

ICSID Case No ARB/10/5

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

Claimants

–and–

THE BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

AWARD

rendered by

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Dr. Andrés Rigo Sureda, Arbitrator
Professor Brigitte Stern, Arbitrator**

Secretary of the Tribunal

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Date of dispatch to the Parties: 13 March 2015

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GLOSSARY OF DEFINED TERMS

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| Astivenca | Astilleros de Venezuela, C.A. |
| Barbados BIT | Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (signed 15 July 1994, entered into force 31 October 1995) 1984 UNTS 181 (Ex C-10) |
| Brailovsky/ Flores 1 / 2 | First Expert Report on Valuation prepared by Vladimir Brailovsky & Daniel Flores (24 October 2013) and Second Report (24 April 2014) |
| Brailovsky Presentation 1 | Valuation Approach, Discount Rate and Pre-Award Interest Presentation (10 June 2014) |
| Claimants or Tidewater | Tidewater Investment SRL and Tidewater Caribe, C.A. |
| Corocoro Contract | Contract CO-067 (Ex C-22) |
| Cardón Contract | Ex C-86. |
| CVP | Corporación Venezolana del Petróleo SA, a wholly-owned subsidiary of PDVSA |
| Figuera 1 / 2 | Direct Testimony of Rubén Figuera (24 October 2013) and Second Direct Testimony (24 April 2014) |
| Flores Presentation 1 | PowerPoint Presentation accompanying direct testimony of Dr. Flores (11 June 2014) |
| Brailovsky/Flores Answers to Questions | PowerPoint Presentation: Respondent's Experts' Answers to Tribunal's Questions (12 June 2014) |
| Gulmar Offshore | Gulmar Offshore Middle East L.L.C. |
| Investment Law | Venezuelan Law on the Promotion and Protection of Investments (<i>Ley sobre Promoción y Protección de Inversiones</i>), dated 3 October 1999 (as published in the Official Gazette No. 5.390 of 22 October 1999) |
| Kehoe 1 / 2 | Direct Testimony of Gerard P. Kehoe (29 July 2013) and Second Direct Testimony (22 January 2014) |
| La Cañada | La Cañada, a town on the shores of Lake Maracaibo, Venezuela, where SEMARCA had its headquarters |
| Ministry | <i>Ministerio del Poder Popular para la Energía y Petróleo</i> Ministry of the Popular Power for Energy and Petroleum |

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| Navigant 1 / 2 | Expert Report of Brent C. Kaczmarek for Navigant Consulting, Inc. (29 July 2013) and Second Expert Report (24 January 2014) |
| Navigant Presentation 1 | PowerPoint Presentation accompanying direct testimony of Mr. Kaczmarek (10 June 2014) |
| Navigant Answers to Questions | PowerPoint Presentation: Response to Tribunal Questions from 11 June 2014 (12 June 2014) |
| PDVSA | Petróleos de Venezuela, S.A. |
| PDVSA Petróleo | PDVSA Petróleo, S.A. |
| PetroSucre | PetroSucre, S.A. |
| Request | Amended Request for Arbitration dated 1 March 2013 |
| Reserve Law | <i>Ley Orgánica que Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos</i> [Organic Law that Reserves to the State the Assets and Services Related to Primary Activities of Hydrocarbons] (7 May 2009) (Ex RL-1) |
| Respondent Venezuela or | The Bolivarian Republic of Venezuela |
| Resolution No. 51 | Resolution No. 51 of the Ministry of Popular Power for Energy and Petroleum (8 May 2009) (Ex RL-7) |
| SEMARCA | Tidewater Marine Service, C.A. |
| SEMARCA Enterprise | The value of Claimants' equity in SEMARCA together with SEMARCA's Headquarters at La Cañada (Memorial [96]) |
| Servipica | Guanta Consult, C.A. & Servicios Picardi, C.A. |
| Supply Vessels Contract | (Contract No. 4627) (Ex R-87) |
| Tidewater Caribe or Second Claimant | Tidewater Caribe, C.A. |
| Tidewater Barbados or First Claimant | Tidewater Investment SRL |
| Tugs Contract | (Contract No. 8027) (Ex R-86) |
| Wells 1 / 2 | Expert Report of Prof. Louis T. Wells (24 October 2013) and Second Expert Report (24 April 2014) |
| World Bank Guidelines | World Bank Guidelines on the Treatment of Foreign Direct Investment 1992 (CL-152) |

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| ADC v Hungary | <i>ADC Affiliate Ltd v Hungary</i> ICSID Case No ARB/03/16 (Award, 2 October 2006) 15 ICSID Rep 539 |
| AIG v Iran | <i>American International Group, Inc v Islamic Republic of Iran</i> (Award, 19 December 1983) 4 Iran-US CTR 96 |
| Amco Asia v Indonesia II | <i>Amco Asia Corp v Republic of Indonesia</i> , ICSID Case No ARB/81/1 (Award on Merits on Resubmission, 31 May 1990) 89 ILR 580 |
| Amoco | <i>Amoco International Finance Corp v Islamic Republic of Iran</i> (Partial Award, 14 July 1987) 15 Iran-US CTR 189 |
| AMT v Zaire | <i>American Manufacturing & Trading, Inc v Zaire</i> ICSID Case No ARB/93/1 (Award, 21 February 1997) 5 ICSID Rep 14 |
| Burlington v Ecuador | <i>Burlington Resources Inc v Ecuador</i> ICSID Case No. ARB/08/5 (Decision on Liability, 14 December 2012) |
| Chevron v Ecuador | <i>Chevron Corp v Ecuador</i> UNCITRAL (Partial Award on the Merits, 30 March 2010) |
| Chorzów Factory | <i>Chorzów Factory (Germany v Poland)</i> (Merits) (1928) PCIJ Rep Ser A No 17 |
| CMS v Argentina | <i>CMS Gas Transmission Company v Argentina</i> ICSID Case No ARB/01/8 (Award, 12 May 2005) |
| Continental Casualty v Argentina | <i>Continental Casualty Co v Argentina</i> ICSID Case No ARB/03/9 (Decision on Jurisdiction, 22 February 2006) |
| Duke v Peru | <i>Duke Energy International Peru Investments No 1 Ltd v Peru</i> ICSID Case No ARB/03/28 (Decision on Annulment, 1 March 2011) |
| Emmis v Hungary | <i>Emmis International Holding BV v Hungary</i> ICSID Case No ARB/12/2 (Award, 16 April 2014) |
| Enron v Argentina | <i>Enron Corp and Ponderosa Assets LP v Argentina</i> ICSID Case No ARB/01/3 (Award, 22 May 2007) |
| Funnekotter v Zimbabwe | <i>Funnekotter v Republic of Zimbabwe</i> ICSID Case No ARB/05/6 (Award, 22 April 2009) |
| Goetz v Burundi | <i>Antoine Goetz v Burundi</i> ICSID Case No. ARB/95/3 (Award, 10 February 1999) 6 ICSID Rep 3 |
| Himpurna v PT (Persero) | <i>Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)</i> (Final Award, 4 May 1999) XXV Ybk Comm Arb 11 |

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| Lemire v Ukraine | <i>Joseph Charles Lemire v Ukraine</i> ICSID Case No ARB/06/18 (Award, 28 March 2011) |
| LIAMCO | <i>Libyan American Oil Company (LIAMCO) v Libya</i> (Award, 12 April 1977) 20 ILM 1 |
| Merrill & Ring v Canada | <i>Merrill & Ring Forestry LP v Canada</i> (Award, 31 March 2010) |
| Metalclad v Mexico | <i>Metalclad Corporation v Mexico</i> ICSID Case No ARB(AF)/97/1 (Award, 25 August 2000) 5 ICSID Rep 212 |
| Middle East Cement v Egypt | <i>Middle East Cement Shipping & Handling Co SA v Egypt</i> ICSID Case No ARB/99/6 (Award, 12 April 2002) 7 ICSID Rep 178 |
| Mobil Cerro Negro v PDVSA | <i>Mobil Cerro Negro Ltd v Petróleos de Venezuela SA and PDVSA Cerro Negro SA</i> ICC Case No. 15416/JRF/CA, (Final Award, 23 December 2011) |
| Mondev v United States | <i>Mondev International Ltd v United States of America</i> ICSID Case No. ARB(AF)/99/2 (Award, 11 October 2002) 6 ICSID Rep 192 |
| Norwegian Shipowners' Claims | <i>Norwegian Shipowners' Claim (Norway v United States)</i> PCA (Award, 13 October 1922), 1 RIAA 307 |
| Oil Platforms | <i>Oil Platforms (Islamic Republic of Iran v United States of America)</i> (Preliminary Objection) [1996] ICJ Rep 803 |
| Patuha v PT (Persero) | <i>Patuha Power Ltd v PT (Persero) Perusahaan Listrik Negara</i> (Final Award, 4 May 1999) |
| Papamichalopoulos v Greece | <i>Papamichalopoulos and Others v Greece</i> ECHR Ser A, Vol 330-B (Judgment of 31 October 1995) |
| Phoenix Action v Czech Republic | <i>Phoenix Action, Ltd v Czech Republic</i> , ICSID Case No ARB/06/5 (Award, 15 April 2009) |
| Pope & Talbot v Canada | <i>Pope & Talbot Inc v Canada</i> (Interim Award, 26 June 2000) 7 ICSID Rep 69 |
| Quasar de Valores | <i>Quasar de Valores SICAV SA v Russian Federation</i> SCC Case No 24/2007 (Award, 20 July 2012) |
| Rumeli v Kazakhstan | <i>Rumeli Telekom A/S v Kazakhstan</i> ICSID Case No ARB/05/16 (Award, 21 July 2008), affirmed: Decision on Annulment, 25 March 2010 |
| Santa Elena | <i>Compañía de Desarrollo de Santa Elena SA v Costa Rica</i> ICSID Case No ARB/96/1 (Award, 17 February 2000) |
| Sapphire International | <i>Sapphire International Petroleum Ltd v National Iranian Oil Co</i> (Award) (1963) 35 ILR 136 |

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| <i>Siemens v Argentina</i> | <i>Siemens AG v Argentina</i> ICSID Case No ARB/02/8 (Award, 6 February 2007) |
| <i>SPP v Egypt</i> | <i>Southern Pacific Properties (Middle East) Ltd v Egypt</i> ICSID Case No. ARB/84/3 (Award, 20 May 1992) 3 ICSID Rep 195 |
| <i>Tecmed v Mexico</i> | <i>Técnicas Medioambientales Tecmed SA v Mexico</i> ICSID Case No ARB(AF)/00/2 (Award, 29 May 2003) 10 ICSID Rep 134 |
| <i>UPS v Canada</i> | <i>United Parcel Service of America Inc v Canada</i> (Award on Jurisdiction, 22 November 2002) 7 ICSID Rep 285 |
| <i>Vivendi v Argentina (Resubmission)</i> | <i>Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina</i> ICSID Case No ARB/97/3 (Award, 20 August 2007) |
| <i>Wena Hotels v Egypt</i> | <i>Wena Hotels Ltd v Egypt</i> ICSID Case No ARB/98/4 (Award, 8 December 2000) 6 ICSID Rep 89 |

I INTRODUCTION

A Request for Arbitration

1. On 16 February 2010, Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. filed a Request for Arbitration under the ICSID Convention against the Bolivarian Republic of Venezuela (**Venezuela** or **Respondent**).
2. On 8 February 2013, the Tribunal delivered its **Decision on Jurisdiction** in which it held that it has jurisdiction only in respect of the claims made by Tidewater Investment SRL (**First Claimant**) and Tidewater Caribe, C.A. (**Second Claimant**) (together **Tidewater** or **Claimants**) pursuant to Article 8 of the Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments 1994 (**Barbados BIT**). In light of that Decision, Claimants filed an Amended Request for Arbitration (**Request**) on 1 March 2013.
3. The dispute concerns the Claimants' investment in marine support services to the oil industry in Venezuela. The factual background to the dispute is summarised in Part I C below.

B Procedural history

4. The procedural history of this arbitration until the Decision on Jurisdiction is reviewed in that Decision.
5. On 7 June 2003, the Tribunal adopted, with the Parties' consent, a procedural schedule for the remaining steps in the arbitration.
6. The Parties then exchanged the following pleadings on the merits:
 - a) On 29 July 2013, the Claimants submitted their Memorial on the Merits, together with a witness statement of Mr. Gerald P. Kehoe (Vice President and then Senior Vice President of Tidewater, Inc. during the relevant period) and an expert report by Mr. Brent C. Kaczmarek (of Navigant Consulting, Inc).
 - b) On 25 October 2013, the Respondent submitted its Counter-Memorial on the Merits, together with a witness Statement of Mr. Rubén Figuera (former General Manager of Offshore Mixed Companies at Corporación Venezolana del Petróleo, S.A. (**CVP**), a subsidiary of PDVSA), an expert report of Professor

Louis T. Wells (Herbert F. Johnson Professor of International Management, Emeritus at Harvard Business School) and an expert report of Mr. Vladimir Brailovsky and Dr. Daniel Flores (of Economía Aplicada, S.C. and Econ One Research, Inc respectively).

- c) On 25 January 2013, the Claimants submitted their Reply on the Merits, together with a second witness Statement of Mr. Kehoe and a second expert report by Mr. Kaczmarek.
 - d) On 25 April 2014, the Respondent submitted its Rejoinder on the Merits, with the second witness Statement of Mr. Figuera, the second expert report by Prof. Wells and the second expert report by Mr. Brailovsky and Dr. Flores.
7. On 8 November 2014, the Claimants advised the Tribunal of the Parties' agreement not to make requests for the production of documents to the Tribunal.
 8. On 20 May 2014, following a request from the Tribunal, the Parties communicated the extent of their agreement as to the organisation of the hearing on the merits, including the hearing timetable and the order of witnesses.
 9. On 21 May 2014, the Claimants sought leave to introduce into the record further exhibits C-250 to C-261. On 23 May 2014, the Respondent confirmed that it no longer objected to the admission of those documents.
 10. On the same day, the Tribunal resolved the outstanding issues for the organisation of the hearing and communicated its decision on these issues to the Parties.
 11. The hearing on the merits was held from 9 to 12 June 2014 at the seat of the Centre in Washington, D.C. Present at the hearing were:

Tribunal

Professor Campbell McLachlan QC (President)
Dr. Andrés Rigo Sureda
Professor Brigitte Stern

Mr. Marco Tulio Montañés-Rumayor (Secretary)

Claimants

Counsel (Covington & Burling)
Mr. Miguel López Forastier
Mr. Thomas (T.L.) Cabbage
Mr. Alexander Berengaut
Mr. Daniel Matro

Ms. Gisselle Bourns
Mr. Felipe Nazar Pagani
Ms. Ana Maria Matias (paralegal)
Mr. Jorge Garcia (paralegal)

Parties:

Mr. Jeffrey Gorski
Mr. Bruce Lundstrom
Mr. Matthew Mancheski
Mr. Chris Ogle

Witness(s):

Mr. Gerard Kehoe

Expert(s):

Mr. Brent Kaczmarek
Ms. Isabel Kunsman
Ms. Sarah Sherman
Mr. Matt Shopp

Respondent

Counsel (Curtis, Mallet-Prevost, Colt & Mosle LLP)

Mr. George Kahale, III
Ms. Miriam Harwood
Ms. Gabriela Alvarez Avila
Mr. Eloy Barbará de Parres
Ms. Claudia Frutos-Peterson
Mr. Simon Batifort
Ms. Arianna Sánchez
Mr. Carlos Guzmán
Ms. Gloria Diaz-Bujan
Mr. Francisco Sánchez
Mr. Ali Topaloglu
Mr. Herbert Tapia

Parties:

Dr. Joaquín Parra
Dr. Alvaro Silva Calderón
Dra. Natalia Linares
Dra. Moreeliec Peña

Witness(s):

Mr. Rubén Figuera

Expert(s):

Lic. Vladimir Brailovsky
Prof. Louis T. Wells, Jr.
Dr. Daniel Flores
Mr. Andrea Cardani
Mr. Jordan Heim

Court Reporters

Ms. Liliana Avalos de Bulgarelli
Mr. David Kasdan

Interpreters

Ms. Silvia Colla
Mr. Daniel Giglio
Ms. Judith Leandre

12. On 13 June 2014, the Tribunal conducted a preliminary deliberation in Washington, D.C. It has subsequently deliberated by various means.

C Factual background

13. The Tidewater group was founded in 1956 to supply marine transportation services in the Gulf of Mexico.¹ It first established operations in Venezuela in 1958, by the acquisition of the company now called Tidewater Marine Service, C.A. (**SEMARCA**), a company constituted under the laws of Venezuela.² When the events that are the subject of this arbitration took place, Tidewater had been operating continuously in Venezuela since 1958.
14. Prior to May 2009, the Second Claimant, Tidewater Caribe, C.A. (**Tidewater Caribe**), a company incorporated in Venezuela, owned SEMARCA. Following a corporate reorganisation on 9 March 2009, Tidewater Caribe was in turn owned by the First Claimant, Tidewater Investment SRL, a company incorporated in Barbados. Each of the claimant companies are part of the Tidewater group of companies, ultimately owned by Tidewater, Inc, a United States company.
15. SEMARCA had its headquarters in the village of La Cañada, on the western shores of Lake Maracaibo. Tidewater Caribe owned the parcel of land used by SEMARCA for this purpose.³
16. The oil industry in Venezuela was nationalised in 1975. From that date onwards, Venezuela's national oil company Petróleos de Venezuela, S.A. (**PDVSA**) and its partially- or wholly-owned

¹ Memorial, [13].

² Memorial, [14].

