ICSID Case No ARB/10/5

(1) TIDEWATER INC.
(2) TIDEWATER INVESTMENT SRL
(3) TIDEWATER CARIBE, C.A.
(4) TWENTY GRAND OFFSHORE, L.L.C.
(5) POINT MARINE, L.L.C.
(6) TWENTY GRAND MARINE SERVICE, L.L.C.
(7) JACKSON MARINE, L.L.C.
(8) ZAPATA GULF MARINE OPERATORS, L.L.C.

Claimants

and

THE BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

DECISION ON JURISDICTION

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rendered by

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

Secretary of the Tribunal

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Date: 8 February 2013

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GLOSSARY OF DEFINED TERMS

Barbados BIT	Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (signed 15 July 1994, entered into force 31 October 1995) 1984 UNTS 181.
Claimants or **Tidewater**	Tidewater Inc., Tidewater Barbados, Tidewater Caribe, Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C., and Zapata Gulf Marine, L.L.C.
ILC Unilateral Declaration Principles	International Law Commission's Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Relations 2006 (UN Doc A/61/10) [177].
Investment Law	*Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones* [Decree with Status and Force of Law for the Promotion and Protection of Investments] (adopted by means of Decree-Law No 356 of 3 October 1999).
PDVSA	Petróleos de Venezuela, S.A.
PDVSA Petróleo	PDVSA Petróleo, S.A.
PetroSucre	PetroSucre, S.A.
Reserve Law	*Ley Orgánica que Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos* [Organic Law that Reserves to the State the Assets and Services Related to Primary Activities of Hydrocarbons] (7 May 2009).
Respondent or **Venezuela**	The Bolivarian Republic of Venezuela.
SEMARCA	Tidewater Marine Service, C.A.
Tidewater Barbados	Tidewater Investment SRL.
Tidewater Marine	Tidewater Marine International, Inc.
Tidewater Caribe	Tidewater Caribe, C.A.
Treaty Claimants	Tidewater Barbados and Tidewater Caribe.
VCLT	Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

TABLE OF CASES CITED

Aguas del Tunari v Bolivia	*Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3) (Decision on Jurisdiction) (2005) 16 ICSID Rep 297.
Anglo-Iranian Oil Co Case	*Anglo-Iranian Oil Co Case (United Kingdom v Iran)* (Preliminary Objections) [1952] ICJ Rep 93.
ATA v Jordan	*ATA Construction, Industrial and Trading Company v. Jordan* (ICSID Case No ARB/08/2) (Award) 18 May 2010.
Autopista v Venezuela	*Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) (Decision on Jurisdiction) (2001) 6 ICSID Rep 419.
Banro v Democratic Republic of Congo	*Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo* (ICSID Case No. ARB/98/7) (Award) (2000) 17 ICSID Rev-FILJ 380.
Biwater Gauff v Tanzania	*Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) (Award) 24 July 2008.
Brandes American Resources v Venezuela	*Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) (Decision on Jurisdiction) 2 August 2011.
Case concerning Right of Passage over Indian Territory	*Case concerning Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125.
Cemex v Venezuela	*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) 30 December 2010.
CSOB v Slovakia	*Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4) (Decision on Jurisdiction) (1999) 5 ICSID Rep 330.
Fisheries Jurisdiction Case (Spain v Canada)	*Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432.
Headquarters Agreement Case	*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12.
Interpretation of Peace Treaties Case	*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 65.

Lucchetti v Peru	*Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4) (Award) 7 February 2005 (annulment dismissed, 5 September 2007).
Mavrommatis Palestine Concessions	*Case of the Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Objection to Jurisdiction) (1924) PCIJ Rep Series A, No 2.
Mobil v Venezuela	*Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd And Mobil Venezolana de Petróleos, Inc v Venezuela* ICSID Case No ARB/07/27 (Decision on Jurisdiction) 10 June 2010.
Phoenix Action v Czech Republic	*Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5) *(Award)* (2009) 48 ILM 1115.
Plama v Bulgaria	*Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) (Decision on Jurisdiction) (2005) 13 ICSID Rep 272.
SPP v Egypt	*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) (Decision on Jurisdiction No 2) (1988) 3 ICSID Rep 131.
Tokios Tokelés v Ukraine	*Tokios Tokelės v. Ukraine* (ICSID Case No. ARB/02/18) (Decision on Jurisdiction) (2004) 11 ICSID Rep 313.
Tradex v Albania	*Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2) (Decision on Jurisdiction) (1996) 5 ICSID Rep 43.
Vieira v Chile	*Sociedad Anónima Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7) (Award) 21 August 2007.
Wintershall v Argentina	*Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14) (Award) 8 December 2008.
Zhinvali v Georgia	*Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. ARB/00/1) (Award) (2003) 10 ICSID Rep 3.

I. INTRODUCTION

A. Request for Arbitration

1. On 16 February 2010, Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. (together **'Tidewater'** or **'Claimants'**) filed a Request for Arbitration under the ICSID Arbitration Rules against the Bolivarian Republic of Venezuela (**'Venezuela'** or **'Respondent'**).

2. The dispute concerns the Claimants' investment in marine support services to the oil industry in Venezuela. Venezuela's national oil company Petróleos de Venezuela, S.A. (**'PDVSA'**) engaged private companies to provide support to the oil industry in the country. One of these private companies was Tidewater Marine Service, C.A. (**'SEMARCA'**), a company constituted under the laws of Venezuela. SEMARCA contracted with PDVSA and two other national or semi-national companies, PDVSA Petróleo, S.A. (**'PDVSA Petróleo'**) and PetroSucre, S.A. (**'PetroSucre'**) to provide support both at Lake Maracaibo and offshore in the Gulf of Paria.

3. Prior to February 2009, SEMARCA was owned by Tidewater Caribe, C.A. (**'Tidewater Caribe'**), a company incorporated in Venezuela, which in turn was owned by Tidewater Marine International, Inc. (**'Tidewater Marine'**), a company incorporated in the Cayman Islands. That company was in turn owned by **Tidewater Inc.** (a company incorporated in the United States of America). In addition, a number of other United States — and Cayman Islands — incorporated subsidiaries of Tidewater Inc. performed contracted services for SEMARCA, and owned a number of vessels and other assets in Venezuela. Tidewater had owned SEMARCA and provided marine support services in the country since 1958.

4. In February 2009, Tidewater Marine incorporated Tidewater Investment SRL (**'Tidewater Barbados'**) in Barbados. On 9 March 2009, Tidewater Marine transferred to Tidewater Barbados all of the shares in Tidewater Caribe. Accordingly, Tidewater Barbados was inserted into the chain of ownership and became the owner, through Tidewater Caribe, of

SEMARCA. The current corporate ownership structure is depicted in the diagram annexed to this Decision as **Appendix A**.[1]

5. In 2008–2009, world oil prices fell significantly. PDVSA struggled to meet its payment obligations to SEMARCA, leading to contractual negotiations between the two companies, the significance of which for present purposes will have to be considered in more detail later in this decision.

6. On 7 May 2009, the Government of Venezuela enacted the Organic Law that Reserves to the State the Assets and Services Related to Primary Activities of Hydrocarbons (**'Reserve Law'**).[2] The following day, the Ministry of Popular Power for Energy and Petroleum issued a resolution that identified the Claimants, along with 38 other service providers, as subject to the Reserve Law.[3] Venezuela thereupon seized the Claimants' operations and assets in Lake Maracaibo and the Gulf of Paria, together with 15 vessels owned by the Fourth to Eighth Claimants.

7. The parties have not reached agreement on compensation for those seizures and on 16 February 2010, the Request for Arbitration was filed seeking reparation and other relief. The Claimants invoke two grounds for the Tribunal's jurisdiction:

   (a) Article 22 of the Venezuelan Law on the Promotion and Protection of Investments (**'Investment Law'**), which the Claimants submit constitutes a standing consent to ICSID arbitration;[4] and

   (b) The bilateral investment treaty between Venezuela and Barbados (under the law of which country Tidewater Barbados is constituted) (**'Barbados BIT'**).[5]

   The Claimants submit that they consented to ICSID jurisdiction in a letter to Venezuela on 11 December 2009.[6]

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[1] This diagram was annexed to the Request for Arbitration as an unnumbered appendix, and accepted by the Respondent as accurate: see Memorial [25].

[2] *Ley Orgánica que Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos*. Memorial [2], Ex. RL-1.

[3] Memorial [20], citing Ex. RL-7.

[4] *Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones* (adopted by the Republic of Venezuela by means of Decree-Law No 356 of 3 October 1999). See Request for Arbitration [25]–[27]; Ex. C-9 and EU-1.

[5] Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (signed 15 July 1994, entered into force 31 October 1995) 1984 UNTS 181. See Request for Arbitration [28]–[31], Ex. C-10.

[6] Request for Arbitration [32].

8. Venezuela disputes the Tribunal's jurisdiction:

   (a) It maintains that Article 22 does not constitute a standing consent to arbitrate all investment disputes under ICSID; and

   (b) It contends that Tidewater Barbados is a 'corporation of convenience' incorporated for the sole purpose of gaining access to ICSID. Accordingly, it submits that Tidewater's invocation of the Barbados BIT is an abuse of that Treaty.

B. Procedural Background

1. Constitution of the Tribunal and First Session

9. On 31 August 2010, the ICSID Secretariat informed the parties that, pursuant to Arbitration Rule 6, the Tribunal consisting of Professor Campbell McLachlan QC (President), Dr Andrés Rigo Sureda and Professor Brigitte Stern was deemed to have been constituted on that date.

10. On 28 September 2010, Tidewater proposed the disqualification of Professor Stern. After each of the parties and Professor Stern had offered comments on the Proposal, the other two members of the Tribunal rendered a decision on 23 December 2010 dismissing the Proposal. Accordingly, the suspension of the proceedings that had been in effect was lifted pursuant to Arbitration Rule 9(6) on that date.

11. Following the distribution of a Provisional Agenda and the preparation of a Joint Statement by the parties, the Tribunal's First Session was held on 24 January 2011, at the seat of the Centre in Washington, D.C. In the Minutes of that session, the Tribunal ordered that, in accordance with Arbitration Rule 41 and pursuant to the parties' agreement, Venezuela's objections to the Tribunal's jurisdiction would be addressed by the Tribunal prior to the pleadings on the merits.

12. Accordingly, the Tribunal set a calendar for the written and oral phases of the jurisdictional phase of the arbitration.[7]

2. Procedural matters

13. On 24 January 2011, the Claimants and the Respondent respectively filed Requests for Production of Documents with the Tribunal.[8] The Claimants sought documents concerning the drafting and enactment of the Investment Law, and particularly Article 22.[9] The Respondent sought documents relating to the incorporation of Tidewater Barbados and the

[7] Minutes, Part I, [14.2].
[8] Procedural Order No. 1, [8].
[9] Ibid [15].

transfer of shares to it,[10] and documents identifying the services underlying the accounts receivable for which the Claimants sought compensation.[11]

14. On 29 March 2011, the President made Procedural Order No. 1 for and on behalf of the Tribunal, addressing the outstanding requests and ordering the parties to search for, and if possible, produce various documents or explain their reason(s) for objecting to production.[12]

15. In response, the Respondent confirmed that it had no documents responsive to the Claimants' request relating to the preparation of the Reserve Law. The Claimants produced an itemised schedule of documents responsive to the Respondent's request specifying in it their claim to privilege.[13] The Respondent objected to the adequacy of the Claimants' disclosure, but by Procedural Order No. 2 on 20 April 2011, the Tribunal declined to make the further orders sought by the Respondent, finding the claim to privilege to be adequately made out.[14]

16. Concurrently with the filing of their Counter-Memorial on Jurisdiction, on 29 July 2011, the Claimants made a Request that the Tribunal invite two individuals alleged to have been involved with the drafting of the Investment Law, Ambassador Werner Corrales Leal and Mr Gonzalo Capriles, to appear and testify at the oral phase of the proceedings.[15] Following an exchange of submissions, on 22 September 2011, the Tribunal issued Procedural Order No. 3. It declined the Claimants' request on the ground that, within the framework of the ICSID Convention, the preparation and presentation of evidence is the responsibility of the parties and not that of the Tribunal.[16]

3. Written phase

17. Pursuant to the timetable set at the First Session, the following pleadings were exchanged:

(a) Venezuela filed its Memorial on Jurisdiction on 6 May 2011, together with Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros;

(b) The Claimants filed their Counter-Memorial on 29 July 2011, together with Legal Expert Opinion of Professor Carlos Ayala Corao and Direct Testimony of Kevin Carr, Vice President, Taxation, Tidewater Inc.;

[10] Ibid [24].
[11] Ibid [36].
[12] Ibid [43].
[13] Ex. C-19.
[14] This Order was conveyed by letter from the Secretary of the Tribunal to the parties.
[15] Procedural Order No. 3, [1].
[16] Ibid [14].

(c) Venezuela filed its Reply on 14 October 2011, together with Expert Report of Professor John P. Steines, Jr. and Supplementary Legal Expert Opinion of Professor Urdaneta; and

(d) The Claimants filed their Rejoinder on 21 December 2011, together with Supplemental Opinion of Professor Ayala and Supplemental Testimony of Mr Carr.

4. Oral phase

18. By agreement between the parties and the Tribunal, an oral hearing for the jurisdiction phase was scheduled at the seat of the Centre in Washington, D.C. for Wednesday 29 February and Thursday 1 March 2012. Neither party wished to avail itself of the opportunity to call any witness or expert for oral testimony, nor did the Tribunal. Accordingly, the oral hearing consisted of the submissions of counsel for both parties according to an agreed timetable, together with the responses of counsel to questions from the Tribunal.

19. At the conclusion of the hearing, both parties confirmed that they had no continuing objection to any aspect of the conduct of these proceedings since the constitution of the Tribunal.[17] The President then closed the evidentiary record and the oral procedure in the jurisdictional phase of this arbitration.

20. The Tribunal has since deliberated in person in Washington on Friday 2 March 2012 and subsequently by various means of communication.

[17] T2/371/12-20. References to the transcript are in the format T[Day]/[Page/[Line numbers]. Dashes denote page ranges; hyphens denote line ranges.

II. THE PARTIES' SUBMISSIONS

A. First ground of jurisdiction: Article 22 of the Investment Law

1. Introduction

21. The Claimants submit that Article 22 constitutes a standing consent to international arbitration of investment disputes. Venezuela disagrees. The text of Article 22 reads:

> 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 éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente.[18]

22. Venezuela translates Article 22 as follows:

> 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.[19]

23. The Claimants' translation is:

> Controversies that may arise 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 controversies in respect of which the provisions of

[18] Ex. EU-01.
[19] Memorial [37] (emphasis removed).

> 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) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so establishes, without prejudice to the possibility of using, as appropriate, the contentious means contemplated by the Venezuelan legislation in effect.[20]

24. The parties exchanged extensive submissions on the interpretation of Article 22, which were further elaborated in oral pleading. The points in dispute between the parties can be divided into four issues:

(a) The standard to be applied to the interpretation of Article 22, including the relevance of Venezuelan and international law to its interpretation;

(b) The correct interpretation of Article 22 produced by the application of that standard;

(c) The historical context of the enactment of the Investment Law as a guide to interpretation; and

(d) The relevance of comparison with other instruments containing consent to international arbitration, including other countries' investment laws and BITs signed by Venezuela.

The parties' submissions on each of these issues are summarised in turn.

2. Standard of interpretation to be applied to Article 22

(a) Venezuela's submissions

25. Venezuela submits that domestic Venezuelan principles of interpretation 'play a useful role'[21] in the interpretation of a Venezuelan statute alleged to constitute a standing consent to arbitration,[22] as an 'appropriate starting point'[23] in the interpretative process as evidence of the state's intention.[24] It submits that domestic principles require consent to be 'clear',

[20] Counter-Memorial [59] (emphasis removed).
[21] Reply [21] quoting *Mobil* [96].
[22] Memorial [41] citing *Zhinvali v Georgia* [297], *SPP v Egypt* [61] and I. Suárez Anzorena 'Consent to Arbitration in Foreign Investment Laws' in Laird & Weiler *Investment Treaty Arbitration and International Law* Vol 2 (JurisNet, 2009) 63 & 79.
[23] T2/266/17.
[24] Reply [9], citing *Mobil* [120]–[140], *Cemex* [127]–[138] and *Brandes* [113]–[118]; T1/15, citing *Zhinvali v Georgia*.

