

ICSID Case No ARB/10/5

THE BOLIVARIAN REPUBLIC OF VENEZUELA

Applicant

–and–

(1) TIDEWATER INVESTMENT SRL  
(2) TIDEWATER CARIBE, C.A.

Respondents

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DECISION ON APPLICATION FOR REVISION

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rendered by

**Professor Campbell McLachlan QC, President**  
**Dr Andrés Rigo Sureda, Arbitrator**  
**Professor Brigitte Stern, Arbitrator**

Secretary of the Tribunal

Mr Marco Tulio Montañés-Rumayor

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## I. INTRODUCTION

1. On 13 March 2015, the present Tribunal issued an Award in ICSID Case No. ARB/10/5, brought by Tidewater Investment SRL and Tidewater Caribe, C.A. (**Tidewater**) against the Bolivarian Republic of Venezuela (**Venezuela**).<sup>1</sup>
2. The Award concerned Tidewater's claim for compensation arising out of the expropriation of its oil services business in Venezuela.
3. The Tribunal found that Venezuela had expropriated Tidewater's investment in its Venezuelan subsidiary SEMARCA without payment of prompt, adequate and effective compensation. It determined that Tidewater was entitled to be compensated for that expropriation, and calculated the principal amount of the compensation to be paid as US\$46.4 million.

## II. PROCEDURE

4. Venezuela filed with the Secretary-General of the Centre an Application for Revision pursuant to Article 51(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (**Convention**) and Arbitration Rule 50 of the ICSID Arbitration Rules dated 20 March 2015 (**Application**). At the same time, Venezuela also sought a provisional stay of enforcement of the Award pursuant to Article 51(4) of the Convention and Arbitration Rule 54(1).
5. On 23 March 2015, Tidewater filed a document entitled Respondents' Preliminary Response to the Republic's Application for Revision (**Tidewater's Preliminary Response**). Tidewater submitted that the Application was inadmissible and should be dismissed.
6. On 24 March 2015, the Application was registered by the Secretary-General.
7. On 31 March 2015, all members of the Tribunal that rendered the Award having expressed their willingness to take part in the consideration of the Application, the Tribunal was reconstituted to consider the Application in accordance with Article 51(3) of the Convention.
8. By letter dated 31 March 2015, the Tribunal invited the parties to submit a further exchange of submissions on the Application.

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<sup>1</sup> Save as otherwise expressly provided in this Decision, the Tribunal adopts the defined terms in the Award.

9. On 3 April 2015, Venezuela submitted its Additional Observations on its Application (**Venezuela's Additional Observations**).
10. On 9 April 2015, Tidewater submitted its Rejoinder to the Republic's Additional Observations on its Application (**Tidewater's Rejoinder**).
11. On 15 April 2015, the Tribunal wrote to the Parties to seek their agreement to the application *mutatis mutandis* of its first procedural order<sup>2</sup> in the underlying proceeding to the Application. It also indicated that, having had the benefit of two rounds of written submissions, it did not regard an oral hearing as necessary. However, in view of the terms of ICSID Arbitration Rules 53 and 29, the Tribunal informed the Parties that they were entitled to an oral hearing unless they consented otherwise.
12. By letters dated 17 and 20 April 2015, the Parties each gave their consent to these proposals. Accordingly, the Tribunal has, by agreement, dispensed with a hearing and proceeded to determine the Application on the basis of the Parties' written submissions.
13. On 29 June 2015, the Tribunal declared the proceedings closed in accordance with ICSID Arbitration Rules 53 and 38(1).
14. The Tribunal has deliberated on the Application in person at the seat of the Centre in Washington DC and by other means.

### **III. THE PARTIES' SUBMISSIONS**

#### **A. Venezuela's submissions**

15. Venezuela's Application is based on what it describes as an error in the Tribunal's damages calculation.
16. It describes the error in the following way:
  - a. At paragraph 197 of the Award, the Tribunal recorded the assumptions that it had determined to adopt for the purpose of the discounted cash flow (**DCF**) valuation of Tidewater's business:
    - i. a business consisting of services performed by the 15 vessels that SEMARCA operated in or from Lake Maracaibo;

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<sup>2</sup> A reference to the procedural directions contained in the Minutes of the First Session of the Tribunal dated 24 January 2011.

