INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the annulment proceeding between

BOLIVARIAN REPUBLIC OF VENEZUELA

Applicant

and

TIDEWATER INVESTMENT SRL AND TIDEWATER CARIBE, C.A.

Respondents

ICSID Case No. ARB/10/5

DECISION ON ANNULMENT

Members of the ad hoc Committee
Judge Abdulqawi Ahmed Yusuf, President
Tan Sri Dato' Cecil W.M. Abraham
Professor Dr. Rolf Knieper

Secretary of the Committee
Marco Tulio Montañés-Rumayor

Date of dispatch to the Parties: December 27, 2016

REPRESENTATION OF THE PARTIES

Representing Bolivarian Republic of Venezuela:

Dr. Reinaldo Enrique Muñoz Pedroza
Procurador General de la República
Procuraduría General de la República
Av. Los Ilustres, cruce con calle Francisco Lazo Martí
Edif. Procuraduría General de la República, piso 8
Urb. Santa Mónica
Caracas 1040
Venezuela

Ms. Gabriela Álvarez-Ávila
Mr. Eloy Barbará de Parres
Curtis, Mallet-Prevost, Colt & Mosle, S.C.
Rubén Darío 281, Pisos 8 & 9
Col. Bosque de Chapultepec
11580 Mexico, D.F.

Representing Tidewater Investment SRL Tidewater Caribe, C.A.:

Mr. Miguel López Forastier
Mr. Thomas L. Cubbage III
Mr. Alexander A. Berengaut
Ms. Clovis Trevino
Mr. Mark D. Herman
Covington & Burling LLP
One City Center
850 Tenth Street, N.W.
Washington, D.C. 20001-4956
United States of America

Mr. Bruce Lundstrom
Tidewater Inc.
6002 Rogerdale Road
Suite #600
Houston, Texas 77072
United States of America

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TABLE OF ABBREVIATIONS

Applicant	Bolivarian Republic of Venezuela
Application	Application for Annulment of the Award rendered on March 13, 2015, dated July 9, 2015
Award	Tidewater Investment SRL and Tidewater Caribe, C.A. v. the Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5), Award dated of March 13, 2015
BIT	Agreement between the Government of Barbados and the Government of the Bolivarian Republic of Venezuela for the Promotion and Protection of Investments which entered into force on 1994
C-__	Claimants' (Tidewater) Exhibit [number]
Counter-Memorial	Respondents' Counter-Memorial on Annulment, dated February 29, 2016
DCF	Discounted cash flow
Decision on Revision	Decision on the Revision Request, dated July 7, 2015
Hearing	Hearing on Annulment of July 11, 2016
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, effective April 10, 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated March 18, 1965
Memorial	Applicant's Memorial in Support of Application for Annulment, dated January 11, 2016
PDVSA	Venezuela's national oil company Petróleos de Venezuela, S.A.
R-__	Respondent's (Venezuela) Exhibit [number]
Rejoinder	Respondents' Rejoinder on Annulment, dated May 23, 2016
Reply	Applicant's Reply on Annulment, dated April 11, 2016

Reply on Provisional Stay	Tidewater's Reply to the Applicant's Request for a Continued Stay of Enforcement of the Award, dated October 28, 2016
Reserve Law	Organic Law that Reserves to the State the Assets and Services Related to primary Activities of Hydrocarbons
Respondents	Tidewater Investment SRL and Tidewater Caribe, C.A.
Revision Request	Venezuela's Revision Request pursuant to Article 51(1) of the ICSID Arbitration Rules, dated March 20, 2015
Stay Decision on Stay	Committee's Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award, dated February 29, 2016
Stay Request	Applicant's Request for Stay of Enforcement, dated July 9, 2015
Submission on Provisional Stay	Applicant's Submission in Support of a Continuation of the Provisional Stay of Enforcement of the Award, dated October 7, 2015
Tidewater's PHB	Tidewater's Post-Hearing Brief, dated July 29, 2016
Tr. __,2014 p. _	Transcript of Hearing on the Merits (original proceedings) held on June 9 to June 12, 2014, followed by date and page number
Tr. __,2016 p. _	Transcript of Hearing on Annulment, held on July 11, 2016, followed by date and page number
Venezuela's PHB	Venezuela's Post-Hearing Brief, dated July 29, 2016

I. INTRODUCTION AND OVERVIEW OF THE APPLICATION

1. This case concerns an application for annulment (the "**Application"**) of the award rendered on March 13, 2015 in ICSID Case No. ARB/10/5 (the "**Award**") in the arbitration proceeding between the Bolivarian Republic of Venezuela (the "**Applicant**" or "**Venezuela**") and Tidewater Investment SRL and Tidewater Caribe, C.A. (the "**Respondents**" or "**Tidewater**").

2. In the Award, the Tribunal found that Venezuela had expropriated Tidewater's investment in Venezuela without payment of prompt, adequate and effective compensation. It determined that Tidewater was entitled to be compensated for that expropriation, and calculated the principal amount of the compensation to be paid at US$46.4 million plus interest.

3. Venezuela applied for the annulment of the Award on the basis of Article 52(1), subparagraphs (b), (d) and (e) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"), identifying three grounds for annulment: (i) manifest excess of powers, (ii) serious departure from a fundamental rule of procedure, and (iii) failure to state reasons on which the Award was based.

4. Venezuela notes that its Application does not relate to any of the legal holdings of the Tribunal, but only to one issue emerging from paragraphs 197, 201 and 202 of the Award. In its view the Tribunal's determination of the final amount of compensation was based on an error which resulted in an award of compensation that does not follow from, and is significantly higher than the amount that would have been derived, based on the Tribunal's decision regarding (a) the methodology that should be used to calculate compensation and (b) the elements that should be incorporated in that methodology.

5. The Applicant and the Respondents are hereinafter collectively referred to as the "**Parties**." The Parties' respective representatives and their addresses are listed above on page i.

II. THE PROCEDURAL HISTORY

6. On July 9, 2015, Venezuela filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**") an Application for Annulment of the Award issued on March 13, 2015.

7. The Application was filed in accordance with Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**").

8. As mentioned above, Venezuela sought annulment of the Award on three of the five grounds set out in Article 52(1) of the ICSID Convention: (i) that the Tribunal had manifestly exceeded its powers; (ii) that there had been a serious departure from a fundamental rule of procedure; and (iii) that the Award had failed to state the reasons on which it was based.

9. In its Application, Venezuela also requested the Secretary-General to provisionally stay enforcement of the Award (the "**Stay Request**") of US$46.4 million plus interest in favor of Tidewater.[1] It further requested that the stay be maintained until the *ad hoc* Committee issued its Decision on the Application for Annulment.[2]

10. On July 16, 2015, the Secretary-General registered the Application and notified the Parties of the provisional stay of enforcement of the Award pursuant to Rule 54(2) of the ICSID Arbitration Rules.

[1] Application, ¶ 18.
[2] *Ibid*.

11. On September 9, 2015, the Secretary-General notified the Parties that the *ad hoc* Committee (the "**Committee**") had been constituted in accordance with Rule 52(2) of the ICSID Arbitration Rules. The Committee was composed of Judge Abdulqawi Ahmed Yusuf (Somali) as President; Tan Sri Dato' Cecil W. M. Abraham (Malaysian) and Professor Dr. Rolf Knieper (German), as Members.

12. The annulment proceeding was thus deemed to have begun on the above date. The Parties were also informed that Mr. Marco Tulio Montañés-Rumayor, Legal Counsel, ICSID, would serve as Secretary of the Committee.

13. On September 17, 2015, the Committee decided to extend the provisional stay of enforcement of the Award until it ruled on such request after its first session.

14. On October 7, 2015, the Applicant filed a Submission in Support of a Continuation of the Provisional Stay of Enforcement of the Award (**"Submission on Provisional Stay"**).

15. On October 28, 2016, the Respondents filed a Reply to the Applicant's Submission Requesting Continuation of the Provisional Stay of Enforcement of the Award (**"Reply on Provisional Stay"**).

16. On November 23, 2015, the Committee held its first session with the Parties in Paris, France. After the session, the Committee heard oral arguments regarding the Stay Request (**"Hearing on Stay"**). The following persons attended the Hearing on Stay:

<u>For the Applicant:</u>

Ms. Gabriela Alvarez Avila	Curtis, Mallet-Prevost, Colt & Mosle, LLP
Mr. Eloy Barbara de Parres	Curtis, Mallet-Prevost, Colt & Mosle, LLP

For the Respondents:

Mr. Miguel López Forastier	Covington & Burling LLP
Mr. Daniel Hudson	Tidewater Inc.

17. On January 11, 2016, the Applicant filed a memorial on Annulment ("**Memorial**").

18. On February 29, 2016, the Committee issued its Decision on the Applicant's Request for a continued Stay of Enforcement of the Award (**"Decision on Stay"**). In it, the Committee decided to (i) lift the stay of enforcement for the undisputed amount of US$27.407 million plus interest from May 8, 2009 to the date of payment at the rate of 4.5% per annum, compounded quarterly; and (ii) maintain the stay of enforcement of the amount of US$18.993 million in Claimants' compensation awarded by the Tribunal and of US$2.5 million in partial reimbursement of Claimants' costs.[3]

19. On February 29, 2016, the Respondent filed a Counter-Memorial on Annulment ("**Counter-Memorial**").

20. On April 11, 2016, the Applicant filed a Reply on Annulment ("**Reply**").

21. On May 23, 2016, the Respondent filed a Rejoinder on Annulment ("**Rejoinder**").

22. On July 11, 2016, a hearing on annulment ("**Hearing**") was held in Paris, France. The following persons attended the Hearing:

[3] Decision on Stay, ¶62.

For the Applicant:

Ms. Gabriela Alvarez Avila	Curtis, Mallet-Prevost, Colt & Mosle, LLP
Mr. Eloy Barbara de Parres	Curtis, Mallet-Prevost, Colt & Mosle, LLP

For the Respondents:

Mr. Miguel López Forastier	Covington & Burling LLP
Ms. Clovis Trevino	Covington & Burling LLP
Mr. Bruce Lundstrom	Tidewater Inc.

23. On July 29, 2016, the Parties filed their post-hearing briefs ("**PHB**s)."

24. On October 27, 2016, the proceedings were declared closed.

III. THE PREVIOUS PROCEEDINGS

A. The Arbitration Proceeding

25. The original dispute was submitted to ICSID under the Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments 1994 (the "**BIT**").

26. Respondents, Tidewater Investment SRL and Tidewater Caribe, C.A., which were Claimants to the original proceeding, are two companies incorporated in Barbados and Venezuela respectively.[4]

[4] In its February 2013 Decision on Jurisdiction, the Tribunal dismissed the claims of six out of the eight Claimants from the Tidewater Group and found jurisdiction over only Tidewater Caribe, C.A., a Venezuelan company, and Tidewater Investment SRL, a Barbados company that owned Tidewater Caribe, C.A., since 2009.

27. SEMARCA, a Venezuelan company owned by Tidewater Caribe, had been providing marine transportation services since 1958 to subsidiaries of Venezuela's national oil company Petróleos de Venezuela, S.A. ("**PDVSA**").

28. On May 7, 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**"). The following day, on May 8, 2009, the Government issued Resolution No. 51 that identified the Claimants, along with 38 other service providers, as subject to the Reserve Law.

29. That same day, SEMARCA's assets on Lake Maracaibo, including its offices and 11 vessels, were seized.

30. On July 12, 2009, four more vessels of SEMARCA were seized.

31. On February 12, 2010, the Claimants filed a Request for Arbitration under the ICSID Arbitration Rules against Venezuela.

32. In its Award of March 13, 2015, the Tribunal found that Venezuela had expropriated Tidewater's investment in Venezuela and awarded it US$46.4 million plus interest.[5]

33. In calculating the amount of compensation, the Tribunal first determined the applicable standard of compensation, namely 'the market value of the investment expropriated immediately before the expropriation' as provided in Article 5 of the BIT.[6]

[5] Award, ¶202.
[6] Award, ¶¶151-158.

