

**DECISION ON RESPONDENT’S REQUEST
FOR RECONSIDERATION**

**Dissenting Opinion
of Georges Abi-Saab**

1 – In its letter of 8 September, 2013¹, the Respondent « formally request[ed the Tribunal to hold] a limited focused hearing to address” mainly the issue of “good faith negotiation”, given that “[i]t is clear that the Tribunal was under certain misapprehensions with respect to the parties’ confidentiality commitments and the progress of the negotiations after the migration”, as well as to consider some crucial related evidence recently revealed via Wikileaks.

2 – The Majority rejects this request, for reasons I find wanting; whence this dissenting opinion, as explained below.

3 – The Majority, after rapidly examining the relevant articles of the ICSID Convention and the Rules of Arbitration, does not find in them any basis for exercising the power needed to reconsider certain of its findings in its Decision of 3 September 2013. In this respect it states :

“... this Decision is limited to answer the question whether the Tribunal has the power which the Respondent would have it exercised. The Decision does not address the grounds the Respondent invokes for reconsidering the part of the Decision which it challenges and the evidence which it sees as supporting those grounds. The power must be shown to exist before it can be exercised” (para.9)

¹ Letter of the Respondent of 8 September, 2013, last paragraph. (EX-R313).

4 – If the last proposition (that “power must be shown to exist before it can be exercised”) is correct, the proposition implied in the penultimate sentence (that this can, or rather has to be done in isolation from and prior to addressing the grounds invoked for exercising the power) is not.

5 – This is because the power we are speaking of here is not a mere undifferentiated entitlement, a right, its holder having the faculty to exercise it or not, for whatever purpose he may have in mind (within certain limits all the same such as the principle of “abuse of right”).

6 - The power envisaged here is legal power, translated in the context of a tribunal in terms of jurisdiction to do certain things, in the course of discharging its overall adjudicative function. The empowerment as part of a function, carries with it a duty or obligation to exercise this power to achieve certain specific purposes or to fulfil certain specific legal tasks within the framework of the larger function.

7 – The existence of the power may thus depend on, and its extent can vary with the specific legal purpose or task for the fulfilment of which the power is provided. The power may thus exist for achieving certain purposes but not for others.

8 – In other words, as with the ascertainment of jurisdiction in general, a tribunal has to look into the grounds or reasons invoked for the exercise of the power, i.e. the specific legal purpose, task or operation for the fulfilment of which the exercise of power is sought, in order to be able to determine :

a – whether *prima facie*, these grounds are possibly applicable to the underlying contended facts, if proven; and, in the affirmative,

b – whether these grounds legally found or justify the exercise of the power requested in that particular case.

9 – In *casu*, the specific purpose (or legal ground) for which the Tribunal is requested to exercise the power of limited reconsideration of its prior partial Decision of 3 September 2013, while the case is still pending before it, is that of correcting a claimed material error committed by the Tribunal itself in establishing the facts, as well as in the legal conclusions and consequences it drew from or built on these erroneously established facts.

10 – In order for the Tribunal to be able to respond to the request of reconsideration of which it is seized, the Tribunal has thus, for the reasons explained in paragraph 8 above, to answer the following questions :

1 – Does the Tribunal have before it sufficient elements, or evidence *prima facie* of a possible material error in its establishment of facts; and if the answer is positive,

2 – does the Tribunal have a general power of reconsideration of partial decisions while the case is still pending before it, that cover *inter alia* (or as a specific application) reconsideration on the grounds invoked *in casu*; but if the answer is negative,

3 – does the Tribunal all the same have a specific power of reconsideration covering the particular legal ground invoked *in casu* ?

These three questions are addressed, in that order below.

I - *Prima facie* evidence of the material error committed by the Majority Decision of 3 September 2013 and consequently in the legal conclusions it drew from it

11 – In order to answer the first of the questions set forth in the preceding paragraph, it is necessary first to recall the premises on which the Majority based its findings concerning the issue of negotiations over compensation in

the Decision of 3 September 2013. These premises consist mainly of a series of presumptions of fact, drawn from what the Majority considered as valid evidence before it, namely :

a – that the offer of compensation made by Venezuela before nationalization, and submitted to the Tribunal by the Claimants, for the two big projects of Petrozuata and Hamaca was derisory and far below the standard required by the BIT (a presumption I need not address here, but which I rebut at length in my dissenting opinion from the 3 September 2013 Majority Decision); and

b – that Venezuela had not budged from that position or made any other offer in the negotiations that preceded or followed the nationalization and continued even after the beginning of this arbitration in November 2007 and which went on well into 2008.

