Association.⁷⁶ A joint venture company formed by Conoco and Maraven, Petrolera Zuata, Petrozuata C.A. (“Petrozuata, C.A.”), was the project operator. Conoco owned 50.1 percent of Petrozuata, C.A. through Conoco Orinoco Inc., and Maraven owned a minority share of 49.9 percent.⁷⁷

124. Section 9.07 of the Petrozuata Association Agreement provided that Maraven would compensate Conoco according to a certain procedure and a sliding scale formula (using the price of Brent crude oil as a benchmark), in the event that certain actions of “national, state, or municipal, administrative, or legislative authorities”,⁷⁸ constituting “Discriminatory Actions” caused Conoco to suffer “Significant Economic Damage”.⁷⁹ Both “Discriminatory Actions” and “Significant Economic Damage” were defined in the Section 1.01 of the Petrozuata Association Agreement.⁸⁰

⁷³ Ex. C-21, Petrozuata Association Agreement, Antecedent Seven and Section 9.01. *See also* Cl. Mem. ¶ 76.

⁷⁴ Ex. C-16, Contract for the Purchase and Sale of Upgraded Extra Heavy Crude Oil (F.O.B.) between Petrolera Zuata, Petrozuata C.A. as Seller and Conoco Inc., as Buyer, dated 27 June 1997 (“Offtake Agreement”). *See also* Cl. Mem. ¶¶ 76, 128.

⁷⁵ Ex. C-16, Offtake Agreement at Section I.C.1. *See also* Cl. Mem. ¶ 128.

⁷⁶ Cl. Mem. ¶ 76.

⁷⁷ Cl. Mem. ¶ 78b.

⁷⁸ Ex. C-21, Petrozuata Association Agreement, Section 1.01, Definitions, “Discriminatory Actions”. *See also* Resp. C-Mem. ¶¶ 41-42.

⁷⁹ *See* Resp. C-Mem. ¶¶ 41, 42, 44, 46-48.

⁸⁰ Ex. C-21, Petrozuata Association Agreement, Section 1.01, Definitions, “Discriminatory Actions” and “Significant Economic Damage”. *See also* Resp. C-Mem. ¶¶ 41-45; Cl. Reply ¶ 18b.

125. Exhibit I to the Petrozuata Association Agreement set out the “Initial Investment and Business Plan” for the Project.⁸¹ This plan stated that:⁸²

Based on a letter from the Ministry of Energy and Mines, the plan assumes a reduction of the royalty tax to 1% during the third party debt repayment period.

The letter in question had agreed in principle to a one percent royalty rate for the first nine years of the heavy oil associations.⁸³ It was envisaged that, following these initial nine years, the royalty rate would return to 16 $\frac{2}{3}$ percent.⁸⁴

126. Exhibit I also stated that:

The Company will be taxed at the regular rate applicable to corporations in Venezuela, 34%.

127. Pursuant to Section 13.16, disputes arising in connection with the Petrozuata Association Agreement were to be referred to ICC Arbitration.⁸⁵

128. The Board of Conoco’s then-parent company, E.I. du Pont de Nemours and Company, issued its approval of the Petrozuata Project on 29 May 1996.⁸⁶

(6) Financing of the Petrozuata Project

129. The parties to the Petrozuata Association Agreement set out to obtain project financing, consisting of a bond issuance and a commercial bank facility.⁸⁷

⁸¹ Ex. C-21, Petrozuata Association Agreement, Exhibit I (stating that the Initial Investment and Business Plan was applicable from 1996 to 2005).

⁸² *Id.*

⁸³ Ex. C-12 and Ex. C-12A, Letter from Aquiles Fernández Ch. Minister of Energy and Mines, to Aliro Rojas of Maraven, S.A., dated 3 October 1994.

⁸⁴ *See* Cl. Reply ¶ 17g and h.

⁸⁵ Ex. C-21, Petrozuata Association Agreement, Section 13.16. Section 13.15 of the Petrozuata Association Agreement confirmed that the agreement would be governed by Venezuelan law.

⁸⁶ Ex. C-87, E.I. du Pont de Nemours and company, Resolution of the Board of Directors dated 19 June 1996.

⁸⁷ *See* Cl. Mem. ¶ 125; Resp. C-M. ¶ 56.

130. The Offering Circular of 17 June 1997 for the Petrozuata Project financing set out, *inter alia*, a description of the project and certain terms of the Petrozuata Association Agreement, and an assessment of the risk factors associated with the project.⁸⁸

131. With respect to royalties, the Offering Circular made reference to the 3 October 1994 letter in which the Minister of Energy and Mines “agreed in principle in a letter to reduce the royalty rate for Maraven’s strategic associations to 1% for approximately nine years”.⁸⁹ The Offering Circular also stated that: “The Ministry could unilaterally modify (increase or decrease) the royalty at any time”.⁹⁰

132. Financing for the Petrozuata Project closed on 27 June 1997. The cumulative project debt, which was incurred by the joint venture company, Petrozuata C.A., was US\$ 1.45 billion.⁹¹

(7) The Orinoco Belt Royalty Agreement

133. On 29 May 1998, a royalty agreement was executed between the Ministry and PdVSA which applied to the Orinoco Belt strategic associations engaged in extra-heavy crude oil exploitation (“Orinoco Belt Royalty Agreement”).⁹²

134. Clause Four of the agreement established a nine-year royalty reduction for the relevant extra-heavy oil projects, as follows:⁹³

Based on the Sole Paragraph of Article 41 of the [1943] Hydrocarbons Law, which authorizes the Government to make adjustments to the Royalty, the Ministry grants

⁸⁸ Ex. C-75, Confidential Offering Circular, Petrolera Zuata, Petrozuata C.A. dated 17 June 1997. *See also* Cl. Reply ¶ 18d.

⁸⁹ Ex. C-75, at p. 29.

⁹⁰ *Id.* *See also* Cl. Mem. ¶ 127; Resp. C-Mem. ¶ 58.

⁹¹ Cl. Mem. ¶ 125.

⁹² Ex. C-13, *Convenio de Regalía de las Asociaciones Estratégicas de la Faja Petrolífera del Orinoco entre el Ministerio de Energía y Minas y Petróleos de Venezuela, S.A.* (Royalty Agreement of the Strategic Associations of the Orinoco Oil Belt between the Ministry of Energy and Mines and Petróleos de Venezuela, S.A.), dated 29 May 1998 (“Orinoco Belt Royalty Agreement”) at Clause One. *See also* Cl. Mem. ¶ 136.

⁹³ Ex. C-13, Orinoco Belt Royalty Agreement at Clause Four.

a rebate in the Royalty in favour of each Association whenever it is evidenced to its satisfaction that the minimum margins of profitability for the commercial exploitation of hydrocarbons cannot be reached. For this purpose, the methodology in Clause five hereof to perform such Royalty rebate is established.

135. Clause Five provided that during the early or development production stage of a project, the applicable royalty rate would be 16 $\frac{2}{3}$ percent. It also established via a formula that a one percent royalty rate would apply until the accumulated gross income of a project exceeded three times the total investment made; however, this reduction could apply for a maximum of nine years from the date of commencement of commercial production.⁹⁴

136. The Petrozuata Association adhered to the Orinoco Belt Royalty Agreement on 8 October 1998.⁹⁵

(8) Implementation of the Petrozuata Project and Commencement of Production

137. The Petrozuata upgrader was constructed and entered into service in April 2001. Petrozuata began full syncrude production and made its first commercial sales on 12 April 2001, commencing the 35-year production life of the Association Agreement, the term of which would run until 11 April 2036.⁹⁶ It also marked the beginning of the Project's nine-year royalty reduction.⁹⁷

(9) The Insertion of the Claimant CPZ into the Chain of Ownership

138. ConocoPhillips decided to restructure its investment in the Petrozuata, Hamaca and Corocoro Projects, in order to ensure that its investments would be covered by the Treaty.⁹⁸

⁹⁴ Ex. C-13, Orinoco Belt Royalty Agreement at Clause Five. *See also* Cl. Mem. ¶¶ 137-38.

⁹⁵ Ex. C-14 and Ex. C-14A, Letter from María Lizardo Gramcko, President, Petrolera Zuata, Petrozuata, C.A. to Edwin Arrieta, Minister of Energy and Mines, dated 8 October 1998.

⁹⁶ Cl. Mem. ¶ 169.

⁹⁷ Cl. Mem. ¶ 169; Cl. Closing Skeleton, Annex, "An Overview of the Projects".

⁹⁸ Cl. Reply ¶ 17s.

Accordingly, in 2005, the Claimant CPZ was inserted into the chain of ownership of the Petrozuata Association.⁹⁹

139. On 26 July 2005, CPZ was incorporated in the Netherlands with Conoco Orinoco Inc. as its sole shareholder.¹⁰⁰ On 27 July 2005, Conoco Orinoco Inc. transferred its ownership interest in Conoven Holding Ltd. — the indirect owner of a 50.1 percent interest in the Petrozuata Association — to CPZ.¹⁰¹

140. On 11 August 2005, Conoven Holding Ltd. transferred its ownership interest in Conoco Venezuela Holding, C.A. — the Venezuelan entity that was then a direct 50.1 percent owner of the Petrozuata Association — to CPZ.¹⁰²

D. THE HAMACA PROJECT

(1) Overview of the Hamaca Project

141. The Hamaca Project was also a vertically integrated extra-heavy oil project located in the Orinoco Belt. Hamaca's design level was extraction of 190,000 BPD of crude oil and production of 180,000 BPD of syncrude. The project's term was 32 years. ConocoPhillips owned a 40 percent interest in the Hamaca Project and the other two participants were a PdVSA subsidiary and Chevron, each of which held a 30 percent interest.¹⁰³ Further details about the Hamaca Project are provided below.

⁹⁹ See also Cl. Mem. ¶ 216.

¹⁰⁰ Ex. C-37, ConocoPhillips Petrozuata B.V. Certificate of Incorporation and Articles of Association, dated 26 July 2005. See also Cl. Mem. ¶ 216, fn. 350.

¹⁰¹ Ex. C-218, Action of the Board of Directors of Conoco Orinoco Inc. attaching a Board Resolution, 27 July 2005; Ex. C-219, Shareholder's Resolution of Conoco Orinoco Inc., 27 July 2005. See also Cl. Mem. ¶ 216, fn. 350.

¹⁰² See Resp. C-Mem. ¶ 11 (showing the corporate chain of ownership relating to the Petrozuata Project as of 26 June 2007).

¹⁰³ See generally Cl. Closing Skeleton, Annex, "An Overview of the Projects". See Resp. C-Mem. ¶ 13 (showing the corporate chain of ownership relating to the Hamaca Project as of 26 June 2007).

(2) Initial Discussions among Phillips and PdVSA Regarding the Hamaca Project

142. In June 1995, Phillips advised PdVSA of its potential interest in investment opportunities in the Orinoco Oil Belt.¹⁰⁴ Following discussions among Phillips and Corpoven, including with respect to the applicable income tax and royalty rates, in October 1996, Phillips confirmed its interest in an extra-heavy oil project in the Hamaca region of the Orinoco Oil Belt — the Hamaca Project.¹⁰⁵

143. In December 1996, Corpoven, Phillips, ARCO and Texaco concluded a Joint Study Agreement and an Agreement for the Conduct of the Hamaca Project, which would proceed in four stages.¹⁰⁶

(3) The Congressional Authorisation of the Conditions for the Hamaca Project

144. On 24 April 1997, following the review and approval of the Congressional Bicameral Energy and Mines Committee of draft conditions submitted by the Ministry in accordance with Article 5 of the Nationalisation Law,¹⁰⁷ the Venezuelan Congress approved the framework of conditions for the Hamaca strategic association (“Hamaca Authorisation”).¹⁰⁸

¹⁰⁴ Cl. Mem. ¶ 103.

¹⁰⁵ Cl. Mem. ¶¶ 104–10.

¹⁰⁶ Cl. Mem. ¶ 113–115. See Ex. C-127, *Proyecto Hamaca de Mejoramiento Acuerdo de Estudio Conjunto Corpoven-Arco-Phillips-Texaco* (Hamaca Upgrading Project Joint Study Agreement, Corpoven-Arco-Phillips-Texaco) dated 4 December 1996; Ex. C-128, Agreement for the Conduct of the Hamaca Project among Corpoven, S.A., ARCO International Oil and Gas Company, Phillips Petroleum Company Venezuela Limited, and Texaco Overseas Holdings Inc. dated 4 December 1996.

¹⁰⁷ Cl. Mem. ¶¶ 112, 115.

¹⁰⁸ Cl. Mem. ¶ 116. See Ex. C-132, *Acuerdo Mediante el Cual se Aprueba el Marco de Condiciones del Convenio de Asociación para la Producción, Transporte y Mejoramiento de Crudos Extrapesados a Ser Producidos en el Área Hamaca de la Faja Petrolífera del Orinoco, así como la Comercialización del Crudo Mejorado y Otros Productos que se Generen Durante el Proceso de Producción y Mejoramiento de Dichos Crudos, a Celebrarse entre Corpoven, S.A. Filial de Petróleos de Venezuela y las Empresas Atlantic Richfield Co. (ARCO), Phillips Petroleum Company y Texaco, Inc.* (Agreement Approving the Framework of Conditions of the Association Agreement for the Production, Transportation and Upgrading of Extra-Heavy Crude to Be Produced in the Hamaca Area of the Orinoco Oil Belt, as well as the Marketing of the Upgraded

145. The Hamaca Authorisation approved the execution of the Association Agreement for the Hamaca Project, which would involve the production, transportation and upgrading of extra-heavy oil produced in the Hamaca area, as well as the marketing of the upgraded crude and other products.¹⁰⁹

146. The terms and conditions of the Hamaca Authorisation were similar to those of the Petrozuata Authorisation.¹¹⁰ These conditions included a term of either 35 years from the first commercial shipment of upgraded crude or 40 years from the date the Association Agreement was concluded, whichever event came earlier.¹¹¹ The conditions also provided that the Association Agreement would be governed by Venezuelan law and disputes arising under the agreement would be resolved by ICC arbitration.¹¹²

147. Condition Fifteen provided that:¹¹³

... [U]nder the provisions of the single paragraph of Article 9 of the Income Tax Law currently in effect, the Parties and each of the Entities shall pay tax under the ordinary regime established in such law for companies and entities consolidated into them [*ie*, the normal corporate rate of 34 percent], for any income realized in connection with the activities of the Association.

148. Condition Sixteen provided that:¹¹⁴

The National Executive Branch may agree on a mechanism for adjusting the imposition of the exploitation tax established in Article 41 of the [1943] Hydrocarbons Law to the Parties.

Crude and Other Products Generated During the Process of Production and Upgrading of Such Crudes, to Be Entered into between Corpoven, S.A., a Subsidiary of Petróleos de Venezuela, and the Companies Atlantic Richfield Co. (ARCO), Phillips Petroleum Company and Texaco, Inc.), Official Gazette No. 36,209, published 20 May 1997 (“Hamaca Authorisation”).

¹⁰⁹ Ex. C-132, Hamaca Authorisation, Art. 1.

¹¹⁰ Resp. C-Mem. ¶ 64.

¹¹¹ Ex. C-132, Hamaca Authorisation, Art. 2, Condition Twelve (stating that the term was subject to potential change in the event of production cuts pursuant to Condition Thirteen).

¹¹² Ex. C-132, Hamaca Authorisation, Art. 2, Condition Twenty-Two.

¹¹³ Cl. Mem. ¶ 116.

¹¹⁴ Cl. Mem. ¶¶ 116-17 (also referring to subsequent discussions among Phillips and Corpoven regarding the applicable royalty rate).

149. Condition Nineteen provided that:¹¹⁵

... The Association Agreement, the creation and operation of Entities and other activities shall not impose any obligation on the Republic of Venezuela or restrict the exercise of its sovereign rights, the exercise of which shall not give rise to any claim, regardless of the nature or characteristics thereof, by other States or foreign governments.

150. Condition Twenty-One, similarly to the Petrozuata Authorisation, provided for compensation in the event that a participant's net cash flows was "materially and adversely affected as the direct, necessary and demonstrable result of discriminatory or unfair measures ...".¹¹⁶

151. A final report of the Bicameral Commission ("Hamaca Bicameral Report") authorised the draft Hamaca Association Agreement as compliant with the framework of conditions in the Hamaca Authorisation.¹¹⁷

(4) The Hamaca Association Agreement

152. The Hamaca Bicameral Report was submitted to the Venezuelan Congress on 29 May 1997,¹¹⁸ and, on 11 June 1997, the Hamaca Association Agreement was authorised by Congress.¹¹⁹

¹¹⁵ Ex. C-132, Hamaca Authorisation, Art. 2, Condition Nineteen. *See also* Resp. C-Mem. ¶ 64; Cl. Reply ¶ 18e.

¹¹⁶ Ex. C-132, Hamaca Authorisation, Art. 2, Condition Twenty-One. *See also* Resp. C-Mem. ¶ 65; Cl. Reply ¶ 18e.

¹¹⁷ Ex. C-126, *Informe de la Comisión Bicameral de Energía y Minas del Congreso de la República sobre el Convenio de Asociación entre las Empresas Corpoven S.A., Atlantic Richfield Company, Phillips Petroleum y Texaco, Inc. para la Exploración, Explotación, Producción, Mezcla, Industrialización, Transporte, Refinación, Mejoramiento y Comercialización de Crudos Extrapesados del Área Hamaca de la Faja Petrolífera del Orinoco* (Report of the Bicameral Energy and Mines Committee of the Congress of the Republic of Venezuela on the Association Agreement among Corpoven S.A., Atlantic Richfield Company, Phillips Petroleum and Texaco, Inc. for the Exploration, Exploitation, Production, Blending, Processing, Transportation, Refining, Upgrading and Marketing of Extra-Heavy Crude from the Hamaca Area of the Orinoco Oil Belt), May 1997 at p. 6; Cl. Mem. ¶ 118.

¹¹⁸ Cl. Mem. ¶ 121.

153. On 9 July 1997, Phillips Petroleum Company Venezuela Limited signed the Hamaca Association Agreement, alongside ARCO and Texaco affiliates, and Corpoguanipa, S.A. (on behalf of Corpoven).¹²⁰ Ultimately, the Phillips affiliate held a 40 percent interest in the Hamaca Project, while Corpoguanipa, S.A. and Texaco (now Chevron) each held a 30 percent interest.¹²¹

154. The Hamaca Project was structured as an unincorporated joint venture. The project's purpose was to produce and upgrade extra-heavy crude oil, and to market a new synthetic crude oil and the by-products of the upgrading process.¹²² The Project would extract extra-heavy crude oil from horizontal well pads, following which the extra-heavy crude oil would be mixed with a diluent and transported by pipeline to an upgrading plant at the Jose Industrial Complex. The crude would be processed into syncrude ("Hamaca Syncrude") and sold on the open market.¹²³

¹¹⁹ Ex. C-26, *Acuerdo del Congreso de la República de Venezuela Mediante el cual se Autoriza la Celebración del Convenio de Asociación y sus Anexos para la Exploración, Desarrollo, Explotación, Mezcla, Industrialización, Transporte, Refinación y Mejoramiento, así como la Comercialización del Crudo y otros Productos a ser Generados durante el Proceso de Producción y Mejoramiento de Dichos Crudos Extrapesados en el Área Determinada por el Ministerio de Energía y Minas, entre las Filiales de Corpoven, S.A., Filial de Petróleos de Venezuela, S.A., Atlantic Richfield Company, Phillips Petroleum Company y Texaco Inc., en los Términos y Condiciones que han sido Presentados por el Ejecutivo Nacional*; and Ex. C-26A, *Agreement of the Congress of the Venezuelan Republic Authorizing the Execution of an Association Agreement and its Annexes for the Exploration, Development, Production, Blending, Processing, Transportation, Refining and Upgrading, as well as the Marketing of Crude Oil and Other Products to be Generated During the Process of the Production and Upgrading of Such Extra-Heavy Crudes in the Area Determined by the Ministry of Energy and Mines, Among the Subsidiaries of Corpoven, S.A., a Subsidiary of Petróleos de Venezuela, S.A., Atlantic Richfield Company, Phillips Petroleum Company and Texaco Inc., on the Terms and Conditions that Have Been Presented by the National Executive Branch*, Official Gazette, No. 36,235, published 26 June 1997. *See also* Cl. Mem. ¶ 121.

¹²⁰ Ex. C-22, *Convenio de Asociación entre Corpoguanipa, S.A., ARCO Orinoco Development Inc., Phillips Petroleum Company Venezuela Limited, Texaco Orinoco Resources Company* (Association Agreement between Corpoguanipa, S.A., Arco Orinoco Development Inc., Texaco Orinoco Resources Company, and Phillips Petroleum Company Venezuela Limited) dated 9 July 1997 ("Hamaca Association Agreement").

¹²¹ Cl. Reply ¶ 17i.

¹²² Cl. Mem. ¶ 123.

¹²³ *Id.*

155. The Hamaca Association Agreement expressly referenced the framework of conditions approved in the Hamaca Authorisation.¹²⁴ Similarly to the Petrozuata Association Agreement, the Hamaca Association Agreement included provisions for granting compensation to parties affected by governmental measures that constituted “Discriminatory Actions”.¹²⁵ The compensation formula was linked to the price of Brent crude oil.¹²⁶ The definition of “Discriminatory Action” stated that:¹²⁷

... reductions or increases in the royalty rate applicable to the crude oil produced by the Parties ... will not be considered Discriminatory Actions under this provision unless such changes result in a royalty rate for the Parties in their capacity as participants in the Association, in excess of the maximum rate specified by law for the hydrocarbon industry in general.

156. Pursuant to Article XVII, the Hamaca Association Agreement was governed by Venezuelan law and disputes arising under the agreement were to be resolved through ICC arbitration.

157. The “General Business Plan” at Annex B to the Hamaca Association Agreement set forth “Fiscal Assumptions”, including that “until Project payout royalty rate will be reduced to 1% of the Extra-Heavy Oil Produced, and thereafter increased to the prevailing royalty rate, currently 16 $\frac{2}{3}$ %”.¹²⁸ The General Business Plan also stated that the Project entitled the parties to be qualified for “the generally applicable Venezuelan corporate income tax rate, currently 34% ...”.¹²⁹

(5) The Orinoco Belt Royalty Agreement

¹²⁴ Ex. C-22, Hamaca Association Agreement at p. 2. *See* Resp. C-Mem. ¶ 66.

¹²⁵ Ex. C-22, Hamaca Association Agreement, Art. XIV (Consequences of Certain Governmental Actions). *See also* Resp. C-Mem. ¶¶ 67-75; Cl. Reply ¶ 18f.

¹²⁶ Ex. C-22, Hamaca Association Agreement, Art. 14.2 (Principles of Compensation). *See* Resp. C-Mem. ¶¶ 67-75.

¹²⁷ Ex. C-22, Hamaca Association Agreement, Article 14.1(b) (Discriminatory Action).

¹²⁸ Ex. C-22, Hamaca Association Agreement, Annex B, Section IV.E (Preliminary Economic Parameters, Fiscal Assumptions/Expectations) at p. B-15. *See also* Cl. Mem. ¶ 123.

¹²⁹ Ex. C-22, Hamaca Association Agreement, Section IV.E (Preliminary Economic Parameters, Fiscal Assumptions/Expectations) at p. B-15. *See also* Cl. Mem. ¶ 123.

158. As discussed above,¹³⁰ the Orinoco Belt Royalty Agreement was executed on 29 May 1998. Phillips formally adhered to the Orinoco Belt Royalty Agreement on 29 October 1998.¹³¹

(6) Financing of the Hamaca Project

159. On 22 June 2001, the financing for the Hamaca Project closed. The project incurred approximately US\$ 1.1 billion in project finance debt.¹³²

160. The Hamaca Confidential Preliminary Information Memorandum provided a description of the Hamaca Project, including the associated risks. The section of the Memorandum on “Financial Projections” referred to the reduced 1 percent royalty for the nine years following the first commercial shipment (or until the Project had recovered three times the project costs, whichever date was sooner) after which the 16.67 percent royalty rate would become effective, and to the applicable income tax rate being the general corporate tax rate of 34 percent.¹³³

(7) Implementation of the Hamaca Project and Commencement of Production

161. Following the construction of the essential aspects of the Project, including drilling and transportation facilities and the upgrader, the establishment of necessary contractual arrangements within the Jose Industrial Complex, and pre-marketing activities,¹³⁴ the Hamaca Project commenced development production of extra-heavy crude oil in October 2001.¹³⁵ The upgrader commenced commercial production of upgraded crude oil in October 2004.¹³⁶

¹³⁰ See *supra* ¶ 133.