34. The Tribunal then found that calculating the fair market value by reference to either the liquidation value of SEMARCA's assets or the book value of the seized assets would likely only be appropriate where the enterprise was not a proven going concern. Given that SEMARCA was not a publicly listed company and its business was limited to one country and one customer, the Tribunal determined that a discounted cash flow ("**DCF**") analysis was appropriate in this case.[7]

35. The Tribunal continued with an analysis of the variables that should be utilized in a DCF analysis and made its own assessment as to each of the six relevant factors.[8] The Tribunal summarized those elements as follows:

> *"a) business consisting of the services performed by the 15 vessels that SEMARCA operated in or from Lake Maracaibo;*
>
> *b) Including the outstanding accounts receivable, both as an element supporting the working capital of the ongoing business and as being recoverable in itself;*
>
> *c) Taking the average of the historic cash flows of the business for the four years 2006 – 2009;*
>
> *d) Applying an equity risk of 6.5%;*
>
> *e) Applying a country risk of 14.75%;*
>
> *f) But with no additional discount for single customer concentration."*[9]

36. At the hearing of June 11, 2014, the Tribunal requested the experts to prepare additional calculations using their existing models, and taking into account the above-mentioned variables. The experts prepared additional tables which they presented to the Tribunal during the Parties' closing submissions.[10]

[7] Award, ¶¶ 165-166.
[8] Award, ¶¶ 169-196.
[9] Award, ¶ 197.
[10] Award, ¶ 198.

37. The Tribunal noted that the tables prepared by both Parties' experts "*have proved of very considerable assistance to the Tribunal in its deliberations.*"[11] It also noted that "*[t]hese tables produced a significantly greater convergence in figures than had been the case in the experts' reports that were filed in the written phase. Nevertheless, there continue to be material differences in the approach adopted by the experts, which in turn affect the figures presented.*"[12]

38. In paragraph 201 of the Award, the Tribunal set forth the results of the experts' calculations based on the variables it determined appropriate for this case and the qualifications set out in paragraphs 199 and 200, as follows:

> *"(a) Claimants: US$31.959 million (11 vessels only) (an earnings multiple of 3.79) + US$16.484 million non-recurring accounts receivable = US$48.443 million;*
>
> *(b) Respondent: US$27.407 million (15 vessels with 100% recoverability of accounts receivable).*"[13]

39. The Tribunal concluded that "*a willing buyer would have valued the business at approximately US$30 million, but that it would also have been prepared to pay an additional amount of US$16.4 million for the non-recurring accounts receivable* […]."[14] Accordingly, the Tribunal calculated the principal amount of the compensation to be paid at US$46.4 million plus interest.[15]

B. The Revision Proceeding

40. On March 20, 2015, Venezuela filed a Revision Request ("**Revision Request**") pursuant to Article 51(1) of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules.

[11] Award, ¶ 198.
[12] Award, ¶ 198.
[13] Award, ¶ 201.
[14] Award, ¶ 202.
[15] Award, ¶ 202.

41. Venezuela argued that the Tribunal had erred in the calculation of the compensation that should have been awarded to the Claimants. It asserted that although the Tribunal in reaching the compensation figure "*clearly had in mind the calculations of the parties*", instead of taking into account the amount figuring in the presentation of Tidewater's expert, which was US$13,917,433 it mistakenly added the wrong figure of US$31,959,732.[16] For this reason, Venezuela requested that the amount of compensation provided in the Award be 'revised' to take into account the figure that had been actually presented by the Tidewater's expert.

42. On July 7, 2015, the Tribunal issued its decision on the Revision Request (the "**Decision on Revision**"). In it, the Tribunal admitted that there was a clerical error in paragraph 201(a) in its transcription from the Tidewater's expert presentation. It concluded that the sub-paragraph should correctly read as follows:

> *"(a) Claimants: US$13.917 million (11 vessels only) (an earnings multiple of 1.65) + US$16.484 million non-recurring accounts receivable = US$30.401 million."*[17]

43. However, the Tribunal dismissed the Revision Request on the basis that Venezuela failed to present a new and unknown fact to the Tribunal in terms of Article 51(1) of the ICSID Convention.

44. The Tribunal further noted that the illustrative tables submitted by the experts of both Parties during the hearing showed "*the effect in the respective expert's view of different assumptions upon that expert's own calculation*"[18] and "*did not represent the experts' respective opinions as to the appropriate valuation to be applied*" in the case.[19] It also recalled the significant differences in the approach adopted by the experts which explained the difference in the figures presented by the Parties.

[16] Revision Request, ¶¶ 8-9.
[17] Decision on Revision, ¶ 29.
[18] Decision on Revision, ¶ 40.
[19] Decision on Revision, ¶ 41.

45. The Tribunal went on to explain that in view of the lack of comparability between the figures presented by the experts of both Parties, it had to take its own approach to determining valuation. The Tribunal pointed out to paragraph 202 of the Award in which the Tribunal explained that this *"is not and cannot be an exact science, but is rather a matter of informed estimation"*[20] and which, according to the Tribunal, clearly suggests that it did not adopt the figures put forward by the Parties' experts.[21]

46. In light of the aforementioned, the Tribunal concluded that, even if Venezuela's Revision Request were admissible as being based upon a new and unknown fact, this was not of such a nature as 'decisively to affect the award'; and thus it dismissed the Revision Request.

IV. THE PARTIES' POSITIONS

(1) **The Applicant**

47. At the outset, the Applicant insists that "the Annulment Application does not relate to any of the legal holdings of the Tribunal and exclusively focuses on the section of the Award related to the Tribunal's conclusion on the DCF calculation and how, as a matter of fact, the Tribunal did not apply the different elements it found to be applicable under an appropriate DCF analysis. In particular, the Application refers only to paragraphs 202 and 217(3) of the Award."[22]

48. Venezuela is not seeking to have the Committee overturn the Tribunal's selected method of determining the adequate compensation. As such, the Applicant argues, its Application does not constitute an appeal. Instead, the Applicant seeks the full

[20] Award, ¶ 202.
[21] Decision on Revision, ¶ 44.
[22] Memorial, ¶5.

and effective application of the decisions made by the Tribunal regarding the calculation of Tidewater's compensation.[23] It explains:

> *"In doing so and based on the parties' submissions, the Tribunal also meticulously analyzed and decided each of the elements in dispute between the parties regarding the premises of an appropriate discount cash flow ("DCF") analysis that would yield an adequate compensation for the expropriation. However, the Tribunal failed to apply its own decisions regarding such premises. Applicant submits that by doing that, the Tribunal manifestly exceeded its powers, failed to state the reasons for the value it finally attributed to SEMARCA's business and committed a serious departure from a fundamental rule of procedure pursuant to Article 52(1), subparagraphs (b), (d) and (e) of the ICSID Convention, all of which warrant the partial annulment of the Award."*[24]

49. Furthermore, the Applicant asserts that no matter how high the threshold of review is determined to be, this is "abundantly fulfilled" since the Tribunal disregarded its own decisions and contradicted its own reasoning in determining the amount of compensation due to Tidewater.[25]

50. Moreover, the Applicant submits that the remedy of annulment provided in Article 52(1) of the ICSID Convention constitutes an exception to the principle of finality and to the binding force of ICSID awards, and as any other provision within the ICSID Convention it should be given full effect.[26]

51. The Applicant also argues that *ad hoc* committees are not empowered with the discretion not to annul an award once it is found that there are grounds for annulment. On the contrary, "*if the Committee determines that any of these grounds for annulment is in fact present, then the Committee is under the obligation to partially annul the Award, as Venezuela has requested.*"[27]

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[23] Reply, ¶¶9-18.
[24] Memorial, ¶4.
[25] Reply, ¶22.
[26] Reply, ¶23.
[27] Reply, ¶¶23-32. The Applicant relies on *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, dated May 3, 1985 ("*Klöckner*").

52. According to the Applicant, the Award is annullable on three grounds set out in Article 52(1) of the ICSID Convention, namely:

(a) The Tribunal has manifestly exceeded its powers because it awarded compensation in excess of the amount that had been calculated by the experts of both sides, who used a methodology that the Tribunal determined was appropriate and elements that the Tribunal determined were applicable.

(b) The Award has failed to state the reasons on which it is based when the Tribunal valued SEMARCA's business at an amount that is significantly higher than the amount that would have been derived based on the Tribunal's decisions regarding the appropriate methodology and the applicable elements without stating any reason. It also failed to state any reason for going beyond the range of values as calculated by both Parties' experts.

(c) There has been a serious departure from a fundamental rule of procedure because the Tribunal did not respect the Parties' right to be heard on a fundamental point regarding the value of SEMARCA's business.

53. In the course of the proceedings, the Applicant has adjusted its request. In its Application, it has requested that the Award be "partially annulled"[28]; in its Memorial, it has requested that "*the portion of the Award dealing with the conclusion on DCF calculation should be annulled*"[29]; and in its Reply, it has requested that "*the section of the Award regarding the determination of the total compensation awarded by the Tribunal to the Tidewater Parties should be annulled*."

[28] Application, ¶¶17 and 19.
[29] Memorial, ¶63.

54. Finally, in its PHB, the Applicant submits that its request must not be understood as a challenge of only a portion of the Award while the ascertained compensation in an amount of US$36.481 million is recognized, as alleged by the Respondent:

> *"This is incorrect. The Republic requested the annulment of the finding of the total compensation awarded in the Award (i.e. paragraphs 202 and 217(3) of the Award). Under the ICSID Convention, the Annulment Committee does not have powers to determine the amount of compensation owed to the Tidewater Parties, and in any event it may not consider, in order to determine the amount of compensation, evidence that was not before the Tribunal who issued the Award. If the parties cannot reach a settlement to end their dispute, it would correspond to a new tribunal the calculation of the compensation that would be owed for the expropriation under the Treaty, in which case such new tribunal would need to consider the decisions taken by the first Tribunal and that were not the subject of the annulment proceeding."*[30]

A. Manifest Excess of Powers

55. According to the Applicant, a tribunal manifestly exceeds its powers under ICSID Convention Article 52(1)(b) when it fails to apply the law specified by the Parties.[31] This is also the case when, even if the tribunal argues that it is applying the applicable law, an examination of the award clearly indicates that the applicable law was disregarded.[32]

56. The Applicant submits that the present "*is not a case where the Tribunal erred in the interpretation of the law or in the weighing of evidence*."[33] Instead, Venezuela contends that the Tribunal had "*established*" the legal framework for the Award by opting for the DCF analysis by reference to "*the World Bank's guidelines as an additional source of international law to interpret the compensation standard of the BIT*."[34] The Tribunal had thereby determined that the DCF analysis with its various elements "constitutes the legal framework" and thus the correct law.[35] It

[30] Venezuela's PHB, p. 2.
[31] Memorial, ¶27.
[32] Memorial, ¶28.
[33] Reply, ¶39.
[34] Memorial, ¶36; Reply, ¶35.
[35] Memorial, ¶33.

was bound to apply this law but subsequently has ignored its application as well as the evidence before it.[36]

57. In the Applicant's view, the Tribunal first identified 'very clearly' the applicable law to the dispute, i.e. the relevant provisions of the BIT. [37] Then, the Tribunal defined what 'compensation' meant under the applicable law. Next, the Tribunal described the methodology it would use to determine the 'market value' of the expropriated assets and pointed out to the special factors pertaining to SEMARCA's business that had to be taken into account in implementing that methodology. Finally, the Tribunal determined the essential elements of an appropriate DCF analysis for this case.

58. The Applicant contends that the Tribunal, "oddly enough", disregarded the very same legal framework it had established, and thus ended up overcompensating Tidewater.[38]

59. According to the Applicant, the experts' materials, which were at the Tribunal's disposal during its deliberations, established a specific value range for the different scenarios anticipated by the Tribunal. Accordingly, the value of the SEMARCA business that had to be taken into account for the calculation of the adequate compensation would have to fall between US$13.917 and US$24.435 million, and by no means exceed that range.[39]

60. It follows from the above, the Applicant maintains, that by determining in paragraph 202 that the value of the SEMARCA business was of US$30 million, the

[36] Reply, ¶39.
[37] Memorial, ¶32; Reply, ¶¶35-38.
[38] Memorial, ¶ 33.
[39] Memorial, ¶34.