12 – It is to be noted that the latter part of the negotiations was covered by a Confidentiality agreement which was invoked by both Mr. Goff (Conoco negotiator)² and Dr. Mommer (Venezuela)³ to abstain from saying anything about negotiations during the latter period in their oral testimony before the Tribunal, apart from Goff saying that it went on for a long time⁴.

13 – The Majority Decision thus assumed, without having “any evidence at all of the proposals made by Venezuela in this final period”⁵, that during that period Venezuela had not budged from its initial proposition, inferring from this presumed intransigence that the Respondent did not engage or intend to engage in good faith negotiations over compensation.

14 – The Majority Decision supports this inference by two arguments :

² HearingsTr. (day 3) p. 684.

³ HearingsTr. (day 7) pp. 1857-8.

⁴ HearingsTr. (day 3) p. 684.

⁵ Decision of 3 September 2013, para. 400.

a – the first, already mentioned, is that “The Tribunal does not have before it any evidence at all of the proposals made by Venezuela in this period”⁶. It thus brushes aside and gives no credence at all to the general statements of Dr. Mommer in his written and oral testimonies to the effect that Venezuela was always willing to pay just compensation, attributing the failure of the negotiations to the exaggerated and intransigent demands of the Claimants.

b – The Majority decision also brushes aside any legal significance and effect of the Confidentiality agreement when invoked by Dr. Mommer in his oral testimony to abstain from providing the Tribunal with any information about the course of the negotiations, necessarily including whatever offers made by Venezuela during that period; and this by adding immediately after the first sentence of paragraph 400,quoted above (under a), the following :

“It [the Tribunal] 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”⁷.

15 – In other words, the Majority Decision is saying that, notwithstanding the Confidentiality agreement, had Venezuela made any reasonable offers during that period that could favour its position *in casu*, it would not have hesitated to put them before the Tribunal, as it did by submitting to the Tribunal the Claimants proposals of June and August 2007, in violation of that agreement.

⁶ *Ibid.*

⁷ *Ibid.*

16 – This reasoning (ground, *motif*) of the Majority Decision is revealing in more ways than one. Apart from a general attitude vis-à-vis the Respondent, it reveals an important *error in the establishment of facts* on the part of the Majority Decision, by assuming that the Confidentiality agreement was in effect in June 2007, while it had on record before it evidence to the contrary. Indeed, the question of the date of entry into force of the Confidentiality agreement was put to Counsel for the Respondent during the oral hearings. His answer was that it did not come into force until November 2007⁸. This answer was neither challenged nor contradicted by the Claimants during the Hearings and was even confirmed by them later on⁹.

17 – Thus, the Majority Decision committed *a material error in establishing the facts*. But worse still, it drew from it by inference, a grave legal consequence : not only that the Respondent has breached its confidentiality obligation by submitting to the Tribunal the Claimants offers of June and August 2007, when that obligation had not yet come into effect; but also, and *ex hypothesi*, that the Respondent would not have hesitated to do the same, i.e. submit to the Tribunal any proposition it would have made during the final period of negotiations, had they existed, in violation of its confidentiality obligation which indeed covered that final period. In other words, the Majority Decision predicated, not on the basis of positive proof, but by divination or sheer fiat, a presumption - drawn from a single misconceived instance involving an error of fact - of a constant pattern of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes.

⁸ HearingsTr. (day 13) pp. 3705-6.

⁹ Claimants' *Second Submission on Respondent's Application for Reconsideration* (Claimants' Second Submission) (25 November 2013) p. 15, para.15 : "Given that the Confidentiality agreement did not take effect until the arbitration began..."