- ii. the outstanding accounts receivable would be included, both as an element supporting the working capital of the ongoing business and as being recoverable in itself;
  - iii. taking the average of the historic cash flows of the business for the four years 2006 – 2009;
  - iv. applying an equity risk of 6.5%;
  - v. applying a country risk of 14.75%;
  - vi. but with no additional discount for single customer concentration.
- b. During the hearing, the Tribunal had requested the valuation experts from both sides to prepare additional calculations, applying their existing valuation models but with various alternative variables.<sup>3</sup>
- c. At paragraph 201 of the Award, the Tribunal recorded the results of the experts' calculations applying the elements it had identified at paragraph 197. It recorded the valuations produced as follows:
- (a) Claimants: US\$31.959 million (11 vessels only) (an earnings multiple of 3.79) + US\$16.484 million non-recurring accounts receivable = \$48.443m;
  - (b) Respondent: US\$27.407 million (15 vessels with 100% recoverability of accounts receivable).
- d. After observing that the determination of compensation 'is not and cannot be an exact science, but is rather a matter of informed estimation', the Tribunal valued Tidewater's business at US\$30 million, to which it added \$16.4 million for the non-recurring accounts receivable to arrive at a total compensation figure of US\$46.4 million. Venezuela submits that in reaching that result, 'the Tribunal clearly had in mind the calculations of the parties' respective experts set forth in paragraph 201 of the Award'.<sup>4</sup>
- e. The valuation recorded for the Claimants was based on the presentation made by Tidewater's expert, Mr Kaczmarek, at the hearing. Venezuela submits that the actual figure presented by Mr Kaczmarek corresponding to the variables adopted in paragraph 197 was not US\$31.959 million but \$13.917 million. Consequently, the

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<sup>3</sup> Application, [6].

<sup>4</sup> Application, [8].

total recorded in paragraph 201(a) should have been US\$30.401 million (US\$13.917 million + US\$16.484 million).<sup>5</sup>

17. Venezuela submits that this involves the discovery of facts that are of such a nature as decisively to affect the Award. In its submission, if the Tribunal had been aware of the fact that the figures presented in paragraph 201 did not correspond to the experts' presentations, the Tribunal would have awarded a different amount of compensation,<sup>6</sup> and requests that the Tribunal revise the award accordingly.<sup>7</sup>
18. Venezuela rejects Tidewater's suggestion that the correct procedure for addressing the alleged error is an application for the Award to be rectified pursuant to Article 49 of the Convention and Rule 49 of the Arbitration Rules. It submits that the amount awarded 'cannot easily be corrected without a substantive review by the Tribunal' and if the impact of the error 'requires review and analysis by the Tribunal, it should not be determined in an application for rectification'.<sup>8</sup>
19. Venezuela also rejects Tidewater's argument that the alleged error may not have had a material impact on the amount of the compensation awarded.<sup>9</sup> It submits that, although Tidewater's expert did not present a figure based on a business consisting of 15 vessels, it is possible to scale up his figure for 11 boats or scale down his figure for 17 boats (which was US\$24.435 million). Venezuela accepts that the experts treated accounts receivable differently: Venezuela's experts including it entirely in the DCF calculation and Tidewater's expert including an additional line item of non-recurring accounts receivable in addition to including recurring accounts receivable in the valuation of the business itself. But it submits that this did not affect the Tribunal's ability to compare the valuations.

#### **B. Tidewater's submissions**

20. Tidewater rejects the Application. It submits that a transcription error does not constitute a new fact in terms of Article 51 of the Convention, but is properly a matter for rectification under Article 49, and the Application is consequently inadmissible. Even if the Tribunal's error

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<sup>5</sup> Application, [9].

<sup>6</sup> Application, [11], Additional Observations, [2], [6].