¹³¹ Ex. C-15 and Ex. C-15A, Letter from Carlos Bustamante, Vice President of New Government Business and Relations, Phillips Petroleum Company Venezuela Limited, to Edwin Arrieta, Minister of Energy and Mines, dated 29 October 1998. See *also* Cl. Mem. ¶ 139.

¹³² Cl. Mem. ¶ 173.

¹³³ Cl. Mem. ¶ 174; Ex. C-101, Hamaca Confidential Preliminary Information Memorandum, Volume I, Morgan Stanley Dean Witter, August 2000 at XIII.

¹³⁴ Cl. Mem. ¶ 175.

¹³⁵ Resp. C-Mem. ¶ 77.

¹³⁶ Resp. C-Mem. ¶ 77; Cl. Mem. ¶ 176.

162. In accordance with the Hamaca Association Agreement, the term of the Project would last either 40 years from the signing of the Association Agreement on 9 July 1997 or from the date of the first commercial shipment, whichever took place first. Thus, the term of the Hamaca Association was scheduled to end on 8 July 2037.¹³⁷

(8) The Insertion of the Claimant CPH Into the Chain of Ownership

163. In 2006, ConocoPhillips restructured its investment in the Hamaca Association.¹³⁸

164. On 17 July 2006, the Claimant CPH was incorporated in the Netherlands with Phillips Petroleum International Investment Company as its sole shareholder.¹³⁹

165. On 22 September 2006, Phillips Petroleum International Investment Company transferred to CPH its ownership interest in Hamaca Holding LLC — a Delaware company that indirectly held ConocoPhillips' 40 percent interest in the Hamaca Association.¹⁴⁰

E. THE COROCORO PROJECT

(1) Overview of the Corocoro Project

166. An additional aspect of the Oil Opening was Venezuela's decision to open up new exploration areas for light and medium crude oil ("New Areas").¹⁴¹

167. The Corocoro Project was an offshore project for the extraction of light to medium crude oil, on the basis of a profit sharing agreement. ConocoPhillips held a 32.2075 percent interest in the project. The other participants held interests as follows: CVP, a PdVSA subsidiary (35

¹³⁷ Cl. Mem. ¶ 177.

¹³⁸ Cl. Mem. ¶ 225, fn. 364.

¹³⁹ Ex. C-37, ConocoPhillips Hamaca B.V. Certificate of Incorporation and Articles of Association, dated 17 July 2006. *See also* Cl. Mem. ¶ 225, fn. 364.

¹⁴⁰ Ex. C-229, Shareholder's Resolution of Phillips Petroleum International Investment Company, 22 September 2006. *See also* Cl. Mem. ¶ 225, fn. 364; Resp. C-Mem. ¶ 13 (showing the corporate chain of ownership relating to the Hamaca Project as of 26 June 2007).

¹⁴¹ Cl. Mem. ¶ 82.

percent); Eni (25.8 percent); and another investor (7 percent).¹⁴² Production at the Corocoro Project did not take place prior to ConocoPhillips' handover of the operatorship of the Project to PdVSA on 1 May 2007.¹⁴³ Further details about the Corocoro Project are set out below.

(2) The Congressional Authorisation of Exploration at Risk in New Areas and Profit Sharing Agreements

168. On 4 July 1995, the Venezuelan Congress approved a framework of conditions for the conclusion of Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons Under the Shared Profits System Agreements (“Congressional Authorisation for New Areas”).¹⁴⁴ The Congressional Authorisation for New Areas allowed an affiliate of PdVSA to carry out the bid processes necessary to select the private investment companies with which it would conclude Association Agreements.¹⁴⁵

169. The conditions in the Congressional Authorisation for New Areas envisaged private investors holding equity in projects,¹⁴⁶ and allowed the PdVSA affiliate to acquire an interest of up to 35 percent in the event of a commercial discovery.¹⁴⁷ The Authorisation provided for terms of up to 20 years for commercial operations as of the approval of the Development Plan, but no longer than 39 years from the conclusion of the relevant agreement.¹⁴⁸ Similarly to the Petrozuata and Hamaca Authorisations, the Congressional Authorisation for New Areas

¹⁴² See Resp. C-Mem. ¶ 14 (showing the corporate chain of ownership relating to the Corocoro Development Consortium as of 26 June 2007).

¹⁴³ See generally Cl. Closing Skeleton, Annex, “An Overview of the Projects”; Resp. C-Mem. ¶ 84.

¹⁴⁴ Ex. C-18, *Acuerdo Mediante el cual se Autoriza la Celebración de los Convenios de Asociación para la Exploración a Riesgo de Nuevas Áreas y la Producción de Hidrocarburos bajo el Esquema de Ganancias Compartidas* (Agreement Authorising the Execution of Association Agreements for Exploration at Risk of New Areas and Production of Hydrocarbons under the Shared Profits System), Official Gazette No. 35.754, published 17 July 1995 (“Congressional Authorisation for New Areas”) at Art. 1. See also Cl. Mem. ¶ 85; Resp. C-Mem. ¶ 80.

¹⁴⁵ Ex. C-18, Congressional Authorisation for New Areas at Art. 2.

¹⁴⁶ Ex. C-18, Congressional Authorisation for New Areas at Art. 2, Condition Five.

¹⁴⁷ Ex. C-18, Congressional Authorisation for New Areas at Art. 2, Condition Seven.

¹⁴⁸ Ex. C-18, Congressional Authorisation for New Areas at Art. 2, Condition Eleven.

provided that an Association Agreement would be governed by Venezuelan law and that disputes would be resolved by ICC arbitration between the parties.¹⁴⁹

170. Condition 19 stated that:¹⁵⁰

The Agreement ... shall in no case give rise to liability or [*sic*] any nature or type to the Republic of Venezuela, nor be detrimental to its sovereign rights, and the exercise of such Agreement shall in no case give rise to claims by other Governments or foreign powers.

171. Additionally, Condition Twenty One provided that:¹⁵¹

The Executive may establish a system allowing for adjustments to the tax specified in the royalty rate in Article 41 of the [1943] Hydrocarbon Law when it is shown at a given time that it is not possible to achieve the minimum margins of profitability for one or more Development Areas during the performance of the Agreement.

172. Unlike the vertically-integrated heavy and extra-heavy oil projects, there was no special income tax rate applicable to the New Area projects. Accordingly, these projects would be subject to the 67.7 percent income tax rate applicable to upstream petroleum activities.¹⁵²

(3) Royalty Agreement for the New Areas

173. On 5 December 1995, the Ministry and CVP (the PdVSA affiliate designated to implement the profit sharing system), concluded a Royalty Agreement for the New Areas.¹⁵³ Pursuant to the formula in the royalty agreement, the royalty rate would be adjusted quarterly

¹⁴⁹ Ex. C-18, Congressional Authorisation for New Areas at Art. 2, Condition Seventeen.

¹⁵⁰ Ex. C-18, Congressional Authorisation for New Areas at Art. 2, Condition Nineteen. *See also* Resp. C-Mem. ¶¶ 81-82; Cl. Reply ¶ 18h.

¹⁵¹ Ex. C-18, Congressional Authorisation for New Areas at Art. 2, Condition Twenty One. *See also* Cl. Mem. ¶ 84.

¹⁵² Cl. Mem. ¶ 88.

¹⁵³ Ex. C-20, *Convenio de Regalía de los Convenios de Asociación para la Exploración a Riesgo de Nuevas Áreas y la Producción de Hidrocarburos bajo el Esquema de Ganancias Compartidas entre el Ministerio de Energía y Minas y Petróleos de Venezuela, S.A.*, (Royalty Agreement of the Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons Under the Shared Earnings Scheme between the Ministry of Energy and Mines and Petróleos de Venezuela, S.A.), dated 5 December 1995 (“Royalty Agreement for New Areas”). *See also* Cl. Mem. ¶¶ 93-94.

and would range from one percent to a maximum of 16 $\frac{2}{3}$ percent. The agreement also provided that: “[h]owever, in accordance with the law, in no event will the exploitation tax rate (royalty) exceed 16 $\frac{2}{3}$ %”.¹⁵⁴

(4) The Association Agreement for the Corocoro Project

174. In 1996, Conoco successfully bid on one of the New Areas—an offshore medium crude project in the Gulf of Paria West.¹⁵⁵ Conoco later acquired a portion of an area in the Gulf of Paria East intended to be unitised with the Gulf of Paria West area, to engage in the drilling operation that became known as the Corocoro Project.¹⁵⁶

175. On 19 June 1996, the Venezuelan Congress approved the Association Agreements governing the New Areas.¹⁵⁷

176. On 10 July 1996, Conoco Venezuela B.V. concluded an Association Agreement with CVP (“Association Agreement for the Corocoro Project”), providing for a 39-year term and for Conoco to be the operator of the project.¹⁵⁸

177. Among its terms, Section 25 of the Agreement provided that:¹⁵⁹

¹⁵⁴ Ex. C-20, Royalty Agreement for New Areas at Clause Fourth.

¹⁵⁵ Cl. Mem. ¶ 97 (stating that Conoco’s bid was for 50 percent *Participación en las Ganancias* (“PEG”) (the government’s pre-tax share of profits) plus US\$ 21,197,844); Cl. Reply ¶ 17j.

¹⁵⁶ Cl. Mem. ¶ 97.

¹⁵⁷ Ex. C-17 and Ex. C-17A, *Acuerdo Mediante el cual Se Autoriza que Se Celebren los Convenios de Asociación para la Exploración a Riesgo de Nuevas Áreas y la Producción de Hidrocarburos bajo el Esquema de Ganancias Compartidas en Ocho de las Áreas Determinadas por el Ministerio de Energía y Minas* (Agreement Authorizing the Execution of Association Agreements for Exploration at Risk of New Areas and the Production of Hydrocarbons under the Shared Profits System in Eight of the Areas Determined by the Ministry of Energy and Mines), Official Gazette No. 35.988, published June 26, 1996.

¹⁵⁸ Ex. C-23, *Convenio de Asociación entre Corporación Venezolana del Petróleo, S.A. y Conoco Venezuela B.V.* (Association Agreement between Corporación Venezolana del Petróleo, S.A. and Conoco Venezuela B.V.), dated July 10, 1996 (“Association Agreement for the Corocoro Project”) at Section I, Definitions, Section XII and Section XXI.

¹⁵⁹ Ex. C-23, Association Agreement for the Corocoro Project, Section 25.6. *See also* Resp. C-Mem. ¶ 83; Cl. Reply ¶ 18i.

This Agreement ... shall in no event impose any obligation on the Republic of Venezuela or limit the exercise of its sovereign rights.

(5) Declaration of Commerciality With Respect to the Corocoro Project

178. On 29 April 2002, Conoco adhered to the Royalty Agreement for the New Areas.¹⁶⁰ In October 2002, ConocoPhillips,¹⁶¹ with its partners ENI and OPIC, made an official declaration of commerciality.¹⁶²

(6) The Corocoro Development Plan

179. The Development Plan submitted by ConocoPhillips and its partners on 1 November 2002 was approved by CVP and the other members of the Control Committee on 8 April 2003.¹⁶³

180. On 10 April 2003, CVP acquired a 35 percent interest in the Corocoro Project, reducing the interests of the other investors.¹⁶⁴ (ConocoPhillips eventually held a 32.2075 percent interest in the Corocoro Project.)¹⁶⁵ On 16 May 2003, the partners in the Corocoro Project entered into a Consortium Agreement.¹⁶⁶

181. A revised Development Plan Addendum, approved by all Project partners, was issued on 3 March 2005.¹⁶⁷ The Claimants assert that during the development of the Corocoro Project,

¹⁶⁰ Cl. Mem. ¶ 181; Ex. C-20 and Ex. C20A, Letter from Roger Ramshaw to the Ministry of Energy and Mines dated 29 April 2002.

¹⁶¹ See Cl. Mem. ¶ 183, fn. 295 (confirming that Conoco and Phillips merged on 30 August 2002).

¹⁶² Ex. C-183, Letter from John Hennon *et al.* to Jorge Carnevali *et al.*, 28 October 2002. See also Cl. Mem. ¶ 183.

¹⁶³ Cl. Mem. ¶ 186; Ex. C-185, Meeting Minutes *Comité de Control Área del Golfo de Paria Oeste* (Control Committee Gulf of Paria West Area), 8 April 2003.

¹⁶⁴ Cl. Mem. ¶ 187.

¹⁶⁵ Cl. Reply ¶ 17j.

¹⁶⁶ Ex. C-24 and Ex. C-24A, Consortium Agreement dated 16 May 2003. See also Cl. Mem. ¶ 187.

¹⁶⁷ Ex. C-181, Corocoro Oil Development Plan Addendum (Revision 3, Final Addendum), 3 March 2005 at p. 7. See also Cl. Mem. ¶ 212.

US\$ 650 million was spent on construction and implementation of the necessary infrastructure.¹⁶⁸

182. The Corocoro Project had not commenced production before ConocoPhillips handed over the operatorship of the Project to PdVSA on 1 May 2007.¹⁶⁹

(7) The Insertion of the Claimant CGP Into the Chain of Ownership

183. The Claimant, CGP, was incorporated in the Netherlands on 26 July 2005.¹⁷⁰ On 11 August 2005, ConocoPhillips Gulf of Paria Ltd. transferred its ownership interest in Conoco Venezuela C.A. — the Venezuelan entity that directly held the interest of ConocoPhillips in the Corocoro Project — to CGP, thereby inserting CGP into the chain of ownership.¹⁷¹

F. THE FACTS GIVING RISE TO THE DISPUTE

184. The factual context and details of the principal measures taken by Venezuela on which the Claimants base their claims for compensation under the Investment Law and the Treaty are elaborated below.

(1) Election of President Chávez and Promulgation of the Investment and New Hydrocarbons Laws

(a) Election of President Chávez

185. Mr Hugo Chávez Frías was elected President of Venezuela on 6 December 1998 and assumed the presidency in February 1999.

(b) Promulgation of the Investment Law

¹⁶⁸ Cl. Mem. ¶ 213.

¹⁶⁹ *See supra* ¶ 167.

¹⁷⁰ Ex. C-37, ConocoPhillips Gulf of Paria B.V. Certificate of Incorporation and Articles of Association dated 26 July 2005. *See also* Cl. Mem. ¶ 216, fn. 350.

¹⁷¹ Cl. Mem. ¶ 216, fn. 350.

186. On 22 October 1999, President Chávez promulgated the Investment Law. Article 1 of the Investment Law states that its objective is:¹⁷²

[T]o provide investments and investors, both domestic and foreign, with a stable and predictable juridical framework whereby the former and the latter may work in a secure environment, by regulating the actions of the State towards these investments and investors.

The Investment Law contains obligations to treat investments fairly and equitably and not to expropriate investments without prompt, fair and adequate compensation.¹⁷³

187. Article 22 of the Investment Law provides as follows:¹⁷⁴

Disputes arising between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments with Venezuela, or any disputes which apply the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration under the terms provided for in the respective treaty, should it so provide, without prejudice to the possibility of using, when applicable, the systems of litigation provided for in the Venezuelan laws in force.

(c) Promulgation of the New Hydrocarbons law and Execution of the Procedure for Payment of Exploitation Tax (Royalty)

188. On 13 November 2001, exercising powers delegated to him to legislate changes to the hydrocarbons laws in force, President Chávez issued a new Organic Law of Hydrocarbons (“New Hydrocarbons Law”).¹⁷⁵ Under the New Hydrocarbons Law, private companies were only allowed to participate in oil projects through mixed enterprises in which the State held a

¹⁷² Ex. C-1, Investment Law, Art. 1. *See also* Cl. Mem. ¶ 156.

¹⁷³ Ex. C-1 and Ex. R-12, Investment Law, Arts. 6 and 11. *See also* Cl. Mem. ¶ 156.

¹⁷⁴ Ex. C-1, Investment Law, Art. 22. *See infra* ¶ 225 for Respondent’s English language translation of this provision.

¹⁷⁵ Ex. C-41, *Decreto con Fuerza de Ley Orgánica de Hidrocarburos* (Decree with Force of the Organic Hydrocarbons Law), Decree No. 1,510, Official Gazette No. 37,323, published 13 November 2001 (“New Hydrocarbons Law”). *See also* Cl. Mem. ¶¶ 159-60.

majority stake.¹⁷⁶ The New Hydrocarbons Law also fixed the royalty rate at 30 percent.

189. In January 2002, the Ministry executed an agreement with the Petrozuata Association reaffirming that the one percent royalty would remain applicable to its production in accordance with the Orinoco Belt Royalty Agreement (“Procedure for Payment of Exploitation Tax (Royalty”).¹⁷⁷ The Procedure for Payment of Exploitation Tax (Royalty) further stipulated that thereafter the royalty rate would be 16 $\frac{2}{3}$ percent.¹⁷⁸

(2) Measures Taken to Increase the Applicable Royalty Rate

(a) Amendment of the Orinoco Belt Royalty Agreements

190. Minister Ramírez, in a letter to PdVSA dated 8 October 2004, referred to the increase in Brent crude oil prices that had taken place and indicated that the changed economic circumstances meant that the reduced royalty rate of one percent could not be justified.¹⁷⁹ On 10 October 2004, President Chávez announced that the government would increase the royalty rate applicable to the Orinoco Belt extra-heavy oil projects from one percent to 16 $\frac{2}{3}$ percent.¹⁸⁰

191. ConocoPhillips objected to the increased royalty rate including by letter to the Ministry of 22 November 2004, stating that the royalty rate increase on the commercial production of the Petrozuata and Hamaca Associations was not in conformity with the Orinoco Belt Royalty

¹⁷⁶ Ex. C-41, New Hydrocarbons Law at p. 5 and Art. 22.

¹⁷⁷ Ex. C-174, *Procedimiento para el Pago del Impuesto de Explotación (Regalía) del Crudo Extra Pesado Producido y del Azufre Extraído por [Petrolera Zuata, Petrozuata C.A.], entre [Petrolera Zuata, Petrozuata C.A.] y el Ministerio de Energía y Minas* (Procedure for Payment of Exploitation Tax (Royalty) for Extra Heavy Crude Produced and Sulfur Extracted by [Petrolera Zuata, Petrozuata C.A.], between [Petrolera Zuata, Petrozuata C.A.] and the Ministry of Energy and Mines), 14 January 2002 (“Procedure for Payment of Exploitation Tax (Royalty)”), Section 5.7.4. See Cl. Mem. ¶¶ 164-65.

¹⁷⁸ Ex. C-174, Procedure for Payment of Exploitation Tax (Royalty) at Section 5.7.4.2.

¹⁷⁹ Ex. R-110, Letter from Rafael Ramírez, Minister of Energy and Mines to Alí Rodríguez, President of Petróleos de Venezuela, S.A., dated 8 October 2004. See also Resp. C-Mem. ¶ 90.

¹⁸⁰ Cl. Mem. ¶¶ 193-97; Cl. Reply ¶ 17p.

Agreement as the conditions on which an increased rate could be imposed had not occurred.¹⁸¹ ConocoPhillips reserved its legal rights with respect to the royalty rate increase.

192. According to the Claimants, the Corocoro Project stalled apparently because of its objection to the increase in the royalty rate.¹⁸² In the following months, a number of meetings between ConocoPhillips and government officials, including President Chávez, Minister Ramírez and Vice Minister Mommer, took place.¹⁸³ On 14 January 2005, in a letter to Minister Ramírez, ConocoPhillips withdrew its objection to the increased royalty rate.¹⁸⁴ On 3 March 2005, the Corocoro Development Plan Addendum was approved and progress on the Project recommenced.¹⁸⁵

(b) Imposition of a Higher Royalty Rate on Production of Between 120,000 and 145,000 Barrels Per Day

193. Vice Minister Mommer informed ConocoPhillips on 26 April 2005 that, effective 1 May 2005, production above 120,000 BPD up to 145,000 BPD would be permitted but that a 30 percent royalty rate would apply to production of between 120,000 BPD and 145,000 BPD.¹⁸⁶

(c) Further Increase in the Effective Royalty Rate - the Extraction Tax

194. On 16 May 2006, the Venezuelan National Assembly approved and implemented a new “Extraction Tax” of one-third of the value of all hydrocarbons extracted “from any deposit”.¹⁸⁷

¹⁸¹ Ex. C-28 and Ex. C-28A, Letter from Gregory Goff of ConocoPhillips to Dr Rafael Ramírez, Minister of Energy and Mines, dated 22 November 2004. *See also* Cl. Mem. ¶ 198.

¹⁸² Cl. Mem. p. 99, heading (b) and ¶¶ 203-04; 208; Cl. Reply ¶ 17r.

¹⁸³ Cl. Mem. ¶¶ 205-08.

¹⁸⁴ Ex. C-29, Letter from William B. Berry, Executive Vice President of Exploration and Production, ConocoPhillips, to Dr Rafael Ramírez, Minister of Energy and Mines, dated 14 January 2005. *See also* Resp. C-Mem. ¶ 93.

¹⁸⁵ Cl. Mem. ¶ 208; Cl. Reply ¶ 17r.

¹⁸⁶ Ex. C-213, Letter from Bernard Mommer to William Berry, 26 April 2005. *See also* Cl. Mem. ¶ 215.

¹⁸⁷ Ex. C-42. *Ley de Reforma Parcial del Decreto No. 1.510 con Fuerza de Ley Orgánica de Hidrocarburos* (Law Partially Reforming Decree No. 1,510 with Force of the Organic Hydrocarbons Law), Official Gazette No. 38,443, published 24 May 2006 at Art. 5.4.

The taxpayer had the right to deduct the amount paid as a royalty from the amount of Extraction Tax owed.¹⁸⁸

195. The introduction of the Extraction Tax raised the effective royalty rate applicable to each of the Petrozuata, Hamaca and Corocoro Projects from 16 $\frac{2}{3}$ percent to 33 $\frac{1}{3}$ percent.¹⁸⁹ On 29 November 2006, ConocoPhillips sent a letter to Vice Minister Mommer objecting to the application of the Extraction Tax and reserving its rights with respect to the measure.¹⁹⁰

(3) Increase in the Income Tax Rate for Extra-Heavy Oil Projects

196. The National Assembly approved an increase in the income tax rate for the extra-heavy oil projects from 34 percent to 50 percent on 29 August 2006.¹⁹¹ The increased income tax rate became effective on 1 January 2007.¹⁹²

197. In its letter of 29 November 2006 to Vice Minister Mommer, ConocoPhillips also protested the application of the income tax increase.¹⁹³

(4) The Nationalisation Decree and Venezuela's Taking of the Claimants' Interests in the Petrozuata, Hamaca and Corocoro Projects

(a) Draft Contracts for Conversion of the Projects Into Empresas Mixtas

198. In August 2006, "Not Binding Term Sheets for the Migration of the Associations" were sent to ConocoPhillips.¹⁹⁴

¹⁸⁸ Cl. Mem. ¶ 221; Resp. C-Mem. ¶ 95.

¹⁸⁹ Cl. Reply ¶ 17t; Cl. Mem. ¶ 221.

¹⁹⁰ Ex. C-30 and Ex .C-30A, Letter from A. Roy Lyons to Dr Bernard Mommer, dated 29 November 2006. *See also* Cl. Mem. ¶ 225; Cl. Reply ¶ 17t.

¹⁹¹ Ex. C-43, *Ley de Reforma Parcial de la Ley de Impuesto Sobre la Renta* (Law Partially Reforming the Income Tax Law), Official Gazette No. 38,529, published 25 September 2006.

¹⁹² Cl. Mem. ¶ 224; Cl. Reply ¶ 17u.

¹⁹³ Ex. C-30 and Ex .C-30A, Letter from A. Roy Lyons to Dr Bernard Mommer, dated 29 November 2006. *See also* Cl. Mem. ¶ 225; Cl. Reply ¶ 17u.

199. On 8 January 2007, President Chávez announced¹⁹⁵ a new program of nationalisation pursuant to which all oil projects in Venezuela, including the Petrozuata, Hamaca and Corocoro Projects, would be subject to the legal regime of the New Hydrocarbons Law.¹⁹⁶

200. Later in January, ConocoPhillips received draft contracts for the conversion into *empresas mixtas* of the Hamaca Association, the Petrozuata Association and the Corocoro Project.¹⁹⁷

(b) The Claimants Notify the Respondent of the Existence of a Dispute Under the Investment Law and the Treaty

201. On 31 January 2007, ConocoPhillips transmitted to the government of Venezuela a letter notifying the Respondent of the existence of a dispute arising under the Investment Law and the Treaty.¹⁹⁸ In that letter, the Claimants consented to ICSID arbitration of the dispute.¹⁹⁹

¹⁹⁴ Ex. C-231, Petrozuata Not Binding Terms Sheet for the Migration of the Associations, August 2006 and Ex. C-232, *Ameriven Hoja de Términos no Vinculante para la Migración de la Asociación* (Ameriven Non-Binding Term Sheet for Migration from Association), August 2006.