'unequivocal' and 'express'.[25] It cites a decision of the Supreme Tribunal of Venezuela which applied this standard and which ruled that Article 22 was not a standing consent to arbitration.[26]

26. Nevertheless, the Respondent recognises that, 'since the issue is whether Article 22 can serve as a consent for purposes of the ICSID Convention, the principles of international law also come into play.'[27] In this context, it refers to the principles of interpretation in Articles 31–32 of the Vienna Convention on the Law of Treaties (**'VCLT'**). But the Respondent places particular reliance on the International Law Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations 2006 (**'ILC Unilateral Declaration Principles'**),[28] Principle 7 of which requires unilateral declarations within the scope of the Principles to be 'stated in clear and specific terms' and 'interpreted in a restrictive manner', concluding that 'weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.'[29]

27. Venezuela accordingly endorses authorities that suggest that consent must be 'clear, express and unequivocal',[30] should not be presumed,[31] should be construed 'strictly'[32] and should be 'expressed in a manner that leaves no doubts.'[33] It accordingly rejects the formulation adopted by the *SPP v Egypt* tribunal to this extent.[34] It contends that the principle of *effet utile* cannot cure the absence of language of consent,[35] and only requires that the Tribunal reject a meaningless interpretation in favour of a meaningful interpretation, where the latter is available.[36]

28. In conclusion nevertheless, the Respondent submits that there is a 'fairly consistent list of factors' that cuts across the various types of instruments of consent, namely, the text, the context, the purposes and the circumstances of the instrument, which may properly be

[25] Memorial [42]–[43] citing various decisions of the Supreme Tribunal of Justice of Venezuela; T1/16/14-17.
[26] Memorial [45]–[46], quoting *Decision on Interpretation Request,* Case No 2008-0763, 17 October 2008, 18, 47–48 (in the English translation) (Ex. EU-29).
[27] T2/267/13-16.
[28] UN Doc A/61/10, [177].
[29] Idem.
[30] Memorial [31] citing *Plama v Bulgaria* [198]; Reply [14]; T1/19–21.
[31] Memorial [32] citing *Wintershall v Argentina* [160(3)], [161], [167]; Reply [15].
[32] Memorial [33]; Reply [16]. See also Memorial [56] & T1/18 citing ICISD Model Clauses (1968) 7 ILM 1159, 1162.
[33] Reply [26] quoting *Brandes* [113].
[34] T2/266/7-11.
[35] Reply [38].
[36] Reply [44] quoting *Cemex* [114]–[115]; T1/13–14.

applied to construe Article 22.[37] Despite objecting to the application of the *effet utile* principle, the Respondent accepts that the provision must be interpreted in good faith.[38]

(b) Claimants' submissions

29. The Claimants submit that, in determining the question of whether Article 22 expresses Venezuela's consent to ICSID jurisdiction, one must start with the ICSID Convention, in order to determine whether the statement is capable of validly stating the party's consent to ICSID jurisdiction, and then to general international law in order to ascertain whether the content of the statement expresses such consent.[39] Within international law, one should look specifically to those principles governing the unilateral declarations of states 'formulated within the framework and on the basis of a treaty.'[40] The Claimants contend that such declarations are in a different category to those dealt with in the ILC Unilateral Declaration Principles.[41] Relying upon the jurisprudence of the International Court of Justice in relation to the interpretation of states' unilateral declarations of acceptance of the Court's jurisdiction, the Claimants contend that the declaration 'must be interpreted as it stands having regard to the words actually used' and 'in a natural and reasonable way, having due regard to the intention of the state concerned.'[42] 'That intention can be deduced from the text, the context, the circumstances of its preparation, and the purposes intended to be served.'[43]

30. In consequence, the Claimants fully endorse the formulation adopted in *SPP v Egypt,* namely that:

> [J]urisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant.[44]

[37] T2/273/15-20.
[38] T2/275/1-6.
[39] Counter-Memorial [45], [60]; T2/305–6.
[40] Counter-Memorial [61].
[41] T2/308/17–312/21; T2/320/17–321/21; citing UN Doc A/CN.4/L.703 [3] and UN Doc A/52/10, [204].
[42] T2/314/8-20, citing *Anglo-Iranian Oil Co Case* 105 and *Fisheries Jurisdiction Case (Spain v Canada)* [49]. See also T1/143/4-19.
[43] T2/314/17-20.
[44] Counter-Memorial [46], [62] and T2/312/10-19, citing *SPP v Egypt* [63].

They accordingly reject Venezuela's contention that a restrictive approach to interpretation ought to be adopted. They reject the statement to that effect in *Brandes*[45] and distinguish the cases involving Most-Favoured Nation clauses.[46]

31. The Claimants reject Venezuela's reliance on municipal law principles. They are only relevant to matters such as the legal existence of the statute,[47] and to the extent that Venezuelan law requires a restrictive interpretation of consent – which the Claimants submit it does not[48] – Venezuelan law must cede to international law.[49] The Claimants argue that *Decision No 1541* of the Venezuelan Supreme Tribunal of Justice was wrong and politically tainted and accordingly ought to be given no weight.[50]

32. According to the Claimants, this requires the application of the principle of *effet utile*, which they allege the *Mobil* and *Cemex* tribunals failed to apply.[51] The ICJ's consideration of the intention of the drafting state in the *Fisheries Jurisdiction Case (Spain v Canada)* did not exclude the principle.[52] Likewise the Court in the *Anglo-Iranian Oil Co* case recognised the *effet utile* principle but decided that the words in question had been included *ex abundanti cautela*,[53] and the principle was also recognised in the *Case Concerning Right of Passage Over Indian Territory*.[54]

3. The correct textual interpretation of Article 22

(a) Venezuela's submissions

33. Venezuela submits that Article 22 is a 'compound provision which covers three types of disputes: those arising under bilateral investment treaties, those arising under the MIGA Convention and those arising under the ICSID Convention. '[55] It submits that the requirement of consent 'in writing' in Article 25(1) of the Convention is not met. Irrespective of the use of the imperative 'shall' in Article 22, this is subject to the condition 'if it so provides'. Thus, Article 22 'only recognizes international arbitration where the treaty or

[45] T1/146/4–147/20; T1/153/7-13.
[46] T1/153/14–154/15.
[47] Counter-Memorial [125]; Rejoinder [23] citing *Mobil* [96(i)] and *Cemex* [89(a)].
[48] Counter-Memorial [130]; Rejoinder [24], [25]; T1/156/6–157/21.
[49] Counter-Memorial [124], [126]–[128], criticizing Venezuela's reliance on *Zhinvali v Georgia*, *SPP v Egypt* and *Cemex*; Rejoinder [26]; T1/155/1-11.
[50] Counter-Memorial [164]–[174]; T1/157/22–158/16.
[51] Counter-Memorial [64].
[52] Counter-Memorial [66]–[69] quoting *Fisheries Jurisdiction Case (Spain v Canada)* [52]; T1/150/9–151/13.
[53] Counter-Memorial [71]; T1/151/14–152/6.
[54] Counter-Memorial [72] quoting *Case Concerning Right of Passage over Indian Territory* [142].
[55] Memorial [38].

agreement itself contains an obligatory submission to arbitration' (as some BITs and the MIGA Convention do).[56] In other words, the proviso is only satisfied if all the requirements of the treaty in question are satisfied, 'including, in the case of the ICSID Convention, a separate written consent.'[57]

34. Because the condition is not met, there is no basis to go beyond the text of the statute in determining Venezuela's intention in enacting Article 22,[58] and the Claimants seek to construct consent to arbitration by reference to another document (the ICSID Convention) which provides nothing more than a set of rules to be applied where consent otherwise exists.[59] Venezuela rejects the Claimants' argument that the word 'so' in 'if it so provides' refers to an 'infrastructure or framework of international arbitration' and rejects the 'logical leap' between interpreting 'so' to refer to submission to international arbitration and concluding that 'submission to international arbitration means to provide for the settlement of disputes through international arbitration.'[60]

35. To the extent that the principle of *effet utile* requires the Tribunal to adopt an interpretation that gives meaning to the clause, Venezuela submits that the purpose of Article 22 is to acknowledge existing international commitments and thus avoid any misrepresentation[61], a purpose which other articles in the same statute serve,[62] as well as to make it clear that investors retain the right to resort to domestic Venezuelan jurisdiction (by the last sentence).[63] In this respect, Venezuela accepts that the first two limbs (referring to BITs and the MIGA Convention) and the third limb (referring to the ICSID Convention) have different purposes: the first two acknowledge existing standing consents, while the third acknowledges Venezuela's commitment to arbitration under the ICSID Convention only where an independent instrument of consent (such as a concession contract) exists.[64] Venezuela nevertheless submits that Article 22 treats the three limbs alike, in the sense that in each case the Article acknowledges the obligations contained in the treaty in question.[65]

[56] Memorial [39]; Reply [30]–[32]; T1/26/19-21 & T1/27/12-14.
[57] T1/24/7-12.
[58] Reply [20].
[59] Reply [34].
[60] Reply [35-36] quoting Counter-Memorial [84].
[61] Reply [44], citing *Cemex* [114]–[115]; T1/14/6-16, citing *Cemex;* T1/32/11–33/4, citing *Biwater Gauff v Tanzania*.
[62] T1/30/20–32/3.
[63] Reply [45].
[64] T1/121/7-20.
[65] T1/123/5-8.

Finally, Venezuela submits that its interpretation is consistent with the surrounding Articles 18, 21 and 23.[66]

(b) Claimants' submissions

36. The Claimants focus on the 'ICSID clause' part of Article 22.[67] It is accepted that the first part of the clause ('Controversies in respect of which the provisions of the [ICSID Convention] are applicable') refers to jurisdiction *ratione personae* and *materiae* which are met.[68] The term 'shall' denotes a mandate (notwithstanding Venezuela's 'fallacious' comparison with Article 23).[69] The word 'it'/'*este*' refers to the noun 'treaty or agreement' – in this context the Convention – so '*asi…lo*' refers to 'the action of the preceding verb', *i.e.* submission to arbitration.[70] Accordingly, the qualifier 'if it so establishes' means 'if [the respective treaty or agreement] establishes [submission to international arbitration].'[71] The crux of the Claimants' interpretation is their argument that to 'establish' submission means to provide for the settlement of disputes through international arbitration.[72] Venezuela's interpretation, according to the Claimants, requires reading the clause to mean 'if the ICSID Convention establishes consent'.[73] That is untenable because (a) the term 'consent' appears nowhere in the preceding clause[74] and (b) if 'submission to international arbitration' (the phrase to which 'if it so provides' refers back) encompassed the notion of consent then none of the listed treaties would qualify:[75] the ICSID Convention cannot contain a state's consent[76] and neither the ICSID Convention nor any of the other treaties can contain both the state's and the investor's consent, both of which are necessary.[77]

37. Venezuela's interpretation deprives the Article of useful effect in violation of the principle of *effet utile*.[78] The ICSID Convention does not contain an obligation to arbitrate without a separate instrument of consent, so there is no obligation in the ICISD Convention to recall.[79] In any case, to merely recall and confirm existing obligations is not a useful effect because

[66] T1/43/2–46/16.
[67] T1/160/1-6.
[68] T1/161/3-8.
[69] T1/161/14, T1/162/3–163/13.
[70] T1/163/18-22.
[71] T1/164/1-7.
[72] Counter-Memorial [84]; Rejoinder [33]–[38].
[73] T1/164/14-17.
[74] Counter-Memorial [132]; T1/164/21–165/3.
[75] Rejoinder [37].
[76] T1/165/11-16.
[77] T1/166/13-17.
[78] Counter-Memorial [132]; Rejoinder [41]–[45].
[79] T1/172/8-12.

the principle of *effet utile* requires a *legal* effect.[80] Finally, Venezuela's approach amounts to the imposition of a burden of proof inconsistent with a neutral approach to the interpretation of such clauses.[81] The Claimants suggest that 'rational legislators' are presumed not to have intended a self-defeating result,[82] and that the presumption of good faith 'precludes an interpretation that makes the legal provision useless while giving to the addressees of the provision the illusion that it confers a right or benefit to them.'[83]

38. The final sentence providing for Venezuelan jurisdiction 'confirms that Article 22 was intended to have useful effects.'[84] It cannot have been intended to disclaim instruments other than Article 22 because that would be illogical and ineffective (in the case of international treaties which cannot be disclaimed by a domestic statute).[85]

4. The historical context of the enactment of the Investment Law

(a) Venezuela's submissions

39. Venezuela submits that the Claimants' interpretation is 'irreconcilable with the historical background of the statute and prevailing attitudes in Venezuela towards international arbitration in general and arbitration by the State in particular.'[86] It cites the fact that President Chávez, who also promulgated the Investment Law, proposed that there be no provision in the Constitution for arbitration in the case of public interest contracts,[87] and cites an Instruction and a Decree issued by President Chávez limiting arbitration of disputes involving public interest contracts.[88] It rejects the Claimants' argument that, because Venezuela took 'pro-arbitration' steps around the time the Investment Law was promulgated, Article 22 must express consent.[89] It also rejects the Claimants' reliance on Article 258 of the Constitution which, it says, merely promotes a range of dispute resolution mechanisms and does not mandate arbitration, let alone international arbitration.[90] Venezuela maintains that Article 151 of the Constitution, despite the fact that President

[80] Counter-Memorial [136]–[140], citing *Biwater Gauff v Tanzania* [329] and *Cemex* [115]; T1/172/13-21.
[81] Counter-Memorial [161] citing *Fisheries Jurisdiction Case (Spain v Canada)* [38]; Rejoinder [64].
[82] T1/148/13-15.
[83] T1/148/19-149/2.
[84] Counter-Memorial [87].
[85] Rejoinder [39]–[40]; T1/168/16–170/2.
[86] Memorial [47]; Reply [25] relying on *Brandes* [100]–[105]; T1/64/5-8, 65/4-8.
[87] Memorial [52], citing Urdaneta Opinion [21].
[88] Memorial [53]–[54], citing Instruction No. 4, Articles 1–4 and Decree with Force of Organic Law of the Office of the Attorney General of the Republic, Articles 11–13; T1/66/6-10.
[89] Reply [48], [56].
[90] T2/262/6-9.

Chávez's initiative was not taken up, along with other factors, demonstrates a continuing hostile attitude to international arbitration.[91]

40. Venezuela refers to the mandate to negotiate further BITs in Article 5 of the Investment Law, says that an interpretation of Article 22 as a standing consent is inconsistent with Venezuela's policy of negotiating reciprocal investment protection,[92] and suggests that if Article 22 was intended to have that effect it would have been promoted as such to international investors at the time, as was the case in *SPP v Egypt*.[93] Accordingly, there is no basis on which to suggest that Venezuela set out to 'deceive' investors into thinking the state had unilaterally consented to arbitration.[94]

41. Venezuela submits that Mr Corrales' statements on the drafting and meaning of the Investment Law provided no basis on which to conclude that Article 22 was a standing consent to arbitration.[95] It argues that Mr Corrales' stated 'opinions' have been constructed *ex post facto* to serve the benefit of investors such as the Claimants,[96] and that those views cannot be equated with the intention of the legislators[97] and were not necessarily adopted by the legislators.[98] It also points to the contrary views of other commentators.[99]

(b) Claimants' submissions

42. The Claimants point to a number of developments around the time of the Investment Law that demonstrate a shift in Venezuela's attitudes towards the encouragement of foreign investment and the protection of investors, including through access to arbitration.[100] They also rely on the support for arbitration given in Article 258 of the Constitution.[101] They submit that the interpretation of Article 22 advanced by Venezuela suggests that Venezuela encouraged the 'illusion' that it consented to ICSID jurisdiction, 'an exercise in deception [which] is the antithesis of good faith.'[102]

[91] Reply [50]–[56]; T2/262/17-22.
[92] T1/50/2-16.
[93] T1/52/3-15.
[94] T2/260/11-17.
[95] Reply [25] quoting *Brandes* [103].
[96] T1/56/6-9.
[97] Reply [59]–[65]; T1/56/17-20, 57/15-17, 58/1-3.
[98] T1/60/13-22.
[99] Reply [67], [70], [71]; T1/55/15–56/3, T1/58/9-15.
[100] Counter-Memorial [88]–[93], [142]–[147]; Rejoinder [49]–[56]; T1/177/9-18.
[101] T1/177/19-22.
[102] T1/187/4-9.