18 – And through this extraordinary speculative reasoning by hypothesis, extrapolated from an erroneously established fact, the Majority Decision makes another positive finding of fact over something it admitted knowing nothing about, namely the possible offers Venezuela made or did not make during the final period of negotiations, which was indeed covered by the Confidentiality agreement; an agreement that was invoked by witnesses for both parties to justify their refusal to divulge the exchanges and offers made during that period.

19 – This positive finding of fact that the Respondent did not make any new offer, or rather that it stayed put on its initial position during that final period of negotiations, reached through the extraordinary speculative reasoning described above, is at the basis of the even more serious legal finding that Venezuela had not negotiated in good faith during that final period over compensation.

20 - Obviously, if a factual premise on which are based these legal findings – reached by speculative chain reaction reasoning – turns out to be erroneous, the whole edifice crumbles down like a house of card.

21 – This is exactly the situation *in casu*, as there is no room for doubt, as shown above, that on the basis of the record as it stood at the time of its issue, the Majority Decision of 3 September 2013 committed an error in determining the scope of applicability of the Confidentiality agreement in time, from which it drew by inference equally vitiated legal conclusions and findings.

22 – It is worth noting in this regard that, in order to reach its conclusions concerning the final period of negotiations, the Majority Decision, having admitted possessing no evidence at all for that period, had to make a leap of faith, encompassing three steps, a) relying almost exclusively and

uncritically on the affirmations and representations of the Claimants throughout the proceedings, insisting that they did not receive any offer beyond the initial one concerning the Petrozuata and the Hamaca projects. But in order for this version to prevail, the Majority Decision had to neutralize any contradictory evidence by b) shedding away as lacking credibility the general statements of Dr. Mommer in his written and oral testimonies that Venezuela was always willing to pay just compensation, and that the negotiations failed because of the intransigent and exaggerated demand of the Claimants; as well as c) denying any legal significance and effect to “whatever confidentiality agreement there was”¹⁰

23 – The error committed by the Majority Decision as described above, was easily detectable from the record at the disposal of the Tribunal at the time that Decision was issued. It confounds the third step covered by the leap of faith of the Majority Decision i.e. denying any significance and effect to the Confidentiality agreement. As such, it suffices as an affirmative answer to the first of the three questions set forth in paragraph 10 above, namely whether the Tribunal has before it sufficient elements or evidence *prima facie* of a possible material error in the establishment of facts; i.e. whether there is a valid ground or cause for reconsideration

24 – However, with the revelations of the Wikileaks cables submitted to the Tribunal as annexes to the Respondent’s letter of 8 September 2013 (see paragraph 1 above) the ground or cause for reconsideration changes radically in dimension and importance. For, these cables administer a flagrant refutation to the remaining steps - a) and b) - covered by the leap of faith of the Majority Decision.

¹⁰ *Loc.cit. supra* note 5, para. 400.

25 – Indeed, in a cable dated 4 April 2008 and entitled “ConocoPhillips Briefs Ambassador on Compensation Negotiations”¹¹, the US Embassy in Caracas reports to Headquarters on a meeting held on that day (4 April 2008) in which “Greg Goff [the Chief ConocoPhillips negotiator then] and...Roy Lyons...briefed the Ambassador on the state of compensation negotiations with BRV [Bolivarian Republic of Venezuela]”.

26 – The cable starts by noting (in paragraph 1) that “ConocoPhillips (CP) is guardedly optimistic on the state of negotiations on compensation”, and that “CP and the BRV have reached agreement on the methodology for determining the fair market value of CP’s assets”.

27 – Then (in paragraph 4) it relates Mr. Goff’s description of the state and progress of the negotiations and the positions of the parties in them (*pace* the Confidentiality agreement) in the following terms :

“According to Goff, CP has two basic claims : a claim for compensation for its expropriated assets and a claim based on the progressive expropriation of the underlying assets. Goff stated the BRV has accepted that fair market value is the standard for the first claim. He said the BRV has moved away from using book value as the standard for compensation and has agreed on a fair market methodology with discount rates for computing the compensation for the expropriated assets. However, given the recent increase in oil prices, the fair market value of the assets have increased. As for the claim based on the progressive expropriation of the assets, Goff said the claim was on top of the fair market value of the assets. CP has proposed a settlement number and the BRV appears to be open to it.

¹¹ EX-R 313, Annex 4.