¹⁹⁵ Ex. R-39, Hugo Chávez Frías, President of the Bolivarian Republic of Venezuela, Speech Following the Induction of New Cabinet Members, 8 January 2007.

¹⁹⁶ Resp. C-Mem. ¶ 107.

¹⁹⁷ Cl. Mem. ¶¶ 230-31. See Ex. C-31, *Proyecto de Contrato para la Conversión a Empresa Mixta entre Corporación Venezolana del Petróleo, S.A., Phillips Petroleum Company Venezuela Limited and Texaco Orinoco Resources Company* (Form of Contract for Conversion to a Mixed Company Among Corporación Venezolana del Petróleo, S.A., Phillips Petroleum Company Venezuela Limited and Texaco Orinoco Resources Company) dated 17 January 2007; Ex. C-32, *Proyecto de Contrato para la Conversión a Empresa Mixta entre Corporación Venezolana del Petróleo, S.A. y Conoco Orinoco, Inc.* (Form of Contract for Conversion to a Mixed Company Between Corporación Venezolana del Petróleo, S.A., and Conoco Orinoco Inc.), dated 22 January 2007; Ex. C-236, *Proyecto de Contrato para la Conversión a Empresa Mixta entre Corporación Venezolana del Petróleo, S.A., [ConocoPhillips], [ENI], y [OPIC]* (Form of Contract for Conversion to a Mixed Company among Corporación Venezolana del Petróleo, S.A., [ConocoPhillips], [ENI], and [OPIC]), received 22 January 2007.

¹⁹⁸ Ex. C-36, Letter from A. Roy Lyons, President, ConocoPhillips Latin America, to Rafael Ramírez Carreño, Minister of Popular Power for Energy and Petroleum, Nicolás Maduro, Minister of Popular Power for Foreign Affairs, and Gladys Gutiérrez, Distinguished Attorney General of the Republic, dated 31 January 2007 at p. 4.

¹⁹⁹ Cl. Mem. ¶ 232; Cl. Reply ¶ 17v.

(c) Promulgation of Decree Law 5,200

202. On 1 February 2007, the Venezuelan National Assembly passed the *Law that Authorises the President of the Republic to Issue Decrees having Rank, Value, and Force of Law on the Matters Delegated Hereby* (the “Enabling Law”).²⁰⁰ The Enabling Law granted President Chávez the power to enact or modify legislation governing the Orinoco Belt strategic associations and the New Areas.²⁰¹

203. On 26 February 2007, Decree Law 5,200 on the “Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Risk and Profit Sharing Exploration Agreements” was issued.²⁰² Decree Law 5,200 directed that the Orinoco Oil Belt associations and the associations under the Exploration at Risk and Profit Sharing scheme be transformed into mixed companies, of which PdVSA (or a PdVSA affiliate) would hold at least 60 percent of the shares.²⁰³

204. Decree Law 5,200 required the creation of a “Transition Commission” for each association, to which control of the association’s activities was required to be transferred by 30 April 2007.²⁰⁴ Additionally, Article 4 afforded foreign investors such as ConocoPhillips four months — until 26 June 2007 — “to agree to the terms and conditions of their possible participation in the new Mixed Companies”.²⁰⁵ Absent such an agreement, on the expiry of the

²⁰⁰ Ex. C-33 and Ex. C-33A, *Ley que Autoriza al Presidente de la República para Dictar Decretos con Rango, Valor y Fuerza de Ley en las Materias que se Delegan* (The Law that Authorizes the President of the Republic to Issue Decrees Having Rank, Value, and Force of Law on the Matters Delegated Hereby), Official Gazette No. 38,617, published 1 February 2007 (“Enabling Law”). See also Cl. Mem. ¶ 233.

²⁰¹ Ex. C-33 and Ex. C-33A, Enabling Law at Art. 1(11).

²⁰² Ex. C-5, *Decreto con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas* (Decree Having the Rank, Value and Force of Law of Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Risk and Profit Sharing Exploration Agreements), Decree No. 5,200, Official Gazette No. 38,632, published 26 February 2007 (“Nationalisation Decree”). See also Resp. C-Mem. ¶¶ 109-11.

²⁰³ Ex. C-5, Nationalisation Decree at Arts. 1 and 2. See also Cl. Mem. ¶¶ 234-35; Cl. Reply ¶ 17w.

²⁰⁴ Ex. C-5, Nationalisation Decree at Art. 3.

²⁰⁵ Ex. C-5, Nationalisation Decree at Art. 4.

four-month term, “the Republic through Petróleos de Venezuela, S.A. or any of its affiliates that has been designated to such effect, shall assume directly the activities performed by the associations ...”.²⁰⁶

(d) Negotiations Regarding the Claimants’ Interests in the Project

205. Both before and after the enactment of Decree Law 5,200, meetings took place among ConocoPhillips’ and Venezuela’s representatives to discuss the transfer of the Petrozuata, Hamaca and Corocoro Projects to the mixed companies’ regime.²⁰⁷

206. Among the issues discussed at meetings and in related communications was the question of compensation for ConocoPhillips’ rights in the Projects. According to the Claimants, any offer of compensation by Venezuela was premised on the waiver of their rights to seek compensation through other legal means, which they were not willing to do.²⁰⁸ No offer of compensation was made for the Corocoro Project.²⁰⁹

(e) PdVSA Assumes Operational Control of the Projects

207. A PdVSA affiliate assumed physical control of the operations of the Petrozuata, Hamaca and Corocoro Projects on 1 May 2007.²¹⁰

(f) Expiry of the Period for Reaching Agreement Under the Nationalisation Decree

208. On the expiry of the four-month term envisaged in Decree Law 5,200, no agreement had been reached regarding the Claimants participation in the new mixed enterprises. Accordingly, as envisaged in Article 4 of Decree Law 5,200, on 26 June 2007 Venezuela assumed

²⁰⁶ Ex. C-5, Nationalisation Decree at Art. 5.

²⁰⁷ Cl. Mem. ¶¶ 238-39; Resp. C-Mem. ¶ 112.

²⁰⁸ Cl. Mem. ¶¶ 238-39; Cl. Reply ¶ 17x.

²⁰⁹ Cl. Mem. ¶ 240.

²¹⁰ Cl. Mem. ¶ 241.

ConocoPhillips' interests in the Petrozuata, Hamaca and Corocoro Projects.²¹¹ No compensation has been provided for the taking.²¹²

209. On 8 October 2007, the Venezuelan National Assembly ratified the Law on the Effects of the Process of Migration into Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration at Risk and Profit Sharing Agreements (“Law on the Effects of the Process of Migration”).²¹³

210. Article 1 of the Law on the Effects of the Process of Migration provided that the Orinoco Belt association agreements and Exploration at Risk and Profit Sharing Agreements would be “extinguished as of the date of the publication of this Law in the Official Gazette of the Bolivarian Republic of Venezuela”.²¹⁴ Article 2 of the Law transferred the interests of the Orinoco Belt associations including Petrozuata and Hamaca, and of the Exploration at Risk and Profit Sharing Agreements, to the mixed companies.

211. On 29 July 2007, President Chávez gave a speech in which he discussed the various measures in the context of the “progressive recovery of oil sovereignty”.²¹⁵ On 8 February 2008, Minister Ramírez, stated that “[s]tarting in 1999, the Bolivarian government of President Hugo Chávez initiated a policy for the recovery of Absolute Oil Sovereignty and management of [Venezuela’s] main resource”.²¹⁶

²¹¹ Cl. Mem. ¶¶ 246-48; Cl. Reply ¶ 17x.

²¹² Cl. Mem. ¶ 247; Cl. Reply ¶ 17x.

²¹³ Ex. C-35, *Ley sobre los Efectos del Proceso de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas* (Law on the Effects of the Process of Migration into Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration at Risk and Profit Sharing Agreements) (“Law on the Effects of the Process of Migration”), Official Gazette No. 38,785, published 8 October 2007.

²¹⁴ Ex. C-35, Law on the Effects of the Process of Migration at Art. 1.

²¹⁵ Ex. C-4, Transcript of *Aló Presidente 288: Desde la Faja Petrolífera del Orinoco*, Hugo Chávez Frías, President of the Bolivarian Republic of Venezuela 29 July 2007 at 6-10.

²¹⁶ Ex. C-44, *Declaraciones del Ministro Ramírez en Cadena Nacional: Mensaje al Pueblo Venezolano, en Cadena Nacional, del Ministro del Poder Popular para la Energía y Petróleo y Presidente de Petróleos de Venezuela S.A. (PDVSA), Rafael Ramírez, con Motivo al Arbitraje Internacional entre ExxonMobil-PDVSA* (Statements from Minister Ramírez on the National

V. SUMMARY OF THE PARTIES' POSITIONS

A. THE CLAIMANTS' REQUESTS FOR RELIEF

212. In their Request for Arbitration, the Claimants requested that the Tribunal:²¹⁷

(a) DECLARE that Venezuela has breached:

(i) 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;

and

(ii) Articles 1 and 6 of the Foreign Investment Law and Article 3 of the Treaty by failing to accord ConocoPhillips' investments in Venezuela fair and equitable treatment, full protection and security, and by taking arbitrary and discriminatory measures impairing the use and enjoyment of its investments in Venezuela;

(b) ORDER Venezuela to pay damages to ConocoPhillips for its breaches of the Foreign Investment Law and the Treaty in an amount to be determined at a later stage in these proceedings, including by payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate;

(c) AWARD such other relief as the Tribunal considers appropriate; and

(d) ORDER Venezuela to pay all of the costs and expenses of this arbitration, including ConocoPhillips' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs.

213. In their Memorial, the Claimants reiterated that:²¹⁸

Venezuela's persistent and intentional breaches of its obligations to ConocoPhillips have given rise to the claims asserted herein. Venezuela has violated its obligations

Network: Message to the Venezuelan People on the National Network from the People's Power Minister of Energy and Petroleum and President of Petróleos de Venezuela S.A. (PDVSA), Rafael Ramírez, Concerning the International Arbitration Proceeding Between ExxonMobil [and] PDVSA), 8 February 2008 at p. 1.

²¹⁷ RFA ¶ 130.

²¹⁸ Cl. Mem. ¶ 18.

to ConocoPhillips Company under the Foreign Investment Law. Venezuela has also violated its obligations to the Dutch subsidiaries of ConocoPhillips Company – CPZ, CPH and CGP – under the bilateral investment treaty between the Netherlands and Venezuela.

214. With respect to their request for damages, the Claimants stated that:²¹⁹

[...] ConocoPhillips respectfully turns to this Tribunal to vindicate its rights and award it redress in an amount provisionally quantified at US\$30,305,400,000.

215. More specifically, in their Memorial and Reply, the Claimants claimed the following compensation:²²⁰

- (a) Damages for the lost income to the Claimants as a result of the fiscal overpayments required of the Petrozuata and Hamaca Projects prior to June 26, 2007, in an amount to be determined as at the date of the Tribunal’s Award.
- (b) Damages for the lost income to the Claimants that would have accrued from their interests in the Petrozuata, Hamaca and Corocoro Projects in the period between June 26, 2007 and the date of the Tribunal’s Award, in an amount to be determined as at the date of the Tribunal’s Award.
- (c) Damages for the total loss to the Claimants of their interests in the Petrozuata, Hamaca and Corocoro Projects, in an amount equal to the fair market value of those interests, to be determined as at the date of the Tribunal’s Award.
- (d) Damages to reflect the additional losses the Claimants will suffer as a result of the United States federal and state income tax liability of ConocoPhillips Company on the Tribunal’s Award, in an amount to be determined as at the date of the Tribunal’s Award.
- (e) Pre-award interest on (a) and (b) above from the date of each loss of income that would have accrued to the Claimants but for Venezuela’s unlawful actions, at rates reflecting the historic cost of equity of each Project (as relevant), as at the date of the Tribunal’s Award, compounded annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation.
- (f) Post-award interest on (a), (b), (c) and (e) above at a rate equal to the cost of equity of each Project (as relevant), as at the date of the Tribunal’s Award,

²¹⁹ Cl. Mem. ¶ 19.

²²⁰ Cl. Mem. ¶ 478; Cl. Reply ¶ 619 (also claiming at (h) the Claimants’ costs of arbitration “in an amount to be quantified by the Claimants after the hearing in June 2010”).

compounded annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation.

- (g) A declaration that the Tribunal's Award is made net of all Venezuelan taxes, and that Venezuela may not impose any tax on the Claimants arising from the Tribunal's Award.
- (h) All of the Claimants' costs of arbitration, including legal and expert costs.

B. THE RESPONDENT'S REQUESTS

216. In its Memorial on Objections to Jurisdiction, the Respondent asserts that:²²¹

With respect to the jurisdictional objections, the claims set forth in the Request should be dismissed in their entirety inasmuch as: (i) Article 22 of the Investment Law does not provide a basis for finding "consent" on the part of the Republic to arbitration of this dispute; (ii) ConocoPhillips does not qualify as an "international investor" as defined in the Investment Law Regulation, and thus would not be entitled to bring claims under the Investment Law concerning the Projects even if Article 22 did constitute a consent to jurisdiction; (iii) Claimants CPZ, CPH and CGP are merely corporations of convenience created for the purpose of obtaining ICSID jurisdiction in this case in an abuse of the corporate form and therefore jurisdiction under the Dutch Treaty should be rejected; and (iv) the interests held by Claimants CPH and CGP in any event are indirect investments which do not qualify for protection under the Dutch Treaty.

217. The Respondent, in its Counter-Memorial reiterated that "[f]or the reasons set forth above and in the Memorial on Objections to Jurisdiction, the claims should be rejected in their entirety for lack of jurisdiction".²²² The Respondent further stated that:²²³

In the event that the Tribunal were to find jurisdiction on any of the claims asserted, those claims should nevertheless be dismissed for the substantive reasons set forth above. In the event that the claims are not rejected in their entirety for lack of jurisdiction or on the merits, the aggregate amount of compensation in respect of the three Projects should not exceed US\$583 million, with simple interest. In addition, Claimants should be ordered to reimburse Respondent for all reasonable costs and expenses, including legal fees, relating to this Arbitration.

²²¹ Resp. Mem. on Objections to Jurisdiction ¶ 183.

²²² Resp. C-Mem. ¶ 351.

²²³ Resp. C-Mem. ¶ 351.

218. In its Rejoinder, the Respondent repeated its requests in its Memorial on Objections to Jurisdiction and Counter-Memorial that the Claimants' claims be dismissed for lack of jurisdiction and on the merits. Further, the Respondent stated that, if the claims are not rejected in their entirety, "the aggregate amount of compensation in respect of the three Projects should not exceed US\$570.5 million, with simple interest".²²⁴

VI. JURISDICTION

A. INTRODUCTION

219. The preamble to the ICSID Convention declares that a Contracting State by the mere fact of ratifying, accepting or approving the Convention is not under any obligation to submit any particular dispute to conciliation or arbitration. Under Article 25 of the Convention, the jurisdiction of the Centre extends to a legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State that the parties to the dispute consent in writing to submit to the Centre.

220. On the adoption of the Convention, the Executive Directors of the World Bank in their report of 18 March 1965 affirmed that "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre".²²⁵ That consent of the two parties they said and, as subsequent decisions have confirmed, need not be expressed in a single instrument: in particular, "a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing".²²⁶

221. The Claimants gave their consent to the jurisdiction of the Centre over their claims, which are the subject of this proceeding, in their letter of 31 January 2007 advising the Minister of Energy and Petroleum, the Minister of Foreign Affairs and the Attorney-General of

²²⁴ Rejoinder of the Bolivarian Republic of Venezuela dated 1 February 2010 ("Resp. Rej.") ¶ 577.

²²⁵ Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Report of the Executive Directors on the Convention"), ¶ 23.

²²⁶ Report of the Executive Directors on the Convention, ¶ 24.

Venezuela of the existence of a dispute arising in relation to the measures taken by Venezuela.²²⁷

222. The Claimants submit that Venezuela gave its consent to the jurisdiction of the Centre under:

- a. Article 22 of the Investment Law;²²⁸ and
- b. Article 9 of the Netherlands-Venezuela BIT.²²⁹

223. In their Memorial, the Claimants invoke:²³⁰

- the Investment Law as the basis for jurisdiction over the claims made by ConocoPhillips Company, a national of a State Party to the Convention (the United States of America), and Venezuela, also a State Party to the Convention; and
- the BIT as the basis of jurisdiction over the claims made by the three Dutch Claimants.

224. The Respondent objects to both the Investment Law and the BIT as bases for jurisdiction.

B. ARTICLE 22 OF THE INVESTMENT LAW

225. Article 22 of the Investment Law provides as follows:

Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI – MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así este lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente.

²²⁷ Ex. C-36 *supra* at fn. 198.

²²⁸ Ex. C-1 and Ex. R-12, Investment Law, Art. 22.

²²⁹ Ex. C-2 and Ex. R-13, Treaty, Art. 9.

²³⁰ Cl. Mem. ¶¶ 261–88.

The translations into English provided by the Parties differ in detail. Venezuela's translation is as follows.²³¹

Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which are applicable the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI–MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.

The Claimants' translation is to this effect:²³²

Disputes arising between an international investor whose country of origin has in effect a treaty or agreement for the promotion and protection of investments with Venezuela, or any disputes to which apply the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility of using, when applicable, the systems of litigation provided for in the Venezuelan laws in force.

While there are small differences between those translations the Parties do not see them as significant.²³³ Nor does the Tribunal.

226. The Claimants contend that Venezuela gave its consent to jurisdiction through Article 22; Venezuela rejects that interpretation. Venezuela also submits that, wholly apart from the question of consent, jurisdiction over the claims made by ConocoPhillips Company is lacking because it does not qualify as an “international investor” under the Investment Law and therefore is not within the scope of Article 22.²³⁴ The Claimants reject that contention.

²³¹ Ex. R-12, Investment Law, Art. 22.

²³² Ex. C-1, Investment Law, Art. 22. *See supra* fn. 174.

²³³ *See, e.g.*, Tr. Day 1:81–82.

²³⁴ Resp.'s Mem. on Objections to Jurisdiction ¶ 126.

227. The Parties agree, as indeed Article 41(1) of the ICSID Convention, reflecting a long and well established principle, makes clear, that “the Tribunal shall be the judge of its own competence”.

228. The Parties disagree, however, on the following matters relating to the interpretation of Article 22 of the Investment Law:

- a. the starting point: must Article 22 state the consent of Venezuela clearly and unequivocally, or is the provision to be interpreted objectively and in good faith?
- b. the applicable law: is Article 22 to be interpreted in accordance with Venezuelan law or international law or on some other basis? If international law is applicable, is it the law relating to the interpretation of treaties or some other area of international law that is to be applied?
- c. the text of Article 22: in the light of the answers to the two preceding questions, what is the meaning of the text?

229. In relation to the third issue, the Parties addressed: the words and structure of Article 22, its plain or ordinary meaning, its object and purpose, its context, both immediate and over a longer period, including the Respondent’s attitude to international arbitration and to arbitration generally; the opinions of commentators, including those said to be involved in the preparation of the Investment Law; and the discussion of those issues in decisions of tribunals in other ICSID cases holding that Article 22 did not incorporate a unilateral consent by Venezuela to ICSID arbitration.²³⁵

230. The Tribunal will now address those issues and, in the light of its conclusions on them, particularly the third issue, to which the Parties gave most attention, determine whether the

²³⁵ *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated 10 June 2010 (“*Mobil*”). See also *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction dated 30 December 2010 (“*Cemex*”) and *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated 8 February 2013 (“*Tidewater*”)

Respondent, by enacting Article 22 of the Investment Law, has given its consent to ICSID jurisdiction.

(1) The Starting Point

231. The Respondent contends that to satisfy the requirement of consent in Article 25(1) of the ICSID Convention, the statement of consent must be “clear and unequivocal” and not merely arguable from ambiguous language.²³⁶ In support of that proposition, it cites ICSID decisions and ICSID commentaries including a statement by the drafters of the ICSID Model Clauses recording consent: “[t]he one basic requirement that any consent clause must fulfil is that it should unequivocally show submission to the jurisdiction of the Centre of a particular dispute or class of disputes”.²³⁷ It also refers to a statement by the International Court of Justice to the effect that the consent to the jurisdiction of that Court must be “voluntary and indisputable”,²³⁸ and to commentators similarly urging the Court to be cautious in assuming jurisdiction.²³⁹

232. The Claimants reject the Respondent’s starting point: “the only issue before this Tribunal is whether, as a matter of international law, the language included by Venezuela can be reasonably construed in good faith to constitute consent to arbitrate certain claims within Article 25 of the ICSID Convention”.²⁴⁰ In support of that approach the Claimants also cite ICSID decisions.

²³⁶ Resp. Mem. on Objections to Jurisdiction at ¶ 80.

²³⁷ Ex. R-61, Model Clauses Recording Consent to the Jurisdiction of the International Centre for Settlement of Investment Disputes, 7 I.L.M. 1159, 1162 (1968).

²³⁸ *Corfu Channel Case (Preliminary Objection)*, Judgment, 25 March 1948, I.C.J. Reports 1948, p. 15 at p. 27.

²³⁹ Ex. R-58, Malcolm Shaw, *INTERNATIONAL LAW*, (Cambridge University Press, 5th ed. 2003), 974 (“Consent has to be clearly present, if inferred, and not merely a technical creation. The Court has emphasised that such consent has to be ‘voluntary and indisputable’); and Ex. R-59, Sir Hersch Lauterpacht, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (Frederick A. Praeger, 1958), 91 (stating that the Court “has emphasised repeatedly the necessity for extreme caution in assuming jurisdiction, which must be proved up to the hilt Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it.”).

²⁴⁰ Cl. Reply ¶ 217.

(2) The Applicable Law

233. The Respondent contends that the Investment Law, as part of the law of Venezuela, must be interpreted in light of principles of Venezuelan law.²⁴¹ It is well established under that law that consent to arbitration must be clear and unequivocal.²⁴² As will appear, it also contends that the plain language of Article 22 does not, in any event, provide for consent.

234. The Claimants submit that the question whether the Respondent consented to ICSID arbitration under Article 22 is a matter of international law: “[b]y referring to consent under the ICSID Convention, Venezuelan law incorporates a *renvoi* to international law in relation to that question”.²⁴³ The question whether Venezuela consented to ICSID arbitration in its national law, the Claimants continue, is a matter to be determined within the meaning of Article 25 of the ICSID Convention and, thus, under international law, not Venezuelan law.²⁴⁴ In support of its contentions, each Party has referred the Tribunal to decisions of ICSID Tribunals.

235. An ICSID Tribunal reviewed the range of ICSID decisions on the issue of the governing law when consent is claimed to have been given in the national law. It provided this summary:

From this review of ICSID case law, it results that in four cases, the question was not dealt with. In *SPP v. Egypt*, the tribunal decided to apply ‘general principles of statutory interpretation,’ ‘taking into consideration relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.’ In *CSOB v. Slovak Republic*, the Tribunal took its decision only on the basis of the latter principles. In *Zhinvali v. Georgia*, it opted for domestic law ‘subject to ultimate governance by international law’.²⁴⁵

236. It commented that, in those cases, the States’ (claimed) consent to arbitration “was not contained in a treaty to be interpreted according to the Vienna Convention on the Law of Treaties ... but in a unilateral offer made by that State in one form or another”.²⁴⁶ “[T]hat very

²⁴¹ Resp. Mem. on Objections to Jurisdiction ¶ 87.

²⁴² Resp. Mem. on Objections to Jurisdiction ¶ 88.

²⁴³ Cl. Reply ¶ 225.

²⁴⁴ Cl. Reply ¶ 230.

²⁴⁵ *Cemex* ¶ 76.

²⁴⁶ *Cemex* ¶ 77.

problem”, it continued, arose when the International Court of Justice interpreted unilateral declarations accepting its jurisdiction under Article 36(2) of its Statute. Those international instruments, according to the Court, “must be interpreted by reference to international law”.²⁴⁷ That Tribunal said that it shared this analysis:²⁴⁸

Unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention. Such offers could be incorporated into domestic legislation or not. But, whatever may be their form, they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States.

237. That Tribunal then considered “the rules of interpretation” as fixed by the International Court when interpreting unilateral declarations accepting the compulsory jurisdiction of the Court under Article 36(2) of its Statute.²⁴⁹ It concluded in these terms:²⁵⁰

[T]he International Court of Justice interprets ‘the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned.’ The Court does so by starting with the text and, if the text is not clear, by giving due consideration to the context and examining the ‘evidence regarding the circumstances of its preparation and the purposes intended to be served.’ Thus the intention of the declaring State must prevail.