43. The Claimants rely on statements of Mr Corrales that the drafters (he and Mr Capriles) envisaged Article 22 as a standing consent to arbitration,[103] and that this intention was 'discussed and endorsed' at two meetings of the Economic Cabinet and one of the Cabinet in full.[104] The Claimants say that Mr Corrales' statements are relevant because Venezuela has presented no other contemporaneous evidence or *travaux préparatoires*[105] and that those opinions are therefore the 'sole available evidence.'[106] The Claimants suggest that *Mobil* and *Cemex* rejected this evidence only because his statements took place after those proceedings had begun and because the Claimants apparently did not ask him to testify.[107]

5. The relevance of other instruments as sources of comparison

(a) Venezuela's submissions

44. Venezuela contrasts Article 22 with a number of model arbitration clauses,[108] other domestic investment laws,[109] and Venezuelan BITs[110] that all contain consent to arbitration to demonstrate that Article 22 does not contain such consent. Venezuela submits that while there is no 'magical language for expressing consent',[111] these comparators do show that, if Venezuela had intended Article 22 to have that effect, it would have chosen one of the common formulations with which Venezuela was already familiar,[112] not the 'confusing and ambiguous wording of Article 22.'[113] Moreover, if Article 22 was intended to constitute consent, then the drafters would have defined the scope of that consent.[114]

(b) Claimants' submissions

45. The Claimants reject Venezuela's reliance on the 1968 Model Clauses because the relevant words have been deleted from the latest version and because a model clause provides no guide to the interpretation of Article 22.[115] They also reject Venezuela's other comparisons because the 'comparators have completely different structures from that of Article 22' and

[103] Counter-Memorial [95]–[98].
[104] Counter-Memorial [98]; Rejoinder [57]–[58]; T1/175/16-21.
[105] Counter-Memorial [99]; Rejoinder [59].
[106] T1/180/7-10.
[107] Rejoinder [58].
[108] Memorial [57]–[60]; T1/39/2-6, citing US Model BIT & T1/40/16–41/7, citing OECD Working Group Model Investment Law.
[109] Memorial [61]–[64]; T1/39/7-20, citing the Albanian Investment Law In *Tradex v Albania*; T1/41/8-18, citing the Investment Code of the Central African Republic.
[110] Memorial [66]–[68]; T1/34/22–36/5.
[111] Reply [13].
[112] Memorial [72]; Reply [22] relying on *Mobil* [139]–[140]; T1/48/10-13.
[113] Reply [24] quoting *Brandes* [92].
[114] T1/42/8-22, citing Barbados-Venezuela BIT.
[115] Counter-Memorial [121]; Rejoinder [19].

do not tell us anything about the meaning of Article 22.[116] The argument that Venezuela knew how to draft a consent clause by 1999 is misplaced because it ignores the fact that consent may be drafted in any number of ways, and presupposes correspondence between domestic statutes and BITs.[117]

B. Second ground of jurisdiction: the Barbados BIT

1. Introduction

46. The second ground of jurisdiction invoked by the Claimants is based on the Barbados BIT. If the Tribunal concludes that it has jurisdiction pursuant to Article 22 of the Investment Law, then it will have jurisdiction over the entire dispute submitted by the Claimants in their Request for Arbitration irrespective of the effect of the Barbados BIT. However, if the Tribunal concludes that jurisdiction is only available under the Barbados BIT, that would exclude from the Tribunal's remit the losses suffered by the Tidewater subsidiaries, Point Marine, L.L.C, Twenty Grand Marine Service L.L.C., Jackson Marine L.L.C. and Zapata Gulf Marine Operators, L.L.C., including the vessels and assets seized from those companies (except to the extent that these losses caused damage properly the subject of a claim by the Treaty Claimants).[118] Nevertheless, the identification of the losses in respect of which the Tribunal has jurisdiction is a matter that will fall to be considered at the merits phase of this proceeding. The Tribunal does not express a view on this question at this stage but simply notes it in order to put Venezuela's jurisdictional objections in context.

47. Venezuela accepts that Article 25 is *prima facie* satisfied by the Claimants' invocation of the Barbados BIT, but alleges that in doing so the Claimants are committing 'treaty abuse' and should thus not be permitted to invoke the BIT. Venezuela says that the Tidewater group was restructured to insert Tidewater Barbados into the chain of ownership for the sole purpose of establishing ICSID jurisdiction in respect of a dispute that already existed at the time of the restructuring, or in preparation for anticipated litigation. The parties' submissions are now summarised.

[116] Counter-Memorial [150]; Rejoinder [68]–[69].
[117] Counter-Memorial [153].
[118] Request for Arbitration [61].

2. The concept of treaty abuse

(a) Venezuela's submissions

48. Venezuela relies on the concept of 'abuse of right' in international law.[119] It relies on six ICSID awards to extract a number of factors that may be taken into account to determine whether jurisdiction will be denied on this ground. Venezuela summarises the relevance of these decisions as follows:

(i) *Banro American Resources v Democratic Republic of the Congo:* Canada is not a party to the Convention but the United States is. After the Congo repealed decrees approving the concession held by a subsidiary of Banro (a Canadian company), Banro transferred its shares in the subsidiary to a United States affiliate. The tribunal refused jurisdiction despite the fact that the requirements of Article 25 were technically met.[120]

(ii) *Autopista v Venezuela*: The tribunal relied on the following key factors in upholding jurisdiction: (i) the transferee entity had been incorporated 8 years earlier; (ii) the transferee was not just a shell corporation but had actual business operations; (iii) the claimant had requested and obtained the state's approval; and (iv) the claimant had a reasonable business justification for the transfer.[121]

(iii) *Tokios Tokelés v Ukraine*: ICSID jurisdiction can be denied in circumstances where an investor creates a shell company for the sole purpose of gaining access to arbitration under a BIT.[122]

(iv) *Aguas del Tunari v Bolivia*: Although acknowledging that the corporate form could be abused, the majority found that such was not the case because (i) the entity was not simply a corporate shell set up to obtain jurisdiction; (ii) the joint venture was structured so that neither party had exclusive control; (iii) the entity had a portfolio of 8 contracts and real operations; and (iv) the restructuring was planned and executed before the events giving rise to the dispute.[123]

(v) *Phoenix Action v Czech Republic*: The restructuring in question was a 'mere redistribution of assets' within the same family for the purpose of gaining access to

[119] Memorial [80]; see also [113] quoting Hersch Lauterpacht *The Development of International Law by the International Court* (Frederick A. Praeger, 1958) 164.
[120] Memorial [81].
[121] Memorial [92].
[122] Memorial [95].
[123] Memorial [106].

jurisdiction to which the original investor was not entitled.[124] The Tribunal drew a distinction between structuring an investment at the outset for the purpose of benefiting from the protection of a treaty, and restructuring after the fact in order to gain protection.[125] Venezuela cites along the same lines Zachary Douglas' argument that if 'the objective purpose of the restructuring was to facilitate access to an investment treaty tribunal with respect to a claim that was within the reasonable contemplation of the investor' then the claim would be inadmissible.[126]

(vi) *Mobil v Venezuela*: Whether a restructuring constituted 'legitimate corporate planning' or an 'abuse of right' depended on the circumstances,[127] and restructuring for the purpose of gaining jurisdiction in respect of 'pre-existing disputes' is abusive.[128]

49. As to the moment when the dispute arose – which is an important point in time for deciding whether or not there is an abuse of right – Venezuela adopts the test propounded by the International Court of Justice in *Mavrommatis Palestine Concessions* that a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or of interests'[129] and there must arise 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or the non-performance of certain treaty obligations.'[130] The *Headquarters Agreement Case* shows that the existence of a dispute 'in no way requires that any contested decision must already have been carried into effect' where 'opposing attitudes' are present.[131] According to *Case Concerning Right of Passage over Indian Territory*, the tribunal must look to the 'source of the dispute' – the facts which are its 'real cause'.[132] In reliance on *Lucchetti, Vieira* and *ATA*, Venezuela submits that where 'two' disputes share the same subject-matter and the same origin or cause they are the same dispute.[133]

50. Venezuela therefore submits that treaty abuse is committed when an investment is transferred to a shell company in order to obtain jurisdiction in respect of an *existing*

[124] Memorial [117], quoting *Phoenix Action* [140], [143].
[125] T2/280/16-22.
[126] Memorial [117] quoting Zachary Douglas *The International Law of Investment Claims* (Cambridge UP, 2009) 870.
[127] Memorial [119] quoting *Mobil* [191].
[128] Memorial [120] quoting *Mobil* [205].
[129] Reply [108] citing *Mavrommatis Palestine Concessions* 11.
[130] Reply [109] citing *Interpretation of Peace Treaties Case* 74.
[131] Reply [110] citing *Headquarters Agreement Case* [42]–[43].
[132] Reply [111] citing *Case Concerning Right of Passage over Indian Territory* 35.
[133] T1/86/16-21, citing *Lucchetti* [50], T1/88/13-19 citing *ATA v Jordan* [102], T1/90/1–T1/91/4 citing *Vieira* [266]–[303].

dispute, or in anticipation of a dispute that is *foreseeable*, especially where an 'intra-corporate rearrangement' was for the purpose of gaining access to ICSID rather than a 'good-faith investment.'[134]

51. Venezuela extracts the following factors from the cases cited which, in its submission, show that the dispute over which the Tribunal is asked to take jurisdiction was foreseeable at the time of Tidewater's restructuring, that the restructuring was done in anticipation of that dispute, and the Claimants thus seek to abuse the BIT: (i) the timing of the restructuring; (ii) the fact that Tidewater Investment is a shell company with little or no economic operations; (iii) the lack of a reasonable business explanation for the restructuring, which means that it did not create a 'good faith investment'; and (iv) the fact that the host state's consent was not obtained.[135]

(b) Claimants' submissions

52. The Claimants submit that there is nothing objectionable in an investor considering the protection provided by investment treaties in structuring its investments,[136] and there is no basis on which to impose additional nationality requirements 'extraneous to the Treaty.'[137] The Claimants do not accept the principle on which Venezuela relies that restructuring to obtain protection in respect of an anticipated dispute constitutes treaty abuse.[138]

53. They take issue with Venezuela's reliance on the cases cited and the series of factors Venezuela extracts from them, noting: in *Banro*, the dispute arose before the restructuring;[139] in *Autopista*, the tribunal was concerned with 'fictional control';[140] in *Tokios Tokelés*, the tribunal rejected the imposition of additional nationality requirements;[141] in *Aguas del Tunari*, the tribunal rejected Bolivia's argument that the restructuring was a fraudulent device and accepted that it was legitimate for an investor to take into account the existence of a BIT in choosing a jurisdiction in which to establish;[142] in *Phoenix Action*, the tribunal only held that restructuring cannot be done 'after damages have occurred';[143]

[134] T1/73/19-22, T1/74/5-10.
[135] T1/74/8-10, 15-20.
[136] Counter-Memorial [191], relying on *Aguas del Tunari* [332], *Phoenix Action* [94]–[95] and *Mobil* [204]; Rejoinder [102]–[103]; T1/204/14, T2/369/1-7.
[137] Counter-Memorial [239]–[252].
[138] Counter-Memorial [231].
[139] Counter-Memorial [198]; Rejoinder [108].
[140] Counter-Memorial [203]; Rejoinder [109].
[141] Counter-Memorial [209]; Rejoinder [110].
[142] Counter-Memorial [215]; Rejoinder [111]; T1/213/10-17.
[143] Counter-Memorial [219] quoting *Phoenix Action* [86]; Rejoinder [112]; T1/205/12-13, T1/206/5-18.

and in *Mobil*, the tribunal accepted that restructuring to obtain protection for future disputes is legitimate.[144]

54. The Claimants accept that the Tribunal must examine whether the international law principle of good faith has been violated, and identify three factors that in *Phoenix Action* were held to demonstrate that the principle had been violated: the timing of the investment, the substance of the transaction and the intended economic activity.[145]

55. On the question of whether the dispute between the parties predated the restructuring, the Claimants adopt the *Mavrommatis* definition of 'dispute' also presented by Venezuela,[146] but stress that 'a dispute cannot arise until all its constituent elements have come into existence'[147] and that '[i]t must be shown that the claim of one party is positively opposed by the other.'[148] They say that the *Lucchetti, ATA* and *Vieira* cases are distinguishable on the facts and thus irrelevant to the Tribunal's analysis.[149]

3. Application to the facts of this case

(a) Venezuela's submissions

56. Venezuela submits that an application of the factors it has identified leads to the conclusion that the Claimants' conduct is an abuse of the Barbados BIT. Venezuela defines the 'dispute' in question as 'a dispute over the need to ensure the continuity of service provided by SEMARCA despite the … accounts receivable.'[150] A subsidiary aspect of the dispute concerned the position of employees of SEMARCA, whom SEMARCA stopped paying in late 2008 and whom PDVSA began to pay directly.[151]

57. Venezuela relies on the following facts to establish that a dispute was already in existence or at least reasonably anticipated when the restructuring occurred:

(i) The continuity of SEMARCA's operations was required by the 2001 Hydrocarbons Law;[152]

(ii) In late 2008 and early 2009 PDVSA had fallen behind on its accounts payable;[153]

[144] Counter-Memorial [228] quoting *Mobil* [204]; Rejoinder [113].
[145] T1/207/11-16.
[146] Counter-Memorial [237], fn 543; T1/234/15-22.
[147] Rejoinder [91] quoting *Case Concerning Right of Passage over Indian Territory* 34; T1/238/7-22.
[148] Rejoinder [90] quoting *Headquarters Agreement Case* [35]; T1/236/9-21.
[149] T1/241/4-22.
[150] T1/75/6-11.
[151] T1/92/8-11.
[152] T1/75/12-19.
[153] Memorial [11]–[13].

(iii) PDVSA requested all suppliers and contractors, including SEMARCA, to renegotiate their service contracts;[154]

(iv) SEMARCA and the other suppliers refused to reduce their tariffs;[155]

(v) The Ensco 69 rig was seized by workers under PetroSucre's control in January 2009 in response to Ensco International's decision to shut down the rig until arrears were paid, and service companies were warned on several occasions that Venezuela would not permit the industry to be paralysed;[156]

(vi) SEMARCA and the other suppliers stopped paying accrued wages[157] and Mr Mikael Jacob, General Manager of SEMARCA, refused to extend contracts with PDVSA unless SEMARCA's demands were met, and on 30 April 2009 described the situation as being at 'breaking point';[158]

(vii) According to the Minister of Energy and Petroleum the suppliers were threatening to abandon Venezuela with their equipment;[159] and the Reserve Law was enacted to guarantee continuity of service.[160]

58. Venezuela identifies a 'conflict of interest' existing prior to 9 March 2009 (when the restructuring was completed) between the Claimants' interest in receiving payment, even where this resulted in interrupted service, and Venezuela's interest in ensuring continuity of service.[161] It thus submits that, when the restructuring was effected, a dispute already existed because the Reserve Law was a continuation of the dispute that had arisen earlier about the payment of invoices and the continuation of services[162] and the position of SEMARCA's workers.[163] In reliance on *Lucchetti* and *ATA*, Venezuela submits that the 'two' disputes share the same subject-matter and the same origin or cause and are thus the same dispute.[164]

[154] Memorial [13]–[15].
[155] Reply [73].
[156] Memorial [16], T1/77/2-5, T1/103/10-16.
[157] Memorial [15].
[158] Reply [76].
[159] Memorial [18].
[160] T1/83/2-7, citing Ex. R-41.
[161] T1/82/17-22.
[162] Reply [107]–[117], T1/93/19.
[163] T1/92/8–T1/93/18.
[164] T1/86/16-21, citing *Lucchetti* [50] and T1/88/13-19 citing *ATA v Jordan* [102]. Venezuela also relies on *Vieira* at [266]–[303] (T1/90/1).