Tribunal *"clearly failed to apply the relevant provisions of [the legal framework it itself had established] . . . [and thus] manifestly exceeded its powers."*[40]

61. The Applicant contends that the Tribunal failed to make an "*informed estimation in light of all the evidence available to it*."[41] If the Tribunal were to consider the evidence available to it during the deliberations, it would under no possible scenario determine that an adequate compensation for Tidewater's expropriated assets would exceed a principal amount of US$40.835 million, i.e. the highest figure submitted by Tidewater's experts, let alone the US$46.4 million that the Tribunal eventually awarded to Tidewater.[42] For this reason, the Applicant argues that there is no logical sequence between, on the one hand, the amount of compensation the Tribunal awarded, and on the other hand, the evidence in the record and the legal framework it decided to apply.[43]

62. In light of the aforementioned, the Applicant explains that it is not enough that a tribunal declares to have applied the relevant law, but instead one should look into whether it actually did.[44]

63. As evidenced by the compensation awarded to Tidewater, the Tribunal failed, in the view of the Applicant, to apply the elements that it itself declared to be applicable in this case, and to adequately consider the calculations presented by the Parties. Therefore, it manifestly exceeded its powers.[45]

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[40] Memorial, ¶35, quoting *Amco Asia Corporation et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment of Award of June 5, 1990 and of Supplemental Award of October 17, 1990, dated December 3, 1992 ("*Amco*"), ¶95.
[41] Memorial, ¶36, quoting Decision on Revision, ¶¶60-61.
[42] Memorial, ¶36; Reply, ¶¶42-46.
[43] Reply, ¶47.
[44] Memorial, ¶37.
[45] Memorial, ¶¶37-38.

B. Failure to State Reasons

64. The Applicant submits that the obligation to state reasons follows from Articles 48(3) and 52(1)(e) of the ICSID Convention. Both Articles require that the award enables a reader to follow the tribunal's reasoning "from Point A to Point B." [46]

65. The Applicant cites different legal authorities to suggest that providing contradictory reasons equals to not providing reasons at all.[47] It further contends that insufficient and inadequate reasons may also result in the annulment of an award.[48] Finally, the Applicant notes that Articles 48(3) and 52(1)(e) of the ICSID Convention also require that a tribunal deals with *"the issues, arguments and evidence presented to it."*[49]

66. The Applicant argues that the Tribunal failed to state reasons on why it valued SEMARCA's business at US$30 million, an amount that exceeded even the amount proposed by the Tidewater's expert when considering a scope of business of 17, instead of 15, vessels. The Applicant alleges that

> *"[I]t did so without stating any reasons at all for that departure. This resulted in an award of compensation that does not follow from, and is significantly higher than, the amount that would have been derived based on the Tribunal's decisions regarding the methodology that should be used to calculate compensation and the elements that should be incorporated in that methodology. Therefore, the Tribunal's reasoning for determining the appropriate compensation under the BIT is contradictory and cannot be followed from Point A to Point B."*[50]

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[46] Memorial, ¶40, quoting *Maritime International Nominees Establishment v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, dated December 14, 1989 ("*MINE*").
[47] Memorial, ¶41, quoting Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (2nd ed., Cambridge University Press 2009), Art. 52, p. 1011, ¶389.
[48] Memorial, ¶43, quoting *inter alia Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, dated June 5, 2007, ¶¶122-123.
[49] Memorial, ¶46.
[50] Memorial, ¶47; Reply, ¶47.

67. The Applicant further argues that the amount of US$30 million which the Tribunal used for the determination of the value of SEMARCA's business cannot be "an informed estimation" because it is not based on the calculations presented by the Parties' experts.[51] Based on the latters' calculations, SEMARCA's business should have been valued between US$13.917 million and US$24.4 million.[52] In this respect, the Applicant argues that the Tribunal failed to state any reasons in going beyond the estimates of the Parties' experts. Clearly, the Tribunal made a mistake in calculating the compensation.[53]

68. In light of the above reasons, the Applicant requests that the Award be annulled for failure to state reasons.

C. A Serious Departure from a Fundamental Rule of Procedure

69. The Applicant states that two elements should be present in order to annul an award under Article 52(1)(d) of the ICSID Convention, namely: (i) the departure must be "serious", i.e. that it *"had or may have had a material effect on the tribunal's decision*";[54] and (ii) it must be a departure from a "fundamental" rule of procedure, i.e. it must violate *"a set of minimal standards of procedure to be respected as a matter of international law*."[55]

70. The Applicant submits that *ad hoc* committees have consistently recognized as "fundamental" a party's right to be treated on a footing of equality, to present its case fully and the "right to be heard."[56]

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[51] Memorial, ¶¶48-49.
[52] Memorial, ¶48.
[53] Memorial, ¶50.
[54] Memorial, ¶52.
[55] Memorial, ¶53 citing *inter alia Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision in Annulment Proceedings, dated February 5, 2002 ("*Wena*"), ¶57; *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment, dated January 13, 2015, ¶105.
[56] Memorial, ¶¶53-57, citing *inter alia Amco*, ¶¶9.05-9.10; *Klöckner*, ¶¶89-92; *Wena*, ¶57; *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the Ad Hoc Committee on the Application for Annulment of the Republic of Seychelles, dated June 29, 2005 ("*CDC*"), ¶49.

71. The Applicant contends that the Tribunal breached its right to be heard by awarding Tidewater an amount that goes beyond both the amount that would result had the Tribunal applied the DFC analysis properly, and beyond the range of compensation presented by the Parties' experts. When doing so, the Tribunal neither stated the reasoning behind this departure nor did it afford Venezuela the opportunity to respond to the Tribunal's considerations. The Parties' experts had established a range of criteria that determined the business value. The Tribunal's intention to depart from these limits should have been announced beforehand, in order to give Venezuela the opportunity to react to this intention and to introduce arguments which might have changed the Tribunal's reasoning.[57]

72. According to the Applicant, the only plausible justification behind the Tribunal's decision to award this amount is that it took into account additional considerations, other than those pleaded by the Parties. If this is true, the Applicant argues, then the Tribunal engaged in a serious departure from a fundamental rule of procedure. The Applicant insists that

> *"[N]obody can seriously deny that an over-compensation of more than 50% of the value of the business of the "SEMARCA Enterprise" did not have a "material impact in the award." An over-compensation of that magnitude clearly has a material impact on the Award, and therefore, a serious departure from a fundamental rule of procedure took place."*[58]

73. Additionally, the Applicant submits that the Tribunal cannot be relieved of this breach on the ground that the "*determination of the appropriate level of compensation…cannot be an exact science, but is rather a matter of informed estimation*."[59] In making an 'informed estimation', the Tribunal should have taken into account the limits on the value of SEMARCA's business under the various

[57] Memorial, ¶¶58-59.
[58] Reply, ¶¶63-65.
[59] Memorial, ¶60, citing Award, ¶ 202; Decision on Revision, ¶¶61-62.

scenarios contemplated by the Tribunal, as laid out in the presentations of the Parties' experts during the hearing on the merits.[60]

74. In light of the above, the Applicant requests the Committee to annul the section of the award regarding compensation because its right to be heard was breached, constituting a serious departure from a fundamental rule of procedure.

(2) **The Respondents**

75. At the outset, the Respondents make general remarks with respect to the standard of review for annulment applications.[61] The Respondents recall that annulment constitutes *"an exceptional and narrowly circumscribed remedy and the role of an ad hoc committee is limited*"[62] and that *ad hoc* committees are not appellate courts and thus should not review the merits.[63]

76. The Respondents further submit that the Applicant does not meet its burden with respect to each of the three grounds on which it bases its Application. In any event, assuming that Venezuela could establish that a ground for the annulment exists, the Committee has discretion not to annul the Award in light of the text of Article 52(3) of the ICSID Convention and the principle of finality of ICSID awards.[64]

A. Manifest Excess of Power

77. The Respondents argue that the applicable test under Article 52(1)(b) of the ICSID Convention is to determine both whether (i) there is an 'excess' of powers; and (ii)

[60] Memorial, ¶60.
[61] Counter-Memorial, ¶¶37-40.
[62] Counter-Memorial, ¶39, quoting *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, dated February 1, 2016 ("*Total*"), ¶167.
[63] Counter-Memorial, ¶39.
[64] Counter-Memorial, ¶40; Rejoinder, ¶10.

whether the excess is 'manifest', i.e. it is "*obvious, clear or self-evident, and […] is discernable without the need for an elaborate analysis of the award.*"[65]

78. The Respondents contend that, although failure to apply the applicable law may constitute a ground for annulment, there is no basis for annulment when the Tribunal has identified and attempted to apply the correct law.[66] In support of their proposition, the Respondents point out to the annulment decisions in *Lahoud* and *Teco*.[67] Accordingly, the Respondents submit that errors in the application of law or weighing of evidence cannot constitute a valid ground for annulment.[68] This is evident in that the drafters of the ICSID Convention did not include the 'manifestly incorrect application of the law' as a possible ground for annulment.[69]

79. The Respondents then explain why Venezuela's argument that the factors identified by the Tribunal constitute a "legal framework" fails.

80. First, the Applicant fails to cite any authority in support of its proposition that the Tribunal's application of a DCF analysis constitutes a "legal framework" which limits the Tribunal's judgement to determine the compensation due to the Respondents: *"A tribunal's conclusion that a given method of financial analysis is probative in the case at hand does not establish 'applicable law'."*[70] The BIT obliged the Tribunal to award compensation rather than a specific valuation method. *"If the Republic's view were accepted, annulment would be required any time a tribunal erred in weighing or applying evidence."*[71]

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[65] Counter-Memorial, ¶42 quoting *Total*, ¶171.
[66] Counter-Memorial, ¶¶43-44, citing *Daimler Financial Services v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, dated January 7, 2016 ("*Daimler*"), ¶191; *CDC*, ¶45; Rejoinder, ¶11.
[67] Rejoinder, ¶12.
[68] Counter-Memorial, ¶45, citing *Total*, ¶180.
[69] Counter-Memorial, ¶46.
[70] Counter-Memorial, ¶¶48-49; Rejoinder, ¶14.
[71] Rejoinder, ¶14.

81. Second, the relevant law does not establish a requirement to apply a specific valuation methodology, let alone a DCF analysis.[72]

82. Third, nowhere in the Award did the Tribunal hold that it had to apply the DCF methodology and take into account the five variables it identified earlier, neither did it suggest that the Parties' respective evaluations were binding upon the Tribunal.[73] The Respondents note that the Tribunal repeatedly affirmed in its Award that its calculations were the product of "informed estimation in light of all the evidence available" and not the application of legal norms.[74]

83. Fourth, assuming *arguendo* that the DCF analysis constituted the "legal framework" for the calculation of Tidewater's compensation, it cannot be argued that the Tribunal departed from this legal framework by not following the calculations of the Parties' experts.[75] In arguing so, the Respondents point out to several paragraphs of the Decision on Revision, in which the Tribunal purportedly explained why the figures identified in paragraph 201 of the Award did not provide a range within which the compensation should be calculated.[76] Thus, it cannot be held that the compensation awarded to Tidewater exceeded that requested by the Respondents, or any limit set by the Award's reasoning.[77]

84. Finally, the Respondents argue that an error in the application of what the Applicant claims to be the applicable law and weighing of evidence does not amount to a failure to apply the correct law. A correction of such alleged error by the Committee would represent an inadmissible appeal.[78]

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[72] Counter-Memorial, ¶50.
[73] Counter-Memorial, ¶51.
[74] Counter-Memorial, ¶52, citing the Award, ¶¶164, 202.
[75] Counter-Memorial, ¶53.
[76] Counter-Memorial, ¶54.
[77] Counter-Memorial, ¶55.
[78] Counter-Memorial, ¶56.