(3) The Text of Article 22

238. The task of the Tribunal in this case is to determine whether Venezuela in enacting Article 22 has given its consent to ICSID jurisdiction. Has it made a standing offer to foreign investors under the ICSID Convention? It is only when that question has been answered that the need to determine the extent of the consent might arise.

239. Accordingly, the Tribunal now addresses the question just asked by reference to the words and structure of Article 22, its ordinary meaning, its object and purpose and its context, both immediate and long term, along with the other matters mentioned in paragraph 237 above.

²⁴⁷ *Cemex* ¶ 78.

²⁴⁸ *Cemex* ¶ 79.

²⁴⁹ *Cemex* ¶¶ 83-87.

²⁵⁰ *Cemex* ¶ 87.

240. The Claimants make their submissions relating to the words and structure and ordinary meaning of Article 22 by emphasising two different versions of the article. In the first, they address the following parts of the provision:

... disputes to which are applicable the provisions of ... the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides

241. In relation to that text, the Claimants' first contention was that the express reference in Article 22 to the ICSID Convention is significant. Under the principle of effective interpretation, "a fundamental principle of interpretation", a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text.²⁵¹ Second, the Claimants emphasise the mandatory wording of the provision: certain categories of dispute "shall be submitted to international arbitration". That mandatory wording, they say, is to be contrasted with the permissive terms of the provision at the end of Article 22 relating to litigation in Venezuelan courts and of Article 23 about Venezuelan national courts and arbitral tribunals.²⁵² The third argument relates to the final phrase of the provision as quoted above — the arbitration is to be carried out "under the terms provided for in the respective treaty or agreement, should it so provide".²⁵³ There is no question, according to the Claimants, that the ICSID Convention provides for arbitration, as well as the rules for conducting the arbitration. In answer to the Respondent's argument that "if it so provides" means "if the respective treaty or agreement establishes, by its terms, that the dispute shall be submitted to international arbitration", the Claimants contend that the essence of such an interpretation would be that Article 22 is pointless from start to finish.²⁵⁴ That argument returns to the effectiveness argument.

²⁵¹ Cl. Reply ¶ 251.

²⁵² Cl. Reply ¶¶ 252-53.

²⁵³ Cl. Reply ¶ 255.

²⁵⁴ Cl. Reply ¶ 258 (citing Legal Expert Opinion of Enrique Urdaneta Fontiveros dated 28 November 2008, ¶ 14).

242. The Respondent, in answer to the Claimants' first point about the principle of effective interpretation, contends that that principle does not permit the reading out of the statute words that are there or reading in words that are not there. The Claimants' reading would deny effect to the words "if it so provides". In the opinion of the Respondent, those words, to move to the second and third submissions made by the Claimants, state a condition which has to be satisfied and which has not been: Article 25 of the ICSID Convention requires that the Parties to the dispute consent to the jurisdiction of the Centre and Venezuela has not given that consent. Moreover, submits the Respondent, Article 22 does serve a useful purpose in making clear that Venezuela intended to honour all existing international commitments it had undertaken for international arbitration. In the context of "the traditional Venezuelan hostility to international arbitration" that affirmation was significant.²⁵⁵

243. Before it considers those contextual matters to which the Parties gave considerable attention and the opinions of commentators on the Investment Law, including those said to have been involved in the preparation of the Law, the Tribunal sets out the second way in which the Claimants present Article 22 in support of their argument that, by that provision, Venezuela has consented to ICSID jurisdiction:

... disputes to which are applicable the provisions of ... the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration

244. The Claimants' contention that Article 22 should be read in this abbreviated way is based in significant part on the use of the words "treaty or agreement" both at the beginning of the Article and towards its end, by contrast to the word "Convention" which is used twice in relation to identified texts, one of them being the ICSID Convention. The submission is that the words "treaty or agreement" are used as abstract categories, to be distinguished from the two specified Conventions, and, in the context of Article 22, do not include those two Conventions. Accordingly, the Claimants continue, in terms of the version of Article 22 set out above, disputes to which the provisions of the ICSID Convention apply "shall be submitted to international arbitration". There is no need to read on. Indeed it would be "nonsense" if the

²⁵⁵ Resp. Rej. ¶ 36.

words “if it so provides” were “supposed to reach back to modify the ICSID Convention. It would be foolish to ask whether the ICSID Convention provides for arbitration. That is what the ICSID Convention is all about”.²⁵⁶

245. It is convenient to consider at this stage the Claimants’ argument based on the abbreviated text (as set out in paragraph 243) — an argument, which was not made in the two earlier cases on Article 22 and that was mainly developed in the oral hearings.

246. It is true that the argument gains some support from the literal terms of Article 22 and its possible distinction between treaties and agreements on the one side and the two specified Conventions on the other. It does, however, face what, in the opinion of the Tribunal, is an insurmountable hurdle when the provisions of those two Conventions dealing with disputes are considered. The MIGA Convention establishes procedures for the settlement of four different types of disputes:²⁵⁷

- a. questions of interpretation and application of the Convention arising between the Agency and a member State or between members: they are to be decided by the Board of the Agency, with a right of appeal by any member to the Council of the Agency (Article 56);
- b. disputes arising under a contract of guarantee or reinsurance between the Agency and the other Party: they are to be submitted to final arbitration in accordance with the rules in the contract of guarantee or reinsurance (Article 58);
- c. disputes between the Agency as subrogee of an investor and a member: they are to be settled in accordance with the procedure laid down either in Annex II to the Convention or in an agreement between the Agency and the member for an alternative method or methods of dispute settlement. Annex II provides for negotiation, and, if it fails, for arbitration on the submission of either party, or for

²⁵⁶ See Tr. Day 1:87–89.

²⁵⁷ Ex. R-62, Convention Establishing the Multilateral Investment Guarantee Agency, October 11, 1985, 24 I.L.M. 1605 (1985).

conciliation if they agree; the conciliation and arbitration processes are regulated in some detail, by reference to the parallel provisions in the ICSID Convention (Article 57(b)); and

- d. any dispute other than those in (a), (b) and (c) above between the Agency and a member or former member (or an agency thereof): they are also to be settled in accordance with Annex II (Article 57(a)).

247. The detail of those processes, including the use of arbitration in some cases but not in others, indicates plainly that “disputes to which are applicable the provisions of the [MIGA] Convention ... shall be submitted to international arbitration” only “according to the terms of the respective treaty or agreement [here the MIGA Convention]”.²⁵⁸ That final phrase, omitted in the Claimants’ abbreviated version, cannot be ignored in considering the reference to that Convention in Article 22. Those words are not to be read out of the text.

248. The same is true when the provisions for the settlement of disputes included in the ICSID Convention are considered. The first point is that investment disputes to which are applicable the provisions of the Convention may be submitted to conciliation under its Chapter III rather than to arbitration under Chapter IV. Second, “[a]ny dispute arising between Contracting States concerning the interpretation or application of the Convention which is not settled by negotiation shall be referred to the International Court of Justice by any party to the dispute unless the States concerned agree to another method of settlement”²⁵⁹. As with the provisions of the MIGA Convention, those provisions make it clear that it is not enough, as the abbreviated version of Article 22 would have it, to say that “disputes to which are applicable the provisions of ... [the ICSID Convention] shall be submitted to international arbitration. The submission has to be ‘according to the terms of the respective treaty or agreement [here the ICSID Convention, Chapter IV]’”.

249. The Claimants’ argument based on the abbreviated version of Article 22 must therefore fail.

²⁵⁸ Ex. C-1 and Ex. 12, Investment Law, Art. 22 (emphasis added).

²⁵⁹ ICSID Convention, Art. 64.

250. The Tribunal accordingly returns to the fuller version of Article 22 set out in paragraph 225 above on which the Parties placed their primary emphasis. As already indicated, in addressing the meaning of that text, they gave considerable attention to the context, especially Venezuela’s attitude to international arbitration over the last 100 or more years and more recently.

251. The most immediate context to the parts of Article 22 being considered is the final phrase of that provision and Article 23 and Article 1. The final phrase saves the existing rights of the investor or the State to bring proceedings under Venezuelan Law. Article 23 similarly recognises the right of the investor to submit a dispute arising in connection with the application of the Law, once it has exhausted administrative remedies, to national courts or arbitral tribunals of Venezuela, that is to say to bring proceedings unilaterally. The clear grant or recognition of those unilateral powers to initiate proceedings under national law provides a sharp contrast to the provisions of Article 22 relating to international arbitration, according to the Respondent. The Claimants comment in respect of Article 23 that it uses the permissive word may as opposed to the mandatory shall that is used in Article 22.²⁶⁰ The reply of the Respondent is that this is a misreading of Article 23, which provides for national, not international, arbitration at the option of the investor; the permissive “may” becomes mandatory once the investor exercises that option.²⁶¹

252. It is the Claimants who emphasise Article 1 of the Investment Law:

This Decree-Law is intended to provide investments and investors, both domestic and foreign, with a stable and predictable legal framework whereby the former and the latter may work in a secure environment, by regulating the actions of the State towards these investments and investors so as to bring about the increase, diversification and harmonic complementarity of investments in favour of the national development goals.²⁶²

²⁶⁰ Cl. Reply ¶ 252.

²⁶¹ Resp. Rej. ¶ 31, fn. 71.

²⁶² Cl. Reply ¶ 267.

Article 22, they submit, must be interpreted with the purpose of realising the goals, expressed in Article 1, of promoting and protecting foreign investment.²⁶³ The Respondent submits that it is the final phrase of Article 1, with its emphasis on advancing the objective of national development, which expresses the purpose of the Investment Law. Further, such a purposive provision does not itself have substantive effect.²⁶⁴

253. The Parties' submissions on the external context, beyond the terms of the Investment Law itself, addressed traditional and more recent Venezuelan attitudes toward arbitration, both national and international, and the particular background to the enactment of the Investment Law. In respect of that last matter, they gave close attention to the opinions of a number of commentators including some said by the Claimants to be the drafters, or involved in the drafting, of the Law. The Tribunal has not found this material helpful. It does not lead to a clear result.²⁶⁵ What is critical for the Tribunal is the wording of Article 22 read in the immediate context in accordance with accepted principles of interpretation which appear to be the same in international law and Venezuelan law.²⁶⁶

254. Against that background, the Tribunal returns to the terms of Article 22 to determine their meaning. It begins with the difference between the Parties about the question whether the consent of Venezuela must be stated clearly or unequivocally or the provision is to be interpreted objectively and in good faith. Given that States are subject to binding third party dispute settlement procedures only if they so consent and, given the weight of authority referred to earlier, particularly as found in decisions of the International Court of Justice and in the particular ICSID context, the Tribunal considers that its approach should be cautious. In the

²⁶³ Cl. Reply ¶¶ 267–68.

²⁶⁴ See Tr. Day 2:366.

²⁶⁵ With respect to the history of the drafting of the Investment Law and, in particular, the lack of clarity that Venezuela, in adopting Article 22, intended to give its consent to ICSID arbitration in the absence of a bilateral investment treaty, *etc.*, see *Mobil* ¶ 131 (“[T]he Tribunal cannot draw from this general evolution in favour of BITs the conclusion that Venezuela, in adopting Article 22, intended to give in advance its consent to ICSID arbitration in the absence of such BITs”).

²⁶⁶ See, e.g., Resp. Rej. ¶ 25 (stating that the Investment Law “bears no resemblance to any of the other consents to arbitration in any of Venezuela’s treaties or to the model ICSID clauses for consent to arbitration.”).

words of the International Court of Justice in considering the very first challenge made to its jurisdiction, the consent must be “voluntary and indisputable”,²⁶⁷ and in the words of both ICSID tribunals “clear and unambiguous”.²⁶⁸ The necessary consent is not to be presumed. It must be clearly demonstrated. As will be seen, the difference on this issue may not be significant.

255. That also appears to be the case with the Parties’ initially different positions on the applicable law. By the end, they were in broad agreement that the meaning of Article 22 was to be determined by considering its terms in context and in the light of their purpose.²⁶⁹ The Tribunal is of the same opinion. No significant difference is to be seen between Venezuelan law as found in Article 4 of the Civil Code and decisions of the Supreme Court of Venezuela, the law reflected in Article 31 of the Vienna Convention on the Law of Treaties and the statements to be found in relevant decisions of international courts and tribunals. They all call for particular attention to be given to the text, along with the other matters. The question remains: did Venezuela in Article 22 of the Law give its consent to international arbitration under ICSID?

256. So far as the text is concerned, the Respondent, it will be recalled, gave particular weight to the phrase “according to the terms of the respective treaty or agreement, if it so provides”. The final four words, it said, state a condition. The treaty — in this case the ICSID Convention — does not, according to the Respondent, itself “provide” for international arbitration. On the contrary, in its Article 25, the ICSID Convention expressly requires that the State consent to jurisdiction. That condition has not been satisfied. For the Claimants, that contention was answered by the fact that ICSID does provide for international arbitration: it regulates all the necessary elements.

²⁶⁷ See *supra* fn. 238.

²⁶⁸ See, e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 February 2005, ¶ 198 (“It is a well-established principle, both in domestic and international law, that [an agreement to arbitrate] should be clear and unambiguous”). See also *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award dated 8 December 2008, ¶ 167.

²⁶⁹ See, e.g., Cl. Reply ¶¶ 246–47; Resp. Rej., ¶ 23, fn. 55; Tr. Day 14:3797:12-16 (Claimants’ Counsel); Tr. Day 14:3919-20 (Respondent’s Counsel).

257. The Tribunal considers that those four words — if it [the treaty or agreement] so provides [should it so provide] — present the essential issue to be determined. They do state a condition — as indeed the Claimants’ expert on Venezuelan law accepted. In the Tribunal’s opinion, that condition has not been satisfied. It is not enough, as the Claimants contend, that the ICSID Convention provides for international arbitration. That treaty must itself manifest Venezuela’s consent to arbitration; but that treaty does not do that, as its Article 25 and preamble make clear. The ordinary meaning of the terms of Article 22, and especially of the condition, leads the Tribunal to the conclusion that Venezuela does not by that means consent to international arbitration under the ICSID Convention. Other considerations support that conclusion.

258. If the Claimants’ position was correct, it would follow that, if Venezuela in a future investment treaty were to accept the possibility of international arbitration but not to consent to it in that treaty, the Investment Law, by way of Article 22, would provide for that consent notwithstanding the deliberate choice of the State Parties to the treaty and the absence of reciprocity that that reading would introduce. That cannot be correct. A further possible difficulty with the Claimants’ reading of Article 22 is that the consent of the investor would also apparently not be required: the State would have a unilateral right to initiate the process against the investor and the investment dispute “shall be submitted to international arbitration”, notwithstanding the plain terms of Article 25 of the ICSID Convention.²⁷⁰ If that is not a direct consequence of the “mandatory” reading, then Article 22 leaves the investor with an option.

259. The Claimants, it will be recalled, invoke the principle of the effective interpretation of treaties: a reason and meaning is to be attributed to every word in the text. In their view, the Respondent’s interpretation would deprive the reference to ICSID in Article 22 of all effect. The Respondent submits, to the contrary, that the Claimants’ proposed interpretation would deprive the expression “if it so provides”, also included in Article 22, of all effect. The principle of effective interpretation does not enable a court or tribunal to rewrite the provision that it is interpreting, in particular, by writing words out of the text. The Respondent also submits that, on its reading of Article 22, the reference to ICSID, along with the reference to the other treaties and agreements, does have a useful purpose: it made it clear that Venezuela

²⁷⁰ Resp. Rej. ¶ 32.

intended to honour all existing international commitments that it had undertaken for international arbitration, including those in particular BITs in which it plainly had already accepted that investors had the option to bring international arbitration proceedings against it. In the context of the traditional Venezuelan hostility to international arbitration, that affirmation, it says, was significant.²⁷¹ The Respondent points out that other provisions of the Investment Law, relating to sectors of economic activity reserved by law to the State or to Venezuelan investors, and the law and policy regulating the entry and stay of foreigners and labour legislation,²⁷² are not necessary as a matter of Venezuelan law: they do no more than replicate provisions of the constitution and other laws, and appear in a general law which gives a more comprehensive sense of the law applying to investments made by national investors and foreign investors. The Claimants' expert agreed.²⁷³ There is the further consideration, to quote from the ICSID decision in the *Biwater Gauff* case, that a provision such as Article 22 may have some effect by clearing the way for the State to conclude specific types of dispute resolution agreements without internal issues such as *ultra vires* arising and as such it provides a sense of certainty for investors.²⁷⁴

260. Given its broad scope and general nature, the 1999 Decree is not, in the opinion of the Tribunal, the kind of law to every provision of which distinct legal effect is necessarily to be given. In that respect it differs from legal instruments with a single purpose such as declarations accepting the compulsory jurisdiction of the International Court of Justice under Article 36(2) of its Statute. Accordingly, on the matter of effective interpretation, the Tribunal agrees with the contentions made by the Respondent.

261. As the Tribunal has already indicated, the ordinary meaning of the terms of Article 22 leads it strongly to the conclusion that Venezuela has not consented to ICSID jurisdiction by enacting that provision. The immediate context provided by the proviso to Article 22, by other

²⁷¹ Resp. Rej. ¶ 36.

²⁷² See Ex. C-1 and Ex. R-12, Investment Law, Arts. 7 and 14.

²⁷³ Tr. Day 9:2365–66.

²⁷⁴ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, ¶ 331.

provisions of the Investment Law, particularly Article 23, point in the same direction. The broader context, along with the commentaries, does not affect that conclusion. Nor do the contentions based on the principle of effective interpretation; if anything that principle supports the conclusion.

262. Accordingly, the Tribunal concludes that it does not have jurisdiction under Article 22 of the Investment Law. It follows that it need not consider the Respondent's contention that the Tribunal does not have jurisdiction over ConocoPhillips Company's claims on the basis that ConocoPhillips Company is not an "international investor" under Article 22 of the Law.

263. Another consequence of the ruling that Venezuela by way of Article 22 does not consent to international arbitration is that the Tribunal does not have jurisdiction over the claim made by ConocoPhillips Company based on its loss of future tax credits. It will be recalled that only ConocoPhillips Company and not the Dutch companies made that claim and that ConocoPhillips Company is not able to claim under the Dutch BIT. In any event, after the present Tribunal has issued its Award, ConocoPhillips Company will be at liberty to consider any measure which Venezuela may adopt with respect to any element of the Award that has a bearing on US tax credits of ConocoPhillips Company and then decide whether such measures give rise to any claim before an appropriate forum.

C. ARTICLE 9 OF THE BILATERAL INVESTMENT TREATY BETWEEN THE NETHERLANDS AND VENEZUELA

264. Article 9, paragraphs (1), (3), (4) and (5) of the Treaty provide as follows:

1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.

...

3. The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether

such breach of obligations has caused damages to the national concerned, and, if such is the case, the amount of compensation.

4. Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

5. The arbitral award shall be based on:

- the law of the Contracting Party concerned;
- the provisions of this Agreement and other relevant Agreements between the Contracting Parties;
- the provisions of special agreements relating to the investments;
- the general principles of international law; and
- such rules of law as may be agreed by the parties to the dispute.

265. The three Dutch claimants contend that Venezuela has consented to ICSID arbitration under Article 9(1) in respect of their claims:

(1) CPZ, CPH and CGP are Dutch nationals within the definition of “nationals” in Article 1(b) of the BIT:

[t]he term “nationals” shall comprise with regard to either Contracting Party ... (ii) legal persons constituted under the law of that Contracting Party.

(2) The dispute concerns qualifying investments of the three companies in Venezuela within the meaning of Article 1(a) and 9(1). “Investments” include “rights derived from shares, bonds and other kinds of interest in companies and joint ventures”.

(3) A dispute in relation to an investment as defined in Article 9(1) is present here. The claims in the arbitration concern Venezuela’s obligation under the Treaty and international law in relation to the investments of CPZ, CPH and CPB in the Venezuelan hydrocarbons sector.²⁷⁵

266. The Respondent contends that the three companies cannot gain access to ICSID under the Dutch Treaty for two reasons:

(1) the claimants are “corporations of convenience” created in anticipation of litigation against the Respondent for the sole purpose of gaining access to ICSID; and

²⁷⁵ See Cl. Mem. ¶¶ 284–88.

(2) the investments relied on by CPH and CGP are indirect investments and fall outside the definition of an investment, which does not extend to investments in Venezuela owned or controlled indirectly by Dutch nationals through one or more intermediaries.²⁷⁶

267. The Respondent also contends that, even if those arguments do not succeed, several of the claims would fail because, at the time the particular measure that was at the basis of the claim was taken, the Dutch claimants were not in existence or had not been inserted into the corporate chain of ownership.²⁷⁷ It will be seen that the facts relating to this argument and the argument about “corporations of convenience” overlap.

(1) “Corporations of Convenience”

268. The Respondent cites a number of ICSID decisions in support of its argument that, notwithstanding that the claimants in those cases technically met the nationality requirements of the relevant treaties, the tribunals refused, or considered refusing, the claims. The basis for such refusals was, in the Respondent’s terms, abuse of the corporate form and blatant treaty or forum shopping, which should not be condoned. On the facts, it says that ConocoPhillips had no valid business purpose for this corporate restructuring and the Tribunal should find that it has no jurisdiction under the BIT.

269. The Claimants have two responses. The first relates to the facts, including the timing of the restructuring of their investments in Venezuela which, they say, occurred before the dispute arose. They made those investments before the changes were made in the tax law and before the investments were confiscated. Second, there is no principle of law, they contend, which precludes a corporation from altering its form, by creating subsidiaries or reincorporating to benefit from the protection of another country’s laws.²⁷⁸

270. That last contention of the Claimants is supported, in their view, by the relevant part of the definition of “nationals” — they are “legal persons constituted under the law of that Contracting Party [the Netherlands]”. The Parties in determining the personal scope of the BIT

²⁷⁶ See Resp. Mem. on Objections to Jurisdiction ¶¶ 136–181.

²⁷⁷ See Resp. C-Mem. ¶¶ 124-45.

²⁷⁸ Cl. Reply Mem. ¶¶ 294-97.

did not include any additional element of control, as provided in subparagraph (iii) of the definition of nationals for legal persons constituted under the law of a third State, a test which is elaborated in the Protocol to the Treaty but only in respect of that specific part of the definition of a national.²⁷⁹

271. Four of the cases cited by the Parties share two significant features. The first is that the definition, or its relevant part, of “investors”, “legal persons” and “companies” is essentially to the same effect as the definition of nationals in Article 1(b)(ii) of the BIT:²⁸⁰

- a. an “investor” includes an entity established in the territory of the Ukraine in conformity with its laws and regulations.²⁸¹
- b. “nationals” include legal persons constituted in accordance with the law of that Contracting Party²⁸²
- c. “investor” includes “legal entities incorporated or constituted in accordance with Israel’s laws and having their permanent seat in the territory of the State of Israel.”²⁸³
- d. definition applicable in this case, in the *Mobil* case.

272. The second significant feature is that, in those cases, the tribunals deciding the challenges to jurisdiction did not dismiss the challenges simply on the basis that those formal requirements were met — as they were, and, as the Respondent accepts, they were here.²⁸⁴ The tribunals

²⁷⁹ See Ex. C-2, Treaty, Art. 1(b)(ii).

²⁸⁰ See *supra* ¶ 265

²⁸¹ *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 April, 2004 (considering the Lithuania-Ukraine bilateral investment treaty).

²⁸² *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Objections to Jurisdiction dated 21 October 2005 (considering the Netherlands-Bolivia bilateral investment treaty).

²⁸³ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009 (considering the Czech Republic-Israel bilateral investment treaty).

²⁸⁴ Resp. Rej. ¶ 104.

went on to consider whether the objection to jurisdiction should be upheld on a distinct broader basis. In the third case, the tribunal did in fact uphold that challenge. In another case, *Autopista Concesionada de Venezuela, C.A. (“Aucoven”) v. Bolivarian Republic of Venezuela*,²⁸⁵ which turned on the definition of “national of another Contracting Party State” in Article 25(2)(b) of the ICSID Convention itself, the tribunal similarly did not limit itself to the parties’ definition of foreign control in their concession agreement — the expression used in Article 25(2)(b). While accepting that it could not discard the criterion which the parties had established, it did qualify that proposition in the event that the criterion proved “unreasonable”.²⁸⁶ It then considered matters of fact similar to those considered in the other four cases mentioned and those which are taken up later in this Decision.

273. The principal reason that tribunals have given for not treating compliance with formal or technical requirements as being sufficient is to avoid the misuse of power conferred by law. The *Mobil* tribunal observed that “in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law”.²⁸⁷ It referred to good faith, *détournement de pouvoir* and abuse of right. In support of that proposition, it referred to decisions of the International Court of Justice, the Appellate Body of the World Trade Organisation, other international tribunals and other ICSID tribunals.²⁸⁸ A decision related those broad principles to the ICSID process itself:²⁸⁹

The Tribunal is concerned here with *the international principle of good faith as applied to the international arbitration mechanism of ICSID*. The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance

²⁸⁵ *Autopista Concesionada de Venezuela, C.A. (“Aucoven”) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction dated 27 September 2001.