³ Memorial, [16], citing Ex C-190. The rest of the parcel was (and continues to be) leased to a third party: Memorial, [17].

subsidiaries engaged private companies to provide support to the oil industry in the country. Those subsidiaries included three relevant to this case: Corporación Venezolana del Petróleo SA (**CVP**), PDVSA Petróleo, S.A. (**PDVSA Petróleo**) and PetroSucre, S.A. (**PetroSucre**).

17. SEMARCA provided its maritime support services under contract to both PDVSA Petróleo and PetroSucre.
18. SEMARCA's operations were originally confined to Lake Maracaibo itself.
19. From the late 1990s, SEMARCA expanded its operations to offshore locations, including in the Gulf of Paria off the northwest coast of Venezuela.
20. Despite having operated in Venezuela for many years, SEMARCA did not have a general concession contract with PDVSA or its subsidiaries. Instead, it operated on a running account basis by means of short-term charter agreements: frequent contracts with a duration of several months that were periodically extended.⁴ It is common ground that at the time of the seizure of the Claimants' assets, SEMARCA was providing services in both Lake Maracaibo and the Gulf of Paria, under four short-term contracts:⁵
 - a) **Lake Maracaibo**: SEMARCA was providing maritime support services to PDVSA Petróleo under two time-charter agreements: (i) the so-called **Tugs Contract** (Contract No. 8027); and (ii) the **Supply Vessels Contract** (Contract No. 4627).⁶
 - b) **Offshore**: (i) SEMARCA had chartered four vessels to PetroSucre to support operations in the Corocoro Project in the western area of the Gulf of Paria (the **Corocoro Contract**);⁷ and (ii) SEMARCA had a short-term agreement with Chevron Cardón III, S.A. for two vessels to support its operations in the Cardón III block of the Rafael Urdaneta Project north of Lake Maracaibo (the **Cardón Contract**).⁸
21. The Parties dispute the duration and status of those contracts at the date of the Reserve Law, a matter that the Tribunal addresses below.

⁴ As noted in Decision on Jurisdiction, [153]; Memorial, [20], citing Kehoe 1, [15]-[16].

⁵ Memorial, [25]-[29]; Counter-Memorial, [40].

⁶ Ex R-86 (Tugs Contract); Ex R-87 (Supply Vessels Contract).

⁷ Contract CO-067 (Ex C-22).

⁸ Ex C-86.

22. In 2008–2009, world oil prices fell significantly. PDVSA struggled to meet its payment obligations to SEMARCA.⁹
23. As the Tribunal observed in the Decision on Jurisdiction, accounts receivable owed to SEMARCA began to accrue in June 2008.¹⁰ By 31 May 2009, Tidewater’s Annual Report recorded that SEMARCA had accounts receivable of approximately USD \$40 million.¹¹
24. On 7 May 2009, the Government of Venezuela enacted the Organic Law that Reserves to the State the Assets and Services Related to Primary Activities of Hydrocarbons (**Reserve Law**).¹² The following day, 8 May 2009, the Ministry of Popular Power for Energy and Petroleum issued a resolution (Resolution No. 51) that identified the Claimants, along with 38 other service providers, as subject to the Reserve Law.¹³
25. The same day SEMARCA’s assets on Lake Maracaibo were seized, including its headquarters at La Cañada and 11 vessels.¹⁴ SEMARCA continued to provide services to PetroSucre in the Gulf of Paria following that seizure, but on 12 July 2009 the Claimants’ four vessels serving the Corocoro Project in the Gulf of Paria were also seized.¹⁵ The Parties disagree on the scope of application of the Reserve Law, the extent of the seizures, and the extent of the Claimants’ remaining assets and operations in Venezuela. The Tribunal returns to those issues in Part III of this Award.

⁹ Counter-Memorial, [11].

¹⁰ See Decision on Jurisdiction, [154]-[181]. As noted below, the factual findings that were made by the Tribunal for the purpose of determining whether the Respondent’s objections to jurisdiction were made out are not binding on the Tribunal when it comes to the determination of the Claimants’ claims on the merits. Nevertheless, and subject to what follows in this Award, that summary describes the events leading up to the seizures that have given rise to the present arbitration.

¹¹ Memorial, [32], citing Ex C-207, 43. This total was comprised of approximately \$16m payable in USD and the equivalent of \$24m payable in bolívares.

¹² *Ley Orgánica que Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos* (Ex RL-1).

¹³ Ex RL-7.

¹⁴ Kehoe 1, [35] and Ex C-14; Counter-Memorial, [16].

¹⁵ Memorial, [62]; Counter-Memorial, [16].

II THE PARTIES' SUBMISSIONS

26. In this section of the Award, the Tribunal summarises the Parties' respective submissions on the two issues which it is the Tribunal's task to resolve: first, the scope of Respondent's liability; and second, the proper quantum of compensation due to Claimants in the light of the Tribunal's findings as to liability.
27. The Tribunal observes at the outset that Respondent accepts that the Reserve Law and the Government's associated administrative acts had the effect of expropriating property of value belonging to Claimants.¹⁶ Respondent also accepts that the Respondent is obliged to pay to Claimants compensation for those expropriations.¹⁷ As a consequence, the focus of the Parties' submissions was on the scope of Respondent's expropriation of Claimants' property, the lawfulness of the expropriation, and the proper quantum of compensation due as a consequence.

A Liability

1. Preliminary

28. Claimants base their claim in this arbitration on the Barbados BIT. They observe that the law applicable to the substance of the claim is determined by Article 42(1) of the ICSID Convention, and submit that the "rules of law ... agreed by the Parties' pursuant to that provision are recorded in the Barbados BIT itself, supplemented by general principles of international law."¹⁸ They submit that Venezuelan law is relevant to the extent that it bears on the scope of Claimants' rights and Respondent's obligations; while Article 11 of the Barbados BIT incorporates by reference any principles of international law or Venezuelan law that are more favourable than those imposed by the Treaty, equally Venezuelan law cannot be applied to the extent that it is inconsistent with Respondent's international legal obligations.¹⁹
29. Respondent does not take issue with these propositions.

¹⁶ Counter-Memorial, [49].

¹⁷ Counter-Memorial, [161].

¹⁸ Memorial, [71]-[72].

¹⁹ Memorial, [73]-[74].

2. The scope of the expropriation

30. Claimants say that the effect of the Reserve Law and the associated administrative acts was to directly expropriate valuable tangible assets belonging to Claimants, as well as to indirectly expropriate their shares in SEMARCA itself, thus depriving Claimants of a business with a 50-year history in Venezuela and a proven history of profitability. Respondent, by contrast, says that the expropriations deprived Claimants of nothing more than a piece of land at La Cañada (together with buildings and inventory), 15 vessels (which, as a consequence of the Decision on Jurisdiction, are beyond the competence of the Tribunal, being owned by Tidewater companies outside the scope of the Barbados BIT) and the short period remaining in the terms of two contracts with PDVSA Petróleo.

(a) Claimants' submissions

31. Claimants begin by noting that Article 5(1) of the Barbados BIT prohibits both *direct* and *indirect* expropriation. It defines the latter as State measures which 'interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.'²⁰

32. Thus, Claimants submit that following the enactment of the Reserve Law on 7 May 2009, and the Ministerial designation of Claimants on 8 May 2009, Respondent's expropriation consisted of three elements:²¹

- a) On 8 May 2009, direct expropriation of SEMARCA's headquarters, operations and assets on Lake Maracaibo, as well as certain real estate owned by the Second Claimant at La Cañada.
- b) On 12 July 2009, direct expropriation of Claimants' offshore assets and operations in the Gulf of Paria.
- c) As a consequence of all Respondent's acts, indirect expropriation of Claimants' rights and interests in SEMARCA, including their shareholding.

²⁰ Memorial, [79], quoting *Vivendi v Argentina (Resubmission)* (Ex CL-138), [7.5.16].

²¹ Memorial, [80]-[81].

33. Claimants note that Respondent concedes the first stage of expropriation.²² However, Claimants explain that the expropriation itself had wider effects on SEMARCA's other operations in the country, because its operations in the Gulf of Paria were deprived of access to dispatchers, mechanics or spare parts located in La Cañada.²³
34. As to the second stage, Claimants reject Respondent's argument that because the Reserve Law only applied by its terms to Lake Maracaibo, Claimants were (and remain) free to operate offshore. They note that, on 12 July 2009, Respondent seized four vessels operating offshore in support of the Corocoro Project, that this had the effect of terminating the Corocoro contract which was still on foot,²⁴ and that this seizure was undertaken pursuant to the Reserve Law. They also rely on the Tribunal's finding in the Decision on Jurisdiction that on 12 July 2009 'the Claimants' remaining assets and operations in Venezuela were expropriated.'²⁵ The inference that Claimants would have the Tribunal draw is that they did not remain free to operate offshore.
35. As to the third stage, Claimants say that Respondent's implementation of the Reserve Law deprived the Second Claimant of control over SEMARCA, as demonstrated by: (i) multiple Venezuelan court decisions which recognise that SEMARCA has become part of, or is represented by, PDVSA; (ii) the fact that the Second Claimant was barred from registering documents for SEMARCA in the Commercial Registry; (iii) letters from SEMARCA's officers to the Respondent explaining that they had been effectively removed from office; and (iv) integration of SEMARCA into the PDVSA business.²⁶
36. Claimants further submit that Respondent's acts have rendered the shares in SEMARCA worthless (and that they do not enjoy the benefit of the accounts receivable because they have lost control over the company).²⁷
37. Claimants say that Respondent's argument that they could not have suffered indirect expropriation because Claimants lacked proprietary rights capable of expropriation is a red herring: their shares in SEMARCA were undoubtedly a proprietary right and they have been

²² Reply, [75].

²³ Memorial, [61].

²⁴ Reply, [48]. The Claimants say that PetroSucre's 3 July 2009 letter (Ex C-101) had the effect of renewing the contract for three months.

²⁵ Reply [43]-[50] & [76]-[77], quoting Decision on Jurisdiction, [181].

²⁶ Reply, [50]-[55], [81].

²⁷ Reply, [82]-[84].

deprived of the benefit of that right. It is not necessary that Claimants identify any long-term contractual rights beyond that investment to make out a case of indirect expropriation.²⁸

(b) Respondent's submissions

38. Respondent says that Claimants have confused expropriation by a State with reservation of an area of activity within its borders.²⁹ It says that all that was expropriated were the vessels, the tangible assets at La Cañada, and the short periods remaining on the two Lake Maracaibo contracts.³⁰
39. As to the contracts, Respondent says that the Reserve Law only expropriated a short period remaining on two contracts (the Towing Contract and Supply Vessels Contract), each of which had only 24 days left to run and no right of renewal. Respondent says that because the Reserve Law only applied to Lake Maracaibo, the offshore contracts were not expropriated and expired according to their terms: the Corocoro Contract expired on 30 June 2009 (52 days after the enactment of the Reserve Law) because renewal terms were not agreed;³¹ and the Cardón Contract expired on 23 May 2009 but continued until 12 June 2009, 35 days after the enactment of the Law (after which Chevron chose not to extend it because the project was not commercial).³²
40. Respondent also says that the limited scope of the Reserve Law left the company free to operate elsewhere in Venezuela, and that this is demonstrated by the fact that the Claimants continued to negotiate with Repsol in respect of the Rafael Urdaneta Cardón IV Project after the enactment of the Reserve Law.³³ It says that in consequence there can be 'no issue of compensation with respect to any business outside of the reserved area.'³⁴ The seizure of the four vessels serving the Corocoro Project does not demonstrate that the Reserve Law applied outside Lake

²⁸ Reply, [85]-[89].

²⁹ Counter-Memorial, [18].

³⁰ Counter-Memorial, [16], [49].

³¹ Rejoinder, [33]-[43].

³² Counter-Memorial, [42]-[45]; Rejoinder, [19], [47]-[55].

³³ Counter-Memorial, [54]-[55]; Rejoinder, [28], [76].

³⁴ Counter-Memorial, [76].

Maracaibo, because all four vessels were registered there and three had been used for maritime support services on the Lake.³⁵

41. As to the allegation of indirect expropriation, Respondent says that nothing in the Reserve Law affects the ownership or control of SEMARCA. It submits that SEMARCA continued to receive payments in its own name after the enactment of the Reserve Law, continued to operate and negotiate offshore contracts, and that the Claimants remain in control of its accounts receivable.³⁶ Respondent says it did not take possession and control of SEMARCA or remove its officers.³⁷ Respondent says the SEMARCA officers' letters on which Claimants rely were self-serving and written after the expropriation in order to 'create a record of "indirect expropriation"'.³⁸
42. Respondent says that, in the absence of a property right owned by SEMARCA being taken, there can be no indirect expropriation.³⁹ In other words, Claimants cannot make an expropriation claim for rights or interests that Claimants never had.⁴⁰ In circumstances where Claimants remain the legal owners of the shares in SEMARCA, Claimants have not identified any substantial assets or rights held by SEMARCA the taking of which deprived the company of its value.⁴¹ Respondent says that Claimants seek compensation for the loss of a 'vested right to continue to do business with PDVSA' that they never possessed.⁴²

³⁵ Rejoinder, [27].

³⁶ Counter-Memorial, [55]-[57]; Rejoinder, [68], [112].

³⁷ Rejoinder, [111], citing *Pope & Talbot v Canada* (Ex RL-163).

³⁸ Rejoinder, [69]-[72], [110].

³⁹ Counter-Memorial, [56]-[68].

⁴⁰ Rejoinder, [92]-[98].

⁴¹ Counter-Memorial, [69]-[74], distinguishing *Quasar de Valores* (Ex CL-140) & *Vivendi v Argentina (Resubmission)* (Ex CL-138); Reply, [99]-[109], relying on *Emmis v Hungary* (Ex RL-159) and distinguishing *Wena Hotels v Egypt* (Ex CL-141); *AIG v Iran* (Ex CL-159); *Tecmed v Mexico* (Ex CL-133) and *Metalclad v Mexico* (Ex CL-172) as cases where the company in question was dispossessed of valuable rights or assets.

⁴² Rejoinder, [9].

3. Whether the expropriation was lawful or unlawful

(a) Claimants' submissions

43. Claimants say that Respondent's expropriation is unlawful because it fails to respect two of the conditions imposed by Article 5(1) of the Treaty: that the expropriation be taken 'against prompt, adequate and effective compensation'; and that it be carried out on a non-discriminatory basis.
44. Compensation: Claimants note that the Barbados BIT requires that any expropriation be accompanied by payment of compensation which amounts to the market value of the investment expropriated, calculated before the expropriation (or when the impending expropriation became public knowledge).⁴³ Claimants thus begin by submitting that the mere failure of Respondent to pay compensation in accordance with the BIT renders the expropriation unlawful.⁴⁴ They note that Respondent's representative rejected the proposal to pay immediate but partial compensation consisting of all the accounts receivable, and indicated that assets would be valued on a book-value basis.⁴⁵ Claimants say that Respondent was required, at the least, to make a 'good-faith determination of the fair market value of the investment ... and to tender that amount promptly' without prejudice to subsequent proceedings by Claimants to challenge its quantum.⁴⁶ They cite authority for the proposition that a failure to offer compensation,⁴⁷ or Treaty-compliant compensation,⁴⁸ renders the expropriation unlawful. They distinguish the authorities on which Respondent relies on the basis that they either concerned expropriation without compensation under customary international law standard, or they involved distinguishable Treaty provisions.⁴⁹
45. In any case, they submit that because the Reserve Law requires Respondent to pay compensation only on a book-value basis, and prohibits the compensation of 'lost profits or

⁴³ Memorial, [83], citing Article 5(1) of the Barbados BIT.

⁴⁴ Memorial, [84] and the cases there cited.

⁴⁵ Memorial, [66]; Reply, [66]-[69]; Kehoe 1, [49], referring to a meeting on 21 July 2009 with the coordinator of the task force formed by the Minister of Energy to implement the Reserve Law.

⁴⁶ Reply, [94].

⁴⁷ Reply, [95]-[96], citing in particular *Burlington v Ecuador* (Ex CL-135), [543]-[545] & *Vivendi v Argentina (Resubmission)* (Ex CL-138), [7.5.21].

⁴⁸ Reply, [97], citing *Rumeli v Kazakhstan* (Ex CL-95), [706].

⁴⁹ Reply, [97]-[104].

indirect damages’, the Reserve Law forbids Respondent from paying the compensation required by the BIT, and this renders the expropriation unlawful.⁵⁰

46. Discrimination: Claimants submit that, under the Treaty, an expropriation will be unlawful unless it is carried out ‘on a non-discriminatory basis’. They say that the expropriation of SEMARCA was unlawful because not all similarly situated providers of maritime support services to the oil and natural gas industry in Venezuela received equal treatment. In particular, they say that three other operators were treated more favourably than SEMARCA:⁵¹

- i. Gulmar Offshore Middle East L.L.C. (**Gulmar Offshore**), a United Arab Emirates company, was one of the operators on Lake Maracaibo specifically designated in Resolution No. 51. After Respondent seized three vessels owned by Gulmar Offshore in accordance with that Resolution, it subsequently returned them and the company continued to operate in Venezuela (including taking on services formerly provided by SEMARCA). Claimants reject Respondent’s explanation that PDVSA did not have the expertise to operate the vessels as the reason for returning them, because this exception was not provided for in the Reserve Law.
- ii. Guanta Consult, C.A. & Servicios Picardi, C.A. (**Servipica**), a Venezuelan competitor of SEMARCA who was not listed in Resolution No. 51 and whose assets were not expropriated. Servipica ultimately went on to contract its vessels to Repsol on the Cardón IV project, an operation that Claimants had been in negotiations to service.
- iii. Astilleros de Venezuela, C.A. (**Astivenca**), a Venezuelan company, also operated offshore and was not subject to expropriation.