<sup>7</sup> Application, [13].

<sup>8</sup> Additional Observations, [3], citing *Railroad Development Corporation(RDC) v Republic of Guatemala* ICSID Case No. ARB/07/23 Decision on Claimant's Request for Supplementation and Rectification of Award (18 January 2013), [43], [47].

<sup>9</sup> Additional Observations, [5].

did constitute a new fact, there is no basis for the conclusion that it ‘decisively’ affected the ultimate Award.

21. In its Preliminary Response, Tidewater accepted that the Tribunal had made an ‘apparent error’ in the transcription of figures from Mr Kaczmarek’s presentation.<sup>10</sup> In its Rejoinder, Tidewater submits that the Tribunal’s adoption of the US\$31.959 million figure may have been deliberate. Having recognised that the parties’ experts had not produced comparable scenarios, it may have deliberately chosen to adopt a range bounded by a high-end figure produced by Tidewater’s expert and a low-end figure produced by Venezuela’s expert.<sup>11</sup>
22. Even if the alleged error identified by Venezuela constituted a new fact for this purpose, Tidewater submits that it is ‘utter speculation’ to suggest that the error had any impact on the Award, let alone a ‘decisive[]’ one:<sup>12</sup>
  - a. The Tribunal recorded that there remained ‘material differences in the approach adopted by the experts’ that limited the meaningfulness of the spread of figures, and that the two sets of figures could not ‘be directly compared’.
  - b. The Award does not specify how the spread of values in paragraph 201 translated into the Tribunal’s determination of the appropriate level of compensation, but those differences meant that it cannot be assumed that the Tribunal intended to adopt a figure somewhere within the spread of figures in that paragraph.<sup>13</sup>
  - c. In particular, the fact that Tidewater’s expert had not prepared a valuation based on 15 vessels meant that the 11-vessel figure ‘substantially underestimates [Tidewater’s] assessment of the true value of SEMARCA’. Thus, Venezuela’s assumption that the Tribunal would not have awarded US\$46.4 million because that value exceeds US\$30.401 million is unfounded,<sup>14</sup> as the Tribunal would have known that this valuation was underestimated.
  - d. In addition, Venezuela’s approach ignores that the parties’ experts took different approaches to the treatment of accounts receivable, and that the Tribunal adopted Mr Kaczmarek’s approach, which further undermines the assumption that the

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<sup>10</sup> Preliminary Response, 1.

<sup>11</sup> Rejoinder, [3].

<sup>12</sup> Preliminary Response, 2.

<sup>13</sup> Rejoinder, [13].

<sup>14</sup> Rejoinder, [13]-[14].

appropriate amount of compensation would fall within the range set by the figures in paragraph 201 of the Award.

- e. The Tribunal's assessment likely reflected other considerations as well, such as SEMARCA's financial performance prior to the expropriation. Tidewater submits that if the Tribunal had awarded total compensation of US\$27.407 million plus interest, Venezuela would have 'effectively nationalised' SEMARCA's business as a whole for total compensation equivalent to slightly more than half the company's annual revenue in 2009.<sup>15</sup>

#### **IV. TRIBUNAL'S ANALYSIS**

##### **A. Requirements of Article 51(1) of the Convention**

23. Pursuant to Article 51(1) of the Convention, the sole ground upon which an applicant may request revision of an award is 'discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and the applicant's ignorance of that fact was not due to negligence.'
24. Revision is one of a closed list of remedies provided in the Convention by way of specific exceptions from the fundamental principle of the finality of the award enshrined in Article 53.<sup>16</sup>
25. The test for revision contains three essential elements:
  - a. That a fact has been discovered;
  - b. That it is of such a nature as 'decisively to affect the award'; and,
  - c. That it was unknown to the Tribunal and to the applicant when the award was rendered (the applicant's ignorance of the fact not being due to its negligence).
26. Unless the Applicant can establish all three of these elements, its application will not meet the requirements of Article 51 and must be dismissed.

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<sup>15</sup> Rejoinder, [15].