59. Even if that were not so, Venezuela argues that the restructuring was completed in preparation for anticipated arbitration proceedings,[165] and that it was the prospect of government action that prompted the Claimants to restructure their investment to gain treaty protection that they had been content to live without for the previous 50 years.[166]

60. Venezuela relies on the chain of privileged communications relating to the restructuring which the Claimants have refused to disclose on grounds of privilege, and infers from the fact that the chain was begun by Mr Jacob,[167] and that advice was (first) sought from Venezuelan lawyers with experience in arbitration and compensation for expropriation rather than tax lawyers,[168] that the restructuring must have been done to prepare for a dispute with Venezuela.[169] It also relies on the fact that no document was produced that demonstrated a business reason for the restructuring.[170]

61. Venezuela thus submits that no legitimate business reason for the restructuring other than to obtain protection against a foreseeable risk of nationalisation or 'government action' was identified.[171] Venezuela submits that the tax reason for the creation of Tidewater Barbados is not credible because the timing was coincidental (coming five years after the enactment of the United States statute that is said to have prompted the desire for a tax restructuring) and decades after the original corporate structure was established;[172] and because the alleged tax advantage only required one foreign company to be interposed between Tidewater Inc. and SEMARCA – and Tidewater Marine (a Cayman Islands company) already served that purpose.[173]

62. Venezuela accordingly disputes the Claimants' argument that their continued investment in Venezuela was inconsistent with the expectation of expropriation and litigation, and suggests that the cash advances relied on by the Claimants were nothing more than 'transfers that were strictly necessary to maintain minimal operations' and not true

[165] Reply [121]–[122], T1/98/21-22. Cf Factor (i) above.
[166] T2/282/15-17.
[167] T1/103/5-9.
[168] Reply [93], T1/104/3-6.
[169] Reply [79]. Cf Factors (i) and (iii) above.
[170] T1/102/22–T1/103/2.
[171] T1/105/1-3, T1/105/16–106/1.
[172] Reply [91].
[173] Reply [95]–[98], relying on opinion of Professor Steines [15]. Cf Factor (iii) above.

investments,[174] and that the other alleged investments were either plans[175] or concerned unrelated projects.[176]

63. Venezuela argues that Tidewater Barbados is a corporation of convenience with minimal alleged investments and operations and 'does not perform any real economic activity in Barbados [...].'[177] It thus does not fulfil the object and purpose of the BIT, which is to promote the economic development of the contracting parties.[178]

64. Although Venezuela accepts that (unlike in *Aguas del Tunari* and *Autopista*) the state's consent was not required for the restructuring in this case, it was relevant that the Claimants did not request authorisation and hid the restructuring from the state.[179]

65. Venezuela thus submits that Tidewater's restructuring was not done in good faith, pointing to the fact that Tidewater Barbados was incorporated shortly before the claim was initiated, that the restructuring was done for reasons clearly related to an eventual arbitration proceeding, and that the Claimants created a legal fiction to gain access to international arbitration to which they had no right of access.[180]

(b) Claimants' submissions

66. The Claimants submit that no dispute arose before Venezuela adopted the Reserve Law because the Claimants were not on notice that expropriation would follow if the Claimants refused to enter into a new contract with PDVSA[181] and because a dispute cannot arise 'until all of its constituent elements have come into existence.'[182] Accordingly, they submit that the 'alleged "dispute"' with PDVSA concerning new contracts (referred to in the 30 April 2009 communication from Mr Jacob) was not the same dispute as that which arose out of the enactment of the Reserve Law.[183]

67. The Claimants rely on the following facts in particular:

(i) Contrary to Venezuela's submission, the Claimants' activities were not governed by the 2001 Hydrocarbons Law.[184] Accordingly, SEMARCA was not required by law to

[174] Reply [81], T2/295/10-20.
[175] Reply [82], T2/295/21-22.
[176] Reply [85], T2/296/3-4, 10-16.
[177] Reply [102]. Cf Factor (ii) above.
[178] T1/112/9-19, T2/293/12-21.
[179] T1/110/14-21, T1/111/1-3.
[180] T1/113/4-20.
[181] Rejoinder [90].
[182] Rejoinder [91]; T1/238/13–18 quoting *Right of Passage over Indian Territories* 34.
[183] Rejoinder [95].
[184] T2/355/9-16.

provide continuous service; it was only required to provide to PDVSA those services which were contractually negotiated.[185]

(ii) Between December 2008 and June 2009, PDVSA and PetroSucre paid over US$11m to SEMARCA.[186]

(iii) The Claimants' restructuring was commenced in 2008, before the events which Venezuela suggests made nationalisation foreseeable.[187]

(iv) The correspondence between SEMARCA and PDVSA in February 2009 showed that SEMARCA sought payment for services rendered, and was reluctant to enter into a *new* contract and keep sending money to Venezuela until payments were received, and PDVSA promised that payments would be forthcoming.[188]

(v) SEMARCA did not threaten to suspend its services in February 2009 but in *April* 2009 (after the restructuring) refused to extend them unless agreement was reached on certain issues.[189]

(vi) PDVSA paid a portion of the salaries of SEMARCA workers of its own accord and not because it had to.[190]

(vii) PDVSA never requested that SEMARCA adjust its tariffs and SEMARCA had not substantially increased them since 2006.[191]

(viii) The Claimants were never warned that the Government would expropriate any supplier that suspended its services and none of the articles cited by Venezuela substantiate this assertion,[192] and in any case SEMARCA never interrupted its operations until the day it was seized.[193]

(ix) If there was a dispute, it was not between the Claimants and Venezuela but with PDVSA, which cannot be equated with the state.[194]

(x) Accordingly, they say that the enactment of the Reserve Law came as a complete surprise and without any prior announcement.[195] Moreover, there is no reference in

[185] T2/358/6-18.
[186] Counter-Memorial [11]–[12].
[187] T2/360/8-9, T2/361/6-10.
[188] T1/220/5-14 citing Ex. R-47, C-25 and R-48.
[189] Counter-Memorial [13]; Rejoinder [74], [78].
[190] Rejoinder [75].
[191] Rejoinder [73].
[192] Rejoinder [76], [79]–[80]; T1/227/2 ff citing Ex. R-77, R-40, R-43, R-41.
[193] T1/226/2-8.
[194] Counter-Memorial [15]; T1/235/10-15.

> the Reserve Law itself to continuity of services, which undermines Venezuela's argument that it was enacted as part of a single ongoing dispute about continuity of service.[196]

68. The Claimants say that this is supported by the investments they made in Venezuela during this time,[197] which show that they saw a long-term future for Tidewater in Venezuela,[198] and while they were reluctant to renew contracts while payments were in arrears, they saw the problems their investment was facing as 'short-term challenges', given PDVSA's 'repeated assurances it would pay the arrears.'[199] This is supported by the statement by Mr Dean Taylor, CEO and Chairman of the Board of Tidewater, on 14 May 2009, that Tidewater did not want to abandon the Venezuelan market unless absolutely necessary.[200]

69. The Claimants reject Venezuela's attempt to infer from the non-disclosure of the privileged communications, or the sequence of correspondents, that the purpose of the restructuring was to obtain access to jurisdiction for this dispute.[201]

70. The Claimants submit that the restructuring undertaken by Tidewater was not done in anticipation of litigation but (i) to achieve better protection for Tidewater's investments in Venezuela generally;[202] (ii) to achieve a better tax structure;[203] and (iii) because Tidewater was already familiar with doing business in Barbados and it was economical to set up business there.[204] The restructuring was part of a 'unified corporate strategy'[205] and it was not effected immediately after the 2004 United States statute that made tax benefits available because it was only in 2008 to 2009 that Tidewater Caribe's dividends increased sufficiently to justify the restructuring.[206]

71. The Claimants deny that Tidewater Barbados is a 'paper company.'[207]

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[195] Counter-Memorial [19], [235], T1/196/21–197/1.
[196] T2/353/19–354/3.
[197] T1/199/5-16, T1/200/1 ff.
[198] Counter-Memorial [28]–[35], [182]–[187]; Rejoinder [82]–[87].
[199] T1/198/22–199/4.
[200] T1/202/20.
[201] Counter-Memorial [40]–[41]; Rejoinder [81].
[202] Counter-Memorial [23].
[203] Counter-Memorial [24]; Reply [96]–[100]. See Supplemental Direct Testimony of Kevin Carr [5].
[204] Counter-Memorial [26]–[27], [181].
[205] T1/215/4-5.
[206] T1/217/1-9.
[207] Counter-Memorial [188]–[189], [234].

72. Accordingly, the Claimants submit that none of the 'factors' extracted by Venezuela from the cases point to a finding of treaty abuse,[208] and argue that the restructuring was not done in order to access arbitration in respect of an existing dispute or in anticipation of litigation.[209]

[208] T1/207/17–209/17.
[209] Rejoinder [116].

III. THE TRIBUNAL'S ANALYSIS

A. Introduction

73. The Tribunal will now analyse in turn each of the objections to jurisdiction advanced by the Respondent in the order in which they were argued by the parties:

(a) Whether Article 22 of Venezuela's Investment Law is effective to confer jurisdiction in relation to the claims of all of the Claimants; and,

(b) Whether the Barbados BIT is effective to confer jurisdiction in relation to the claims of the Second Claimant, Tidewater Barbados, and the Third Claimant, Tidewater Caribe (together 'the Treaty Claimants').[210]

74. The Tribunal is empowered to determine these questions by virtue of Article 41(1) of the ICSID Convention, which provides that '[t]he Tribunal shall be the judge of its own competence.'

B. First ground of jurisdiction: Article 22 of the Investment Law

1. Consent in writing under Article 25(1) of the ICSID Convention

75. The starting-point for any analysis of the question whether a tribunal constituted under the ICSID Convention has jurisdiction to determine a dispute is the master provision in the Convention itself, namely Article 25(1), which provides, in relevant part:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, *which the parties to the dispute consent in writing to submit to the Centre.*[211]

Thus, as the framers of the Convention emphasised, '[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre.'[212]

76. The proper construction of Article 22 of the Investment Law has given rise to arguments of considerable legal sophistication. It was indeed presciently observed in the leading Commentary on the ICSID Convention that this Article 'is drafted in ambiguous terms and is likely to give rise to difficulties of interpretation, notably as to whether it contains an

[210] Request for Arbitration, [30]; T1/188/12-14.
[211] Emphasis added.
[212] Report of the Executive Directors on the Convention [23].

expression of Venezuela's consent to ICSID arbitration or not.'[213] Nevertheless, at its heart, the question before this Tribunal is simply whether Article 22, on its proper construction, constitutes consent in writing on the part of Venezuela to submit this dispute to ICSID arbitration. In other words, does this provision of a municipal statute operate so as to produce the effect on the international plane prescribed by Article 25(1) of the ICSID Convention?

77. From the outset of the Convention, it was envisaged that one method by which a state might give its consent in writing is in municipal investment promotion legislation:[214]

> Thus, 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.

The first example of a finding that municipal investment promotion legislation did constitute consent in writing to ICSID arbitration is found in the Decision on Jurisdiction in the '*Pyramids*' arbitration[215] in which the tribunal interpreted Article 8 of the Egyptian Investment Law. But it is axiomatic that each document alleged to constitute consent in writing for the purpose of the Convention must be interpreted on its own terms in order to determine whether it does in fact give rise to such consent.

78. The Tribunal notes that the question of whether Article 22 of the Venezuelan Investment Law does constitute consent has been argued before three other ICSID arbitral tribunals, whose decisions on the point have been cited to it in these proceedings.[216] Nevertheless, the present Tribunal will determine the question afresh, in the light of the submissions, and the expert evidence, placed before it. It proposes to do so by examining:

(a) The approach to be applied to the interpretation of Article 22 as an instrument of consent; and then,

(b) The correct interpretation of Article 22 produced by that approach.

[213] Schreuer et al *The ICSID Convention: A Commentary* (2ed, Cambridge UP, 2009) 363 [46].
[214] Report of the Executive Directors on the ICSID Convention [24].
[215] *SPP v Egypt*.
[216] *Mobil v. Venezuela, Cemex v. Venezuela* and *Brandes v. Venezuela*. One of the arbitrators in the present arbitration, Professor Stern, also served as one of the arbitrators in *Brandes*.

2. Legal principles applicable to the interpretation of Article 22

(a) Fundamental elements

79. Although the parties disagreed on several aspects of the approach which they respectively contended ought to be adopted by the Tribunal to the interpretation of Article 22, nevertheless, the Tribunal finds that there was a broad measure of agreement as to the following fundamental elements:

(a) Both parties accepted that both international law and Venezuelan law have a role to play (though they differed as to the nature of these respective roles);[217]

(b) Both parties accepted that the provision had to be interpreted in good faith;[218]

(c) Both parties accepted that, in arriving at the meaning of the provision, the interpreter was entitled to have regard to a list of factors that were fairly consistent across the various approaches, namely the natural and ordinary meaning of the text, the context, the object and purpose of the provision and the surrounding circumstances.[219]

80. The Tribunal agrees with each of these propositions. It will, however, elaborate on the applicable principles, which require that two questions be answered: the first one is whether national law has a priority role to play as argued by Venezuela, or whether essentially international law applies to the interpretation of a national law like the Investment Law, as argued by the Claimants; the second question is, if international principles of interpretation are applicable, should one use the rules for the interpretation of treaties or rules for the interpretation of unilateral acts?

(b) National law or international law?

81. Should the Tribunal apply national rules of interpretation or the international rules of interpretation? It is the Tribunal's view that the Investment Law being a municipal legal instrument susceptible to having effects on the international plane, both national rules of interpretation and international rules of interpretation have their role to play.

82. In addressing this question of consent under Article 25, a tribunal is not bound to apply only host state law, even in a case where one of the parties' consent derives from host state law. This question has already been addressed by other ICSID tribunals.

[217] Respondent: T2/266/17–267/16; Claimant: T2/306/1-7, T2/316/15–317/8.
[218] Respondent : T2/275/4-6 ; Claimant : T2/315/16-17.
[219] Respondent: T2/273/14-20 ; Claimant: T2/315/21–316/5.

83. Thus, in *SPP v Egypt,*[220] the source of the state's consent was a provision in its investment law. Egypt submitted that the jurisdictional issues were governed by Egyptian law, and that, pursuant to the Egyptian Civil Code, no effective arbitration agreement had been concluded. This submission was rejected by a tribunal presided over by Jiménez de Aréchaga. It applied instead general principles of interpretation and international law to the question of consent, stating that:

> Thus in deciding whether in the circumstances of the present case Law No. 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.[221]

84. In *CSOB v Slovakia,* the tribunal's jurisdiction was derived from a contract. The tribunal held nevertheless that:

> The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention.[222]

85. However, in *Zhinvali* v *Georgia*, a case where the instrument of consent was a municipal investment protection statute, the tribunal opined that:

> … if the national law of Georgia addresses this question of 'consent', which the Tribunal finds that it does, then the Tribunal must follow that national law guidance but always subject to ultimate governance by international law.[223]

86. The Tribunal does not consider that national law has to be completely disregarded, but considers that logic implies that an act, which is both rooted in the national legal order and extends its effects in the international legal order, has to be interpreted by reference to both legal orders. Thus, an ICSID tribunal determining its jurisdiction is not required to interpret the instrument of consent according primarily to national law, but rather has to take into account the principles of international law. The next question naturally is to determine which principles of international law are applicable.