Goff added that CP also plans on increasing the settlement number for the second claim due to recent increases in oil prices”.

28 – This description, from the horse’s mouth, clearly reveals

1 – that Venezuela had moved from its initial position on the methodology of evaluating the current market value, from “book value” to a “discounted (cash flow) rate” methodology;

2 – that ConocoPhillips was prosecuting two claims of compensation the first for its expropriated assets and the second for “progressive expropriations”, i.e. what is sometimes called “creeping nationalization”, *in casu* changes in the tax and royalty regime. (This latter claim was dismissed by this Tribunal in its Decision of 3 September 2013, as unfounded either in the BIT or in general international law);

3 – that for both claims ConocoPhillips was claiming compensation reflecting automatically any post-nationalization increases in the price of oil.

29 – The Claimants did not contest the veracity of the contents of these cables in their two briefs submitted in the present phase of the procedure, though they questioned their relevance and admissibility. Of course, these questions would have constituted one of the first items on the agenda of the “short concentrated hearing” requested by the Respondent had the Tribunal acceded to this request.

30 - However, the Majority bars the road from the outset to any such examination, arguing, as has been discussed in paragraph 3 above, that “the power must be shown to exist before it can be exercised”, which prevents the Tribunal, according to the Majority, from examining the grounds

invoked by the request and attendant evidence, before the showing of the existence of the power.

31 – The Majority follows with a very summary, pro-forma examination (in 5 paragraphs) of the question whether or not the Tribunal is possessed in general of the power to reconsider its prior partial decisions in cases still pending before it. It does so by interpreting the relevant provisions of the ICSID Convention and the Arbitration Rules in a narrow, formal and abstract manner, detached from any context, particularly the grounds invoked for the exercise of the power, not to mention the larger context and the general purposes of all systems of procedure; reaching quickly the conclusion that the Tribunal does not possess such power.

32 – I have explained in paragraphs 4 to 10 above, the reasons why I consider this manner of proceeding wanting. Be that as it may, even if one follows the narrow, formal, method of interpretation of the Majority, a very strong case can be made for an affirmative answer to the question, contrary to that reached by the Majority, as shown below.

II - Is the Tribunal Possessed of a General Power to Reconsider Its Prior Partial Decisions in Cases still Pending before it ?

33 - The answer to this question turns on whether one considers the Decision of 3 September 2013 “final”, hence “*res judicata*”, or not and consequently subject to reconsideration by the Tribunal while the case is pending before it; certain aspects of the merits (particularly the relevance of the compensation clauses in the Association Agreements) and the whole quantum issue being still awaiting consideration.

34 - The Majority starts by admitting that the Decision of 3 September 2013 is not an “Award”, in the sense given to the term in the ICSID Convention and that consequently, Article 53 of the Convention that provides in paragraph 1, “The Award shall be binding on the Parties and shall not be subject to any appeal or to any other remedy except for those provided for in the Convention” (i.e. the binding character and finality that make up *res judicata*) is “not directly applicable”. But it hastens to add that this “does not mean that it may not be relevant in a more general sense” (paragraph. 19); and proceeds to build up an argument purporting to show that the Decision of 3 September 2013 is after all final and binding and bearing *res judicata* authority; a discourse that is critically analysed in what follows.

35 – The Majority starts by refuting the Respondent’s characterization of the Decision of 3 September 2013 as “interim” or “preliminary”, stating that “The Decision does not...take an interim or preliminary form in respect of the matters on which it rules”, reciting as proof different statements of the Decision, in which the Tribunal “concludes”, “finds” or “decides as follows...” (paragraph 20).

36 – However, the fact that a Tribunal reaches conclusions, makes findings or takes decisions does not mean that they are or make them, by any logical or legal necessity, “final” or “binding”, particularly on the Tribunal itself (if it becomes aware for example that it has committed an error).

37 – The Majority tries to fill this logical gap with two succinct sentences, namely :

“1) Those decisions *in accordance with practice* are to be incorporated in the Award.

2) It is *established as a matter of principle and practice* that such decisions that resolve points of dispute between the Parties have *res judicata* effect”¹².