<sup>16</sup> Report of the Executive Directors on the Convention, [41].

## B. The relevant paragraph of the Award

27. In the present case, the Application is founded upon the reference in paragraph 201(a) of the Award which states:

With these qualifications, the spread of figures presented by the two experts are as follows:

(a) Claimants: US\$31.959 million (11 vessels only) (an earnings multiple of 3.79) + US\$16.484 million non-recurring accounts receivable = US\$48.443 million;

28. Venezuela submits that the figure that was recorded in the document submitted by Claimants' expert (on the assumptions found by the Tribunal) was US\$13.917 million not US\$31.959 million.

29. On reviewing the document referred to in this paragraph of its Award for the purpose of the present Application,<sup>17</sup> the Tribunal finds that there is a clerical error in its transcription from the underlying document there cited. The sub-paragraph should correctly read, and should be read as stating:

(a) Claimants: US\$13.917 million (11 vessels only) (an earnings multiple of 1.65) + US\$16.484 million non-recurring accounts receivable = US\$30.401 million.

30. Tidewater submitted in the Preliminary Response to the Application<sup>18</sup> that such a transcription error ought properly to have been the subject of an application for rectification under Article 49(2), a procedure that is specifically designed for the correction of an obvious clerical error.<sup>19</sup>

31. Venezuela however submits that rectification is not the appropriate course in the present case, because the error 'requires review and analysis by the Tribunal' and 'cannot easily be corrected without a substantive review by the Tribunal.'<sup>20</sup> It has therefore chosen to maintain its application for revision under Article 51.

32. In these circumstances, Venezuela must meet all of the elements required by Article 51, each of which is indispensable to a claim for revision. The Tribunal considers first, in section C, the

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<sup>17</sup> Navigant PowerPoint Presentation: Response to Tribunal Questions from 11 June 2014, dated 12 June 2014, 8.

<sup>18</sup> Preliminary Response, 1.

<sup>19</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* ICSID Case No ARB(AF)/09/1 Decision Regarding the Claimant's and the Respondent's Requests for Corrections (Bernadini P, Williams & Dupuy, 15 December 2014), [38], discussing the equivalent provision in the Additional Facility Rules.

<sup>20</sup> Additional Observations, [3].

requirement of the discovery of a new fact unknown to the Tribunal and the applicant and then, in section D, the requirement of decisive effect on the award.

### **C. The requirement of discovery of a new and unknown fact**

33. Venezuela submits that the new fact is the knowledge that the correct figure for an 11-vessel business was \$13.917m rather than \$31.959m.<sup>21</sup> It submits that if the Tribunal had been aware of this fact, the Award would have been between \$27.407m and \$35.462m (the 11 vessel figure produced by Tidewater's expert scaled up to 15 vessels).

34. Venezuela cites no authority for the proposition that a transcription error can constitute a new fact for the purpose of revision.

35. For this purpose, the Tribunal and the parties must be taken to be aware of every fact established by the material before the Tribunal. As the International Court of Justice has held in an application for revision:

The Court must be taken to be aware of every fact established by the material before it, whether or not it expressly refers to such fact in its judgment; similarly, a party cannot argue that it was unaware of a fact which was set forth in the pleadings of its opponent, or in a document annexed to those pleadings or otherwise regularly brought before the Court.<sup>22</sup>

36. In the Tribunal's view, Venezuela has not identified a new 'fact' in terms of Article 51(1).

37. If the 'fact' on which Venezuela relies is that Tidewater's expert's DCF valuation for an 11-vessel business was \$13.917m, not \$31.959m, then this fact is not new, nor has been discovered since the Award was rendered. On the contrary, it was contained in the document submitted by the expert, as part of a set of calculations requested by the Tribunal and submitted on the last day of the hearing.

38. If the alleged new 'fact' is the knowledge that the Tribunal used the wrong figure, neither does that qualify. A fact must have been in existence (but undiscovered) at the time of the Award in order to engage Article 51(1). If that knowledge constituted a new 'fact' then any alleged error made by a Tribunal would engage Article 51(1). That would directly conflict with the principle of finality set forth in Article 53, which provides that the award 'shall not be subject

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<sup>21</sup> Additional Observations, [6].