B. Failure to State Reasons

85. The Respondents submit that the Applicant has to meet a high standard when pursuing the annulment of an award under Article 52(1)(e) of the ICSID Convention.[79] According to the Respondents, two conditions must be met in order to annul an award for failure to state reasons: (i) "*the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale*"; and (ii) "*that point must itself be necessary to the tribunal's decision.*"[80]

86. The Respondents further argue that, similarly to Article 52(1)(b), Article 52(1)(e) does not allow a committee to deal with the correctness and persuasiveness of the reasoning of the award. Accordingly, the Respondents submit that Article 52(1)(e) only poses a "minimum requirement" of stating reasons.[81]

87. It should be also borne in mind, the Respondents say, that the tribunals are not "computational machines" and thus have a considerable measure of discretion in assessing compensation.[82] According to the Respondents, consistent practice of *ad hoc* committees, which have refrained from overturning compensation awards, supports this proposition.[83]

88. Moreover, the Respondents make reference to certain *ad hoc* committees which have held that what may appear as contradiction may actually be the result of a compromise reached by the Tribunal. The Respondents further point out to certain annulment decisions which have accepted that in considering the contradictions of an award, the *ad hoc* committee must favor an interpretation that supports an award's consistency, not its contradictions.[84]

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[79] Counter-Memorial, ¶58; Rejoinder, ¶17.
[80] Counter-Memorial, ¶58, quoting *Daimler*, ¶77, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, dated August 10, 2010 ("*Vivendi*"), ¶65.
[81] Counter-Memorial, ¶59, citing *Wena*, ¶79.
[82] Rejoinder, ¶19.
[83] Rejoinder, ¶19.
[84] Counter-Memorial, ¶60, citing *inter alia Daimler*, ¶78.

89. In any event, the Respondents say, any contradictions existing in the award can be addressed through Articles 49 and 50 of the ICSID Convention as this has been additionally confirmed by two *ad hoc* committee decisions.[85]

90. The Respondents then move to counter Venezuela's argument that the Tribunal either failed to state reasons, or it provided contradictory reasons by establishing the value of SEMARCA's business at US$30 million.

91. First, in their view, the Tribunal explicitly provided reasons of its valuation by explaining that the determination of the compensation *"cannot be an exact science but is rather a matter of informed estimation."*[86]

92. Second, assuming the Tribunal did not provide sufficient reasons in the Award on how it reached the specific amount, it did state such reasons in its Decision on Revision.[87]

93. Third, the Applicant incorrectly argues that the Award went beyond the Respondents' valuation and that the maximum compensation supported by evidence was US$24.4 million.[88]

94. Finally, the Respondents contend that the Tribunal never accepted to be bound by the figures submitted by the Parties' experts when evaluating SEMARCA's business.[89] According to the Respondents, this is in line with the findings in *Rumeli*, where the Committee held that the Parties' figures are not binding upon the

[85] Counter-Memorial, ¶¶61-67, citing *Wena*, ¶¶91, 93; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment, dated March 25, 2010 ("*Rumeli*"), ¶146; Rejoinder, ¶¶18, 20.
[86] Counter-Memorial, ¶69, citing the Award, ¶202; Rejoinder, ¶22.
[87] Counter-Memorial, ¶70.
[88] Counter-Memorial, ¶71.
[89] Counter-Memorial, ¶72.

Tribunal, that estimation of damages is not exact science, and that the Tribunal had the right to test the reasonableness of the DCF.[90]

95. The Respondents further stress that the Tribunal reached the amount under dispute after considering the totality of evidence, and any doubt about it was erased by the Tribunal's Decision on Revision.[91]

96. The Respondents affirm that the Tribunal applied its well-established discretion to assess the level of compensation. No contradiction exists. "Point A" of the Tribunal's reasoning was its statement that not the experts but the Tribunal itself had to determine the amount of compensation in light of all evidence before it and exercising its informed estimation, based upon a discounted cash flow analysis. "Point B" was the determination that *"a willing buyer would have valued the business at approximately US$ 30 million*",[92] following the exercise of informed estimation.[93]

97. The Respondents thus conclude that Venezuela's argument is merely a disagreement with the Tribunal's evaluation of the evidence.[94]

98. Finally, contrary to the Applicant's allegations, the Respondents submit that nothing prevents the Committee from considering the Decision on Revision, which reconfirms the finding of the Tribunal in the Award regarding the misreading of the significance of paragraph 201.[95]

[90] Counter-Memorial, ¶72.
[91] Rejoinder, ¶23.
[92] Award, ¶202.
[93] Rejoinder, ¶22.
[94] Counter-Memorial, ¶74.
[95] Rejoinder, ¶24.

C. Serious Departure from a Fundamental Rule of Procedure

99. According to the Respondents, to annul an award under Article 52(1)(d) of the ICSID Convention, three elements need to be met, namely: [96]

> - *First, the procedural rule must be fundamental. "Fundamental" rules of procedure are "rules of natural justice i.e., rules concerned with the essential fairness of the proceedings.*
>
> - *Second, there must have been a "departure" from the relevant fundamental rule. Where a tribunal is acting within the significant degree of discretion afforded to it, there can be no such departure.*
>
> - *Third, the departure from the fundamental rules of procedure must be sufficiently "serious" to warrant annulment. As the Republic acknowledges, to be "serious", the departure must have "produced a material impact on the award."*

100. Although the Respondents agree with the Applicant that the "right to be heard" is a fundamental rule of procedure, they note that *ad hoc* committees have recognized to ICSID tribunals a wide margin of discretion as to how best to organize the proceedings in each case.[97]

101. Moreover, *ad hoc* committees have consistently held, according to the Respondents, that a tribunal may afford the parties an opportunity to be heard under different ways and that in those cases, the Committee should reject the annulment of an award on the basis that there was a departure from a fundamental rule of procedure.[98]

102. According to the Respondents, the Applicant's argument that its right to be heard was breached because the Tribunal went beyond the legal framework it established, and the Parties' valuations should be rejected. Venezuela had "*a full and fair opportunity to be heard*" both during the merits phase and at the stage of Revision

[96] Counter-Memorial, ¶76.
[97] Counter-Memorial, ¶¶77-78; Rejoinder, ¶27.
[98] Counter-Memorial, ¶80.

"*through voluminous written submission, days of oral hearing, and an application for revision*" on all the issues that have been raised in this case.[99]

103. In any event, assuming there was a departure from a fundamental rule of procedure, Venezuela has not established that this was "serious."[100] Instead, Venezuela's assertion that the alleged departure was "serious" is only based on a speculation that the Tribunal would have awarded lower compensation.[101]

104. The Respondents further emphasize the fact that the tribunals have considerable discretion as to how to assess appropriate compensation. Accordingly, the Applicant should have expected that the Tribunal would exercise this discretion.[102]

105. The Respondents further submit that Venezuela wrongly contends that Tidewater "pleaded" a DCF valuation under the factors the Tribunal determined to be appropriate. Instead, Tidewater submitted evidence about other methods of valuation which went well above US$40 million.[103]

106. Finally, the Respondents argue that any speculation that the Tribunal would have awarded a lower amount is excluded by the Decision on Revision, where the Tribunal admitted to have known the correct figure as well as the transcription error, and which it found not to be of such a nature 'as decisively to affect the award'.[104]

107. For the reasons set out above, the Respondents request the Committee to dismiss Venezuela's argument that there has been a serious departure from a fundamental rule of procedure.

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[99] Counter-Memorial, ¶¶81-85; Rejoinder, ¶¶26, 28, 30.
[100] Counter-Memorial, ¶86.
[101] Counter-Memorial, ¶87.
[102] Rejoinder, ¶28.
[103] Counter-Memorial, ¶88.
[104] Counter-Memorial, ¶¶89, 30.

108. As an overall conclusion, the Respondents contend that Venezuela "*does not contest the Tribunal's decision to award compensation for Respondents' investments*"[105] but that it only requests the annulment of the portion of the Award that exceeds the allegedly correctly calculated compensation for the loss of business value and accounts receivable. They state:

> *"The remainder of Tidewater's Counter-Memorial, as well as Tidewater's Rejoinder and argument at the Hearing on Annulment, makes clear that Tidewater's position is that the Republic's application for annulment should be dismissed in its entirety. Indeed, the Committee has no power to reduce the Award. "The drafting history of the ICSID Convention […] demonstrates that annulment is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment]." As explained by the Committee in Tulip v. Turkey, "[u]nder the ICSID Convention, an ad hoc committee only has the power to annul the award. The ad hoc committee may not amend or replace the award by its own decision on the merits."*
> *Nevertheless, should the Tribunal [sic] determine that the Republic's Application is meritorious, the Committee should leave undisturbed the portion of the compensation awarded by the Tribunal that the Republic admits would have been supported by Navigant's model (i.e., US$36.481 million). Even under the Republic's view, had the Tribunal awarded this amount, it would not have manifestly exceeded its powers, failed to state reasons, or seriously departed from a fundamental rule of procedure."*[106]

V. ANALYSIS

A. Introductory Observations on the Structure and Objectives of the Remedies under the ICSID Convention

109. The evolution of the present case after the Award is particular in two aspects. On the one hand, the whole range of remedies under the ICSID Convention was the focus of the Parties: a possible rectification of clerical errors (Article 49(2) ICSID Convention), a revision (Article 51 ICSID Convention) and an annulment (Article 52 ICSID Convention). On the other hand, Venezuela has based its Application on

[105] Reply on Provisional Stay, ¶¶10 and 11.
[106] Tidewater's PHB, ¶¶9-10.

the grounds of a manifest excess of power, a serious departure from a fundamental rule of procedure and/or a failure to state reasons on one identical circumstance, the determination of Tidewater's compensation. As stated in Venezuela's Memorial, "*the Application refers only to paragraphs 202 and 217(3) of the Award.*"[107]

110. Under these circumstances, the Committee finds it appropriate to make two general observations: first, on the structure and objectives of the system of remedies under the ICSID Convention, and secondly, on the specificity of objectives of the different grounds for annulment.

111. As to the observation on the different remedies under the ICSID Convention, the Respondents have consistently maintained that Venezuela's applications, including the application for the partial annulment, is only based on a "clerical error" in the Award, and "*that clerical error continues to be the sole basis for the Republic's arguments that the Tribunal manifestly exceeded its powers, that the Award failed to state the reasons on which the quantum of compensation is based, and that the Tribunal seriously departed from a fundamental rule of procedure.*"[108] In reality "A*rbitration Rule 49(2) provides the appropriate mechanism for bringing that type of error to the attention of the Tribunal.*"[109]

112. The term "clerical error" seems to lead naturally to an application of Article 49 of the ICSID Convention which provides for a procedure to "*rectify any clerical, arithmetical or similar error.*"

113. Indeed, in its Decision on Revision, the Tribunal has recognized "*a clerical error in its transcription from the underlying documents*", has corrected the error and stated how the respective paragraph should read.[110]

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[107] Memorial, ¶5.
[108] Rejoinder, ¶1.
[109] Respondents' Preliminary Response to Venezuela's Revision Request, p. 1.
[110] Decision on Revision, ¶29.

114. However, the Applicant had not requested a rectification in accordance with Article 49 ICSID Convention but a revision of the Award in accordance with Article 51 of the ICSID Convention, based on the fact that it had discovered, after the Award was rendered, that *"the Tribunal's determination of the final amount of compensation was based on an error in its review of the presentation of the Tidewater Parties' expert*."[111] In hindsight, Venezuela's strategy not to seek a rectification seems understandable. It would not have led to the expected result, since the Tribunal has voluntarily corrected its 'clerical error' without any consequences for the outcome of the dispute.

115. After a detailed and careful analysis, the Tribunal has rejected the application for a revision. It found that the criteria of Article 51 were not met: no new and unknown fact had been discovered, and, in any event, the clerical error had not decisively affected the Award. The Tribunal affirmed that it had made its own determination, which "is not and cannot be an exact science", by way of its own informed estimation and not based on the "figures put forward by either experts."[112] Thus, the Tribunal reiterated the correctness of its reasoning and the irreproachability of the Award.