These assertions call for close scrutiny, as they go to the very nature and specificity of the ICSID procedural system. The first needs to be qualified, whilst the second takes as given what it is supposed to prove.

38 – Regarding the first of these two assertions, it is to be noted that the incorporation of such interlocutory decisions in the final Award is not only a matter of practice as stated therein. It is a matter of legal necessity and obligation, given the specificity of the procedural system of ICSID. Indeed, Article 48, paragraph 3 of the ICSID Convention provides : “The award shall deal with every question submitted to the Tribunal...”. In other words, this provision mandates that the award incorporates any conclusions (findings, decisions) on a question submitted to the Tribunal that it would have formulated before the final award.

39 – If an award is incomplete, in the sense of not integrating earlier decisions on certain questions put to the tribunal, or otherwise omitting to deal with some such questions, it would not correspond (or not as yet) to the substantive definition of the “award” in article 48/3 of the Convention. In other words, it would not be the “final” award envisaged in that definition; “final” being understood not only in its chronological current meaning of “last” (though under the ICSID Convention it should also be); but in its technical procedural meaning of “definitive”, signifying that the Tribunal has deployed and totally discharged its adjudicative function vis-à-vis the treated matter, putting an end to the dispute before it on that matter, and de-

¹² *Loc.cit.spra* note 5, para.20. Emphasis added. The Majority concludes with a quote from a recent Decision of another Tribunal which is addressed in para. below.

seizing the Tribunal of it, except for post-adjudicative tasks (unless otherwise provided).

40 – If the award cannot be considered final unless and until it incorporates the prior partial decisions – finality being attached to the all-inclusive character of the instrument – these interlocutory partial decisions *a fortiori* cannot be considered final until they are thus incorporated as part of the whole. Nor can they be subject to (i.e. benefit from the status conferred by) article 53, which is the ICSID rendering of the principle of *res judicata*, of which finality is one of the two pillars (together with the binding character on the parties); contrary to the second assertion of the Majority (quoted in paragraph 35 above), on which more later.

41 – Finality is important in another respect as it opens the door to post-judgment remedies, which are in the ICSID system those of articles 50 to 52 of the Convention. But these are available only against “awards”, to the exclusion of pre-award interlocutory or partial decisions, whether on preliminary objections or certain aspects of the merits; that which comforts the position that these latter decisions are not “final” in the technical sense of the term.

42 – This is a “peculiarity” of the ICSID procedural system, singled out by several important authors¹³, and referred to in some awards. It distinguishes it from most other international procedural systems such as those of the ICJ, the International Criminal Court and Tribunals, the European Court of Human Rights and other international arbitration systems; which means from general international law on the subject. All these systems and rules provide for interlocutory decisions, particularly on preliminary objections,

¹³ E.g. Fouchard, Gaillard & Goldman, *International Commercial Arbitration* (1999), p. 739, from whom the term “peculiarity” is borrowed.

not to mention partial decisions on certain aspects of merits, in the form of final judgments or awards, open to whatever remedies are available in these diverse systems against defective judgments or awards. In other words, the ICSID procedural rules, constitute a *lex specialis* in this regard. The second assertion of the Majority (see paragraph 37 above) is true under general international law and these other systems, but it does not tally with the ICSID *lex specialis*.

43 – It appears that the rationale or philosophy underlying this peculiarity of the ICSID procedural system¹⁴ is to have all the controverted issues of a case resolved in a kind of a package deal; probably to ensure that while deciding in law, a tribunal will have at the back of its mind the total balance of equities.

44 – Finality thus comes with the closure of this all inclusive package in the form of an instrument it calls “award”; and attaches to the whole as well as to its constitutive parts simultaneously; but only from that moment on. Until that moment, according to the inner logic of this chosen system or *lex specialis*, all the components of the package, whether decided upon or not, remain on the table (or the Bench), amenable to rectification and adjustment by the Tribunal, in order to fit better in, and to perfect as much as possible the final product, which is the package as a whole.