(a) Respondent’s submissions

47. Compensation: On the facts, Respondent says that it engaged in compensation discussions with Claimants, but those could not proceed because Claimants insisted on an overly-broad confidentiality agreement. It says that agreement on compensation has also been hampered by Claimants’ insistence on seeking compensation for rights SEMARCA never had.⁵²

⁵⁰ Memorial, [84], Reply, [92], citing Reserve Law, Article 6.

⁵¹ Memorial, [63]-[65], [85]-[86]; Reply, [56]-[65], [106]-[109].

⁵² Rejoinder, [81]-[89], [116].

48. On the law, Respondent submits that an expropriation is not rendered unlawful by the mere fact that compensation has not been paid, provided that the government ‘recognises the obligation to compensate.’⁵³ Respondent points out that in the *Chorzów Factory* case (as followed in *LIAMCO*), the expropriation was unlawful because the Government of Poland did not have the right to expropriate the property in question under the applicable Treaty, and that, if Poland had been entitled to expropriate, then the appropriate standard of compensation would have been ‘the value of the undertaking at the moment of dispossession’ even if Poland had failed to pay any compensation.⁵⁴ Respondent submits that the concept of ‘provisional payment’ invoked by Claimants has no support in the authorities.⁵⁵
49. Respondent distinguishes the five cases which Claimants cite for the proposition that the mere failure to pay compensation renders an expropriation unlawful, arguing that in those exceptional cases the State had never made an offer of compensation, or had offered compensation so low as to be non-existent.⁵⁶ In Respondent’s submission, Article 6 of the Reserve Law does not prohibit compliance with the Treaty’s terms as to compensation and there is no basis for assuming that the State intended to breach its international obligations in enacting the Law.⁵⁷
50. Discrimination: Respondent says that it did not act in a discriminatory fashion:⁵⁸
- i. The vessels belonging to Gulmar Offshore were returned because PDVSA did not have the expertise to operate them. Respondent also suggests that the treatment of Gulmar Offshore’s vessels was consistent with the treatment of the Claimants’ vessels *President Tide* and *High Quest* (which were released by the Respondent), because in both cases they were foreign-flagged and had all-international crews. Respondent also says that Gulmar Offshore is in dispute

⁵³ Counter-Memorial, [81] and the cases there cited; Rejoinder, [116].

⁵⁴ Counter-Memorial, [82]-[83], citing *Chorzów Factory* (Ex RL-81), 46-7 and *LIAMCO* (Ex RL-114), 138-9.

⁵⁵ Rejoinder, [120].

⁵⁶ Counter-Memorial, [86]-[88], citing in the first category *Burlington v Ecuador* (Ex CL-135); *Funnekotter v Zimbabwe* (Ex CL-136); *Wena Hotels v Egypt* (Ex CL-141); and *Vivendi v Argentina (Resubmission)* (Ex CL-138) and in the second category *Rumeli v Kazakhstan* (Ex CL-95); Rejoinder, [118].

⁵⁷ Rejoinder, [119].

⁵⁸ Rejoinder, [125].

with Venezuela over the effects of the Reserve Law and no longer operates in the country.⁵⁹

- ii. Servipica, by contrast, was not operating in Lake Maracaibo at the time of the Reserve Law and therefore was not included in Resolution No. 51.⁶⁰
- iii. Astivenca was included in Resolution No. 51 and its assets in Lake Maracaibo were expropriated.⁶¹

4. Other breaches of the Barbados BIT

(a) Claimants' submissions

51. Claimants also allege that the Respondent's conduct constitutes a breach of three other protections afforded by the Barbados BIT:

- i. Fair and equitable treatment: Article 2(2) of the BIT guarantees investors 'fair and equitable treatment in accordance with the rules and principles of International law'. A 'central pillar' of the BIT's guarantee is the protection of legitimate expectations, and Claimants say that Respondent violated their legitimate expectation (rooted in the BIT and Venezuela's Constitution) that their investment would not be expropriated without compensation. Claimants submit, in particular, that the Venezuelan Constitution requires compensation to be paid *before* any seizure.⁶² Claimants say that the Treaty protection is not qualified by the (lower) customary international law minimum standard of treatment of aliens, but even that standard prohibits expropriation without compensation.⁶³
- ii. Arbitrary or discriminatory measures: Article 2(2) also prohibits the impairment of investments by arbitrary or discriminatory measures. Claimants

⁵⁹ Counter-Memorial, [92]-[94]; Rejoinder, [77].

⁶⁰ Counter-Memorial, [95]; Rejoinder, [77], [80].

⁶¹ Rejoinder, [77].

⁶² Reply, [113], citing Constitution, Article 115 (Ex C-227).

⁶³ Memorial, [87]-[91]; Reply, [110]-[115].

say that Respondent's measures were arbitrary because they violated the BIT and the Constitution, and discriminatory for the reasons described above.⁶⁴

- iii. National treatment and most-favoured nation treatment: Claimants also say that the discriminatory nature of Respondent's conduct constitutes a freestanding violation of Article 3 of the BIT.⁶⁵

(b) Respondent's submissions

52. Respondent says that Claimants' other causes of action under the BIT add nothing to their claim of expropriation:

- i. Fair and equitable treatment: Respondent says that the guarantee in Article 2(2) of the BIT is the customary international law minimum standard of treatment. Claimants do not claim they had a right to operate in Venezuela in perpetuity and Respondent has a sovereign right to reserve certain activities to itself. This claim therefore boils down to an allegation that compensation has not been paid and adds nothing to the primary claim. That argument cannot succeed because Respondent has always recognised its obligation to compensate.⁶⁶
- ii. Arbitrary or discriminatory measures, national treatment and most-favoured nation treatment: These claims simply recycle Claimants' allegation of discriminatory expropriation.⁶⁷

B Compensation

53. At the close of the written phase, the calculations proffered by the respective experts were some distance apart. Claimants' experts quantified the total claim at between US \$217m and US \$234m on an *ex post* basis, and between US \$103m and US \$141m on an *ex ante* basis.⁶⁸

⁶⁴ Memorial, [92]-[94]; Reply, [116]-[117].

⁶⁵ Memorial, [95]; Reply, [118].

⁶⁶ Counter-Memorial, [107]-[121]; Rejoinder, [128]-[130].

⁶⁷ Rejoinder, [126]-[127].

⁶⁸ Navigant 2, [4]-[6].

Respondent's experts, by contrast, concluded that the proper quantum of compensation was US \$1.68m.⁶⁹

54. It became apparent during the hearing that much of the difference between the valuations was attributable to the different assumptions that the experts had adopted, in some cases on instruction from counsel.⁷⁰ During the hearing, both Parties' experts were given an opportunity to make a brief direct presentation of their evidence to the Tribunal, before being cross-examined and questioned by the Tribunal. Subsequently, and at the request of the Tribunal, each Party's experts produced revised valuations on the basis of alternative assumptions. In this section, the Tribunal first outlines the different approach the Parties took to the valuation exercise, before explaining the valuation figures presented by the experts during the hearing.

1. Standard of compensation and date for assessment of compensation

(a) Claimants' submissions

55. Claimants say that they are entitled to *restitutio in integrum*: that is, compensation to place them in the position they would have been absent the Respondent's wrongful acts.⁷¹ At a minimum, they are entitled to the fair market value of the **SEMARCA Enterprise** (which they define to include the value of their equity in SEMARCA plus the value of the part of the terminal at La Cañada occupied by the company⁷²) as a going concern before the expropriation measures became public (the **ex ante approach**). On this approach, the business is valued on the basis of reasonable expectations at that date.⁷³ But Claimants submit that, because the expropriation was unlawful, they are entitled to be compensated for the net cash flows that they would have enjoyed between the date of the expropriation and the date of this Award, plus the value of the SEMARCA Enterprise at the later date (the **ex post approach**).⁷⁴

⁶⁹ Brailovsky/Flores 2, [10].

⁷⁰ For example, the Respondent's experts were instructed to exclude accounts receivable from their calculation: T2/438/17 – T4/439/1.

⁷¹ Memorial, [97].

⁷² Memorial, [96].

⁷³ Navigant Presentation 1, Slide 4.

⁷⁴ Memorial, [100].

56. Claimants say that the prescribed standard of compensation in Article 5(1) of the BIT represents the condition for a *lawful* expropriation, but that Article 5(1) does not prescribe the standard of compensation that is payable for an expropriation which the Tribunal has found to be *unlawful* or *wrongful*.⁷⁵ Consequently, the applicable standard is supplied by customary international law as reflected in the *Chorzów Factory* case, requiring reparation to ‘wipe out all the consequences of the illegal act’.⁷⁶ This equates to the Claimants’ *ex post* approach.⁷⁷ The same standard applies to any breach of the BIT (such as a violation of the guarantee of fair and equitable treatment).⁷⁸ Claimants say that although ‘in most adjudicated expropriation disputes’ compensation has been assessed at the date of expropriation, in those cases either additional compensation was not sought or there was insufficient evidence to determine the increase in value.⁷⁹
57. Claimants say that if compensation is to be assessed at the date of dispossession, it must exclude the adverse impact of pre-expropriation measures that were taken to reduce the value of the Claimants’ interests.⁸⁰

(b) Respondent’s submissions

58. Respondent begins by submitting that there is no difference between an *ex ante* and *ex post* valuation in this case, because, for the reasons described above, the Respondent did not expropriate the SEMARCA Enterprise itself.⁸¹
59. To the extent that the valuation date might make a difference, Respondent says that Article 5(1) of the BIT stipulates the standard of compensation. It is not limited by its terms to ‘lawful’ expropriations, and authority supports the proposition that the standard of compensation set by the applicable Treaty should apply regardless of whether the expropriation is lawful (but particularly where the only ‘wrongful’ conduct is the non-payment of compensation).⁸²

⁷⁵ Reply, [129]-[133].

⁷⁶ Memorial, [105]-[106] & Reply, [122]-[123], citing *Chorzów Factory* (Ex CL-147), 47.

⁷⁷ Memorial, [108].

⁷⁸ Memorial, [114].

⁷⁹ Reply, [133].

⁸⁰ Reply, [136].

⁸¹ Counter-Memorial, [96], [106].

⁸² Counter-Memorial, [96]-[102], citing *Chorzów Factory* (Ex RL-81), 47.

Respondent distinguishes *ADC v Hungary* on the basis that the expropriation was deemed unlawful for a number of reasons other than the failure to pay compensation.⁸³

2. Method of valuation

(a) Claimants' submissions

60. On Claimants' preferred *ex post* approach, their experts calculated compensation in two tranches: (i) the lost net cash flows of the SEMARCA Enterprise from 7 May 2009 until the date of the Award; and (ii) the fair market value of the SEMARCA Enterprise at the date of the Award.
61. As to the value of the business itself, Claimants adopt the 'willing buyer/willing seller' approach endorsed by, *inter alia*, the World Bank Guidelines,⁸⁴ and say that on the *ex post* approach the investor is entitled to the higher of the business's value at the time of dispossession or the value it would have had at the date of the Award taking into account the profits that would have been earned in the interim in valuing the business.⁸⁵ Claimants' experts utilise a combination of valuation methodologies: primarily (i) a Discounted Cash Flow (**DCF**) analysis, assisted by (ii) the comparable publicly traded companies approach and (iii) the comparable transactions approach.⁸⁶ To implement the DCF approach, Claimants' experts project future cash flows through to 31 March 2019 (using the same general methodology as for the period 2009–2013) and determine the remaining value of the business beyond 2019 with a terminal (or residual) value calculation.⁸⁷

(b) Respondent's submissions

62. Respondent's primary position is that it is not appropriate to value the SEMARCA Enterprise at all, because it was not expropriated. To the extent that it is necessary to value the business, the Respondent's experts say that a DCF valuation alone is appropriate, and reject Claimants experts' comparable companies and transactions approaches for the reasons given below.

⁸³ Counter-Memorial, [103].

⁸⁴ Memorial, [109], citing Guidelines on the Treatment of Foreign Direct Investment (Ex CL-152).

⁸⁵ Memorial, [110]-[113] & Reply, [124]-[128], citing *ADC v Hungary* (Ex CL-107), *Siemens v Argentina* (Ex CL-128), *Vivendi v Argentina (Resubmission)* (Ex CL-205) and *Amco Asia v Indonesia II* (Ex CL-161).

⁸⁶ Memorial, [117], [130].

⁸⁷ Memorial, [131]-[135].

3. Elements of the valuation

(a) Scope of the business

63. The Parties dispute the scope and long-term prospects of SEMARCA's business at the date of the expropriation.
64. Claimants: As to the long-term prospects of the business, Claimants dispute the Respondent's contention that SEMARCA was vulnerable to 'stiff competition' and the risk of PDVSA bringing services 'in-house'.⁸⁸ They say that SEMARCA had a proven track record of success and numerous competitive advantages, and was one of the few companies well placed to service the increased demand after 2009.⁸⁹ As a result, the fact that SEMARCA had no guaranteed right to future contracts on the Lake is not a good reason to ignore its future earning capacity.⁹⁰ They say that PDVSA had no viable internalisation plan, submit that the market would not have regarded PDVSA's isolated 'musings' as a realistic threat to SEMARCA's prospects, and say that, in any case, the limited plans were largely focused on services that SEMARCA did not provide.⁹¹
65. On the assumption that the Tribunal takes into account business that Claimants would have undertaken in the period between expropriation and the date of this Award, Claimants point to several offshore projects that they say would have resulted in an expansion of their business. In particular, they identify: the Rafael Urdaneta Project, a large natural gas drilling operation north of Lake Maracaibo (of which the Cardón III Project, to which SEMARCA briefly contributed two vessels – *High Quest* and *President Tide* – was a part);⁹² the Mariscal Sucre Project, in which PDVSA has committed to invest;⁹³ and the Plataforma Deltana Project off the east coast of Venezuela, in respect of which SEMARCA was in discussions at the time of the expropriation.⁹⁴ They do not say that the projects on-going at the date of expropriation would necessarily have continued, but that Claimants would have captured a sufficient share of the offshore business to

⁸⁸ Reply, [14], [145].

⁸⁹ Reply, [17]-[19].

⁹⁰ Reply, [143].

⁹¹ Reply, [20]-[24], [146], [161].

⁹² Memorial, [41]-[46]; Reply, [27]-[29].

⁹³ Memorial, [47]-[48]; Reply, [29]-[32].

⁹⁴ Memorial, [49]-[50]; Reply, [33]-[34].

employ the existing vessels plus six more.⁹⁵ As noted above, Claimants dispute the suggestion that they are still free to exploit offshore opportunities.⁹⁶

66. Respondent: Respondent stresses that after 1975 Claimants had a single customer in Lake Maracaibo: PDVSA and its subsidiaries.⁹⁷ Whatever its trading history, SEMARCA had no guarantee of continuing operation and was subject to the risk that the State would choose to reserve activities in Lake Maracaibo to itself, as it did.⁹⁸ PDVSA had firm internalisation plans, and all the Reserve Law did was to expedite them.⁹⁹
67. Respondent submits that the Reserve Law does not prevent the Claimants participating in offshore operations.¹⁰⁰ It nevertheless says that the record belies Claimants' hypothetical expansion plans in Rafael Urdaneta, Mariscal Sucre and Plataforma Deltana,¹⁰¹ in circumstances where SEMARCA's actual business there was 'virtually non-existent'.¹⁰² Respondent thus says that Claimants have failed to establish what the 17 vessels that Claimants assume would have operated in Venezuela would have been doing,¹⁰³ noting in particular that the *President Tide* and *High Quest* left Venezuela after the Chevron Contract concluded.¹⁰⁴
68. Respondent says that Claimants' damages claim is speculative, impermissibly assumes that SEMARCA would continue providing services into perpetuity, and is contrary to authority that damages should not be awarded on the assumption that contracts would be renewed when there was no right of renewal.¹⁰⁵ It says that no hypothetical buyer would value SEMARCA on that basis.¹⁰⁶

⁹⁵ Reply, [165].

⁹⁶ Reply, [147]-[149].

⁹⁷ Rejoinder, [17].

⁹⁸ Rejoinder, [22], [138].

⁹⁹ Rejoinder, [23], citing *Figuera 1*, [42]-[44] & *Figuera 2*, [26]-[27].

¹⁰⁰ Rejoinder, [26], [178].

¹⁰¹ Rejoinder, [56]-[64].

¹⁰² Counter-Memorial, [124].

¹⁰³ Rejoinder, [66], [179]-[187].

¹⁰⁴ Rejoinder, [187].

¹⁰⁵ Counter-Memorial, [126]-[128], citing *Merrill & Ring v Canada* (Ex RL-99) & *CMS v Argentina* (Ex CL-162).

¹⁰⁶ Rejoinder, [144].

(b) Accounts receivable and working capital

69. The Parties agree that the accounts receivable owed to SEMARCA totalled US \$44,888,040 as at 8 May 2009. However they dispute how the accounts receivable should be treated in the calculation of damages.
70. Claimants say that because they have been deprived of control or operation of SEMARCA, they are not able to collect the accounts receivable.¹⁰⁷ They submit that if the expropriatory acts had not been committed, it is reasonable to think that PDVSA would have been able to satisfy the obligations, and thus include the accounts receivable in their assessment of damages.¹⁰⁸ Nevertheless, they assume that some of the amount outstanding at January 2009 would have remained outstanding, and some would have gone to pay off supplier liabilities, so only include US \$16.48m in their calculations.¹⁰⁹ They thus say that Respondent's experts have wrongly excluded most of SEMARCA's working capital from their calculation.¹¹⁰
71. Respondent relies on Claimants' assertion in the document production phase that they 'are not seeking payment of those accounts receivable in this proceeding'¹¹¹ and their experts were accordingly instructed to exclude accounts receivable from their calculations.¹¹² When instructed to include the accounts receivable in their calculations, Respondent's experts subtracted US \$27,464,640 in current liabilities, leaving a recoverable total of \$17,423,400.¹¹³

¹⁰⁷ Reply, [150]-[151].