116. Unsurprisingly, the Respondents have condemned the Applicant's request for an annulment as an effort to delay the enforcement of the correct and convincing Award: *"Having twice raised and lost its arguments before the Tribunal, the Republic now seeks to challenge the quantum of compensation for a third time*."[113]

117. However, the Committee recalls that the remedies of the ICSID Convention follow different rationales and objectives. The revision is concerned with circumstances that existed before the rendering of the Award but could not be taken into account

[111] Revision Request, ¶4.
[112] Decision on Revision, ¶¶61, 62.
[113] Counter-Memorial, ¶6.

by the tribunal because it was unaware of them and whose knowledge would have altered the outcome. The re-opening of the case allows for a correction because it is considered inappropriate to uphold a decision which is wrong in substance as evidenced by newly discovered facts. The correction is oriented to the protection of material justice.

118. Differently, the annulment is concerned with the integrity of the proceedings and addresses fundamental issues *"of the protection of parties against procedural injustice, as defined in the five sub-paragraphs of Article 52(1)."*[114]

119. Therefore, the admissibility of either remedy depends on different prerequisites that are of equal value. They do not overlap and they do not exclude each other. The aggrieved party is free to pursue either or both remedies independently as long as the specific prerequisites are met. The fact that Venezuela lost its Revision Request does not de-legitimize its efforts to pursue the remedy of annulment.

120. This leads to the general observation on the different grounds for annulment.

121. The Applicant submits that the Tribunal has failed to apply its own decisions regarding the premises of an appropriate discounted cash flow analysis that would yield an adequate compensation for the expropriation and *"by doing that, the Tribunal manifestly exceeded its powers, failed to state the reasons for the value it finally attributed to SEMARCA's business and committed a serious departure from a fundamental rule of procedure*."[115]

122. The one and identical fact of an alleged erroneous determination and miscalculation of the amount of compensation is taken as the one set of facts that fits all. Thereby, the three grounds for an annulment with their very different and specific rationales

[114] Background Paper on Annulment for the Administrative Council of ICSID, dated August 2, 2012, ¶111.
[115] Memorial, ¶4.

and objectives are taken as a more or less identical and amalgamated trio under which the same fact is subsumed after some bending, stretching and twisting.

123. The Committee insists with some gravity on the finality of ICSID awards. They "*shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*", as unequivocally stated in Article 53 of the ICSID-Convention.

124. Article 52 limits the finality of the Award to five exceptional reasons. They all protect the fundamental procedural integrity, propriety and fairness of the ICSID system but pursue each time a specific and well defined objective based on specific facts. The facts must be established separately and subsumed under the non-identical requirements of each of the specific grounds.

125. The Committee has to determine whether the fact that the Tribunal had 'meticulously' established the elements of the discounted cash flow analysis for the appraisal of the specific business value of SEMARCA and the specific conditions of the expropriation and had thereafter estimated and calculated a Dollar-amount of such value could represent at the same time a manifest excess of its powers, a failure to state the reasons and a serious departure from a fundamental rule of procedure. It insists that its findings on the existence of one of the grounds does not automatically reflect on to the other grounds.

B. Article 52(1)(b): Manifest excess of powers

126. It should be recalled that "*Consent of the Parties is the cornerstone of the jurisdiction of the Centre*."[116] Part of the central significance of the parties' consent is their freedom to agree on the applicable law. The tribunal's power and mandate is circumscribed by the parties' agreement. If it does not apply the law that both

[116] Report of the Executive Directors on the Convention of the Settlement of Investment Disputes between States and Nationals of other States, ¶23.

parties request it to apply, the tribunal exceeds its powers. The Committee subscribes to what it recognizes as *jurisprudence constante,* namely that both the non-application of the proper law and the application of a law that is not proper must be considered as such excess of powers.

127. While the tribunal's power to identify the applicable law is subject to the parties' consent, its power is not restricted with respect to the application and interpretation of the law properly identified. The tribunal has a duty to apply the law *lege artis* and cannot be bound by the parties' directives, even consented, as to a specific method of application. It is for the tribunal to determine the outcome of the dispute in an independent interpretation of the different requirements of the law. If it is convinced that a specific method to appraise the quantum of compensation is more appropriate than another method, it will follow its conviction. The parties to the dispute have no authority to direct the tribunal's choice in one way or another.

128. Therefore, the non-application of the proper law must be distinguished from an erroneous application of the proper law. Allegations of an erroneous application of the proper law can only be scrutinized in a system of the administration of justice which provides for appeals of decisions through specific instances. Appeals are explicitly excluded in the ICSID system and *ad hoc* committees are not instance courts. That is a matter of the text of the ICSID Convention. In the abstract, it is not contested by either Party.

129. Sometimes, the line between non-application of the proper law and its misapplication may be difficult to draw but it exists and must be found.

130. The Committee notes that the Tribunal took great care to establish what the properly applicable law is in the present case. It has distilled from the Parties' submissions that it is the BIT and the ICSID Convention by reference and, since there was no agreement to the contrary, the "*law of the Contracting State party to the dispute*

[…] and such rules of international law as may be applicable", as provided in Article 42(1) of the ICSID Convention.[117]

131. The Tribunal found that Article 8(3) of the BIT empowered it to determine the "amount of compensation" once it had ascertained the claim for a breach of Venezuela's obligations and resulting damages. It has further applied Article 5(1) of the BIT and found that Venezuela owed the Tidewater Parties "*prompt, adequate and effective compensation*", which "*shall amount to the market value of the investment expropriated immediately before the expropriation or before the pending expropriation became public knowledge*."

132. In its search for a proper standard for the determination of the "market value" as specified in Article 5(1) of the BIT, the Tribunal reviewed in a first step doctrine, case law, the World Bank 'Guidelines on the Treatment of Foreign Direct Investment' as well as the Text and Commentary of the International Law Commission on 'Responsibility of States for Internationally Wrongful Acts'.[118]

133. The Tribunal found the World Bank Guidelines "*reasonable […] as to the content of the standard chosen by the State Parties to the BIT as the standard of compensation to be applied in cases of lawful compensation, where the investment constituted a going concern*",[119] while recognizing that the Guidelines make it clear "*that there is no exclusive validity of a single standard.*"[120]

134. Convinced by the appropriateness of the World Bank Guidelines, the Tribunal stated that it would determine the fair market value by its "*informed estimation in light of all the evidence available to it*"[121] and "*by reference to a discounted cash*

[117] Award, ¶¶28, 29.
[118] Award, ¶¶152-158.
[119] Award, ¶152.
[120] Award, ¶155.
[121] Award, ¶164.

flow analysis"[122] and not *"by reference to either the liquidation value of the assets of the SEMARCA Enterprise, or the book value of those assets, as Respondent contends."*[123]

135. In a second step, the Tribunal continued by identifying *"six variables adopted in the experts' reports that have a material effect on the valuation*", i.e. the scope of business, accounts receivable, historical cash-flow, equity risk, country risk and business risk.[124]

136. After a detailed analysis of the six variables, accompanied each time by the conclusion of whether a certain variable "must" or "must not" be taken into account, and if yes, at what figure, rate, price or amount, whatever the case may be,[125] the Tribunal concluded that it "*applies the elements that it has found appropriate*" using the DCF analysis, i.e:

> *"a) A business consisting of the services performed by the 15 vessels that SEMARCA operated in or from Lake Maracaibo;*
> *b) Including the outstanding accounts receivable, both as an element supporting the working capital of the ongoing business and as being recoverable in itself;*
> *c) Taking the average of the historic cash flows of the business for the four years 2006 – 2009;*
> *d) Applying an equity risk of 6.5%;*
> *e) Applying a country risk of 14.75%;*
> *f) But with no additional discount for single customer concentration."*[126]

137. In a third step, the Tribunal asked the Parties' experts to prepare additional calculations using their existing models including, *inter alia*, the above variables[127]. Realizing that there were remaining differences in the experts' calculations and that "*a discounted cash flow analysis of this kind is not and cannot be an exact science, but rather a matter of informed estimation*", the Tribunal considered in a fourth

[122] Award, ¶165.
[123] Award, ¶166.
[124] Award, ¶169.
[125] Award, ¶¶170-196.
[126] Award, ¶197.
[127] Award, ¶198

step "*that a willing buyer would have valued the business at approximately US$30 million, but that it also would have been prepared to pay an additional amount of US$16.4 million for the non-recurring accounts receivable*."[128]

138. The Committee is of the view that the estimation of the amount of the market value is irreconcilable with the elements that the Tribunal affirmed to apply in its estimation of the appropriate amount of the market value. The Tribunal's statement may have to be qualified as contradictory, in which case the Committee will have to specify the effect of such a contradiction.

139. However, in the context of the discussion on a possible excess of powers as ground for an annulment, a finding on a contradiction in a tribunal's findings and reasoning is of no avail. It does neither equate a non-application of the proper law nor the application of a law that is not proper. At the same time, a possible contradiction is nothing so egregious and outrageous – and the Applicant does not contend so – that it might be worthwhile to examine whether it should be paralleled to a non-application.

140. The Applicant appears to be conscious of that. It insists that "*Venezuela is not arguing either, as the Tidewater Parties want the Committee to believe, that this case concerns a mistake in the application of the applicable law*."[129] Rather, it divides the four steps that the Tribunal has made in application of Articles 5 and 8 of the BIT and tries to present them as hierarchically different. It cloaks the Tribunal's interpretation of the term "market value" of Article 5 of the BIT, step 1, as applicable law. It quotes the elements identified by the Tribunal as appropriate to calculate the market value and contends that "*[a]s explained by the Tribunal, the foregoing constitutes the legal framework to be applied in determining an adequate amount of compensation required under Articles 5 and 8 of the BIT […and that] the Tribunal had to remain within the legal framework it had*

[128] Award, ¶202.
[129] Reply, ¶¶39 and 35.

established." [130] In doing so, the Applicant's argumentation tries to treat as applicable law established by the Tribunal what in reality is step 1 of the Tribunal's application of law.

141. The Applicant relies on the annulment decision in *Amco*, where the committee had found that the tribunal "*clearly failed to apply the relevant provisions of Indonesian law. The ad hoc Committee holds that the Tribunal manifestly exceeded its powers in this regard*." [131] The Applicant uses the quotation by removing the words "Indonesian law" and replacing them by "legal framework." The revised quotation reads, in seeming reference to the *Amco* Committee, that "*the Tribunal clearly failed to apply the relevant provisions of [the legal framework it itself had established] … [and thus] manifestly exceeded its powers*"[132].

142. Further, the Applicant submits that the Tribunal "*confirmed the provisions of the BIT related to the valuation criteria (valuation date and compensation standard), then it cited the World Bank's guidelines as an additional source of international law to interpret the compensation standard of the BIT, and then it decided that the appropriate compensation shall be calculated by reference to a DCF analysis that took into account certain specific elements, which were also defined by the Tribunal itself*."[133] It qualifies this process as the various steps of the identification of the law, based on Articles 5 and 8 of the BIT as invoked by the Tribunal and asserts that subsequently, in the next step, the Tribunal ignored its application.[134]

143. With respect to the foregoing submission, the Committee notes that it has not found an indication in the Award where the Tribunal has 'explained' that the elements for the determination of the market value constitute a legal framework.

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[130] Memorial, ¶¶33 and 36.
[131] Memorial, ¶31.
[132] Memorial, ¶35.
[133] Reply, ¶35 (footnotes omitted).
[134] Reply, ¶39.

144. The Committee has equally not found an indication in the Award that the Tribunal qualifies the World Bank Guidelines as 'an additional source of international law'. Rather, it found them, together with case law, doctrine and the International Law Commission Draft on the Responsibility of States, as providing 'reasonable guidance' for the interpretation of Articles 5 and 8 of the BIT. The Guidelines themselves do not pretend to be international law and clarify their status unequivocally by stating that they are meant to be "*useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage of its development*."[135]

145. In fact, the Tribunal did not have the power to create and establish law. The Applicant's effort to elevate the application of law to the level of establishment of law must fail. It is therefore inappropriate to remove a reference to Indonesian law in the *Amco* decision and replace it by 'legal framework that the Tribunal had established'.