45 - In this respect, rules of procedure are like the rules of traffic. They can be to the left or to the right, but they have to be consistent. They cannot be to the left for some purposes, uses or users, but at the same time to the right for others. The same applies to a procedural system. It cannot consider interlocutory decisions on preliminary objections or certain aspects of the

¹⁴ This is apart from the dissuasive example of the drawn out proceedings on preliminary objections before the ICJ, which was also invoked during the *travaux préparatoires*.

merits as final for certain purposes such as the prohibition of their reconsideration by the Tribunal; while at the same time considering them non-final when it comes to post-judgment remedies.

46 – This brings me back to the second assertion of the Majority that “It is established as a matter of principle and practice that such [interlocutory] decisions that resolve points of dispute between the Parties have *res judicata* effect”. As mentioned above, while this statement sounds true for general international law and its codification in diverse statutes that consider interlocutory judgments final and open to post-judgment remedies, it does not for the ICSID *lex specialis*.

47 - As a matter of principle, by which I understand “according to straight legal reasoning and logic”, I submit that the case for the refutation of this assertion, as far as ICSID *lex specialis* is concerned, is sufficiently made above. As for practice, positions are divided. Thus, while some tribunals consider that such interlocutory decisions are “final” (see below, paragraph 50), others declare that :

“the ICSID Arbitration Rules contain no provisions which permit or even contemplate “Partial” or “Interim” awards, indeed, it seemed to the Tribunal that the Rules contemplated only one, Final Award”¹⁵.

48 – Similar divisions are found in the writings on the subject. There seems to be a wide consensus that there is only one final decision in the ICSID system, the Award that puts an end of the dispute before the Tribunal. Thus, in a scholarly publication, three senior Counsel for the Claimants *in casu* write :

¹⁵ *Tanzania Electric Supply Company Ltd v. Independent Power Tanzania Ltd.* (ICSID case No. ARB/98/8), Final Award of 22 June 2001, para. 32).

“...not all ICSID decisions are awards, let alone final awards. Pursuant to Convention Article 48(3), an award is final if it disposes of all questions put to the tribunal”¹⁶.

This means by necessary implication that all interlocutory decisions other than the all comprehensive Award, are not final, nor consequently *res judicata*. However, some of those who take the position that only the comprehensive Award is final maintain that interlocutory decisions are not open for reconsideration by the same Tribunal before the award.. A perfect example of blowing hot and cold at the same time, and the telling proof of the fallacy of the thesis of the finality of interlocutory decisions in ICSID as well as the second assertion of the Majority.

49 – After making the two assertions reproduced above in paragraph 37 above, the Majority concludes with a quotation from a recent interlocutory Decision of an ICSID tribunal, which describes the “several decisions and reasons” on jurisdiction and merits contained therein in the following terms : “they are intended to be final and not to be revisited by the Parties or the Tribunal in any later phase of these arbitrations proceedings”¹⁷.

50 - First of all, one notes a Freudian slip by omission in the quotation by the Majority. Indeed, the original reads : “[they] are intended *by the Tribunal* to be final...”. That Tribunal was cautious enough not to say, as infers the Majority here, that they are intended by principle and practice, by the drafters of the Convention or by law. That Tribunal limits its intention or contention to itself. And as mentioned before, opinions are divided on that matter.

¹⁶ Lucy Reed, Jan Paulson and Nigel Blackaby, *Guide to ICSID Arbitration*, (2nd ed., Kluwer 2011) p. 182.

¹⁷ *Electrabel S.A. v. Hungary*, ICSID case No. ARB 07/19), Decision of 30 November 2012, para. 10.1-

51 - All the same, I dare presume, with all due respect to the eminent members of that Tribunal, that if they become aware, before the final award, that they have made a crucial error of fact or of law that led them astray in their findings, or of new evidence or changing circumstances to the same effect, they may not hesitate to revisit their decisions, for reasons further developed below.

III - Is the Tribunal possessed of a Specific Power Covering the Particular Legal Ground invoked *in casu* ?

52 – In paragraph 32 above, I said that a strong case can be made for the existence of a general power of reconsideration by an ICSID tribunal of its interlocutory decisions (within certain limits or under certain conditions all the same) in a case still pending before it. However, if the answer to the question whether such a power exists or not were to be in the negative, there remains the possibility (alluded to in paragraph 10 above) that the Tribunal possess a specific power for dealing with requests based on a particular or certain particular legal grounds.