¹⁰⁸ Memorial, [36].

¹⁰⁹ T2/293/1-9. The calculation is found in Navigant Answers to Questions, Slide 10.

¹¹⁰ Reply, [193]-[198].

¹¹¹ Rejoinder, [75], quoting Claimants' Response to Respondent's Answer to Claimants' First Document Request and Claimants' Reply to Respondent's Answer to Claimants' Objections to Respondent's First Document Request (17 March 2011), [40].

¹¹² T2/438/17 – T2/439/1.

¹¹³ Brailovsky/Flores Answers to Questions, Slide 7 (liquidation value). In the Respondent's calculations of SEMARCA's value on a going-concern (DCF) basis, the difference between the valuation including the accounts receivable (at 100%) and excluding them entirely ranged between \$18.762m and \$19.252m, depending on the other assumptions adopted: compare figures in the first column of Slides 10 and 11.

(c) Cash flow

72. The Parties dispute whether, for the purpose of calculating cash flows in the DCF analysis, it is appropriate to adopt a three-year spread of historical cash flows (i.e. FY2006 to FY2008) or a four-year spread (FY2006 to 2009). Claimants' expert includes FY2009 in his calculations.¹¹⁴ Respondent's experts opine that this has a distorting effect on the figures, since FY2009 was a year of historically high oil revenues, which had a consequent effect on day rates that could be commanded by SEMARCA.¹¹⁵

(d) Discount rate

73. Claimants: Having calculated cash flows, Claimants' experts discount them to the valuation date by calculating SEMARCA's Weighted Average Cost of Capital (**WACC**). This takes into account both the cost of equity and the cost of debt. To calculate the cost of equity, Claimants' expert uses the Capital Asset Pricing Model (**CAPM**), which takes into account three principal factors: (i) the rate of return for risk-free investments; (ii) the equity risk premium; (iii) a measure of system risk associated with a given security relative to the market as a whole (known as the *beta* value); and add (iv) a country risk premium.¹¹⁶ As a preliminary point, Claimants say that Respondent's experts use the wrong industry code when extracting data from the Ibbotson/Morningstar Cost of Capital Yearbook, which itself produces a 3.74 per cent reduction in WACC.¹¹⁷ As to the individual components of the discount rate:
- a) For the risk-free rate, Claimants' expert uses the ten-year historical average yield on United States Treasury Inflation-Protected Securities.¹¹⁸
 - b) For the equity risk premium, Claimants' expert used 5.0 per cent, said to be an approximate average of the range of estimates recommended in empirical

¹¹⁴ Navigant 1, [121] (Fig 27); Navigant 2, [116]-[137].

¹¹⁵ Brailovsky/Flores 1, [71]; Brailovsky/Flores 2, [72]-[83].

¹¹⁶ Memorial, [138].

¹¹⁷ Reply, [184].

¹¹⁸ Memorial, [139].

studies.¹¹⁹ Claimants say that Respondent's premium is based on a single source and, at 6.5 per cent, is at the top end of the usual range of 3.5 to 7 per cent.¹²⁰

- c) For the asset beta, the expert used a sample of comparable companies to derive an unlevered *beta* of 0.618, adjusting the figures for an assumed debt/equity ratio of 10:90 for SEMARCA. He justifies the low ratio on the basis that SEMARCA leased its vessels, meaning it had modest financing needs.¹²¹ He says that if the Respondent's experts were to use the right Ibbotson/Morningstar industry code, the applicable *beta* is 0.69.¹²²
- d) For the country risk premium (which accounts for two-thirds of the difference in overall discount rate between the respective experts), Claimants' expert excludes the impact of 'certain Venezuelan government policies, such as its nationalisation agenda, which heightened the level of legal, regulatory and political risk'.¹²³ He says that expropriation risk must be excluded because the BIT protects against it,¹²⁴ and criticises Respondent's experts' reliance on the Ibbotson-Morningstar report because it is based on empirical data that inevitably incorporates such risks.¹²⁵ That leaves currency risk (assessed as low because most profits were in US Dollars); macroeconomic risk (also assessed as low because of the vital role of the maritime support service sector in the Venezuelan economy); and social risk such as the risk of labour unrest (assessed as moderate). Moreover, Claimants say that recent data suggests that investors in real world transactions are not applying significant 'country risk' discounts.¹²⁶ They distinguish the cases on which

¹¹⁹ Memorial, [139].

¹²⁰ Reply, [186].

¹²¹ Memorial, [140].

¹²² Reply, [187].

¹²³ Memorial, [141]; Reply, [168].

¹²⁴ Reply, [169]-[172].

¹²⁵ Reply, [173].

¹²⁶ Reply, [174].

Respondent relies.¹²⁷ Claimants' expert thus adopts a country risk premium of 1.5 per cent.

- e) Finally, the expert calculates the cost of debt based on average rates at which comparable companies could borrow in US Dollars for the three years prior to expropriation, settling on 6.68 per cent.¹²⁸

74. Claimants dispute the additional downward adjustments proposed by the Respondent for business risk:

- a) Claimants dispute that SEMARCA should be treated as dependent on a single customer, PDVSA, given the offshore expansion opportunities.¹²⁹ Although a buyer might in principle discount a company's value to account for high customer concentration, Claimants say the risk to SEMARCA was reduced because PDVSA already had a diversified customer base and a long history of continuous operation.¹³⁰
- b) Claimants say that geographic concentration was not a significant risk because no prospective buyer would have been concerned that the market for SEMARCA's services would suddenly dry up.¹³¹
- c) Finally, Claimants dispute the addition of Respondent's *alpha* premium of 2.27 per cent and small-company size premium of 1.08%, because they do not reflect how a willing buyer would have valued SEMARCA in real life.¹³²

75. In combination, and assuming a debt/equity ratio of 10:90, Claimants' expert proposes a WACC of 6.96 per cent.¹³³ For the purpose of valuing the SEMARCA Enterprise, the Claimants' expert then calculates the residual (terminal) value using the constant dividend growth model, under which free cash flow in the final year of the projection period is divided by the difference

¹²⁷ Reply, [175]-[179], citing *Himpurrna v PT (Persero)* (Ex RL-82), *AMT v Zaire* (Ex RL-139), *Lemire v Ukraine* (Ex RL-140) & *Mobil Cerro Negro v PDVSA* (Ex RL-83).

¹²⁸ Memorial, [142].

¹²⁹ Reply, [156].

¹³⁰ Reply, [158]-[160].

¹³¹ Reply, [162].

¹³² Reply, [188].

¹³³ Memorial, [143].

between the WACC and the long-term growth rate of the economy.¹³⁴ Using a valuation date of 31 December 2013 (i.e. the *ex post* approach), Claimants' expert produced a valuation for the SEMARCA Enterprise of US \$153,781,338.¹³⁵ On the *ex ante* approach, they produce a valuation of US \$81,677,467 at 8 May 2009, plus interest.¹³⁶

76. Respondent: On the assumption that a DCF analysis is appropriate (i.e. that the Tribunal decides to value the SEMARCA Enterprise itself), Respondent's experts adopt the following approach:

- a) In calculating a discount rate, the experts take into account three elements: the cost of equity for an on-going concern operating in SEMARCA's field in a mature economy; the cost of equity due to country risk and the cost of debt to SEMARCA.¹³⁷
- b) Respondent's experts use the CAPM and International Capital Asset Pricing Model (**ICAPM**) methods, and in particular the Ibbotson/Morningstar implementation of the ICAPM method, confirmed by reference to the 'bludgeon method' of Professor Damodaran.¹³⁸
- c) As to equity risk, Respondent's experts adopt 6.5%.¹³⁹ They explain that this figure represents the most accurate long-term cost of equity capital and it is supported by both the Ibbotson-Morningstar report, which collates data from 1926 to the valuation date, and other published data sources.¹⁴⁰ Respondent's experts maintain that Claimants' figure is not reliable, as it is based on data that post-dates the valuation date.
- d) As to country risk, Respondent says that the discount rate adopted by Claimants' expert would not even be appropriate for a project in the United States. In reliance on *Himpurna*, *AMT*, *Lemire* and *Mobil Cerro Negro*,

¹³⁴ Memorial, [144].

¹³⁵ Navigant 2, [4] (Table 1). This excludes the separate addition of the lost cash flows, although they were taken into account in calculating the value of the business at 31 December 2013.

¹³⁶ Navigant 2, [6] (Table 2).

¹³⁷ Counter-Memorial, [153].

¹³⁸ Counter-Memorial, [153].

¹³⁹ Brailovsky/Flores 1, Table IV.1.

¹⁴⁰ Brailovsky/Flores 2, [201] – [209], Table IV.4; Ibbotson-Morningstar Report, BF-23, Table A-1.

Respondent says that much higher country risk must be assigned.¹⁴¹ It says that Claimants' exclusion of factors such as expropriation risk is based on a mistaken premise. The rule that the value of an asset must be assessed at a date before the announcement of the specific expropriation does not mean that one must ignore the general risk of government intervention that has always accompanied the investment activities in Venezuela, including the risk that the government would reserve a certain sector of activity to the State.¹⁴² It is no answer to say that such risks are controlled by the State.¹⁴³ Nor does the BIT permit that risk to be excluded from the analysis.¹⁴⁴ The Respondent's experts propose a country risk rate on equity of 14.76%, and on debt of 11.89%.¹⁴⁵

- e) Respondent also says, in reliance on the expert report of Professor Wells, that a significant discount must be applied to take account of business risk, driven by the fact that SEMARCA operated on the basis of short-term contracts with no long term commitments, and because of SEMARCA's dependence on a single customer.¹⁴⁶ Respondent says that Claimants confuse 'single customer' risk with 'single supplier' risk,¹⁴⁷ and have no answer to the risk of internalisation.¹⁴⁸
- f) Taking into account an appropriate debt/equity ratio, Respondent's experts calculated an overall discount rate of 24.57%.¹⁴⁹

¹⁴¹ Counter-Memorial, [139]-[144], Rejoinder, [167]-[170] citing in particular *Himpurna v PT (Persero)* (Ex RL-82), *AMT v Zaire* (Ex RL-139), *Lemire v Ukraine* (Ex RL-140) & *Mobil Cerro Negro v PDVSA* (Ex RL-83).

¹⁴² Counter-Memorial, [145]-[147].

¹⁴³ Rejoinder, [167].

¹⁴⁴ Counter-Memorial, [148]-[151]; Rejoinder, [171]-[175].

¹⁴⁵ Brailovsky/Flores 1, Table IV.1

¹⁴⁶ Counter-Memorial, [134]-[137]; Rejoinder, [146]-[160].

¹⁴⁷ Rejoinder, [156].

¹⁴⁸ Rejoinder, [158].

¹⁴⁹ Counter-Memorial, [153].

77. Respondent's experts produce a final valuation (on the assumption that a DCF approach is appropriate) of US \$2.9m,¹⁵⁰ as compared to its liquidation valuation of US \$1.6m.¹⁵¹

(e) Comparable companies and transactions

78. Claimants: Claimants' experts supplement their DCF calculation by examining both comparable companies and comparable transactions:¹⁵²
- a) The experts identify three publicly traded companies most directly comparable to SEMARCA, assign each a comparability rating and then weight their EV/EBIT multiple accordingly. Multiplying SEMARCA's projected EBIT for 2013 by the weighted EBIT multiple produces an enterprise value.¹⁵³ The experts dispute Respondent's claim that the selected companies are associated with very different country risk profiles, because much of the difference is attributed to uncompensated expropriation risk and related risks, and because there is no correlation between the 'in country' cost of equity and the EV/EBIT valuation multiples of the selected companies.¹⁵⁴
 - b) The experts adopt a similar approach for comparable transactions, identifying six in the period 2010 to 2013 that are potentially comparable to SEMARCA.¹⁵⁵
79. Respondent: Respondent's experts reject both of Claimants' comparables analyses. They say that each of the firms selected by Claimants operates its own vessels; the firms do not work exclusively in one geographic area or for a single customer; all the firms are much larger than SEMARCA; and Claimants do not account for different country risks.¹⁵⁶

¹⁵⁰ Brailovsky/Flores 2, Table III.1.

¹⁵¹ Brailovsky/Flores 2, Table II.1.

¹⁵² Reply, [199]-[203].

¹⁵³ Memorial, [146].

¹⁵⁴ Reply, [201]-[202].

¹⁵⁵ Memorial, [147]-[148].

¹⁵⁶ Counter-Memorial, [155]; Rejoinder, [164].

4. Interest

(a) Claimants' submissions

80. Claimants seek both pre-award and post-award interest, in each case calculated on a compound basis.¹⁵⁷ Claimants propose that the rate should be calculated by reference to Venezuela's sovereign debt rate, because otherwise Claimants would have been forced to serve as compulsory creditors to Respondent. Alternatively, they propose a 'normal commercial rate' as required by the BIT. Their experts propose the US Prime Rate + 2 per cent, or LIBOR + 4 per cent as alternatives to Venezuela's sovereign bond rate.¹⁵⁸ They say that Respondent's proposed rate cannot be considered a normal commercial rate.¹⁵⁹

(b) Respondent's submissions

81. Respondent says that pre-award interest should be based on a short-term and risk-free rate, such as the 3-month US Treasury bond plus 1.33 per cent. Otherwise, Claimants would be compensated for risks they did not bear.¹⁶⁰ It maintains that simple interest is appropriate as a matter of Venezuelan and international law.¹⁶¹

III THE TRIBUNAL'S ANALYSIS

A Liability

82. In its Decision on Jurisdiction, the Tribunal decided that '[i]t has jurisdiction over the claims of Tidewater Barbados and Tidewater Caribe pursuant to Article 8 of the Barbados BIT to the extent that such claims concern alleged breaches of the obligations of the Respondent under that Treaty arising after 9 March 2009'.¹⁶² It found that all of the other claims advanced by all other Claimants fell outside its jurisdiction and could not proceed within the framework of the present arbitration. This included, materially, the claims for alleged expropriation of their vessels brought

¹⁵⁷ Memorial, [156]-[163]; Reply, [208].

¹⁵⁸ Reply, [205]-[206].

¹⁵⁹ Reply, [207].

¹⁶⁰ Counter-Memorial, [157]-[158]; Rejoinder, [190].

¹⁶¹ Counter-Memorial, [159].

¹⁶² Decision on Jurisdiction, [199(2)].

by affiliates of Tidewater Barbados within the Tidewater group that owned each of the vessels used by SEMARCA in the operation of its business in Venezuela.

83. In arriving at its Decision, the Tribunal had to consider the present Claimants' allegations of fact as to the acts of Respondent that gave rise to its claims. The Tribunal had to make an evaluation of these facts. The gravamen of Respondent's objection to jurisdiction under the BIT (ultimately rejected by the Tribunal) was that Claimants' invocation of Respondent's consent to arbitration under the BIT was an abuse of process, since the dispute which is the subject of the present proceedings was already in existence, or could reasonably have been foreseen at the time Tidewater Barbados was incorporated and the ownership of Tidewater Caribe transferred to it. This turned on questions of fact.¹⁶³
84. However, it is axiomatic that no findings of fact made by an international tribunal in the context of a jurisdictional challenge can bind it in its subsequent determination of the merits of the dispute. On the contrary, an arbitral tribunal must, for the purpose of its jurisdictional determination, presume the facts that found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation). In that sense, its determination may be said to be *prima facie*. In the application of those presumed facts to the legal question of jurisdiction before it, the tribunal must objectively characterise those facts in order to determine finally whether they fall within or outside the scope of the Parties' consent. In making this determination, the tribunal may not simply adopt the claimant's characterisation without examination. In this way, a tribunal whose jurisdiction is contested strikes the balance between avoiding pre-judging the merits, on the one hand, and objectively determining the question of jurisdiction on the other. This is the consistent jurisprudence of the International Court of Justice,¹⁶⁴ and of ICSID tribunals.¹⁶⁵
85. It follows therefore that the Tribunal approaches the determination of Respondent's substantive liability to Claimants, if any, entirely afresh and on the basis of the evidentiary record presented to it in the written and oral phase on the merits.

¹⁶³ Ibid, [145].

¹⁶⁴ *Oil Platforms* (CL-39), [16], Higgins Separate Opinion, [31].

¹⁶⁵ *Continental Casualty v Argentina*, [60]–[64]; *Duke v Peru*, [115]–[123]; *Phoenix Action v Czech Republic* (RL-45), [63]–[64].

1. Expropriation

(a) Cause of action

86. The first and principal cause of action pleaded by Claimants is that Respondent expropriated Claimants' investments in Venezuela without payment of prompt, adequate and effective compensation in breach of Article 5 of the BIT.¹⁶⁶

87. The Tribunal analyses this claim in the following four steps:

(a) *First*, it considers the constituent elements of the cause of action provided by the Contracting States in Article 5 of the BIT itself;

(b) *Second*, it identifies and analyses the relevant State measures alleged to constitute the expropriatory acts;

(c) *Third*, it assesses whether, and if so to what extent, those measures did in fact have an expropriatory effect; and,

(d) *Fourth*, it considers whether, if so, such expropriation was lawful or unlawful.