²⁸⁶ *Aucoven* ¶ 120.

²⁸⁷ *Mobil* ¶ 169.

²⁸⁸ *See Mobil* ¶¶ 169–76. *See also Case Concerning Certain Questions in Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, 4 June 2008, ¶¶ 145–48.

²⁸⁹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009, ¶ 113 (emphasis in the original). *See also Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil dated 29 April 2004, ¶ 25.

with the international principle of good faith and do not attempt to misuse the system are protected.

274. It may be observed that, apart from the ICSID cases, the authorities cited concern claims that States have abused their powers or acted in bad faith. In the present context, the doctrine is being invoked in relation to the actions of a corporate body, not of a State, but it is a corporate body seeking to make use of a procedure of an international character to settle a dispute with a State, set up by States which drafted, concluded and accepted the Convention. That Convention has as its purpose to establish a “Centre ... to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention”.²⁹⁰ There is jurisdiction only if the parties to the dispute have each consented and throughout the process each is treated on an equal footing, as indeed the principles of due process and natural justice require. That equality of position in the present context is, in this Tribunal’s view, a further factor supporting the growing body of decisions placing some limits on the investor’s choice of corporate form, even if it complies with the relevant technical definition in the treaty text.

275. Whether those limits have been breached must turn on a close examination of all of the circumstances of the case, circumstances to which the parties in this arbitration have given particular attention. The Tribunal now turns to that examination. It will do that bearing in mind how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one.

276. The facts relating to the incorporation of the Dutch companies and their placing in the chain of ownership of the projects appear earlier in this Decision. In brief:

- a. The three projects began in the 1990s. The Petrozuata and Hamaca projects were set up through US companies in 1995 and 1997 and, although the Corocoro project was undertaken initially in 1996 through a Dutch company (Conoco Venezuela BV), those interests were transferred three years later to a Venezuelan company (Conoco Venezuela CA).

²⁹⁰ ICSID Convention, Art. 1(2).

- b. The Dutch companies were incorporated and took interests in the projects as follows:
- CPZ was incorporated on 26 July 2005 and the relevant ownership interest was transferred to it on 27 July 2005;²⁹¹
 - CGP was incorporated on 26 July 2005 and the relevant ownership interest was transferred to it on 11 August 2005;²⁹² and
 - CPH was incorporated on 17 July 2006 and the relevant ownership interest was transferred to it on 22 September 2006.²⁹³
- c. The record includes notifications to the Venezuelan Mercantile Registry in respect of CPZ on 3 November 2005²⁹⁴ and on 9 January 2007,²⁹⁵ and to PdVSA on 25 September 2006;²⁹⁶ and in respect of CGP on 11 January 2007.²⁹⁷

277. Those steps and their timing are to be related to the elements of the claims and other significant events as follows:

- a. 10 October 2004: the royalty rate increase announced on Venezuelan television, which was protested by letter from ConocoPhillips on 22 November 2004, following which the protest was withdrawn on 14 January 2005.

²⁹¹ Resp. Mem. on Objections to Jurisdiction, p. 40. On 11 August 2005, a subsidiary of CPZ, through which CPZ owned its interest in Petrozuata, transferred its interest in Conoco Venezuela Holding C.A. to CPZ. The effect was to remove Conoco Venezuela Holding, C.A. from the chain of ownership. Subsequently, CPZ indirectly owned a 50.1 percent stake in Petrozuata through Conoco Venezuela Holding, C.A., a Venezuelan company. *See supra* ¶¶ 138-140.

²⁹² Resp. Mem. on Objections to Jurisdiction, p. 44. *See supra* ¶ 183.

²⁹³ Resp. Mem. on Objections to Jurisdiction, p. 47. *See supra* ¶¶ 163-165.

²⁹⁴ Ex. C-220, Mercantile Registry Certificate attaching 11 August 2005 Shareholder's Resolution of Conoco Venezuela Holding, C.A dated 3 November 2005.

²⁹⁵ Ex. C-221, Letter from María Alejandra Pino to Marcela Miranda Montealegre dated 9 January 2007.

²⁹⁶ Ex. C-353, Letter from J.A. Carrig *et al.* to Armando Giraud Torres dated 25 September 2006.

²⁹⁷ Ex. C-222, Letter from María Alejandra Pino to *Director de Industrialización y Tecnología de Hidrocarburos* (Director of Industrialisation and Technology of Hydrocarbons) dated 10 January 2007.

- b. 12 April 2005: the Minister of Energy and Mines declared the illegality of the Operating Service Agreements and the initiation of the “migration” of those agreements to a new form of mixed companies under the 2001 Hydrocarbons Law.
- c. 26 April 2005: Vice Minister Mommer announced to ConocoPhillips that enhanced 30 percent royalty rates would be applied to production of between 120,000 and 145,000 barrels a day.
- d. June 2005: Minister Ramírez announced that the income tax law would be amended.
- e. 16 May 2006: the 33 $\frac{1}{3}$ percent extraction tax was enacted.
- f. 29 August 2006: the tax law was amended so that the income tax rate for extra-heavy oil producing companies was raised from 34 percent to 50 percent.
- g. 1 January 2007: the law increasing the income tax rate for extra-heavy oil companies to 50 percent took effect.
- h. 8 January 2007: President Chávez announced the nationalisation of all projects operating outside the framework of the 2001 Hydrocarbons Law.
- i. 31 January 2007: ConocoPhillips sent a letter to the Venezuelan Government giving notice of a dispute and referring to the events described at (e), (f), (g) and (h) above.²⁹⁸
- j. 26 February 2007: Decree Law 5,200 calling for the transformation of all oil associations into mixed companies was promulgated.

²⁹⁸ See Ex. C-36, *supra* at fn. 198. See also Ex. C-30 and C-30A, Letter from A. Roy Lyons, President, ConocoPhillips Latin America to Dr Bernard Mommer, Vice Minister of Hydrocarbons dated 29 November 2006.

- k. February to June 2007: negotiations took place concerning ConocoPhillips' interests in the projects.
- l. 1 May 2007: PdVSA took physical control of the projects.
- m. 26 June 2007: the four month period for reaching agreement under (j) above expired and Venezuela took ConocoPhillips' interests in the projects.

278. Against that chronology and bearing in mind the matters weighed by other tribunals considering objections to jurisdiction made on the basis of “treaty abuse”, this Tribunal makes a number of observations. The first is that the transfers of ownership in 2005 and 2006 did not attempt to transfer any right or claim arising under ICSID or a BIT from one owner to another. Indeed, at the time of the transfers, ConocoPhillips had withdrawn its only claim of breach and had done that in the clearest of terms. It was not until May 2006 that the first of the actions, which were later to be the subject of the letters from ConocoPhillips notifying the Venezuelan government of a dispute, was taken. The Tribunal later considers the significance of the date of that measure and of 29 August 2006 for the CPH claim.

279. It is the case, to turn to a second matter, that the only business purpose of the restructuring, as acknowledged by the Claimants' principal witness on this matter, was to be able to have access to ICSID proceedings.²⁹⁹ But as against that, as already noted, no claim had been made at the time of the restructuring and, subject to the qualification made in respect of the claims by CPH about the two measures taken in 2006, none was in prospect at the times of the restructurings.

280. One major factor indicates that ConocoPhillips wished to continue to carry out the projects and that proceedings under the BIT were not in prospect at that time. That factor, a very weighty one in the Tribunal's opinion, is ConocoPhillips' continuing expenditure on the projects. According to its evidence, which was not challenged, ConocoPhillips invested approximately U.S.\$ 434 million on the three projects after the decision to restructure was made

²⁹⁹ Tr. Day 3:552:4–9 (Goff).

in mid-2005.³⁰⁰ The total ConocoPhillips' expenditure after the enactment of the Investment Law was U.S.\$ 5.3 billion.³⁰¹ For the Tribunal, this continued substantial involvement in the development and operation of the projects is evidence telling strongly against any finding of treaty abuse.

281. Accordingly, the Tribunal rejects that challenge to jurisdiction.

(2) Indirect Investment

282. The Respondent contends that because two of the Dutch companies — CPH and CGP — have only indirect investments held through subsidiaries, their claims under the Treaty must be dismissed. The Respondent points out that several bilateral investment treaties concluded by both Venezuela and the Netherlands expressly cover both direct and indirect investments, language not used in the Netherlands-Venezuelan BIT. To read the present non-express BIT wording as covering indirect investments would make that careful elaboration unnecessary and ignore the limit arising from the ordinary meaning of the words of the Treaty, taken in light of its object and purpose.³⁰²

283. The Claimants invoke “the plain language of Article 1 of the Treaty [which] contains the broadest definition of investment possible: every kind of investment”.³⁰³ Both the Respondent and the Claimants refer in support of their contentions, in addition to other treaty practice, to decisions of other ICSID tribunals.

284. The Tribunal remarks in respect of treaty practice that this demonstrates that there is no single way of drafting definitions. Different formulations may have precisely the same effect. Drafting practice varies. While, as the Respondent notes, some of the Dutch bilateral investment treaties use a different formula, its model bilateral investment treaty, along with very

³⁰⁰ Tr. Day 14:3817:11–16 (Claimants' Counsel).

³⁰¹ Tr. Day 14:3817:21–22 (Claimants' Counsel).

³⁰² Resp. Mem. on Objections to Jurisdiction ¶¶ 172–81.

³⁰³ Cl. Reply ¶ 361.

many others, uses exactly the wording to be found in the treaty with Venezuela. The one case which is directly in point — *Fedax* — also supports the Claimants’ “plain meaning”.³⁰⁴

285. For the Tribunal the words of the definition are clear beyond question. They are written in broad terms, as indeed the Respondent accepts.³⁰⁵ In the words of Vattel, there is no need to interpret that which has no need of interpretation.³⁰⁶

286. Accordingly, this objection to jurisdiction in respect of the claims of CPH and CGP fails.

(3) Ratione Temporis

287. The Respondent contends that the Tribunal has no jurisdiction over the claims made by CPH in respect of the extraction tax that was enacted in May 2006 and the amendment to the Income Tax Law enacted in August 2006 before that company was inserted in September into the corporate chain relating to the Hamaca project. The Claimants and CPH in particular do not challenge the principle that the Dutch companies have no claims in respect of actions taken by Venezuela before they had acquired the relevant interest.

288. The law increasing the extraction tax to 33½ percent came into force on 24 May 2006 and, accordingly, CPH can make no claim in respect of it.

289. While the income tax increase was enacted before CPH was inserted into the chain of ownership in the following month, September 2006, the increase did not come into effect until 1 January 2007.³⁰⁷ Which date is decisive? The date of the enactment of the law providing for the increase or the date it took effect in the law? In principle, the Tribunal considers that a breach of obligation does not occur until the law in issue is actually applied in breach of that

³⁰⁴ *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction dated 11 July 1997.

³⁰⁵ Resp. Mem. on Objections to Jurisdiction ¶¶ 174, 180.

³⁰⁶ Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle* (1758) ¶ 263.

³⁰⁷ Tr. Day 13:3617:2–4 (Respondent’s Counsel); Cl. Mem. ¶ 224.

obligation and that cannot happen before the law in question is in force.³⁰⁸ In this particular context the relevant date was 1 January 2007, some months after CPH acquired its ownership interest. Accordingly the Respondent's objection to the Tribunal's jurisdiction over CPH's claim based on the increase in income tax must be rejected.

D. CONCLUSION

290. For the foregoing reasons the Tribunal decides that:

- a. It does not have jurisdiction under Article 22 of the Investment Law and that 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.

The Tribunal recalls that one consequence of its decision above relating to Article 22 of the Investment Law is that it does not have jurisdiction over the claim by ConocoPhillips Company based on its loss of future tax credits.³⁰⁹

³⁰⁸ See The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Introduction, Text and Commentaries*, James Crawford, Cambridge University Press at p. 130 (Commentary on Draft Art. 12).

³⁰⁹ See *supra* ¶ 263.

VII. MERITS

A. CLAIMS FOR BREACH OF THE OBLIGATION OF FAIR AND EQUITABLE TREATMENT: ARTICLES 3 AND 4 OF THE NETHERLANDS-VENEZUELA TREATY

(1) Introduction

291. The Claimants base their claims of breaches by the Respondent of its obligation to accord their investments fair and equitable treatment on the requirements to that effect included in the Investment Law and the Treaty. Since the Tribunal has held that it has no jurisdiction over the claims brought under the Investment Law, this section of the Decision is concerned only with the obligations owed to the Dutch companies and arising under the Treaty.

292. Article 3 of the Treaty places an obligation on each Contracting Party to ensure the fair and equitable treatment of the investments of nationals of the other Contracting Party. It is in these terms:³¹⁰

(1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by arbitrary or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.

(2) More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

(3) If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.

(4) Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party. If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the

³¹⁰ Ex. C-2 and Ex. R-13, Treaty, Art. 3.

present Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.

In a Protocol to the Treaty signed on the same day as the Treaty as “an integral part” of it, the Contracting Parties agreed to the following:³¹¹

2. Ad Article 3(1):

The Contracting Parties agree that the treatment of investments shall be considered to be fair and equitable as mentioned in Article 3, paragraph 1, if it conforms to the treatment accorded to investments of their own nationals, or to investments of nationals of any third State, whichever is more favorable to the national concerned, as well as to the minimum standard for the treatment of foreign nationals under international law.

293. That detailed specification of the fair and equitable treatment standard constitutes one departure from the model Netherlands BIT, a model followed in scores of other Dutch treaties. A second departure is the use of the word “arbitrary” instead of “unreasonable” in the second limb of Article 3(1): the obligation not to impair, by arbitrary or discriminatory measures, the operation ... of the investments by the nationals of the other Party. There is also a third departure, namely, the specification of the applicable law included in paragraph (5) of Article 9 on applicable law beginning with the law of the Contracting Party concerned, an addition to the model. It does not appear to have a particular significance in this case, but it is to be related to the general position of Venezuela in the negotiation of the BIT, discussed in the next paragraph.

294. The reporting by both Contracting Parties to their legislatures, when seeking approval of the ratification of the Treaty, makes it clear that these changes were made at the request of the Venezuelan negotiators and to respond to their concerns. The letter from the Netherlands’ Minister for Foreign Affairs to the Dutch Parliament explained that:³¹²

The Venezuelan delegation had problems with the [usual] formulation of [the general article for the treatment of investors]. Because the carrying out of obligations under this article can also be the subject of disagreements between an investor and a host country which can be presented for international arbitration, the

³¹¹ *Id.* Protocol, Section 2 (Ad Article 3(1)).

³¹² Ex. R-151, Note to Dutch Parliament accompanying the Netherlands-Venezuela BIT dated 3 June 1992.

Venezuelan delegation feared that under the wording of this article the scope of the international arbitration provision was not narrow enough and thus opened the possibilities for misuse. To appease these objections, the word ‘arbitrary’ has been substituted for ‘unreasonable’. Also, a protocol-text (section 2) has been laid down in which the basic treatment is further defined as containing either national treatment, or most-favored-nation treatment, depending on which of the two treatments is the most favorable for the investor. Apart from that, the treatment must fulfill the minimum standard under international law for the treatment of foreigners.

The letter goes on to explain that the paragraph about applicable law was added in response to “fundamental objections” initially presented by Venezuela to international arbitration, based on the Calvo doctrine. The agreed text “can be seen as a break-through”.³¹³ The Explanatory Statement to the Venezuelan Congress is to the same effect:

Treatment not inferior to the minimum required by International Law for the treatment of foreign nationals. This is, by definition, a pre-existing obligation of the Parties, independently of the Agreement. Its express inclusion in the Protocol which is an integral part of the Agreement has, however, a great importance because it specifies expressions such as ‘fair and equitable treatment,’ and thus limits the discretion of eventual arbitrators when examining the behaviour of any of the Parties.³¹⁴

(2) The Relationship between Articles 3 and 4

295. The claims based on Article 3 were at first put in terms of what the Claimants saw as guarantees of fiscal stability given by the Respondent in respect of their investments in the three projects. Later, as will appear, the submissions emphasised what the Claimants saw as breaches by the Respondent of their reasonable or legitimate expectations based on regulatory frameworks, breaches caused by various increases in income tax and royalties or extraction tax.

296. The Respondent disputes the factual and legal bases of the contentions advanced by the Claimants under Article 3. The Respondent also submits that, as a matter of interpretation of the BIT, the various changes in tax and royalty rates that it introduced do not fall within the

³¹³ *Id.*

³¹⁴ Ex. R-152 and Ex. R-229, Explanatory Statement for the Dutch Treaty presented to the Congress of the Republic of Venezuela, dated November 19, 1991.

scope of Article 3; rather they are to be assessed by reference to Article 4. As a matter of convenience and logic that submission is considered first.

(3) The Effect of Article 4

297. The Respondent contends that the “fair and equitable” treatment obligation imposed by Article 3 of the Dutch Treaty does not apply to tax and fiscal measures. Article 4, it says, sets out a specific standard of treatment with respect to tax and fiscal measures.³¹⁵

Article 4 reads as follows:

With respect to taxes, fees, charges, and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party with respect to their investments in its territory treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party:

- a) under an agreement for the avoidance of double taxation; or
- b) by virtue of its participation in a customs union, economic union, or similar institutions; or
- c) on the basis of reciprocity with a third State.

Under those express terms, the Respondent’s argument continues, “foreign investors in Venezuela are entitled to be treated in the same manner as Venezuelan nationals and nationals of third States”.³¹⁶ So long as its tax and fiscal measures were applied to the Dutch companies in a non-discriminatory manner, which is undisputed in this case, there is no violation of its obligations under the Treaty in relation to such measures.³¹⁷

298. The Claimants reply that the Respondent is not relieved of liability by Article 4 of the Treaty. It is not, they contend, a tax “carve-out” provision. The Respondent, they continue, misconstrues the clear language of Article 4 to suggest that the Dutch Claimants may not bring a fair and equitable treatment claim with respect to any tax and fiscal measures under the

³¹⁵ Resp. C-Mem. ¶ 217.

³¹⁶ Resp. C-Mem. ¶ 218.

³¹⁷ Resp. C-Mem. ¶¶ 217-18.

Treaty. According to the Claimants, Article 4 simply states that a foreign investor cannot bring a claim for discrimination under either the national treatment or most favoured nation (MFN) treatment standards due to more favourable provisions in tax treaties or economic unions that either the Netherlands or Venezuela has entered into with third States.³¹⁸

299. The Respondent further submits that the special treatment of tax and fiscal measures in the Dutch Treaty is consistent with the overwhelming authority discussed in its Counter-Memorial, recognising that taxation is a quintessential sovereign right. It is not unusual, according to the Respondent, for investment treaties to exclude taxation matters from the fair and equitable treatment standard. It cites a number of examples and tribunal rulings applying provisions making such exclusions.

300. The Claimants respond that a true tax carve-out provision, as in issue in a number of those cases, would exempt tax measures from the protection afforded by a treaty in terms such as the following included in Article X of the US-Ecuador Bilateral Investment Treaty:³¹⁹

(1) With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investments of nationals and companies of the other Party.

(2) Nevertheless, the provisions of this Treaty, and in particular Articles VI and VII [concerning dispute settlement], shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; (b) transfers, pursuant to Article IV; or (c) the observance and enforcement of terms of an investment Agreement or authorization as referred to in Article VI(1) (a) or (b), to the extent that they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

That provision was in issue in *Duke Energy*, one of the cases discussed by the Parties.³²⁰

³¹⁸ Cl. Reply ¶¶ 472–5.

³¹⁹ Cl. Reply ¶ 474, fn. 788 (citing *Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment*, signed on 27 August 1993 (entered into force on 11 May 1997)).

(4) The Ordinary Meanings and Purposes of Article 3 and Article 4

301. The Tribunal begins with the ordinary meanings of the terms of Article 3 and Article 4. It gives particular attention to the differences between them. Article 3 is the more general in scope being concerned with the “treatment of investments”; Article 4 deals with more specific matters: “taxes, fees, charges, and ... fiscal deductions and exemptions”.

302. Paragraph (1) of Article 3 begins by requiring each Contracting Party to “ensure fair and equitable treatment of the investments of nationals of the other Contracting Party”. That obligation is the subject of the Protocol to the Agreement in which the Contracting Parties agree that the treatment of investments shall be considered to be fair and equitable if the treatment conforms to national treatment and to MFN treatment, as well as to the minimum standard for the treatment of foreign nationals under international law. Paragraph (2) of Article 3 “more particularly” requires that such investments be accorded full physical security and protection which is not to be less than that accorded on a national or MFN basis. Paragraph (3) provides for exceptions to the MFN treatment obligation, the details of which the Tribunal considers later. Finally, paragraph (4) of Article 3 requires compliance with any other obligations a Contracting Party may have with regard to the treatment of investments of nationals of the other Party, if those obligations require treatment more favourable than that provided in the Treaty. Like the Parties, the Tribunal does not see that final paragraph as relevant in this case.

303. Article 4 requires each Contracting Party “with respect to taxes, fees, charges, and to fiscal deductions and exemptions” to accord the nationals of the other Contracting Party national or MFN treatment; however, by contrast to Article 3, it says nothing about “fair and equitable treatment”. That more specific obligation is subject to three particular exceptions, two of which are not included in Article 3(3) and which are also considered later.

304. To summarise, there are three significant differences between Article 3 and Article 4, as follows:

³²⁰ See Cl. Reply ¶ 475, fn. 790 (citing Ex. R-145, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated August 18, 2008 at ¶¶ 171–89).

- a. Article 3 imposes obligations relating to the treatment of investments of nationals of the other Contracting Party in general, while Article 4 imposes obligations “with respect to taxes” and related charges imposed on the nationals of the Contracting Party.
- b. Article 3 requires fair and equitable treatment and national and MFN treatment (the latter repeated in the Protocol), while Article 4 requires only national and MFN treatment.
- c. Article 4 includes exceptions not included in Article 3(3).

305. The Claimants point out that the Treaty makes no explicit link between Article 3 and Article 4. Thus the fair and equitable treatment obligation of Article 3(1) is not expressly made “subject to Article 4” nor does Article 4 begin with the words “notwithstanding Article 3(1)”, (only) national and MFN treatment is to be accorded in respect of taxes and charges. Article 4 is not, in their opinion, a tax “carve-out” provision such as that which they quoted from other BITs.³²¹

306. According to the Respondent, the drafters in this case did not use a “carve-out” approach because they did not need to. Rather they dealt in successive provisions with the general case in Article 3 and the specific case in Article 4. The specific provision must, its argument continues, within its area of operation, exclude the general one. What role could the specific provision play if the matters that it regulates were also to fall within the broader terms of Article 3(1) with its more extensive obligations, notably the obligation to ensure fair and equitable treatment? The Respondent also emphasises the significance in this context, as in others, of the care the Parties to the Treaty, and especially the Respondent itself, had taken in the drafting of Article 3 and the Protocol to prevent a broad reading being given to the obligation to accord fair and equitable treatment.³²²

³²¹ See *supra* ¶ 300.

³²² See Resp. Rej. ¶¶ 377-380.

307. The Claimants respond that Article 4 does have a role while standing alongside and independently of the fair and equitable treatment obligation in Article 3. The overlap which they see relates only to discriminatory treatment on grounds of nationality in respect of taxes; in that case alone Article 3(3) would defer to Article 4. Article 4 does not occupy the field with respect to all Treaty issues relating to taxes.³²³

(5) The Exceptions to Article 3 and Article 4

308. The Tribunal now addresses the detail of the two sets of exceptions included in Article 3(3) and in Article 4 to the obligations which each of those articles imposes. Article 3(1), when read with the Protocol, requires, among other things, national and MFN treatment. Article 3(2) also requires such treatment. Article 3(3) then makes the following exceptions to the MFN treatment obligations:

If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.

That list is to be compared with that included in Article 4, which sets out exceptions to the non-discrimination obligations that it imposes in respect of taxes and fiscal matters. In addition to the exceptions in respect of customs unions, economic unions or similar institutions, Article 4 contains a further exception: it excludes from the effect of the non-discrimination obligations special fiscal advantages accorded to a third Party by agreements for the avoidance of double taxation or on a reciprocal basis.

(6) Effective Interpretation

309. If paragraph (1) of Article 3 (read with the Protocol) and paragraph (2) of that article applied generally to taxation measures, the MFN treatment requirements of the provisions would require that the benefit of those tax agreements with third States or that reciprocity be accorded to the other Party to the BIT. As noted,³²⁴ the Claimants, recognising that point,

³²³ See Tr. Day 14:3824:18-22 (Claimants' Counsel); Cl. Reply ¶ 473.