53 – The Majority examines, in paragraph 22, two provisions invoked by the Respondent, article 44 of the Convention and Rule 38/2 of the Arbitration Rules, as possible sources of the power sought, and summarily dismisses them as being of a purely procedural nature. Thus, while admitting that article 44 confers on the tribunals a subsidiary power to fill procedural gaps , “it cannot be seen [according to the Majority] as conferring a broad unexpressed power of substantive decision”¹⁸. As to Rule 38/2, it is

¹⁸ I concur in general with this statement. But the argument of the Respondent is not that the power emanates from article 44, but that article 44 is needed to provide the modalities of its exercise.

dismissed in one short sentence as having “a much more limited function”¹⁹.

54 - Article 44 is examined by the Majority, however, in the context of establishing whether or not the Tribunal has a general power of reconsideration. But this article is relevant *in casu* in another meaningful way, as a partial codification and specific application of the *inherent jurisdiction or powers* of any judicial or adjudicative organ. A jurisdiction which was first incarnated by and evolved through the development of the general principle of *Kompetenz-Kompetenz* (la compétence de la compétence), but which transcended this principle, to a much wider ambit, as articulated particularly by the ICJ.

55 – Thus, in the *Northern Cameroons* case (1963), the Court refers to “the duty of the Court to maintain its judicial character”, before adding : “The Court itself, and not the parties, must be the guardian of the Court’s judicial integrity”²⁰. Later on, in the *Nuclear Tests* case (1974), the Court gives a fuller rendering of its understanding of the concept :

“...the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the

¹⁹ The Majority avoids even reciting this Rule not to say examining its contents, although (or is it because ?) the “exceptional circumstance” or “ground” it envisages is exactly that invoked *in casu*, and for which it provides : “Exceptionally, the Tribunal may, before the award [not any decision] has been rendered, reopen the proceeding [which has not been closed *in casu*, making the Rule *a fortiori* applicable] on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor or that there is a vital need for clarification on certain specific points”. The Majority adds (in para. 23) another reason, apart from their purely procedural nature, to dismiss the relevance of these two provisions, namely that the provisions of the Convention and its overall structure, leave no room for a power gap to be filled; a highly debatable proposition. Anyway, both reasons given by the Majority fall if the interlocutory decisions are not final, hence not *res judicata*, as has been demonstrated above.

²⁰ *ICJ Rep. 1963*, p. 29.

‘inherent limitations on the exercise of the judicial function’ of the Court, and to ‘maintain its judicial character’ (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial function may be safeguarded”²¹.

56 – Thus, inherent jurisdiction accrues to any body or organ by the mere fact of it being possessed of the adjudicative function. It brings with it powers as well as duties and responsibilities. The powers enable the organ to exercise its principal jurisdiction over the subject-matter (the merits) in a proper, efficient and equitable manner; by asserting the independence of the organ from the parties in the exercise of its function, while drawing its jurisdiction ultimately from their consent, through the principle of *Kompetenz-Kompetenz*; and by allowing the organ to fill procedural gaps, a power often codified in statutory provisions such as article 44 of the ICSID Convention, but which can be exercised even in the absence of such provisions²²; as well as all the other powers necessary for the organ to discharge its duties and responsibilities which are part of the inherent jurisdiction. These are “to maintain its judicial character”, “safeguard its basic judicial function” and be “the guardian of [its] judicial integrity”; in short to ensure and safeguard the efficiency, credibility and integrity of the adjudicative function and the adjudicative character of the organ, whose first

²¹ *ICJRep. 1974*, pp. 259-260, para. 23.

²² Cf. Constantinos Saloniadis, « Inherent Powers in ICSID Arbitration », in *5 Investment Treaty Arbitration and International Law* (Laird & Weiler, eds. *New York, Juris*, 2012, p. 43 at 52 ; “Arbitral tribunals have typically exercised their powers under Article 44 by declaring that in doing so they are also exercising powers that inhere in their judicial function and status as international tribunals”.

and foremost task is to seek the truth and to dispense justice according to law on that basis.