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[220] *SPP v Egypt* [55]–[61].
[221] *SPP v Egypt* [61].
[222] *CSOB v Slovakia* [35].
[223] *Zhinvali v Georgia* [339].

(c) Which principles of international law?

87. The Respondent presented arguments for a restrictive approach, by reference to the ILC Unilateral Declaration Principles. Indeed, the Respondent seeks to argue, on various grounds, that the Tribunal ought to take a more restrictive approach to interpretation of Article 22 than might be the case with other instruments. In the first place, the Respondent alleges that Article 22 ought to be treated as the unilateral declaration of a state to be construed in accordance with the ILC Unilateral Declaration Principles, Principle 7 of which requires declarations to be 'interpreted in a restrictive manner.' For the reasons set out below, the Tribunal does not accept that it must do so.

88. To the extent that Article 22, as a provision in a municipal law statute, is alleged to produce the prescribed effect of state consent under Article 25(1) of the ICSID Convention, it may be analysed as a unilateral declaration of a state. That is to say, it is a statement made unilaterally by an organ of the state, namely the legislature, which may, according to its proper construction, produce legal effects on the international plane vis-à-vis other states, namely the Contracting States to the ICSID Convention and their nationals. The Working Group of the International Law Commission, when engaged initially in defining the scope of its work on unilateral declarations, accepted that internal acts ('laws, decrees, regulations') need not be treated as unilateral acts, but 'internal acts that may have effects on the international plane … should be included to the extent that such unilateral acts create legal situations which are opposable in conformity with international law.'[224]

89. In the Tribunal's view, the critical distinction is not whether the source of the unilateral act is found in municipal legislation, but rather whether the act is undertaken within, or outside, the framework of a treaty, and in particular a treaty that provides for the possibility of submission to the jurisdiction of an international court or tribunal. Where the question is one of the legal effects in international law to be attributed to the unilateral statements of a state offered outside any treaty framework, one might well accept that a restrictive approach should be adopted, so as to separate from the numerous statements made by heads of state, heads of government and foreign ministers, that much smaller category of such statements that were really intended to produce legally binding effects on the international plane. The same point may equally be made in relation to municipal legislation. The great majority of legislation enacted by states produces its effects solely on the

[224] [1997] Ybk ILC Vol II(2), [205], Ex. CL-112.

municipal plane, and one must carefully distinguish the much smaller category of cases in which the state intended its legislation to produce opposable effects in international law.

90. But these considerations do not apply where the action of the state, whether expressed in legislation or in some other form of statement, is undertaken expressly by reference to an international treaty to which the state is (or wishes to become) a party. In that situation, the treaty itself provides the legal framework within which the effect of the statement is to be determined, and so it is both unnecessary and inappropriate to add an additional standard to that provided under the relevant treaty to the interpretation of the state's act. It was for this reason that the Working Group of the ILC left this category of acts that have a treaty connection out of the scope of its work on unilateral declarations.[225]

91. In other words, a national law which is intended to have some effects on the international plane might be subject to the restrictive interpretation provided for in the ILC Unilateral Declaration Principles, but this does not apply to a national law which is adopted in the framework of an international treaty, even if such law is an exercise of the freedom of the state to act on the international plane, as has been outlined by the ILC Working Group on unilateral acts:

> 203. The Working Group bore in mind that, in the process of treaty formation, amendment, execution, termination, and so on, States carry out acts which, prima facie, are unilateral in character when viewed in isolation (for example, accession, denunciation, reservation, withdrawal). The Working Group nonetheless considered that the characteristics and effects of such acts are governed by the law of treaties and do not need to be dealt with further in the context of the new study proposed.
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> 204. Similar arguments were presented in discussing the possible inclusion of unilateral acts carried out by States in the context of international justice. Mention was made in particular of the characterization of acceptance of the optional clause in article 36, paragraph 2, of the Statute of ICJ as a unilateral act. The Working Group was inclined to leave this category of acts out of the study taking the view that such acts have a treaty basis.
>
> 205. The same position was taken with regard to internal acts (laws, decrees, regulations) that do not have any effect at the international plane. However, internal acts that may have effects on the international plane, such as fixing the extent of the various kinds of maritime jurisdiction (territorial sea, contiguous

[225] Ibid [203]–[204].

> zone, economic zone, baselines), should be included to the extent that such unilateral acts create legal situations which are opposable in conformity with international law.[226]

92. In the Tribunal's view, different kinds of unilateral acts have to be distinguished, *i.e*. purely unilateral acts, called in the work of the ILC unilateral acts *stricto sensu*, to which the Guiding Principles apply; unilateral acts which are a cause or a consequence of a treaty – like acts implicated in the formation or the execution of the treaty – to which apply the rules of interpretation of the VCLT; and finally unilateral acts which are adopted freely but in the framework of a treaty which recognizes this freedom of action, to which apply some specific rules, whose content the Tribunal will now explain.

93. Clearly, the Investment Law is one of those unilateral acts, freely entered into by a state, but taken in the framework of a treaty that leaves all its freedom to the state. In this sense, it can be considered as being analogous to a unilateral declaration of a state accepting the compulsory jurisdiction of the ICJ, in the framework of Article 36 (2) of the Statute of the Court.

94. The Tribunal is therefore minded to take inspiration from the analysis adopted by the ICJ for the interpretation of a unilateral declaration of compulsory jurisdiction to the ICJ, which is very similar to a unilateral offer to arbitrate, the difference being that in the first case the offer to accept the jurisdiction of an international court is made to the other states and in the second case the offer to accept the jurisdiction of an international arbitral tribunal is made to the nationals of the other states, both being offers that will deploy their effect on the international plane.

95. A first remark is that when a state decides to extend an offer to arbitrate to foreign investors in a municipal law, it is free to do so and it can be considered as a unilateral act taken in the exercise of the state's sovereign powers. The ICJ analyzed in the same manner a unilateral declaration of compulsory jurisdiction: 'A declaration of acceptance of the compulsory jurisdiction of the Court … is a unilateral act of State sovereignty. At the same time, it establishes … the potential for a jurisdictional link with the other States ….'[227]

96. These unilateral acts are neither to be interpreted according to the rules of the VCLT, nor according to the rules stated in the ILC Unilateral Declaration Principles; they have their own

[226] Ibid, [203]–[205].
[227] *Fisheries Jurisdiction Case (Spain v Canada)* [46].

rules of interpretation. In the *Fisheries* case, the ICJ clarified this point in the following manner:

> The régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties …. The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction.[228]

97. These *sui generis* rules applicable to unilateral offers of jurisdiction imply that the interpretation is performed:

> in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a … State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.[229]

98. One of the specificities of the *sui generis* rules applying to the interpretation of the kind of unilateral act at stake here is that the unilateral act 'should be interpreted in a manner compatible with the effect sought by the … State.'[230]

99. Another specificity is that it has not to be interpreted restrictively, since it takes place in the conventional context of a treaty. Thus, declarations of a state that fall for assessment in terms of whether they produce effects within the context of a treaty framework – and in particular the effect of submission to the jurisdiction of an international tribunal – are not subject to the restrictive approach to be taken for other kinds of unilateral declarations. Such an approach does not limit a state's freedom to act, since the state retains full power to decide whether to enter into the treaty in question and whether to take advantage or not of the possibilities offered by the treaty.

100. Thus, an ICSID tribunal determining its jurisdiction is required to consider directly whether there is the requisite evidence of consent required by Article 25(1) of the ICSID Convention, having regard to the common will of the parties on which arbitration is grounded and the

[228] Ibid.
[229] Ibid [49].
[230] Ibid [52].

general principle (widely applied in municipal law as well as in international law) of good faith.

(d) The Tribunal's conclusion on the approach to interpretation

101. The Tribunal therefore approaches the question of the interpretation of Article 22 without adopting an *a priori* position which is either restrictive or expansive. As it was rightly put in the *Pyramids* Decision:[231]

> [J]urisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant.

Putting the point in the present Tribunal's own words, it will proceed to find that it has jurisdiction if, but only if, the existence of the consent in writing of both parties to its jurisdiction is clear.

102. The Tribunal finds itself largely in agreement with the general step-by-step approach to interpretation of instruments of consent proposed by the Claimants[232] which it restates to some extent in its own words as follows:

(1) The first step is to look at Article 25(1) of the ICSID Convention itself in order to determine whether the statement is capable of constituting a party's consent to ICSID jurisdiction.

(2) In order then to determine whether the content of the statement expresses such consent one must look to general international law applicable to this type of unilateral act, since the issue is to determine the effects of the statement for the purposes of the ICSID Convention as a matter of international law.

(3) Such a statement has the character of a unilateral declaration. But it is a unilateral declaration formulated within the context of a treaty. Accordingly, for the reasons that the Tribunal has already explained, the ILC Principles are not applicable.

(4) Rather, a unilateral declaration alleged to constitute consent to the jurisdiction of an international tribunal is to be interpreted in accordance with the approach set out by the International Court of Justice when interpreting declarations of acceptance of the Court's jurisdiction.

[231] *SPP v Egypt* 141 [63].
[232] T2/304/3–317/10.

(5) This means that the declaration must be interpreted in good faith 'as it stands, having regard to the words actually used'[233]; 'in a natural and reasonable way, having due regard to the intention of the State concerned.'[234] That intention can be deduced from the text, but also from the context, the circumstances of its preparation and the purposes intended to be served.

(6) Municipal law is relevant to determine the existence and validity of the instrument at issue and may help to ascertain the intention of the state. But the question whether the statement constitutes consent for the purpose of Article 25(1) of the ICSID Convention is, for the purpose of this Tribunal determining its own competence under Article 41 of the Convention, a question of international law.

3. Concrete application to the interpretation of Article 22

(a) The limited application of Venezuelan legal interpretation

103. As just mentioned, domestic law has a role to play first in order to ascertain the existence and validity of the national law, but also in order to help understanding the intention of the state in adopting such law.

104. Venezuela argues that, as a matter of Venezuelan law, Article 22 does not constitute a standing consent to ICSID arbitration and that this Tribunal ought to apply and give effect to restrictive rules of Venezuelan law in this regard. The Tribunal has carefully considered the submissions of the parties on the interpretation of Article 22 under Venezuelan law; the Expert Opinions of Professor Urdaneta Fontiveros, filed on behalf of the Respondent and of Professor Ayala Corea filed on behalf of Claimants; and in particular the Judgment of the Supreme Tribunal of Venezuela on the interpretation of Article 22.[235] The parties' experts disagree on the proper interpretation of Article 22. Further Professor Ayala Corea takes issue with the Judgment of the Supreme Tribunal on a number of grounds. Neither party nor the Tribunal wished to cross-examine either of these experts.

105. This Tribunal does not find it necessary to its decision to decide the issues of interpretation under Venezuelan law, nor, for that purpose to determine any conflict of evidence between the experts. That is because the experts agree that the Venezuelan law principles of statutory interpretation require determination of the meaning 'that is evident from the proper meaning of the words, according to their connection among themselves and the

[233] *Anglo-Iranian Oil Co Case* 105.
[234] *Fisheries Jurisdiction Case (Spain v Canada)* [49].
[235] Decision No 1541 on Interpretation Request dated 17 October 2008, Ex. EU-29.

intention of the Legislator,'[236] which is in full coherence with the international principles applicable to the case. Where they disagree is as to the proper application of those principles to the interpretation of Article 22 as a Venezuelan legislative instrument.

106. But the question with which this Tribunal is concerned is the interpretation of Article 22 in order to determine whether it produces the effect specified under Article 25 of the ICSID Convention on the plane of international law. This question the Tribunal must answer for itself, adopting the general principles of construction which have been outlined by the Tribunal.

107. It also follows that this Tribunal is not bound by the decision of the Supreme Tribunal of Venezuela. While this decision is entitled to respectful consideration, the present Tribunal is bound by Article 41 of the ICSID Convention to be the judge of its own competence.

(b) Text

108. With these considerations in mind, the Tribunal returns to the text of Article 22 itself, which it will be convenient to restate here:

> 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 Constituvo 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 éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente.

109. The parties each prepared English translations of Article 22. These differ slightly in the nomenclature used. But the Tribunal is satisfied that its decision on the effect of Article 22 does not turn upon any difference in the English translations, nor was it contended by the parties that the differences were material.[237] In any event, the Tribunal has considered the interpretation of Article 22 directly in the original and authoritative Spanish text as well as by

[236] Art 4 Venezuelan Civil Code Ex. EU-4 ; Ayala Opinion [15] ; Urdaneta Supp. Opinion [4].

[237] Claimants translate 'si así éste lo establece' as 'if it so establishes' and Respondent prefers 'if it so provides.' However, Respondent pleads that '[t]he word "establishes" could also be correct, but only in the sense of *if the treaty or agreement establishes that the type of dispute should be submitted to arbitration,* not in the sense of *if the treaty or agreement establishes the fundamental rules and framework of arbitration*' Reply [34] n 60. The Tribunal therefore approaches this point of dispute between the parties as one of substantial meaning rather than semantic translation.

reference to the parties' English translations.[238] For ease of reference, it now reproduces below a consolidated translation derived from those prepared by each of the parties. Where there is a difference in the translation, the Claimants' text appears first[239] and then the Respondent's alternative formulation.[240] The Tribunal gives each translation equal weight:

> Controversies [disputes] that may arise [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 controversies [disputes] in respect of which [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) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so establishes [provides], without prejudice to the possibility of using [making use], as [when] appropriate, [of] the contentious [dispute resolution] means contemplated by [provided for under] the Venezuelan legislation in effect.

110. The text contemplates three different types of treaty that may be applicable to the dispute. Each of these cases is stated disjunctively and concerns respectively:

(1) First case: A treaty on the promotion and protection of investments in effect between an international investor's country of origin and Venezuela;

(2) Second case: The Convention establishing the Multilateral Investment Guarantee Agency (MIGA);[241] or,

(3) Third case: The ICSID Convention.

111. One such category, the Second case (disputes under the MIGA Convention), is not concerned with disputes with an investor at all, but rather with disputes concerning investment guarantees entered into with the Agency itself.[242] The other two categories are concerned with disputes involving international investors:

- In the First case, the express words of the Article refer to disputes that may arise with 'an international investor …';

[238] The procedural languages of the arbitration are both English and Spanish: First Session, [7.1]. If there had been a material difference between the Spanish original and the English translations of the Investment Law, the Tribunal would have treated the Spanish text as authoritative in favour of either of the English translations. The Tribunal is satisfied that there are no material differences.
[239] Counter-Memorial [59].
[240] Memorial [37].
[241] Convention establishing the Multilateral Investment Guarantee Agency (signed 11 October 1985, entered into force 12 April 1988).
[242] Ibid Art 57 and Annex II.

- In the Third case, the very name of the ICSID Convention (recited in the Article) refers to 'disputes between States and nationals of other States.'

112. To each of these three cases, Article 22 adds a condition and a proviso:

(a) The dispute may only be submitted to arbitration 'according to the terms of the respective treaty or agreement, if it so establishes/provides'; and,

(b) Such submission is without prejudice to the possibility of using dispute settlement mechanisms provided for under Venezuelan law 'as/when appropriate.'

(c) Textual context

113. Article 22 appears as the second of three operative provisions within Chapter IV of the Investment Law, which deals generally with 'Dispute Resolution.' The first of these provisions, Article 21, deals with inter-state disputes in cases where there is no treaty in force. It provides:

> Any controversy that may arise between the State of Venezuela and an international investor's country of origin with which there is no treaty or agreement on investments, concerning the interpretation and application of the provisions herein, shall be solved by diplomatic means. Should an agreement not be made within twelve (12) months following the date in which the controversy began, the State of Venezuela shall propose the submission of the controversy to an Arbitration Tribunal whose composition, appointment mechanism, proceedings and regulations of fees shall be agreed upon with the other country. The decisions of this Arbitration Tribunal shall be final and mandatory.