³²⁴ See *supra* ¶ 307.

contend that to that extent but to that extent only Article 4 would override Article 3(3). But, on that reading, the remainder of Article 4 would have no effect at all and the provision would impose no obligation. That would be so notwithstanding the expressly mandatory terms of Article 4: each Contracting Party, it declares, “shall accord” national and MFN treatment. It would unnecessarily repeat those obligations that are already to be found in Article 3 along with the related provisions of the Protocol. It is a well-established principle for the interpretation of provisions of a treaty that they should if possible be interpreted so that they do not become devoid of effect.³²⁵ Further, if the drafters had intended the reading proposed by the Claimants, the direct way of achieving that would have been simply to include the double taxation exception in Article 3 and not to have included Article 4 at all. The Claimants’ interpretation would transform a provision, which on its face places defined obligations on the Contracting Parties with carefully stated exceptions when they exercise their powers to impose taxes and charges, into nothing more than a provision adding further exceptions to an obligation imposed by another article which itself already contains specific exceptions, also included in the tax provision. That would be remarkably awkward drafting.

(7) The Broader Context

310. The improbability of the Claimants’ proposed reading of Article 4 as merely providing further limits on the Parties’ non-discrimination obligation additional to those already to be found in Article 3(3) is increased by two contextual matters: the first specific to one of the Contracting Parties to the Treaty; and the second more general. The first is that the Netherlands’ model bilateral investment treaty includes Article 3 and Article 4 in essentially the same form as they appear in the Netherlands-Venezuela Treaty, with the qualifications, already noted, of the inclusion of the Protocol relating to Article 3(1) and the replacement of the word “unreasonable” by “arbitrary”. Further, that format and wording is adopted in the majority of the almost one hundred bilateral investment treaties which the Netherlands has signed. In a number of those Netherlands’ bilateral investment treaties that do not have a separate provision

³²⁵ See, e.g., *Corfu Channel Case (Merits)*, Judgment, 9 April 1949, I.C.J. Reports 1949, p. 4 at p. 24; *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, ¶ 133.

about taxation along the lines of the standard Article 4, such as those with Chile, the People's Republic of China, the Czech Republic, Hungary, India, Lebanon, Mexico, Mongolia, the Russian Federation and Slovakia, the double taxation agreement exception is included in the general provision requiring fair and equitable protection and non-discrimination which in other respects otherwise takes the standard Article 3 form.³²⁶ That drafting is one direct way of achieving the result which the Claimants seek.

311. The second contextual point is that, in at least five model bilateral investment treaties which have no separate taxation provision, double tax agreements are expressly excluded from the application of the non-discrimination obligations; *see, for instance*, the model bilateral investment treaties of the People's Republic of China (Article 8(3)), France (Article 4), Germany (Article 3), India (Article 4), and the United Kingdom (Articles 3 and 7).³²⁷

312. The Parties referred the Tribunal to a number of decisions in which investors made claims which the host State said were related to taxation and in terms of the relevant bilateral investment treaty fell outside the scope of its protection. Some of the decisions confirm the proposition, which both Parties accept, that the power to tax is in principle within the customary regulatory or sovereign powers of the State.

³²⁶ Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Chile, 30 November 1998; Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, 26 November 2001; Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 29 April 1991; Agreement between the Kingdom of the Netherlands and the Hungarian People's Republic for the encouragement and reciprocal protection of investments, 2 September 1987; Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments, 6 November 1995; Agreement on the encouragement and reciprocal protection of investments between the Lebanese Republic and the Kingdom of the Netherlands, 2 May 2002; Agreement on promotion, encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the United Mexican States, 13 May 1998; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Mongolia, 9 March 1995; and Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Russian Federation, 5 October 1989.

³²⁷ 2003 China Model BIT; 2006 France Model BIT; 2008 Germany Model BIT; 2003 India Model BIT; 2005 United Kingdom Model BIT, with 2006 amendments.

313. That proposition is reflected in many treaties by the exclusion from their coverage of matters of taxation, sometimes with exceptions to that exclusion, for instance when taxation measures amount to an expropriation. Such exclusions are to be found for instance in the model bilateral investment treaties of Canada (Article 16), the United States (Article 21), the US-Ecuador Treaty quoted earlier (Article X), the Energy Charter Treaty (Article 21) and the North American Free Trade Agreement (Article 2103).³²⁸ The exclusions are also to be related to the very extensive body of treaties dealing specifically with the issues of taxation — a separate, large and highly technical field. All of the cases to which the Parties referred, as they also acknowledge, essentially turn on the specific way in which tax matters are regulated by the investment treaty in question. Those provisions are all markedly different from those in issue in this case. In particular, they all expressly address the relationship between the Parties’ undertakings and matters of taxation by providing, for instance, that nothing in the Agreement in question applies to taxation or that only certain provisions, especially the prohibition on expropriation, apply. The Claimants emphasise the express terms of those provisions by contrast to the silence on that matter of Articles 3 and 4 of the Dutch Treaty. That silence, they contend, indicates that the two provisions are to operate alongside one another.

314. Because of the different formulations of the taxation provisions at issue in those cases to the provisions in issue in this case, the Tribunal does not find them helpful except for their recognition of the special character of the State power of taxation.

(8) Conclusion Regarding the Scope of Article 3 and of Article 4

315. What is critical for the Tribunal is the wording and structure of Article 3 and Article 4. The wording and structure lead the Tribunal to the conclusion that matters of taxation, fees, charges and fiscal deductions and exemptions are subject only to the obligations stated in Article 4 and not to the more generally worded fair and equitable treatment obligation included in Article 3. This conclusion, in summary, follows from three features of the provisions. First, Article 3 imposes an apparently general treatment obligation in respect of investments, but is

³²⁸ Ex. R-143, 2004 Canada Model BIT; Ex. R-142, 2004 US Model BIT; Ex. R-146, Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993; Ex. R-140, Energy Charter Treaty; Ex. R-141, NAFTA.

immediately followed by a provision, Article 4, specifically dealing with taxation and related measures in respect of investments. Second, Article 3 imposes the broad and absolute obligation of fair and equitable treatment (although qualified by the Protocol), while Article 4 imposes only the contingent obligations of national and MFN treatment, obligations already included in Article 3 along with the fair and equitable treatment standard. That repetition by itself indicates that each provision stands alone. That also appears from the third feature of the two Articles. While Article 3(3) excepts from the MFN treatment obligation stated in Article 3 special advantages accorded to nationals of a third state by virtue of agreements establishing customs unions, economic unions, monetary unions and similar bodies, it does not, by contrast to Article 4, exclude “special fiscal advantages” accorded under double taxation agreements or on the basis of reciprocity with a third State.

316. The determination of the meaning of the provisions must also have regard both to the evident concern of Venezuela to limit its obligations under Article 3 and to the special character of the power of a State to impose taxation. Other significant contextual matters supporting the interpretation are, first, the near consistency of the wording of the Venezuelan Treaty with that of many of the Netherlands’ bilateral investment treaties.³²⁹ A second contextual matter is the way in which the model bilateral investment treaties of a number of other States deal with taxation – some expressly exclude matters of taxation largely or entirely. If they do not make that express exclusion, but rather leave matters of taxation within the scope of general fair and equitable treatment and MFN treatment obligations, they make express exceptions for double taxation and other fiscal agreements.

317. Accordingly, the Tribunal concludes that the changes made to the Venezuelan law challenged by the Claimants “with respect to taxes, fees, charges, and to fiscal deductions and exemptions” do not fall within the scope of Article 3. As already noted,³³⁰ the Claimants do not contend that any of those changes breach the non-discrimination prohibitions included in Article 4.

³²⁹ See *supra* ¶ 310.

³³⁰ See *supra* ¶ 307.

(9) Do the Measures Adopted by Venezuela Relating to Taxes and Royalties Fall Within Article 4 of the BIT?

318. One of the measures challenged by the Claimants, namely, the Law Partially Reforming the Income Tax Law dated 29 August 2006,³³¹ amends the Income Tax Law by increasing the applicable rate of income tax from 34 percent to 50 percent. There cannot be any doubt that that is a measure with respect to “taxes”. But are royalties, such as those changed in the Law Partially Reforming Decree No. 1,510 with Force of the Organic Hydrocarbons law of 16 May 2006,³³² to be seen differently? That question would also arise in respect of the proposed increase in royalties announced on 10 October 2004,³³³ if that were relevant notwithstanding the Claimants’ withdrawal of its reservation of its rights on 14 January 2005.³³⁴

319. The Tribunal considers, first, the relevant provisions of the Venezuelan law, the agreements made in terms of it and the adherences of participants to those agreements, second, the ways in which the Claimants presented their claim relating to those two measures and, finally, its understanding of the phrase at the beginning of Article 4: “taxes, fees, charges, and ... fiscal deductions and exemptions”.

(a) The Relevant Provisions of Venezuelan Law and Related Agreements

320. Article 1 of the Hydrocarbons Law, as added in 1967,³³⁵ under the Part heading “Taxes”, fixed the “production tax” at 16⅔ percent. The Executive Branch was given the authority both to lower the tax to make commercial production possible and to raise the previously lowered production tax to the original rate when it deemed that the reasons for lowering it no longer

³³¹ Ex. C-43, *Ley de Reforma Parcial de la Ley de Impuesto Sobre la Renta* (Law Partially Reforming the Income Tax Law), Official Gazette No. 38,529, published 25 September 2006.

³³² Ex. C-42, *Ley de Reforma Parcial del Decreto No. 1.510 con Fuerza de Ley Orgánica de Hidrocarburos* (Law Partially Reforming Decree No. 1,510 with Force of the Organic Hydrocarbons Law), Official Gazette No. 38,443, published 24 May 2006.

³³³ Ex. C-193, *Aló Presidente Nro. 207*, 10 October 2004 (available at www.alopresidente.gob.ve).

³³⁴ Ex. C-29, Letter from William B. Berry, Executive Vice President of Exploration and Production, ConocoPhillips, to Dr Rafael Ramírez, Minister of Energy and Mines, dated 14 January 2005.

³³⁵ Ex. C-50, *Ley de Reforma Parcial de la Ley de Hidrocarburos* (Law Partially Reforming the Hydrocarbons Law), Extraordinary Official Gazette No. 1,149, published 15 September 1967.

existed. Article 41 and all of the other provisions in that Part use the word “tax” to refer to the regulation and calculation of the royalty, as well as to refer to other taxes.

321. Article 1 of the Royalty Agreement of the Strategic Associations of the Orinoco Oil Belt between the Ministry of Energy and Mines³³⁶ and PdVSA of 29 May 1998 provides as follows:³³⁷

The object of this Agreement is to set the basis for the calculation of the exploitation tax contemplated in Article 41 of the Hydrocarbons Law (hereinafter the “Royalty”) and applicable to the exploitation of extra heavy crudes from the Orinoco Oil Belt by Participants, in the above associations or projects (hereinafter the “Association”), pursuant to Article 5 of the Organic Law that Reserves for the State the Industry and Commerce of Hydrocarbons, in the areas determined to that effect by the Ministry.

The covering letter from the Ministry to PdVSA of 11 June 1998, (enclosing 11 copies of the Agreement) states that the Agreements “will apply in the Strategic Associations approved by the Sovereign Congress of the Republic for the exploitation and upgrading of crude from the Orinoco Oil Belt”. The letter concludes by saying that “it is important that the participants of the associations indicate in writing their ‘intention to adhere to such Agreements’”. The Royalty Agreements were to be in force for up to nine years.³³⁸

322. The formal adherences of Petrozuata and in respect of Hamaca accept the May 1998 Agreement “for the calculation of the exploitation tax” set out in Article 1 of the Hydrocarbons Law. The letters refer to the fact that the entity is a party to the relevant Association Agreement approved by the Congress of the Republic of Venezuela in 1993 and 1997, respectively.³³⁹

³³⁶ The name of the Ministry of Energy and Mines was changed in 2005 to the Ministry of Energy and Petroleum and again, in 2007, to the People’s Ministry of Energy and Petroleum. *See* Cl. Reply ¶ 17g, fn. 8.

³³⁷ Ex. C-13, Orinoco Belt Royalty Agreement, Art. 1.

³³⁸ *Id.* Art. 9.

³³⁹ Ex. C-14 and C-14A, Letter from María Lizardo Gramcko, President, Petrolera Zuata, Petrozuata, C.A. to Edwin Arrieta, Minister of Energy and Mines, dated 8 October 1998; and Ex. C-15A, Letter from Carlos Bustamante, Vice President of New Government Business and Relations, Phillips Petroleum Company Venezuela Limited, to Edwin Arrieta, Minister of Energy and Mines, dated 29 October 1998.

323. A further agreement establishing “the procedure for Payment of the Exploitation Tax (Royalty) for extra heavy crude produced and sulphur extracted by Petrozuata, C.A.” and referring to the May 1998 Agreement was signed on 14 January 2002.³⁴⁰ Conoco Venezuela on 29 April 2002, when informing the Ministry of its intention to adhere to the relevant agreement in respect of the Corocoro area, referred to the “Exploitation Tax (‘Royalty’)” owed to the Nation in respect of crude oil developed by the company.³⁴¹

324. The Tribunal sees those consistent references to “tax” in the documents relating to the royalty as significant. The Venezuelan legislation, the agreements and the adherences all treat the royalty payments as a tax.

(b) The Presentation of the Claimants’ Case With Respect to the Relevant Measures

325. The Tribunal now considers the section of the Claimants’ Request for Arbitration headed as follows:

In 2005 And 2006, Venezuela Abrogated Its Commitments With Respect To The Fiscal Regime Applicable To The Petrozuata And Hamaca Associations (Emphasis added.)

It specified the breaches in this way:³⁴²

[...] Most significantly, on May 16, 2006, the Venezuelan National Assembly implemented an ‘extraction tax’ of one-third of the value of all hydrocarbons extracted. This extraction tax functions in a manner identical to a royalty. Indeed, the law specifically provides that royalty payments could be credited against amounts owed for the extraction tax. Thus, whereas Venezuela had originally used the promise of a nine-year royalty of one percent and a maximum royalty of 16.66 percent to induce ConocoPhillips to invest in Venezuela, the extraction tax required

³⁴⁰ Ex. C-174, Procedure for Payment of Exploitation Tax (Royalty).

³⁴¹ Ex. C-20 and C-20A, *Convenio de Regalía de los Convenios de Asociación para la Exploración a Riesgo de Nuevas Áreas y la Producción de Hidrocarburos bajo el Esquema de Ganancias Compartidas entre el Ministerio de Energía y Minas y Petróleos de Venezuela, S.A.* (Royalty Agreement of the Association Agreements for the Exploration at Risk of New Areas and the Production of Hydrocarbons Under the Shared Earnings Scheme between the Ministry of Energy and Mines and Petróleos de Venezuela, S.A.), dated 5 December 1995; Letter from Roger Ramshaw of Conoco Venezuela C.A. to the Ministry of Energy and Mines, dated 29 April 2002.

³⁴² RFA ¶¶ 70, 72 (emphasis added).

that ConocoPhillips pay in substance a royalty of 33.33 percent for all extra-heavy oil produced.

The dismantling of the fiscal regime promised to ConocoPhillips was completed shortly thereafter when, on August 29, 2006, the National Assembly approved a change in the income tax law that increased the tax rate for the extra-heavy oil projects, including the Petrozuata and Hamaca Associations, from 34 to 50 percent, effective January 1, 2007.

326. In the relevant part of their Memorial, headed “Total Abrogation by Venezuela of its Fiscal Commitments to ConocoPhillips in 2005 and 2006”, the Claimants, after referring to the increase in the income tax rate,³⁴³ referred to “the next confiscatory ‘step’: The Extraction Tax”.³⁴⁴ In their description of that measure, they mention the announcement by the Venezuelan President of a new “Extraction Tax” and the National Assembly’s prompt approval of it. The Memorial then says the following:³⁴⁵

The new Extraction Tax effected a *de facto* increase in the existing production tax (royalty) regime. The new tax functioned in a manner identical to the royalty required under the production tax because; (a) it was calculated on the value of liquid hydrocarbons extracted; (b) the taxpayer had the right to deduct any amount paid as royalty from the amount of Extraction Tax owed; and (c) the calculation method was the same as that set out in the New Hydrocarbons Law for calculating royalty payments in cash. Minister Ramírez , Vice Minister Mommer and President Chávez have all affirmed that the introduction of the Extraction Tax raised the effective royalty rate to 33 1/3 percent. For the Petrozuata and Hamaca Projects, this meant that within a period of 18 months, the applicable royalty rate had been taken from one percent to 33 1/3 percent.

The Claimants conclude this part of the Memorial by quoting from a speech of 29 July 2007 by the Venezuelan President in which, in their words, he described “the Extraction Tax as another ‘step’ in his administration’s plan to confiscate the interests of ConocoPhillips”.³⁴⁶ The Memorial, referring again to the Income Tax increase, states that, with that change, “Venezuela accomplished the full and final dismantling of the fiscal regime guaranteed to ConocoPhillips in

³⁴³ Cl. Mem. ¶ 218.

³⁴⁴ Cl. Mem. at p. 110.

³⁴⁵ Cl. Mem. ¶ 221.

³⁴⁶ Ex. C-4, Transcript of *Aló Presidente 288: Desde la Faja Petrolífera del Orinoco*, Hugo Chávez Frías, President of the Bolivarian Republic of Venezuela (29 July 2007) at pp. 8-10.

respect of the Petrozuata and Hamaca Projects”. The Memorial then refers to the letter of protest of 29 November 2006 sent by ConocoPhillips to the Hydrocarbons Vice-Minister.³⁴⁷ That letter included this passage:³⁴⁸

In particular, we note that in recent months, the government of Venezuela has (i) amended the Hydrocarbons Law (amendments published in the Official Gazette on May 24, 2006), creating an extraction tax of 33.33% applicable to all hydrocarbons extracted by ConocoPhillips, (ii) increased the income tax from 34% to 50%, effective January 1, 2007; and (iii) adopted Orders Nos. 313 and 314 of the Ministry of Energy and Petroleum (published in the Official Gazette on November 14, 2006), which involve the imposition of royalties of 30% on associated gas, condensate, liquid hydrocarbons, sulphur and coke produced by ConocoPhillips in Venezuela.

These changes, among others, negatively affect and will continue to negatively affect ConocoPhillips’ legitimate expectations, based on the guarantees offered by the Venezuelan State.

327. In their Reply, the Claimants continued to treat the taxation and royalty rates together, as “fiscal incentives” or as parts of a “fiscal regime” or as “fiscal guarantees”.³⁴⁹ They quote from the 1993 Bicameral Commission the recommendation that the Petrozuata Project had to be subject to reduced income tax and royalty rates in order to attract investment.³⁵⁰

328. In their oral argument, the Claimants similarly grouped the income tax and royalty rates together. The changes made to those rates in the 1990s, following the recommendations of the 1993 Bicameral Commission, are referred to as the “fiscal incentives” or the “fiscal regime” necessary to induce them to make the major investments needed for the projects; in particular, the royalty changes are referred to as “fiscal” measures and the Claimants assert that it was those fiscal measures and that fiscal regime that was “dismembered” in 2005-2006.³⁵¹

³⁴⁷ See *supra* fn. 298.

³⁴⁸ *Id.*

³⁴⁹ Cl. Reply, headings on pp. 17, 27, 216, 225, 283; Cl. Reply ¶¶ 44, 45 (fiscal guarantees also) and 400.

³⁵⁰ Cl. Reply ¶ 23. See also, e.g., Cl. Reply ¶¶ 434, 437.

³⁵¹ See, e.g., the following references to argument by the Claimants’ Counsel: Tr. Day 1:19:19-20:3; Tr. Day 1:39:2-5; Tr. Day 1:47:7-16; Tr. Day 1:121:7-22; Tr. Day 1:123:3-10; Tr. Day 1:138:5-140:4; Tr. Day 1:144:9-20; Tr. Day 1:147:15-148:15; Tr. Day 1:149:16-22; Tr. Day 1:150:20-

329. The Respondent in its argument similarly treated the changes to the tax and royalty rates in terms of the provisions of the BIT without distinguishing between them. Given the way that the Claimants presented their claims, the Respondent had no reason to make any distinction. The Respondent contended that those changes were “tax and fiscal measures”, which, if governed by Article 4, were not in breach of that provision since the changes were not discriminatory.³⁵² In its opinion, stated in its Rejoinder, “as Claimants’ fair and equitable treatment claims relate solely to the changes in the tax and royalty rates, the provisions of Article 4 govern”.³⁵³ It argued in the alternative that if the measures were not exclusively governed by Article 4, the “tax and fiscal measures” did not in any event breach the fair and equitable standard set forth in the BIT.³⁵⁴ That is to say the Respondent, on its view of Article 4, does not argue that the royalty payments are “taxes” according to some specific definition of the word.

(c) The Tribunal’s Conclusion That the Relevant Measures Fall Within Article 4

330. The positions of the Parties as presented by the Parties during the course of the arbitration indicate that the tax and royalty measures constitute a “fiscal regime”. That understanding of the opening phrase in Article 4 is supported by the first meaning of “fiscal” in the Oxford English Dictionary:

“of or pertaining to the fisc or treasury of a State or Prince; pertaining to the public revenue”.

151:7; Tr. Day 1:186:21–187:14; Tr. Day 1:219:10-22; Tr. Day 1:220:20-221:7; Tr. Day 1 229:5-13; Tr. Day 1:254:13–255:4; Tr. Day 13:3373:8–12; Tr. Day 13:3376:14–21; Tr. Day 13:3378:17; Tr. Day 13:3384:3; Tr. Day 13:3384:11–3387:22; Tr. Day 13:3401:14 (bespoke fiscal regime); Tr. Day 13:3403:3 (bespoke fiscal regime). They also refer to the May 2006 measure as an Extraction Tax. *See, e.g.*, Tr. Day 1:47:7–9; Tr. Day 1:115:2-12; Tr. Day 1:124:12-16; Tr. Day 1:176:7–14; Tr. Day 13:3407:4–6; Tr. Day 13:3422:10–12; Tr. Day 13:3522:15–18; Tr. Day 13:3523:18–21; Tr. Day:13:3615:1–2; Tr. Day 14:3827:13.

³⁵² Resp. C-Mem. ¶¶ 217-26.

³⁵³ Resp. Rej. ¶ 392.

³⁵⁴ Resp. C-Mem. ¶¶ 227-35.

To go to the noun, the applicable definition of “fisc” is the State treasury. Royalties such as those in issue here are payable to the State. The royalties, along with the taxes, are part of the public revenue.

331. It may also be noted that in terms of standard legal definitions of tax, such as those in Black’s Law Dictionary and Thomas M Cooley’s writings on taxes and constitutional law, royalties such as those here may well qualify as taxes. Those definitions involve a charge levied by the State by virtue of its sovereignty to yield public revenue for the support of government and for all public needs. The Tribunal need not, however, decide that issue since royalties appear without any question to fall within the compendious phrase used at the beginning of Article 4 and in particular within “fiscal deductions”.

332. Accordingly, the Tribunal concludes that the measures taken in May and August 2006 do not fall within the scope of Article 3. It follows that the Tribunal need not go on to consider whether those measures breached the fair and equitable treatment standard set out in that provision and elaborated in the Protocol to the BIT. As already noted, the Claimants accept that the measures did not breach Article 4.

**B. CLAIMS FOR BREACH OF THE OBLIGATION NOT TO EXPROPRIATE UNDER
ARTICLE 6 OF THE NETHERLANDS-VENEZUELA TREATY**

333. The Tribunal has determined in the previous section of this Decision that the Dutch Claimants are unable to base their claims on the fair and equitable treatment standard included in Article 3 of the BIT. It accordingly now turns to Article 6 of the BIT which the Claimants contend has also been breached by the Respondent. It provides as follows:

“Article 6

Neither Contracting Party shall take any measures to expropriate or nationalise investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of law;
- (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given;

- (c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier; it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.”

334. The Parties’ submissions and evidence relating to this provision raised several issues. At this stage, the Tribunal proposes to make rulings on four of them:

- (1) the date of the valuation it is to make; is it the date of the taking, 26 June 2007, or the date of the Award?
- (2) were the measures taken by the Respondent expropriating or nationalizing the investments unlawful as a breach of Article 6(b) because they were contrary to any undertaking which the Respondent gave?
- (3) did the measures taken by the Respondent between 2004 and 2007 amount to a single taking and, as a consequence, was the taking unlawful, with the valuation of the investments being measured by applying the original royalty rate and income tax rate?
- (4) did the Respondent in the negotiations with the Claimants concerning the compensation payable in respect of the taking of the Claimants’ investments negotiate in good faith in accordance the standard stated in Article 6(c) of market value of the investments immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier, and were its actions accordingly lawful?