88. Article 5 provides:

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of

¹⁶⁶ Request, [56(a)(i)]; Ex C-10.

paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

89. The term ‘investment’ is defined in Article 1 to mean ‘every kind of asset invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party’. Such assets include, inter alia, shares in a company,¹⁶⁷ goodwill and know-how.¹⁶⁸
90. Article 5 is in a form commonly found in many investment treaties. It does not prohibit the expropriation of investments. Rather, each Contracting Party undertakes only to expropriate if certain specified conditions are met. The expropriation must be:
- (a) ‘for a public purpose related to the internal needs of that Party’;
 - (b) ‘on a non-discriminatory basis’; and
 - (c) ‘against prompt, adequate and effective compensation’.

The Contracting States extend these protections to ‘measures having effect equivalent to nationalisation or expropriation.’ They also undertake to provide prompt judicial or independent review of an investor’s case or the valuation of its investment in accordance with the principles set out in Article 5.

(b) Relevant measures

91. Four measures were relied upon as constituting acts by which Respondent expropriated Claimants’ investments in Venezuela:
- (i) Reserve Law of 7 May 2009;¹⁶⁹
 - (ii) Ministerial Resolution No 51 of 8 May 2009;¹⁷⁰
 - (iii) Physical seizure of SEMARCA’s business operations at La Cañada, Lake Maracaibo on 9 May 2009; and,
 - (iv) Physical seizure of SEMARCA’s business operation at Corocoro on 12 July 2009.

¹⁶⁷ Article 1(a)(ii).

¹⁶⁸ Article 1(a)(iv).

¹⁶⁹ Ex C-12.

¹⁷⁰ Ex C-13.

It is necessary to take each of these measures in turn.

(i) *Reserve Law*

92. The Reserve Law itself, adopted by the National Assembly of Venezuela on 7 May 2009, is entitled: Organic Law that Reserves to the State Assets and Services related to Primary Activities of Hydrocarbons.
93. Its object is set forth in Article 1 as being ‘the reservation for the State, because of their strategic character, of assets and services related to the performance of the primary activities contemplated in the Organic Law on Hydrocarbons.’ These activities are henceforth to be carried out by PDVSA, or its designated subsidiary, or through mixed enterprises controlled by them. They are declared to be a public service and of public and social interest.¹⁷¹
94. The assets and services thus reserved include ‘[t]hose related to the activities in Lake Maracaibo: vessels for [diverse purposes]; maintenance of vessels in workshops, piers or docks of any nature.’¹⁷² The Ministry of the Popular Power for Energy and Petroleum with competence on oil matters (the **Ministry**) is empowered to determine by resolution the specific assets and services of enterprises that fall within the Law.¹⁷³ All subsisting agreements in connection with the reserved activities are to terminate by operation of law.¹⁷⁴ As of the date of publication of the Law, PDVSA or its designated subsidiary ‘shall take possession of the assets and control of the operations referred to [as] the reserved activities’.¹⁷⁵
95. The National Executive is empowered to decree the total or partial expropriation of the shares or assets of companies performing the reserved activities.¹⁷⁶ The just price for any such expropriation shall be limited to the book value of the assets. ‘[I]n no event there shall be taken into account lost profits or indirect damages.’¹⁷⁷

¹⁷¹ Article 5.

¹⁷² Article 2.

¹⁷³ Article 3.

¹⁷⁴ *Ibid.*

¹⁷⁵ Article 4.

¹⁷⁶ Article 6.

¹⁷⁷ *Ibid.*

96. As summarised above, the Reserve Law had two functions: (a) the reservation to the State in the public interest of the oil industry support functions there specified; coupled with (b) the nationalisation of the assets and operations of the private companies then carrying out such activities and services.
97. These two functions were interlinked. Mr Figuera, a witness called by Respondent, who at that time was General Manager of the Offshore Mixed Companies for Corporación Venezolana del Petróleo SA (**CVP**), a wholly-owned subsidiary of PDVSA, testified before the Tribunal:

[O]ur operations in Lake Maracaibo are huge. We have more than 7,000 Wells. All independent, isolated. 7,000 Wells, we have more than 17,000 kilometers of pipeline laying out in the bottom of the lake. We have ... about 200 flow stations that we have to supervise and maintain and operate. A huge amount of facilities, not to refer to the rigs, drilling rigs and all the barges that are used to lay out the pipeline and do production and construction activities in Lake Maracaibo.

So, yes, although we have, as I mentioned, more than 400 vessels of our own, and we have always had a large significant capacity to operate in the lake, yes, that's not sufficient. And we depended up to a point, a significant point, [we] depended upon contractors.

There are vessels that also we don't have. We have only a few supply vessels, that's not something that we ever care for to develop.¹⁷⁸

98. The conclusion that the Tribunal draws from the text of the Reserve Law and this evidence is that Venezuela's objective in reserving to the State the relevant oil service activities integrally required the nationalisation of the assets and facilities of the private operators then operating on Lake Maracaibo. Without such nationalisation, the object of the Reserve Law could not then have been achieved.

(ii) *Ministerial Resolution No 51 of 8 May 2009*

99. The Ministerial Resolution contemplated by the Reserve Law was promulgated the following day, Friday 8 May 2009.¹⁷⁹ It recites: the 'activities that were the object of outsourcing schemes ... place the Venezuelan State in a situation of vulnerability', such that it is necessary to 'correct and recover the dismemberment of essential aspects of the oil activity since such dismemberment threatens the national sovereignty'.¹⁸⁰ It resolves that '[t]he services of enterprises or sectors and assets ... and the enterprises that provide said activities that are

¹⁷⁸ T1/264/18–T1/265/16.

¹⁷⁹ C-13.

¹⁸⁰ Ibid, Recitals 1 & 2.

affected by the measure of seizure' are a number of listed enterprises including SEMARCA.¹⁸¹ PDVSA or its designated subsidiary 'is hereby instructed to take control of the operations and immediate possession of the facilities, documentation, assets and equipment related to the activities to which this Resolution refers'.¹⁸²

(iii) *Physical seizure of SEMARCA's assets at La Cañada on 8 May 2009*

100. On the same day, Friday 8 May 2009, PDVSA assumed, as recorded in a contemporaneous judicial minute 'the possession of the assets and control of the operations related to the reserved activities and corresponding to the operating headquarters of ... SEMARCA'.¹⁸³ Mr. Kehoe, then Manager of SEMARCA, describes this event in the following terms in his witness Statement:

At approximately 1:30 AM on 8 May 2009, the Venezuelan National Guard arrived at the SEMARCA headquarters at La Cañada, entered the facility, and took control. We did not receive any notice that the Venezuelan National Guard was coming. At approximately 5:00 AM, three buses arrived, loaded with many PDVSA employees dressed all in red. These PDVSA employees also participated in the takeover of the facility. After the arrival of the National Guard, SEMARCA managers were no longer allowed on the premises except for specific appointments that had to be requested through the local PDVSA management. SEMARCA's non-managerial employees were expected to report for work after the takeover.¹⁸⁴

(iv) *Physical seizure of SEMARCA's assets at Corocoro on 12 July 2009*

101. Subsequently, on 12 July 2009, PetroSucre, an affiliate of PDVSA, seized the remainder of SEMARCA's operations at Corocoro in the Gulf of Paria, including the four vessels operating there. It instructed the crews of those vessels that they would henceforth be working for PetroSucre.¹⁸⁵ Respondent does not dispute this taking.¹⁸⁶ It submits that the Reserve Law was limited to services and activities in Lake Maracaibo.¹⁸⁷ When questioned by the Tribunal on why these vessels were taken, Mr. Figuera answered:

¹⁸¹ Article 1; item 31, whose activities are described as '[S]upply vessels with cranes for the transport of materials, diesel, industrial water and other materials; tugs.'

¹⁸² Article 2.

¹⁸³ C-13.

¹⁸⁴ Kehoe 1, [35].

¹⁸⁵ C-102.

¹⁸⁶ Counter-Memorial, [16].

¹⁸⁷ Rejoinder, [79].

The law, the Reserve Law, requested all vessels related to, underlined "related" to Lake Maracaibo operations be taken, and these vessels were registered in Lake Maracaibo, that belonged to the Lake Maracaibo fleet. These vessels worked in Lake Maracaibo eventually, and in several times we noticed in the reports that these vessels moved from Corocoro to Lake Maracaibo operations and performed services to our fleet—as part of the fleet in Lake Maracaibo.¹⁸⁸

102. However that may be, the uncontradicted evidence is that these vessels were working, and continued to work after the seizure at least for some time, for PetroSucre at Corocoro. Their seizure brought to an end SEMARCA's operations in Venezuela.

(c) Expropriatory effect

103. The next issue is whether these seizures had the effect of nationalisation or expropriation or were 'measures having effect equivalent to nationalisation or expropriation' of Claimants' investment in Venezuela.

104. As the terms of Article 5 of the BIT confirm, it is well accepted in international law that expropriation need not involve a taking of legal title to property. It is sufficient if the State's measures have an equivalent effect. As one tribunal put it:

When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation, or, as in the BIT, as measures "the effect of which is tantamount to expropriation".¹⁸⁹

105. In reaching an assessment of whether the measures had an effect equivalent to expropriation, the Tribunal finds it useful to consider the factors relied upon by the tribunal in *Pope & Talbot* as relevant in the determination of whether a State measure has such an effect, namely whether:

- (a) The investment has been nationalised or the measure is confiscatory;
- (b) The investor remains in control of the investment and directs its day-to-day operations, or whether the State has taken over such management and control;
- (c) The State now supervises the work of employees of the Investment; and,

¹⁸⁸ T1/270/17–T1/271/4.

¹⁸⁹ *Middle East Cement v Egypt* (CL-171), [107].

(d) The State takes the proceeds of the company's sales.¹⁹⁰

106. Respondent accepts that the vessels were taken, but points out (correctly) that, as a result of the Decision on Jurisdiction, the taking of the property in these vessels—whether on Lake Maracaibo or at Corocoro—which were not owned by Claimants but by affiliates, is outside the jurisdiction of the present Tribunal. It also accepts that it expropriated SEMARCA's physical assets at La Cañada, but claims that these had a minimal value.¹⁹¹ Nevertheless, it asserts that Claimants' shares in SEMARCA were not, and have not been expropriated. Thus, it alleges, other assets of SEMARCA, including its accounts receivable, remain in the hands of the Claimants, who remain free to engage in other oil supply business in Venezuela outside the scope of the activities on Lake Maracaibo reserved to the State under the Reserve Law.

107. Respondent points out that, after the first seizure on 8 May 2009, SEMARCA continued to assert its ownership of the assets of the company; to claim payment of the accounts receivable (which Claimants continued to carry in their books); and to seek redress for the seizure. It also continued to perform its contracts with PetroSucre at Corocoro, and with Chevron, invoicing and seeking payment for arrears on those contracts, and to negotiate contracts with Repsol in relation to Venezuelan business. This conduct, Respondent claims, is consistent with Claimants' continued ownership of SEMARCA.¹⁹²

108. Mr. Kehoe, when challenged on this under cross-examination, deposed:

[T]he expropriation for me was a transition period from the beginning, let's say May 8th, up until July 12th. In the beginning, we almost felt that this wasn't really going to happen to us, but, as the milestones went along, we found out that this was really the reality right up until the final taking of the PetroSucre vessels on July 12th.¹⁹³

109. The Tribunal has carefully considered this evidence. It accepts Mr. Kehoe's account. The first seizure took place without warning on the very day of the promulgation of the Ministerial Resolution, the day after the passing of the Reserve Law itself. It removed Claimants from control of the seat of their operations at La Cañada. Claimants had operated an oil supply business in

¹⁹⁰ *Pope & Talbot v Canada* (RL-163), [100].

¹⁹¹ T4/851/11–15.

¹⁹² Respondent refers in particular to: SEMARCA to PetroSucre, 14 July 2009 (Ex C-102); Tidewater Accounts Receivable Statement to 31 July 2009 (C-27); Kehoe 2, [18] n 13; SEMARCA Trial Balance Sheet to 31 July 2009 (NAV-473).

¹⁹³ T1/131/22-T1/132/7.

Venezuela for fifty years at that stage. Whilst the seizure would have come as a surprise, the Tribunal does not find it surprising that Claimants would not immediately accept its effect. Moreover, the scope of that effect upon Claimants' investment did not finally become clear until the seizure of the remainder of the vessels at Corocoro some two months later. In these circumstances, documents from Claimants asserting the continuation of their business in the intervening period are consistent with a dawning realisation that their business had been nationalised. They do not lend support for the proposition that, after 12 July 2009, Claimants remained in effective control of SEMARCA, their investment in Venezuela.

110. On the contrary, contemporaneous evidence from the Venezuelan Courts supports the conclusion that the business as a whole had been effectively nationalised. When employees of SEMARCA brought labour suits against the company in June 2009 and December 2009, the Courts directed that the suits be served on the Attorney General of the Republic. The record showed that only when such service had been effected could the proceedings continue. The Court explained, in the first case, this was '[b]ecause the Court notes the Respondent in this proceedings, the corporate entity Tidewater Marine Service Compañía Anónima, also known as SEMARCA, has become a part of the State of Venezuela, this being a matter of public knowledge within the country'.¹⁹⁴ In the second case, the Court observed: 'TIDEWATER MARINE SERVICE, C.A. (SEMARCA) is an enterprise that was subject to expropriation pursuant to Resolution Number 51 ... because it was deemed that said company is of a necessary and strategic character to Petroleos de Venezuela, S.A. and its subsidiaries'.¹⁹⁵
111. This contemporaneous evidence is also corroborated by the testimony of witnesses called for both by Claimants and Respondent at the hearing. Mr. Kehoe for Claimants deposed that, as a result of the seizure, PDVSA obtained 'the entire infrastructure as it were, actually, of our business of SEMARCA in Venezuela at the time'.¹⁹⁶ Mr. Figuera for Respondent confirmed that 'PDVSA Operaciones Acuáticas is now operating the vessels that belonged before to SEMARCA'. As such 'it has a director [with] personnel appointed to it'.¹⁹⁷ He confirmed that, although it was

¹⁹⁴ Judgment of 2 June 2009 (Ex C-229).

¹⁹⁵ Judgment of 14 December 2009 (Ex C-230).

¹⁹⁶ T1/199/11-13.

¹⁹⁷ T1/268/12-14, 22-269/2

not yet separately incorporated, this was planned so that it would become its own cost and profit centre.¹⁹⁸

112. The seizure applied to all of SEMARCA's non-managerial employees, who were expected to work for PDVSA after 8 May 2009 – both the ship crews and the shore-based staff.¹⁹⁹
113. The Parties dispute whether the assets of SEMARCA that were the subject of the seizure included its accounts receivable. Claimants allege that both Parties acknowledged this at the time.²⁰⁰ Respondent alleges that Claimants are still entitled to sue to recover the accounts receivable, either in the Venezuelan Courts or otherwise in accordance with the contractual dispute resolution terms.²⁰¹ It points out that Chevron paid Claimants the dollar portion of the amounts outstanding under its Venezuelan support contract after the seizure.
114. The Tribunal finds, in the light of the Venezuelan Court decisions referred to above, that Claimants would not have been recognised as exercising effective control over SEMARCA such that they could have pursued legal process in Venezuela for recovery of debts due to SEMARCA in Venezuela. On the contrary, the Venezuelan Courts treated the State as the effective owner of SEMARCA.
115. Before leaving this section, however, it is necessary to address one further submission advanced on behalf of Respondent as to the scope of the expropriation. Respondent avers that the property that is the subject of an expropriation can only be determined by reference to property rights held under the host State law.²⁰² Respondent alleges that, apart from the fixed assets, the only property rights Claimants held at the date of the seizure were under two short-term contracts with PDVSA. Thus, it claims, at best only the rights under these contracts may form the subject matter of Claimants' claim.

¹⁹⁸ T1/268/20 – 269/11.

¹⁹⁹ Kehoe 1, [34], [41]; Kehoe T1/198/20-199/13.

²⁰⁰ Letter of 6 July 2009 (C-59); Letter of 9 December 2009 (C-247).

²⁰¹ T4/868/21 – 871/20.

²⁰² Relying inter alia on *Emmis v Hungary* (RL-159).

116. Expropriation under international law undoubtedly contemplates property rights existing under national law that have been taken by the State.²⁰³ As the Iran-US Claims Tribunal put it in *Amoco*:²⁰⁴

Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, *i.e.*, freely sold and bought, and thus has a monetary value.

117. In *Emmis v Hungary*, the reason there could be no claim for expropriation was because the only property right that the claimants in that case had acquired upon making their investment in Hungary was a fixed-term broadcasting licence that had expired prior to the State measure alleged to constitute the expropriation. For that reason, the claimants in that case, in their contemporaneous regulatory filings, attached no value to their investment after the expiry of the licence.²⁰⁵

118. By contrast, in the present case, Claimants' investment in Venezuela was begun many years before on its acquisition of SEMARCA. It consisted in the operation of a business that was open-ended as to time. The terms of the BIT confirm²⁰⁶ that an investment is capable of including goodwill and know-how as well as other tangible and intangible assets, including contractual rights. Venezuelan law provides the same. Article 3(1) of the Investment Law²⁰⁷ defines 'Investment' as including:

Every asset destined to the production of income, under any of the entrepreneurial or contractual forms permitted by Venezuelan legislation, including personal and real property, tangible or intangible, over which property rights and other rights in rem are exercised; negotiable instruments; rights to any performance having an economic value; intellectual property rights, including know how, prestige and good will;...

²⁰³ *EnCana Corporation v Ecuador* (RL-101), [184]; *Emmis v Hungary* (RL-159), [157].

²⁰⁴ *Amoco* (CL-148), [108].

²⁰⁵ *Emmis* (RL-159), [217]–[221].

²⁰⁶ Article 1(a)(iv).