<sup>22</sup> *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1985] ICJ Rep 192, [19].

to any appeal' or to any other remedy, save for the carefully confined procedures enumerated in the Convention.

39. As a consequence, the Tribunal holds that the first element indispensable for an application for revision has not been met and accordingly the Application must be dismissed on that basis. However, and without prejudice to that primary finding, the Tribunal also considers whether, if this clerical error met the first element of the test, it is of 'such a nature as decisively to affect the award'. The Tribunal approaches this question by reference to the Award itself.

#### **D. Effect on the Award**

40. The two documents from which the figures set forth in paragraph 201 of the Award are drawn consist of illustrative tables of figures, prepared at the Tribunal's request on the penultimate day of the hearing and submitted on the last day of the hearing. They show in tabular form, and without further elaboration, the effect in the respective expert's view of different assumptions upon that expert's own calculations.<sup>23</sup>
41. These documents did not represent the experts' respective opinions as to the appropriate valuation to be applied to the business that the Tribunal has found to have been expropriated. Claimant's expert advanced an *ex ante* valuation of the business of US\$81.68 million, whereas Respondent arrived at an *ex ante* valuation of US\$2.9 million.<sup>24</sup>
42. At paragraph 198, the Tribunal records its appreciation for these illustrative tables but goes on to note:<sup>25</sup>

They produced a significantly greater convergence in figures than had been the case in the experts' reports that were filed in the written phase. *Nevertheless there continue to be material differences in the approach adopted by the experts, which in turn affect the figures presented.*

43. This was particularly the case with two of the variables that, on the Tribunal's analysis, 'have a material effect on the valuation of Claimants' investment in SEMARCA'<sup>26</sup>: (a) the treatment of accounts receivable and (b) the scope of the business to be valued.

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<sup>23</sup> They are defined respectively in the Glossary of Defined Terms as: **Navigant Answers to Questions** 'PowerPoint Presentation: Response to Tribunal Questions from 11 June 2014 (12 June 2014)'; **Brailovsky/Flores Answers to Questions** 'PowerPoint Presentation: Respondent's Experts' Answers to Tribunal's Questions (12 June 2014)'.

<sup>24</sup> Award, [167].

<sup>25</sup> Emphasis added.

<sup>26</sup> [169].

44. The Tribunal approached each of these elements separately in its Award. It ultimately held that a separate element of the total amount of compensation ought to be attributed to the value of the business, based on an assumption of a scope of business of 15 vessels, and a separate element to non-recurring accounts receivable, before arriving at a total valuation for purposes of compensation of US\$46.4 million.<sup>27</sup>

### **1. Accounts receivable**

45. The Tribunal explains the divergence between the experts in the approach adopted in their illustrative tables as to accounts receivable in paragraph 199, in which it observes:

Accounts receivable: Claimants' expert extracts the outstanding large amount of accounts receivable from his calculations. He presents this as an additional sum that would have to be valued and included as a separate line item. After adjustments, he calculates the total non-recurring working capital to be added in this way to be US\$16,484,677 (from the total due from PDVSA and PetroSucre as at 8 May 2009 of US\$44,888,040).<sup>28</sup> Respondent's experts present only the effect of including the accounts receivable as working capital within their calculations.

46. The Tribunal had already held that 'the investment that was lost must include outstanding unpaid accounts receivable'<sup>29</sup> because they 'constitute a valuable asset of the business' and 'a willing buyer would so regard them.'<sup>30</sup> It therefore decided 'to include SEMARCA's outstanding accounts receivable as at 7 May 2009 in determining the value to be ascribed to the business.'<sup>31</sup>

47. However, as the Tribunal observes in paragraph 199, the approach adopted by the respective experts in their respective illustrative tables was not directly comparable, as regards the valuation to be ascribed to accounts receivable that should be treated as 'non-recurring.' The total amount of outstanding working capital due from PDVSA and PetroSucre as at the valuation date was US\$44,888,040.<sup>32</sup> Respondent's experts did not present a separate figure for non-recurring working capital, and instead calculated the value of the whole business (including working capital) at the lesser sum of US\$27.407 million. Claimants' expert on the

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<sup>27</sup> [202].