335. The Claimants, to quote their Memorial, have not challenged and in the arbitration do not challenge, the Respondent’s sovereign prerogative to nationalize. But, they continue, the

Respondent must exercise that prerogative lawfully.³⁵⁵ They contend, in brief, that the takings were unlawful for one or more of the reasons indicated in questions (2)-(4) in paragraph 334 above, and that because of that unlawfulness the value is to be determined at the date of the Award. The Respondent submits that the takings were lawful and that, whether the taking is lawful or not, it is the date of taking that is the date of valuation.

336. It is convenient to consider the issue of the valuation date ahead of the three issues of lawfulness: if the date of the taking is the valuation date whether the taking is lawful or not, the Tribunal would not need to consider those three issues.

(1) The date of valuation of the investment taken by the Respondent

337. The Claimants contend, on the basis of principle and the authorities, that if the taking is unlawful then the date of the award and not the date of the taking is in general the date of valuation.³⁵⁶ That submission is supported by the fact that “as a result of improving market conditions in the energy sector, the [three projects] have increased in value since the final act of confiscation by Venezuela on June 26, 2007”³⁵⁷. The Claimants submit that the Treaty is silent on the standard of reparation for takings carried out other than in accordance with the conditions specified in Article 6 of the BIT; “in these circumstances,” they continue, “it is well settled that tribunals must look to customary international law for the applicable standard of reparation”³⁵⁸. They cite a number of authorities in support of this submission. The first in time is the Judgment of the Permanent Court of International Justice in *Chorzów Factory* (Merits) PCIJ Pubs A17, where the taking in issue was unlawful; it was in breach of Poland’s obligations:

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation — to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not

³⁵⁵ Cl. Mem. ¶ 19.

³⁵⁶ Cl. Mem. ¶¶ 405-410

³⁵⁷ Cl. Mem. ¶ 410

³⁵⁸ Cl. Mem. ¶ 388

of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles. (A No. 17, p. 46.)

The Court continued in terms of principle:

The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. (A No. 17, p. 47; see also p. 29.)

At an earlier stage in the case, it had said this:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. (A No. 9, p. 21.)

338. The Claimants seek support from decisions to the same effect of other ICSID tribunals, the Iran-US Claims Tribunal, the European Court of Human Rights and *ad hoc* international tribunals, scholarly writing and the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001). Article 31 (1) of that text, headed Reparation, provides that:

The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

339. In support of that provision, the Commission cited passages from the *Chorzów* judgment including those quoted above. "Full reparation" may take the form of restitution, compensation and satisfaction either singly or in combination (Article 34). Under Article 36(2) "The compensation shall cover any financially assessable damage including loss of profits insofar as it is established." Those ILC Articles, supported in their commentaries by reference to the authorities, have been regularly referred to in subsequent decisions, including ICSID awards

and decisions, as codifying or declaring customary international law, e.g. *ADC v. Hungary*³⁵⁹, *LG&E v. Argentine Republic*³⁶⁰; *CMS Gas Transmission Company v. Argentine Republic*³⁶¹; and *Siemens AG v. Argentine Republic*³⁶², and other decisions and awards summarised in the UN Secretariat Reports A/62/62, paragraphs 103-115, and A/65/76, paragraphs 28-43). A number of those cases, in addition to citing the ILC articles and *Chorzów Factory*, refer to a consistent body of earlier decisions including *Texaco v. Libya* (1977)³⁶³ and *Amoco v. Iran* (1987).³⁶⁴

340. The Respondent emphasizes the terms of Article 6 of the BIT: that provision requires compensation for expropriation to be made according to the market value at the date of the taking³⁶⁵. From the *Chorzów Factory* case it refers particularly to the proposition that “in the normal case, failure to pay compensation does not change the valuation date”³⁶⁶. That, it says, is the teaching of basically all the decisions. It cites the Tribunal in the *LIAMCO* case which, after discussing *Chorzów Factory*, said this:

in a lawful expropriation where the only wrongful act was the failure to pay the just price of what had been expropriated, the compensation due should be the value of the undertaking at the time of dispossession.³⁶⁷

³⁵⁹ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006 at ¶¶ 484-499

³⁶⁰ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award of 25 July 2007 at ¶ 31.

³⁶¹ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 25 September 2007, at ¶¶ 399-405.

³⁶² *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007 at ¶¶ 349-355.

³⁶³ Cl. Mem. fn. 584 and CL-33, *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, Award on the Merits dated January 19, 1977, 17 International Legal Materials 1 (1978) at ¶102 (citing relevant scholarly writing).

³⁶⁴ Cl. Mem. fn. 584 and CL-36, *Amoco International Finance Corp. v. Islamic Republic of Iran*, Partial Award dated July 14, 1987 at ¶¶ 196-206.

³⁶⁵ Resp. Rej. fn. 983 and ¶ 544.

³⁶⁶ See Tr. Day 2:476:17-19

³⁶⁷ *Libyan American Oil Company (LIAMCO) v. the Government of the Libyan Arab Republic*, Award dated April 12, 19n, 20 International Legal Materials 1, pp. 34-37, 156-160 (1981).

341. It also refers to the ICSID Tribunal decision in *Santa Elena v. Costa Rica*³⁶⁸, in which the Tribunal determined the value of the property expropriated as at the date of its taking. The Claimants, in response, submit that the *Santa Elena* and *LIAMCO* cases involved lawful takings, while the takings in this case were unlawful (referring also to *Vivendi v. Argentina*).³⁶⁹

342. The Tribunal, coming back to the terms of the BIT, does not consider that the extent of the compensation payable in respect of an unlawful taking of an investment, for instance because it is in breach of an “undertaking” in terms of Article 6(b), is to be determined under Article 6(c): that provision establishes a condition to be met if the expropriation is in all other respects in accordance with Article 6. So, in the *Chorzów* case, the Court did not determine reparation in accordance with the provisions of the Convention before it, because it was concerned with a dispossession in breach of those provisions. It decided in accordance with “the essential principle” quoted earlier, that is a principle of customary international law, not dependent on the Convention provisions. The other cases cited are also to be understood in that way. Next, the cases cited by the Respondent in which the Tribunal fixed the compensation by reference to the value of the property at the time of the taking are cases where the taking was lawful and the only allegedly wrongful act was the claimed failure to pay the value of the investment to be fixed, either in terms of the relevant treaty or customary international law, at the time of the taking;³⁷⁰ in *Santa Elena*, the valuation submissions by the Parties and the tribunal’s assessment related only to the date of taking; the Respondent also refers to *Mondev v. The United States of America*³⁷¹, but there too the dictum relates to lawful expropriation.

³⁶⁸ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, at ¶¶ 35, 38, 77 and 95.

³⁶⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award of 20 August 2007, at ¶¶ 8.2 1-8.2.7.

³⁷⁰ *LIAMCO, Santa Elena, In the Matter of an Arbitration between the Government of the State of Kuwait and The American Independent Oil Company (Aminoil)*, 21 International Legal Materials 976 (1982) Award of 24 March 1982, *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3) (2004) 6 ICSID Reports 5, at ¶¶ 120-137.

³⁷¹ *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, at ¶ 71.

343. The Tribunal, on the basis of principle and the authorities reviewed above, concludes that if the taking was unlawful, the date of valuation is in general the date of the award. The Tribunal accordingly turns to the contentions of the parties about the lawfulness of the taking of the investments, as listed in paragraph 334 (2)-(4) above.

(2) Did the Respondents taking of the Claimants' investments breach an "undertaking" in terms of Article 6(b) of the BIT?

344. The Tribunal recalls that Article 6 provides that neither Contracting Party shall take any measures to expropriate or nationalize investments of nationals of the other Contracting Party unless, among other things,

(b) "the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given."

345. In the final stage of the hearings the Claimants' argument had moved away from the submissions made in the written pleadings and at the opening of the hearings that the Respondent had abrogated fiscal guarantees³⁷². Even in the absence of express stabilization, their counsel contended, international law provided protection for "commitments made by a State to induce an investment where the commitment is relied upon by the Investor"³⁷³. Counsel cited investment arbitration cases as demonstrating that the State did not have a magic eraser that could erase the terms on the basis that there were no legitimate expectations unless there exists a stabilization agreement. Several cases were cited in support of the proposition that

where there is a relationship, a specific relationship and negotiated relationship between the State and a foreign investor on the strength of which investment occurs, the foreign investor changes its position, commits itself to the State, makes an investment in the territory of the State, the consequence is not a treaty, not a reversal of the principle of sovereignty, but a legitimate expectation entitled to respect.³⁷⁴

³⁷² Cl. Reply, at IV.B.1.

³⁷³ See Tr. Day 13:3497.

³⁷⁴ See Tr. Day 13:3499.

346. Counsel for the Respondent submitted that those cases did not support the Claimants' position in law and in fact. He also cited other cases which in his view supported the Respondent's position.³⁷⁵

347. The cases in which the particular claimants alleged breaches of their legitimate or reasonable expectations turned on fair and equitable treatment obligations included in the relevant treaty or on provisions requiring decisions in accordance with "international law" among other sources. Given the ruling which the Tribunal has already made that the claims in respect of the tax measures do not fall within the scope of the FET provision of Article 3 but within Article 4 concerned with taxation and related matters, no breach of which is alleged, those cases are not relevant. Rather what has to be determined in this case is whether Venezuela has given "an undertaking" which it has breached by its taking of the Claimants' assets.

348. The Tribunal understands the word "undertaking" to bear its ordinary meaning of a promise. In the context of a binding international agreement, the promise is one which is binding in law on the person who has made it. That meaning gains further support from the careful particularity of the statements of obligation included in the substantive provisions of the agreement and its protocol both of which, as already noted, depart in important ways from the Netherlands model investment treaty.

349. Have the Claimants demonstrated on the basis of the evidence presented to the Tribunal that the Respondent gave undertakings to the Claimants or their predecessors in respect of the tax and related measures which were breached by the changes made to those measures and by the taking of the Claimants' assets?

350. The Claimants, through their counsel at the final stages of the hearing, effectively provided the answer, a negative one, to that question. Their argument, as noted, was no longer in terms of guarantees or express stabilization provisions but was made by reference to legitimate or reasonable expectations, with at best passing and unsupported references to

³⁷⁵ See Tr. Day 13:3667-3671.

“commitments”.³⁷⁶ But such expectations cannot themselves establish a commitment of the kind contemplated by Article 6(b). At best, they might fall within the scope of the fair and equitable cause in Article 3, but, for the reasons already given that is not available to the Claimants in this case.

351. In any event, as the cross-examination of the Claimants’ witnesses by reference to the documentary record so clearly showed, no undertaking can be found in that record.³⁷⁷

352. Accordingly, this part of the claim fails.

(3) Did the measures taken by the Respondent between 2004 and 2007 amount to a single taking and, as a consequence, was the taking unlawful, with the valuation of the investments being measured by applying the original royalty rate and income tax rate?

353. The Claimants contend the Respondent must compensate them for the value of their investments excluding the effect of all of its unlawful and expropriatory measures.³⁷⁸ The “single taking”, they submit, is established as a matter of fact by statements made by President Chavez on 29 July 2007 and by Minister Ramírez on 8 February 2008. Each of the five progressive steps, consisting of incremental breaches of the promised fiscal regime, was interconnected by design. The interconnected nature of the Respondent’s actions was detailed by none other than President Chavez in that speech in which he revealed the plan put in place years before the projects went into commercial operation.³⁷⁹ The Claimants conclude their discussion of the facts in this way:

In asking the Tribunal to consider Venezuela’s measures from 2004 to 2007 as a single taking, ConocoPhillips has asked the Tribunal to consider those measures in the very same manner as President Chavez and Minister Ramírez have publicly described them: as progressively giving Venezuela a greater take of ConocoPhillips’ investments until it finally “buried” them. Venezuela would understandably prefer that the Tribunal only consider ConocoPhillips’ investments at the burial stage so

³⁷⁶ See Tr. Day 13:3414 and Tr. Day 14:3831.

³⁷⁷ See Tr. Day 13:3645-3653.

³⁷⁸ Cl. Reply at IV; C-Mem at IV A.

³⁷⁹ Cl. Mem. at ¶ 297.

that it may be rewarded with a discount for expropriating ConocoPhillips' investments.³⁸⁰

354. On the law, the Claimants contend that the cases they cite stand for the proposition that a tribunal does not merely look at the last and final act in order to assess liability and the nature of the expropriation.³⁸¹ Because the measures were interconnected, the value of the confiscated interests of the Claimants must be measured according to the value of the investments applying the royalty rate and income tax rate the Respondent had guaranteed to induce the investments.³⁸²

355. The Respondent contends that none of the 10 cases which the Claimants cite in support of their “novel theory” do in fact support it.³⁸³ A detailed review of each of the cases, it says, demonstrates the extent to which the Claimants have distorted precedent in their effort to manufacture a legal basis for their claims.³⁸⁴ A number of the cases indeed support the opposite conclusion, with damages being calculated at the date of the taking in accordance with the amended law. In its Rejoinder, the Respondent points out that the Claimants in their Reply did not even try to rehabilitate or justify their inaccurate portrayal of the cases they cited.³⁸⁵ In the Rejoinder the Respondent provides a further review of the cases cited by the Claimants.³⁸⁶

356. The Respondent further submits that the Claimants hope by this argument to impose liability for measures which were themselves entirely lawful.³⁸⁷ All of those measures taken

³⁸⁰ Cl. Reply. at ¶ 424.

³⁸¹ Cl. Reply. at ¶ 426.

³⁸² Cl. Mem. at ¶ 305.

³⁸³ Resp. C-Mem. at ¶¶ 245-266.

³⁸⁴ Resp. C-Mem. at ¶ 246.

³⁸⁵ Resp. Rej. at ¶ 453 referring to Cl. Reply at ¶ 426.

³⁸⁶ Resp. Rej. at ¶¶ 454-470.

³⁸⁷ Resp. Rej. at ¶ 451.

from 2004 to 2006, were non-discriminatory and non-confiscatory, and none of them deprived the Claimants of the “fruits” of their investment or forced them to abandon their interests.³⁸⁸

357. The Respondent also contends that the Claimants’ “single taking” theory has no basis in fact. The speeches they cite were not some sort of confession of a single plan in existence years before the February 2007 Decree. Rather, they were simply a review of the measures taken. The history shows the opposite of what the Claimants submit. It was not until January 2007 that the decision was made to require migration:

Until then, the policy had been to correct what the Government considered to be irregularities in the associations and to ensure fairness in the royalty and tax regime. Claimants’ pure speculation that the Government had something else in mind all along flies in the face of the entire record in this case.³⁸⁹

358. At the opening of the hearings, counsel for the Claimants played a video of President Chávez’ speech and recalled the speeches of Minister Ramírez ;³⁹⁰ he also referred to the cases cited in the pleadings, but without responding to the Respondent’s review of those cases.³⁹¹ Counsel for the Respondent referred to that review and its understanding of the cases; he also contended, citing relevant authorities, that government officials are presumed to be acting in good faith.³⁹² The Respondent came back to the good faith issue in the final rounds,³⁹³ when the matter was otherwise the subject of only limited attention.

359. The Tribunal recalls that it has decided that the challenges by the Claimants to changes in the tax and royalty law fail. These changes were not taken in breach of Article 4 which excludes the application of Article 3 in its field of application. Accordingly, for that reason alone, the single taking contention, insofar as it would characterise those changes as unlawful and make them relevant to the calculation of quantum, must fail.

³⁸⁸ Resp. Rej. at ¶ 468.

³⁸⁹ Resp. C-Mem. at ¶ 268; Resp. Rej. at ¶¶ 472-474.

³⁹⁰ See Tr. Day 1:57; Tr. Day 1:194-200.

³⁹¹ See Tr. Day 1:200-201.

³⁹² See Tr. Day 2:445-446.

³⁹³ See Tr. Day 13:3690-3691.

360. It follows that the Tribunal does not consider it necessary to resolve the other issues of fact and law presented by this submission.

(4) Did the Respondent in the negotiations about compensation negotiate in good faith by reference to the standard in Article 6(c) of the BIT?

361. Article 6 provides that neither Contracting Party shall take any measures to expropriate or nationalise investments of nationals of the other Contracting Party unless, among other things:

(c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier; it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

362. The requirements for prompt payment and for interest recognise, in accordance with the general understanding of such standard provisions, that payment is not required at the precise moment of expropriation. But it is also commonly accepted that the Parties must engage in good faith negotiations to fix the compensation in terms of the standard set, in this case, in the BIT, if a payment satisfactory to the investor is not proposed at the outset.

(a) The submissions of the Parties

363. The Tribunal begins with the Parties' submissions which were based on the evidence they presented about the negotiations by way of documents and written testimony by witnesses who were subject to examination before the Tribunal. It then examines and assesses that evidence in detail. The evidence relates to two overlapping periods, the first, from 2006 to early 2007, concerning the proposed migration of the projects into *empresas mixtas* and the second from early 2007 concerning the negotiations both before the taking of the investments, in June 2007, and beyond.

364. The witnesses who testified about the negotiations were Mr A. Roy Lyons, President of ConocoPhillips Venezuela from 2005 to June 2008 called by the Claimants; and

Dr Bernard Mommer, the Venezuelan Vice-Minister of Hydrocarbons from January 2005 to June 2008, called by the Respondent³⁹⁴. The documentary evidence consists of the Respondents' non binding term sheets of August 2006 relating to the migration of the Petrozuata and Hamaca Associations³⁹⁵, the Respondent's draft contracts of 17 and 22 January 2007 for the migration of the three Associations, the three ConocoPhillips "trigger" letters of 31 January 2007³⁹⁶, its three letters of 12 April 2007 responding to oral proposals made on 29 and 31 March 2007³⁹⁷, three requests by the Ministry in May 2007 for comments by ConocoPhillips on a draft contract for the conversion of Hamaca to an *empresa mixta* which was attached to the first request, but which was not included in that exhibit submitted to the Tribunal³⁹⁸, the two written proposals made by ConocoPhillips in June and August 2007³⁹⁹, and various public statements made in 2007 and 2008 by ConocoPhillips officials and Venezuelan Ministers. The limited extent of the documentation may be explained by a confidentiality agreement referred to in the proceedings, but not documented or given any precision⁴⁰⁰ or by the fact that offers stated expressly that they were made without prejudice, or both.

365. The Claimants submit that in late 2006, at the time of the proposed "migration", ConocoPhillips negotiated in good faith about the possible relinquishment of its rights in

³⁹⁴ Gregory Goff testified very briefly that he was heavily involved in the compensation negotiations, that he had signed a confidentiality agreement and that the negotiations went on for a long time; (*See*. Tr. Day 3:684). He was based in Venezuela in 2004-2005. Jeff W Sheets testified that he was aware of discussions within senior management in 2005, 2006 and 2007 about the Association Agreements and their compensation provisions but was not involved in them (*See*. Tr. Day 6:1547:13-20).

³⁹⁵ Ex. C-231, Petrozuata Not Binding Terms Sheet for the Migration of the Associations, August 2006; Ex. C-232, Ameriven Hoja de Términos no Vinculante para la Migración de la Asociación (Ameriven Non-Binding Term Sheet for Migration from Association), August 2006.

³⁹⁶ Ex. C-36, *supra* at fn. 198.

³⁹⁷ Ex. C-241, Letters from A. Roy Lyons to Rafael Ramírez et al., April 12, 2007.

³⁹⁸ Ex. R-44, Correspondence with ConocoPhillips Regarding Migration.

³⁹⁹ Direct Testimony of Dr Bernard Mommer, 24 July 2009; Appendix 4: Draft Memorandum of Understanding, dated June 15, 2007; Appendix 5 Letter from Randy L. Limbacher, ConocoPhillips Company to Bernard Mommer, Vice-Minister of the People's Power of Energy and Petroleum and Eulogio Del Pino, President of CVP and Director of PdVSA Petróleo, S.A., dated August 17, 2007.

⁴⁰⁰ *See*. Tr. Day 3:684; Tr. Day 7:1858; Tr. Day 14:3977.

exchange for fair, prompt and adequate compensation, but Venezuela refused to offer compensation representing more than a fraction of the value of those interests; further it insisted that ConocoPhillips execute a waiver of rights including the right to have recourse to international arbitration, as a condition for any compensation.⁴⁰¹ According to the Claimants, under the August 2006 term sheets for the migration of the Petrozuata and Hamaca Associations into *empresas mixtas*,

[t]he compensation proposed by Venezuela for this planned expropriation was limited to offering ConocoPhillips reduced and unprotected minority stakes in the new *empresas mixtas*, without the right of recourse to international arbitration. In fact, ConocoPhillips would have to pay a bonus in order to participate in the new *empresas mixtas*, and would also have to waive all claims arising from the expropriation.⁴⁰²

366. On 16 January 2007 Rafael Ramírez , the Minister of Hydrocarbons, was reported as saying that the Government was initiating a new phase in discussions on the partnership agreements for companies operating in the Orinoco Oil Belt through a nationalization law. In 2006 it had not been possible to reach agreements with the foreign oil companies:

The Minister said that once the nationalization law is issued, we can provide details on the time frames. For now, we are calling on all partners to discuss separately what their future will be in these strategic partnerships.

367. Mr Lyons, in his testimony, said that the August 2006 terms were unacceptable to ConocoPhillips and that with his colleagues he made that clear in discussions with Mr Del Pino, a PdVSA executive, and Dr Bernard Mommer, Vice-Minister of Hydrocarbons. On 17 and 22 January 2007, ConocoPhillips received copies of draft contracts for the conversion of each of the three Associations into an *empresa mixta*. Under their terms ConocoPhillips would, according to the submissions, in relation to the Petrozuata and Hamaca Projects, (1) have a reduced stake in the new *empresa mixta*, (2) contribute an extra amount to the capital of the *empresa mixta*, (3) transfer all assets to the body, (4) receive no compensation, and (5) waive all

⁴⁰¹ Cl. Mem. at ¶¶ 14, 227 and 228.

⁴⁰² Cl. Mem. at ¶ 228.

claims. In the case of Hamaca, ConocoPhillips was also to pay a bonus⁴⁰³. According to the Claimants:

[i]n sum, the migration comprised expropriation, minimal compensation in the form of a reduced participation in the resulting *empresa mixta* and waiver of all claims arising from the expropriation. But for the waiver requirement (which was unacceptable), ConocoPhillips might have been able to accept the terms of the migration in order to mitigate damages, knowing that it could sue to obtain further compensation for the expropriation. However, Venezuela never relented with respect to its waiver demand.⁴⁰⁴

368. The Respondent flatly denies the last point about the bonus to be paid in respect of the Hamaca project, by reference to the Hamaca contract with Chevron.⁴⁰⁵

369. Dr Mommer also testified that under the proposals the projects were to be doubled in area.⁴⁰⁶

370. On 31 January 2007, representatives of CoconoPhillips, including Mr Lyons, met representatives of the Venezuelan Ministry of Hydrocarbons, including Vice-Minister Mommer, and of PdVSA. Mr Lyons said that the Venezuelan officials were informed that the terms they proposed were inadequate. Accordingly, the waiver of all legal claims to additional compensation was plainly unreasonable. But, he says, Dr Mommer made it clear that the government did not intend to modify the terms. “In the circumstances, as a potential measure, we provided to the government trigger letters invoking our rights under the Foreign Investment Law and the applicable bilateral investment treaty.”⁴⁰⁷

371. Following the making of the “Nationalization Decree” on 26 February 2007 ConocoPhillips says that its executives attended a number of meetings with the President of the

⁴⁰³ Cl. Mem. at ¶¶ 229-231.

⁴⁰⁴ Cl. Reply at ¶ 131.

⁴⁰⁵ Ex. R-45, Contract for the Conversion to a Mixed Company among Corporación Venezolana de Petróleo, S.A., Texaco Orinoco Resources Company and Chevron Orinoco Holdings B.V., executed December 5, 2007; Resp. C-Mem. at ¶ 209.

⁴⁰⁶ *See*. Tr. Day 7:1848

⁴⁰⁷ Ex. C-36 *supra* at fn. 198.