²⁰⁷ C-9 Venezuelan Law on the Promotion and Protection of Investments (*Ley sobre Promoción y Protección de Inversiones*), dated 3 October 1999 (as published in the Official Gazette No. 5.390 of 22 October 1999).

119. It is uncontested that each of SEMARCA and Tidewater Caribe were companies in good standing duly incorporated under Venezuelan law and that Venezuelan law recognises such assets as property.
120. True it is that the short-term nature of the contracts through which SEMARCA conducted its business in Venezuela, along with other factors, are elements that may be relevant in the determination of the monetary value to be placed upon the business, were it to have been the object of a commercial transaction (to utilise the language of *Amoco*). But this is a subsequent issue to the establishment of a property right capable of expropriation. The Tribunal finds that Claimants' investment in SEMARCA was such a property right.
121. In sum, the effect of Respondent's measures was the expropriation in fact of the whole of Claimants' investment in its subsidiary in Venezuela, SEMARCA. The value to be ascribed to that investment for the purpose of determining any compensation to be awarded to Claimants for their loss is a separate question, which will be addressed in Part B of the Tribunal's analysis.

(d) Was the expropriation lawful or unlawful?

122. The Tribunal has found that Respondent did expropriate Claimants' investment in SEMARCA in Venezuela. The next question is to determine whether such expropriation is lawful or unlawful. Article 5 of the BIT does not, after all, prohibit the State taking property by way of nationalisation or expropriation. Rather it permits such a taking, but only under the conditions there specified. That is to say, the expropriation must be:
- (a) 'for a public purpose related to the internal needs of that Party';
 - (b) 'on a non-discriminatory basis'; and
 - (c) 'against prompt, adequate and effective compensation'.
123. If these conditions are met, the expropriation accords with the terms of the Treaty and is not therefore a breach of international law. If the conditions are not met, the expropriation must be treated as a breach of international law.
124. In the present case, neither Party disputes the first condition, namely that the expropriation was for a public purpose related to the internal needs of Venezuela. The Parties do dispute the lawfulness of the expropriation in relation to the second and third conditions: non-discrimination and compensation. Claimants submit that the taking was discriminatory. They also point out that the only compensation provided for under the Reserve Law was book value of the assets. The Law expressly excluded lost profits. This, by definition, did not meet the Treaty standard of

‘adequate and effective compensation’ since Article 5 itself specifies that such compensation ‘shall amount to the *market value* of the investment expropriated immediately before the expropriation’ [emphasis added]. Respondent, on the other hand, contends that the taking was not discriminatory. The whole of the oil support business on Lake Maracaibo was nationalised, affecting numerous other companies. They submit that the Reserve Law did provide for compensation. From the earliest stage after 8 May 2009, Respondent claims the Government had made clear to Claimants that it was prepared to compensate Claimants, but only on the basis of a global settlement. It was Claimants that had not accepted that offer and elected to proceed instead to arbitration.

125. Claimants submit that, if the expropriation is unlawful, they are entitled, as a matter of the international law of State responsibility, to additional compensation, in the event that the property that is the subject of the illicit taking has increased in value since the date of the State measure.²⁰⁸ Respondent, on the other hand, while insisting that the expropriation was lawful, also submits that the date for valuation prescribed in the Treaty is applicable in any event, whether the expropriation was lawful or unlawful.²⁰⁹
126. The Tribunal will consider first (i) the question of whether the taking in the present case was non-discriminatory; and then (ii) the relevance and application of the compensation standard in the determination of the lawfulness of the expropriation.

(i) *Non-discrimination*

127. In order to be lawful, a State taking of property must be non-discriminatory. The Tribunal has carefully considered the evidence relied upon by Claimants in support of their allegation that, in the present case, Respondent did discriminate against Claimants in the application of the Reserve Law.²¹⁰ It finds that none of the instances of alleged different treatment of other contractors in fact constitutes discrimination against Claimants:

(a) In the case of services provided by Gulmar Offshore, the unchallenged evidence of Mr. Figuera was that its vessels were originally seized, but then released once it was established that they were foreign-flagged and foreign-crewed – a like treatment to that accorded to the foreign-

²⁰⁸ Memorial, [106]-[114]; T4/797/22–T4/798/6.

²⁰⁹ Counter-Memorial, [97]-[104].

²¹⁰ Memorial, [85]; Counter-Memorial, [90]; Reply, [106]; Rejoinder, [77] (and following).

flagged vessels of Tidewater affiliates; and that Gulmar in any event no longer provides services on Lake Maracaibo and is pursuing a claim in arbitration against PDVSA.²¹¹

(b) In the case of Servipica, its services were provided off shore and were not covered by the Reserve Law.

(c) In the case of Astivenca, its services on Lake Maracaibo were indeed expropriated under Ministerial Resolution No 51.²¹²

128. The Tribunal therefore finds that the expropriation was not discriminatory against Claimants. It is therefore necessary to assess the relevance of the non-payment of compensation to the lawfulness or otherwise of Respondent's taking.

(ii) *Compensation*

129. Both Parties rely upon the foundational decision of the Permanent Court of International Justice (**PCIJ** or **Permanent Court**) in *Chorzów Factory*.²¹³ In that decision, the Permanent Court first explained the difference between an expropriation that has to be considered lawful on the condition that a fair compensation is granted or will be granted – possibly by a tribunal – and an expropriation that is illegal *per se*. Once such distinction has been clarified, the PCIJ presented 'the guiding principles according to which the amount of compensation due may be determined'²¹⁴ and explained that the compensation was not to be the same under both situations.

130. The Court begins by elucidating a distinction between a lawful expropriation and an unlawful one:

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation – to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation....²¹⁵

²¹¹ Figuera 1, [40].

²¹² C-13, Schedule, no 3.

²¹³ Ex RL-81.

²¹⁴ *Ibid*, 46.

²¹⁵ *Idem*.

Here the Court is stating expressly that illegality must stem from a circumstance beyond the mere absence of compensation.

131. After having posited the distinction between a lawful expropriation and an unlawful expropriation, the Court explains that the two situations do not entail the same level of compensation:

It follows that the compensation due to the German government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the date of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if the wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.²¹⁶

132. Having thus stated that lawful and unlawful expropriation must not bear the same financial consequences, the Permanent Court lays down the standard of compensation for *unlawful* expropriations:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation for an act contrary to international law.²¹⁷

133. The Iran–US Claims Tribunal in the *Amoco* case confirmed that the level of compensation depended on the legal qualification of the expropriation:

[T]he Tribunal holds that the question of the lawfulness or unlawfulness of the expropriation has a direct bearing on the issue of compensation....

...

²¹⁶ Ibid, 47.

²¹⁷ Idem.

Undoubtedly, the first principle established by the Court is that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking.²¹⁸

134. The Iran-US Claims Tribunal found that ‘the compensation to be paid in case of a lawful expropriation (or of a taking which lacks only the payment of a fair compensation to be lawful) is limited to the value of the undertaking at the moment of dispossession’.²¹⁹ It elucidated the distinction in the standard of compensation between a lawful and an unlawful expropriation in the following way:

193. According to the Court in *Chorzów Factory*, an obligation of reparation of all the damages sustained by the owner of expropriated property arises from an unlawful expropriation. The rules of international law relating to international responsibility of States apply in such a case. They provide for *restitutio in integrum*: restitution in kind or, if impossible, its monetary equivalent. If need be, "damages for loss sustained which would not be covered by restitution" should also be awarded. See *Chorzów Factory, supra*, at 47. On the other hand, a lawful expropriation must give rise to "the payment of fair compensation," *id.* at 46, or of "the just price of what was expropriated." *Id.* at 47. Such an obligation is imposed by a specific rule of the international law of expropriation.

135. More recent investment arbitral practice also supports the same approach. In *Santa Elena*, the Tribunal determined compensation at the date of the taking on the basis that the expropriation was lawful, even though no compensation had been paid for many years.²²⁰ In *Goetz v Burundi*, the Tribunal held that, all other conditions for a lawful taking having been met, the failure to pay prompt and adequate compensation did not suffice ‘to taint this measure as illegal under international law’.²²¹ In *Mondev v USA*, the Tribunal considered that, in order to render the expropriation lawful under the treaty (NAFTA) all that was required was that ‘the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure

²¹⁸ *Amoco* (CL-148), [86], [192], citations omitted. The same approach is adopted by the ECtHR: *Papamichalopoulos v Greece*, [36]: ‘The act of the Greek Government ... contrary to the Convention was not an expropriation that would have been legitimate but for the failure to pay fair compensation ... The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession.’

²¹⁹ *Amoco*, [196].

²²⁰ *Santa Elena* (RL-110), [68], [83].

²²¹ *Goetz v Burundi* (RL-112), [130].

must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation'.²²²

136. Scholars also have insisted on the necessity to distinguish expropriation illegal *per se* and expropriation only wanting compensation to be considered legal. If an expropriation were to be considered illegal as soon as no compensation is granted, then the consequence, according to Salacuse would be that

... in cases in which an expropriation meets all the conditions for a legal expropriation except for a determination of the tribunal that the host State had not paid market value for the property expropriated such an expropriation would have to be considered 'illegal' and compensation would therefore be awarded not on the basis of the valuation standard in the Treaty but on the basis of the *Chorzów Factory* principle and customary international law. It is suggested that such a result would not accord with the intention of the contracting Parties as evidenced by the Treaty text.²²³

137. Wälde and Sabahi point out that the inclusion in bilateral investment treaties of specific language regarding the standard of compensation for expropriation has the consequence that 'nearly every expropriation dispute will be adjudicated not under customary international law, but under specific binding treaty language'.²²⁴ Ripinsky and Williams state that 'a good faith offering of, or provision for, compensation (even if not in a sufficient amount, as long as not manifestly unreasonable) should render the expropriation lawful'.²²⁵ Marboe concludes:

While earlier the mere 'promise' of a State to pay any sum at any time was not enough for the lawfulness of an expropriation, today there seems to be consensus that it is sufficient, if a State, at the time of the expropriation, offers compensation or provides for the determination of compensation.... One may, therefore, conclude that according to arbitral practice and scholarly

²²² *Mondev v USA* (CL-046), [71]. Cf. the position where the State makes no offer of compensation at all (as in *Wena v Egypt* (CL-141), [100]; *Vivendi v Argentina (Resubmission)* (CL-138) or offers an amount that is so negligible as not to be in made in good faith (as in *Rumeli v Kazakhstan* (CL-95)).

²²³ Salacuse *The Law of Investment Treaties* (2009) (RL-123), 328.

²²⁴ Wälde and Sabahi 'Compensation, Damages and Valuation' in Muchlinski, Ortino and Schreuer *The Oxford Handbook of International Investment Law* (Oxford UP, 2008) (CL-163), 1070.

²²⁵ Ripinsky and Williams *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008) (RL-143), 68-9.

writing, the mere existence of a dispute about the amount of compensation does not render the expropriation unlawful.²²⁶

138. Most expropriation claims turn on the question whether a measure is expropriatory at all. In such cases, where the tribunal finds expropriation, compensation is almost always due. Cases where expropriation is acknowledged and the dispute revolves around the proper amount of compensation are rare; cases where no compensation has been paid because the label of expropriation itself is contested are the norm. That means that almost every decision finding expropriation would also find unlawful expropriation – and almost every tribunal would then set aside the ‘fair market value at the time of expropriation’ standard for compensation for expropriation. Such an approach thus would make a detailed and elaborate element of the expropriation provision in modern BITs, including the provisions of Article 5 of the Venezuela-Barbados BIT, effectively nugatory.
139. The Tribunal’s approach is also consistent with the World Bank Guidelines.²²⁷ The Guidelines ‘may be applied by members of the World Bank Group institutions to private foreign investment in their respective territories, as a complement to applicable bilateral and multilateral treaties’ (to the extent that there is no conflict between them).²²⁸ Part IV deals with expropriation. It prohibits expropriation or measures having similar effects ‘except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation’.²²⁹ Compensation is deemed appropriate ‘if it is adequate, effective and prompt’.²³⁰ Compensation is deemed adequate ‘if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known’.²³¹ Determination of such fair market

²²⁶ Marboe *Calculation of Compensation and Damages in International Investment Law* (Oxford UP, 2009) (RL-117), [3.46], [3.48].

²²⁷ CL-152.

²²⁸ *Ibid.*, I.1.

²²⁹ IV.1.

²³⁰ IV.2.

²³¹ IV.3.

value is acceptable if conducted on a basis agreed between the State and the foreign investor *'or by a tribunal or another body designated by the Parties'*.²³²

140. The Guidelines thus reinforce the conclusion of the Tribunal that an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation. They prescribe a standard for compensation that is identical to that required under Article 5 of the BIT in the present case and then provide that the amount of such compensation will be acceptable if determined *'by a tribunal ... designated by the Parties.'* It follows that such a tribunal must have an opportunity to make its determination as to compensation. Where such a tribunal has done so (and assuming that the other conditions are met) the expropriation will not be illegal.
141. The Tribunal concludes that a distinction has to be made between a lawful expropriation and an unlawful expropriation. An expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation.
142. The essential difference between the two is that compensation for a lawful expropriation is fair compensation represented by the value of the undertaking at the moment of dispossession and reparation in case of unlawful expropriation is restitution in kind or its monetary equivalent. The precise manner in which, in the modern context, the standard of fair value at the date of dispossession is to be applied will have to be considered in greater depth in Part B of the Tribunal's analysis.
143. In the present case, the State did not seek to expropriate the assets without compensation. But Claimants submit that the taking is to be treated as illegal, since the Reserve Law mandates a level of compensation that is limited to the book value of the assets and it prohibits the taking into account of lost profits or indirect damages.²³³ This, Claimants argue, is inconsistent with the standard of compensation required by Article 5 of the BIT and thus illegal.²³⁴
144. The Tribunal observes that Article 5 defines the compensation payable for expropriation simply as *'the market value of the investment expropriated immediately before the expropriation'*. It does not prescribe how that market value is to be determined. That valuation is a matter that

²³² IV.4.

²³³ Article 6.

²³⁴ Reply, [92]; T4/790-2.

both Venezuela and Barbados, as contracting Parties to the BIT, entrusted to this Tribunal by virtue of the consent to arbitration in Article 8 of the Treaty. Article 8(3) confirms that the arbitral award may determine, in case of a dispute relating to an expropriation, ‘the amount of the compensation.’ Thus, to use the language of the World Bank Guidelines, the present Tribunal is a ‘tribunal ... designated by the Parties’ to determine the acceptable level of compensation.

145. As will be seen in Part B of the Tribunal’s analysis, the Treaty standard of ‘market value’ does not denote a particular method of valuation. The appropriate method of valuation will depend upon the context. In some cases, the appropriate valuation may indeed be the book value of the assets.²³⁵ By virtue of the terms of the BIT and the consent to the determination of valuation by this Tribunal accorded by Venezuela thereunder, this Tribunal is not limited by the limits on valuation imposed by the Reserve Law. But this Tribunal is not disposed to find that the valuation limits in Article 6 of the Reserve Law are of such a character as to render the expropriation as a whole illegal. This is not a case where the State took assets without any offer of compensation. The record does not demonstrate a refusal on the part of the State to pay compensation. Rather, it discloses that the Parties were unable to agree on the basis or the process by which such compensation would be calculated and paid.²³⁶ This is therefore a task that they have submitted to this Tribunal.
146. For present purposes, it suffices to conclude that the present expropriation was lawful, since it wants only compensation, a matter vouchsafed by the Parties to this Tribunal to determine according to the standards prescribed in the BIT.²³⁷

2. Other Causes of Action

147. In essence both Parties argued this case as a claim of compensation for expropriation. In the Tribunal’s view, this is the correct approach. The gravamen of Claimants’ complaint is that Respondent took their property, being their investment in SEMARCA by means of the State measures that the Tribunal has just analysed in the preceding section. The real questions for the

²³⁵ CL-152, World Bank Guidelines, IV-6(iii)(b).

²³⁶ Kehoe 1, [49], Ex R-113, R-114, R-115, R-116.

²³⁷ The present case is therefore to be distinguished from the position in *ADC v Hungary*, CL-107, where the tribunal found that the expropriation violated the four criteria mentioned in the BIT: it was not made in furtherance of a public interest, it was not made according to due process of law, it was discriminatory and no just compensation was provided.

Tribunal are as to the legality of such taking and the amount of compensation due in respect of it.

148. In their Request for Arbitration, Claimants added claims for breach of the Treaty standards of fair and equitable treatment, for the taking of arbitrary or discriminatory measures and the failure to accord Claimants' investments the same treatment as that accorded to nationals of Venezuela or third States.
149. The Tribunal has already considered and rejected the allegation that Venezuela's measures were discriminatory in the context of its discussion of the legality of the taking. The additional causes of action for the taking of discriminatory measures or of a failure in national or most favoured nation treatment do not add anything in the light of that finding.
150. The claim of failure of fair and equitable treatment is, in the Tribunal's view, simply inapposite in the present case in which the real focus of the claim is not on the procedural fairness of Respondent's treatment of Claimants, but on its taking of their property. Considering the case through the prism of a claim of fair and equitable treatment does not add anything to the Tribunal's consideration of the questions of liability or the quantum of damage. Claimants rely on the same measures for this claim²³⁸ and do not assert that a different measure of damage is applicable. Accordingly, the Tribunal leaves aside the other alleged causes of action and proceeds to analyse the level of compensation to be awarded for the principal claim of expropriation.