146. Instead, the Tribunal applied Articles 5 and 8 of the BIT in a sequence of four steps. There is no hierarchy between step one and the subsequent steps. To the extent that the steps are inconsistent and contradictory, we are at best or at worst confronted with a mistake in the application of the law and not with an excess of powers.

147. For these reasons, the Committee rejects the request for the annulment of the Award for an excess of powers by the Tribunal.

[135] Guidelines on the Treatment of Foreign Direct Investment, in: Foreign Investment Law Journal 7/2 (1992), pp. 297, 298 (CL-152) (emphasis by the Committee).

C. Article 52(1)(d): Serious Departure from a Fundamental Rule of Procedure

148. The Committee has the authority to annul the Award, if and to the extent that the Tribunal departed in a serious manner from a fundamental rule of procedure. The Applicant asserts that the Tribunal violated its right to be heard when it ascertained compensation in an amount falling *"beyond the amount that results from applying the key elements of an appropriate DCF analysis decided by the Tribunal itself, and beyond the range of compensation presented by the parties' experts at the request of the Tribunal, without stating the considerations for that departure and without giving the opportunity to Venezuela to respond and contest those considerations*"[136] and "*without stating any reasons at all for that departure*."[137]

149. The Committee agrees with the Applicant's assertion that the right to be heard and to present one's case is one of the fundamental principles of due process. Its violation is a serious departure from a fundamental rule of procedure. Therefore, the Committee has to determine whether the Tribunal violated the Applicant's right to be heard when it adjudicated compensation in an amount that was not consistent with the elements of the DCF analysis without prior consultation with the Parties.

150. The Parties do not contest that the Tribunal studied the voluminous written submissions and heard the Parties and the experts on quantum extensively during the hearing.

151. During the hearing, the Tribunal has formulated a set of questions to the Parties and in particular to the Parties' experts "*to ensure that we have the full range of possibilities ventilated before us*"[138]. The questions related mostly to the two different methods to appraise the market value as provided for in Article 5 of the BIT, i.e. the method to establish the liquidation value suggested by the Respondent

[136] Memorial, ¶ 58; Reply ¶63.
[137] Memorial, ¶59.
[138] Tr. July 11, 2014, p. 721.

in the main proceeding and the DCF analysis suggested by the Claimants. When asking the questions, the Tribunal insisted that none of them "*are to be taken as any indication of any view that the Tribunal has one way or another on the very excellent submissions advanced before it*"[139]. The questions were answered and discussed during the hearing and the Tribunal stated that they "*will assist us in our deliberations greatly*"[140].

152. At the end of the hearing "*the Tribunal's view was that it has been very greatly assisted by the very detailed written submissions and oral evidence and submissions given to it before this Hearing, and it does not consider that this is a case in which it would be greatly assisted by further Post-Hearing Briefs […] it is anxious to be able to proceed to the deliberation phase*"[141]. The Parties agreed to this view and conclusion and did not ask for a further opportunity to submit arguments or evidence.

153. The Committee relates this part of the proceeding in some detail because it demonstrates the pain that the Tribunal had taken to afford both Parties exhaustive opportunities to present their case and be heard.

154. The Applicant is conscious of that. In order to transport the facts under the provision of Article 52(1)(d), it alleges that the Tribunal has not applied its own standard, has not given reasons for its assessment and has certainly employed 'additional considerations' to which the Applicant was not able to react: "*there is no other logical explanation as to why the Tribunal exceeded the amount that would have corresponded to the 17-vessel scenario, unless the Tribunal took into account additional considerations, other than the ones argued by the Parties. If that is the case, then the Tribunal, without a doubt, engaged in a serious departure from a fundamental rule of procedure, since it did not give Venezuela the opportunity*

[139] Tr. July 11, 2014, p. 721.
[140] Tr. July 12, 2014, p. 947.
[141] Tr. July 12, 2014, p. 969.

to be heard with regards to those additional considerations that it may have been taking into consideration, whatever they might have been."[142] The Applicant submits that it had only been able to discover the violation after the Award which does not destroy its relevance.[143]

155. Apparently, the first two of these assertions refer to Article 52(1)(b) and Article 52(1)(e) respectively: the non-application of a legal standard targets an excess of powers and the reproach of not having given reasons for its decision targets the failure to state reasons. The serious departure of a fundamental rule of procedure is not concerned with either of these assertions.

156. As to the third assertion, the Applicant speculates about additional considerations in the Tribunal's deliberations without proffering any evidence. The only objective of the Applicant's construction of considerations that the Tribunal "may have had" is to be able to allege that the Tribunal has hidden evidence or thoughts from the Parties. It cloaks the inconsistency and contradiction within the Tribunal's analysis as something new which should have been brought to the attention of the Parties before the Award.

157. The Committee has studied the Award carefully and tried to detect new elements on which the Tribunal might have based its decision. It has not found any. In addition, the Tribunal had unambiguously declared at the closing of the hearing that it had all the evidence before it that it would use during deliberations. It had further stated the obvious that before the end of the deliberations no decision was reached.

158. The only evidence available on the deliberations is in the Tribunal's Decision on Revision. In that decision, the Tribunal has stated, and the Committee has no reason to doubt, that it had not relied on 'any other consideration' in its deliberations but

[142] Reply, ¶64.
[143] Memorial, ¶56; the Applicant relies on the Decision on Annulment in *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, dated December 18, 2012, ¶26.

that "*it has taken into account the totality of the evidence presented to it in determining the appropriate level of compensation*."[144]

159. The possible inconsistency and contradiction within the Award are what they are: possible contradictions with possible material consequences. The Committee will have to ascertain this under the appropriate ground for an annulment. They do not present at the same time procedural shortcomings.

160. The Applicant bears the burden of proving both that (i) the Tribunal committed a serious departure from a procedural rule; and (ii) that the said rule was fundamental. This has not been done in the present case. Therefore, the Committee rejects the request for the annulment of the Award for a serious departure from a fundamental rule of procedure.

D. Article 52(1)(e): Failure to State Reasons

161. Read under any perspective, the Applicant's submissions center on an identical gravamen: it complains that the Tribunal has established elements for the determination of the market value of the Respondents' business and of the appropriate amount of compensation for the lawful expropriation and that it has fixed that amount in contradiction to these elements.

162. The Committee will have to ascertain whether this determination and presentation by the Tribunal amounts to a failure to state the reasons on which its decision was based.

[144] Decision on Revision, ¶62.

1.1. The Legal Standard

163. The Committee recalls that the statement of reasons is one of the central duties of arbitral tribunals. An award is not a discretionary *fiat* but the result of the process of weighing evidence and applying and interpreting the law and subsuming the facts thus established under the law as interpreted by the Tribunal. The legitimacy of the process depends on its intelligibility and transparency. The statement of reasons allows the Parties to understand the process through which the tribunal makes its findings. Therefore, it is "*the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision*."[145]

164. The documentation of the process that leads an arbitral tribunal to its award is of particular importance in investor-state arbitration. In agreeing to arbitration, States surrender part of their sovereign prerogatives and allow arbitral tribunals to scrutinize the legality of acts of *puissance publique*. It is a matter of public policy that the parties to the dispute but also other States' organs and the public be enabled to understand, if a tribunal rules against the State, why the tribunal believes that a sovereign act violated the law and what would be – in the eyes of the tribunal – a lawful sovereign act under the circumstances. A similar reasoning applies, *mutatis mutandis*, to rulings against an investor.

165. In instituting the possibility of an annulment for failure to state reasons, the ICSID Convention recognizes the particularity of investment arbitration. While in commercial arbitration, parties are autonomous and free to exempt the tribunal from stating reasons, the participation of a State and the subject matter of the dispute forbid such waiver. The legitimacy of an arbitral decision to invalidate a sovereign act would be severely undermined if the tribunal did not have to explain why the act contradicts the law.

[145] *Wena*, ¶79.

166. At the same time, the procedural mandatory requirement to state reasons does not target the substantive correctness of reasoning in the award. In ratifying the ICSID Convention, the member States recognize the finality of the award and accept the tribunals' determination of the (un-)lawfulness of their acts. The statement of reasons guarantees procedural legitimacy and validity and does not open the door to a controversy over the substantive correctness of the tribunals' reasoning. The Contracting States to the ICSID Convention have decided to exclude such controversy by insisting on the binding character of the awards and the inadmissibility of any appeal. The *ad hoc* committee in *Impregilo* formulated a general conviction according to which "*Article 52(1)(e) does not allow a committee to assess the correctness or persuasiveness of the reasoning in the award or to inquire into the quality of the reasons*."[146]

167. In light of these considerations, the Committee does not have the authority to reassess the merits of the dispute or to substitute the Tribunal's determination by its own convictions. Its authority is limited to the examination of the award with respect to the alleged failure to state the reasons on which the Tribunal has based its decision.

168. The Committee is mindful that it must try to avoid two errors. One concerns the appreciation of the quality of the reasons. The requirement of stating reasons does not install a benchmark of quality standard. Reasons may be long or succinct, they may be exhaustive or "*baldly stated*"[147], they may quote heavily from preceding decisions or argue without referencing any – the difference of style or effort to convince the Parties is no reason to discredit reasons.

169. It is the same with the frequent label "frivolous": this Committee has never seen an award which lacked reasons completely and has difficulties to understand what the

[146] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision on Annulment, dated January 24, 2014 ("*Impregilo*"), ¶181.
[147] Counter-Memorial, ¶66.

qualification of reasons as frivolous may mean. Either a reasonable, attentive and willing reader is able to understand a tribunal's motivation, in which case the reasons are not 'frivolous', whatever may be their quality, or the same reader is not enabled to understand the motivation, in which case the tribunal has failed to state reasons.

170. With respect to the label "contradictory", the Committee shares the view that not any maneuver in the tribunals' analysis to present a common view can be qualified as contradictory but that only genuine contradictions which 'cancel each other out'[148] may amount to a failure to state reasons.

171. The second error that the Committee needs to avoid concerns the line between the procedural failure to state reasons and the substantive correctness of the award. The Committee is conscious that it must not re-argue the merits of the case. It would do so if it discarded the Tribunal's exercise of discretion in fixing the amount of compensation and replaced it by its own discretion. Particularly with respect to the amount of compensation, the Committee shares the view of the *Wena ad hoc* committee that stated:

> *"The notion of 'prompt, adequate and effective compensation' confers to the Tribunal a certain margin of discretion, within which, by its nature, few reasons more than a reference to the Tribunal's estimation can be given, together with statements on the relevance and the evaluation of the supporting evidence."*[149]

It also subscribes to the views of the *Rumeli ad hoc* committee that stated:

> *"The tribunal must be satisfied that the claimant has suffered some damage under the relevant head as a result of the respondent's breach. But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in the light of all the evidence available to it."*[150]

172. Therefore, the Committee will abstain from scrutinizing whether the Tribunal has established the facts correctly, has interpreted the applicable law correctly and has

[148] *Vivendi*, ¶65.
[149] *Wena*, ¶91.
[150] *Rumeli*, ¶146.

subsumed the facts as established correctly under the law as interpreted. It must also not concern itself as to whether the Tribunal has used its discretion erroneously. That would necessarily imply a substitution of the Tribunal's interpretation and discretion by its own interpretation and discretion and amount to an inadmissible decision on appeal. Rather, the Committee will determine whether the reasons developed by the Tribunal have enabled the addressees of the Award and, for that matter, the Committee itself, to understand the process leading to its conclusions and to the determination of the amount of compensation.