114. The two ensuing articles then deal with other investment disputes. Article 22 deals with cases in which there is an applicable treaty. It is then followed by Article 23, which provides for other disputes of investors generally under the Investment Law. As already noted, it provides:

> Any controversy that arises in relation with the application of this Decree-Law, once the administrative remedies have been exhausted by the investor, may be submitted to the Domestic Courts or to the Venezuelan Arbitration Tribunals, at the investor's discretion.

115. Pausing at this point in the analysis, it may be observed that the general structure and intent of Article 22 may be discerned from its text, when viewed in the context of Chapter IV of the Investment Law as a whole:

- Inter-state disputes are provided for by way of *ad hoc* arbitration to be settled by *compromis* agreed with the other state under Public International Law (Article 21);
- Disputes under treaties are to be resolved by international arbitration if the treaty so establishes or provides (Article 22);
- In the case of all other disputes under the Investment Law, investors have the choice of Venezuelan courts or Venezuelan arbitral tribunals (Article 23).

116. The Investment Law carefully defines an 'international investor' – being the category of investors referred to in Article 22 – by Article 3(4) as '[t]he owner of an international investment or whoever effectively controls it.' An international investment is, according to Article 3(2) '[t]he investment that is the property of, or is effectively controlled by foreign natural or legal persons.'

117. By contrast, Article 23 refers simply to 'the investor.' It is not by its terms limited to international investors, but can apply to both international and Venezuelan investors. Article 1 states that the Law applies generally to investors 'both domestic and foreign.' Thus, the avenues of dispute resolution afforded by Article 23, being court proceedings or arbitration in Venezuela, apply equally to international and Venezuelan investors. Article 23 therefore operates as a catch-all provision in respect of any disputes by any investor in relation to the application of the Investment Law that are not otherwise provided for in Article 22. These may, at the investor's election, be submitted to adjudication or arbitration in Venezuela. This is reinforced by the without prejudice proviso at the end of Article 22, which directs attention, even in the case of international investors, to the possibility of applying Venezuelan dispute resolution mechanisms as/when appropriate.

(d) Historical context

118. The Respondent advances arguments based upon the historical context against the background of which it contends Article 22 was promulgated and which, according to it, demonstrates that Article 22 could not have been intended to serve as standing consent. It refers to Venezuela's historical antipathy to international arbitration in general, and in particular in cases where the state itself is a party.

119. The Tribunal accepts that the general historical and legal context, both under municipal law and under international law, within which a legislative instrument alleged to constitute consent was promulgated may well provide helpful evidence as to its interpretation. But in the present case, it does not find the material advanced by the Respondent to be helpful.

120. The Tribunal does not have in the arbitration file any documents pertaining directly to the legislative history of the Investment Law. Indeed, when requested to produce such material by the Claimants, the Respondent replied that it had no such documents.[243] When ordered by the Tribunal to undertake a fresh search, the Respondent confirmed on enquiry that it had no such documents.[244]

121. The documents adduced by the Claimants prepared by Ambassador Corrales, Venezuela's Permanent Representative at the World Trade Organisation in Geneva, do not, in the Tribunal's view, advance matters materially. Although the Respondent accepts that Mr Corrales participated in discussions regarding the Investment Law,[245] the views of Mr Corrales cannot be imputed to the legislature. In any event, only one such document predates the passing of the Investment Law. In it, Mr Corrales observes: 'in our view, a regime applicable to foreign investments must leave open the possibility to resort to international arbitration, which today is accepted almost everywhere, by means of the mechanism provided for in the [ICSID] Convention ….'[246] It can readily be accepted that Article 22 does indeed leave open such a possibility. But this statement is ambiguous on the issue that the Tribunal must decide, namely whether Article 22 constitutes an open offer by the Venezuelan State to international investors to resort to ICSID arbitration.

122. The Respondent's submissions on historical context do not relate directly to the framing of the Investment Law. Rather, they concern earlier periods in the history of Venezuela or other acts of the President of Venezuela taken in relation to other legislation. Both parties accept, however, that the Investment Law was lawfully promulgated by President Chávez, and indeed remains in force. The title of the law is 'Decree with status and force of law for the promotion and protection of investments.' Article 1 provides:

> This Decree-Law is intended to provide investments and investors, both domestic and foreign, with a stable and foreseeable legal framework in which they may operate in an environment of security, through the regulation of the State's action toward such investments and investors, with a view toward achieving the increase, diversification and harmonious integration of investments in favor of the domestic development objectives.[247]

[243] Procedural Order No 1, [17].
[244] Respondent's letter dated 13 April 2011.
[245] Reply [59].
[246] Ex. C-155 dated 30 April 1999.
[247] Ex. C-9; Ex. EU-1. The translation given is the Claimants', but there are no material differences.

123. To the extent that it is alleged that Venezuela maintained a policy against arbitration of investment disputes at the relevant time, the Tribunal notes that, in addition to Article 22 itself, the Investment Law provides in Article 23 for a right on the part of any investor to resort to Venezuelan arbitral tribunals for the resolution of disputes relating to the application of the Investment Law.

124. Moreover, Venezuela had signed the ICSID Convention on 18 August 1993. The Venezuelan Parliament had passed the necessary enabling legislation on 10 August 1994.[248] Venezuela deposited its instrument of ratification on 2 May 1995. The Convention had entered into force for Venezuela on 1 June 1995.[249] As at 1999, Venezuela had entered into at least 15 bilateral investment treaties providing for international arbitration of investor-state disputes,[250] including the Barbados BIT which was signed on 15 July 1994 and entered into force on 31 October 1995. In the light of these international acts, the Tribunal is unable to conclude that, as at 1999, Venezuela maintained a fixed policy hostile to the international arbitration of investment disputes with the Republic which might shed relevant light on the interpretation of Article 22.

(e) Submission if the respective treaty so establishes/provides

125. For present purposes, however, the critical question before the Tribunal is to establish the meaning in the context of Article 22 of the condition applicable to all three of the treaty cases contemplated therein that such dispute 'shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so establishes/provides.'

126. In the Tribunal's view, part of the apparent difficulty with this condition is the linguistic tension between the use of the mandatory direction 'shall be submitted to international arbitration' which is then immediately qualified by the phrase 'if it so establishes/provides.' Yet, in the context of the role that Article 22 plays within Chapter IV as a whole, this structure of direction and qualification makes sense.

127. Compendiously, Article 22 is designed to ensure that provision is made for the option of dispute resolution by way of international arbitration in cases in which Venezuela has assumed a treaty obligation under international law so to provide. It follows, therefore, that the provision for international arbitration contemplated by Article 22 must be one that

[248] Ex. C-123.
[249] Venezuela denounced the Convention on 24 January 2012. The denunciation took effect on 25 July 2012. In accordance with Art 72 of the Convention, such notice does not affect the obligations of a Contracting State arising out of consent to the jurisdiction of the Centre given by it before such notice was received by the depositary.
[250] Ex. C-125.

accords with the terms of the relevant treaty, since Article 22 makes no provision for international arbitration save to the extent that the relevant treaty makes such provision. In other words, Article 22 refers to and respects the terms of Venezuela's international obligations to submit disputes to international arbitration, but does not do more.

128. In the First case, this qualification is necessary because the category of treaties contemplated by the First case is heterogeneous and not uniform. Each investment treaty contains its own unique terms, including as to investor-state dispute settlement. Indeed, the examples adduced by the Claimants of Venezuelan bilateral investment treaties show numerous different forms of dispute settlement provisions.[251] Nor is it necessary that an investment treaty, which protects investments made by investors of one state in the other state, makes provision for the resolution of disputes between investors and states by way of international arbitration at all. Such a treaty may validly engage the responsibility of the state to afford protection to foreign investors, but provide only for inter-state dispute resolution; or it may provide only for resolution by municipal courts. Alternatively, it may provide for investor-state arbitration, but only for a class of claims that is more limited *ratione materiae* than the total corpus of substantive rights vouchsafed under the treaty. All of these are solutions that may be found in contemporary investment treaty practice.

129. By adding the qualification presently under discussion, the Venezuelan legislator made it plain in its framework legislation on investment protection that all of these options remained open to the Venezuelan state. Thus, in the First case, the international investor would only have the right to resort to international arbitration if and to the extent that the relevant treaty provided for it and not otherwise.

130. In the Second case, the legislator denoted no more and no less than the standing mandatory consent to arbitration of disputes between the Multilateral Investment Guarantee Agency and the member states expressly contained in the MIGA Convention itself, to which Venezuela is a party.[252]

131. What, then, of the Third case, namely the reference to the ICSID Convention, on which the Claimants rely in the present proceedings? In the Third case, the legislator is concerned with one treaty only, namely the ICSID Convention, to which a majority of the world's states are

[251] Ex. C-125.
[252] Art. 57 and Annex II MIGA Convention.

party.[253] But the terms of the ICSID Convention provide that the submission of a dispute under it to international arbitration is subject to the requirements of Article 25. As earlier stated, a fundamental tenet of the ICSID Convention is that 'no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.'[254]

132. Thus, the Tribunal agrees with the Claimants that the subject-matter of the phrase 'if it so establishes/provides' is 'submitted to international arbitration' with the consequence that 'the condition means, quote: If the ICSID Convention establishes submission to international arbitration.'[255] But the Tribunal does not accept the gloss added to this by Claimants that the reference to international arbitration denotes international arbitration as a *means* of dispute settlement.[256] Rather, in the Tribunal's view, all of Article 22 is concerned with cases where, by operation of the relevant treaty, there is, for the purpose of the dispute itself, a consent to submission to international arbitration. In the case of the ICSID Convention, that can only be achieved if and to the extent that the requirements of Article 25, including consent of both parties, are met. Otherwise, that fundamental requirement of the Convention would be subverted, which would not accord with the express terms of Article 22 of the Investment Law, which requires that the submission be 'according to the terms of the respective treaty.'

133. In the Tribunal's view, the argument that Article 22 itself supplies consent is circular, since the condition stated in Article 22 expressly refers to the respective treaty – here the ICSID Convention – for determination of whether it establishes or provides for a submission to international arbitration. Article 22 itself adds nothing further as to this question, which must be resolved according to the international treaty obligations assumed by Venezuela.

(f) Application of the principle of effectiveness

134. Now, Claimants argue that such an interpretation is contrary to the principle of *effet utile* because it would serve to empty this Third case contemplated by Article 22 of any useful effect. The Tribunal agrees that, in interpreting an instrument of consent for the purpose of Article 25(1) of the ICSID Convention, applying the principle of good faith, it should strive to

[253] As at 1999, 130 states (including Venezuela) had deposited instruments of ratification. As at July 2012, 158 had signed it and 147 (excluding Venezuela) had deposited instruments of ratification and had not denounced the Convention.
[254] Preamble ICSID Convention.
[255] T1/163/22–164/2.
[256] T1/164/3-4.

avoid an interpretation that either (i) leads to an impossibility or absurdity or (ii) empties the provision of the legal effect intended by the state.

135. But the Tribunal does not regard an interpretation of the Third case in Article 22 which requires the terms of the ICSID Convention itself to be met before a dispute may be submitted to arbitration under the Convention to have either of these consequences. Of course, as the Directors of the World Bank envisaged, a host state might in its investment promotion legislation offer to submit investment disputes to the jurisdiction of the Centre. But that is not the only means by which a state may give its consent in writing. As the Convention's framers pointed out: '[c]onsent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen.'[257] At the time that the Convention was developed, one of its most important objectives was to ensure that 'arbitration agreements voluntarily entered into would be implemented.'[258] In such a case, the parties' written consent is embodied in a contract, but its effect on the plane of international law is to engage the operation of the ICSID Convention as the procedural regime under which their dispute is to be resolved by binding international arbitration. Consent in writing established in this way provides a sphere of operation for a submission to arbitration under the Third case in Article 22 that is independent of either of the other cases. Such a submission is established/provided for under the ICSID Convention. It operates according to the terms of that Convention.

136. In addition to the instrument of consent, the Convention imposes other jurisdictional constraints on the operation of the parties' consent, such as the requirement that the dispute arise 'directly out of an investment' together with the nationality requirements of Article 25. Moreover, the manner in which the parties' consent operates to submit the dispute to international arbitration is prescribed in detail under the provisions of Chapter IV of the Convention, which, as is well-known, provides terms that are very different from those that apply to other forms of international arbitration.

137. If the Claimants' construction of Article 22 were adopted, it would have the consequence that all investment disputes with Venezuela involving nationals of any of the (currently) 147 states parties to the ICSID Convention would be, without more, subject to the jurisdiction of the Centre. In the Tribunal's view, such a construction would require clearer words in the Investment Law indicating the intention of Venezuela to give such general standing consent.

[257] Report of the Executive Directors on the ICSID Convention [24].
[258] Broches (1972) 136 Recueil des Cours 331, 345.

Such words are not to be found in the text of Article 22. On the contrary, a good faith interpretation of Article 22 in the light of the context of other elements of the Investment Law applicable to the resolution of disputes involving international investors negates such an intention.

138. If such a construction were adopted, it would create a significant overlap with the First case in Article 22, greatly reducing the purpose of that clause. Most of the bilateral investment treaties entered into by Venezuela with foreign states prior to 1999 themselves made provision for investor-state arbitration of disputes under those treaties within the framework of the ICSID Convention. If all disputes with investors of states parties to the ICSID Convention were to be treated as submitted to ICSID jurisdiction under the Third case, there would be much less purpose to be served by the First case, whose operation would be confined to choices of non-ICSID international arbitration, where permitted under the relevant bilateral treaty or, in rare cases, required because the other state is not a party to the ICSID Convention.

139. The approach submitted by the Claimants would also have wide-ranging implications for the jurisdiction *ratione materiae* of an ICSID arbitral tribunal and the applicable law. Article 22 is not stated to be concerned solely with disputes under the Investment Law, but rather refers generally to disputes arising under treaties. In the First case – a bilateral investment treaty – the scope of claims and the applicable law will be determined by the terms of the treaty itself. The same is true of the Second case – the MIGA Convention. In both of these cases, 'the terms of the respective treaty' will dictate the scope of the claims that may be submitted to international arbitration. Those will be claims arising under international law.

140. In the Third case – the ICSID Convention – the treaty itself supplies no substantive causes of action. Its choice of law clause, Article 42(1), refers to the 'rules of law as may be agreed between the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.' The ICSID Convention, including Article 42(1), would operate naturally in the event that the Third case is construed so as to require consent of the state by separate instrument. In the case of consent by arbitration agreement, the contract itself would supply the scope of the cause of action, to be determined according to its applicable law. In the case of consent to ICSID jurisdiction by bilateral investment treaty, the treaty will supply the scope of the cause of action under international law. In both of those situations, the ICSID tribunal would be acting, as contemplated by Article 22, 'according to the terms' of the ICSID Convention. But if the Third

case were to be interpreted as supplying consent for all disputes with international investors from states parties to the ICSID Convention, the scope of the causes of action submitted to international arbitration would not be clearly defined.[259]

(g) The Tribunal's conclusion on the first ground of jurisdiction

141. For all of the above reasons, the Tribunal concludes that Article 22 (Third case) does not operate so as to give the consent in writing of Venezuela to submit all investment disputes with nationals of other ICSID Contracting States to the jurisdiction of the Centre. Accordingly, the Respondent's first jurisdictional objection must succeed. The claims of all Claimants, other than the Treaty Claimants, being based solely upon this first ground of jurisdiction, are not within the competence of the Centre and the jurisdiction of the Tribunal and must therefore be dismissed.

C. Second ground of jurisdiction: Barbados BIT

1. Legal character of this jurisdictional issue

142. The second basis upon which Claimants invoke the jurisdiction of the Centre, and thus of this Tribunal, is by virtue of the provisions of Article 8 of the Barbados BIT. This provides, in relevant part:

> (1) Disputes between one Contracting Party and a national or company 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 March 18, 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.

[259] Art 22 may be contrasted with Art 23, which permits submission of disputes to Venezuelan courts or arbitral tribunals and does contain a limitation *ratione materiae* to the resolution of '[a]ny controversy that arises in relation with the application of this Decree-Law'.