B Compensation

1. Standard of compensation

151. Once the distinction between lawful and unlawful expropriation is accepted, such distinction has to be translated into a workable standard, applicable to the case before the Tribunal, which is one of lawful expropriation. Here, the starting point is the standard enunciated in Article 5 of the Treaty itself, namely 'the market value of the investment expropriated immediately before the expropriation'.
152. In the Tribunal's view, the World Bank Guidelines provide reasonable guidance as to the content of the standard chosen by the States Parties to the BIT as the standard of compensation to be applied in cases of lawful compensation, where the investment constituted a going concern at

²³⁸ Memorial, [90].

the time of the taking. The Guidelines prescribe ‘the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred’.²³⁹ Such standard is also consistent with the standard of fair compensation required by customary international law in the case of a lawful expropriation.²⁴⁰

153. The International Law Commission has noted that this approach has been widely adopted by international tribunals, in the case of the nationalisation of a going concern:

Decisions of various ad hoc tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.²⁴¹

154. Absent agreement of the Parties, the Guidelines define the fair market value as to be determined ‘according to reasonable criteria related to the market value of the investment, i.e., in an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case’.²⁴²
155. Whilst making plain that there is no exclusive validity of a single standard, the Guidelines provide for a distinction to be drawn between ‘a going concern with a proven record of profitability’ and other enterprises and assets not having this characteristic. Where the enterprise meets this

²³⁹ World Bank Guidelines, IV-3.

²⁴⁰ *Norwegian Shipowners’ Claims* (Award, 13 October 1922), I RIAA 307, 340; Marboe *Calculation of Compensation and Damages in International Investment Law* (Oxford UP, 2009), [3.24]

²⁴¹ International Law Commission ‘Responsibility of States for Internationally Wrongful Acts: Text of the Draft Articles with Commentaries thereto’ (Crawford, Special Rapporteur) [2001] 2(2) YB ILC 31, Article 36(23). Footnote 587 observes: ‘Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business.’

²⁴² World Bank Guidelines, Article IV-5.

criterion, the Guidelines indicate that compensation will be reasonable if determined 'on the basis of the discounted cash flow value'.²⁴³

156. In the field of investment treaty law, tribunals have frequently found the discounted cash flow (**DCF**) method to provide the most useful method for arriving at a valuation of a business that had been operating as a going concern prior to the taking. In *CMS v Argentina*, the tribunal endorsed the application of the DCF method in that case, which involved a going concern. It found this to be an 'appropriate method for valuing business assets ... [where] there is adequate data to make a rational DCF valuation'.²⁴⁴ In *Enron*, the tribunal held that 'there is convincing evidence that DCF is a sound tool used internationally to value companies, albeit that it is to be used with caution as it can give rise to speculation'.²⁴⁵

157. A *going concern* is defined in the World Bank Guidelines as meaning:

[A]n enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State.²⁴⁶

158. *Discounted cash flow* is defined as meaning:

[T]he cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value.²⁴⁷

²⁴³ Ibid, Article IV-6.

²⁴⁴ *CMS v Argentina* (CL-162), [416].

²⁴⁵ *Enron v Argentina* (CL-198), [385] (footnote omitted).

²⁴⁶ World Bank Guidelines, Article IV-6.

²⁴⁷ Idem.

2. Date of valuation

159. As the Tribunal has already found that it is to apply the Treaty standard of compensation for expropriation, the question of the appropriate date to be taken for valuation may be dealt with rather more shortly. Article 5 itself prescribes that what is to be determined is ‘the market value of the investment expropriated immediately before the expropriation’. In other words, the question is what a willing buyer would have paid a willing seller for the expropriated investment at that time.
160. This type of valuation has been commonly referred to in shorthand as an *ex ante* valuation, because it seeks to determine the value of the investment *before* the expropriatory measure. But it is important to be clear that this does not mean that the valuation is unconcerned with future prospects:
- (a) In the first place, as the World Bank Guidelines themselves confirm, the factors that a willing buyer would itself take into account on the purchase of such an investment necessarily include ‘the circumstances in which it would operate in the future’.
- (b) In the second place, the Tribunal is not required to shut its eyes to events subsequent to the date of injury, if these shed light in more concrete terms on the value applicable at the date of injury or validate the reasonableness of a valuation made at that date.²⁴⁸
161. This second qualification, however, does not change the actual date of valuation. The purpose of referring to subsequent events is not to present a hypothetical business that never in fact occurred and would not reasonably have been taken into account by a willing buyer prior to expropriation. Rather, it is permitted in cases where such events shed more light in concrete terms on the value of the investment prior to expropriation. In assessing the value of the business at that date, the Tribunal disregards business prospects that it considers to be too remote or speculative to justify inclusion.
162. In the present case, both experts agree that ‘the *ex post* approach should only be used if hindsight allows for a reliable measurement of lost cash flows between the date of breach and a present date’.²⁴⁹ There may in particular cases be a real benefit in hindsight. For the reasons

²⁴⁸ Kantor *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (2008) 68-9; *Rumeli v Kazakhstan* (Decision on Annulment), [150].

²⁴⁹ Navigant 1, [268]; Flores, T3/580/8 – 581/22.

already developed, the present case is not one of an illegal expropriation and so the Tribunal is not required to determine the content of the requisite standard of compensation required by international law by way of restitution in such a case. The Tribunal is mindful, as the International Law Commission has said, of the need to guard against ‘the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits’.²⁵⁰

163. In the present case, it is not necessary for the Tribunal to delve in detail into the case advanced by Claimants as to SEMARCA’s alleged future prospects in support of deep-water oil exploration in Venezuela. Substantial time was spent on this aspect of the claim in the expert reports on quantum and in cross-examination at the hearing. The Tribunal considers that this projected future business is too remote from SEMARCA’s established support business in Lake Maracaibo and the Gulf of Paria and too speculative to be reasonably capable of inclusion in an assessment of loss in any event. This is borne out by the fact that, when an opportunity did arise to support Chevron’s drilling programme in the Cardón III block (a program that Chevron abandoned in June 2009 when the well that it had drilled was dry), Tidewater supported this by supplying US-flagged and crewed vessels direct from the United States.

3. Appropriate method for assessment of fair market value

164. Although it is for the Claimants to prove that they have suffered some damage in order to be awarded compensation, it is for the Tribunal itself to determine the amount of compensation.²⁵¹ This is necessarily a matter of the Tribunal’s informed estimation in the light of all the evidence available to it.²⁵²
165. The Tribunal considers that in the present case, it is appropriate to determine the fair market value of Claimants’ investment in SEMARCA by reference to a discounted cash flow analysis for

²⁵⁰ International Law Commission ‘Responsibilities of States for Internationally Wrongful Acts: Text of the Draft Articles with Commentaries thereto’ [2001] 2(2) YB ILC, Article 36(26).

²⁵¹ *Sapphire International*, 187-8; *SPP v Egypt* (RL-113), 215. Thus, in *Chorzów Factory*, the Permanent Court found that the two German companies had suffered *some* damage as a result of the illegal act of the Polish Government in dispossessing them of the Factory at Chorzów (*Chorzów Factory*, 46). It then took up itself the task of determining the quantum of that damage, by appointing its own experts to conduct an enquiry: *Ibid*, 51 and Order (Expert Enquiry): (1928) PCIJ Ser. A No 17, 99-103.

²⁵² *Rumeli v Kazakhstan* (Decision on Annulment) [141]–[149]; Gotanda ‘Recovering Lost Profits in International Disputes’ (2004-5) 36 *Georgetown JIL* 61, 101.

the following reasons: (a) SEMARCA was, immediately prior to the date of the taking, a going concern with a proven track record of profitability; (b) it had been operating successfully in Venezuela for some fifty years, and (c) in the five years prior to the taking, it had recorded substantial operating income as recorded in its income statements.²⁵³ Thus, in the Tribunal's view, it is not appropriate to determine the fair market value by reference to either the liquidation value of the assets of the SEMARCA Enterprise, or the book value of those assets, as Respondent contends.²⁵⁴ Such methods would likely only be appropriate, as the World Bank Guidelines point out, where the enterprise was not a proven going concern.²⁵⁵

166. However, the valuation of Claimants' investment in SEMARCA as a going concern does present particular difficulties in view of the character of SEMARCA's business. SEMARCA was not a publicly listed company and its business was limited to one country and one customer. The Tribunal is not persuaded that the other transactions and companies referenced by Claimants' experts in their reports²⁵⁶ are sufficiently comparable to SEMARCA's business, and to the market in which it operated, so as to assist it in arriving at a fair market value of SEMARCA. It accepts the views of Respondent's experts that the differences between the business contexts in which such other companies were operating are simply too great for them to be comparable.²⁵⁷
167. The consequence is that the Tribunal must approach the valuation of SEMARCA based upon the factors that are specific to its business. However, even when examined on this basis alone, the *ex ante* valuations prepared by the Parties' experts differed greatly. In his written reports, Claimants' expert arrived at an *ex ante* valuation of US\$81.68 million (excluding interest).²⁵⁸ By contrast, Respondent's experts, in their second report, arrived at a valuation of US\$2.9 million.²⁵⁹
168. The reasons for these great differences in valuation are to be found in a number of specific variables adopted by the experts on the basis of assumptions that they respectively made, either on the basis of their instructions from counsel or in their own opinion. It is therefore necessary for the Tribunal to make its own findings as to each of the material elements in the DCF analysis

²⁵³ Navigant 1, Ex 1.5.

²⁵⁴ Brailovsky Flores 1, [26] Table II.2.

²⁵⁵ World Bank Guidelines, IV-6.

²⁵⁶ Navigant 1, [199]–[255].

²⁵⁷ Brailovsky Flores 1, [193]–[236].

²⁵⁸ Navigant 2, [6].

²⁵⁹ Brailovsky Flores 2, [125] (Table III.1).

on the basis of the evidence before it. Once this has been done, it will be possible to apply the assumptions that the Tribunal has determined to be applicable to the DCF analysis in order to assist in arriving at an appropriate figure. At the Tribunal's request during the course of the hearing, the experts for both Parties prepared illustrative tables showing the effect of different assumptions upon their calculations, which have greatly assisted the Tribunal in this part of its work.

4. Elements in DCF valuation analysis

169. There are six variables adopted in the experts' reports that have a material effect on the valuation of Claimants' investment in SEMARCA:

- a) Scope of business: Whether SEMARCA's business is assumed to be limited to its operations on Lake Maracaibo, or whether one adds operations existing in 2009 outside Lake Maracaibo (and, if so, whether one includes services provided to international oil companies or only to PDVSA and its subsidiaries);
- b) Accounts receivable: Whether the outstanding accounts receivable from PDVSA are to be included in the value of the company at the valuation date or excluded from it;
- c) Historical cash-flow: Whether to include the whole period from 2006 to March 2009 or to exclude 2009 (on the basis that the cash flow is disproportionately high in comparison to earlier years);
- d) Equity risk: Whether to apply an equity risk premium at 5% or 6.5%;
- e) Country risk: Whether to apply a country risk of 1.5% (Claimants' expert) or 14.75% (Respondent's experts);
- f) Business risk: Whether to make an adjustment for single customer concentration at an assumed rate of 25% per annum or no such adjustment.

(a) *Scope of business*

170. SEMARCA's business was primarily concerned with supplying support to PDVSA's oil operations on Lake Maracaibo. As at the valuation date of 7 May 2009, this business was conducted using 11 vessels. The business was a mature one. It had been conducted successfully and profitably over many years. Equally, Claimants and their expert did not seek to suggest that the business on Lake Maracaibo presented real opportunities for expansion. The oil field on Lake Maracaibo, though containing extensive reserves, is a mature oil field. There were numerous other private operators providing support services to PDVSA.
171. However, in addition, SEMARCA was then under contract to support two further oil projects, both of which were carried out off shore. In the first place, SEMARCA was supporting PetroSucre, a PDVSA affiliate, in its operations at Corocoro in the Gulf of Paria with four vessels. The Tribunal has already found on the evidence that these were treated by PDVSA as being covered by the Reserve Law and were seized on 12 July 2009. They had historically formed part of SEMARCA's fleet based at La Cañada on Lake Maracaibo. The value of the business represented by the operations of these vessels must therefore be added to the 11 vessels actually stationed on Lake Maracaibo.
172. The position is different, however, in respect of the business represented by the two vessels, the *President Tide* and the *High Quest*, that were contracted to support Chevron in its exploratory drilling project in the Cardón III block.²⁶⁰ These vessels were not part of SEMARCA's ordinary fleet. They were registered under a United States flag²⁶¹ and were crewed by United States citizens.²⁶² The contract with Chevron came to an end in June 2009, when Chevron's drilling operations produced a dry well and Chevron abandoned the Cardón III block. The Tribunal considers that this contract cannot be treated as an ordinary part of SEMARCA's operations for the purpose of valuing its business as a going concern. It was out of the ordinary course of SEMARCA's business and did not continue. It was not organized or staffed on the same basis as the rest of SEMARCA's operations.

²⁶⁰ Cardón Contract dated 23 March 2009 (C-86).

²⁶¹ Kehoe 1, [46].

²⁶² Letter from Jacob (SEMARCA) to Hernández 15 June 2009 (C-88).

173. Accordingly, the Tribunal decides to exclude the business represented by these two vessels from the cash flow of the business for the purpose of calculating its value. The result is that the business is to be treated as having an assumed scope, based upon its historical operations, represented by the cash flow generated by 15 vessels.

(b) Accounts receivable

174. The second element that led to differences in the respective experts' valuations was the treatment of accounts receivable. It is common ground that there was, as at 7 May 2009, a large amount (some US\$44,888,040) of accounts receivable from PDVSA/PetroSucre recorded in the accounts of SEMARCA.²⁶³ Claimants' expert included these sums in valuing the company, making adjustments to ensure that they did not distort the cash flow of the business on an ongoing basis.²⁶⁴ Respondent's experts, on the other hand, had been instructed by counsel not to include accounts receivable in any of their valuations.²⁶⁵ The experts justified this exclusion on the basis that the accounts receivable had not been expropriated, because SEMARCA still exists as a company and is therefore entitled to collect its receivables.²⁶⁶ Its effect on Respondent's experts' DCF valuation was considerable. Respondent's experts excluded all accounts receivable and other working capital from their DCF analysis. This produced a negative free cash flow to equity and a negative discounted cash flow of US\$2.433 million in FY2010,²⁶⁷ with consequential effects on subsequent years.

175. The Tribunal has already found, on the basis of the contemporaneous record, including the decisions of the Venezuelan Courts themselves, that Respondent expropriated the SEMARCA Enterprise as a whole, by assuming control in fact of its business and all of its assets. Thus, the investment that was lost must include outstanding unpaid accounts receivable.

176. For the purpose of valuation of the business as a going concern on the date immediately prior to the expropriation, the accounts receivable must be included. They constitute a valuable asset of the business. The Tribunal is satisfied that a willing buyer would so regard them. In the light of

²⁶³ SEMARCA Aged Receivables ledger July 2009 (NAV-472).

²⁶⁴ Kaczmarek, T2/405/21 – 409/20.

²⁶⁵ Brailovsky, T2/468/5-21; Flores T3/585/17 – 588/7.

²⁶⁶ Brailovsky T2/468/18 – 469/7.

²⁶⁷ BF-5, Table 1A; Flores T3/585/17 – 588/7.

the long history of successful dealings between SEMARCA and PDVSA, these sums, which represent an accrued debt on contracts already performed, would be treated as fully recoverable. There was some evidence presented at the jurisdiction stage that PDVSA wished to negotiate discounts on its outstanding debts with its major suppliers in early 2009,²⁶⁸ but SEMARCA's position had been that it needed to be paid in full. In the merits phase, Respondent's position is that 'the principal asset of the company, its accounts receivable, was not taken, and Claimants remain free to pursue collection of any outstanding accounts under the relevant contracts'.²⁶⁹

177. For these reasons, the Tribunal decides to include SEMARCA's outstanding accounts receivable as at 7 May 2009 in determining the value to be ascribed to the business.

(c) Cash flow

178. The third element that contributed to the differences in the valuations of the Parties' respective experts is the question whether the cash flow of SEMARCA for the year ended 31 March 2009 should be included in the determination of the historical cash flows of the company. Both experts start their calculation of historical cash flows in FY2006. Claimants' expert includes the results for FY2009. Respondent's experts exclude them on the basis that FY2009 was an exceptional year in terms of profitability.²⁷⁰ They therefore work on an average of historical cash flows for the three years ended FY2008.
179. The Tribunal considers it proper to include the results of all four years for which historical cash flow data is presented. A willing buyer of SEMARCA in May 2009 would have taken into account all of the available current financial data on the cash flows of the company. Although the rates commanded in FY2009 were higher than in the previous years, the oil industry is notoriously price volatile. The higher prices in 2009 also in part reflected higher labour costs.²⁷¹ Taking an average of all four years of historical cash flow seems to the Tribunal to reflect most fairly the available information.

²⁶⁸ Decision on Jurisdiction, [161]–[163].

²⁶⁹ Rejoinder, [8].

²⁷⁰ Flores T3/573/14 – 574/2.

²⁷¹ Letter from SEMARCA to PDVSA 6 July 2009 (C-59).

(d) Equity risk premium

180. A fourth material element in the discounted cash flow analysis that led to material differences between the experts is the percentage premium to be applied to the risk involved in investing in equities rather than risk-free US Treasury bonds. Claimants' expert maintains that 5% is a reasonable estimate. Respondent's experts apply a rate of 6.5%. They opine that this represents the most reliable long term arithmetical mean of equity risk premia in the relevant industry and that Claimants' expert had applied a percentage that was not supported by the most reliable primary data.
181. The Tribunal has carefully examined the primary data available to it in the form in which it was exhibited to the experts' reports. It finds particularly salient three primary sources of long-term equity risk premia: the Ibbotson-Morningstar Report (which covers the period 1926-2009),²⁷² the Damodaran Report (which covers the period 1928-2009),²⁷³ and the Dimson-Marsh-Staunton Report (which covers the period 1900-2009).²⁷⁴ These report a long-term market risk premium, as at 2009 of between 6.0% and 6.7%.²⁷⁵ Thus the Tribunal concludes that it is reasonable to include an equity risk premium of 6.5% in the calculation of the cost of capital.