PdVSA subsidiary, Minister Ramírez and Vice-Minister Mommer among others. The Claimants considered that the latter made it clear that Venezuela had no intention of compensating ConocoPhillips adequately for the forced transfer of the projects. ConocoPhillips informed Venezuela that it would not relinquish its rights and interests without adequate compensation.⁴⁰⁸ At a meeting held on 29 March 2007, Venezuela, ConocoPhillips says, made offers in respect of its interests in the Petrozuata and Hamaca projects but not in respect of Corocoro. These offers, according to the Claimants, came nowhere close to reflecting the fair market value of those interests. On 12 April 2007 Mr Lyons wrote letters in respect of each of the three projects to the Minister, the Vice-Minister and the President of the PdVSA subsidiary referring to that meeting and another held on 31 March. In those letters, ConocoPhillips stated it “would like to continue efforts to negotiate in good faith the possibility of an agreement with respect to the terms on which ConocoPhillips will participate in the migration of [each] Project with a mixed company . . . pursuant to [the 26 February 2007] Decree...”. There remained, however, fundamental differences between ConocoPhillips and the Government about the terms for nationalization. In that context the letters referred to two verbal compensation proposals made at a meeting of 29 March 2007. Mr Lyons asked for confirmation of the proposals in several respects.⁴⁰⁹

372. Mr Lyons in his testimony says that from March to June 2007 he participated in further meetings with Ministry and PdVSA officials, in which, together with other ConocoPhillips personnel, he attempted to engage in good faith negotiations for fair compensation. He referred in particular to the meeting of 29 March and the ConocoPhillips responses to the offers made by the PdVSA official. The last meeting, of at least nine held since January before the final deadline of 26 June 2007 fixed in the February 2007 Decrees, was held on 20 June. On 26 June, Venezuela, he says, took the three ConocoPhillips investments in their entirety without providing any compensation at all.

373. The Respondent submits that

⁴⁰⁸ Cl. Mem. at ¶ 238.

⁴⁰⁹ Ex. C-241, *supra* fn. 397.

In an attempt to reach agreement on an orderly and amicable migration, representatives of the ConocoPhillips companies were called to several meetings to discuss drafts of the documents for conversion of the associations to mixed companies. However, unlike the other companies, including its own partners in the Hamaca Project (Chevron) and the Corocoro Project (Eni), ConocoPhillips refused to participate in the negotiation process in any meaningful manner. The meetings did proceed with the other companies, and, in most cases, reached a successful conclusion, much like the earlier process for the migration of the Operating Service Agreements.⁴¹⁰

The indispensable fact remains that ConocoPhillips is one of only two exceptions and that virtually the entire international oil industry continues to do business and seek new business opportunities in Venezuela⁴¹¹.

374. The Respondent continues that although ConocoPhillips refused to participate in any meaningful way in the migration process, the Venezuelan Government agreed to discuss reasonable compensation. As reported in the press, “those discussions proceeded in good faith on an amicable basis for some time”. It quoted the ConocoPhillips CEO, Mr Mulva, speaking in early 2008:

We continue our discussions with PdVSA and the Venezuelan authorities ... I believe that we are making progress. It will take time. I would like to see and hope that we can come to some sort of solution to this in 2008...

We’re going to do this in a very deliberate way[;] the objective is to reach an amicable solution so as not to follow the (arbitration) process though for a number of years.⁴¹²

375. It refers to the two written proposals made by ConocoPhillips on 15 June 2007 and 17 August 2007 referred to in Dr Mommer’s evidence. He says of the second of those proposals, a modification of the first, that it was completely unrealistic because it gave no consideration to the compensation formulas negotiated at the outset and applicable to the Petrozuata and Hamaca Projects and did not refer the true value of the interests at issue without considering those formulas. Dr Mommer refers to the settlement discussions in these terms: “we were always

⁴¹⁰ Resp. C-Mem. ¶ 112.

⁴¹¹ Resp. C-Mem. at fn. 211.

⁴¹² Resp. C-Mem. ¶ 113.

open to paying reasonable compensation, but ConocoPhillips from the beginning insisted on exorbitant sums that made settlement impossible”.⁴¹³ The Respondent says of the ConocoPhillips proposals that they were based on unrealistic assumptions regarding both valuation and legal issues and totally disregarded the express limitations of liability provided for under both the Congressional Authorizations and the Petrozuata and Hamaca Association agreements. Those elaborate compensation provisions were negotiated at great length more than a decade earlier. In short neither the amounts sought then or in this case has ever been a serious compensation demand.⁴¹⁴ It emphasises, especially in its Rejoinder, the Claimants’ failure to call attention to the compensation provisions.⁴¹⁵

376. The Respondent, later in its Counter-Memorial, develops its argument that the claims of the Claimants relating to the two major projects, Petrozuata and Hamaca, have to be dismissed in any event because they fall foul of the carefully structured compensation provisions of the Congressional Authorizations and the Association Agreements governing those projects.⁴¹⁶ Non economic measures, such as the change of operatorship, were not covered and “significant economic damage” had to be caused. The structure flowed from the condition of the Congressional Authorizations reserving the State’s sovereign right to take action affecting the Projects but allowing Maraven and Corpoven to provide compensation in certain circumstances. Further, the February 2007 Decree was non-discriminatory in nature.

377. The Claimants, in their Reply, in response to the Respondent’s contention that they were uncooperative in the compensation negotiations, quote public statements by Minister Ramírez in August 2007, February 2008 and September 2008 indicating that the Parties were in fact continuing to seek an amicable solution.⁴¹⁷

378. The Claimants also submit that the Association Agreements cannot alter Venezuela’s obligations to the Claimants under international law and that the compensation provisions are

⁴¹³ Direct Testimony of Dr Bernard Mommer, 24 July 2009 ¶ 20.

⁴¹⁴ Resp. C-Mem. ¶¶ 113, 117, 274-276.

⁴¹⁵ Resp. Rej. ¶¶ 15, 240-243.

⁴¹⁶ Resp. C-Mem. ¶¶ 146, 153, 156.

⁴¹⁷ Cl. Reply ¶¶ 133-134.

irrelevant to their claims.⁴¹⁸ The Tribunal's interest at this stage is not with the substance of this difference between the Parties but rather with the role that the compensation provisions did or did not play in the negotiations from mid-2006 to 2007 and beyond.

379. At the end of the hearings the Claimants submitted that:

Now, if Venezuela had actually made a good faith offer of compensation and then provided a reasonable opportunity for the Parties to resolve their dispute, we accept that that would have been a lawful expropriation, *sub modo*, subject to the actual payment of compensation and interest. But that's not what happened.⁴¹⁹

380. They recalled, from the migration period, Venezuela's failure to make any written compensation offer, its oral offers as set out in Mr Lyons' testimony, an account not contradicted by Venezuela, Mr Lyons' three April 2007 letters to which Venezuela did not reply, and Mr Lyons' evidence that Vice-Minister Mommer stated that compensation would not be based on fair market value; and, from the settlement negotiations period, when ConocoPhillips had decided not to migrate, the two proposals which ConocoPhillips made.⁴²⁰

381. The Respondent countered by recalling that Dr Mommer had testified that it had offered and did discuss compensation in terms of market value in good faith and mentioning the impact of the compensation provisions. Further, the Respondent contrasted the claim of \$30 billion made in the arbitration with the \$6 or \$7 billion offered by the Claimants. Further, there was over a year of intensive negotiations – a fact that in itself indicates a negotiation in good faith involving serious offers.⁴²¹

(b) The Tribunal's assessment of the evidence relating to the negotiations

382. The Tribunal now sets out the evidence more fully and makes its assessment of it. It begins with the evidence given by Mr Lyons and Dr Mommer. Mr Lyons states that he and his

⁴¹⁸ Cl. Reply ¶ 388, 391.

⁴¹⁹ *See*. Tr. Day 14:3852.

⁴²⁰ *See*. Tr. Day 14:3853-3855.

⁴²¹ *See*. Tr. Day 14:3977-3979.

colleagues made it clear to Mr Del Pino of PdVSA and to Vice-Minister Mommer that the proposals made in the August 2006 term sheets for the migration were not acceptable.

Although the terms of the proposed transition were not fully spelled out in the two-page term sheets, they clearly showed that Venezuela intended to take the existing interests of ConocoPhillips in those Projects, and offer in return a diminished stake and rights in the new *empresas mixtas*. The term sheets also demanded that we waive any claims in relation to the nationalization.⁴²²

383. Although called as a witness, Mr Lyons was not cross-examined on this statement or indeed on any part of his written testimony about the negotiations from August 2006 until June 2007. (He held his position in Venezuela until June 2008.) Following the receipt of the draft contracts of 17 and 19 January 2007, Mr Lyons testifies that with a colleague he attended a meeting with Vice-Minister Mommer and several PdVSA officials:

At that meeting, we made clear that the terms being offered to compensate ConocoPhillips for relinquishing its rights in the existing Projects and migrating to the *empresas mixtas* regime were inadequate. Vice Minister Mommer made clear, however, that the government did not intend to modify these terms. In the circumstances, as a protective measure, we provided to the government trigger letters invoking our rights under Venezuela's Foreign Investment Law and applicable bilateral investment treaty.⁴²³

384. Those "trigger letters" contained this passage:

In light of Venezuela's stated intention not to negotiate the terms of its expropriation with ConocoPhillips, ConocoPhillips reserves the right to submit the dispute to international arbitration in accordance with the provisions of the Treaty and the Foreign Investment Law at any time necessary to protect its legal interests. In this context, ConocoPhillips accepts Venezuela's offers to submit this dispute to ICSID arbitration, as set forth in the Treaty and the Foreign Investment Law.⁴²⁴

385. Dr Mommer in cross-examination said that he did not think that that was the breakpoint in the negotiations. The blanks in the model contracts remained negotiable as the success of the

⁴²² Witness Statement of A. Roy Lyons, 10 September 2008, at ¶ 6.

⁴²³ Ex. C-36 *supra* at fn. 198.

⁴²⁴ *Id.*

negotiations with the other Parties to the Association Agreements showed.⁴²⁵ Dr Mommer's testimony becomes specific, in terms of the sums proposed, only in respect of the proposals made by ConocoPhillips in June and August 2007, considered later⁴²⁶. In respect of the migration proposals of the second half of 2006 he says that he had various meetings with the project participants about restructuring with expansion opportunities but "ConocoPhillips was not interested in these concepts".⁴²⁷ In cross-examination, in response to the proposition that ConocoPhillips did seek to negotiate in that period, he said that they were less interested than the other two companies, but he would never say they were not interested.⁴²⁸ In his testimony he makes this general statement about the negotiations:

ConocoPhillips' argument that the Republic never offered to discuss reasonable compensation in connection with the migration is also untrue. At first, we hoped that the ConocoPhillips companies would join the migration. When they refused, we tried in good faith to reach an amicable settlement, as we had done successfully before with other companies. I was present in the settlement discussions with the ConocoPhillips representatives. We were always open to paying reasonable compensation, but ConocoPhillips from the beginning insisted on exorbitant sums that made settlement impossible.⁴²⁹

386. He also says:

Of all the companies involved in the associations, ConocoPhillips exhibited the least interest in discussing migration. I had to call representatives many times to request their participation and comments. However, to my recollection, ConocoPhillips is the only company not to send a mark-up of the draft agreements for any of the three projects involved in this case. By contrast, the other partners in the Hamaca and Corocoro Projects (Chevron in the Hamaca Projects and Eni in the Corocoro Project) participated constructively, providing mark-ups of the documents and negotiating the terms and conditions of the migration. Both successfully completed the migration and now participate as shareholders in new mixed companies for those projects under the 2001 Organic Hydrocarbons Law. There was no migration of the Petrozuata Project because a ConocoPhillips subsidiary was the only foreign party participating

⁴²⁵ See. Tr. Day 7:1851.

⁴²⁶ *Supra* fn. 399, at ¶ 28 and ¶ 395.

⁴²⁷ *Supra* fn. 399, at ¶ 13.

⁴²⁸ See. Tr. Day7:1855.

⁴²⁹ *Supra* fn. 399, at ¶ 20.

in that project. In addition to ConocoPhillips' former partners, Chevron and Eni, the other companies successfully participating in the migration process for the associations included Total, Statoil, BP and Sinopec.⁴³⁰

387. In his supplemental testimony he does not address the negotiations and in particular Mr Lyons' testimony about ConocoPhillips' response to the August 2006 migration proposals or the positions ConocoPhillips took in January 2007 and in its letters of 12 April 2007, including the question asked by ConocoPhillips in respect of the position of the Venezuelan Government on book value.

388. Mr Lyons testifies that in March and April 2007, in further meetings, the ConocoPhillips representatives

attempted to engage in good faith negotiations for fair compensation for the interests in the three Projects that would be taken away. While the Venezuelan side always acknowledged that the Petrozuata, Hamaca and Corocoro Projects (and the underlying contracts) were fully legal and binding, they declined to offer anything approaching fair value for the investment interests that Venezuela would be taking. We made equally clear that ConocoPhillips would not relinquish its investments without fair compensation.⁴³¹

389. He gives the example of a meeting on 29 March 2007 in which Mr Del Pino was accompanied by Vice-Minister Mommer.

At a meeting on March 29, 2007 ... Mr Del Pino, accompanied by Vice-Minister Mommer, made verbal offers for the Petrozuata and Hamaca Projects. In each case, these offers included one amount (US\$100 million for Petrozuata, US\$370 million for Hamaca) if ConocoPhillips accepted an unprotected minority interest in the new *empresas mixtas* (40 percent for Petrozuata; 22.85 percent for Hamaca); or in the alternative, a higher amount (US\$1.1 billion for Petrozuata, US\$1.2 billion for Hamaca); if ConocoPhillips entirely relinquished its interests in the Projects. The offers also sought a full waiver from ConocoPhillips of its right to bring claims for adequate compensation. Venezuela made no offer at all with respect to the Corocoro Project.

We told Mr Del Pino and Vice-Minister Mommer that these offers were far below the fair market value of our interests in the Projects. Vice-Minister Mommer responded that compensation would not be based on fair market value.

⁴³⁰ *Supra* fn. 399, at ¶ 17.

⁴³¹ *Supra* fn. 422, at ¶ 11.

In three letters (one for each Project) to Minister Ramírez , Vice-Minister Mommer and Dr. Del Pino dated April 12, 2007, ConocoPhillips restated the fundamental differences between the parties in the negotiations for compensation. We noted that any valuation based upon book value would neither adequately compensate ConocoPhillips for . . . Venezuela's unilateral changes in commercial terms (royalty and taxes) over the past several years, nor for the additional changes resulting from the Nationalization Decree. Moreover certain critical provisions were missing from the proposed migration contracts, including, among others, adequate minority governance rights and the right to recourse to international arbitration.⁴³²

390. In their Memorial the Claimants state that the 29 March verbal offer represented no more than 5 % of the real value of their investments and, therefore was totally inadequate.⁴³³

391. Following that and other meetings ConocoPhillips wrote on 12 April 2007 to the Minister, Vice-Minister and PdVSA Official in respect of each project (see *supra* ¶ 371). The letters said that at the meeting of 29 March 2007:

ConocoPhillips received two verbal compensation proposals based upon book value less depreciation for its interests in the Petrozuata Project. The first compensation proposal, which contemplated ConocoPhillips holding a 40% interest in the Petrozuata Project post nationalization, was in the amount of U.S.\$100,000,000. The second compensation proposal in the amount of U.S.\$1,100,000,000 contemplated a complete exit of ConocoPhillips from the Petrozuata Project. We were informed during this meeting that the Bolivarian Government of Venezuela would not compensate ConocoPhillips for the fair market value of its interests in the Petrozuata Project. Please confirm that our understanding of the Bolivarian Government of Venezuela's compensation proposals as stated above is accurate and complete and further that the Bolivarian Government of Venezuela is willing to consider alternative compensation proposals as discussed in the March 31, 2007 meeting. As noted by Mr Mulva on March 31, 2007, any valuation based upon book value does not adequately compensate ConocoPhillips for the Bolivarian Government of Venezuela's unilateral changes in commercial terms (royalty and taxes) over the past several years nor for the additional changes resulting from the Nationalization Decree.

In addition to prompt, adequate and effective compensation for the unreduced fair market value of all losses, damages and other diminutions in value suffered by ConocoPhillips, in order to agree to participate in the migration of the Petrozuata

⁴³² *Supra* fn. 422 ¶¶ 12-14; *See also*. Cl. Mem. at ¶ 239.

⁴³³ *Id.*

Project ConocoPhillips will require that it be afforded adequate governance rights for a minority interest owner and the right to resolve disputes by international arbitration in a neutral forum, among other customary terms and conditions for these types of transactions.⁴³⁴

Neither the Venezuelan Government nor PdVSA replied to these letters.

392. Dr Mommer in cross-examination twice testified, in response to Mr Lyons' testimony, that he did not think he had said to the ConocoPhillips representatives that compensation would not be based on fair market value.⁴³⁵

393. Against that general denial, made only at the hearings and not in the two rounds of written testimony, the Tribunal notes the contrary written testimony of Mr Lyons who was not cross-examined on this point. The Tribunal considers most significant in this respect the written account which the three letters give of the meetings of 29 and 31 January 2007, with their precise questions about the basis for valuation. The letters make it clear that ConocoPhillips rejects a valuation based on book value. That would not adequately compensate it. The Tribunal recalls that the Venezuelan authorities, which had received the trigger letters just 12 days earlier in which ConocoPhillips reserved all its legal rights under the Investment Law and the BIT, made no reply to those letters, they did not challenge the account the letters gave of the course of the meetings, and, in particular, they did not reject the position attributed to them that any compensation would not be based on fair market value. The Tribunal does of course recognise, in terms of the ruling made earlier in this decision that the royalty and tax changes are not in its view in breach of the BIT. But that was not known to the Parties at that stage of their negotiations.

394. Considering the situation after 12 April 2007, the date of those three letters, the Tribunal, on the basis of the evidence before it, concludes that Venezuela at that time was not negotiating in good faith by reference to the standard of "market value" set out in the BIT. It had not responded in any meaningful way to the points made about those negotiations, in particular in those letters. Two further important features of the negotiations support that conclusion. The

⁴³⁴ *Supra* fn. 397.

⁴³⁵ *See* Tr. Day 7:1858, Tr. Day 7:1861-62.

first is that Venezuela had not yet made a proposal for compensation in respect of the Corocoro Project. The second is that there is no evidence at all that the compensation formulas played any part in the negotiations between the Parties.

395. The Tribunal now turns to the evidence concerning the negotiations from April 2007 before and after the taking of the assets. As already noted, Dr Mommer makes specific reference to the two ConocoPhillips proposals for compensation. The following paragraphs follow his general assessment of the course of the negotiations quoted earlier (¶¶ 385 and 386 *supra*):

ConocoPhillips at first sought as compensation an asset exchange pursuant to which (a) the ConocoPhillips subsidiaries would relinquish all of their interests in Petrozuata, Hamaca and Corocoro Projects and (b) ConocoPhillips would receive the interests of PdVSA subsidiaries in a refinery in Lake Charles, Louisiana and a joint venture with ConocoPhillips at the Mery Sweeney refinery in Texas. At the time, the entire appraised value of the interests to be transferred to ConocoPhillips under this proposal was approximately US\$8.2 billion. This proposal was made in a June 15, 2007 draft Memorandum of Understanding which is attached hereto as Appendix 4.

Just two months later, by letter dated August 17, 2007 (a copy of which is attached hereto as Appendix 5), ConocoPhillips made a new proposal. While the assets to be exchanged remained the same, this proposal included a cash payment of US\$1.5 billion from ConocoPhillips to the Republic in recognition that the value of the refinery interests to be transferred by the PdVSA subsidiaries far exceeded the value of the ConocoPhillips subsidiaries' interests in Venezuela. The value of this proposal was approximately US\$6.7 billion. Even though that amount is far below US\$30 billion that the ConocoPhillips entities are seeking in this Arbitration, it was nonetheless completely unrealistic because it gave no consideration to the compensation formulas that had been negotiated and agreed at the outset of the Petrozuata and Hamaca Projects and did not even reflect the true value of the interests at issue without considering those formulas.⁴³⁶

396. Except for the final sentence, these paragraphs do no more than purport to summarise the substance of the two proposals which appear as Appendices to Dr Mommer's testimony. He was not cross-examined on them. It will be observed that his comment in the final sentence is not presented as an account of a reason given by the Venezuelan authorities in June and August

⁴³⁶ *Supra* fn. 399 at ¶¶ 21-22.

2007 to ConocoPhillips for rejecting the proposals. That comment was not the subject of cross-examination.

397. ConocoPhillips in its covering note to the first proposal said that it was making it without prejudice to its existing legal rights in continuance of its good faith efforts to reach an amicable solution with Venezuela. It reserved the right to change the terms of the proposal and its rights under, *inter alia*, the BIT and the Investment Law. The covering letter to the second proposal “appreciates the verbal compensation offer made to Roy Lyons on Monday August 13, 2007”; that offer does not appear anywhere else in the evidence. After consideration, the letter continues, ConocoPhillips submitted the counterproposal attached and concluded:

We trust you will understand that the terms of this proposal reflect significant movement from ConocoPhillips’ previous position and are made in a good faith effort to resolve our differences and reach agreement amicably and without the necessity of third party dispute resolution.

398. Mr Lyons in his evidence says only this about that final period, stopping short of the period after 26 June 2007 when the taking occurred:

Negotiations continued throughout May and June 2007, but without producing an agreement. At a meeting that I attended on June 11, 2007, we again reiterated that the compensation being offered was a fraction of the true value of our investment interests, which we could not accept. Mr Del Pino made clear, however, that the nationalization process was nonnegotiable and would move forward on the government’s terms, with or without ConocoPhillips.

Our last meeting before the final deadline established in the Nationalization Decree took place on June 20, 2007. At that meeting, Vice Minister Mommer informed us that no new offer of compensation would be forthcoming prior to the June 26, 2007 deadline. He added that after that date, ConocoPhillips would no longer own any interest in the three Projects. Consistent with his statement, on June 26, 2007, Venezuela took our three investments in their entirety, without providing any compensation at all.⁴³⁷

399. The only other evidence before the Tribunal about the later phase of the negotiations appears in reports of public statements made by the ConocoPhillips CEO on 12 February 2008 quoted earlier (*supra* ¶374) and the Venezuelan Minister of Hydrocarbons on 8 and 14 February

⁴³⁷ *Supra* fn. 422 at ¶¶ 18-19

2008. In the first, the Minister said that they were in a negotiating process with ConocoPhillips in spite of having entered into the process of arbitration; currently teams for both countries are establishing the terms to approach a friendly agreement in this dispute.⁴³⁸ In the second statement, a detailed account given in an address to the National Assembly, the Minister said this:

There are two remaining arbitrations pending, two U.S. multinational corporations. Conoco-Phillips has filed an arbitration against the Republic but unlike Exxonmobil, it has requested and has maintained communications to an extent that makes it possible to reach an amicable solution to our dispute. We are working on that, and, as the Global CEO of Conoco-Phillips expressed in past statements, we are on our way to reaching an agreement.

[...]

And we, the Republic, as the United Nations declarations state [the Minister had earlier quoted from General Assembly resolution 1803 (XVII) of 1962], and in the spirit of our legislation, have not refused to indemnify the companies that withdraw from the country, but, of course, we should indemnify the book value of those assets, values that can be fully examined, values that are auditable, values that are transparent, so that there is no possibility whatsoever of a settlement between the parties beyond what is justified.

This is an action of nationalization, a sovereign act of the Venezuelan State. Accordingly, we are working with Conoco to resolve our controversy in these matters, and are closing the gap between our numbers.⁴³⁹

400. The Tribunal does not have before it any evidence at all of the proposals made by Venezuela in this final period. It observes that whatever confidentiality agreement there was has not prevented the submission to it by the Respondent of the ConocoPhillips proposals of June and August 2007. There is no evidence that Venezuela moved from its insistence on book value, a standard confirmed by its Minister's statement in early 2008 at a point when the arbitration had begun. Nor is there any evidence that in this period, the Venezuelan representatives brought the compensation formulas in the Petrozuata and Hamaca Association Agreements into the negotiations. Finally, at this stage too there was no proposal for

⁴³⁸ *Supra* fn. 216.

⁴³⁹ Ex. C-190, Transcript of Speech by Rafael Ramírez before the Venezuelan National Assembly, February 14, 2008.

compensation in respect of ConocoPhillips' assets in the Corocoro Project as Dr Mommer appeared to confirm in cross-examination; he was not re-examined on the course of the negotiations.⁴⁴⁰

401. The Tribunal accordingly concludes that the Respondent breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value as required by Article 6(c) of the BIT, and that the date of the valuation is the date of the Award.

402. The Tribunal emphasises that it does not at this stage make a finding in respect of the relevance, if any, of the compensation formulas included in the Petrozuata and Hamaca Association Agreements to the determination of the quantum of compensation payable in this case. What it does find in respect of those formulas is that they were not, on the evidence before it, brought into the negotiations about compensation, in particular by the Venezuelan authorities.

VIII. COSTS

403. The costs are reserved for consideration at the conclusion of a later phase of this arbitration proceeding and there shall accordingly be no order as to costs at this time.

IX. THE TRIBUNAL'S DECISION

404. 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

⁴⁴⁰ See. Tr. Day 7:1867.

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.

[signed]

Mr L. Yves Fortier, CC, QC
Arbitrator

Professor Georges Abi-Saab
Arbitrator
(dissenting)

[signed]

Judge Kenneth Keith
President