> (4) Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph I of this Article to international arbitration in accordance with the provisions of this Article.

143. Claimants accept that their claim under the Barbados BIT is limited to the Treaty Claimants (Tidewater Barbados and Tidewater Caribe). They further accept that the jurisdiction of the Centre under this head is limited to Venezuela's alleged violation of its obligations under the Treaty. Since Article 8(1) requires that there be a dispute 'between one Contracting Party and a national or company of the other Contracting Party', Claimants accept that they 'could not have expected to obtain protection for pre-existing disputes; they expected to obtain prospective protection only against any actions in breach of the treaty the Respondent might take after the restructuring.'[260]

144. There is no jurisdictional dispute between the parties as to the validity or terms of the BIT. Rather, the Respondent objects to this second basis for jurisdiction on the sole ground that, according to it, Tidewater restructured its business by incorporating Tidewater Barbados and placing Tidewater Caribe under its ownership in order to gain access to ICSID in respect of a dispute that was already in existence or, alternatively, anticipated and foreseeable. This, submits the Respondent, is an abuse of the Treaty, which may not validly supply the basis for jurisdiction of the Centre, in such circumstances.

145. At the heart, therefore, of this issue is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen. Venezuela alleges that there was just one dispute between the parties that was already in existence well before Tidewater Barbados was incorporated, and accordingly the present claim falls outside the ambit of the protection of the Treaty. By contrast, the Claimants submit that the dispute which pre-dates the incorporation of Tidewater Barbados was between SEMARCA and PDVSA and solely concerned SEMARCA's arrears and whether SEMARCA would renew its contracts in light of those arrears. The Claimants say that the dispute arising out of the enactment of the Reserve Law is a different dispute with a different party and was unforeseen.

146. If the Claimants' contentions are found to be correct as a matter of fact, then, in the view of the Tribunal, no question of abuse of treaty can arise. On the other hand, if the Respondent's submissions on the course of events are correct, then there may be a real

[260] T1/193/14-19.

question of abuse of treaty. The distinction was well summarised by the tribunal in *Mobil v Venezuela* when it commented:

> As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.
>
> With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.["][261]

147. Since '[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case',[262] it is necessary for the Tribunal to carefully analyse the events of 2008 and 2009 in order to determine the nature of any disputes, the parties to them and when they arose or were reasonably in contemplation.

148. The Tribunal does this in order to evaluate each of the possibilities addressed by the parties in their submissions:

(1) *Existing dispute:* That the parties were already in a dispute concerning the same subject-matter prior to the incorporation of Tidewater Barbados and the transfer to it of the Venezuelan business on 9 March 2009, such that the dispute which is the subject of the present proceedings had already arisen; or alternatively, even if that were not the case,

(2) *Foreseeable dispute:* That the existence of the present dispute was within the reasonable contemplation of Tidewater at that time.

149. For the purpose of considering the first possibility, the Tribunal proposes to adopt the test set forth by the tribunal in *Lucchetti v Peru* that:

> [T]he critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter. The Tribunal considers that, whether the focus is on the 'real causes' of the dispute or on its 'subject-matter', it will in each

[261] *Mobil v Venezuela* [204]–[205], citing *Phoenix v Czech Republic* [144].
[262] Ibid [177].

> instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.[263]

150. In evaluating the second possibility, the Tribunal will consider whether 'the objective purpose of the restructuring was to facilitate access to an investment treaty tribunal with respect to a claim that was within the reasonable contemplation of the investor'.[264]

151. The parties cooperated to produce a core bundle of factual exhibits for the oral phase of the proceedings and supplemented this with careful submissions, which have greatly assisted the Tribunal. The following section describes the facts as the Tribunal finds them.

2. The Tribunal's findings of fact

(a) Tidewater's marine support business in Venezuela

152. Tidewater first established its operations on Lake Maracaibo in 1957, and as early as 1961 identified Venezuela's 'complex' political environment as particularly challenging. It did, however, operate in Venezuela from that date until 2009.[265]

153. As noted at the beginning of this Decision, the Claimants' operations in Venezuela were conducted through SEMARCA, a company incorporated in Venezuela. SEMARCA contracted with PDVSA, PDVSA Petróleo and PetroSucre to provide marine support services in the Gulf of Paria and Lake Maracaibo. SEMARCA had no general concession contract with PDVSA or the other companies to which it provided services in Venezuela. Despite having been established and done business there for half a century, such business was conducted on a running account basis, with individual contracts entered into for each provision of services. Thus, for example, in July 2008, SEMARCA entered into a six-month contract with PDVSA for supply of marine services on Lake Maracaibo.[266]

(b) Contractual dispute between SEMARCA and PDVSA

154. Accounts receivable owed to SEMARCA began to accrue in USD in June 2008 and in Bolivars in October 2008.[267] Nevertheless, SEMARCA continued to execute new or renewed contracts in respect of its operations in Venezuela through 2008. Its contract for services on Lake Maracaibo was extended on 26 November 2008. [268]

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[263] *Lucchetti v Peru* [50].
[264] Douglas *The International Law of Investment Claims* (Cambridge UP, 2009) 465.
[265] Ex. C-100, 23 & 26.
[266] Ex. C-21.
[267] Ex. C-25.
[268] Ex. C-31.

155. On 17 December 2008, SEMARCA requested that Tidewater transfer to it funds which were necessary to maintain its ongoing operations. Similar requests were made again on 5 February, 11 March, 20 March, 27 March, 3 April and 17 April 2009.[269]

156. On 16 January 2009, *El Universal* reported that PDVSA was struggling to pay its service suppliers but quoted its Director of Finance, Eudomario Carruyo, as saying that the arrears were 'an important amount, but manageable.'[270]

157. PDVSA Petróleo and PetroSucre continued to make payments to SEMARCA from late 2008 until mid-2009,[271] but these did not eliminate the arrears owing during that period. In summary, PDVSA paid approximately US$3 million in December 2008 and a further US$1 million on 6 March 2009. PetroSucre paid US$671,000 in December 2008, US$775,000 in February 2009, US$1,262,000 in April 2009 and a further approximately US$3 million in June 2009.

158. On 27 January 2009, Ensco International shut down the Ensco 69 rig in the Gulf of Paria in response to a lack of payment of arrears, which were said to have been under negotiation since December 2008. PetroSucre's employees then assumed operational control of the rig under Ensco supervision, with PDVSA describing Ensco's decision to shut down the rig as an attempt to exert pressure and a breach of Ensco's contract, which required that 30 days' notice be given before a party could validly cancel for breach.[272] PetroSucre's actions were described by *Forbes* on 30 January 2009 as the 'natural progression' of asset nationalisation in Venezuela.[273] Subsequently, in May 2009, Ensco gave formal notice of PetroSucre's breach of contract,[274] and on 6 June 2009 terminated the contract.[275]

159. On 28 January 2009, SEMARCA entered into a contract with Chevron for offshore maritime services in support of drilling in the Cardon block in Venezuela.[276] On 23 March 2009, a charter agreement was entered into with Chevron,[277] and on 24 March 2009, the Claimants sent two vessels into Venezuelan waters in fulfilment of this contract,[278] which remained

[269] Ex. C-66–C-72.
[270] Ex. R-39.
[271] Ex. C-27.
[272] Ex. R-44, Ex. R-45.
[273] Ex. C-77.
[274] Ex. C-42.
[275] Ex. C-41.
[276] Ex. C-85.
[277] Ex. C-86.
[278] Ex. C-87.

there until June 2009.[279] Similarly, on 12 February and 15 March 2009, SEMARCA submitted a proposal for services to Repsol.[280]

160. On 31 January 2009, PDVSA began paying salaries and other benefits directly to SEMARCA's employees who had not been paid since 15 December 2008, and sought a credit note from SEMARCA for the payments. [281]

161. On 3 February 2009, PDVSA issued a press release assuring service suppliers that arrears would be paid, but only if suppliers wrote off 40% of the outstanding balance. PDVSA also urged service providers to 'not engage in layoffs, or delay the payment of wages'[282] as a result of PDVSA's delay in payments to suppliers.

162. On 9 February 2009, PDVSA rated SEMARCA's performance in its 6-monthly performance review as 'excellent.'[283]

163. In a series of emails in February 2009, SEMARCA made it clear that it would not agree to renew its contracts unless the arrears were paid:

(a) On 17 February 2009, Mr Gerard Kehoe (Senior Vice President, Tidewater Inc.) had written to Eulogio del Pino of PDVSA explaining that SEMARCA had been seeking payment of its arrears since at least June 2008. Mr Kehoe said:

> Unfortunately, Semarca is at its limit for the financial conditions [necessary] to maintain continuous operations and the Tidewater Board of Directors does not want to send additional money from abroad to support operations while not receiving any payment for our invoices.[284]

(b) On 18 February 2009, Ms Rosalyn Sierra (Administrator of Aquatic Operations Contracts) forwarded a formal request from Mr Omar Vargas of PDVSA for an extension of 92 days on Contract 4627.[285]

(c) The same day, Mr Jacob replied that SEMARCA was:

> … pleased that PDVSA wishes to extend the contract for the Boats.

[279] Ex. C-88.
[280] Ex. C-91, Ex. C-89.
[281] Ex. C-29, Ex. R-49.
[282] Ex. R-40.
[283] Ex. C-33.
[284] Ex. C-25.
[285] Ex. R-47.

> Semarca exists to serve needs of PDVSA's vessels, however we cannot commit to any extension of the contract without arriving at an agreement regarding the payments.
>
> We are not asking for an increase in the fees, only that we receive payment for the services that have been provided and that we continue to provide.
>
> After this month, we do not have enough capital to keep maintaining our vessels in good conditions and in safe conditions for our crew.
>
> We find ourselves in a point where, without additional funds, we will have to place the vessels in the dock, one by one. We cannot in good conscience assume a new contractual obligation that we cannot perform with the quality we are used to providing to PDVSA.[286]

(d) On 19 February 2009, Mr Jacob again emailed Ms Sierra. He said that he was 'very worried concerning situation with the boats' contract' and that with only four days before the expiration of the contract it was still unclear whether PDVSA would extend it.[287] On 19 February 2009, Mr Jacob elaborated on Mr Kehoe's email. He said:

> PDVSA owes Semarca an excessive amount of money, by our standards, and nevertheless [we] continue providing services to PDVSA and have not halted operations due to lack of payment.
>
> ….
>
> We are reaching the point where we do not have enough capital to continue maintaining our vessels in good and secure condition for our crew. We cannot in conscience have a contractual obligation that we cannot fulfill with the high quality that we have come to give PDVSA. …
>
> Unfortunately, in order to continue, we must receive payments.
>
> ….
>
> All that we ask is that payment be made for services already provided, and that continue to be provided, to PDVSA.
>
> In the end, this situation of lack of payment is not sustainable and we are close to our breaking point.[288]

[286] Ex. R-47.
[287] Ex. R-47.
[288] Ex. C-25.

(e) On 24 February 2009, Mr del Pino replied to Mr Jacob's 19 February email that '[t]his week [PDVSA] will begin to regularize payments.'[289]

(f) On 28 February 2009, Mr Jacob formally refused Mr Vargas' request for an extension of the contract. He explained that PDVSA had 'changed the basis' of the contract when it had opted to pay crews directly, noted that the arrears remained unpaid, and continued:

> It is a fact that, without an immediate payment by PDVSA, we will not be able to maintain our vessels fit for the work, however, in reality, out [of] a sense of responsibility to the crew and to PDVSA, and with optimism that the payment situation will be soon normalized, we will not turn off the operations \yet [sic].
>
> In view of the situation, instead of a direct 3 month extension, we propose a 15 day extension, starting March 1st, to March 15th, 2009.
>
> At the end of this period, of course, we expect the situation regarding the payments to be, at least, solved, and that this new form of administrating the payrolls and benefits of the crew has ended.
>
> It is only in this manner that we can accept a long term extension.[290]

164. On 2 March 2009, Mr Kehoe and Mr Jacob communicated plans to send expatriate Tidewater employees to Venezuela.[291]

(c) Transfer of Venezuelan business to Tidewater Barbados

165. The Claimants began evaluating the structure of their investments in Venezuela in late 2008.[292] On 13 December 2008, Mr Mikael Jacob, SEMARCA's Area Manager, sought legal advice for the first time from Mr Ramón Azpurua (Venezuelan external counsel) regarding the Claimants' investments in Venezuela.[293]

166. The formal steps for the incorporation of Tidewater Barbados and its acquisition of the shares of Tidewater Caribe were taken in Barbados and Venezuela from 25 February to 9 March 2009:

(a) On 25 February 2009, Tidewater Barbados filed with the Registrar of Companies in Barbados its Articles of Organisation, as a company formed for the purpose of

[289] Ex. C-25.
[290] Ex. R-48.
[291] Ex. C-160.
[292] Carr Direct Testimony [9].
[293] Ex. C-19 (Claimants' Schedule).

'[h]olding and managing of marine transportation',[294] together with its Notice of Registered Office[295] and Notice of Managers;[296] and accordingly obtained its Certificate of Organisation;[297]

(b) On 2 March 2009, it executed its General By-law No 1,[298] as well as appointing Mr Lundstrom as Company Secretary;[299]

(c) On 4 March 2009, Tidewater Marine acquired all 300 shares in Tidewater Caribe from Tidewater, Inc.[300] The same day, Tidewater Barbados in turn acquired those 300 shares from Tidewater Marine.[301]

(d) On 9 March 2009, that share acquisition was recorded in the share register of Tidewater Caribe in Venezuela,[302] which transfer was certified in the Venezuelan Commercial Registry on 23 November 2009.[303]

Tidewater Barbados thus became the sole owner of Tidewater Caribe and the ultimate owner of SEMARCA on 9 March 2009.

(d) Events of March–April 2009

167. On 6 March 2009 (and reported on 7 March 2009) the Minister of Energy and Petroleum and President of PDVSA Rafael Ramírez stated that 'the Executive will not permit the oil industry to be paralyzed' or 'any one service supplier [to] paralyze industry activities.' He went on to say that PDVSA was in the process of 'revising all [of its] cost and expense structures' and that although 94% of service suppliers would be paid in full, there were 56 large contractors who would not be paid in full. Mr Ramírez noted that the amount of debt that PDVSA would pay those contractors 'depends on negotiations.'[304]

168. As noted above, in March and April 2009, Tidewater continued to send money to Venezuela and pursue contracts with Repsol and Chevron. On 3 April 2009, SEMARCA finalised its budget for investments (including dry-docking and major repairs) in Venezuela for the 2010

[294] Ex. R-51.
[295] Ex. R-57.
[296] Ex. R-53.
[297] Ex. R-50.
[298] Ex. R-51.
[299] Ex. R-54.
[300] Ex. R-59.
[301] Ex. R-60.
[302] Ex. R-58
[303] Ex. C-156.
[304] Ex. R-43.

fiscal year at US $2,366,000.[305] On 16 April 2009, Ensco sent another rig, Ensco 68, into Venezuelan waters under contract with Chevron. At the time, Ensco 69 was still under the control of PetroSucre.[306]

169. On 6 April 2009, Mr Jacob wrote to PDVSA to say that SEMARCA would not continue to provide services to PDVSA after the expiration of the two contracts due to expire on 31 May 2009 unless the arrears were reduced.[307]

170. On 30 April 2009, Mr Jacob again wrote to PDVSA and said:

> … We also have not received any payment of the invoices that remain outstanding, which would have helped to mitigate the enormous difficulties that our company has been facing to continue providing services to PDVSA.
>
> Therefore, we sadly need to inform you that our situation has worsened, and it has already reached its turning point. This is so because our parent company has informed us that it may not continue funding local operations from abroad. Therefore, we hereby inform you that our company will not extend the contracts in reference beyond May 31, 2009, date on which the last mutually agreed extension expires. This decision may only be changed by the senior management of our group of companies if we receive payments for the invoices that remain outstanding and if all other legal formalities for a contract extension are executed and fulfilled.
>
> ….
>
> As we have stated on several occasions, our company wishes to continue providing services to PDVSA, but, to do so, it must receive payments for the services already provided, as per the contractually agreed terms.[308]

(e) Enactment of Reserve Law and expropriation: May 2009

171. On 4 May 2009, Venezuela commenced the legislative process for the enactment of the Reserve Law. It was approved by the President and Cabinet[309] and transmitted to Parliament[310] on that day. It received its 'First Discussion' in Parliament the following day and its 'Second Discussion' on 7 May 2009, and was enacted on that day.[311]

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[305] Ex. C-159.
[306] Ex. C-43.
[307] Ex. C-32.
[308] Ex. C-40 (emphasis in original).
[309] Ex. C-35.
[310] Ex. C-36.
[311] Ex. C-37.