(e) Country risk premium

182. An element of greatest difference between the approaches of the experts is the premium to be applied to the risk of investing in a particular country, here Venezuela. Claimants' expert adopted a country risk premium of 1.5%, while Respondent's experts adopted 14.75%.
183. Claimants' expert, Mr. Kaczmarek, accepted in answer to a question from a member of the Tribunal that Venezuela 'quite possibly is one of the highest risk countries' in the world in which to invest.²⁷⁶ The reason why his country risk premium is so low is that he considers that political risk ought to be excluded from the country risk premium. This opinion is in turn based upon a

²⁷² BF-23.

²⁷³ BF-113.

²⁷⁴ BF-114.

²⁷⁵ The Tribunal has also reviewed the additional papers on equity risk premia exhibited by Claimants' expert to his Second Report (NAV-388 – NAV-392 & NAV-474 – NAV-475). It finds that these either post-date the valuation date; do not present a long-term set of data or represent analysts' various evaluations rather than primary data.

²⁷⁶ T2/312/6-12.

view about the legal implications of the existence of the investment protections contained in the Venezuela-Barbados BIT. This, he considers, entitled him to exclude the ‘real risks of the Government acting in a very negative way towards any private investment’.²⁷⁷ He considers that, in the light of such protections, to include such risks would confer an illegitimate benefit on the State:

If the State can create these risks that it controls, threaten businesses, [...] lower the value of the business, and then they expropriate, if we’re going to take all that risk into account, then they get to purchase the company at a very steep discount because of their own risks that they have created hostile towards those companies.²⁷⁸

184. In the Tribunal’s view, Claimants’ expert conflates two separate elements in a legal claim of this kind. The first element is a question of liability: are the protections of Article 5 of the BIT engaged by the specific actions of the host State, such that the investor is entitled to be awarded compensation for the loss of his property? As the Tribunal has already observed, the BIT does not prohibit all State taking of private property. Rather it requires a taking for a public interest to be compensated and provides a mechanism by which the appropriate level of compensation can be awarded by an international tribunal. Doubtless, the Treaty seeks to encourage investment between the Contracting States. But it is not an insurance policy or guarantee against all political or other risks associated with such investment.
185. If the Tribunal finds liability, then, at the second quantum stage, the Tribunal must determine the ‘market value’ of the investment. This second element in the claim is in essence an economic question. It depends upon the value that the market would attribute to the investment in question. Returning to the World Bank Guidelines, this is an amount that a willing buyer would pay to a willing seller of the investment immediately prior to the taking in question. Where this is determined by use of a discounted cash flow analysis, the Guidelines specifically invite a consideration of ‘the risk associated with such cash flow under realistic circumstances’.²⁷⁹
186. This is not a matter of permitting a respondent State to profit from its own wrong. On the contrary, the damages that the Tribunal is empowered by virtue of the Treaty to award are designed to ensure that the private investor is compensated for the loss of its investment. But, in determining the amount of that compensation by reference to a discounted cash flow analysis,

²⁷⁷ T2/366/17-21.

²⁷⁸ T2/314/21 – 315/5; Navigant 2, [204]–[213].

²⁷⁹ World Bank Guidelines, IV-6.

the Tribunal should consider the value that a willing buyer would have placed on the investment. In determining this value, one element that a buyer would consider is the risk associated with investing in a particular country. Such a factor is not specific to the particular State measure that gives rise to the claim. That measure must be left out of account in arriving at a valuation, since, according to Article 5, the market valuation must be arrived at ‘immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier’. Rather the country risk premium quantifies the general risks, including political risks, of doing business in the particular country, as they applied on that date and as they might then reasonably have been expected to affect the prospects, and thus the value to be ascribed to the likely cash flow of the business going forward.

187. The inclusion of a country risk premium is a very common feature of tribunals’ calculations of compensation, since, as one tribunal observed ‘the fundamental issue of country risk [is] obvious to the least sophisticated businessman’.²⁸⁰ For example, in one recent decision concerning Venezuela, the tribunal adopted a country risk rate of 18%.²⁸¹
188. For these reasons, the Tribunal rejects Mr. Kaczmarek’s view as to the appropriate basis on which to approach country risk.
189. Respondent’s experts for their part advanced a country risk premium of 14.75%. This was derived from the Ibbotson-Morningstar International Cost of Capital Report for 2009²⁸² and validated by comparison with the method adopted by Professor Damodaran.²⁸³
190. In the Tribunal’s view, a country risk premium for Venezuela in 2009 of 14.75% represents a reasonable, indeed conservative, premium. In the light of its rejection of Claimants experts’ reasoning, it adopts this premium for the purpose of its valuation of the investment.

²⁸⁰ *Himpurna v PT (Persero)* (RL-82), [364].

²⁸¹ *Mobil Cerro Negro v PDVSA* (RL-83), [777]; for other recent examples see *Himpurna* *ibid* (Indonesia: 19%); *Patuha v PT (Persero)* (RL-138), [482] (Indonesia: 21%); *Lemire v Ukraine* (RL-140), [274] (18.5%).

²⁸² Brailovsky/Flores 1, [157], BF-24.

²⁸³ Damodaran ‘Risk premiums for other markets 2009’ (BF-27).

(f) Business risk

191. The final element that led to material differences in the Parties' discounted cash flow analyses is the question of whether any discount should be applied to take account of the risk to the reduction in SEMARCA's business over time.
192. Respondent, supported by the expert evidence of Professor Wells, Emeritus Professor of International Management at Harvard Business School, argues that SEMARCA's business was subject to a significant risk arising from its concentration on a single customer: PDVSA and its subsidiaries. This risk, it maintains, requires an adjustment to the valuation of the investment at an assumed rate of reduction of 25% per annum.²⁸⁴
193. The Tribunal has considered this risk against the factual evidence that it heard during the hearing. Mr. Figuera, who in 2009 was General Manager of CVP, the subsidiary of PDVSA responsible for relations with private contractors, testified vividly as to the size and scale of the oil industry support services that PDVSA had to call upon on Lake Maracaibo. He concluded that: 'we depended up to a point, a significant point, we depended upon contractors'.²⁸⁵ The Tribunal has already found that the Respondent enacted the Reserve Law not simply so as to reserve to itself the oil services support industry on Lake Maracaibo, but also, to that end, to expropriate the vessels and the business of the private operators in the Lake.
194. Mr. Figuera was questioned closely by counsel as to the state of PDVSA's planning before May 2009 to internalise the type of support services then provided by SEMARCA and a number of other private companies by buying or manufacturing its own vessels and training its own crews.²⁸⁶ The Tribunal has carefully considered this evidence. It concludes on the facts that, although there were some plans for the further development of PDVSA's own capacity in the provision of support services,²⁸⁷ these were not such as to represent a major risk of loss to SEMARCA's business. PDVSA was at the time itself operating some support services on the Lake. As Mr. Figuera testified 'we have always had a large significant capacity to operate in the lake

²⁸⁴ Flores T3/561/10-13.

²⁸⁵ T1/265/12-13.

²⁸⁶ T1/210-234.

²⁸⁷ PDVSA Annual Report 2008 (R-89), 107.

[but] that's not sufficient'.²⁸⁸ As at 7 May 2009, PDVSA retained a significant dependence on private operators such as SEMARCA and would have done so, were it not for the Reserve Law that enabled it to obtain the SEMARCA Enterprise overnight.

195. Thus, the Tribunal rejects on the facts the analogy repeatedly presented in Professor Wells' evidence of the loss of his consulting business with the Harvard Institute for International Development (**HIID**), closed as a result of a decision of his University in 2000.²⁸⁹ In 2009, PDVSA was operating a very large on-going oil extraction business on Lake Maracaibo. The support services for that business were largely, though not exclusively, provided by private companies. That was a matter of conscious choice for PDVSA and for Venezuela, which had elected to nationalise the oil industry itself in 1975, but not the oil services industry that supported it. True it is that this business was conducted between the private contractors and a single customer through short-term contracts. But the underlying industry function required a large developed infrastructure that could not simply be abandoned, if production on Lake Maracaibo were to continue (in contrast to Harvard University's decision to call a halt to the activities of HIID once it was judged not to be appropriate to the University's work). Nor could such a function be replaced by internal service provision without a protracted period of internal investment.
196. Thus, the Tribunal does not consider that a willing buyer, considering the acquisition of this business prior to the enactment of the Reserve Law on 8 May 2009, would have applied a discount for the risk of loss of the business to its customer.

(g) Conclusion on DCF calculation

197. The Tribunal therefore applies the elements that it has found to be appropriate, using the DCF analysis:
- 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%;

²⁸⁸ T1/265/9-11.

²⁸⁹ Wells 2, [21]–[27]; T3/647-650.

- e) Applying a country risk of 14.75%;
- f) But with no additional discount for single customer concentration.

198. As mentioned above, during the hearing the Tribunal requested the experts to prepare additional calculations using their existing models including, inter alia, these variables. The experts prepared additional tables of calculations that they presented to the Tribunal in the course of the Parties' closing submissions. These tables have proved of very considerable assistance to the Tribunal in its deliberations. They produced a significantly greater convergence in figures than had been the case in the experts' reports that were filed in the written phase. Nevertheless, there continue to be material differences in the approach adopted by the experts, which in turn affect the figures presented.

199. Accounts receivable: Claimants' expert extracts the outstanding large amount of accounts receivable from his calculations. He presents this as an additional sum that would have to be valued and included as a separate line item. After adjustments, he calculates the total non-recurring working capital to be added in this way to be US\$16,484,677 (from the total due from PDVSA and PetroSucre as at 8 May 2009 of US\$44,888,040).²⁹⁰ Respondent's experts present only the effect of including the accounts receivable as working capital within their calculations.

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

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

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

202. The Tribunal has already observed that the determination of an appropriate level of compensation based upon a discounted cash flow analysis of this kind is not and cannot be an exact science, but is rather a matter of informed estimation. The Tribunal considers that a willing

²⁹⁰ Navigant Answers to Questions, Slide 10.

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, which it would have been entitled to recover in full from PDVSA upon acquisition of the business. The Tribunal therefore arrives at a valuation (excluding pre-award interest) for the purposes of compensation of US\$46.4 million.

C Interest

203. The Parties do not dispute the payment of interest in principle. Rather, they differ as to (i) the rate at which interest should be calculated; and (ii) whether it should be simple or compound interest.
204. Article 5 of the BIT, which the Tribunal has found to be applicable to its determination of compensation generally, mandates the payment of interest ‘at a normal commercial rate until the date of payment.’ The Parties accept that this is the applicable starting point,²⁹¹ but do not agree on how such a rate is to be determined.
205. Claimants’ first proposed rate was the yield on Venezuela’s sovereign bonds in US dollars, which averaged 13.4% over the period.²⁹² This they proposed on the basis of an argument that Claimants had, as a result of the expropriation, effectively become unwilling creditors of the Respondent and should be compensated at the same rate that the Respondent must pay to willing lenders. In the Tribunal’s view, this approach mistakes the reason why pre-award interest is commonly included in a calculation of compensation in a case such as the present. Interest in such a case simply aims to compensate the claimant from being kept out of its money between the date on which it ought to have been compensated and the date of payment of an enforceable award. Such compensation is not punitive of the Respondent. Rather, as the Treaty’s reference to ‘normal commercial rate’ underlines, it represents the cost of borrowing the sum that the claimant ought to have received over the same period of time. Thus, the appropriate reference point is the cost of borrowing available to Claimants, not the amount that Respondent would have had to pay.

²⁹¹ Memorial, [158]; Counter-Memorial, [158].

²⁹² Memorial, [128], Navigant 1, [261].

206. Respondent proposes the yield on three-month Treasury bonds plus 1.33%, equivalent to an annual rate of 1.43%.²⁹³ But, as Claimants point out, this rate does not qualify as a commercial rate since it is the equivalent of an inter-bank rate, rather than a commercial rate available to a trading company from its bankers.
207. Claimants propose in the alternative either US prime + 2% or LIBOR + 4%. In each case, over the period 8 May 2009 to 31 March 2013, these both averaged 5.2%.²⁹⁴ Their expert also points out that Tidewater itself, the parent company, was able to borrow at rates between 4.35% and 4.47% over the pre-award interest rate period.²⁹⁵ The Tribunal considers that an interest rate of 4.5% most closely meets the standard agreed between Venezuela and Barbados in Article 5 of the BIT.
208. The second issue on which the Parties are in dispute is whether interest ought to be awarded on a simple or compound basis. Claimants submit that ‘the prevailing practice of international tribunals’²⁹⁶ is to award compound interest. Respondent argues that simple interest is called for on the basis of both Venezuelan and international law authorities.²⁹⁷
209. In the Tribunal’s view, the basis on which interest is to be calculated in the present case flows from the specific language of Article 5 of the BIT, which requires a ‘normal commercial rate.’ This is the rate at which the Claimants could themselves have borrowed the same sum. Since a commercial bank will typically compound interest due and unpaid on a quarterly basis, the Tribunal considers that its award of interest ought to be so compounded.²⁹⁸

D Costs

210. Finally, the Tribunal turns to the award of costs in the arbitration. In accordance with Article 61 of the ICSID Convention it is obliged to determine how and by whom the costs of and associated with these proceedings are to be borne, as to which it retains a wide discretion.
211. On 11 July 2014, pursuant to a direction given by the President at the conclusion of the hearing and agreed by counsel for each of the Parties, each Party filed with the Tribunal a Statement of

²⁹³ Counter-Memorial, [158].

²⁹⁴ Memorial, n 206; Navigant 1, [322].

²⁹⁵ Navigant 2, [304], Table 32.

²⁹⁶ Memorial, [158], citing *Chevron v Ecuador* (CL-167), [555].

²⁹⁷ Counter-Memorial, [159].

²⁹⁸ Navigant 2, [307].

Costs. Each Party has paid its portion of the advance on the administrative fees and expenses requested by the Centre, amounting in each case to US\$450,000. In addition:

- (a) Claimants seek reimbursement of the fees of counsel and experts amounting to US\$7,534,361.33 plus expenses of US\$177,739.31;
- (b) Respondent seeks reimbursement of the fees of counsel and experts amounting to US\$8,479,879 plus expenses of US\$520,538.00.

212. The Tribunal recalls that it reserved the costs occasioned by its Decision on Jurisdiction.²⁹⁹ At that stage, each Party prevailed on one of the two grounds of jurisdiction that had originally been asserted. Each of those bases of challenge to the Tribunal's jurisdiction was substantial and properly required the Tribunal's consideration and determination. The Tribunal's Decision resulted in the claims of a number of the original claimants falling outside its jurisdiction. But the claims of the present Claimants under the Barbados BIT were held to be within its jurisdiction. Therefore, as regards the costs of and occasioned by the hearing of Respondent's objection to jurisdiction, the Tribunal holds that each Party must bear equally its share of the administrative fees and expenses of the members of the Tribunal and of the Centre and bear its own costs.
213. The position is different so far as concerns the merits phase of the proceeding. The Tribunal is mindful of the fact that the Claimants have overall succeeded in their claim. The result is that they have been put to a great deal of time, trouble and expense in order to obtain compensation that Venezuela had vouchsafed to provide under the terms of the Barbados BIT and ought to have so provided in 2009.
214. Although the costs that the Parties each claim to have incurred are very large for the scale of the case, the Tribunal does not consider that either Party caused the other to incur substantial wasted costs as a result of the manner in which it conducted the proceedings.
215. On the other hand, the Tribunal notes that the sums that it has in the result awarded to Claimants are very much less than the US\$234 million (including interest) that Claimants sought in the written phase.³⁰⁰ In part, this was because Claimants pursued a claim to what it called 'ex post damages', which the Tribunal has rejected on the law. This claim did result in significant wasted costs in the evidentiary phase, since it required Respondent (and the Tribunal) to consider the

²⁹⁹ Decision on Jurisdiction, [199(7)].

³⁰⁰ Navigant 2, [296] Table 30.

plausibility of various alleged prospects for the expansion of SEMARCA's deep water support business in Venezuela in the period after the expropriation.

216. The Tribunal considers therefore that it is prepared to award Claimants a portion of their costs of the merits phase, but not a full indemnity. In all the circumstances, it considers that a reasonable portion that Respondent ought to bear is US\$2.5 million.

IV AWARD

217. For the above reasons, the Tribunal hereby decides that:

- (1) Respondent has expropriated Claimants' investment in SEMARCA without payment of prompt, adequate and effective compensation;**
- (2) Claimant is therefore entitled to compensation in accordance with Article 5 of the BIT;**
- (3) The Tribunal assesses the principal amount of the compensation to be paid as US\$46.4 million;**
- (4) In addition, Claimant is entitled to interest from 8 May 2009 to the date of payment of this Award at the rate of 4.5% per annum compounded quarterly;**
- (5) Each Party shall bear its equal share of the fees and expenses of the Tribunal members and of the Centre, and shall bear its own costs of and occasioned by Respondent's challenge to the jurisdiction of the Tribunal;**
- (6) Respondent shall pay to Claimants the sum of US\$2.5 million in partial reimbursement of Claimants' costs of and occasioned by the merits phase of these proceedings.**

[signed]

[signed]

Dr. Andrés Rigo Sureda

Professor Brigitte Stern

Arbitrator

Arbitrator

Date

Date

[signed]

Professor Campbell McLachlan QC

President

Date