<sup>28</sup> Navigant Answers to Questions, Slide 10.

<sup>29</sup> [175].

<sup>30</sup> [176].

<sup>31</sup> [177].

<sup>32</sup> Cf. the total valuation of the business determined by the Tribunal for purposes of compensation and awarded of US\$46.4 million.

other hand treated part of the total outstanding accounts receivable as non-recurring, and treated US\$16.4 million of the \$44.888 million total as being in that category.

48. This produced what was, in the Tribunal's view as stated in paragraph 198, a 'material difference[] in the approach adopted by the experts, which in turn affect[s] the figures presented.'
49. The Tribunal had already decided to include the accounts receivable in its valuation as a valuable asset of the business. At paragraph 202, it held that a willing buyer would have paid an additional amount for the non-recurring accounts receivable 'which it would have been entitled to recover in full from PDVSA upon the acquisition of the business.'
50. In order to arrive at a figure attributable to this element, the Tribunal could derive no assistance from the Respondent's experts. They had been instructed by counsel to exclude accounts receivable from the valuations in their expert reports.<sup>33</sup> The figure presented in their illustrative tables prepared at the Tribunal's request did not include a separate calculation for the non-recurring portion of accounts receivable – an element that the Tribunal held should be included within the valuation of the business. Therefore, as the Tribunal explains in paragraph 202, it had to estimate a figure to be added to address this element. Out of a total amount of outstanding accounts receivable of US\$44.888 million, the Tribunal adopted Claimants' expert's figure of US\$16.4 million as attributable to non-recurring working capital in making its own calculations. It added this sum to the Tribunal's valuation of business (excluding non-recurring working capital) of US\$30 million, in order to arrive at the total figure that it awarded of US\$46.4 million.<sup>34</sup>

## **2. Scope of business**

51. The second material divergence between the experts in the approach adopted in their illustrative tables was as to the scope of the business to be valued. The Tribunal explains this divergence in paragraph 200, in which it observes:

Scope of business: Claimants' expert assumes that the total size of SEMARCA's business in May 2009 includes the two vessels chartered to Chevron, thus presenting figures for either 11 vessels only (those actually operating on Lake Maracaibo) or 17 vessels. Respondent's experts limit their calculations of additional business to 15 vessels. As the Tribunal has already found that it should exclude the two vessels chartered to Chevron from its analysis, this has the consequence that the two sets of figures cannot be directly compared.

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<sup>33</sup> [174].

<sup>34</sup> [202].

52. The Tribunal had already held that SEMARCA's business as at 7 May 2009 was not limited to the 11 vessels then operating on Lake Maracaibo.<sup>35</sup> On the contrary, it found that the business must be valued taking account of the business represented by the four vessels operating in the Gulf of Paria, holding that '[t]he value of the business represented by the operations of these vessels must therefore be added to the 11 vessels actually stationed on Lake Maracaibo.'<sup>36</sup> On the other hand, the Tribunal held that the business represented by two further vessels contracting to Chevron should be excluded, for the reasons explained in paragraph 172.
53. Thus, the Tribunal held that 'the business is to be treated as having an assumed scope, based upon its historical operations, represented by the cash flow generated by 15 vessels.'<sup>37</sup>
54. The figures produced by Respondent's experts in their illustrative table did assume 15 vessels. That figure, applying the other assumptions found by the Tribunal, resulted in a valuation of US\$27.407 million, as recorded in paragraph 201(b).
55. However, as the Tribunal noted in paragraph 200, Claimants' expert presented calculations based only upon either 11 vessels or 17 vessels. The 11-vessel figure produced the figure now stated as corrected above in paragraph 28 of US\$13.917 million (an earnings multiple of 1.65). Venezuela points out in its Application that the figure put forward by Claimants' expert on the corresponding assumptions for 17 vessels was US\$24.4 million.<sup>38</sup>
56. On this issue, therefore, in contrast to the position in relation to non-recurring accounts receivable, only Respondent's experts had produced a figure in their illustrative table that was referable to the scope of the business based upon 15 vessels that the Tribunal had decided it ought to apply.
57. The figure that Venezuela pleads ought to have appeared in paragraph 201(a) is one based upon an 11-vessel business that the Tribunal decided was not the appropriate basis upon which to value the business that was expropriated. The use of such a figure would have undercompensated the Claimants for their loss. On the other hand, the Tribunal had specifically rejected a 17-vessel scope of business.
58. Venezuela's suggestion in the Application that either the 11-vessel or 17-vessel figure could be simply proportionately scaled up or down to produce a 15-vessel figure was not put before