57 – It is precisely in fulfilling this task and discharging its duty of safeguarding the credibility and integrity of its adjudicative function, that lies the power of a tribunal to reconsider a prior decision whether interlocutory or not, whether it is considered final or not, and whether such a reconsideration is provided for in its statute or not, i.e. regardless of all these distinctions; if the tribunal becomes aware that it had committed an error of law or of fact that led it astray in its conclusions, or in case of new evidence or changed circumstances having the same effect. This was done by a large spectrum of tribunals governed by a wide variety of Statutes (the European Court of Human Rights, ICTY, ICC arbitral tribunals, etc.) on the basis of the inherent jurisdiction of the organ, whether articulated in these terms or simply, “in the interests of justice”, in order to safeguard the credibility and integrity of the tribunal. A couple of examples suffice.

58 – In the *Hostages* case (1933) before the US-Germany Mixed Claims Commission, the Umpire, Owen Roberts (deciding on a request for rehearing after final judgment) wrote :

“I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules”²³.

²³ 8UNRIIA, p. 160 at 188.

59 – In the same vein, the European Court of Human Rights, in *Waltraud Storck v. Germany* case, declared :

“The Court concedes that neither the Convention, nor the Rules of Court expressly provide a reopening of proceedings before the Court. However, in exceptional circumstances, where there has been a manifest error of fact or in the assessment of the relevant admissibility requirements, the Court does have, in the interest of justice, the inherent power to re-open a case which had been declared inadmissible and to rectify those errors”²⁴.

60 – Similarly, in doctrine, several authors reach identical conclusions. For example, James Castello, commenting UNCITRAL Rules, wrote :

“Even though it is often said that a tribunal is *functus officio* with respect to any issue that it has resolved on the merits by partial award, nevertheless – in a few cases – tribunals have held that they may revisit such issues when, for example, they believe a change in circumstances or in the factual record renders the initial award untenable”²⁵.

61 – In sum, in certain contingencies which put or risk putting the credibility and integrity of the tribunal into question – such as its becoming aware that it had committed an error in interpreting evidence or in establishing the facts that led it astray in its legal findings; that the decision did not follow from the facts as determined; that new credible evidence demonstrate that the facts as established by the tribunal were based on wrong premises; or that changed circumstances have rendered the decision otherwise untenable –

²⁴ European Court of Human Rights, Decision on Admissibility, dated 26 October 2004, pp. 13-14.

²⁵ James Castello, « UNCITRAL Rules », in, *Practitioner Handbook on International Commercial Arbitration*, Weigand ed..OUP, 2010, p.1403, at 1512, para. 16.336. See also Eric Schwartz, “Thoughts on the Finality of Arbitral Awards”, in *Liber Amicorum en l’Honneur de Serge Lazareff*, L.Lévy and Y. Derains eds., Pedone 2011, p. 569 at 576.

inherent jurisdiction empowers and even mandate the tribunal to reconsider the prior decision.

62 – The tribunal is called on to act either *proprio motu* or on showing good cause (ground) and credible *prima facie* evidence by a requesting party, at any stage of the proceedings, and even after a final judgment if the tribunal is still in existence, with a view to correcting the error and all the consequences it drew from it.

63 – This is exactly the situation *in casu*; as there is no doubt that on the basis of the record as it stood at the time of the issue of the Decision of 3 September 2013, the Tribunal committed an error relating to the temporal ambit of the Confidentiality Agreement, from which it drew far reaching conclusions, through speculative *ex hypothesi* reasoning and extrapolation (see paragraphs 12 to 20).

64 – However, the revelations of Wikileaks cables change the situation radically in dimension and seriousness. Here we have a full narrative of the negotiations, with a high degree of credibility, given the level of detail that tallies perfectly with what we know of the rest of the record. It is a narrative that radically confutes the one reconstructed by the Majority, relying almost exclusively on the assertions of the Claimants throughout their pleadings that the Respondent did not budge from its initial offer (see paragraphs 24-29 above).

65 – It reveals, once verified by the Tribunal to be true (but its veracity was not contested by the Claimants, only its relevance and admissibility), that if there was bad faith, it is not attributable to the Respondent, but to the Claimants who misled the Majority by their misrepresentations, in full awareness of their falsity

Conclusion

66 – In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence.

67 – It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.

Whence this dissent.

[signed]

Prof. Georges Abi-Saab