172. The Reserve Law[312] provides, in relevant part:

> **Article 2.** It shall be reserved to the State the assets and services related to the performance of the primary activities contemplated in the Organic Law on Hydrocarbons that were previously performed directly by Petróleos de Venezuela, S.A. (PDVSA) and its subsidiaries, and that were outsourced to third parties, being essential for the development of its activities. The assets and services to which this article refers to are:
>
> ….
>
> 3. Those related to the activities in Lake Maracaibo: vessels for the transport of personnel, divers and maintenance; supply vessels with cranes for the transport of materials, diesel, industrial water and other materials; tugs; deck barges; buoy barges, sludge cranes, laying cranes for the placement or replacement of sub-aquatic pipelines and cables; of maintenance of vessels in workshops, piers or docks of any nature.
>
> ….
>
> **Article 4.** As from the date of publication of the present Law, Petróleos de Venezuela, S.A. ([PDVSA) or the subsidiary that it designates shall take possession of the assets and control of the operations referred to the reserved activities.

173. The following day, SEMARCA's operations in Lake Maracaibo were expropriated,[313] and employees subsequently passed from the payroll of SEMARCA to PDVSA.[314]

174. On 9 May 2009, *El Universal* reported Minister Ramírez as saying that the expropriations were driven by the concern that the service companies might remove their vessels from Venezuela. President Chávez, meanwhile, confirmed that the expropriations would save $700 million per year and stated that '[w]e will bury capitalism in Venezuela.'[315]

175. On 14 May 2009, Mr Dean Taylor, CEO of Tidewater Inc., stated to the Seventh Louisiana Energy Conference that 'we don't want to abandon the [Venezuelan] market unless we absolutely have to, unless we feel like we can't work there in a safe fashion for our employees ... we're going to hunker down and hope for the best.'[316] That statement was filed with the US Securities and Exchange Commission on 18 May 2009.

[312] Ex. C-12.
[313] Ex. RL-7: Resolution No 51 of the Ministry of the Popular Power for Energy and Petroleum, [31].
[314] Ex. C-30.
[315] Ex. C-38.
[316] Ex. C-24.

176. On 4 June 2009, PetroSucre requested a three-month extension of a contract with SEMARCA for services in the Gulf of Paria.[317]

177. On 8 June 2009, an interview with Minister Ramírez was published. He stated that the Reserve Law was enacted in response to contractors refusing to lower their rates by at least 40% to continue operating in the country. He explained that it was unacceptable to have 'a fundamental part of the process for oil production … in the hands of a third party that said: If you don't pay me the amount I demand, I will leave with my motor boats and barges and you figure out how you produce oil.' Minister Ramírez denied that 'PDVSA took over those companies because of the debts' owed. He said that 'we are in a process of revision. Many of those debts need revision both in terms of the rates as well as the contracts.'[318] The following day, Minister Ramírez encouraged service suppliers to 'stay in talks … under the certainty that we will always pay our debts.'[319]

178. On 30 June 2009, PDVSA wrote to SEMARCA requesting information in order to 'prepare a payment schedule' for the outstanding debt.[320] On the same day, SEMARCA offered to extend its contract with PetroSucre on identical terms as before.[321]

179. On 3 July 2009, PetroSucre agreed to extend the contract for three months 'under the same terms and conditions as originally subscribed' and promised to pay the outstanding invoices 'depending on the available cash flow in PetrosSucre.'[322]

180. On 6 July 2009, SEMARCA made an offer to settle PDVSA's debt.[323]

181. On 12 July 2009, the Claimants' remaining assets and operations in Venezuela were expropriated.[324]

3. Legal consequences of factual findings

182. The Tribunal now considers the consequences of these factual findings under three headings:

(a) Claimants' submission as to the alleged tax rationale for the transfer of Tidewater's Venezuelan business to Tidewater Barbados;

[317] Ex. C-98.
[318] Ex. R-41.
[319] Ex. C-97.
[320] Ex. C-26.
[321] Ex. C-99.
[322] Ex. C-101.
[323] Ex. C-59.
[324] Ex. C-102.

(b) Respondent's submission alleging a pre-existing dispute over the continuity of service provided by SEMARCA to PDVSA;[325] and,

(c) Respondent's alternative submission that the present dispute was reasonably in contemplation before the reorganisation in March 2009.

(a) Relevance of tax rationale

183. The Claimants developed the argument in their submissions, by reference to the witness evidence of Mr Carr, which was subsequently supported by the expert report of Professor Steines, that the incorporation of Tidewater Barbados and the transfer to it of Tidewater's Venezuelan business was driven by advantages under US tax law. The Tribunal finds it unnecessary to make a finding as to whether the alleged tax advantages for Tidewater in fact motivated or explained the incorporation of Tidewater Barbados or the reorganisation of its Venezuelan business under the intermediate ownership of Tidewater Barbados. That is because, as Mr Carr very fairly accepts in his statement, the restructuring was motivated both by tax considerations and also by 'risk-mitigation perspectives.'[326] Mr Carr points out that 'Tidewater was aware of nationalizations by the Venezuelan government in 2007 and 2008. We wanted to ensure that we had a structure that would mitigate any such risk, especially because Tidewater was planning to increase its exposure to Venezuela through capital expenditures on its Venezuelan fleet.'[327] This being so, it suffices for the Tribunal to accept for present purposes that *one* of the two reasons for the reorganisation was a desire to protect Tidewater from the risk of expropriation by incorporation of an investment vehicle in a state having investment treaty arrangements with Venezuela.

184. As already observed, it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state in this way. But the same is not the case in relation to pre-existing disputes between the specific investor and the state. Thus, the critical issue remains one of fact: was there such a pre-existing dispute? In the present case, it is plain from the chronology that there was a dispute between SEMARCA and PDVSA that pre-dates the incorporation of Tidewater Barbados in March 2009 and the transfer to it of Tidewater's Venezuelan business. Thus, the real question for this Tribunal is a narrower one, namely: is that dispute to be treated as part of the same dispute as the Claimants currently assert against the Respondent in these proceedings? Alternatively, was the present dispute

[325] T1/75/5-11.
[326] Carr Direct Testimony [9].
[327] Ibid [10].

reasonably to be anticipated by March 2009 when Tidewater Barbados acquired the Venezuelan investment?

(b) Pre-existing dispute as to continuity of service

185. The Respondent alleges that there was a single ongoing dispute as to SEMARCA's obligations to provide continuity of service to PDVSA and that this dispute is inextricably linked to the subsequent decision of the Respondent to assume control over SEMARCA's operations in Venezuela.

186. In order to advance this argument, the Respondent begins by alleging that SEMARCA was subject to the obligations set out in the Decree Law of Hydrocarbons of 2001[328] including the obligation in Article 19 to perform its activities in a continuous way. Claimants submit that this Law had no application to their support services, since the essential obligation of the 2001 Law was to reserve certain primary oil activities to the state, but this was not done in relation to services related to such activities, such as the provision of transport vessels of the kind operated by SEMARCA until the Decree of 7 May 2009.

187. The Tribunal agrees. It finds that the Claimants were under no obligation as a matter of Venezuelan law to afford continuity of service. It does so not simply as a matter of a formal reading of the two pieces of legislation. The record of the parties' dealings in 2008–9 set out above demonstrates that both parties knew and accepted that they were doing business simply on the basis of short-term contracts, each of which was negotiated between them on an ordinary commercial basis. Thus, at the relevant time in relation to Lake Maracaibo, the Claimants' obligations to provide services and the Respondent's corresponding obligation to pay for them were set out in their contract dated 31 July 2008.[329] This was subsequently the subject of negotiations for an extension, at the request of the Lakes District Procurement Division of PDVSA, in a meeting with SEMARCA on 26 November 2008, which records detailed discussions as to the nature of the services to be provided and the accounts between the two contracting parties.[330]

188. Moreover, the Claimants at no time in fact withheld provision of their services. To be sure, they did write to PDVSA on several occasions in early 2009 indicating that they would have to do so, if SEMARCA did not receive payment on its outstanding invoices. The Tribunal regards this as no more than ordinary commercial pressure by the party performing services under a contract in order to encourage the counter-party to make the contractually-agreed

[328] Ex. RL-6.
[329] Ex. C-21.
[330] Ex. C-31.

payments for those services under the contract. When on 30 April 2009, Mr Jacob of SEMARCA wrote to PDVSA, he stated:

> [O]ur company will not extend the contracts in reference beyond May 31, 2009, date on which the last mutually agreed extension expires. This decision may only be changed by the senior management of our group of companies if we receive payments for the invoices that remain outstanding and if all other legal formalities for a contract extension are executed and fulfilled.
>
> ….
>
> As we have stated on several occasions, our company wishes to continue providing services to PDVSA, but, to do so, it must receive payments for the services already provided, as per the contractually agreed terms.[331]

The Tribunal interprets this as a confirmation on the part of SEMARCA that the parties were acting according to mutually agreed defined-term contractual obligations.

189. The Tribunal finds the Respondent's conduct over the same period also to be consistent with the limited contractual nature of the parties' mutual obligations. Thus, both PDVSA and PetroSucre continued to make partial payments to SEMARCA for its services from late 2008 until mid-2009. When on 31 January 2009, PDVSA made direct payment of wages to SEMARCA workers on Lake Maracaibo, it sought a credit note from SEMARCA under the contract for the sums paid.[332] PDVSA was certainly seeking to negotiate with SEMARCA a reduction in the amounts outstanding. But at the same time, PDVSA was seeking extensions to their contracts with SEMARCA,[333] and promising to regularise payments.[334] As late as 4 June 2009, PetroSucre requested a three-month extension of a contract with SEMARCA for services in the Gulf of Paria.[335]

190. This being so, the Tribunal is unable to regard the dispute between SEMARCA and PDVSA as anything other than an ordinary commercial dispute between a supplier of services and its counterpart for recovery of sums due and owing for the services rendered. Both parties recognised that SEMARCA had no obligation to continue to supply services beyond the end of any contractually-agreed period, and SEMARCA's position was that it would not renew its contracts unless the arrears were settled.

[331] Ex. C-40 (emphasis in original).
[332] Ex. C-29, R-49.
[333] Ex. R-47.
[334] Ex. C-25.
[335] Ex. C-98.

191. Moreover, the stated position of the Respondent at the time was that the disputes with suppliers over payments were not the reason for the enactment of the Reserve Law on 7 May 2009. Minister Ramírez is reported on 8 June 2009 as denying that 'PDVSA took over those companies because of the debts' owed. He said that 'we are in a process of revision. Many of those debts need revision both in terms of the rates as well as the contracts.'[336] The following day, Minister Ramírez encouraged service suppliers to 'stay in talks … under the certainty that we will always pay our debts.'[337] Under the Reserve Law, the assets of some 39 service providers were seized.[338] The measure was not simply limited to SEMARCA.

192. Therefore, the Tribunal rejects the Respondent's submission that it should treat the payment dispute between SEMARCA and PDVSA as part of the same dispute as the Treaty Claimants' claims against the Republic of Venezuela in the present arbitration.

(c) Foreseeability of expropriation dispute?

193. However, that still leaves open the alternative possibility that a dispute between the Claimants and the Republic in relation to the expropriation of the Claimants' assets in Venezuela was reasonably foreseeable in March 2009 when Tidewater Barbados was incorporated and the Claimants' Venezuelan business transferred to it.

194. Claimants commenced their restructuring in December 2008. At least one of the reasons for this is accepted to be a desire to protect themselves against the risk of nationalisation. But was there a reasonable prospect, either then or in March 2009 when the restructuring was consummated, that such a nationalisation was imminent? On the evidence before it, the Tribunal does not so find. Tidewater had been in the business of supplying transportation vessels to the oil industry in Venezuela for 50 years by early 2009 and had continued to trade throughout many changes of government and government policies. Its actions in late 2008 and 2009 were consistent with such an approach. It continued to invest funds in its Venezuelan business. It submitted bids for new business with other oil companies operating in Venezuela, as well as negotiating for extensions to its contracts with PDVSA and PetroSucre – the latter even after the expropriation of its Lake Maracaibo business.

195. At the same time, the Tribunal does not find that the Respondent's actions gave rise to a reasonably foreseeable expropriation of the Claimants' business. Although an oil rig belonging to an unrelated company was seized in January 2009, this post-dated the Claimants' decision to restructure their holdings. In any event, PDVSA's actions vis-à-vis

[336] Ex. R-41.
[337] Ex. C-97.
[338] Ex. C-13.

SEMARCA at the same time were consistent with a continuing will to trade. Although Minister Ramírez had stated in March 2009 that 'the Executive will not permit the oil industry to be paralyzed' or 'any one service supplier [to] paralyze industry activities', he went on to say that PDVSA was in the process of 'revising all [of its] cost and expense structures' and that although 94% of service suppliers would be paid in full, there were 56 large contractors who would not be paid in full. Mr Ramírez noted that the amount of debt that PDVSA would pay those contractors 'depends on negotiations.'[339] This is language consistent with a negotiated contractual solution and not with expropriation.

196. The Reserve Law itself was introduced without warning and passed into law over just three days from 4–7 May 2009, with the seizure of the Claimants' assets taking effect the following day.

(d) The Tribunal's conclusion on the second ground of jurisdiction

197. For these reasons, the Tribunal finds that the acts of expropriation that give rise to the present dispute were not reasonably foreseeable by the Claimants either in December 2008 when they began restructuring, or in March 2009 when the restructuring took effect.

198. In the result, therefore, the claims of Tidewater Barbados insofar as they relate to causes of action that arose after its acquisition of the shares of Tidewater Caribe are subject to ICSID jurisdiction, Venezuela having given its consent by virtue of Article 8 of the Barbados BIT, and there having been no abuse of that Treaty by the Claimants of a kind that could render inadmissible their invocation of such jurisdiction.

[339] Ex. R-43.

IV. DECISION

199. **For the above reasons, the Tribunal hereby decides that:**

(1) It has no jurisdiction over the claims of the Claimants by virtue of Article 22 of the Venezuelan Investment Law of 1999;

(2) It has jurisdiction over the claims of Tidewater Barbados and Tidewater Caribe pursuant to Article 8 of the Barbados BIT to the extent that such claims concern alleged breaches of the obligations of the Respondent under that Treaty arising after 9 March 2009;

(3) Accordingly, Respondent's objection to jurisdiction is admitted to the extent set out in paragraph (1) above and overruled to the extent set out in paragraph (2) above;

(4) These proceedings shall therefore proceed only in respect of claims specified under paragraph (2) above;

(5) The Treaty Claimants shall have 21 days from the date of delivery of this Decision on Jurisdiction to file an amended copy of their Request for Arbitration indicating those claims that are pursued and those claims that are not pursued in these proceedings in light of the Tribunal's Decision;

(6) The Tribunal shall fix by Procedural Order, after consultation with the parties, a revised timetable for further pleadings on the merits on the revised Request pursuant to Arbitration Rule 41(4).

(7) All costs of and occasioned by the hearing of this objection to jurisdiction shall be reserved.

Dr Andrés Rigo Sureda
Arbitrator
Date 12-17-12

Professor Brigitte Stern
Arbitrator
Date 12-12-12

Professor Campbell McLachlan QC
President
Date 6 December 2012