1.2. The Application of the Standard

173. The case at hand illustrates the rationale of the annulment mechanism based on the failure to state reasons.

174. Venezuela had expropriated property of the Claimants by an act of *puissance publique*. Together with this act, it had proposed compensation for the expropriation. The Claimants objected to the Government's decision because Venezuela's proposal was based on a book value and liquidation value analysis of legally expropriated property and Tidewater's proposal was based on a discounted cash flow analysis *ex post* an alleged illegal expropriation.[151] The Parties' proposals and valuations submitted by the Parties' experts "differed greatly."[152]

175. The Tribunal has rejected parts of both Parties' approaches to assess the appropriate amount of compensation and has affirmed that "*it is for the Tribunal to determine the amount of compensation. This is necessarily a matter of informed estimation*"[153]. The Parties and in particular Venezuela must be enabled to understand why the method and determination of compensation by an act of *puissance publique* did not meet the requirements of law. That is only possible if

[151] For the Tribunal's discussion of the Parties' respective positions cf. ¶¶53 ss. of the Award.
[152] Award, ¶167.
[153] Award, ¶164.

the information on which the 'informed estimation' is based is clearly exposed to the Parties.

176. The Tribunal has examined the Parties' positions and came to the conclusions that (1) the "*record does not demonstrate a refusal on the part of the Sate to pay compensation*",[154] (2) the expropriation was lawful but (3) Venezuela's proposals for compensation were inadequate. In the long and detailed Chapter III(B) of the Award, the Tribunal has unfolded its analysis with respect to the correct method, level and amount of compensation.

177. After having stated that "*the Treaty standard of 'market value' does not denote a particular method of valuation*"[155], the Tribunal has opted for the DCF analysis as the appropriate method for its assessment and has given extensive reasons for this option. In particular, it has stated that "*the Tribunal must approach the valuation of SEMARCA based upon the factors that are specific to its business*"[156]. It has studied the experts' reports of both Parties in great detail and has distilled six elements that have an effect on the market value. Again after a careful discussion, it has quantified these elements.

178. Three elements are of particular relevance for the Committee's determination.

179. The first element concerns the scope of the Claimants' business. The Tribunal has weighed the evidence before it and came to the conclusion that four vessels "*must therefore be added to the 11 vessels actually stationed on Lake Maracaibo"* leading to "*a cash flow generated by 15 vessels.*"[157]

[154] Award, ¶145.
[155] Award, ¶145.
[156] Award, ¶167 (emphasis by the Committee).
[157] Award, ¶¶171, 173 (emphasis by the Committee).

180. The second element concerns accounts receivable. The Tribunal has explained in detail that "*the investment that was lost must include outstanding unpaid accounts receivable*", and has accepted the undisputed amount of US$16,484,677 presented by Tidewater's expert.[158]

181. The third element concerns the country risk premium. The Tribunal has pondered the experts' opinions carefully and came to the conclusion that "*a country risk premium of 14.75% represents a reasonable, indeed conservative, premium. In light of its rejection of Claimants experts' reasoning, it adopts this premium for the purpose of its valuation of the investment*."[159]

182. In its submissions in support of the Application, the Applicant had reiterated that it still preferred its initial proposals for compensation but had accepted the Tribunal's analysis of the variables and conclusion on the various elements it had found appropriate for purposes of compensation. The legitimizing effect of stating reasons had worked well as far as the identification of those elements was concerned.

183. During the hearing, the Tribunal communicated the elements and their specification to the experts and asked them to prepare "*additional calculations using their existing models including, inter alia, these variables.*"[160]

184. The experts did so. The Tribunal recognized that this had been "*of very considerable assistance to the Tribunal in its deliberations*", although there continued "*to be material differences in the approach adopted by the experts which in turn affect the figures presented.*"[161]

[158] Award, ¶¶175 and 199 (emphasis by the Committee).
[159] Award, ¶190 (emphasis by the Committee).
[160] Award, ¶198.
[161] Award, ¶198.

185. The Tribunal then noted that the Claimants' experts had based their calculation on 11 vessels and presented an amount of US$31,959,732. As already indicated above, the Tribunal qualified the figure as "*a clerical error in its transcription from the underlying documents*" and corrected the "error" by inserting an amount of US$13,917,433. However, the Committee agrees with the Applicant that the figures do not represent clerical errors but the result of alternative calculations. The Claimants' expert calculated the amount of US$31,959,732 on the assumption that the country risk premium is 1.5%, while the amount of US$13,917,433 used a country risk premium of 14.75%, each time departing from an eleven vessels scenario.[162]

186. Contrary to these calculations presented by the Claimants' expert, the Tribunal had adopted a country premium risk of 14.75% and a 15 vessels scenario. Thus, by transcribing an amount of US$31,959,732 into the Award, which was based on a country risk premium of 1.5% which the Tribunal had rejected as being unreasonable, the Tribunal did not commit a 'clerical error' but contradicted its own reasoning.

187. The Tribunal recognized that the Parties' experts had been unable to present converging calculations and figures. The Claimants' experts presented the amounts of US$31,959,732 for the scope of business (based on 11 vessels) and US$16,484,677 for accounts receivable, summing up to roughly US$48.433 million, while the Respondents' expert presented an amount of roughly US$27.407 million based on 15 vessels and not isolating any amount for accounts receivable.

188. After reiterating that "*the determination of an appropriate level of compensation based upon a discounted cash flow analysis of this kind is not and cannot be an exact science, but rather a matter of informed estimation*", the Tribunal concluded that a willing buyer would have valued the business "*at approximately US$30*

[162] R-130.

million" and would have been prepared to pay "*an additional amount of US$16.4 million for the non-recurring accounts receivable*", adding up to US$46.4 million "for the purposes of compensation."[163]

189. The Tribunal did not explicitly rely on the amounts forwarded by the Claimants' experts. In its Decision on Revision, it insisted "*that the Tribunal has not adopted the figures put forward by either experts, whether in their original reports or in their illustrative tables*" but that the conclusion was one of informed estimation.[164] However, it is obvious that the estimation is based on information derived from the calculations of the Claimants' experts. The amounts presented by the Claimants' experts are slightly rounded down by the Tribunal. They are irreconcilable with the Tribunal's findings on the elements of the proper assessment of the market value, i.e. a fleet of 15 vessels and a country risk premium of 14.75%. The information and with it the estimation is based on a quantification of the country risk premium that the Tribunal rejected categorically and in a detailed reasoning. The two statements of the Tribunal cannot be reconciled. They are genuinely contradictory. Under any assumption on the scope of business – 11, 15 or 17 vessels – a valuation of US$30 million is not conceivable.

190. The Respondents in the annulment proceedings assert that the Tribunal's reasoning was free of contradiction, since "Point A" of the Tribunal's reasoning was its statement that it had to determine the amount of compensation in light of all evidence before it and exercising its informed estimation, based upon a discounted cash flow analysis. "Point B" was the determination that "*a willing buyer would have valued the business at approximately US$ 30 million*", following the exercise of informed estimation.

191. The assertion demonstrates that in fact the reasoning does not allow a reasonable, attentive and willing reader to follow the Tribunal's reasoning and the conclusion:

[163] Award, ¶202.
[164] Decision on Revision, ¶62.

"Point A" was, indeed, the Tribunal's statement that it had to determine the amount of compensation by an informed estimation based on a DCF analysis. "Point B" was the scrupulous establishment of the six elements, which the Tribunal had defined as including a country risk premium of 14.75%. "Point C" was the Tribunal's request to the experts to present calculations based on the elements established by it and the presentation of these calculations in the Award. "Point D" would have been a conclusion using the country risk premium of 14.75%, the 15 vessels scenario and the other elements that – as the Tribunal had underlined – must be taken into account. Even by rounding up and down in a legitimate estimation, the result would have been US$16.484 million for accounts receivable and US$19.997 million for SEMARCA's business to sum up to US$36.481 million. The Committee will come back to these amounts. For the present purposes it suffices to state that, using the Tribunal's detailed analysis and careful specification of the elements of the DCF analysis, "Point D" would undoubtedly not be an amount of US$46.4 million.

192. The Committee recalls the rationale of the Tribunal's duty to motivate the process of its determination of compensation and its conclusions. It is the corollary of its power to determine that a sovereign State has violated international and national law by offering, after a lawful expropriation, an amount of compensation that did not correspond to the market value. The State as well as the investor may legitimately expect that the tribunal explains why the State's offer would undercompensate the damage and what the correct standard and amount of compensation would be. The Tribunal is entitled to use its discretion and may estimate the correct compensation as long as it explains the process leading to the estimation.

193. The Tribunal in the present case did so with remarkable clarity and force. But after having done so, the Tribunal contradicted its own analysis and reasoning by quantifying its estimation using one concrete criterion (a country risk premium of

1.5 per cent) which it had rejected as unreasonable. The contradiction cannot be argued away or cured. It is evident and decisive for the outcome.

194. The Committee does not exclude that the calculation was based on an error by the Tribunal in transcribing the figures from the illustrative tables into the Award. However, the ascertainment of a contradiction rests on purely objective criteria and not on subjective reproaches against tribunals. A possible inadvertency of the Tribunal is therefore without relevance and does not have to be established.

195. As a result of the contradiction in the reasoning, Venezuela is not able to understand to what extent it has used its public power unlawfully when it offered compensation. That is not the consequence of a misuse of the Tribunal's authority to discretion but of the Tribunal's contradictory reasoning when presenting what, in its view, it considered the correct elements for the determination of compensation, but in reality used an element it had rejected earlier to fix the amount of compensation.

196. The Committee does not have the authority to annul the Award or any part thereof for reasons of errors in the use of the Tribunal's discretion. However, it has the authority to annul the part of the Award for which the Tribunal failed to state the reasons on which it based that particular part of the Award. The Committee recognizes the high quality of the bigger part of the Award, as both Parties also appear to do. At the same time, it holds that one part of the Award, where a genuinely contradictory reasoning on the amount of compensation cancels out another reasoning with respect to the same compensation, must be annulled.

1.3. The Consequence of the Application of the Standard

197. The contradiction has a material impact on the result of the Award. It cannot be cured by additional reasons. Under these circumstances, the Committee does not

have to decide whether in principle *ad hoc* committees have discretion to annul or not to annul the part of the Award for which the tribunal has failed to state reasons. Lifting the contradiction in reasoning would not lead to an adequate remedy. The material consequences of the contradiction would not vanish. It is the Committee's view that under such circumstances it has no discretion to abstain from annulling what is contradictory.

198. Article 52(3) of the ICSID Convention bestows the authority upon the Committee to annul "the award or any part thereof." Arbitration Rule 55(3) provides that "*[i]f the original award had only been annulled in part, the new tribunal shall not reconsider any portion of the award not so annulled*."

199. The Committee's existence and authority emerges with the application for annulment. Article 52(1) of the ICSID Convention provides that an application may be made for the annulment of the award. An application for a partial annulment is not explicitly foreseen. Arbitration Rule 50 does not provide otherwise.

200. The Applicant has requested the annulment of "*the portion of the Award dealing with the conclusion on DCF calculation*"[165] and later specified that the "*Republic requested the annulment of the finding of the total compensation awarded in the Award (i.e. paragraphs 202 and 217(3) of the Award)*", whereby a "*new tribunal would need to consider the decisions taken by the first Tribunal and that were not the subject of the annulment proceeding*."[166]

201. The Respondents have requested that "*the Republic's application for annulment should be dismissed in its entirety. Indeed, the Committee has no power to reduce the Award. […] The ad hoc committee may not amend or replace the award by its own decision on the merits.*"[167] However, they have requested alternatively:

[165] Memorial, ¶3.
[166] Venezuela's PHB, p. 2.
[167] Tidewater's PHB, ¶9.

"*Nevertheless, should the Tribunal [sic] determine that the Republic's Application is meritorious, the Committee should leave undisturbed the portion of the compensation awarded by the Tribunal that the Republic admits would have been supported by Navigant's model (i.e., US$36.481 million).*"[168]

202. For reasons of procedural economy, the Committee shares the *MINE ad hoc* committee's view that Article 52(3) of the ICSID Convention implies that a "*request for partial annulment is clearly admissible*" and that portions of the award for which annulment had not been requested "*will remain in effect regardless of the annulment in whole or in part of the portion of the Award in respect of which Guinea has formulated its request for annulment*." [169]

203. As stated above, the Committee's authority includes the possibility to annul portions of the part of the Award for which annulment has been requested.

