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## The Duty to Negotiate in Good Faith: Compensation for Expropriation

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The Dissenting Opinion of Georges Abi-Saab to the Decision on Jurisdiction and Merits of September 3, 2013 in the case *ConocoPhillips, Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 (hereinafter the “Dissenting Opinion”), raises the issue of whether there is a duty to negotiate compensation in good faith, and if there is, the subsequent question of whether the lack of good faith in compensation negotiations defines the lawfulness or unlawfulness of an expropriation.

Good faith is a general principle of international law, which in different forms permeates the entirety of international legal order and process. It is considered one of the basic principles governing the creation and performance of all legal obligations (See: *Nuclear Tests, Australia v. France* (Judgment) I.C.J. Reports 1974, p. 268, ¶ 46; p. 473, ¶49). ICSID Tribunals have found that good faith might relate to different sources: (i) a rule of interpretation of treaties; (ii) an obligation part of customary international law; (iii) the requirements of legitimate expectations and transparency, flowing from fair and equitable treatment, without any obvious legal source other than the good faith principle in international; (iv) or the absence of good faith being one of the elements of the obligation.

The question of lawfulness of expropriation has been addressed by the United Nations Conference on Trade and Development (“UNCTAD”) in a series of issues on International Investment Agreements, which established a number of limitations or conditions indicating when an expropriation is unlawful, such as: “(a) the taking was not in the public interest; (b) it did not comply with due process; (c) the taking was discriminatory; and (d) the taking was not accompanied by the payment of just compensation to the expropriated parties.”

Mr. Abi-Saab dissented from the majority in respect of paragraph 401 of the Decision, where it was found that:

The Tribunal accordingly concludes that the Respondent breached its obligations 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 [2] and that the date of the valuation is the date of the Award.

The Tribunal did not declare in fact that the expropriation was unlawful, but this was implied with the Tribunal's conclusion outlined supra. This approach contrasts with the finding of the final award in the case *Exxonmobil v. Venezuela*, where the tribunal held that Venezuela's expropriation of claimants' assets was lawful, even when no compensation was paid, the Tribunal concluding that: "the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of that offer. In order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case." (See: *Exxonmobil v. Venezuela*, Award, 9 Oct. 2014, ICSID Case No. ARB/07/27, ¶ 301)

Mr. Abi-Saab argued that the question of the lawfulness of an expropriation must be analyzed with two questions, specifically, "whether the expropriating State provided for compensation, and if it did, to ascertain that what was offered was not "illusory", amounting to a refusal to pay compensation". Hence, "if the answer to these two questions is in the affirmative, the expropriation is lawful." (Dissenting Opinion, ¶ 252-253).

Mr. Abi-Saab's dissenting opinion is similar to the *ExxonMobil* approach with respect to the legality of the expropriation since the weight is given literally to the offer made to compensate and not whether the compensation was "fair, prompt and adequate" or whether the other parties conducted their compensation negotiation in "good faith".

Hence, according to Mr. Abi-Saab, if the duty to negotiate compensation in good faith is infringed, this will not determine that the expropriation is unlawful since this duty has no basis in either the BIT or in general international law. However, general principles of law are used more often in investment arbitration as investment protection. In particular, the principle of good faith has been highlighted by an arbitral tribunal as a "supreme principle, which governs legal relations in all of their aspects and content (See: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, 28 ICSID Rep. 311 (2008). ¶ 230)."

I believe the scope of the principle of good faith must not be undermined in investment arbitration since the question to be answered with regard to whether there is a duty to negotiate compensation in good faith is whether the absence of this general principle of law gives rise to the specific basis of the claim or is increasingly essential. If it does, then in my view the principle of good faith will play a fundamental role, bearing in mind that the finding as to whether an expropriation is lawful or unlawful, could be critical when determining the compensation and considering that the failure to meet the standard of good faith is not only a moral failure, but may also be a legal one (See: Joint Dissenting Opinion of Basdevant, Winiarski, McNair and Read to the *Admissions case* (Advisory Opinion), ICJ Reports, 1947-48, p. 57).

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This entry was posted on Thursday, August 20th, 2015 at 2:26 pm and is filed under [Expropriation](#), [Good Faith](#), [ICSID Arbitration](#), [Investment Arbitration](#), [Investment protection](#)

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