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<sup>35</sup> [171].

<sup>36</sup> *Idem*.

<sup>37</sup> [173]

<sup>38</sup> Above, [19].

the Tribunal during the main proceedings. Neither Venezuela nor its expert offered such a calculation in the hearing. It was not part of the evidence before the Tribunal and it played no part in the reasoning in the Award. Thus only Respondent's experts had proffered a 15-vessel calculation.

### **3. Conclusion on effect on the Award**

59. Paragraph 201 appears in the Award immediately after the two paragraphs already cited in which the Tribunal explains why 'the two sets of figures cannot be directly compared'.<sup>39</sup> Its function is, as stated, to record 'the spread of figures presented by the two experts'.<sup>40</sup>

60. In view of the lack of comparability, the Tribunal had to take its own approach to determining valuation. It had already observed that:

Although it is for the Claimants to prove that they have suffered some damage in order to be awarded compensation, it is for the Tribunal itself to determine the amount of compensation. This is necessarily a matter of the Tribunal's informed estimation in the light of all the evidence available to it.<sup>41</sup>

61. Paragraph 202, which immediately follows the paragraph setting forth the figures presented by the experts, returns to emphasise that the Tribunal must make its own determination. It opens by stating:

The Tribunal has already observed that the determination of an appropriate level of compensation based upon a discounted cash flow analysis of this kind is not and cannot be an exact science, but is rather a matter of informed estimation. The Tribunal considers that a willing buyer would have valued the business at approximately US\$30 million...

62. This formulation makes clear that the Tribunal has not adopted the figures put forward by either experts, whether in their original reports or in their illustrative tables. Rather it has taken into account the totality of the evidence presented to it in determining the appropriate level of compensation to be awarded, based upon a discounted cash flow analysis. This was a process that, as the Tribunal had observed, 'does present particular difficulties in view of the character of SEMARCA's business.'<sup>42</sup> The resulting determination of an appropriate level of compensation, as it held, 'is not and cannot be an exact science.'

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<sup>39</sup> Award, [200].

<sup>40</sup> [201].

<sup>41</sup> [164], citing *Sapphire International, SPP v Egypt, Chorzów Factory, Rumeli v Kazakhstan* (Decision on Annulment).

<sup>42</sup> [166].

63. The Tribunal therefore concludes that, even if (which it has found not to be the case) Venezuela's application were admissible as being based upon a new and unknown fact, it is not, on analysis of the reasoning in the award, of such a nature 'as decisively to affect the award.'

**V. DECISION**

64. For the above reasons, the Tribunal decides that:

**(1) The Applicant's application for revision is dismissed;**

**(2) Enforcement of the Award is no longer stayed;**

**(3) As to the costs of the proceedings:**

**(a) No fees and expenses shall be charged by the members of the Tribunal;**

**(b) The Applicant shall bear the expenses of the Centre; and**

**(b) Each Party shall bear its own expenses incurred by reason of the Application.**

[signed]

[signed]

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Dr. Andrés Rigo Sureda

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Professor Brigitte Stern

Arbitrator

Arbitrator

Date

Date

[signed]

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Professor Campbell McLachlan QC

President

Date