204. The Applicant has requested the annulment of the totality of the Award that deals with the calculation of the DCF and compensation. At the same time, it has concentrated on the Tribunal's inconsistent reasoning with respect to SEMARCA's scope of business and the country risk premium. It has not alleged any inconsistency with respect to the relevance and the calculation of the accounts receivable. It has equally not submitted that the totality of the Tribunal's calculations was contradictory but only the part which exceeds the amount based on 15 vessels and a country risk premium of 14.75%. It has presented a calculation to the Committee leading to an amount of US$19.997 million if the criteria had been properly applied. However, it has warned the Committee that it "*does not have powers to determine the amount of compensation owed to the Tidewater Parties, and in any event it may not consider, in order to determine the amount of compensation, evidence that was not before the Tribunal who issued the Award.*

[168] Tidewater's PHB, ¶10.
[169] *MINE*, ¶4.07.

If the parties cannot reach a settlement to end their dispute, it would correspond to a new tribunal the calculation of the compensation that would be owed."[170]

205. The Applicant's opinion is refuted by the Respondents. They submit that the Committee has the authority to leave the Award in effect with respect to the accounts receivable, i.e. US$16.484 million, and the amount of the business value that flows from the non-contradictory application of the elements that the Tribunal had established, i.e. US$ 19.997 million. The Respondents submit that the resulting sum of US$36.481 million is the direct and consistent conclusion of the application of the elements and that the "*Republic acknowledges that Tidewater's expert submissions would have supported a principal amount of US$36.481 million.*"[171]

206. Indeed, it was the Applicant that has calculated the corrected amount of the business value, based on the Claimants' expert valuation model and using the elements identified by the Tribunal.[172] It has re-affirmed the figure on page 24 of its power-point presentation during the Hearing. However, it has insisted that the figure was "*not in the record of Arbitration proceeding*."[173]

207. The Parties have no dispute over the following figures and do not allege any inconsistency between them and the Tribunal's elements established for the valuation of SEMARCA's market value: US$16.484 million for accounts receivable, US$19.997 million for SEMARCA's business value, and the total sum of US$36.481 million.

208. The Committee is conscious that its authority is limited to annulling or upholding the Award or parts of it. It is "*not empowered to amend or replace*" the Award by

[170] Venezuela's PHB, p. 2.
[171] Counter-Memorial, footnote 3.
[172] Memorial, Note 26.
[173] Venezuela's Hearing Power-Point Presentation, p. 24.

a new decision on the merits.[174] It "*can extinguish a res iudicata but it cannot create a new one*."[175] It is equally conscious that it is not authorized to appraise new evidence.

209. The Committee has found that the Tribunal has consistently and without contradiction estimated an amount of compensation for accounts receivable of US$16.4 million. The Tribunal has accepted this amount by using the Claimants' expert's calculation [an amount of US$16.484 million] and by exercising its discretion of rounding it down to US$16.4 million. The calculation and the amount are undisputed by the Parties. Although the Applicant has applied for the annulment of the total compensation and calculation of the DCF, it has not pursued this request with respect to the accounts receivable and has not substantiated in what way the Tribunal has failed to state reasons for the adjudication of this amount.

210. Therefore, the Committee rejects the request to annul the totality of the part of the Award that deals with compensation and its calculation. As a first step, it rejects the implied request to annul the Award with respect to the accounts receivable in an amount of US$16.4 million. This part of the Award is upheld as *res iudicata*.

211. Further, the Committee has found that the Tribunal has stated reasons consistently and non-contradictorily for the determination of SEMARCA's business value. According to both Parties, the amount of US$19.997 million flows directly from the application of the elements that the Tribunal had established to be able to estimate the appropriate amount on an informed basis. The Tribunal has stated the reasons which support the ascertainment of the claim in an amount of US$19.997 million. It has only failed to state reasons why it has decided to go far beyond that amount.

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[174] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, dated November 2, 2015 ("*Occidental*"), ¶299.

[175] C. Schreuer, The ICSID Convention – A Commentary, 2nd edition, 2009, Article 52, ¶491.

212. It is the Committee's duty to annul the portion of the Award for which no reasons are stated. The Tribunal has failed to state the reasons for the adjudication of an amount of US$30 million instead of US$19.997 million. That portion of the Award must be annulled. It will be for a new tribunal to assess and calculate whether such amount or another amount must be ascertained. It is not for this Committee to substitute its views in this regard.

213. Conversely, the Committee has no authority to annul portions of the Award for which no ground for an annulment exists, in other words and in the present context, for which reasons are stated.

214. The Committee holds that the Tribunal has stated the reasons for the application of the DCF analysis to establish the market value as requested by Article 5 of the BIT. The Tribunal has also motivated clearly and without contradiction its decision to isolate and describe the elements for the valuation of the market value and to quantify these elements for the specification of such analysis. This part of the Award is also upheld as *res iudicata*.

215. The Committee has been helped by the Parties to understand that the direct consequence of the application of these elements leads to an amount of US$19.997 million. The Committee has to determine whether it has the authority to confirm this amount as *res iudicata*, as requested by the Respondents but contested by the Applicant.

216. When weighing the arguments, the Committee has looked for assistance to the recent decision of the *ad hoc* committee in the *Occidental* annulment proceeding. That committee had found:

> *"Consequently, the Committee's decision to partially annul the Award must lead to the annulment of the quantification of damages (US$ 1,769,625,000) contained in Sub-paragraph (v) of the dispositive section of the Award to the extent that it*

compensates the Claimants for 100% (and not for 60%) of the value of Block 15– but not of the rest of such Sub-paragraph.

The next question to be addressed is whether the Committee is authorized to substitute the annulled figure of damages with the correct number, or whether this task must be entrusted to a new investment tribunal. The parties have discussed this issue, and while Respondent favours the constitution of a new tribunal, Claimants have accepted that in the proper circumstances annulment committees are authorized to insert correct data in partially annulled decisions.

The Committee concurs with Claimants.

It is true that annulment committees are not empowered to amend or replace awards. But this is not the task at hand. What is required in this case, in which the Committee is partially annulling the Award, is for the Annulment Committee to substitute the Tribunal's figure of damages with the correct one. If this task can be performed without further submissions from the Parties and without additional marshalling of evidence, committees should be entitled to do so. Basic reasons of procedural economy speak in favour of this solution. There is no need for the parties to incur the additional cost and delay of going through a second investment arbitration, when the correct number can be inserted by the annulment committee, after performing a very simple arithmetic calculation and without further input from the parties."[176]

217. Apparently, the circumstances of the present case are different. It is not the Committee that has to do a 'very simple arithmetic calculation' because it was done by the Applicant, based on the elements established by the Tribunal and using the matrix of the Claimants' expert that had been accepted by the Tribunal. The Applicant's calculation was agreed by the Respondents to be the direct result of an application of the Tribunal's own criteria.

218. Two issues must be addressed. The first one concerns the Applicant's contention that the figure of US$19.997 million was not before the Tribunal, and can therefore not be taken into its consideration. With some hesitation, the Committee disagrees. It finds that only the naked figure was not in the records. All the elements leading to this figure were in the record, including the 15 vessels scenario and a country risk premium of 14.75%, as well as the calculation matrix that had led to the US$30 million figure, i.e. the Tribunal's estimation. In fact, if the Tribunal had not contradicted itself by picking an amount based on a 1.5% country risk premium,

[176] *Occidental*, ¶¶296-299 (footnotes omitted).

which it had rejected before, the figure of US$19.997 million would have emerged naturally from the facts and evidence before the Tribunal. The figure is part of this evidence and not new. This is not different from the figure that emerged naturally in *Occidental* as a result of a calculation that had not been performed by the tribunal in that case.

219. The second issue concerns the extent of the Committee's authority. It does not cover the creation of a new *res iudicata* as the consequence of a new award. The Committee believes that this is not what it does when confirming an amount of US$19.997 million as part of the Tribunal's Award.

220. The amount is encapsulated in the US$30 million that the Tribunal has put forward in partial contradiction to its own reasoning. The Committee neither adds reasons when it confirms that amount as not contradicting the reasons stated by the Tribunal, nor does it fix a 'new' amount. It simply confirms that the amount of US$19.997 million is the direct and consistent consequence of the Tribunal's reasoning, as presented by the Parties. By so holding, it does not amend or replace the Award and does not create a new *res iudicata* but preserves the Award in part and with it the *res iudicata* effect.

221. In sum, the Committee has decided to follow the Respondents' subsidiary request to "*leave undisturbed the portion of the compensation awarded by the Tribunal that the Republic admits would have been supported by Navigant's model*"[177] and rejects the request to annul the finding of the total compensation. It upholds the adjudication of US$16.4 million for accounts receivable and US$19.997 million for the loss of business value, totaling US$36.397 million.

222. At the same time, the Committee annuls a portion of the Award and the amount attached to this portion, i.e. US$10.003 million, and extinguishes the *res iudicata*

[177] Tidewater's PHB, ¶10.

to that extent. It will be for a new tribunal to render an award with respect to this portion for which the Tribunal has failed to state reasons.

223. The Committee is convinced – not differently from the *Occidental* committee – that reasons of procedural economy militate in favor of this decision. In addition, the high value of finality of awards, which is emphasized by Article 53 of the ICSID Convention, is best respected when the part of the Award, for which no ground for annulment exists, is maintained as *res iudicata*, and only the annullable portion of the award is extinguished.

VI. COSTS

224. According to Article 61(2) of the ICSID Convention and Arbitration Rule 47(1) (j), which are applicable *mutatis mutandis* to annulment proceedings (Article 52(4) of the ICSID Convention), the Committee has discretion to determine *"how and by whom"* the costs and expenses of ICSID, the Committee and the Parties are borne.

225. In accordance with ICSID Administrative and Financial Regulation 14(3) (e), the Applicant was *"solely responsible for making the advance payments […] without prejudice to the right of the Committee in accordance with Article 52 (4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid."* The Applicant has paid the advances as requested.

226. The Committee notes that the Applicant's request to annul the determination of the total compensation on the grounds of a manifest excess of power and of a serious departure from a fundamental rule of procedure has been dismissed, because it is clearly without merits, but that it has partly prevailed because the Tribunal has failed to state the reasons for a part of the Award. The Committee notes that the Parties might have been able to avoid these proceedings upon the discovery of the Tribunal's motivation.

227. The Committee confirms that the Parties have conducted the proceedings efficiently and diligently.

228. Under these circumstances, the Committee determines that the Applicant shall bear 70% and the Respondents shall bear 30% of the fees and expenses of the Members of the *ad hoc* Committee and of the ICSID costs. Since the Applicant has made the entirety of the advance payments, the Respondents shall pay, in partial reimbursement to the Applicant, 30% of the total costs of the *ad ho*c Committee and of ICSID. [178]

229. Each Party shall bear the costs and fees it incurred.

[178] The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices are received and the account is final.

VII. DECISION

230. For the foregoing reasons, the *ad hoc* Committee decides unanimously as follows:

1. The Committee annuls the portion of the Award for which the Tribunal has failed to state the reasons on which this part is based.

2. All other grounds of the Applicant's application for annulment are dismissed.

3. The remainder of the Award, including the adjudication of US$36.397 million, remains unaffected.

4. The Respondents shall pay to the Applicant 30% of the total costs of the *ad hoc* Committee and of ICSID.

5. Each Party shall bear its own costs and fees.

6. In accordance with Arbitration Rule 54(3), the stay of enforcement is automatically terminated with respect to the unannulled part of the Award.

[*Signed*]

Tan Sri Dato' Cecil W.M. Abraham
Member
December 19, 2016

[*Signed*]

Prof. Rolf Knieper
Member
December 12, 2016

[*Signed*]

Judge Abdulqawi Ahmed Yusuf
President of the *ad hoc* Committee
December 23, 2016